1. **The public sector and public sector governance**

# **The public sector**

The *Public Administration Act 2004* (**PAA**) is key to understanding the public sector in Victoria. One of the purposes of this PAA is to provide a framework for good governance in the Victoria public sector and in public administration generally in Victoria. Set out below are some key parts of the public sector, as provided for in the PAA.

## Public service bodies and the public service:

* **Public service bodies** are departments, administrative offices and the Victorian Public Sector Commission [s 4(1)].
  + Departments and administrative offices are established by Order in Council [ss 10, 11]; they have no separate legal personality from the State - they are the administrative machinery of the Government.
* The **public service** is made of the persons employed under Pt 3 of the PAA; persons employed in Departments and administrative offices (being VPS employees and executives, including Secretaries) plus those employed in the 'offices' referred to in s 16 [s 9].

## The public sector:

The public sector is comprised of the public service, ‘public entities’ and ‘special bodies’ [s 4(1)].

**Public entities** are principally bodies (corporate or unincorporate) established by or under an Act, or by the Governor in Council or a Minister other than ‘exempt bodies’, that has a public function to exercise on behalf of the State [s 5].

* If a body corporate, the Governor in Council/Minister must have the right to appoint at least half of the directors.
* Some public entities are expressly public authorities which do/do not represent the Crown (see *Interpretation of Legislation Act 1984*, s 46A).
* This definition excludes **exempt bodies** and **special bodies** [s 54(1)].

**Special bodies** may have a separate legal existence, or may be the people who work for a statutory officer - they are exempt from some, but not most, of the regulatory requirements under the PAA [s 6].

**Declared authorities**: a flexible mechanism to apply parts of the PAA [s 104].

## The people in the public sector:

* **Public sector employees** are the public service and persons employed by public entities and special bodies.
* **Public sector body Heads** (CEOs for public entities), are broadly given responsibilities in relation to implementation of public sector values and codes;
* **Public service body Heads** (and those who exercise similar powers: s 16) also have employer responsibilities.

## Public officials

Public officials, include public sector employees and much more: e.g. statutory and prerogative office holders and public entity directors (others, e.g. judges, are excluded).

Codes of Conduct issued by the Victorian Public Sector Commission may bind public officials [s 61].

Some public officials may also be established as statutory corporations (Secretary of Department of Environment, Land, Water and Planning: natural person; Secretary to Department of Environment, Land, Water and Planning: body corporate sole).

## State owned enterprises

Beyond the public sector, there are State owned enterprises under the *State Owned Enterprises Act 1992*:

* **State body**: example CenITex (see *Victorian Government Gazette*, G44, 2 November 2017, 2394).
* **State business corporation**: example VicForests (see, *Victorian Government Gazette*, S 198, 28 October 2003. There are subsequent amending orders).
* **State owned company**: example City West Water Pty Ltd (see V*ictorian Government Gazette*, G5, 9 February 1995, 311. Since 'renationalised').

## The machinery of government

As discussed in Chapter 1, 'machinery of government' refers to the allocation of functions and responsibilities between departments and Ministers. In Victoria, the machinery of government operates as follows:

* The Premier determines portfolios and recommends to Governor appointment of responsible Minister:
  + *Constitution Act 1975*, ss 87E(b), 88: see [Government Gazettes](http://www.gazette.vic.gov.au/) (<http://www.gazette.vic.gov.au/>) indexed under *Constitution Act 1975*
* The Premier makes Administration of Acts General Order assigning responsibility for administering Acts to Ministers:
  + See [DPC website under 'Machinery of Government';](https://www.dpc.vic.gov.au/index.php/policies/legal)
  + This gives meaning to the word 'Minister' in Acts: *Interpretation of Legislation Act 1984*, s 38.
* The Governor in Council, by Order, determines identity of departments/ administrative offices:
  + PAA, ss 10, 11, See: [VPSC website, Register of Instruments](https://vpsc.vic.gov.au/about-public-sector/register-of-instruments/) (<https://vpsc.vic.gov.au/about-public-sector/register-of-instruments/>);
* Portfolios are assigned to departments:
  + See: statement by the Premier.

