



**Premier  
& Cabinet**

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# NSW PUBLIC SECTOR GOVERNANCE FRAMEWORK

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**FEBRUARY 2013**

### Version and amendment table

Date	Version	Amendments
February 2013	1	Original release

## 1. Introduction

Establishing appropriate governance arrangements for the functions and activities undertaken by public entities is critical to the delivery of high quality performance in the public sector. Well considered and fit for purpose governance arrangements provide a foundation for effective and efficient management of public sector entities.

In 2011, NSW Government entities were consolidated into nine Clusters reflecting nine broad policy areas of Government. These bring together a group of entities and allow similar and complementary Government services to be coordinated more effectively within the broad policy area of a particular Cluster.

Clusters are crucial in improving service delivery but there are many different entities and governance arrangements within Clusters and accountabilities can be blurred. Relationships need to be clear between Coordinating and Portfolio Ministers and between Directors General, Chief Executives and Boards to enable Clusters to operate effectively and meet the goals in *NSW 2021: A Plan to Make NSW Number One* (NSW 2021)<sup>1</sup>. It is necessary to put a framework in place to clearly articulate these relationships. This paper will provide an outline of the proposed Framework which will promote improved governance structures and strengthen the operational efficiency of public sector entities in NSW.

### 1.1 Purpose

The *NSW Public Sector Governance Framework* (the Framework) provides guidance in relation to the key issues to be considered when determining the appropriate governance arrangements and level of Government control required in respect of functions for which the NSW Government is accountable. The Framework has been designed as a tool to assist with the process for establishing new entities and reviewing existing entities in the Executive branch of Government. The Framework also provides consistent and predictable guidance on:

- Defining Clusters, entities and functions of Government
- Clarifying governance structures for NSW public sector entities
- Classifying NSW public sector entity types

### 1.2 Benefits

The Framework provides guidance on governance structures to strengthen operational efficiency and improve relationships between Clusters and entities. Entity governance structures should be amended to reflect the new Cluster arrangements to provide the following benefits:

- better alignment of entities to deliver key policy, business and service delivery priorities and consistent accountability and reporting relationships for entities across Clusters
- reduced duplication of functions and associated costs and identification of opportunities for operational efficiencies between entities
- improved administrative and financial flexibility, agility and responsiveness of entities

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<sup>1</sup> NSW Government, *NSW 2021: A Plan to Make NSW Number One*, Sydney, September 2011. Accessed at <http://www.2021.nsw.gov.au/>

- identification of risks and opportunities around the devolution of functions and responsibilities
- improved relationships between Principal Departments and other entities within Clusters
- improved transparency, integrity and accountability of the NSW public sector.

### 1.3 Key principles

The Framework is based on several key principles which promote improved governance structures and strengthen the operational efficiency of public sector entities in NSW. These key principles are as follows:

- the NSW Government should only pursue functions where there is a public interest in undertaking the function or activity and it is essential to the NSW Government's policy objectives and service delivery priorities;
- opportunities for functions to be delivered outside of the NSW Government or in partnership with an external provider (for example other levels of Government, non government organisations or the private sector) should be considered where the NSW Government cannot deliver greater public value for money by performing the function;
- Principal Departments should carry out Government functions unless the function being undertaken requires a degree of independence from Government such as:
  - regulatory or quasi judicial functions;
  - certain specialised or expert functions;
  - stewardship or custodianship of significant public assets;
- similar or complementary functions should be consolidated and undertaken by a single entity where possible to reduce duplication of functions and associated costs. It should not be assumed that a function should continue to be delivered through an existing entity.

Current entity structures may not necessarily reflect the Framework. Over time, it is intended where appropriate, that entities be aligned to the Framework. There may be some exceptions which should be clearly documented.

## 2. NSW public sector entities and their functions

The New South Wales (NSW) Public Sector is comprised of a large number of diverse entities which perform a range of functions and activities. This section of the paper explains the definition of an entity and the relationship between Clusters and entities and provides an overview of the key functions undertaken by Government.

### 2.1 NSW public sector entities

Government entities are bodies established by Governments, either administratively or by legislation, for which Ministers are ultimately accountable.

The reference to an 'entity' under the Framework is not limited to those entities with separate legal identities but also includes Government departments and other statutory bodies who represent and form part of the Crown. Government departments formed under the *Public Sector Employment and Management Act 2002* (PSEMA) are part of the Crown and do not have a separate legal identity. They are groups of staff based on specified functional areas.

### 2.2 Clusters and NSW public sector entities

NSW Government entities have been consolidated into Clusters reflecting broad policy areas of Government. These Clusters are not legal entities. They are administrative arrangements that bring together a group of different legal and administrative entities and allow similar and complementary Government services to be coordinated more effectively within the broad policy area of a particular Cluster. The allocation of portfolios and entities to a Cluster is a matter for the Premier.

Each Cluster has:

- A Coordinating Minister who has overall Cluster responsibility
- A number of Portfolio Ministers with responsibility for their specific portfolio areas within the Cluster
- A Principal Department led by a Director General
- Other entities within Clusters and generally led by a Chief Executive or a Board

Entity types are discussed in Section 5. Examples of types of entities include Principal Departments, Trusts, State Owned Corporations and Accountability Institutions.

### 2.3 Functions of Government

NSW Government entities undertake functions which broadly relate to three key areas - strategic policy, regulation and enforcement and service delivery. Understanding these functions and their associated risks is necessary to determine the appropriate governance arrangements/level of Ministerial control required to support the undertaking of those functions.

#### 2.3.1 Strategic policy setting

Strategic policy setting is focused on responding to complex issues that have long term or ongoing implications. It directly influences government service delivery by determining the areas of priority focus and often the approach, model or method of delivering the service which can involve the spending of significant amounts of public money.

Ministers, through Cabinet decision-making, set government policy and are accountable for it. A high degree of accountability and Ministerial control is required to make sure policy settings support the effective and efficient spending of public money.

### *2.3.2 Regulation and enforcement*

The regulatory process includes regulatory development, licensing, community education, monitoring and enforcement. A range of different entities are involved in various aspects of the regulatory process, including Principal Departments and other Government bodies. In some instances organisations external to Government may also have a role in the regulatory process.

Implementation of regulation, however, can be undertaken by a range of entities, including those both internal and external to Government. For example, where a high level of professional or technical expertise or knowledge is required, it may be appropriate to establish a statutory body, or a body external to Government, at arm's length from Government to assist in regulatory development, monitoring and enforcement.

### *2.3.3 Service delivery*

In addition to strategic policy setting and regulation and enforcement, the NSW Government is responsible for:

- Delivery of a broad range of services to the community (such as health care, community services, housing and disability services)
- Collection and administration of public money
- Funding and contracting private and non-government organisations to deliver particular services

These services can be delivered by a range of different government entities such as Principal Departments and Departments, Statutory Authorities and State Owned Corporations. Entity types are discussed further in Section 5.

