

Hiring checklist for Local Aboriginal Land Councils

Legal information for Local Aboriginal Land Councils

This fact sheet covers:

- ▶ What steps should your LALC take when hiring new workers?

Your Local Aboriginal Land Council (LALC) should consider a number of important things to avoid legal risks when hiring new workers.



Note

The information in this checklist is designed to give you an overview of these important points, and further information is available on [our website](#).

This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before making a decision about what to do.

Please refer to the [full disclaimer](#) that applies to this fact sheet.

What steps should your LALC take when hiring new workers?

Recruitment of a worker usually involves:

- advertising the position
- conducting interviews
- screening candidates, and
- making an offer of employment

At each of these stages, your LALC should consider its legal obligations under relevant laws, including:

- the [Aboriginal Land Rights Act 1983 \(NSW\) \(ALR Act\)](#) and [Aboriginal Land Rights Regulation 2020 \(NSW\) \(ALR Regulation\)](#)
- [Fair Work Act 2009 \(Cth\) \(Fair Work Act\)](#)
- anti-discrimination laws
- Australian Consumer Law
- laws relating to screening checks for applicants, and
- privacy laws



Step 1: Advertising the position

- Have you considered whether the position to be advertised is for a contractor or an employee?**

The law requires that employers provide employees with certain benefits and entitlements (for example, paid annual leave).

Independent contractors are not owed all the same entitlements as employees, so it's important to be clear about the classification of the position.



Example

A LALC proposes to engage Jane as a contractor to perform administrative services.

If Jane operates a business in the local community that provides these services to other companies for a fee (plus GST) and can delegate the work to others, Jane may be a contractor. If, however, Jane will perform the services under the LALC's CEO's direction on a full-time basis, Jane is more likely to be an employee.

If your LALC incorrectly classifies an employee as an independent contractor, you may fail to:

- provide them with their legal entitlements, or
- meet your obligations under the Fair Work Act, or tax, insurance and superannuation laws, which could result in legal claims against your LALC.



More information

For more information, see:

- our guide: [employee, contractor or volunteer?](#)
- The [Australian Tax Office's webpage](#) on employees and contractors

- Have you considered whether the position will be full-time, part-time or casual, and whether it will be for a specific period of time?**

Full-time and part-time employees are employed on a continuous basis and work each week for a number of hours agreed between the employee and the employer.

Full-time employees are contracted to work, on average, 38 hours per week. Part-time employees are contracted to work, on average, less than 38 hours per week. Full-time and part-time employees receive certain paid leave entitlements (for example, sick and carer's leave and annual leave) and are entitled to written notice, or payment instead of notice, if their employer terminates their employment.

Casual employees are generally entitled to a higher hourly wage because they are paid a casual loading in place of entitlements such as sick leave and annual leave. Casual employees don't have guaranteed hours of work or ongoing employment, and notice is not usually required to terminate their employment.



Example

A LALC gives an employee a casual contract of employment to work eight hours on Monday and Tuesday each week. As hours of work are determined in advance and are regular, the employee is a part-time employee and not a casual employee.

Fixed-term employees are employed on a full-time or part-time basis for a specified period of time or task (for example, a six month contract where employment ends after six months), and generally receive the same entitlements as permanent full-time and part-time employees.



More information

For more information, see the [Fair Work Ombudsman's webpage](#) on types of employees.

Have you checked whether the position being filled is subject to a modern award or enterprise agreement?

Modern awards contain the minimum employment entitlements for employees, depending on their industry or occupation. Generally, more senior positions may not be covered by a modern award.

Enterprise agreements (made between an employer and its employees) contain agreed employment conditions that are better off overall compared to a modern award. An enterprise agreement is approved by the Fair Work Commission. When an enterprise agreement is in place, a modern award will not apply (except that the base rate of pay can't be less than the modern award) and the National Employment Standards (under the Fair Work Act) continue to apply.



More information

For more information, see:

- [our webpage on the Fair Work system](#), and
- the [Fair Work Ombudsman's webpage](#) on types of employees

Have you considered whether an Aboriginal person is required for the position?

In New South Wales, section 14 of the [Anti-Discrimination Act 1977 \(NSW\)](#) allows employers to target a particular race or ethnic group in a recruitment process where being of a particular race or ethnic background is a 'genuine occupational qualification' for the position.

If being Aboriginal is a genuine occupational qualification for the position your LALC is recruiting for, the job advertisement must include the following wording:

[Name of your LALC] considers that being Aboriginal is a genuine occupational qualification of this position for the purposes of s 14 of the Anti-Discrimination Act 1977 (NSW).



If you are unsure whether being Aboriginal is a genuine occupational qualification for the position your LALC is recruiting for, contact:

- Justice Connect for legal advice, or
- the [Anti-Discrimination NSW's Aboriginal and Torres Strait Islander service](#), before going ahead with the advertisement.

Have you reviewed your recruitment materials to ensure they are not unlawfully discriminatory?

Discrimination occurs in the recruitment process when a candidate or applicant for a position is treated less favourably than another person or group because they have (or are believed to have) a certain protected attribute (for example, race, sex, age, disability).

Generally, an employer bound by anti-discrimination laws must not discriminate against a person:

- in determining who should be offered employment
- in the terms on which employment is offered
- by refusing or deliberately omitting to offer employment, or
- by denying the person access to an occupational training program

Consider whether the recruitment material to be advertised places any unreasonable restrictions, conditions or requirements on candidates which might be directly or indirectly discriminatory.

Make sure any specific requirements for the position relate to the skills and experience needed for the position, and avoid references to personal attributes that a person may or may not have.



More information

For more information, see [our webpage on recruitment and engagement of employees](#).

