

**Contracting, Privatisation and  
Public Records**  
PROV Project “All Records; All Activities”  
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Hello,

My name is Sophie Sturup, I have been asked to provide you with an overview of the project “All Records; All Activities” which has been designed to implement the recommendations last years’ *Audit Review of Government Contracts*.

In implementing the recommendations of the Audit Review, the project aims to ensure that all records which document government activities are managed in accordance with the *Public Records Act 1973* (the PR Act), regardless of who may be undertaking the work.

My interest and involvement in this area arises out of work that I was doing while employed by the Department of Treasury and Finance, on energy reform. Records management became a significant issue for that project particularly as time came to wind up the Division. Retention of corporate memory of both the reform process and the energy industry itself was problematical because most people involved in the process were contractors who were moving to other projects, or industry workers who were now working with private companies. As a result EPD conducted a significant review into its obligations in so far as record management was concerned.

## Recommendations of the Audit Review

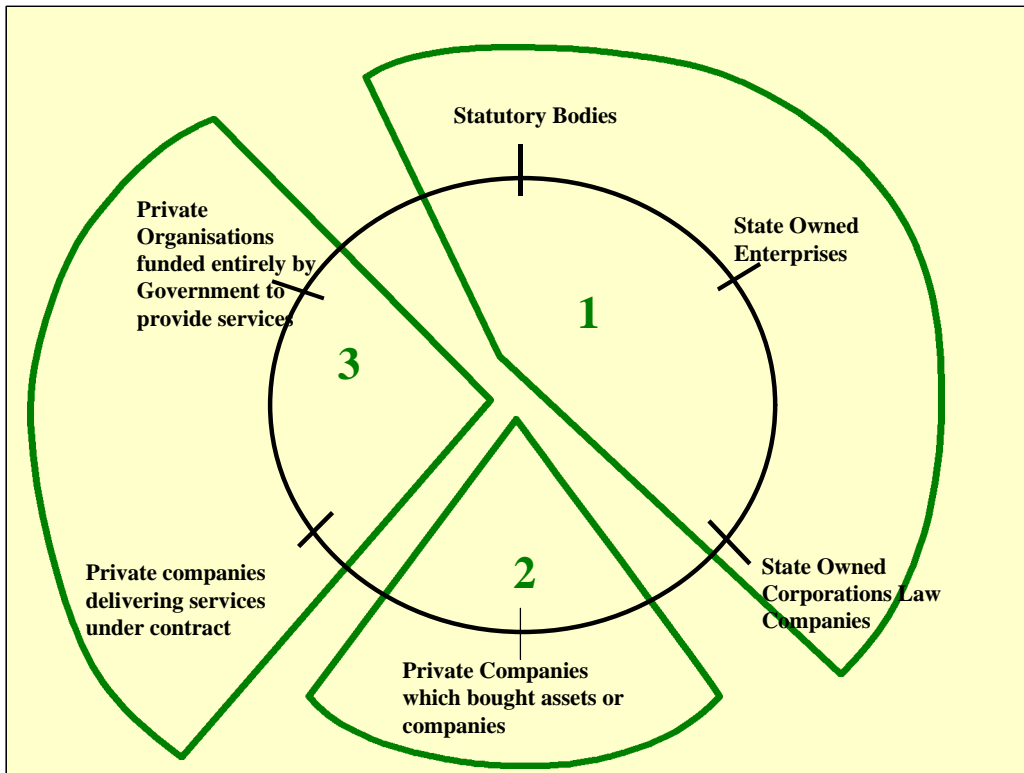
- s.3.15 of the Audit Review into Government Contracts states that government should:
  - recover records currently in the possession of privatised or contracted out entities,
  - clarify whether all government corporations are covered by the Public Records Act 1973, and
  - ensure that future contracts include clauses that ensure proper management of public records.

Last year Ross asked that I come and report on what we had been doing at EPD, which I did and as a result we made a submission to the Audit Review of Government Contracts which led to the above recommendations.

These recommendations form the basis of the project “All Records; All Activities”.

At EPD we had discovered that one contingent liability to be managed was the records which were retained by contractors who had been working from their private offices and had therefore maintained their own records of their work. Under the contracts this material belonged to the State, making it by default a public record. Because of concern over the extent of this liability, we undertook a project to retrieve or verify the status of contract material held by past contractors. Not surprisingly we discovered that in the main the contractor had not considered the ramifications of the *Public Records Act 1973* as it pertained to their material.

This started us thinking about who else might be generating records which are public records and may not be aware of the fact.



This diagram shows the broad categories of the types of entities which now provide public services and which may not be aware of the fact. The project has been divided up into corresponding segments.

