



Guide for Appeal Panels

Head of Service

Promotion Appeals

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Introduction

This guide is intended as a resource for members of appeal panels ('panels') and outlines the roles and responsibilities of panel members in conducting an appeal in the ACTPS.

Panel members should familiarise themselves with the contents of this guide and ensure that they are well informed about their role, responsibilities and the process for appeals.

This guide provides information on:

- what an appeal is in the context of the ACTPS;
- the general principles that panel members should be familiar with and must apply;
- the establishment and composition of a panel;
- the different types of appeals and how to conduct them;
- reporting procedures; and
- links and other materials.

This guide does not displace relevant provisions of ACTPS enterprise agreements and other applicable laws. ACTPS staff and panel members are encouraged to read this document in conjunction with relevant legislation and industrial instruments referenced throughout the guide.

If necessary, further advice can be obtained from the ACT Government Solicitor through the Convenor of Appeals ("the Convenor") as outlined in the Appeal Chairperson's Letter of Engagement.

Part 1 - Appeals Process Outline

Initial decision is made by the head of service (or delegate)



Application made to Convenor of Appeals

The affected employee disagrees with the decision and makes a written application to the Convenor of Appeals for an appeal.



Convenor decides whether or not to accept the appeal

The Convenor will assess the application against the Agreement criteria, including whether the application was made within 14 days of the decision being notified in the gazette.



If the appeal is accepted, the Convenor convenes the panel

The Appeal Coordinator arranges for a panel to be convened.
Panel members consider and sign a declaration of impartiality.



Panel reviews the original decision

This is done 'on the papers' but may include meetings with relevant parties. If needed the panel seeks more information through the Convenor.



Report is produced

The panel produces a report. This report includes the panel's findings and recommendations.



Report and recommendations are provided to the applicant and the head of service.

Following this, the head of service makes the final decision and this decision will be communicated to the appellant in writing, with reasons, within 28 days of the delegate receiving the report from the appeal panel.

Part 2 - Appeals in the ACTPS

What are they?

Appeals in the ACTPS are procedural reviews 'on the papers' to determine whether:

- it was reasonably open to the head of service (or delegate) to take the action that they did.

In relation to promotion appeals the only ground on which the Appeal Panel can review the decision is that the officer making the appeal would be more efficient in performing the duties of the position than the person promoted or selected for temporary transfer

Panel members must familiarise themselves with these provisions before the panel process commences.

Who can appeal?

Any suitably qualified officer may appeal a decision to promote and officer who has been acting in a position for twelve months or more.

Decisions about promotion or temporary performance (for periods of more than six months) can only be appealed by an officer who was also an applicant for the positions.

What can be appealed?

Enterprise agreements set out an appeal mechanism for an employee where the employee is not satisfied with the outcome of decisions described in the following:

- decisions about promotion or temporary performance (for periods more than six months) affecting the officer where the officer was an applicant for the position, except decisions made on the unanimous decisions by a joint selection committee (see PSM Act 1994 and PSM Standards for more information);
- decisions to promote an officer after acting for a period of twelve months or more in a position at or below Administrative Service Officer Class 6 (or equivalent classification).

An appeal may only be made in relation to promotions or temporary transfer to a higher office or role where the pay applicable is any classification with a maximum pay that is less than the minimum pay of a classification equivalent to a Senior Officer Grade C.

Dismissing an appeal in certain circumstances

The panel has the power not to consider an application, or if it has commenced considering the application, not to proceed further, if, in the panel's opinion:

- the application is frivolous, vexatious or not made in good faith;
- the employee may apply to another person or authority about the application and it would be more appropriate for it to deal with the action; or
- an investigation or further investigation of the application is not warranted.

In such an event, the panel should complete a report for the Convenor, outlining the reasons for dismissal.

Establishing the panel

Appeals are conducted by a three-person panel, convened by the Convenor of Appeals.

The composition of panels is prescribed within relevant ACTPS Enterprise Agreements as:

- a nominee of the relevant Directorate;
- a nominee of the employee; and
- a chairperson, where:
 - a) the chairperson is chosen from a panel of providers or in the case of an appeal relating to a promotion decision, an agreed person; and
 - b) a chairperson from the panel of providers is so chosen on a rotational basis, unless there is an identified conflict of interest, in which case the next person on the panel of providers would be selected.