## Machinery of government changes:

Responsibility for the administration of Acts can be changed:

* See supplement to the General Order: [www.dpc.vic.gov.au](http://www.dpc.vic.gov.au/) under 'Machinery of Government';

Departments and administrative offices can have their names changed or can be abolished:

* PAA, ss 10, 11, See: [VPSC website, Register of Instruments](https://vpsc.vic.gov.au/about-public-sector/register-of-instruments/) (<https://vpsc.vic.gov.au/about-public-sector/register-of-instruments/>);
* Consequence of change of name, see: *Interpretation of Legislation Act 1984*, s 38AAA.

Powers and obligations (including funding) etc. can be transferred between departments, Ministers and officers to reflect an administrative change. This extends to construction of their titles in Acts etc.:

* Order of Governor in Council under *Administrative Arrangements Act 1983* (at [Victorian](http://www.gazette.vic.gov.au/) [Government Gazette](http://www.gazette.vic.gov.au/)).

Employees can be transferred between public service bodies and public entities etc.

* Declaration by the Premier in writing: PAA, s 30.

# **Public sector governance**

## Constitutional foundations

As discussed in Chapter 1, Victoria was established as a State by the Constitution, which established and controls some of the key institutions and principles of the State system of government, including the rule of law. Other State powers find their ultimate source in the *Australia Acts 1986*.

Further, while the executive power of the State does not, unlike in the Commonwealth, find its source in the *Constitution Act 1975*, it is subject to regulation under it, with the constitutional and common law foundations of responsible government being reinforced by both the *Parliamentary Committees Act 2003* and the PAA:

* As discussed in Chapter 1, a system of responsible government traditionally has been considered to encompass the means by which the Parliament brings the Executive to

account so that the Executive's primary responsibility in its prosecution of government is to the Parliament: *Egan v Willis (1998)* 195 CLR 424, 451;

* Subject to an inconsistent Act, the Houses of Parliament and their Committees have the powers and privileges of the House of Commons in 1855: *Constitution Act 1975*,

s 19(1);

* The Houses have established Committees (some have also been established under the *Parliamentary Committees Act 2003*) and both the Houses and Committees exercise various powers to call for persons, documents and information;
  + These extend to 'Orders for Production' regulated under the Standing and Sessional Orders of each House: see [Legislative Council - Standing & Sessional](https://www.parliament.vic.gov.au/council/standing-aamp-sessional-orders-rules) [Orders (Rules);](https://www.parliament.vic.gov.au/council/standing-aamp-sessional-orders-rules) [Legislative Assembly - Standing & Sessional Orders (Rules);](https://www.parliament.vic.gov.au/assembly/standing-aamps-sessional-ordersrules)
  + These powers extend to statutory authorities etc. which are obliged to report to Parliament or to a Minister who is responsible to Parliament: *Egan v Willis* (1998) 195 CLR 424, 452; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR

520, 561.

* The responsibility of Ministers to Parliament gives rise to powers to obtain documents and information in order to exercise that responsibility:
  + *Hughes Aircraft v Airservices Australia* (1997) 76 FCR 151, 245-6.
  + The line of accountability is reflected in the PAA, ss 13, 85;
  + The power extends to statutory authorities for whom the Minister is responsible, even where they have some independence: *Hughes Aircraft v Airservices Australia* (1997) 76 FCR 151, 245-6; *Esso Australia Resources v Plowman* (1995)

183 CLR 10, 37-9; PAA, s 81(1)(c) (see also ss 93, 94).

* As Secretaries advise Ministers about the exercise of the Ministers powers, they too have powers to obtain documents and information from relevant public entities:
  + *Hughes Aircraft v Airservices Australia* (1997) 76 FCR 151, 254.
  + This is reinforced by s 13A (and s 81(1)(b)) of the PA Act.
  + Pt V of the PAA creates a general accountability regime for public entities.