Desired outcomes for service delivery can often be managed through appropriate contractual or regulatory arrangements and therefore may be conducted at arms length from Ministers.

### *2.3.4 Summary*

The type of entity most appropriate to undertake a function will depend on the proposed function, the amount of accountability that the Government has for the performance of the function and the governance arrangements and level of Government control required.

Policy, regulatory and service delivery functions of government are not mutually exclusive and it is noted that many government entities may undertake a combination of these functions. The process for determining the governance arrangements required to perform a function is set out in the following section.

### 3. Guidance on governance structures

Effective governance structures strengthen operational efficiency and improve relationships between Ministers, Clusters and entities. This section of the paper provides guidance on the appropriate governance structures for differing levels of Government accountability and control.

Ministers are accountable to Parliament for the exercise of their statutory powers and expenditure of public monies. The amount of accountability that the Government has for the performance of a function is a key factor in determining the governance arrangements or level of Government control that is exerted over the entity that undertakes those functions.

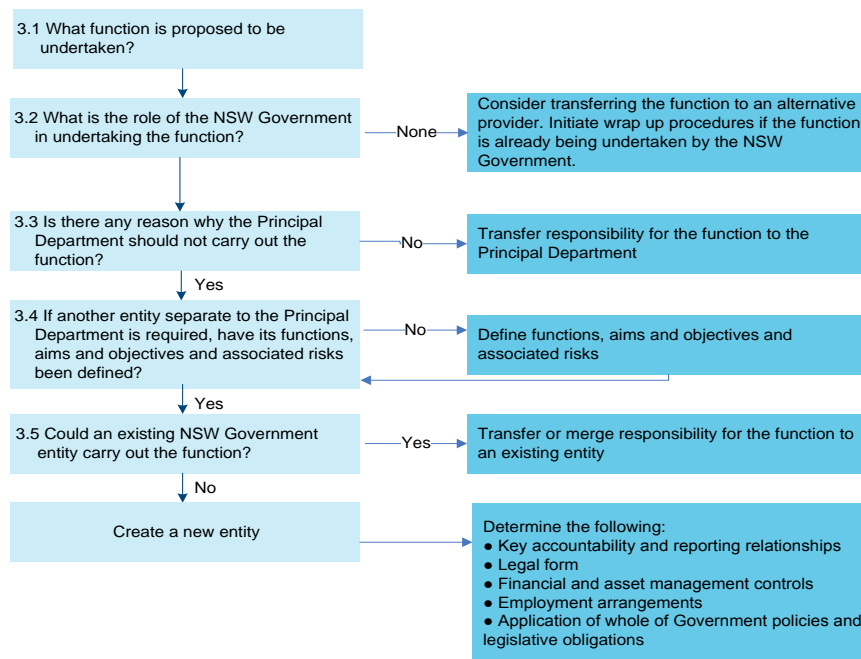
Wherever the Government may be held accountable for a function it will be necessary to establish some kind of control over the function. There are varying degrees and forms of control, including Ministerial direction and control or alternative accountability mechanisms such as functional oversight by a Joint Parliamentary Committee.

When Government decides that a function is to be performed with a degree of independence from Government, an analysis of the function being carried out and the risks arising from being held accountable for an activity that it cannot fully control should be undertaken to determine the appropriate governance arrangements and controls.

#### Assessing entity governance arrangements

The decision making process for assessing the governance arrangements for an entity should be clearly documented. The key issues to be considered in this process are set out in Figure 1. Each decision making point is discussed in further detail below.

Figure 1



### 3.1 Summarise the function

Set out a high level summary of the fundamental and primary function or activity that is being or is proposed to be undertaken, for example strategic policy setting, regulation and enforcement or service delivery. Identify:

- The purpose of the function or activity
- The reason why Government is considering it
- What the Government is aiming to achieve through the function or activity
- Risks associated with the function.

### 3.2 Role of the NSW Government in undertaking the function

The role of Government is to undertake functions that are in the public interest and that are essential to the Government's policy objectives and priorities. The public interest nature of a function may be apparent in, for example, the need to address market failure, a commitment by Government to provide non-commercial service delivery, or a policy priority of Government. The function may require Government to take on responsibility for its delivery or provide some guarantee of delivery.

Examples of where Government may have a role in undertaking a function include:<sup>2</sup>

- There is a public interest in undertaking the activity, for example to address market failure or provide a service that is a public good
- Contractual agreements cannot adequately reflect changing Government policies and priorities
- To avoid conflicts of interest that may arise if the activity is performed external to Government
- Government cannot effectively regulate the function if it is performed externally.

Other relevant factors to consider in determining whether Government should perform the function include:

- Whether the benefit justifies the cost of performing the function or activity
- The costs, risks and other implications of not performing the function or activity.

Any specific legal or financial requirements associated with the function that require the Government to perform the function should be identified.

Where Government can achieve its policy, regulatory and service delivery objectives through commercial contracts it may not be in the public interest for Government to undertake those functions.

It should not be assumed that the NSW Government should continue to perform a function simply because it has always done so. Consideration should be given to whether the outcome could be delivered outside of the NSW Government or in partnership with a provider external to the NSW Government. Alternative providers include:

- Other levels of Government
- Non Government Organisations
- Private sector.

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<sup>2</sup> Productivity Commission 2012, *Electricity Network Regulatory Frameworks*, Draft Report, Canberra Volume 1, p. 253

Where an alternative provider **could** perform the function or activity, market testing should be undertaken to determine whether the NSW Government can deliver greater public value for money by performing the function or activity and, therefore, should perform the function.

If market testing indicates that the NSW Government cannot deliver greater public value for money by performing the function, it should be undertaken by an alternative provider. This could be achieved by developing the market or, alternatively, exiting the market (where a competitive market already exists). NSW Treasury advice should be sought in relation to any proposed market testing.

If there is no public interest in undertaking the function or activity and it is not essential to the NSW Government's policy objectives and priorities, it should not be pursued by Government. Wrap up procedures should be initiated if the function is already being undertaken by the NSW Government.

NSW Treasury's *Economic Framework* can assist with determining whether it is the role of Government to undertake the function. **Appendix A** provides an overview of this Framework.

### 3.3 Degree of Ministerial direction and control

If it is necessary for the NSW Government to perform the function, consideration should be given to the degree of Ministerial direction and control required over the function. This section discusses the key issues to be considered, including:

- Varying degrees of Ministerial direction and control and whether an alternative governance mechanism such as a board is required
- Whether there is any reason why the Principal Department should not carry out the function and types of functions that may require a degree of independence from Government

#### 3.3.1 Ministerial direction and control

Ministerial direction and control refers to the extent to which the entity operates under the direction and control of Executive Government. The less Ministerial control that can be exercised over an entity the more distance or arms length from Government it is considered to be. An alternative governance mechanism will be in place where an entity operates with partial or no Ministerial direction and control, such as a board or oversight by a Joint Parliamentary Committee.