The employer nominee will be nominated by the relevant HR Directorate and will be a person who has appropriate experience relevant to the appeal matter, and has an understanding of broader legislative, management, human resource policy and practices.

The employee nominee will be nominated by the appellant and should be a person who has appropriate expertise relevant to the appeal matter and an understanding of the workplace industry.

The Convenor may only be a member of the panel with the agreement of the appellant. If agreed, the Head of Service must also be satisfied that there are procedures in place to ensure a clear delineation between the two roles of the Convenor.

A person is not eligible to be a member of a panel if that person was involved in the decision or the process that is the subject of the application.

Before proceedings commence, nominated panel members must complete a Declaration of Impartiality to declare they have no conflict of interest in the matter before the panel. The signed Declaration must be provided to the Convenor.

The Declaration of Impartiality form is included in this Guide at **Attachment A**.

Note: prospective panel members should consider whether they are able to bring an unbiased and independent mind to proceedings before they accept a role on the Panel. If there are grounds for reasonable suspicion of bias, prejudice, or conflict of interest, or if they are in doubt, a panel member must decline the nomination.

Part 3 - Roles and Responsibilities

Key Expectations of Panel Members

The key expectations of panel members in conducting an appeal process are that members:

- act in good faith and as a cooperative member of the panel;
- are impartial;
- advise if there is a change in their circumstances, i.e. if an identified or possible perceived conflict of interest arises which would create a real or perceived conflict of interest;
- participate in panel proceedings to ensure they operate efficiently and as quickly as practicable whilst taking into account fair and proper consideration of the issues;

- are open with their deliberations, even if that means their views dissent with the views of the other panel members; and
- have due regard to the principles of natural justice and procedural fairness.

When participating in a panel, members should be mindful of the:

- stresses on parties to an appeal;
- time requirements and the time that needs to be allocated to the matter;
- desirability of informality;
- need to balance a timely process with a thorough process; and
- confidentiality of the appellant.

The panel should not institute any process that may operate directly or indirectly to discriminate against relevant parties to the appeal.

Panel proceedings are to be conducted in private. However, panel members should be aware that the confidentiality of documents produced in the course of the appeal may be subject to the *Freedom of Information Act 1989*. As such, panel members should avoid giving applicants guarantees of confidentiality.

All panel members must act in all panel proceedings with fairness, equity and impartiality and independent of other interests, including those from the body that has nominated them, for example, the employer or union. If a member feels pressure from any body or person, they should declare it, in writing, to the Chairperson or Convenor.

Role of the Convenor of Appeals

The Convenor of Appeals is an ACTPS office holder appointed by the Head of Service to be responsible for the appeals process across directorates. The Convenor is the person to whom applications for appeals need to be made and the Convenor makes the first assessment of whether or not an application meets the required minimum criteria for an appeal. The Convenor's impartiality ensures a fair and transparent process.

The Convenor is independent from the panel and is not involved in the panel deliberations. The Convenor ensures that appeals are managed appropriately and in accordance with the Enterprise Agreements.

Role of the Appeals Coordinator

The Convenor is assisted in their role by the Appeals Coordinator ("the Coordinator"). The Coordinator is generally the first point of contact for the panel and will assist the panel in conducting the appeal. The Coordinator will ensure that the panel has all the relevant information needed and can assist with:

- answering questions on process and procedures; and
- organising facilities to enable panel procedures to be conducted.

Role of Delegates

A delegate is someone who has the delegated (by the head of service or Director General of a Directorate) authority to make a decision or take an action.

There are different delegates performing various functions throughout the promotion process.

Role of Panel Chairperson

Every panel will have a chairperson chair the panel. The chairperson is chosen from a list held by the PSSC and will work with the other panel members to conduct the appeal in an efficient and effective way. The chairperson is responsible for coordinating and leading the process, but all panel members have an equal say on the issues and share the responsibility of conducting the appeal between them. The chairperson will ensure that the report is written,

taking into account the contribution of all panel members and providing them with a draft of the report before finalising it and sending it to the delegate and the applicant.

