Governance considerations when participating on boards and committees



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Purpose

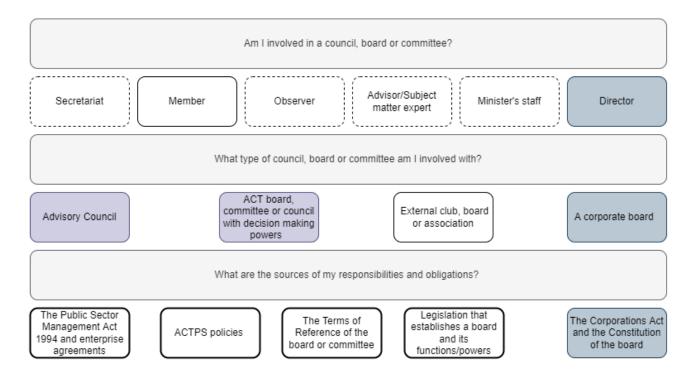
- To set out high level principles and supporting guidance to assist ACT Public Service (ACTPS)
 employees and ACT Public Sector more broadly in understanding their responsibilities when sitting
 on boards and Committees.
- 2. These guidelines are intended to have a broad application and cover any person who is engaged by the ACT Government and involved with boards or committees which have a connection to their work and/or role in the ACTPS. Participating in a board or committee could occur in a range of roles or capacities, including but not limited to as members, corporate directors, advisors and subject matter experts, Minister's staff, observers and secretariat.
- 3. This policy should be read in conjunction with the Governance Principles for Appointments, Boards and Committees in the ACT.
- 4. Topics covered include:
 - a. Types of boards and committee;
 - b. Governance frameworks;
 - c. Appointment types ex-officio or personal capacity;
 - d. Best practice principles for participating in boards and committees;
 - e. The risk of conflict of interest generally;
 - f. The specific conflict of interest risks that arise with corporate boards;
 - g. Remuneration; and
 - h. An overview of governance and responsibilities by role.

Application

- 5. This policy is issued by the Head of Service under section 17(2)(a) of the *Public Sector Management Act 1994* (PSM Act) and binds all employees engaged under the PSM Act and all public sector employers within the meaning of section 152(1)(a) of the PSM Act.
- 6. For the purpose of this policy, any reference to the Head of Service and/or Director-General is also taken to be a reference to a public sector employer within the meaning of section 152(1) of the PSM Act.
- 7. For the purpose of this policy, employees are defined as including executives, permanent officers, temporary employees, casual employees, and a public sector employer's staff member who is employed on either a permanent or temporary basis.
- 8. For the purpose of this policy, any necessary change is made to the terms of the policy so as to apply the policy to a public sector employer and their staff members.

Introduction

- 9. This policy recognises that ACTPS employees engage in different capacities with various types of boards and committees. The most common roles are covered in this policy as well as the most common categories of boards and committees.
- 10. This policy applies to an individual's involvement with boards and committees where there is a connection to that individual's role and/or work in the ACTPS.
- 11. The diagram below provides a high-level overview of role types, board and committee types and sources of responsibilities and obligations.



- 12. Members and directors of councils, boards and committees are subject to formal appointment processes, including Cabinet consultation processes. Observers, Advisors and subject matter experts, Ministers' staff and secretariat are generally not subject to formal appointment processes.
- 13. Advisory Councils and ACT boards, committees and councils with decision making powers are established by the ACT Government.
- 14. External clubs, boards or associations are not within the scope of application of this policy if there is no connection to a person's work in the ACTPS. A helpful question to ask is: whether the person is involved with a specific entity because of their role in the ACTPS.
 - a. For example, if an ACTPS employee attends the Parents and Citizen's Committee of their child's school, this would be because of their relationship to their child as a parent and not be because they are employed in the ACTPS so their involvement in the P&C would not normally be within the scope of application of this policy.
 - b. In contrast, if an ACTPS employee is nominated or asked to sit on a board, council or committee by their Directorate, this policy would apply.
 - c. Where a person decides to be involved in an external board or entity in their personal capacity and their employment in the ACTPS may be related in subject matter and create a risk of conflict of interest, the Conflict of Interest policy needs to be followed and the risks actively managed. See sections on Conflict of Interest (paragraphs 41 to 48).

15. Directors on corporate boards are also subject to the obligations in Corporations law, in addition to the other sources of responsibilities that employees must fulfil when they are sitting on a corporate board and are also an ACTPS employee.