Some entities are subject to full Ministerial direction and control such as Principal Departments.

Other entities may be subject to partial Ministerial direction and control in relation to certain aspects of their functions and operations but not in relation to others. For example, this may be appropriate for a statutory entity performing regulatory or specialist advisory services that are subject to Ministerial direction and control except as to the contents of any advice or recommendation to the Minister. There may be a statutory requirement that the entity's advice is made available publicly. Alternatively, these entities may have a board with partial decision making capacity in respect of some but not all aspects of the entity's operations.

Other entities may not be subject to Ministerial direction and control except in limited and transparent circumstances, for example State Owned Corporations which may be given published written directions in exceptional circumstances (and compensation may be

payable). These entities generally have a board with full decision making authority in respect of all aspects of the entity's operations.<sup>3</sup>

Some entities are not subject to any Ministerial direction and control and the alternative governance mechanism takes the form of a Joint Parliamentary Committee which provides functional oversight, for example Accountability Institutions such as the Ombudsman and Independent Commission Against Corruption.

For those entities established by legislation, the legislation will generally indicate whether or not the entity is subject to Ministerial direction and control and, if so, the extent of the direction and control in relation to the entity's functions. The legislation will set out the entity's functions and powers and any limits to these. If an entity has been established administratively then it will usually be subject to a higher degree of Ministerial direction and control around the functions it is expected to perform.

### *3.3.2 Boards*

Where it is determined that a lesser degree of Ministerial direction and control is required and there are significant functional, operational or financial risks or complexity, it may be appropriate for an entity's structure to include a board. Boards with some decision making authority in relation to the management of their entity are often referred to as 'governing boards' while boards with purely advisory functions are generally referred to as 'advisory boards'.

#### *Governing boards*

There are varying degrees of governing boards. Boards with the greatest degree of governing capacity have decision making authority in respect of all aspects relating to the management of their entity, including:

- setting and delivering operational policies for the entity
- setting and delivering service delivery plans
- delivering core and statutory functions
- employment and allocation of staff
- allocation of budgets
- allocation of assets

Boards with a lesser degree of governing capacity have decision making authority in respect of some, but not all, of the aspects relating to the management of their entity.

Entities whose structure includes a board with a high degree of decision making authority in respect of the management of their entity will generally be subject to a lower degree of Ministerial direction and control. These entities usually have a Shareholder Minister and are often established as a State Owned Corporation under the SOC Act.

Entities whose structure includes a board with only partial decision making authority in respect of some, but not all, of the aspects relating to the management of their entity are generally subject to a higher degree of Ministerial direction and control. These entities have a Portfolio Minister but do not generally have a Shareholder Minister.

#### *Advisory boards*

Some boards have purely advisory functions. The degree of Government control over these boards will vary. Some boards with purely advisory functions may be subject to a high degree of Government control, particularly if they have been established administratively.

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<sup>3</sup> Boards are discussed in further detail in section 3.3.2

However, where independent advice based on a high level of technical expertise or specialised knowledge is required, a lower degree of Government control may be appropriate in respect of professional advice which draws on this expertise or knowledge. Transport for NSW and the Public Service Commission are examples of entities with boards which have purely advisory functions.

### *3.3.3 Principal Departments*

As a general rule, government functions should be carried out by Principal Departments established under the PSEMA unless the function being undertaken requires a degree of independence from Government such as regulatory or quasi-judicial functions, certain specialised or expert functions, or stewardship or custodianship of significant public assets. In particular, policy development and implementation is the role of Government. Departments have the primary role to assist Government in these policy functions and are therefore generally under a high degree of Ministerial direction and control.

The high degree of Ministerial control over Departments results in:

- Higher degree of coordination of policy development and implementation and a whole of Government approach to management of the public sector
- Clearer accountability and reporting relationships and communication between the Minister and the Principal Department
- Improved administrative and financial flexibility, agility and responsiveness
- Reduced duplication or repetition of functions and associated costs
- Consistent application of public sector accountability requirements and policies such as procurement policies and fleet management
- Lower risk of undue influence by third parties over the entity and reputational risks

Alternatively, it may be possible to deliver or undertake a particular function and achieve the required outcomes by for example convening one-off meetings, developing online forums or distributing information via an existing entity rather than setting up a new entity.

In some instances the nature of the function, or associated legal or financial requirements, may require that it be carried out without high levels of Ministerial oversight or be performed at arm's length from Ministers. Functions that may require some degree of independence from Government are discussed below.

### *3.3.4 Regulatory and quasi-judicial functions*

Some regulatory or quasi-judicial functions require independence from Ministerial influence in order to satisfy public expectations of impartiality.

This is also the case where it is important to signal publicly that an activity is carried out free of political interference such as those bodies that monitor certain aspects of Government administration to assist Parliament to hold the Executive branch of Government accountable for its actions.

### *3.3.5 Technical expertise or specialised knowledge*

Functions that require a high level of independent technical expertise or specialised knowledge may benefit from the focus of a single purpose operating environment, for example Infrastructure NSW. A lower degree of Government control may be appropriate in respect of professional decisions and advice which draws on this expertise or knowledge, but the entity's operations would otherwise generally be subject to Ministerial direction and control.

### *3.3.6 Stewardship or custodianship of public interests*

Some entities have stewardship or custodianship functions in relation to significant public assets which are managed in the public interest or on behalf of a particular community. These entities generally have a low degree of Government intervention, or no intervention, in respect of decision making about the entity's core responsibility. There may, however, be differential levels of Government control in respect of other matters relating to the entity's operations, such as the employment and allocation of staff. These entities often take the form of a statutory public official or a trust, such as the Art Gallery of NSW.

### *3.3.7 Functions performed in a contestable market*

Functions that can operate in a market environment and achieve greater efficiency through operating in this way may require a lower degree of Ministerial direction and control. This will also enable more accurate costing of these functions which will be valuable should the function move into a competitive market environment.

State Owned Corporations established under the SOC Act operate commercially and as a general rule are used to provide commercial discipline in the provision of utilities and other commercial services. State Owned Corporations generally obtain the majority of their funding from user charges but may receive specific funding to compensate for the impact of Government policy.

## **3.4 Performing functions outside a Principal Department**

If it is necessary for the function to be performed outside a Principal Department by a separate entity, the next step is to determine the scope of the tasks to be carried out by the entity and its aims, objectives, primary functions and associated risks. Any powers required by the entity to carry out its functions should be identified in addition to any limitations to the scope of the entity's functions or powers.