Protection of Panel Members

Where a panel member is an employee of the ACTPS engaged under the PSM Act, the Territory indemnifies the member for acts or omissions made while involved in panel proceedings, provided the member was acting in good faith and within the powers conferred by the position at the time of the act or omission. This indemnity covers public liability, professional indemnity and directors' and officers' risks, where they act in good faith.

This Territory indemnity does not extend to a person nominated by the unions, nor representatives of independent providers, unless they are employed in the ACTPS (i.e. engaged under the PSM Act). Panel members not engaged under the PSM Act should ensure they are covered by appropriate insurance, including professional indemnity insurance.

Part 4 - General Principles

There are several principles of justice, fairness, etc. that underpin decision making, appeals, investigations and the like. Some of them are regulated through legislation such as the Privacy Act, while others, such as procedural fairness and natural justice are derived from common

All material that is provided to the panel needs to be treated with the appropriate amount of confidentiality and the privacy of those involved needs to be assured and returned.

law and broader legal concepts.

It is important that panel members understand the fundamental underpinnings of these principles. Procedural fairness needs to be applied in the appeal process but is also one of the considerations in whether or not the original decision was correctly made.

Members of panels are required to sign and return declarations of impartiality. The reason for this is that a fundamental cornerstone of appeals is a 'fair hearing' which can only be assured if it is conducted without bias.

General Principles include:

- *Procedural Fairness*
- *Natural Justice*
- *Confidentiality*
- *Impartiality*
- *Timeliness*

Procedural Fairness

The principle of procedural fairness sometimes used interchangeably with the term 'natural justice', applies to any decision that can directly affect the rights, interests or expectations of an individual. For the purposes of this guide the term 'procedural fairness' will be used but should be taken to include 'natural justice' as appropriate.

Procedural fairness gives an individual the right to expect that any decisions made about them are made by an unbiased decision maker and are based on open, fair and reasoned decision-making processes. Procedural fairness also requires that individuals are afforded a reasonable opportunity to respond to any decisions that may affect their interests.

Procedural fairness requires a decision maker to invite, listen to, and take into account an employee's point of view in relation to any matter that adversely affects them. Any decision affecting an employee that has been made without affording that individual procedural fairness is liable to be challenged. The question of whether procedural fairness was afforded to the appellant (and where relevant, other parties) must be considered having regard to all of the relevant circumstances.

The courts have interpreted the principle of procedural fairness to extend from the initiation of a matter right through to its implementation, not just to the reporting stage or once a decision is made.

3 Rules of Procedural Fairness

- The hearing rule
- The rule against bias
- The “evidence” rule

The duty to accord procedural fairness consists of three key rules:

- **the hearing rule**, which requires a decision-maker to afford a person who may be adversely affected by a decision, an opportunity to present their case;
- **the rule against bias**, which requires a decision-maker not to have an interest in the matter to be decided and not to appear to bring a prejudiced mind to the matter; and
- **the "evidence" rule**, which requires a decision to be based upon logically probative evidence.

The rules of procedural fairness require:

- an inquiry into the matters in dispute;
- a hearing appropriate to the circumstances;
- a lack of bias; and
- evidence to support any decision made.

In broad terms, procedural fairness requires a decision-maker to:

- inform people against whose interests a decision may be made of the allegations against them or grounds for adverse comment in respect of them;
- provide those people with a reasonable opportunity to put their case forward;
- hear all parties to a matter and consider submissions;
- make reasonable inquiries or investigations before making a decision;
- ensure that no person decides a case in which they have a direct interest;
- act fairly and without bias, and
- conduct the investigation without undue delay.

Any decision affecting an individual must afford that individual procedural fairness.

Note: *The above does not represent a comprehensive list of factors that need to be considered to ensure a fair hearing. It is intended to be indicative of the kinds of procedural fairness considerations to bear in mind when conducting an appeal.*

Individuals should exercise their own judgement and common sense in applying procedural fairness to each case.

Impartiality

Unbiased participation can be seen as a second aspect of procedural fairness. Prior to agreeing to participate as a member of a panel, consideration should be given to whether an unbiased and independent mind can be brought to the proceedings.