In segment one are the Government owned service providers, which includes the state owned corporations, incorporated associations, unincorporated associations, advisory bodies, statutory bodies and so on.

In segment two there are the private companies which have bought assets or companies and which are providing services which the Government no longer sees as part of its role. This would include the energy companies, ports and so on.

In segment three there are the private providers of services which the Government has not completely surrendered accountability for. This group includes contractors operating under significant lease agreements, such as the tram and train operators and health care providers, right down to small consultancies.

I will explain the issues for each segment and our strategy for each of these in turn.

## Segment 1 - Public Bodies

- According to the definitions in the Public Records Act 1973 the following entities are subject to the Act
  - any department branch or office of the Government of Victoria
  - Any public statutory body corporate or unincorporate
  - a state owned enterprise within the meaning of the State Owned Enterprises Act 1992
  - any municipal council; and
  - any other local governing body corporate or unincorporate
- PROV has contacted most public sector agencies and is seeking to develop a relationship with each agency. This seminar is the first step.
- The next step will be to determine which agencies should be registered separately and which are part of the Departments.

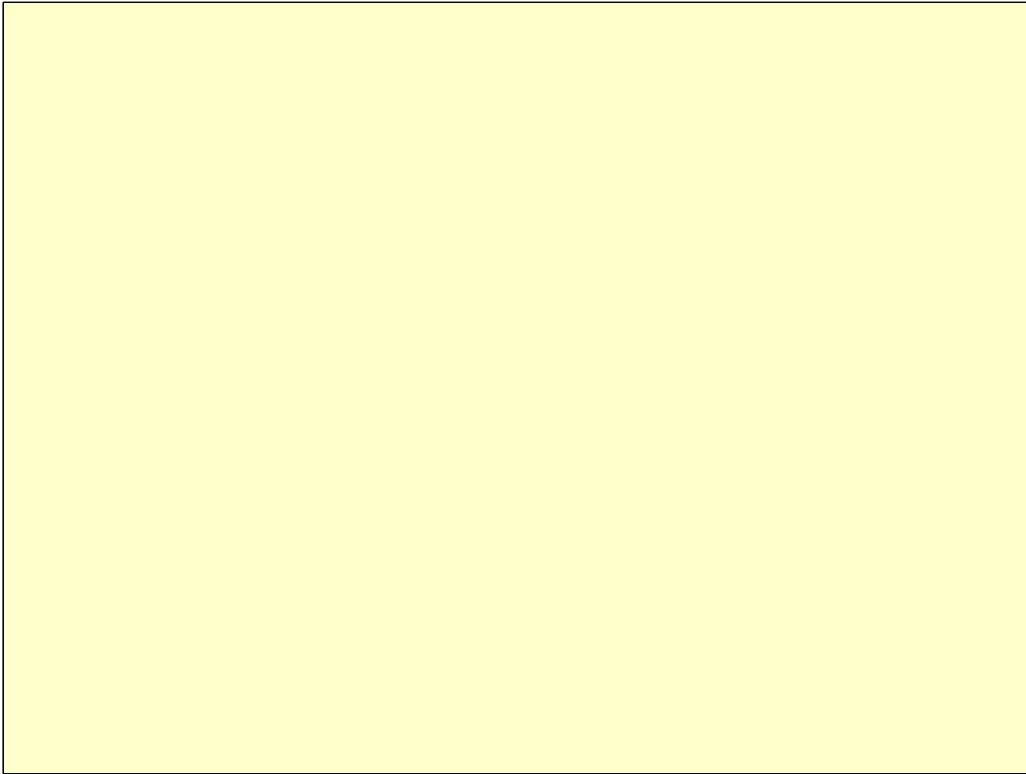
A review of the Treasury list of Portfolio entities uncovered that apart from the Departments and some 58 entities which PROV already dealt with, there were some 268 entities currently undertaking activities for Government where their records management arrangements were unknown.

We wrote to each of these entities and in December 2000 held a seminar to introduce them to PROV and open discussion on what it means to be subject to the Public Records Act. Approximately 1/4 of the entities either attended the seminar or communicated with PROV and I believe some of them are here today.

The purpose of the Public Records Act is to ensure that a record is kept of work undertaken on behalf of the public. Apart from any other considerations of historical posterity or government accountability, PROV is legally obligated under the Act to manage it so that those entities creating public records manage them in accordance with the standards and schedules produced.

The purpose of contacting these entities has been to:

- Develop a relationship between them and PROV
- Determine where they are at with regard to implementing the standards and schedules generated under the Act; and
- Allow PROV establish ongoing management of public records where ever they may have been generated.