The results of this preliminary analysis will also inform other aspects of the decision making process including the identification of all other entities currently undertaking similar or complementary functions (discussed in section 3.5) and the establishment of any new entity (refer section 4.1).

## **3.5 When an existing NSW Government entity should carry out the function**

Before establishing a new entity, all other entities currently undertaking similar or complementary functions and the nature of those functions should be identified and consideration should be given to whether a new entity will duplicate the functions of an existing entity. The results of the analysis discussed in section 3.4 above should be used to assist this process.

Determine whether an existing entity could carry out the function, either under its current legislation or terms of reference or by expanding them to include the new functions. Identify any barriers to an existing entity carrying out the function and develop strategies to overcome them. For example, a new oversight function that must be performed independently may be a barrier to using an already existing entity if the existing entity will be subject to that oversight.

It should not be assumed that a function should continue to be delivered through an existing entity. Consideration should be given to abolishing or merging entities to reduce the duplication of functions.

## 4. Guidance for creating new entities

A new entity should be created where it is necessary for a function to be performed outside a Principal Department by a separate entity and it is not appropriate to use an existing entity.

This section of the paper provides guidance on the key elements to be considered when establishing a new entity, including:

- Key accountability and reporting relationships
- Legal form
- Financial and asset management controls
- Employment arrangements
- Whole of government policies and legislative obligations
- Consultation with central agencies and other key stakeholders
- Cabinet consideration

### 4.1 Key accountability and reporting relationships

Where an entity or officeholder is established to undertake a specific function, the charter for the entity (whether set out in legislation or otherwise) can control the scope and duration of activities undertaken by the entity. The charter can also specify the limits of independence by specifying what activities are/are not subject to Ministerial direction and control.

Accordingly, the first step in establishing a new entity is to define the scope of the tasks to be carried out by the entity and its aims, objectives, primary functions and associated risks. Any powers required by the entity to carry out its functions in addition to any limitations to the scope of the entity's functions or powers should be clearly articulated. This will be informed by the results of the preliminary analysis discussed in section 3.4.

Responsibility for key aspects of the entity's operations and associated accountabilities should be identified and accountability and reporting relationships between the entity and its Portfolio Minister and/or Shareholding Minister, the Principal Department and the head of the entity and board (if any) determined. Degrees of Ministerial direction and control and alternative governance mechanisms are discussed in section 3.3.

Examples of key accountabilities and responsibilities include policy setting and implementation, development of service delivery plans and performance arrangements for the head of the entity. Resources and assets needed by the entity to perform its functions should be determined and the service delivery model to be deployed should be identified.

#### 4.1.1 Risk to Government

Some functions may involve specific risks that can be mitigated using particular governance mechanisms and controls. For example financial and asset related risks may be able to be mitigated by a statutory requirement that Ministerial approval is obtained for transactions above a specified threshold.

Risk can be broadly defined as the "effect of uncertainty on objectives, where an effect is the deviation from what is expected"<sup>4</sup>. It can be positive or negative and is most commonly expressed in terms of an event's consequences and the likelihood of its occurrence.

To undertake a risk assessment, it is first necessary to understand the nature of the function that will be undertaken. The environment in which the function will be undertaken should

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<sup>4</sup> ISO Guide 73-2009: Risk Management – Vocabulary

also be assessed as this can significantly influence the level of risk to Government. Consideration should be given to internal and external factors including the political, economic, social, technological and legal environments, stakeholder expectations, regulatory and operational requirements.

Possible risks will flow from these internal and external factors which should be analysed and evaluated in terms of their consequences and likelihood. The level of Government control required to manage the risk can be determined from the consequence of the risk and its likelihood. For instance, in most circumstances, the more significant the impact of the consequence and the higher its likelihood of occurring, the higher the degree of Government control required to manage the risk.

There are numerous tools available to assist the identification and management of risk such as the NSW Treasury's Policy Paper TPP12-03 *Risk Management Toolkit for NSW Public Sector Agencies*. In some circumstances, it may be necessary to engage external resources such as a risk specialist to undertake the assessment.

## 4.2 Legal form of a new entity

If a new entity is required, it will be necessary to determine its legal form. The legal form of an entity refers to its status as an incorporated or unincorporated body, whether or not it has a separate legal identity or forms part of the Crown and the manner in which it is established, either by legislation or administratively.

### 4.2.1 Incorporated entities

Entities are incorporated either as a company under the *Corporations Act 2001 (Cth)*<sup>5</sup> or under a NSW statute. Incorporated entities may have a separate legal identity. Alternatively, they may represent or form part of the Crown. The legislation establishing the entity will indicate whether or not the entity has a separate legal identity.

### 4.2.2 Unincorporated entities

Unincorporated bodies include unincorporated statutory bodies and natural persons and bodies formed through administrative action without legislation. Entities that have purely advisory functions are more likely to be unincorporated but may be formed under legislation or administratively. Unincorporated entities, such as Government departments formed under the PSEMA, do not have a separate legal identity. They represent and form part of the Crown.

### 4.2.3 Entities established under legislation

Legislation will generally be required where it is necessary for the function to be performed outside a Principal Department by a separate entity and it is not appropriate for an existing entity to perform the function (refer Chapter 3). Some entities may not, however, require new legislation as they can be established by listing them under subordinate legislation. For example, this applies to entities established under the *Growth Centres (Development Corporations) Act 1974*.

If legislation is needed to create any particular entity it should include a statutory obligation to undertake a review of the legislation and the entity after five years. Legislation may also contain a sunset clause under which the legislation automatically expires, however these

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<sup>5</sup> Premier's Memorandum M2006-02: *Formation and Operation of Public Sector Subsidiaries* provide guidelines regarding the establishment and operation of all public sector subsidiaries

clauses are very rare and should only be used in exceptional circumstances following legal advice.

#### 4.2.4 *Entities established administratively*

If an entity is established administratively it will require terms of reference. Consider the need for a time limit on the membership of the entity or on the entity itself. A review requirement makes clear the intention to wind up the entity if it is no longer required.

Legal advice should be sought before creating any new entity.

### 4.3 Financial and asset management controls

The financial and asset management controls put in place in respect of a particular entity depend on NSW Treasury's classification of the entity for financial reporting and policy framework purposes.

The financial activities of all Governments are classified under the Government Finance Statistics Framework (GFS)<sup>6</sup> developed by the Australian Bureau of Statistics (ABS). The GFS is based on international statistical standards. It also reflects Australian accounting standards because GFS statistical information is compiled using data systems that support the public accounts of all Australian governments. These public accounts comply with the Australian accounting standards.

All entities controlled by Governments are classified under the GFS into sectors according to the nature of their activities and funding arrangements. Financial and asset management controls tend to flow from decisions made in the grouping of activities within an entity and who exercises control over the entity.