A Declaration of Impartiality must be signed prior to receiving the substantive appeal documentation. If any actual or potential conflict of interest exists at any stage of the process or if you have any doubt about your impartiality, you should disqualify yourself as a panel member.

Alternatively, and at a minimum, you need to discuss any concerns with the Coordinator (on behalf of the Convenor).

There are often issues where members will know, or be aware of, one or more persons involved in the matter. This does not automatically prevent the person from participating in the appeal. Each instance of potential conflict should be discussed with the Coordinator, having regard to the relevant circumstances.

Note: for employees engaged under the PSM Act 1994, declaration of conflicts of interest is a statutory responsibility. The Code of Ethics at section 9 of the PSM Act requires, among other ethical duties, the declaration of any conflicts of interest that arise in relation to their duties. This includes conflicts relating to reviews and appeals, not only at their inception but also those that arise while the review or appeal is in progress. Contractors are also obliged to declare conflicts as if they were an employee engaged under the PSM Act.

Confidentiality

Inevitably, issues being dealt with in the course of appeals will concern sensitive matters. While the confidentiality of personal information is paramount to the integrity of any appeals process, the documents produced in the course of an investigation may be subject to the *Freedom of Information Act 1989*. As such, it is important that guarantees of confidentiality not be given.

A key element of maintaining confidentiality is ensuring that all documents, recordings and other items relating to review or appeal proceedings are kept in a physically safe environment. Agencies and panel members should also be familiar with and adhere to the *Privacy Act 1988 (Cth)* and the *Information Privacy Act 2014 (ACT)* and ensure that all records associated with an appeal are maintained in accordance with the *Territory Records Act 2002*.

Any materials, information and documentation received by a panel member can only be used for the purposes of the appeal and may not be reproduced or disseminated without authorisation.

All physical materials provided to or created by the panel pertaining to the issue of the process of appeal is to be returned to the Territory at the cessation of the appeal.

Timeliness

There is an expectation that panel members be available for panel meetings and allot time between meetings to consider and read the documentation.

In relation to promotion appeals, there is urgency in that positions need to be filled. A protracted process would also cause undue uncertainty and stress for both the appellant and the individual who was successful in the initial decision.

Thus, when considering participating on a panel it is imperative that consideration be given to any planned absences in the period in which the appeal is estimated to be undertaken. An assessment should be made as to whether other commitments will allow sufficient time to participate on the panel.

Part 5 - Conducting an appeal

Determining the Methodology

The methodology that is appropriate for an appeal varies depending on the type of appeal. However, common to all appeals is that, upon commencement of an appeal, the panel typically needs to determine the best approach to deal with a matter.

The panel may proceed to deal with the matter on the basis of the initial documentary evidence alone and should not seek to collect the same or new information. However, in some circumstances it may be necessary to meet with the appellant and/or the original decision maker. In each case, an assessment about the information at hand and what subsequent steps may be needed in relation to the conduct of appeal will be formed.

Meeting with the appellant

The panel may decide that it would be beneficial to meet with the appellant to seek clarification of certain aspects of the documentation.

If the panel wishes to meet with the appellant, the appellant can bring a support person to be present at any meeting held with the panel. The appellant will be allowed a reasonable opportunity for this to be arranged.

If a meeting is held with the appellant and/or the original decision maker, it is recommended that the following issues are considered:

- Set objectives and an agenda for the meeting.
- Consider the timing of the meeting. Privacy is a major psychological factor which contributes to the success of the meeting, and the environment should be free from distraction.
- The need for an interpreter or other special arrangements should be determined in advance.

Part 6 - Conducting Appeals about Promotion or Temporary Performance

When an application for appeal relates to a decision of promotion or temporary performance in excess of 6 months, the only issue for consideration is if the person making the appeal would be more efficient in performing the duties of the position than the person selected. In considering whether the appellant would be 'more efficient' in performing the duties of the position than the employee being promoted or selected for temporary performance, the appeal panel should have regard to:

- the abilities, qualifications, experience, standard of work performance and personal qualities of each relevant party¹ to the appeal to the extent that the appeal panel considers they are relevant to performing the duties of that position;
- if the head of service or delegate who made the promotion decision had regard to, the potential for further career development, relevant to the position, in making the merit-based decision; and
- any other matter the appeal panel considers relevant.