Types of boards and committees

16. The ACT Government uses a range of boards and committees which perform advisory and quasi-governmental functions. Outlined below are some of the main examples of boards and committees that currently exist in the Territory:

Category	Meaning
Non-statutory advisory councils, committees or boards	Advisory councils are established by a Minister to provide advice and form a connection to the ACT community with regard to a particular subject matter area.
Statutory councils, committees, or boards with decision making powers	Usually, if a board, council or committee not only provides advice to a Minister but also has decision making powers, that entity will be established in legislation. The specific powers the board, council or committee has will usually be defined in the establishing legislation. Governance requirements may be included in the establishing legislation. Anyone involved with a statutory body should ensure they have familiarised themselves with the relevant legislated governance provisions.
Corporate boards	Boards of Directors are responsible for the overall governance and strategic direction of an organisation. In some instances, an ACTPS employee may sit on a corporate board in their ex-officio (official) or personal capacity. ¹

Governance framework

- 17. The governance framework for boards and committees and for ACTPS employees who are involved with them is complex. As well as their obligations as employees, additional governance arrangements, statutory responsibilities and/or Directors' duties may lead to competing obligations which need to be understood and managed by the employee, their manager and the board or committee they are involved with.
- 18. Sources of responsibilities and obligations include:
 - a. The PSM Act;
 - b. ACTPS Enterprise Agreements;
 - c. ACTPS policies including the Governance Principles for appointments, boards and committees in the ACT;
 - d. The Terms of Reference of the specific board or committee;
 - e. Establishing legislation which may include an entity's functions or powers and processes for appointment; and
 - f. Other relevant legislation such as the *Legislation Act 2001* or *Financial Management Act 1996*.

¹ See sections on corporate boards, types of appointments and conflict of interest.

- 19. Directors of corporate boards have additional responsibilities and obligations:
 - a. The Corporations Act 2001 (Cth) and common law;
 - b. Constitution of the corporation; and
 - c. Any other governance documents agreed to by the board such as membership agreements or funding agreements (this will depend on the specific board).

Best practice governance principles for ACTPS employees on boards and committees

- 20. Under section 8 of the PSM Act, ACTPS employees have a duty to do their job in accordance with the best practice principle. This is defined as:
 - a. working efficiently, effectively and constructively; and
 - b. being responsive, collaborative and accountable; and
 - c. making fair and reasonable decisions.
- 21. Decisions made by statutory appointees, boards and committees often have a direct effect on the ACT community and government. Appointees are deemed to hold public offices and are expected to meet certain ethical requirements in order to satisfy standards of probity and accountability that apply to the public sector.
- 22. When an ACTPS employee is appointed to a board or committee, they should ensure they clearly understand the Government's expectation that they uphold the Territory's interests and actively manage risk. This is particularly important in circumstances where the board or committee's decisions may conflict with the interests and policies of the Government.
- 23. All ACT boards and committees should have a documented conflict of interest management protocol. This protocol should include a process for members to declare a potential, perceived or actual conflict of interest. Minutes from meetings should include a record of decisions made about the degree to which that member can be involved in decisions and actions at that meeting and going forward.
- 24. ACTPS employees should make all reasonable efforts to ensure the board or committee understands any requirement that they are obliged to meet under applicable legislation, regulations and/or policies.
- 25. ACTPS employees are expected to behave in ways that are consistent with the public sector values and not undermine the integrity and reputation of the ACTPS. For example, it is generally not appropriate to express personal views which conflict with the policy positions of the Government during formal meetings of an ACT board or committee. An ACTPS employee who is a Director of a corporate board will need to have regard to their purpose for sitting on that board. They need to consider whether their appointment as a Director, relates in any way to their ACTPS position, as well as any duties and obligations which apply to corporate Directors including the duty to avoid conflicts of interest. These factors may inform how to appropriately manage participation on a corporate board.
- 26. These expectations apply to ACTPS employees whether they are appointed in an official or personal capacity to a board or committee.
- 27. Where there is risk of a potential, perceived or actual conflict of interest, a management strategy must be established, monitored, and kept up to date.

Types of appointment

- 28. Section 207 of the *Legislation Act 2001* sets out two types of appointment. An appointment can be made by:
 - a. nominating a position, with the appointee being the person who holds that position at a particular time or from time to time; or
 - b. naming the person appointed.
- 29. It is recommended that ACTPS employees consider the context of their appointment and whether the appointment is in connection with their employment with the ACT Government.
- 30. If an appointment is made in a personal capacity rather than expressly linked to an official position, this does not displace the obligations and responsibilities a person may have if they are employed by the ACT Government and there is any risk of conflict of interest.