NSW Treasury uses the GFS to classify entities into one of the following three sectors for financial reporting and policy framework purposes:

- General Government
- Public Trading Enterprise
- Public Financial Enterprise

A number of financial and asset management controls are incorporated into NSW Treasury's Financial Management Framework and Commercial Policy Framework. The application of the Frameworks and their associated controls to a particular entity will depend on the entity's GFS classification. Updates to these controls are issued through Treasury Circulars, with the latest versions published on the NSW Treasury website.<sup>7</sup>

NSW Treasury advice should be sought before undertaking a new function, establishing a new entity or merging existing entities to determine any implications for financial and asset management controls. Particular care should be taken when changing the scope of an existing entity's functions because different combinations of functions may shift the entity's classification between the Public Trading Enterprise Sector to the General Government Sector. This could have a significant impact on the Government's budget.

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<sup>6</sup>Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, Cat No 5514.0, ABS, Canberra, 2005.

<sup>7</sup> Current budget controls applying to General Government Sector entities include Net Cost of Services Limits, Capital Expenditure Authorisation Limits and Labour Expense Caps. Controls incorporated into the Commercial Policy Framework include a requirement to negotiate annual statements of corporate or business intent containing agreed financial and non-financial performance targets.

### 4.3.1 Assets

In addition to the general controls set out above, specific controls in relation to the acquisition, use and disposal of the assets of a particular entity may also be incorporated into the entity's establishing legislation. For example, there may be a requirement that asset-related transactions over a particular threshold be approved by the relevant Minister or the Treasurer.

## 4.4 Employment arrangements

When creating a new entity or reviewing an existing entity it is important to consider how the head of the entity and the staff of the entity will be employed.

As a general rule, staff of NSW public sector entities are employed by the Government of New South Wales in the service of the Crown. These staff are employed in a Public Sector Service and are subject to NSW Government wages policy and other employment conditions set out in NSW legislation, awards and other industrial agreements.

Examples of Public Sector Services include the following:

- Government Service under the *Public Sector Employment and Management Act 2002*
- NSW Police Force under the *Police Act 1990*
- Teaching Service under Division 1 of Part 4 of the *Teaching Service Act 1980*
- NSW Health Service under Chapter 9, Part 1 of the *Health Services Act 1997*
- Transport Service under Part 7A of the *Transport Administration Act 1988*

The staff of some entities, such as State Owned Corporations, are not employed by the NSW Government in the service of the Crown.<sup>8</sup> These entities have the power to employ staff directly and their staff are generally subject to Commonwealth industrial legislation (ie the *Fair Work Act 2009* (Cth)). These entities are not generally compelled to apply NSW Government employment policies or employment conditions unless specifically directed or prescribed to do so.

### 4.4.1 The Public Service

The Public Service is part of the Government Service and is comprised of the Divisions specified in Part 1 of Schedule 1 of the PSEMA. These Divisions are groups of staff based on specified functional areas.

When considering the employment arrangements for entities whose staff are employed in the Public Service, it is necessary to determine who is the employer of the staff in the Division (ie the 'Division Head'). For some entities, such as Principal Departments and entities which are separate to the Principal Department for employment purposes, the Division Head is the head of the entity or the position which has responsibility for the day to day management of the entity.

For those entities which are part of the Principal Department for employment purposes, the Division Head is the Director General of the Principal Department and their staff are employed by the Director General to assist the entity with its functions.

### 4.4.2 Employment arrangements for head of the entity

The employment arrangements for the head of the entity should also be considered subject to relevant legislative provisions and any other legal arrangements for appointing the head of the entity (for example appointment by the Governor or a Minister).

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<sup>8</sup> Section 20M, *State Owned Corporations Act 1989*

The Public Service Commission should be consulted in relation to employment issues and NSW Treasury should be consulted in relation to any industrial implications.

#### **4.5 Application of whole of Government policies and legislative obligations**

Whole of Government policies and/or legislative obligations apply to entities across the sector to improve governance and strengthen operational efficiency. Whole of Government policies and/or legislative obligations that are intended to apply to the entity should be identified. These may include:

- Annual reporting requirements under the *Annual Reports (Departments) Act 1985* or *Annual Reports (Statutory Bodies) Act 1984*
- Ministerial Memorandums and DPC Circulars
- *Government Information (Public Access) Act 2009*
- NSW Treasury Commercial Policy Framework
- NSW Treasury Financial Management Framework
- *Ombudsman Act 1974*
- *Privacy and Personal Information Act 1998*
- *Public Finance and Audit Act 1983*
- Public Service Commissioner directives
- *Public Sector Employment and Management Act 2002*
- Director General of Department of Finance and Services directives regarding procurement and ICT
- *State Records Act 1998*

Instances where any whole of Government policies and legislative requirements are not proposed to apply to the entity should be documented and reasons provided.

Any other wider implications for policy or the machinery of Government resulting from the creation of the new entity should also be considered and discussed.

#### **4.6 Consultation with central agencies and other entities**

DPC and NSW Treasury must be consulted in relation to all proposals for new entities. They should be advised of the proposed new entity as soon as possible. The Public Service Commission should be consulted in relation to employment issues such as transfer of staff and employment structures. NSW Treasury should also be consulted in relation to any industrial implications and obligations in relation to change management plans and consultation with staff. Other Principal Departments and entities may also need to be consulted.

#### **4.7 Cabinet consideration**

Before creating a new entity, consideration should be given to whether the matter should be brought to Cabinet. Proposals requiring legislation must be brought to Cabinet and all draft Bills require Cabinet endorsement, both prior to drafting (unless the Director General or General Counsel of DPC determine otherwise) and prior to introduction. Parliamentary Counsel will need to be instructed if new legislation is necessary. Please contact DPC for further details.

## 4.8 Abolishing or winding up existing entities

The manner in which a NSW Government entity may be wound up or abolished depends in part on its legal form. Entities can be abolished by:

- Repealing establishing legislation or a subordinate instrument
- Automatic winding up as a result of a sunset clause in establishing legislation
- Transferring a function to another entity
- Winding up procedures under the *Corporations Act 2001* for proprietary limited companies
- Ministerial direction, either under legislation or administratively

The following matters should be considered before winding up or abolishing an entity:

- Transitional arrangements for assets and liabilities
- Transitional arrangements for staff and senior executives
- Transfer of functions to another entity
- Consequential amendments to legislation or subordinate legislation

## 5 Entity types

There are a number of types of entities in the NSW public sector. This section of the paper classifies the common types of entities in the executive branch of the NSW Government and summarises the following characteristics for each entity type:

- Functions
- Ministerial direction and control
- Legal form
- Financial and asset management controls
- Employment of staff

Examples of each entity type are also provided in addition to a summary of any other distinguishing characteristics.