¹ Relevant parties include the person selected for the promotion and any applicants that applied for that position and have lodged an appeal.

The appeal panel will be provided with the Delegate's Statement which consists of all relevant material the original decision maker considered at the time of making their decision.

The Delegate's Statement may include:

- job advertisement;
- position description/selection criteria;
- scheduled of applications;
- shortlisting material, i.e. schedule of short-listed applications;
- interview questions/notes;
- application submitted by the appellant and promotee;
- referee reports;
- staff selection report included comparative and individual statements;
- any further information such as additional notes, written comments made; and
- and other references used.

The appeal panel will also be provided with a copy of the submissions made by relevant parties containing their 'Supporting Claims of Greater Efficiency'.

If necessary, the appeal panel can also conduct truncated interviews with the relevant parties to establish the facts around the issues in contention.

In accordance with ACTPS Agreements, the appeal panel will either confirm the decision or make recommendations to the head of service, i.e. delegate, to substitute another decision. The appeal panel is required to provide reasons for its decision.

It should be noted that it is not a requirement for the appeal panel to produce an 'Appeal Panel Report', but rather, a determination of their findings and the reasons for their decision.

If the appeal panel confirms the original decision, the nominated Appeal Delegate will inform the affect parties of this decision. If the appeal panel has substituted another decision, the Convenor will provide the affected parties with a copy of the appeal panel's determination. A copy of that determination shall be sent to the Delegate at the same time and will inform the affected parties of the final decision.

Part 7 - Reporting

Promotion Appeal Recommendations and Determinations

An appeal panel is not required to produce a lengthy appeal report for appeals relating to promotions and temporary performance. The nature and length of the report to be provided will depend on the particular matter and the outcome of the appeal.

If the appeal panel, after conducting the appeal, does not agree with the original decision, the appeal panel must provide recommendations to the delegate to substitute another decision. Such recommendations should include a summary of the analysis and reasoning behind the recommendations.

However, if the appeal panel, after conducting the appeal, decides to confirm the original decision, the appeal panel will only have to provide its determination in that regard to the delegate. While the determination to confirm the delegate's decision should include some detail as to the reasons for the decision, it is not required to be as detailed as a recommendation to substitute the decision.

The Appeals Coordinator will provide the report/determination to the appellant, the promotee and the decision delegate.

Part 8 – Further Information and Frequently Asked & Questions (FAQ's)

Any issues that arise during the course of an appeal should be discussed with the Convenor of Appeals via the Appeals Coordinator, who provides assistance to facilitating the work of Appeal Panels and administrative support on behalf of the Convenor.

Phone: (02) 6207 8317
Email: ACTPS_Appeals@act.gov.au
Postal Address: GPO Box 158, CANBERRA ACT 2601
Physical Address: Canberra Nara Centre, 1 Constitution Ave, Canberra ACT 2601

Q. What is the role of the Appeals Coordinator?

A. The role of the Appeals Coordinator is to provide support to the appeals process and facilitate the work of panels and to provide assistance on behalf of the Convenor of Appeals.

Q. How long will the appeal process take?

A. The timeliness of the appeals process is dependent on a number of factors including:

- the availability and scheduling of panel members;
- whether a panel member dissents from the other panel members; and
- whether a panel member removes themselves from the appeals process.

Q. How will panel members receive the appeal paperwork?

A. The Appeals Coordinator will send panel members electronic copies of the appeal papers in the first instance, and subsequently, at the first panel meeting, present the hardcopy papers.

Q. When will the panel convene?

A. The chairperson convenes the panel as necessary and by agreement with other panel members. Generally, the panel will convene the first time after the papers have been reviewed by the panel members. It is the responsibility of the panel members to ensure they set aside the time to review the papers, so when the panel convenes, all panel members are across the subject material.

Q. What will happen to the position while the appeals process is underway?

A. The status quo should be maintained. If someone was already acting in the position when the position was advertised that acting arrangement could continue. No new officer should be commenced in the position until the outcome of the appeal has been finalised.

Q. Is the panel able to request further information?

A. If it becomes apparent to the panel that a fundamental piece of evidence was not considered in the original process, it can request the Convenor refers the matter back to the head of service and/or the PSSC for further investigation. The panel cannot reinvestigate the matter.

