

employment arrangements for public entities

The Victorian Government has vested the State Services Authority with functions designed to foster the development of an efficient, integrated and responsive public sector which is highly ethical, accountable and professional in the ways it delivers services to the Victorian community.

The key functions of the Authority are to:

- identify opportunities to improve the delivery and integration of government services and report on service delivery outcomes and standards;
- promote high standards of integrity and conduct in the public sector;
- strengthen the professionalism and adaptability of the public sector; and
- promote high standards of governance, accountability and performance for public entities.

The Authority seeks to achieve its charter by working closely and collaboratively with public sector departments and agencies.

contact us

at the State Services Authority

Email: info@ssa.vic.gov.au

Phone: (03) 9651 1321

Fax: (03) 9651 0747

www.ssa.vic.gov.au

Postal Address:

3 Treasury Place

Melbourne 3002

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1. introduction

This guide provides advice on employment issues to consider when establishing new public entities in Victoria. The guide may also be useful for boards and CEOs of existing entities to understand the implications of their current arrangements.

A thorough consideration of employment issues early on in the process of establishing an entity can highlight the implications of various options and support informed decision-making. Where this level of analysis has not occurred, there is a risk that sub-optimal, needlessly complex, or ambiguous options may be adopted. A lack of upfront attention to employment issues can also result in arrangements that are inconsistent with the original intentions of policy designers.

The guide begins with the assumption that government has decided to establish a public entity to perform a particular role, and that its legal form has been determined, in accordance with its functions (see the SSA's publication *Legal Form and Governance Arrangements for Public Entities*).

1.1 purpose

This guide is intended to address employment considerations relevant to public entities, not public service bodies (departments and other public service organisations).

The guide covers:

- how to provide an entity with the power to employ;
- who should exercise those powers (e.g. CEO); and
- issues to consider in relation to different types of employees (i.e. public sector staff and public service staff).

The guide is a companion document to other SSA public entity governance publications:



- *Legal Form and Governance Arrangements for Public Entities* – provides guidance on the process for determining appropriate legal forms and governance arrangements for public entities.



- *Guide to Whole of Victorian Government Legislative Compliance Obligations for Public Sector Entities* – provides further information on the application of whole of government legislation, guidelines and policies.

Copies of these publications can be found at www.ssa.vic.gov.au.

2. key concepts

2.1 Victorian public sector

The Victorian public sector performs a wide variety of functions on behalf of government, including directly providing services to the community, providing policy advice, collecting and administering public money, and regulating, funding and contracting private and non-government organisations for service delivery.

These services are delivered through:

- the Victorian Public Service: departments, authorities and offices (including the SSA);
- public entities operating in the wider public sector.

Figure 1 shows the composition of the Victorian public sector, as at 30 June 2012.

Figure 1: Composition of the Victorian public sector

Victorian public sector 1,817 employers 266,708 employees	Victorian Public Service 37 employers 38,650 employees	Departments 11 employers
	Victorian public entities 1,780 employers 2000 (approx.) non-employing entities	Authorities and Offices 26 employers
Government schools 1,544 employers		
TAFE and other education 24 employers		
Public health care 90 employers		
Police and emergency services 6 employers		
Water and land management 49 employers		
Arts, finance, transport and other 67 employers		
Non-employing entities 2000 (approx.) non-employing entities		

2.1.1 public entities

Public entities are organisations that exercise a public function but are established outside the public service. As bodies operating at 'arm's length' from government, public entities perform their functions with varying degrees of autonomy from ministers in their day-to-day decisions. Figure 2 provides the definition of a public entity.

The majority of Victorian public entities that employ staff are managed by a board accountable to the relevant portfolio minister.

Figure 2: Definition of a public entity

Under the *Public Administration Act 2004* (s5), a public entity is defined as a body, whether corporate or unincorporated, that is established by:

- an Act (other than a private Act) or the Corporations Act; or
- the Governor in Council; or
- a minister.

In addition to these criteria, the Act applies a further set of tests. These are summarised below.