## 5.1 Principal Departments

Principal Departments are the primary support entities for Coordinating Ministers in carrying out their Cluster responsibilities. They also have a coordinating role across other entities within their Cluster.

Principal Departments undertake a range of functions including directly providing or coordinating service delivery, administration of legislation and policy advice and development across one or more portfolios within their Cluster. Principal Departments are the primary source of policy advice for Ministers.

<b>Principal Department</b>	
Ministerial direction and control	Principal Departments are subject to a high degree of Ministerial direction and control.
Legal form	Principal Departments are created by Administrative Changes Orders. They are a group of staff with the Government Service Division name listed in Schedule 1, Part 1, Division 1 of the PSEMA. Whether or not an entity is a Principal Department is a matter for the Premier.
Financial and asset management controls	Principal Departments are classified as General Government Sector entities and are subject to the NSW Treasury's Financial Management Framework.  Coordinating Ministers for each Cluster receive an appropriation for the Principal Department from the Consolidated Fund. The appropriation is allocated to other entities within the Cluster by way of grant funding from the Principal Department.
Employment of staff	The staff of Principal Departments are employed in the service of the Crown in a Public Sector Service. For those staff employed in the Government Service, the Division Head is the Director General of the Principal Department.
Other characteristics	Principal Departments have internal sub-units. These sub-units are subject to the direct control of the Director General of the Principal Department and are not generally formed externally to the Principal Department.  Some sub-units provide services for a specific portfolio and report directly to a Portfolio Minister. Other sub-units carry out portfolio specific functions within the Principal Department and report to the relevant Portfolio Minister via the Director General of the Principal Department.

## 5.2 Departments

The scope of the functions of a Department is limited to a smaller number of portfolio areas than a Principal Department and they are the primary support entities for their Portfolio Ministers in carrying out their portfolio responsibilities. Departments carry out Government functions where there is a requirement for coordination of portfolio specific policy development and implementation across a number of different entities.

<b>Department</b>	
Ministerial direction and control	Departments are subject to a high degree of Ministerial direction and control.
Legal form	Departments are created by Administrative Changes Orders. They are a group of staff with the Government Service Division name listed in Schedule 1, Part 1, Division 2 of the PSEMA. They do not have their own separate establishing legislation (unlike Statutory Authorities). Other legislation may however confer portfolio specific functions on them or their Director General or Chief Executive.
Financial and asset management controls	Departments are classified as General Government Sector entities and are subject to the NSW Treasury's Financial Management Framework. Portfolio Ministers may receive an appropriation directly for the Department from the Consolidated Fund or the Department may receive grant funding from the Principal Department.
Employment of staff	The staff of a Department is employed in the service of the Crown in the Government Service. The Division Head is the Director General or the Chief Executive of the Department.
Other characteristics	The head of the Department is specified in Division 2 of Part 1 of Schedule 1 of the PSEMA and is a Director General in the case of the Department of Planning and Infrastructure and a Chief Executive in the case of the Ministry for Police and Emergency Services.

### 5.3 Statutory Authorities

Statutory Authorities manage a specific asset or resource or have a well-defined and narrow area of functional delivery. Statutory Authorities are established under legislation which sets out their functions. They may operate with or without a board, depending on the nature of the entity and its functions.<sup>9</sup> Statutory Authorities should only be established where it is necessary for a function to be performed outside a Principal Department by a separate entity and it is not appropriate to use an existing entity (refer Chapter 3).

There are many different variations to the characteristics of Statutory Authorities which depend on the functions performed by the entity. The entity's function will generally influence:

- The degree of Ministerial direction and control over the entity
- The legal form of the entity
- The extent to which they receive grant funding from their Cluster's Principal Department

Statutory Authorities are further classified according to their functions as follows:

- Non-commercial service delivery
- Commercial service delivery
- Trusts
- Regulatory and quasi-judicial review

The broad characteristics of each of the functional types of Statutory Authorities are summarised below.

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<sup>9</sup> When to form an entity with or without a board is discussed further under Section 3.

### 5.3.1 Statutory Authority: Non commercial service delivery

Non commercial service delivery statutory authorities address important social objectives and provide services in the public interest. They are formed outside of a Principal Department in part to achieve a single function focus.

The characteristics of Non-commercial Service Delivery Statutory Authorities are summarised in the table below.

<b>Statutory Authority: Non commercial service delivery</b>	
Ministerial direction and control	Non commercial service delivery Statutory Authorities are generally subject to a high level of Ministerial direction and control, however there may be limits to the degree of Ministerial direction and control in respect of professional decisions or the contents of advice.
Legal form	Statutory Authorities are established under legislation. They are often in the form of a body corporate with or without a board.
Employment of staff	Their staff are generally employed in the service of the Crown in a Public Sector Service. For those staff employed in the Government Service, the Division Head is usually the Director General of the relevant Principal Department. The exception is if the entity is listed as a Division with a Division Head under Schedule 1 of the PSEMA. Conditions of employment may also be set out in specific legislation and awards.
Financial and asset management controls	Non commercial service delivery Statutory Authorities are classified as General Government Sector for financial management purposes and are subject to NSW Treasury's Financial Management Framework. They generally receive the majority of their funding through a grant from their Cluster Principal Department. They may also levy charges for services to client groups on a subsidised basis.

### 5.3.2 Statutory Authority: Commercial service delivery

The characteristics of Commercial Service Delivery Statutory Authorities are summarised in the table below.

<b>Statutory Authority: Commercial Service Delivery</b>	
Ministerial direction and control	Commercial Service Delivery Statutory Authorities will be subject to Ministerial direction and control but the power will generally be tempered to reflect their commercial objectives.
Legal form	Statutory Authorities are established under legislation. They are often in the form of a body corporate with or without a board. They may also be established as corporations under the <i>Corporations Act 2001</i> with NSW Government Ministers as shareholders and a board.
Employment of staff	<p>The staff of Commercial Service Delivery Statutory Authorities are generally employed in the service of the Crown in a Public Sector Service. For those staff employed in the Government Service, the Division Head is usually the Director General of the relevant Principal Department. The exception is if the entity is listed as a Division with a Division Head under Schedule 1 of the PSEMA. Conditions of employment may also be set out in specific legislation and awards.</p> <p>The staff of Commercial Service Delivery Statutory Authorities established under the <i>Corporations Act 2001</i> are not employed by the NSW Government in the service of the Crown. They employ their staff directly.</p>
Financial and asset management controls	<p>They may be classified as Public Trading Enterprises or Financial Trading Enterprises for financial management purposes and are subject to NSW Treasury's Commercial Policy Framework.</p> <p>Commercial Service Delivery Management and Trading Authorities generally generate 50% or more of their funding through fees and charges. They may also receive a grant from their Cluster's Principal Department.</p>

### 5.3.3 Trusts

Trusts have stewardship or custodianship functions in relation to significant public assets which they care for, protect and manage in the public interest or on behalf of a particular community.