## Public sector governance legislation

* Most public sector bodies will have legislation which relate its functions in some way. Statutory bodies corporate, and most statutory officers, will have legislation that imposes particular governance obligations on them. There is also a broad suite of legislation, Commonwealth and State, which imposes governance obligations across the public sector, or particular parts of it. Key legislation is:
  + **Foundational**: the *Commonwealth Constitution; the Australia Acts 1986* (Imp and Cth); *Constitution Act 1975*; *Parliamentary Committees Act 2003*; *Public Administration Act 2004*;
  + **Accountability/integrity**: *Victorian Inspectorate Act 2011*; *Independent Broad- based Anti-corruption Commission Act 2011*; *Ombudsman Act 1973*; *Public Interest Disclosure Act 2012*; *Audit Act 1994*;
  + **Financial, contracting**: *Financial Management Act 1994*; *Victorian Managed Insurance Authority Act 1996*; *Borrowing and Investment Powers Act 1987*; *Victorian Funds Management Corporation Act 1994*; *Public Authorities (Dividends) Act 1983*; *Taxation Administration Act 1997*; *State Owned Enterprises Act 1992*; *Parliamentary Budget Officer Act 2017; Treasury Corporation of Victoria Act 1992*; *Victorian Future Fund Act 2023; Local Jobs First Act 2003;*
  + **Reporting and planning:** *Gender Equality Act 2020; Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (Cth); *Freedom of Information Act 1982*
  + **Employment**: *Fair Work Act 2009* (Cth); *Fair Work (Commonwealth Powers) Act 2009* and agreements and determinations; *Public Administration Act 2004*;
  + **Information Management**: *Public Records Act 1973*; *Freedom of Information Act 1982*; *Privacy and Data Protection Act 2014*; *Health Records Act 2001; Victorian Data Sharing Act 2017*;
  + **Decision-making, interpretation, legislation**: *Charter of Human Rights and Responsibilities Act 2006*; *Interpretation of Legislation Act 1984*; *Subordinate Legislation Act 1994*; *Administrative Arrangements Act 1983*; *Transport Integration Act 2010*, Pt 2; *Gender Equality Act 2020*, Pts 2 and 3*; Climate Change Act 2017*;General Orders and supplements;
  + **Judicial and merits review**: *Commonwealth Constitution*, ss 73 and 78; *Judiciary Act 1903* (Cth) Part IX; *Supreme Court (General Civil Procedure) Rules 2015*, order 56; *Administrative Law Act 1978*; *Victorian Civil and Administrative Tribunal Act 1998*; *Crown Proceedings Act 1958;*
  + **Public land and public development**: *Land Acquisition and Compensation Act 1986; Marine and Coastal Act 2018; Conservation, Forests and Land Act 1987; Crown Land (Reserves) Act 1978; Forests Act 1958; Land Act 1958; National Parks Act 1975; Victorian Environmental Assessment Council Act 2001; Aboriginal Lands Act 1970; Traditional Owner Settlement Act 2010; Native Title Act 1993 (Cth); Development Victoria Act 2003; Environment Effects Act 1970; Major Transport Projects Facilitation Act 2009; Project Construction and Development Management Act 1994; Filming Approval Act 2014.*

## The public sector and policies

Public sector bodies will each have a number of policies that apply to their administrative, operational and decision-making functions.

*Does a policy bind you?*

To determine whether a policy binds you, consider the following basic principles:

* Does it do so in its terms?
* Government policies bind public service bodies and the public service, unless they are inconsistent with a particular statutory power or duty.
* Statutory officers and public entities should have regard to Government policies where they are not inconsistent with their statutory powers or duties;
  + Acts establishing public entities regularly say they can be subject to a direction by the responsible Minister - the Minister could therefore direct a public entity to follow a particular policy;
  + the Governor in Council can make policies binding public entities under s 92 of the PAA;
  + the Secretary of DPC can make guidelines about administrative operations with which relevant public service bodies or entities cannot act inconsistently without providing reasons [PAA, s 36A];
* In general, in exercising a decision-making power, a statutory body or officer may have regard to a policy and even apply it in reaching their own determination once they have had regard to the particular circumstances, including whether there are special circumstances that warrant a different course. Public sector decision-making is discussed further in Chapter 3.