Ex-officio

- 31. An ex-officio appointment is where a person is appointed to a specific statutory office, board or committee because of the position they hold in the ACTPS or ACT Public Sector. The appointment documentation identifies the position, for example, Executive Branch Manager, Industrial Relations and Public Sector Employment, and the appointee is the occupant of that position, whomever that may be from time to time.
- 32. For recordkeeping purposes, when an ex-officio appointment is made by a Minister or Cabinet, the name of the current occupant of the position should be provided in the Cabinet Submission as well as recorded on the Appointments Register. If there is a change in the occupant of an ex-officio position during a term of appointment, the change should be brought to Cabinet for noting.
- 33. Ambiguous language such as "representative" of a Directorate or other entity should be avoided unless it is a nomination-based appointment (see below information on external representative nomination-based appointments).

Personal capacity

- 34. In accordance with section 207(1)(a) of the *Legislation Act 2001*, when appointing an ACTPS employee in their personal capacity, the person is named in the appointment documentation, for example.
- 35. Appointments of ACTPS employees in a personal capacity should only be made in exceptional circumstances and require approval from the employee's Director-General or Agency Head.

External Representative (nomination-based appointments)

- 36. Some boards and committees have governing legislation that require nominations by specific stakeholder groups.
- 37. ACTPS employees should not be appointed on this basis.

Conflict of interest

- 38. ACTPS employees have a duty to declare conflicts of interest. A declaration should be made at various times including when applying for a position on a board or a committee.
- 39. An ACTPS employee who is considering applying for an appointment to a board or committee should first refer to the PSM Act, particularly Section 9, and discuss with their supervisor whether a perceived, potential or actual conflict of interest can be identified.
- 40. It is important that employees understand the differences between perceived, potential and actual conflict of interest as well as the differences between pecuniary and non-pecuniary interests. See paragraphs 13 and 14 of the Conflict of Interest policy.

- 41. Actual, perceived and potential conflicts of interest should:
 - a. be identified and managed on an ongoing basis; or
 - b. exclude an individual from appointment.
- 42. Pages 7-8 of the Conflict of Interest Policy provide a range of management strategies that can be used by employees and their managers/supervisors to avoid or manage conflicts of interest.
- 43. Action officers managing a merit selection process that seeks to nominate an ACTPS employee to a board or committee should also seek the views of the employee's Director-General or Agency Head with respect to any identified conflict of interest.
- 44. If an ACTPS employee is appointed to a board or committee, they will need to complete a second job form and have it agreed by their supervisor in accordance with section 244(1)(c) of the PSM Act.
- 45. Chairpersons of boards and committees are responsible for ensuring conflicts of interest are appropriately addressed at each meeting. Secretariat staff are responsible for documenting conflict of interest declarations and decisions made by the board or committee about how they will be managed.

Conflict of interest risk on corporate boards

- 46. Appointments of ACTPS employees as company Directors should be avoided where possible, due to the potential for conflict of interest, with that potential conflict arising between the best interest of the company and the requirement of the employee to act in the best interest of the Territory.
- 47. The preferred approach for ACTPS employee involvement in corporate boards is as an advisor or an observer.
- 48. Proposals to appoint an ACTPS employee to a corporation should be discussed with their Director-General or Agency Head and Workforce Capability and Governance in CMTEDD.
- 49. A management strategy should be in place so that a employee's manager/supervisor has line of sight and can monitor their involvement in the board including potential conflict of interest issues.

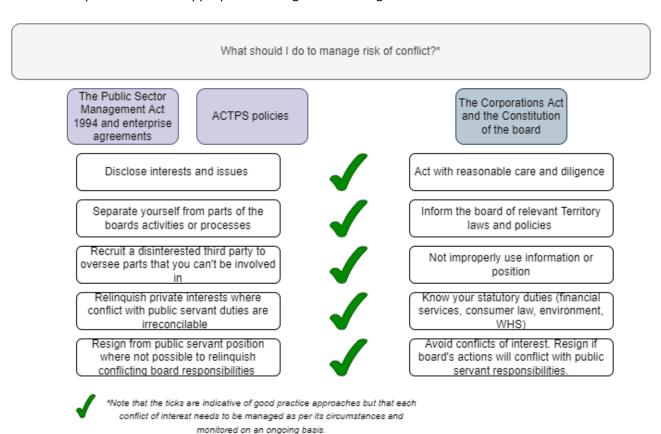
When might my responsibilities as an ACTPS employee and my responsibilities as a Director of a corporate board come into conflict?