<b>Trusts</b>	
Ministerial direction and control	Trusts generally have a low degree of Ministerial direction and control in respect of decision making about the trust's core responsibility. There may, however, be differential levels of Government control in respect of other matters relating to the trust's operations, such as the employment and allocation of staff.
Legal form	Trusts are established under legislation generally as a body corporate with a board. In some instances they may take the form of a statutory public official.
Employment of staff	The staff of a Trust are generally employed in the service of the Crown in the Government Service. The Division Head is usually the Director General of the relevant Principal Department. The exception is if the Trust entity is listed as a Division with a Division Head under Schedule 1 of the PSEMA.
Financial and asset management controls	Trusts may be classified as General Government Sector, Public Trading Enterprises or Financial Trading Enterprises for financial management purposes and may be subject to NSW Treasury's Financial Management Framework or Commercial Policy Framework.  Trusts generally receive the majority of their funding through a grant from their Cluster Principal Department. They may also generate some revenue from user fees and charges from, for example, community access to the asset over which they have responsibility or box office sales.

### 5.3.4 Statutory Authority: Regulation and Quasi-Judicial Review

The characteristics of Statutory Authorities with regulatory and quasi-judicial review functions are summarised in the table below.

Some regulatory or quasi-judicial functions require independence from Ministerial influence in order to satisfy public expectations of impartiality. Functions that require a high level of independent technical expertise or specialised knowledge may benefit from the focus of a single purpose operating environment, for example Infrastructure NSW. A lower degree of Government control may be appropriate in respect of professional decisions and advice which draws on this expertise or knowledge, but the entity's operations would otherwise generally be subject to Ministerial direction and control.

<b>Statutory Authority: Regulatory and Quasi-Judicial Review</b>	
Ministerial direction and control	Regulation and quasi-judicial review entities should not be subject to Ministerial direction and control in respect of their decision making functions.
Legal form	Regulation and quasi-judicial review entities are established under legislation with or without a board.
Employment and allocation of staff	The staff of regulation and quasi-judicial review entities are generally employed in the service of the Crown in a Public Sector Service. For those staff employed in the Government Service, the Division Head is usually the Director General of the relevant Principal Department. The exception is if the entity is listed as a Division with a Division Head under Schedule 1 of the PSEMA. Conditions of employment may also be set out in specific legislation and awards.
Financial and asset management controls	Regulation and quasi-judicial review entities are generally classified as General Government Sector for financial management purposes and are subject to NSW Treasury's Financial Management Framework. They may raise revenue through the imposition of fees and charges. They may also receive grant funding from the Principal Department of their Cluster.

## 5.4 State Owned Corporations

State Owned Corporations (SOCs) operate commercially and generally obtain the majority of their funding from user charges but may receive specific funding to compensate for the impact of Government policy.

<b>State Owned Corporation</b>	
Ministerial direction and control	SOCs generally operate autonomously but are subject to Ministerial direction and control in certain circumstances. Under the SOC Act a Portfolio Minister may give written direction to a statutory SOC if the Portfolio Minister wishes the SOC to carry out non-commercial activities. <sup>10</sup> The Portfolio Minister may also direct a SOC to undertake activities that are in the public interest such as subsidies for pensioners. <sup>11</sup> In either instance, the Government reimburses the SOC. The Portfolio Minister may also notify the board of a statutory SOC of certain public sector policies that apply to the SOC. <sup>12</sup> Other directions may be given to SOCs by Ministers under their establishing legislation.
Legal form	SOCs have two Shareholder Ministers – the Treasurer and another Minister nominated by the Premier. The Premier administers the <i>State Owned Corporations Act 1989</i> (the SOC Act). SOCs have a Board of Directors and a Chief Executive Officer. Statutory SOCs are established under legislation and become a SOC when they are listed in Schedule 5 of the SOC Act. Company SOCs may also be established in accordance with the SOC Act. There were no company SOCs in existence in NSW at the time of writing this Framework.
Employment of staff	The staff of SOCs are not employed by the NSW Government in the service of the Crown. SOCs employ their staff directly <sup>13</sup> and their staff are generally subject to Commonwealth industrial legislation. These entities are not generally compelled to apply NSW Government employment policies or employment conditions unless specifically directed or prescribed to do so.
Financial and asset management controls	SOCs are subject to NSW Treasury's Commercial Policy Framework. Legislation may also contain specific asset management control provisions. SOCs generally operate on a commercial basis and are not in receipt of Government grant funding (in the form of a Community Service Obligation) unless subject to a Ministerial direction that requires them to undertake non-commercial activities or public interest activities.

<sup>10</sup> Section 20N of the SOC Act

<sup>11</sup> Section 20P of the SOC Act

<sup>12</sup> Section 20O of the SOC Act

<sup>13</sup> Section 20M, *State Owned Corporations Act 1989*

## 5.5 Accountability Institutions

Accountability Institutions monitor certain aspects of Government administration and to assist Parliament to hold the Executive branch of Government accountable for its actions.

<b>Accountability Institution</b>	
Ministerial direction and control	Accountability Institutions are independent of the Executive branch of Government and have a statutory obligation to report directly to Parliament as required. They are not subject to Ministerial direction or control. Joint Parliamentary Committees are established to monitor the functions of Accountability Institutions. Appointments to these positions or entities may be vetoed by the Joint Parliamentary Committee for that entity.
Legal form	Accountability Institutions are established under legislation.
Employment of staff	Accountability Institutions should directly employ their own staff. Staff are generally employed under the PSEMA but in some instances their conditions of employment may be determined by the Accountability Institution in so far as they are not fixed by or under another Act or law.
Financial and asset management controls	Funding is generally appropriated directly to the Minister for the Accountability Institution. Accountability Institutions do not generally receive grant funding from the Principal Department.
Other characteristics	An Accountability Institution may be an individual statutory officer or a body corporate comprised of one or more members. It is supported by an administrative office.

## 5.6 Independent Commissions

Independent Commissions are similar to Accountability Institutions but are subject to a degree of Ministerial control in respect of the carrying out of some of their functions but not in respect of their decisions, recommendations or reports.

<b>Independent Commission</b>	
Ministerial direction and control	<p>Independent Commissions are subject to limited Ministerial control in respect of the carrying out of some of their functions but not in respect of their decisions, recommendations or reports.</p> <p>The Commissioner(s) of an Independent Commission may be appointed and removed from office by the Governor without consultation with the Joint Parliamentary Committee that monitors and reviews the exercise of its functions.</p> <p>The annual report of an Independent Commission is provided directly to the Presiding Officer of each House of Parliament and any special or other reports to the Portfolio Minister. An Independent Commission may also provide its special and other reports to Presiding Officer of each House of Parliament.</p>
Legal form	Independent Commissions are established under legislation.
Employment of staff	Staff of an Independent Commission are employed in the service of the Crown in the Government Service. The Division Head (or employer) is generally the Director General of the relevant Principal Department.
Financial and asset management controls	Independent Commissions generally receive grant funding from the Principal Department.