- In the case of a body corporate, the Governor in Council or the relevant minister must have the right to appoint at least one half of the directors.
- The body must have a public function to exercise on behalf of the State or be wholly owned by the State.
- In the case of an advisory body, the body must:
 - have written terms of reference guiding its operation;
 - be required to provide the advice or report to a minister or the government; and
 - be declared to be a public entity for the purposes of the Public Administration Act.

Departments and administrative offices are not public entities.

2.2 legal form

The 'legal form' of a public entity refers to:

- whether it is an incorporated or unincorporated body; and
- the manner in which it is created – regardless of whether this is through a legislative or a non-legislative process.

The appropriate legal form for a new public entity depends on the primary function of the entity and the degree of ministerial control required. The three most common types of legal form used for public entities in Victoria are:

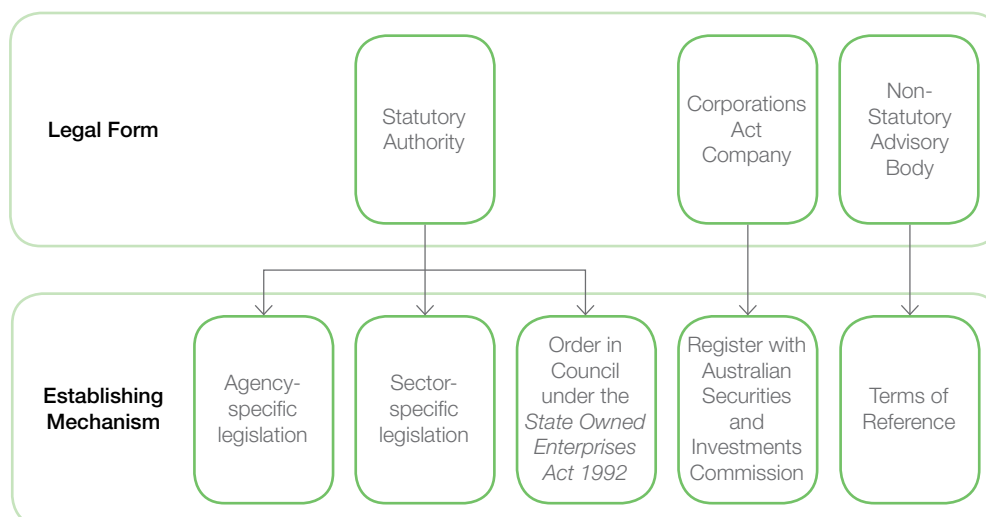
- **statutory authority** – a public entity established under Victorian legislation. Statutory authorities include entities established under their own Act, entities established under an umbrella Act (e.g. the *Water Act 1989*) and entities established under the *State Owned Enterprises Act 1992*;
- **Corporations Act company** – a public entity established and incorporated under the *Commonwealth Corporations Act 2001*; and
- **non-statutory advisory body** – a public entity established by a minister, departmental Secretary or the Governor in Council with formal terms of reference.

In general, a statutory authority is the most appropriate legal form for the majority of public entities created in Victoria and can be tailored, as required, to suit the specific functions of a public entity.

The other legal forms have more limited application. Non-statutory advisory bodies should only be considered where an entity is being established for the purpose of providing advice to a minister(s) or department. A Corporations Act company should only be used where an entity is to perform functions with a highly commercial focus.

Figure 3 summarises the establishing mechanisms for the different types of legal form.

Figure 3: Mechanisms for establishing public entities



3. key principles

The following key principles should guide consideration of the employment arrangements for a public entity:

- consistency in employment arrangements for like entities;
- clarity in roles and responsibilities; and
- clear lines of accountability.

These principles are outlined in more detail in the following sections.

3.1 consistency

Consistent legal and governance arrangements should apply to public entities that perform similar functions or require similar degrees of ministerial control and direction. This also extends to employment arrangements. Wherever possible, entities should be established using commonly used employment mechanisms, consistent with like public entities.

