

PUBLIC RECORDS ACT 1973

The topic on which I have been asked to speak today is “Redefining the Scope of the *Public Records Act 1973*”. Before doing so, however, it may be of comfort to you in coming to grips with the issues arising out of the audit review into government contracts to note that the year in which the *Public Records Act* was introduced was 1973, i.e. it is a relatively recent piece of legislation. Prior to 1973 the arrangements for effecting the preservation, management and utilisation of the public records of Victoria was not the subject of any statutory regime at all. Given that the State of Victoria had then been in existence for more than 120 years it is a little surprising that legislation had not been introduced much earlier to deal with such an important issue.

Another point to note in the context of the issues being discussed today, is that the Act was introduced when the functioning of government at a State level was quite settled. Basically, there were the central departments of government and public statutory bodies. However, that situation changed during the 1980s when outsourcing and shedding of some government activities began to occur in this country on a more common basis. In Victoria, the new era was accelerated by the Kennett government after the October 1992 election. This acceleration is illustrated by the enactment of the *State Owned Enterprises Act 1992* in the first parliamentary session after the election.

This changing approach to government functioning obviously meant that systems which had been established for the traditional approach had to be re-examined to determine whether any adjustments were needed. One of these was the critical area of public records. Apart from one minor, inconsequential, amendment in 1989, the definition of “public office” had remained the same since the Act’s inception. So, it is not surprising that the creation of these new State Owned Enterprises raised questions as to whether they came within the description of “public office” in the *Public Records Act*. To minimise potential debate on the issue the definition of “public office” was amended in 1996 by the insertion of a new paragraph (ba) extending the definition to “a State Owned Enterprise within the meaning of the *State Owned Enterprises Act 1992*”. This amendment was effected by the *Arts Institutions (Amendment) Act 1996* and took place approximately four years after the State Owned Enterprises legislation was

introduced. This meant there was a period of time when the status of records relating to these bodies would require particular consideration. I will return to this issue later.

That brief historical background is provided to highlight that the preservation of public records has only been the subject of relatively recent legislative attention and that, having regard to the change in government functioning, it is both necessary and timely to look at the preservation of public records to ensure the intent of the original legislation is implemented.

Today I have been asked particularly to discuss one of the recommendations made in the Audit Review Report, namely, that “the government clarify whether all government corporations are covered by the *Public Records Act 1973*”.

Although on a first reading of that recommendation, the suggestion seems relatively straight forward, there are some legal difficulties – or potential legal difficulties involved. If the government sought to implement that recommendation by deciding at executive level, yes, all government corporations are covered, it would still be necessary to look at whether the existing legislation enabled that decision to be given effect or whether some legislative amendment would be needed. The reason for this is that the *Public Record. ? Act* applies to (i) records made or received by “a public officer” in the course of duties and (ii) records made or received by a court or person acting judicially in Victoria. So far as the first category is concerned, for a record to be a public record the Act requires that it be made or received by a “public officer”. That term is defined as meaning “any person employed in a public office” Consequently, central to any decision that the Act should apply to all government corporations is the question whether such a corporation is a “public office” within the statutory meaning of that term.

This is an important question because if a body is a “public office” but no mechanisms are in place to implement the requirements of the *Public Records Act*, that body will be failing to comply with the Act. There are at least three adverse consequences of failure to comply with the Act. First, it will cause a deal of grief and aggravation to the Keeper of Public Records. Second, s. 13 makes it the duty of an officer in charge of a public office to cause to be made and kept full and accurate records of the business of

the office and to be responsible for carrying out a program of records management in accordance with standards established by the Keeper of Public Records. Failure to give effect to those duties will expose the officer in charge, presumably, the Chief Executive Officer, to an allegation of neglect of duty. Third, the Act (s. 19) makes it an offence for a person to unlawfully destroy a public record. So, if you are not aware of the status of your organisation in relation to the *Public Records Act* it is in your interest and the interests of the organisation to ascertain exactly what that status is under the legislation.

Presently, there are five categories of public office. They are -

- Any department branch or office of the government of Victoria;
- Any public statutory body corporate or unincorporate;
- Any State Owned Enterprise within the meaning of the *State Owned Enterprises Act*;
- Any municipal council;
- Any other local governing body corporate or unincorporate

Each of those categories you would think should provide a fair guide to determining whether a particular corporation is a public office. Possibly, the category presenting most difficulty is category (ba) dealing with state owned enterprises. According to the definition contained in the *State Owned Enterprises Act*, a "State owned enterprise" means -

- (a) State business corporation
- (b) State owned company
- (c) State body

Each of those terms is separately defined in the *State Owned Enterprises Act*.