Some agencies have stated that they currently manage their records through the Department to which they belong. Others manage their records entirely separately. In terms of how PROV manages records the next step will be to identify and register those agencies which are separate from their department. This will ensure that the agency, its activities and its relationships to the Departments are documented so that records which they may transfer in the future can be properly archived and linked with the records of other related agencies on our databases.

We feel this is a logical place to start building a relationship with each agency.

The Audit Review recommends that PROV “clarify whether all government corporations are covered by the *Public Records Act 1973*”. Advice has been received from the Government Solicitor to the effect that Corporations Law companies which have not been established under the State Owned Enterprises Act, are not covered by the Public Records Act. At present it is estimated that there are approximately 70 entities which are in this category. This is a matter which PROV is still considering and clarification has been sought from the Government Solicitor.

## Segment 2 - Privatised Services

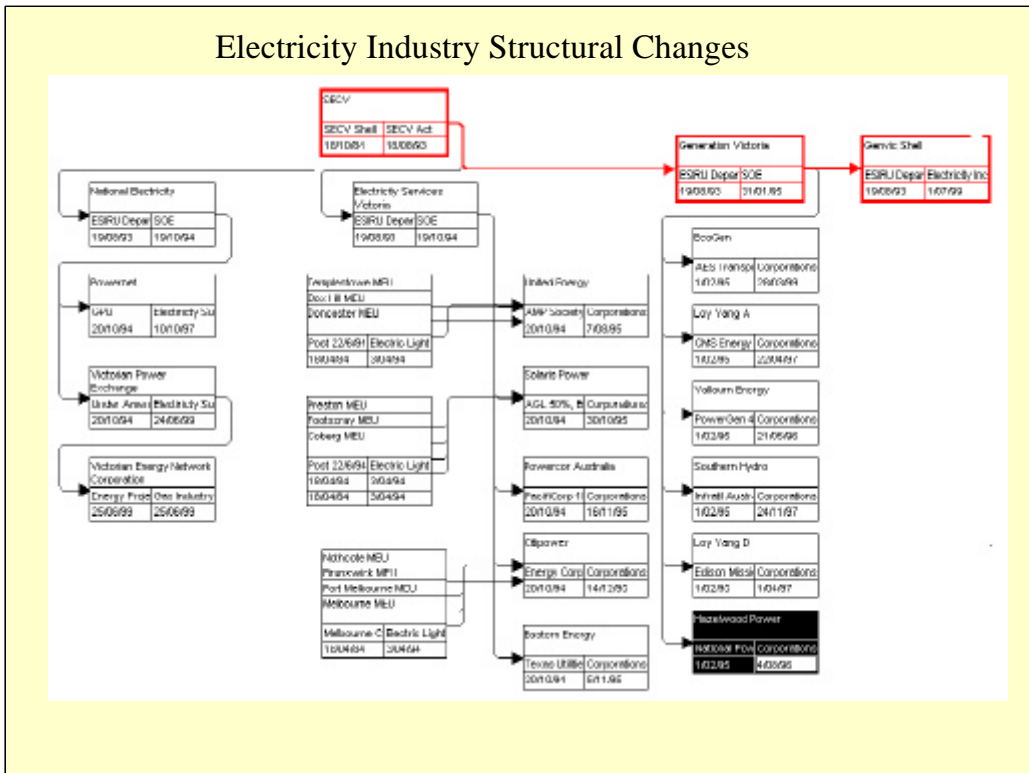
- It has been determined that material generated by most of the now privatised Corporations Law companies prior to privatisation is part of the public record (ie these entities were State Owned Enterprises).
- In the case of most privatisation processes some records were left in the possession of the new owners to enable a smooth transition of functions of the business.
- PROV has started a process to seek retrieval of this information at such time as the private companies no longer require it.

In terms of segment 2, the Audit review recommends that Government “recover records currently in the possession of privatised or contracted out entities”.

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We have generated administrative maps of the privatisation process for electricity and gas which establish at what point privatisation occurred. Here is an example of one such map.

## Electricity Industry Structural Changes



It is surprisingly complicated to work out which records are public records since for various reasons the structures used in privatisation processes were quite varied. In this case what started out as the SECV eventually ended up as one functioning Statutory Authority, 11 Corporations Law companies and one Statutory Authority Shell. In the process other local government agencies were merged and the exact date of each change to the organisational structure is required before you can determine whether the records are public records or not.

In dealing with this segment our intention is to send letters to the purchaser of each part of the industries previously owned by Government, seeking their agreement to surrender the public material at such time as it is no longer of use to them.