Consistency promotes clarity of understanding about the employment status of individuals and groups of staff, their entitlements and obligations and allows entities to build on the experiences of others.

From time to time, circumstances may require that an entity be established with non-standard employment arrangements. As a general rule though, highly customised employment arrangements should be avoided. Proliferation of differences between entities contributes to complexity in the public sector and leads to problems in understanding the implications of specific employment arrangements, particularly as specialised knowledge tends to dissipate over time.

3.2 clarity in roles and responsibilities

In addition to the principle of consistency, clarity in the roles and responsibilities of all parties should guide consideration of employment arrangements.

Clarity in roles and responsibilities ensures that all parties understand the boundaries of their role and what is expected of them, and have the authority to fulfil their responsibilities. Clarity in roles and responsibilities also helps to ensure that all parties understand the relationship between their role and that of other individuals within the entity, other entities, the public service and the government.

3.3 clear lines of accountability

Finally, a focus on clear lines of accountability between public entity staff, entity management (including the CEO) and the board should guide determination of employment arrangements.

Clear lines of accountability promote role clarity and good governance. In contrast, complex reporting structures can create internal confusion and hinder the entity's ability to perform its functions. Internally, reporting lines for employees should be clear, and the relationship between the board (where applicable) and entity staff (including the CEO) should be transparent.

4. standard model

Figure 4 outlines the standard model for public entity employment arrangements in Victoria.

Figure 4: Standard model for public entity employment arrangements



Key features of the model are:

- the board is appointed by the relevant minister or Governor-in-Council;
- the CEO is appointed and employed by the Board;
- the power to employ public entity staff is vested in the board and delegated to the CEO;
- staff are directly employed by the entity, through the CEO; and
- staff are employed as public sector staff.

These arrangements align with the employment principles and mimic those used in the private sector.

5. issues to consider

The following sections detail issues to consider when establishing employment arrangements.

5.1 power to employ

5.1.1 does the entity need employment powers?

Most entities with substantial operational responsibilities (i.e. entities other than advisory bodies and very small entities) will require staff in order to perform their role. Such entities should be provided with the power to directly employ their own staff. This provides the entity with the ability to tailor employment conditions to operational needs.

In exceptional circumstances certain public entities may be supported by staff employed through a delegated power of employment from the portfolio departmental Secretary. This may be appropriate for:

- very small entities where the costs of developing structures to support direct employment could outweigh the benefits;
- entities that need to be established quickly, which should later transition to exercising direct employment arrangements; and/or
- entities where the primary role of the board is to provide expert technical/regulatory advice and as such, the board may not possess the broad range of governance skills necessary for employing staff.

The inherent risks associated with departmentally delegated employment arrangements mean this option is not recommended on medium or long-term basis. As the departmental secretary remains accountable for employment decisions, there is an additional administrative burden for the secretary and the potential for misunderstandings regarding reporting and accountability lines for staff who report on a day-to-day basis to an entity that is not responsible for their overall employment.

Options for providing employment powers

In order to directly employ their own staff, public entities need to be provided with the power to employ. For statutory authorities, this power is generally specified in the entity's establishing mechanism (i.e. the establishing legislation or establishing Order in Council). Public entities created as companies under the Commonwealth Corporations Act are inherently granted employment powers.

Table 1 outlines the options for providing employment powers, suitability for different entity legal forms, and their implications.