Have you followed the requirements under the ALR Act and Regulation in relation to advertising and recruiting for the position?

Division 5 of Part 5 of the ALR Act and the ALR Regulation contain requirements for advertising and recruiting LALC staff, including requirements on:

- people who must not be employed as a LALC's Chief Executive Officer
- people who must not be employed in other LALC positions (including as a consultant)
- the manner in which a Chief Executive Officer position must be advertised by a LALC, and
- the basis on which a LALC may appoint staff and consultants



Step 2: Conducting interviews

Have you avoided making any recruitment decisions on the basis of an applicant's protected attributes (for example, race, sex, age, disability)?

Prepare a list of questions for the interview that relate directly to the position requirements and avoid asking questions that:

- may be interpreted to be relevant only to certain people, or
- relate to irrelevant details about a candidate's personal life

For example, a potentially discriminatory question would be asking a woman if she plans to have children in the future.

Instead, ask prospective workers whether they can fulfil the key requirements of the position, noting the skills and experience the position requires and the duties the candidate would be required to undertake if they were employed.

Have you avoided making any misleading or deceptive representations during the recruitment process?

Under the Australian Consumer Law, your LALC must be truthful and not mislead or deceive applicants or candidates throughout the recruitment process about:

- the terms and conditions of employment (for example, the salary on offer)
- the availability of work
- the work conditions and nature of work
- key duties that the worker will be expected to perform, or
- future employment or promotion prospects

Vague advertisements or statements that are not clear about the nature of the position or other important details may attract significant legal and financial risks if your LALC is found to have breached the Australian Consumer Law.



More information

For more information, see [the Australian Competition and Consumer Commission's webpage](#) on misleading job advertisements.

Have you considered how your LALC uses, stores and discloses personal information about applicants obtained through the recruitment process?

If your LALC is covered by the Commonwealth privacy laws, you must have a privacy policy. Even if your LALC is not covered by privacy laws, it's good practice to have a privacy policy in place which sets out how your LALC uses, stores and discloses personal information about job applicants.

The way your LALC uses, stores and discloses personal information about job applicants might also impact your reputation, so it's worth considering the best way to approach information that might be private or sensitive. If an applicant has applied for a position and is unsuccessful, but you wish to keep their details on file in case another position arises in the future, you should advise the applicant and seek their consent before you do this.



More information

For more information, see [our privacy webpage](#).

Step 3: Screening candidates

Have you carried out any necessary pre-employment checks and checked the applicant's references and job history?

Certain types of pre-employment screening checks are required by law, while others are discretionary and may include:

- a criminal record check (conducted by the [Office of the Registrar for the Aboriginal Land Rights Act 1983](#) for LALC staff)
- a Working With Children Check (conducted by the [New South Wales Office of the Children's Guardian](#)), and
- reference checks (generally conducted by your LALC)



More information

For more information, see [our webpage on recruiting and engagement employees](#).

Have you checked that the applicant has the right to work in Australia?

In addition to the above screening checks, you must also ensure that the applicant has the right to work in Australia.



More information

See the [Department of Home Affairs website](#) for further information about visas, including the types of work-related conditions that might be attached to a particular visa subclass.

Have you asked if the prospective worker is subject to any restraints or other impediments to them working for your LALC?

You should confirm with the applicant that their employment with your LALC will not be restrained or otherwise affected by an existing or past employment agreement with another employer (for example, by an agreement which restrains the prospective worker from engaging in certain activities that they would otherwise be required to perform for your LALC).

Step 4: Making an offer of employment

- Have you reviewed the employment agreement to ensure it is appropriate and contains all the necessary terms?**

An employment agreement usually consists of a letter of offer, an employment contract and a position description which together detail the terms and conditions of employment that will exist between a worker and your LALC, including the rights and obligations of both parties.

In addition to any specific terms and conditions that you believe are relevant to the position (for example, a requirement that non-Aboriginal staff undertake cultural awareness training), certain minimum entitlements must be provided for in the employment agreement.

The employment agreement may not provide for entitlements that don't meet the minimum requirements set out in the National Employment Standards (under the Fair Work Act), which cover matters including maximum weekly hours of work, leave entitlements and notice of termination.

Employees are also entitled to any entitlements set out in any applicable modern award (see above for further information on modern awards).



Example

Jane is employed as a secretary for 38 ordinary hours a week plus overtime. Under the modern award, Jane must be paid overtime rates for all hours worked over 38 hours a week. The LALC must make sure Jane is paid for overtime hours at no less than the amount she would have received for overtime under the modern award.



More information

See the [Fair Work Ombudsman's webpage](#) for further information on the NES and [our webpage](#) for further information on employee entitlements.

- Have you provided the worker with the Fair Work Information Statement (or the Casual Employment Information Statement for casual employees)?**

The Fair Work Information Statement (or Casual Employment Information Statement for casual employees) contains information on conditions of employment, including modern awards, workplace rights and termination of employment.

Employers must provide every new worker with a copy of these statements before, or as soon as possible after, the worker commences their employment.



More information

See the [Fair Work Ombudsman's webpage](#) for further information more information and for a copy of the statements.



More information

See our [LALC Service Information Resources webpage](#) to access resources specifically targeted to LALCs. In particular, see:

- [Performance Management Checklist for LALCs](#)
- [Termination Checklist for LALCs](#)

Our website also has resources for not-for-profit community organisations on a range of related topics which may be useful to your LALC:

- **The people involved** – This section covers the relationships your organisation will have with clients, employees, members and volunteers, including recruitment, resignations and disputes. In particular, see:
 - [What are our legal obligations when recruiting an employee?](#)
 - [Discrimination in recruitment](#)
 - [Screening Checks Guide for NSW community organisations](#)