- 50. ACTPS employees have obligations under the PSM Act to demonstrate the public sector values of respect, integrity, collaboration and innovation.
- 51. ACTPS employees must also apply the best practice principle (see paragraph 20 above).
- 52. The public sector values and principles may come into conflict when an employee is also a Director as Directors have other duties under Corporations law which may be perceived as competing with their ACTPS employment obligations.
- 53. For example, Directors of corporations have an overriding fiduciary duty of undivided loyalty, that is, "the company must always come first." This obviously creates a risk of conflict where the corporation might propose to do something that diverges from the Government's policy position or regulations or is simply not best practice.
- 54. ACTPS employees must actively monitor and manage the risk of these types of conflicts. ACTPS policies provide guidance about how to manage a situation where there is risk that the interests of the board may diverge from the interests of the government and/or ACT community.

Managing conflict of interest risk

55. ACTPS policies and procedure and Corporations law provide guidance and some elements of good practice are extracted below in the diagram.

56. The Conflict of Interest policy should be consulted to thoroughly identify risks and for guidance on the implementation of appropriate management strategies.



Remuneration

- 57. ACT Remuneration Tribunal Determinations for Part Time Public Office Holders prescribe that remuneration is not payable to ACTPS employee for work as Part Time Public Office Holders.
- 58. Where an ACTPS employee serves on a board or committee as part of their government employment, sitting fees are not payable.
- 59. Where an ACTPS employee serves as a community member on a board or committee, it may be possible, in exceptional circumstances and with the granting of specific exemptions, for fees or reimbursement of costs to be paid to them.
- 60. Further enquiries regarding payment of remuneration to ACTPS employees, including part time or casual employees can be directed to Workforce Capability and Governance in CMTEDD.

References

- 61. The relevant legislation, policy and employment arrangements underlying this operational guidance are:
 - Public Sector Management Act 1994
 - ACT Public Service Code of Conduct
 - Whole of Government Conflict of Interest Policy
 - Governance Principles Appointments, Boards and Committees
 - Second Jobs and Volunteering Policy
 - Second Jobs Application form
 - ACT Remuneration Tribunal Determination 13 of 2021

Further Information

62. For further information please email workforce.governance@act.gov.au.

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Approval Authority

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Deputy Director-General
Workforce Capability and Governance Workplace Safety and Industrial Relations
Chief Minister, Treasury and Economic Development Directorate
On behalf of the Head of Service
November 2022

Attachment A –Governance and responsibilities by role

This attachment provides role-specific governance considerations. There may be additional context-specific responsibilities or obligations that are not covered in this summary and may be identified in the governance documents for the specific council, board or committee.

Members

Governance framework for role	 Members are usually participants of the board/committee and act in accordance with the conditions specified within the governance documents Members hold voting rights regarding issues and items for endorsement and/or decision and have the right to contribute to discussion as part of the decision making of the board or committee Public Sector Management Act 1994 ACTPS Enterprise Agreements ACTPS policies and procedures Board or committee Terms of Reference Legislation where board/committee is a statutory body
Responsibilities	 Contributing to the performance of the board or committee functions and responsibilities Adhering to the Governance framework of the board or committee including the Terms of reference and any governing legislation Undertaking any preparatory work for meetings e.g. reading of meeting papers Undertaking any investigation or consultation with stakeholders where relevant to form a position on a recommendation Requesting briefings where further information is required to form a position Declaring any perceived, potential or actual conflicts of interest Exercising functions and discharging responsibilities in a manner which is consistent with the ACTPS Code of Conduct and where Members are ACTPS employees, ensuring that their contributions are consistent with Government policy
	 Chairpersons and Deputy Chairpersons Chair and Deputy Chairpersons have additional responsibilities The Chair is the official representative and spokesperson for the board/committee Providing strategic leadership of the board/committee Ensuring effective performance of the board/committee's responsibilities and functions Ensuring the efficient organisation and conduct of the board/committee Presiding over the board/committee meetings Facilitating board/committee discussions to ensure an effective use of time for discussion on strategic and critical issues May break voting deadlocks Asking for members to declare any possible conflict of interest issues at each meeting Ensuring effective planning of meetings Maintaining the board or committee's focus on its desired outcomes and functions Overseeing secretariat staff and ensuring they are supporting