Table 1: Options for provision of employment powers to public entities

OPTION	EMPLOYMENT POWERS PROVIDED VIA	SUITABLE FOR	IMPLICATIONS	EXAMPLES
1.	Establishing legislation	<ul style="list-style-type: none"> entities created by an Act of Parliament (whether entity specific or umbrella sector Act) 	<ul style="list-style-type: none"> employment powers are explicit in the entity's establishing Act flexibility to tailor employment conditions to the entity or the sector 	<ul style="list-style-type: none"> Public Transport Development Authority State Emergency Service
2.	Establishing Order in Council	<ul style="list-style-type: none"> entities created by an Order in Council 	<ul style="list-style-type: none"> employment powers are explicit in the entity's establishing Order in Council flexibility to tailor employment conditions to the entity or the sector 	<ul style="list-style-type: none"> VicForests
3.	Registration through ASIC	<ul style="list-style-type: none"> entities established under the Commonwealth Corporations Act 	<ul style="list-style-type: none"> inherent employment powers provided under the Commonwealth Corporations Act flexibility to tailor employment conditions to the entity 	<ul style="list-style-type: none"> Melbourne Recital Centre Limited
4.	Delegation from departmental Secretary	<ul style="list-style-type: none"> small entities and/or entities that need to be established quickly (and transition to exercising direct employment powers later) 	<ul style="list-style-type: none"> employment powers can be provided relatively quickly potential reduction in corporate overheads, compared with direct employment by the entity limited flexibility to tailor employment conditions to operational needs additional burden for the departmental secretary, who remains responsible for entity employment decisions made under delegation 	<ul style="list-style-type: none"> Victorian Institute of Forensic Medicine Sustainability Victoria

5.1.2 who will have the power to employ?

In parallel with the decision to grant an entity the power to employ staff, it is necessary to consider with whom these powers should be vested. Options include:

- the board as a collective;
- the chair; or
- the CEO.

The provision of employment powers creates significant responsibilities for the holder of the power, including obligations to ensure compliance with relevant Commonwealth and Victorian employment legislation (e.g. legislation covering employment conditions), organisational policies and industrial agreements. In some cases, employers can be personally held liable for outcomes (e.g. occupational health and safety), as highlighted in the case study at Figure 5.

Figure 5: Case Study – WorkCover

In 2006, a drilling rig supervisor told an inexperienced 21 year old employee to drive a truck with defective brakes and no seatbelt down a steep slope. The vehicle crashed, killing the driver.

The supervisor was sentenced to 20 months in prison, suspended for three years.

The company that employed the driver was charged with recklessly engaging in conduct that places another person at a workplace at risk of serious injury and was convicted and fined \$750,000.

The director of the company that employed the driver was charged with being an officer of a company which breached its obligations to provide or maintain for employees plant and systems of work that were safe and without risks to health. As the responsible officer, he was convicted and fined \$120,000.¹

In addition to these responsibilities, public sector employers are likely to be held to account for the actions of their employees by integrity bodies such as the Ombudsman, the Auditor-General and the Independent Broad-based Anti-corruption Commission.

Appointment requirements

Associated with the choice of employment model, there can be a series of appointment approval requirements.

For instance, the appointment, remuneration and terms and conditions of appointment of CEOs in the health sector requires the approval of the Secretary of the Department of Health (under the *Health Services Act 1988*). In terms of remuneration, they may also require Government Sector Executive Remuneration Panel (GSERP)² approval.

Relevant appointment requirements should be checked with the responsible portfolio department.

1 Further detail on this case study is available from the WorkCover website at: <http://www.worksafe.vic.gov.au/wps/wcm/connect/wsinternet/worksafe/sitertools/news/safety+issues+raised+and+ignored+young+truck+driver+dies>

2 Further detail on GSERP can be found at: <http://www.ssa.vic.gov.au/products/view-products/government-sector-executive-remuneration-panel-gserp-qaq.html>

Preferred model

For entities governed by a board, the preferred model is that the power to employ the CEO and all other staff is provided to the board as a collective. The board should then formally delegate the power to employ all other staff to the CEO. The ability to delegate these powers should be provided for in the legislation. The CEO should consider whether further delegation of employment powers (e.g. to executive officers and others below CEO level) is appropriate. This will generally require board approval.

Provision of employment powers directly to the CEO is not recommended as it may dilute or confuse accountability of the CEO to the Board for employment decisions.

Delegation of employment powers to the CEO, through the board, ensures that the board, in line with its governance role, has oversight of this key area of the entity's operations and the CEO, as the person responsible for the day-to-day operations of the entity, is responsible for day-to-day employment and management decisions. This model is consistent with that used in the private sector.