Q. What do I do if Legal Advice is required?

A. The chairperson will facilitate the panel's request to the Appeals Coordinator (on behalf of the Convenor) to seek legal advice in relation to potential legal issues. The chairperson will need to be specific about what the panel's request is and the legal issues that require advice.

Q. What happens if there is a change of a panel member's circumstances or availability?

A. In the first instance this should be discussed with the chairperson and/or the Appeals Coordinator to assess if the changed circumstances can be accommodated.

Q. What happens if a panel member does not agree with the other panel members' views?

A. It is important for the panel to have an open discussion. If, after that, there is still no agreement, the dissenting view may be recorded by:

- incorporation of the dissenting views into the determination to confirm the original decision; or
- preparing an individual dissenting report, in which case this will be submitted to the Delegate attached to the final report.

Q. When do I return my appeal papers?

A. All members are required to return their appeal papers to the Appeals Coordinator at the Canberra Nara Centre, 1 Constitution Avenue Canberra, at their earliest possible convenience. There is the requirement all panel members must delete the electronic papers and return hardcopy papers at completion of the appeals process.

Further Information:

Commonwealth Legislation: <http://www.comlaw.gov.au>

Fair Work Act 2009 (Cth): <https://www.legislation.gov.au/Details/C2014C00031>

ACT Legislation: www.legislation.act.gov.au

Human Rights Act 2004: <http://www.legislation.act.gov.au/a/2004-5/default.asp>

Public Sector Management Standards 2016: <http://www.legislation.act.gov.au/di/2016-251/default.asp>

Public Sector Management Act 1994: <http://www.legislation.act.gov.au/a/1994-37/current/pdf/1994-37.pdf>

Territory Records Act 2002: <http://www.legislation.act.gov.au/a/2002-18/default.asp>

Information Privacy Act 2014: <http://www.legislation.act.gov.au/a/2014-24/default.asp>

Enterprise Agreements: <http://www.jobs.act.gov.au/about-the-actps/agreements>

Appendix 1 - PANEL DECLARATION OF IMPARTIALITY

The purpose of this document is to facilitate proper, fair and efficient operation of Panels constituted under the Appeal Mechanism of ACTPS Agency Agreements. The Workforce Capability and Governance Division of CMTEDD requires all persons nominated as members of Panels to make this declaration. If any member feels that they are unable to comply with this requirement, they should discuss the matter with the Appeals Coordinator and their nominating body to determine whether or not, in all of the circumstances, they should decline nomination to the Panel.

I,.....(full name)

of(work/ other address)

a member of the Panel in the matter of

.....
.....

DECLARE:

1. I do not have and have not had a relationship with a party before the Panel of a kind that may cause a reasonable person to suspect that I may be biased, including:
 - a family relationship;
 - a close personal relationship;
 - a relationship involving personal hostility; or a
 - business or employment relationship.
2. I do not have or have not had any other personal or professional involvement in the matter to be considered by the Panel (e.g. pecuniary or non-pecuniary interest in the matter – such as acting as a party’s adviser in the matter).
3. I understand that, while acting as a member of the Panel, I am not subject to direction by, nor should I act on instructions from, any person, body or authority other than legal directions (e.g. from a court of law).

4. I will conduct my duties as a member of the Panel in accordance with the identified Appeal Agency Agreement with fairness, equity and impartiality independent of any interests of the body which nominated me.
5. I will contribute to the identification of the key issues of the appeal and participate in the analysis and assessment of those issues based on my own opinions on the merits and the information before the Panel.
6. After making this declaration, should a relationship, involvement or interest of a kind described in this declaration develop, and there are grounds for reasonable suspicion of bias or prejudice on my part, I will disqualify myself from considering the appeal.
7. I will ensure that the free and frank discussion of views of the Panel in deliberating the evidence and matters before the Panel remain strictly confidential.
8. I acknowledge that the written recommendation is confidential and (subject to the Stream Enterprise Agreement) is only made available to the applicant and Head of Service and/or Commissioner (as relevant).
9. I acknowledge that if I fail to comply with the requirements of this declaration, I may not be nominated for future Panel proceedings.

Signature.....

Date.....