	the board or committee's work effectively and in accordance with the governing documents Representing the board or committee and sometimes the Minister at events or to the media (subject to the Minister's discretion) The Deputy Chair takes on the responsibilities of the Chair when the Chair is unable to preside over the meeting
Method of appointment	 Formal appointment by a Minister or the Executive depending on the specific requirements Cabinet consultation is required for all Ministerial and Executive appointments These requirements are also applicable to acting or temporary appointments
Ending an appointment	 Member resignation before the end of their term When an appointee wishes to end their appointment early, they must resign in writing to the relevant Minister (see section 210 of the Legislation Act 2001 for statutory appointments)
	 Ending a statutory appointment – performance and conduct issues Where an appointee/member is unable to meet performance standards, or a breach of the Code of Conduct has occurred, the appointee/member must be informed and provided with a reasonable opportunity to respond to the issues (unless the breach or activity is deemed to be significant)
	 Ending a statutory appointment generally Section 208(2) of the Legislation Act 2001 states the power to terminate an appointment is exercisable in the same way and subject to the same conditions as the power to make the appointment. This means, for example, that if a person was appointed by disallowable instrument, then the appointment can only be ended by disallowable instrument. The enabling legislation may also prescribe limitations on how or why a member's term may be terminated

Directors

Governance framework for role	 The role of Directors of corporate boards is to oversee the performance and compliance of the corporation in accordance with its purpose and objectives ACTPS employees who are considering a Directorship on a board should obtain legal advice on the specific governance arrangements and what is required of them Corporations law (the <i>Corporations Act 2001</i> (Cth) and common law) The constitution of the board Any other governance documents agreed to by the board such as funding or membership agreements
Responsibilities	 Managing risk of conflict of interest between duties to board and duties as an ACTPS employee (see Conflict of Interest) Having a firm understanding of ACTPS employment duties and obligations under relevant legislation, enterprise agreements or executive contracts Director's duties under the Corporations Act 2001 (Cth) and common law (non-conclusive list below): Act in good faith in the best interests of the company and for a proper purpose Not improperly use information or position Act with reasonable care and diligence Statutory duties in the areas of financial services, consumer law the environment and workplace health and safety law Statutory duties in relation to financial record keeping and reporting Prevent insolvent trading Avoid conflicts of interest
Method of appointment	 If there are legislative requirements and processes for a specific corporate board, they should be consulted as the primary source of governance for appointments As a general principle, Cabinet should be consulted with respect to all appointments to ACT government boards and all appointments which involve the ACT government selecting a person to be on a board This principle applies even if a corporate board has independent decision-making power under their Constitution as to who they ultimately appoint as a Director Factors to consider include but are not limited to: the circumstances of the board the relationship of the board to government e.g. whether the board receives funding the nature of the employee's position if the employee is being appointed in an ex-officio or personal capacity The process of engagement should be documented in the Constitution of the board and in documents that are available to Government Consultation with the Workforce Capability and Governance team in CMTEDD is required and obtaining legal advice on the specific circumstances is highly recommended
Ending an appointment	 The possible circumstances and reasons why a Director's term may end are numerous The constitution of the board should specify how to end a Director's term and the process for it The government should be kept informed of circumstances

Observers

Role	 Observers are permitted to attend meetings and sometimes to participate and receive information provided to members (including minutes), but they are not permitted to formally vote on matters submitted for a vote The role observers play is determined by the board or committee governance documents Observers may have been asked to attend as representatives of a Minister/the Government
Governance framework for the role	 Public Sector Management Act 1994 ACTPS Enterprise Agreements ACTPS policies and procedures Board or committee Terms of Reference Legislation where board/committee is a statutory body
Responsibilities	 Ensuring the parameters of their role are clearly defined in the Terms of Reference and governance documents Listening to proceedings of the board or committee Reporting to relevant ministers and other ACTPS employees, especially supervisors and senior executive officers, on matters and issues as appropriate Offering the Government's views where appropriate and when asked by the board/committee Ensuring members have access to relevant ACTPS policies and procedures Exercising functions and discharging responsibilities in a manner which is consistent with the ACTPS Code of Conduct
Method of appointment	 The attendance by an Observer may be requested by the board or committee or by a Minister Formal appointment by a Minister or the Executive with Cabinet consultation is not required
Resignation and transfer of role	 An observer may cease their role for a number of different reasons Formal resignation letter to a Minister will generally not be required however the employee should notify the board members through the Chair or Deputy Chairperson