Boards should be clear that by delegating employment powers, boards delegate only control, not responsibility and accountability for employment matters. The board remains responsible for the actions of the delegate, and needs to take appropriate steps to ensure that the delegate acts appropriately.

Governor in Council appointments

In some cases, CEOs (or other second level positions) are appointed by ministers or Governor in Council, rather than the board. This model should be used sparingly as it carries with it particular risks, as highlighted in the case study below.

Figure 6: Case Study – Governor in Council

The board of public entity “XYZ” has the power to employ staff but the CEO of the entity is appointed by Governor in Council.

Recently, a new CEO has been appointed by Governor in Council. Initially, the CEO and the board developed a positive working relationship. However, in recent months, the relationship has deteriorated and the board is concerned that the CEO is not implementing its vision for the entity.

In discussions between the chair of the board and the CEO, it becomes apparent that the CEO does not see themselves as accountable to the board, but rather as accountable directly to government, by whom they were appointed.

Although the board is accountable for the actions of the CEO, it is struggling to ensure that the CEO follows its directions.

5.2 type of staff

Generally, public entities employ public sector staff. By doing so, these entities remain at “arm’s length” from government, and are able to tailor employment conditions to their operational needs, through the use of entity or sector-specific industrial agreements.

Historically, there have been greater legislative restrictions on the employment conditions of public servants than public sector staff. Today, however, the key differences between the employment conditions of public sector staff and public servants emerge only from the different industrial agreements that apply. As detailed in Figure 7, regardless of whether an entity employs staff as public sector or public service employees, the Public Administration Act confers similar obligations and rights on public sector and public service employees and employers.

Figure 7: Application of the *Public Administration Act 2004*

Regardless of whether an entity employs staff as public sector or public service employees, the Public Administration Act confers a range of obligations and rights on both employees and employers.

Employees

Employees are expected to abide by the public sector values of:

- responsiveness;
- integrity;
- impartiality;
- accountability;
- respect;
- leadership; and
- respect for human rights.

In addition, employees are expected to abide by the *Code of Conduct for Public Sector Employees* which sets the standards of behaviour for public sector employees. The Code of Conduct can be found at www.ssa.vic.gov.au.

The Public Administration Act also allows for employees to appeal to the Public Sector Standards Commissioner for a review of actions relating to their employment.

Employers

Employers are expected to promote the public sector values and to establish employment processes to ensure that:

- employment decisions are based on merit;
- employees are treated fairly and reasonably;
- equal employment opportunity is provided;
- human rights as set out in the *Charter of Human Rights and Responsibilities Act 2006* are upheld; and
- public sector employees have a reasonable avenue of redress against unfair or unreasonable treatment.

In addition, employers are expected to abide by the *Standards: Application of the Public Sector Employment Principles*. The Standards can be found at www.ssa.vic.gov.au.

Employing public servants

In exceptional circumstances, public entities may employ public servants. This option is most commonly used when government needs to transfer existing public servants to the entity and wants to preserve their existing employment entitlements and conditions. These arrangements can be complex. Therefore any such decision should be carefully considered in light of sound legal and industrial relations advice.

If required, there are a number of options for a public entity to employ public servants.³ These options and their respective implications are detailed in Table 2.

It is strongly recommended that the employment of public servants is achieved through section 16(1) of the Public Administration Act, to ensure that all elements of the Act relevant to the employment of public servants, and any future amendments, are applied. Using these options also ensures clarity about the status of the entity as part of the public service.

Some public entities have employed a mix of public sector, public service and (in a small number of cases) non-government staff. This option is not recommended on a medium or long-term basis as it creates challenges for entities in ensuring consistent employment conditions and career opportunities for staff, and creating a unified culture.

The two preferred options for employment of public servants by public entities are highlighted in Table 2.

³ Staff employed as public servants generally have their employment conditions determined through the Victorian Public Service Enterprise Agreement.