It is anticipated that companies which hold material now older than seven years will probably be willing to surrender most material. Although in some cases it may be some time until the material is no longer of any use. This is the same treatment that is given to public records held by Departments and therefore seems a reasonable approach.

It may be that in some cases ownership of material was transferred formally within the contract. In these cases, PROV will seek advice on how to proceed if at all. Given that some material may have commercial sensitivity attached, the surrender of material may not result in its immediate public availability however it will have been preserved as part of the record.

## Segment 3 - Contractors

- The standard VGPB Government contract and most derivatives of it state that the Government is the owner of materials produced under the contract.
- Where this is the case, those materials are subject to the Public Records Act 1973
- These records are largely un-managed in terms of the Public Records Act.
- PROV is planning to develop training mechanisms for both contract managers, and contractors to ensure appropriate management.

In terms of segment three the Audit review recommends that Government “ensure that future contracts include clauses that ensure proper management of public records”.

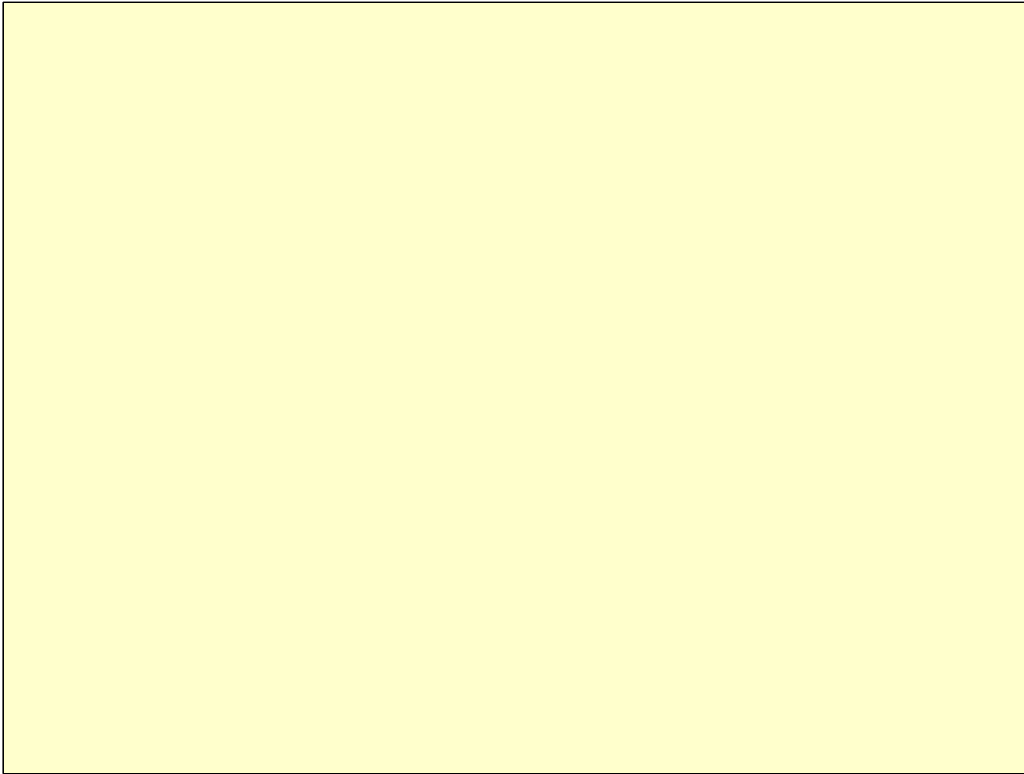
The standard VGPB Government contract and most of its derivatives contain clauses making Government the owner of materials produced under the contract. This is a sensible provision given that access to documentation is a key requirement for management of service standards in any contract.

There are a couple of issues that these clauses raise in terms of public records.

Firstly contractors records (whether large or small) are not generally managed as though they are public records and therefore Departments and Entities that engage these contractors are out of compliance with the Act.

Secondly contractors who “own” the records are largely unaware that they retain public records and therefore are not usually in a position to surrender them (this can include issues of electronic document replication etc) nor manage them in accordance with the Act.