Advisors/Subject matter experts

Role Governance	 As their name suggests, advisors may be called upon by a board or committee for subject matter specific pieces of advice As with observers, advisors or subject matter experts will be involved in the work of a board or committee subject to the organisation's agreement and discretion Public Sector Management Act 1994
framework for role	 ACTPS Enterprise Agreements ACTPS policies and procedures Board or committee Terms of Reference Legislation where board/committee is a statutory body
Responsibilities	 Providing advice to the board or committee where requested and relevant to the board or committee's work Ensuring the parameters of their role are clearly defined in the Terms of reference and governance documents Not expressing opinions or influence beyond the matters they are invited to advise upon, and where and Advisor or subject matter expert is an employee, ensuring the advice or expert opinion offered is consistent with Government policy Exercising functions and discharging responsibilities in a manner which is consistent with the ACTPS Code of Conduct
Method of appointment	 Process of engagement should be documented in the Terms of Reference and governance documents To the extent that an advisor or subject matter expert is not a formal member of a board or committee, formal appointment by a Minister or the Executive with Cabinet consultation is not required
Resignation and transfer of role	 Ceasing an advisor/subject matter expert role may be prompted by various causes Formal resignation letter to a Minister will generally not be required however the advisor/subject matter expert should notify the board members through the Chair or Deputy Chairperson

Ministers' staff

Role	 The role Ministers' staff or representatives may play will depend on the discretion of the Minister and should be discussed between the individual staff member and their Minister The role should also be agreed between the Minister and the specific board/committee and documented in the Terms of Reference
Governance framework for role	 Will depend on method of engagement – Legislative Assembly Members' Staff agreement and Code of Conduct where relevant Board or committee Terms of Reference
Responsibilities	 Ensuring they have a solid understanding of the basis of their role and if it has limitations. For example, if a board is independent of government as defined in legislation, a Minister's advisor should have very limited influence on board matters Ensuring their role is clear and defined in the terms of reference, or other governing documents. For example, whether they are permitted to speak or only listen Inform the board or committee of relevant ACTPS policies and procedures Providing updates to the Minister on board proceedings and decisions where appropriate Providing direction and feedback from Ministers where relevant
Method of appointment	 Process of engagement should be documented in the Terms of Reference To the extent that a Ministers' staff or representative is not a formal member of a board or committee, formal appointment by a Minister or the Executive with Cabinet consultation is not required
Resignation and transfer of role	 Ceasing to represent a Minister on a board or committee may be prompted by various causes Formal resignation letter to a Minister will generally not be required if it is not a formal member appointment, however the advisor should notify the board members through the Chair or Deputy Chairperson

Secretariat

Role	ACTPS employees who perform a secretariat role provide administrative support for boards and committees
Governance framework for role	 Public Sector Management Act 1994 ACTPS Enterprise Agreements ACTPS policies and procedures Board or committee Terms of reference Legislation where board/committee is a statutory body
Responsibilities	 Gathering and preparing background information and papers on various issues so that the board or committee can make recommendations and decisions Assisting with the management of communication between the board or committee and internal and external stakeholders Organising and documenting new starter paperwork for board and committee members including conflict of interest declarations Updating and maintaining governance documents such as Terms of Reference Minute taking Documenting conflict of interest protocol, including management of conflict of interest registers Ensuring members have access to relevant ACTPS policies and procedures Ensuring attendance at meetings is properly documented Arranging remuneration be paid for members in accordance with determinations of the ACT Remuneration Tribunal where applicable General recordkeeping which may include management of updates to the Appointments register, resolutions, decisions and action registers Ensuring papers are managed in accordance with ACT Government record management policy
Method of appointment	 Secretariat are engaged to undertake support functions for boards and committees as part of their ACTPS roles Formal appointment by a Minister or the Executive with Cabinet consultation is not required
Resignation and transfer of role	 Ceasing a secretariat role may be prompted by various causes such as a change to an ACTPS employee's role and duties Formal resignation letter to a Minister will generally not be required however the employee should notify the board members through the Chair or Deputy Chairperson Records of the board/committee and process management documents should be up to date and accessible in the designated records system to enable access by other ACTPS employees as needed