Table 2: Options for employing public servants in public entities

OPTIONS	IMPLICATIONS	EXAMPLE
Preferred options		
In the entity's establishing Act, amend s.16 of the Public Administration Act to declare a particular office holder a 'person with the functions of a public service body Head' for the purposes of the Public Administration Act	<ul style="list-style-type: none"> • Status of the entity as a public service body is clear • All provisions relating to public service bodies and public service employees under the Public Administration Act apply 	<ul style="list-style-type: none"> • Road Safety Camera Commissioner
Obtain an Order in Council to declare a particular office holder a 'person with the functions of a public service body Head' for the purposes of the Public Administration Act	<ul style="list-style-type: none"> • Status of the entity as a public service body is clear • All provisions relating to public service bodies and public service employees under the Public Administration Act apply 	<ul style="list-style-type: none"> • Victorian Equal Opportunity and Human Rights Commission
Other available options		
Obtain an Order in Council to declare an entity to be a 'declared authority' for the purposes of the Public Administration Act	<ul style="list-style-type: none"> • Can result in confusion about the status of the agency (is the agency a public entity? is it a public service body?) • Potential for only some and not all provisions under the Public Administration Act relating to public service bodies and public service employees apply 	<ul style="list-style-type: none"> • CenITex
Include provisions in the entity's establishing act to provide a particular office holder with the functions of a 'public service body Head' for the purposes of the Public Administration Act	<ul style="list-style-type: none"> • Can result in confusion about the status of the agency (is the agency a public entity? is it a public service body?) • Potentially not all provisions under the Public Administration Act relating to public service bodies and public service employees apply to the entity 	<ul style="list-style-type: none"> • Victorian Multicultural Commission
Secretary provides portfolio department staff under delegation ⁴	<ul style="list-style-type: none"> • Potential challenges for managing the entity's identity and culture as a result of employing public servant staff to perform day-to-day activities within a public sector entity that is not part of the public service 	<ul style="list-style-type: none"> • Victorian Institute of Forensic Medicine • Sustainability Victoria

4 Staff may also be employed by the head of the relevant portfolio department and assigned to the entity. The SSA does not recommend this option as it can create confusion as to lines of responsibility and accountability, with entity staff reporting on a day-to-day basis to managers who are not responsible for their employment

5.3 transfer of existing employees

In some cases, establishing a public entity may require the transfer of existing employees to the new entity, either from the public service, or from other public entities.

Transferring employees is a complex matter. The way in which issues are dealt with will be particular to the individual circumstances. There are, however, a number of generic issues that are likely to arise. These include:

- which industrial agreement(s) will apply:
 - whether staff will be covered by an existing agreement;
 - whether there is a need for a new agreement; and
 - whether there is a need for a transitional agreement until a new agreement can be established;
- what executive employment arrangements will apply (including any right of return entitlements under s.27 of the Public Administration Act);
- provision of comparable terms and conditions of employment to ensure that staff aren't disadvantaged from the transfer (this can be both a legislative and industrial requirement);
- arrangements to ensure that there is continuity of employment;
- arrangements to provide for staff to transfer accrued leave entitlements (note: this should be considered for each type of leave, e.g. sick leave, long service leave, annual leave and parental leave); and
- provisions to provide continued access to defined benefit superannuation and other sector-specific schemes for eligible employees.

6. further support and advice

Further support and advice on specific issues facing individual entities is available from:

- internal legal policy and/or governance branches;
- the State Services Authority;
- the Department of Premier and Cabinet – Government Branch;
- the Department of Treasury and Finance – Public Sector Industrial Relations Unit; and
- the Victorian Government Solicitor’s Office (VGSO).

Both the VGSO and the Department of Treasury and Finance – Public Sector Industrial Relations Unit can also provide advice on obligations regarding the transfer of existing employees.

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contact us

at the State Services Authority

Email: info@ssa.vic.gov.au

Phone: (03) 9651 1321

Fax: (03) 9651 0747

www.ssa.vic.gov.au

Postal Address:
3 Treasury Place
Melbourne 3002