## 5.7 Advisory Entities

Advisory Entities have at least one member who is external to Government. They provide advice and may make recommendations on specific areas of policy, functional delivery and/or technical specialist matters within the Executive branch of Government to Ministers or Government entities. They do not make decisions and are not governing bodies.

There are two types of Advisory Entities:<sup>14</sup>

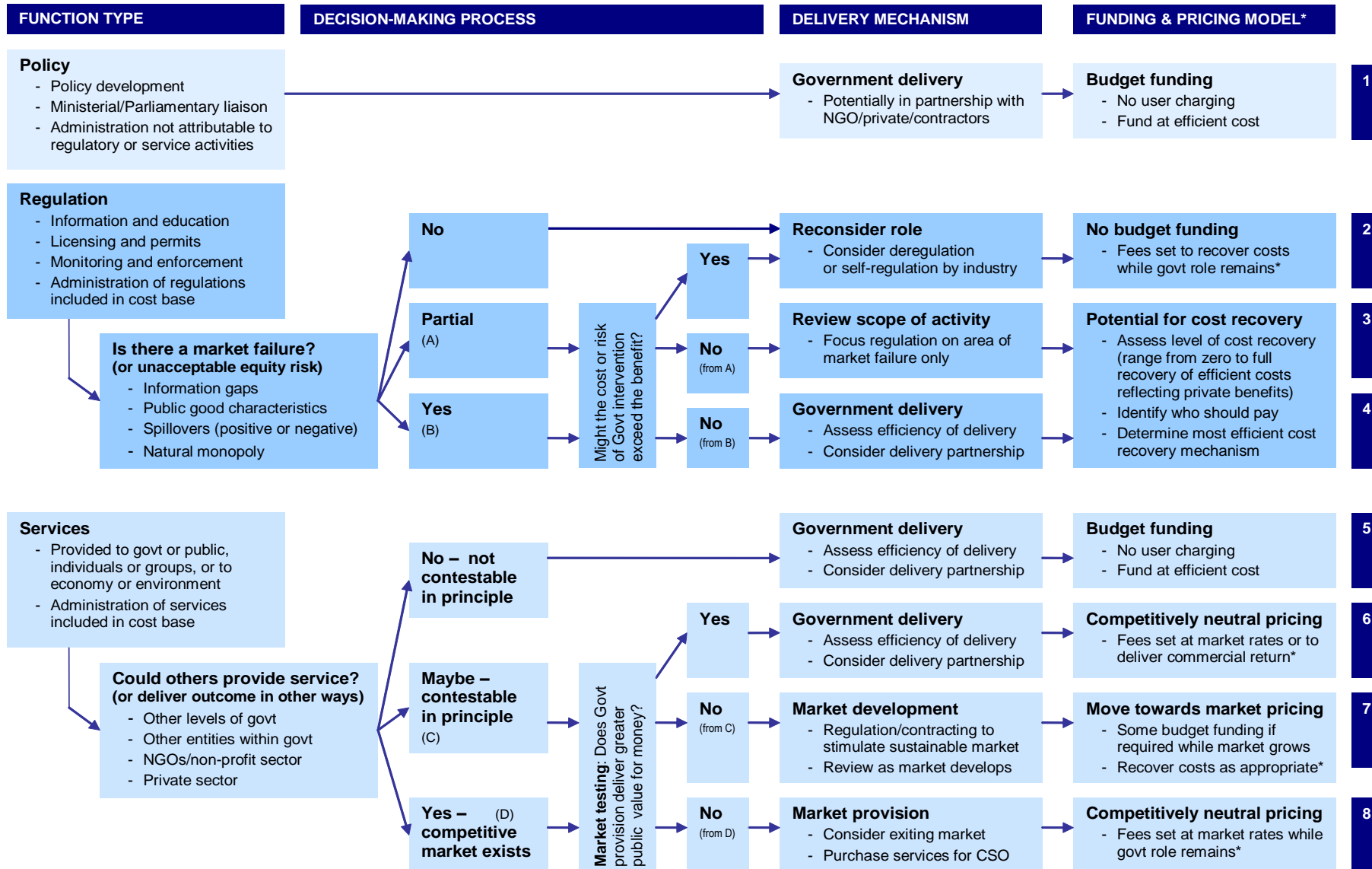
- Ministerial advisory entities established by a Minister
- Departmental advisory entities established by another entity for example a Principal Department or Statutory Authority

Advisory Entities may be established under legislation or administratively. Advisory Entities do not generally employ staff although they may receive secretariat support from another entity. They are not generally incorporated bodies. The characteristics of Advisory Entities are summarised in the table below.

	<b>Ministerial Advisory Entity</b>	<b>Departmental Advisory Entity</b>
<b>Statutory</b>	Established under legislation to provide expert advice to the Minister on a specialised issue. Fully accountable to the Minister and generally subject to a high level of direction and control by the Minister although Ministerial intervention may be limited in respect of the contents of advice. Functions and any limits to Ministerial direction and control are specified in the establishing legislation. Some functions may be activated only upon the request of the Minister.	Established under legislation to provide advice to the head of another entity (eg a Director General of a Principal Department or the Chief Executive or Board of a Statutory Authority) on specific matters. They are fully accountable to the entity that establishes them. Functions are specified in the establishing legislation. Some functions may be activated only upon the request of the establishing entity.
<b>Administrative</b>	Established administratively by a Minister often to provide short term advice on specific challenges currently facing Government. They are generally subject to a very high level of Ministerial direction and control. Functions are set out in a Charter or terms of reference which the Minister has discretion to amend these in any way from time to time.	Established administratively by another entity (eg a Principal Department or Statutory Authority) to provide advice on specific operational or functional challenges facing the Cluster, the portfolio or the entity. They are fully accountable to the entity that establishes them and are subject to a very high level of direction and control by that entity. Functions are set out in a Charter or terms of reference which the entity that establishes the advisory body has discretion to amend these in any way from time to time.

<sup>14</sup> Intra and inter departmental committees are outside the scope of this Framework. Parliamentary and Judicial branches of Government may have similar advisory or consultative mechanisms which are not covered in this Framework.

# Appendix A: NSW Treasury Expenditure Review Directorate Economic Framework



\* If required to protect equity & access, consider targeted customer concessions or Community Service Obligation funding for specific target groups/activities where fees are charged