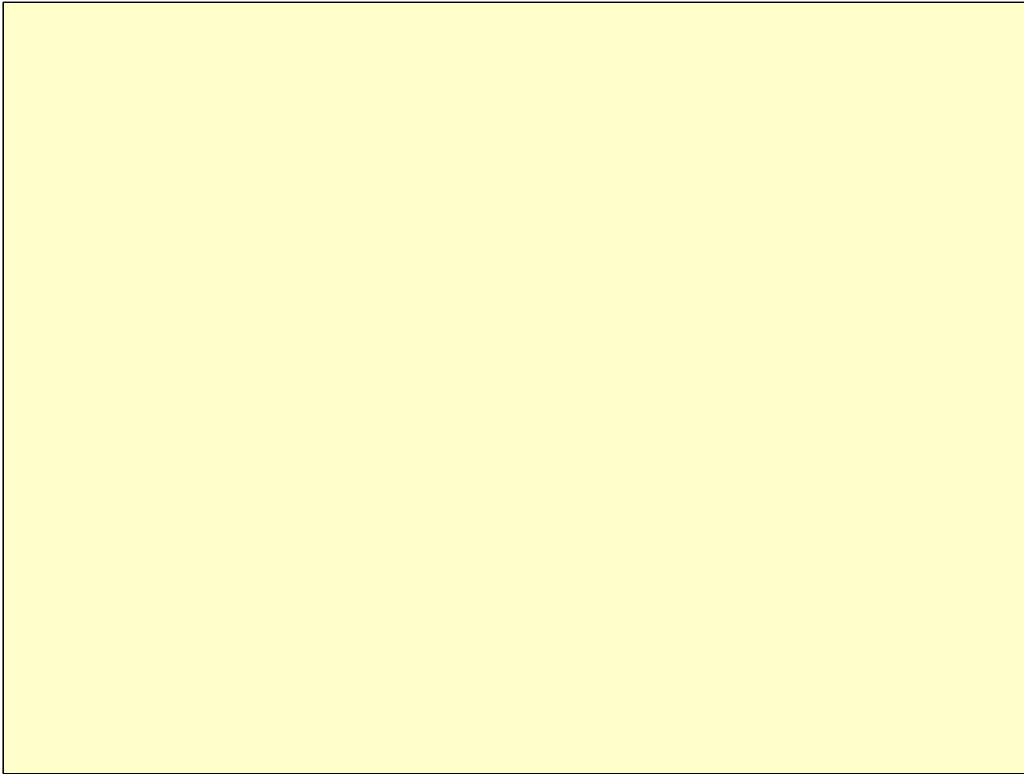
Thirdly there are significant potential liabilities that could arise from these records being retained solely by contractors. As well as the risk of inappropriate destruction of records, there is also the risk that Government may be called upon to undertake discovery of documents not in its possession. This can be an extremely costly exercise for example Longford. not to mention the risks arising from being unable to be sure all documents for your own defence have been uncovered.



Management of contractors records is complicated by the fact that they have their own record keeping requirements. Contractors must maintain records of their activities for insurance purposes. Further, contractors often have difficulty ensuring that records of different projects are easily separated from other work. This is particularly true in larger firms and with regard to electronic records.

A copy of a public record becomes the original for the purposes of the *Public Records Act 1973* if the original is destroyed. Therefore if contractors maintain their own files, even in duplicate to the Government's record, problems may still arise. If the Government sentences and destroys the documents but the contractor retains their version, the contractors records become again public records subject to the *Public Records Act 1973*. So if any management of records is to be carried out it must be done to both the Government and contractor sets of the record.

I am sure you can appreciate even from this very brief commentary that the issues for this segment are many and varied. At present the recommendations for dealing with this segment include:



- Seeking to review the clauses that Departments use to claim ownership of contract material to determine if there is a better way to ensure access to material without the associated difficulties.
- Developing contract material management standards in conjunction with the VGPB to increase awareness of the issue
- Establishing a protocol whereby new contractors, contract managers and records managers meet to ensure proper understanding of the requirements of the Act and establish a system for management of this issue.
- Develop training for new contractors in their requirements under the Act.

Obviously this is a very complicated issue, which will require nearly as many solutions as there are contracts. Since Departments each have their own unique sorts of contracts, and some of them are highly complicated (such as the health services providers etc) we will be developing a way forward in close consultation. I have spoken to some agencies which have been dealing with this issue and would be grateful to hear from anyone else who has found useful ways of dealing with contractors records in compliance with the Act.

## Conclusion

- This project is for the long term
- PROV is committed to managing all public records in accordance with the Act.
- Comments are welcome.

In conclusion let me just say that this is not a project which will be finished in the short term. From the point of view of this group the project will directly effect each of you in two ways:

1. This group will hopefully expand as more public sector entities from segment one join it.
2. Since according to the Audit Review 20% of the work of public servants is now contract management, I would expect that most of you will be affected by directives regarding management of contractors records in accordance with the Public Records Act.

I would therefore strongly urge you to maintain your awareness of this project and support us in finding solutions as you can.

If you have any suggestions or thoughts on other issues I am happy to answer questions now or to speak to any of you further at the end of this session.

Are there any questions?