- A State business corporation means a statutory corporation (which itself is separately defined) declared by Order in Council under s. 17 to be such a corporation;
- A State owned company means a company declared by Order in Council under s. 66 to be such a company; and
- A State body means a body corporate established under s. 14.

What is important for present purposes is that in the definition of "statutory corporation" there is specifically excluded "a body corporate incorporated, or taken to

be incorporated under the Corporations Law of Victoria”. Consequently, any body corporate which is incorporated or taken to be incorporated under the Corporations Law cannot be a statutory corporation. If it is not a statutory corporation it cannot be a State business corporation, so it cannot be a State owned enterprise and, therefore, cannot be a “public office” through that statutory definition process.

Prior to the 1996 amendment it was my view that the Act applied to bodies to which the *State Owned Enterprises Act* applied, except for a State owned company. The reason for this was that once a body had become registered under the Corporations Law it became a different body and would no longer constitute a “public statutory body corporate” within the meaning of the *Public Records Act*. The term State owned company is merely the term given by the Act to a company the subject of a declaration under s. 66. That being the case documents made or received by employees of such a company were not at that time, in my view, public records.

However, the effect of the amendment to the definition of “public office” is that the identification of a State owned enterprise for the purposes of the *Public Records Act* is to be ascertained by reference to the definition of the term “State Owned Enterprises” in the *State Owned Enterprises Act*. As noted, that definition includes a State business corporation, a State owned company and a State body. Consequently, “State owned companies” are now “public offices” by virtue of that definition, notwithstanding they may be registered under the Corporations Law. The reason for this is that s. 66 of the *State Owned Enterprises Act* authorises the Governor in Council to declare a company to be a State owned company. Prior to the amendment such a declaration would not have had any effect for *Public Records Act* purposes because the definition in the *Public Records Act* applied public office to a public statutory body corporate – but the State owned company was not such a creature. It was a creature of registration under the Corporations Law.

Moving on then to consider the situation of a State owned company and its records. I understand the amendment to “public office” came into operation on 6 February 1997. Accordingly, because a State owned company was not prior to that date a public office, records made up to the time were not public records. After that date, though, a State owned company, whether declared as such before or after 6 February, is a public office.

What then is the position regarding government corporations Government owned corporations which are State Owned Enterprises as defined and other statutory corporations which can be described as a “public statutory body corporate or unincorporate” are public offices and are thus covered by the *Public Records Act*. Companies which are incorporated under the Corporations Law but not declared to be “State owned companies” will not be covered by the *Public Records Act* even though they are beneficially owned by the State. Corporations which have been privatised, in that they have been sold in whole or in part to private organisations, cannot be State owned companies because the shares would be held by entities other than the State. However, the records of such a body which were in existence prior to ceasing to be a public office would remain public records by virtue of s. 2B of the *Public Records Act*.

The key date is 6 February 1997.

As we have seen, the first step is to go to the definition of “public office” and identify whether any of the five categories applies. There should not be much difficulty with respect to paras (a) any department, branch or office of the Government of Victoria and (c) any municipal council. In relation to the others, may be necessary to go to the constituting document which could be the Act of Parliament establishing the body or, say, in the case of a State body, the Order in Council made under s. 14 of the SOE Act.

Looking at para (b) first, the Act should do two things. It should first of all contain a provision stating “there is established a Board by the name of”, or some similar expression. If so, it will be a statutory body. Secondly, it may state that the Board is to be a body corporate. If it doesn’t, the body will be unincorporated. A difficulty may sometimes arise in deciding whether the body is a public body – whether its functions can be said to be public functions or purposes. If there is some uncertainty about this, you may need advice.

Looking at para (ba), you will need to decide whether the organisation comes within the definition of State Owned Enterprise in the SOE Act. Is it a State business corporation, State owned company or a State body? If so, the *Public Records Act*

applies. The next issue is to ascertain what records are covered. Here, at least in the case of a State owned company, the date of 6 February 1997 is important.

If however, your organisation is created under the Corporations Law and has not been declared a State owned company, it will not be a public office.

In conclusion, I would make two final observations. First, if you are in doubt about your status or what you should be doing please contact the Office of the Keeper of Public Records for assistance. There are certain obligations under the Act on public officers and it will be in your personal interests to know your position, as well as assisting the objectives of the Act to be met.

The other is that, in the case of doubt as to status, there is a provision in the *Public Records Act* whereby the position can be made clear. Under s. 2(2) the Governor in Council has power to determine if an office or body is or is not a public office.