

Part 1

Introduction to your legal duties as a LALC board member

This fact sheet covers:

- ▶ What is your role as a LALC board member?
- ▶ What are your legal duties as a LALC board member?
- ▶ What can happen if you don't follow your legal duties?
- ▶ What legal protections are available to LALC board members?

This fact sheet is part of a toolkit which provides information on the key legal duties of Local Aboriginal Land Council (LALC) board members.



Note

This toolkit provides information on the key legal duties of LALC board members.

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 deciding what to do.

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

While this toolkit is written with LALC board members in mind, your LALC might find it useful to share the toolkit with your LALC's staff to make sure they have information on how to comply with conduct requirements set out in the [Aboriginal Land Rights Act 1983 \(NSW\) \(ALR Act\)](#) and [Aboriginal Land Rights Regulations 2020 \(NSW\) \(ALR Regulations\)](#) which also apply to LALC staff.

What is your role as a LALC board member?

As a board member, it's important that you understand your role and how that role differs to the roles of other people involved in your LALC, such as employees. This is because, legally, you have different relationships and legal duties to other people involved with your LALC.



The board of a LALC is responsible for governing, overseeing the affairs of a LALC and making strategic decisions for a LALC and on behalf of its members, including:

- making decisions to help the LALC pursue its objectives under the ALR Act to improve, protect and foster the best interests of all Aboriginal people living within the LALC's area and people who are members of the LALC
- looking after the LALC's land and assets
- protecting Aboriginal culture and heritage and promoting awareness in the community about Aboriginal cultural and heritage
- developing and implementing a Community Land & Business Plan (**CLBP**)
- monitoring the finances of the LALC and overseeing risk management
- recruiting and managing the Chief Executive Officer (**CEO**) of the LALC, and
- ensuring the LALC operates within the law, including maintaining its charitable status if it is a charity

Each board member is responsible for contributing to the collective decision making of the board. A board member should not make decisions for the LALC independently of other board members.

A board member's role should not be confused with the operational roles of the LALC (like the CEO, or other staff). The day-to-day work of your LALC should be managed and completed by the staff and CEO. It is generally not your responsibility to perform or be involved in the day-to-day running of your organisation.



More information

For more information on your role as a board member, see [our fact sheet 'Introduction to the role of board member'](#) for new board members

What are your legal duties as a LALC board member?

A legal duty is an obligation to act according to the law (for example, driving within the speed limit or making sure the workplace is safe).

Legal duties that apply to LALC board members may come from a number of sources, including:

- the ALR Act, ALR Regulations and the LALC's code of conduct
- the common law (sometimes referred to as 'general law' or 'judge-made law')
- other legislation (such as work health and safety legislation), and
- if your LALC is a registered charity, the [Australian Charities and Not-for-profits Commission Act 2012 \(Cth\) \(ACNC Act\)](#)



Note – code of conduct

Every LALC must adopt a code of conduct which, once approved by the Registrar, is binding on all officers and staff members.

The ALR Regulations contain an [example code of conduct \(model code of conduct\)](#) which LALC's can use when preparing their own code of conduct.



What are your legal duties under the ALR Act and code of conduct?

The ALR Act includes a number of legal duties that LALC board members and staff must follow. These duties require board members and staff to act and behave in certain ways.

The model code of conduct also includes further legal duties which apply specifically to LALC board members.

Sometimes the duties under the ALR Act and model code of conduct are called 'standards of conduct'.

The legal duties that apply to LALC board members under the ALR Act and model code of conduct are essentially common-sense standards requiring care and honesty. Meeting these duties will help to ensure that your LALC is well run, has a good reputation and continues to receive the support of the community.

The legal duties (or standards of conduct) under the ALR Act and model code of conduct are set out below.



Which code of conduct?

While most LALCs use and follow the model code of conduct set out in the ALR Regulations, some LALCs might have their own code of conduct which they drafted (and which has been approved by the Registrar of the ALR Act).

Check which version your LALC is using.

If your LALC hasn't drafted its own version of the code of conduct, the model code of conduct will automatically apply.



Requirements under the ALR act

Section 176 of the ALR Act sets out how every board and staff member must act and behave:

- (1) *Every councillor, Board member and member of staff of an Aboriginal Land Council or an advisory committee, must:*
 - (a) *act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under this or any other Act, and*
 - (b) *act for a proper purpose in carrying out his or her functions under this or any other Act, and*
 - (c) *not use his or her office or position for personal advantage, and*
 - (d) *not use his or her office or position to the detriment of an Aboriginal Land Council.*



Requirements under the model code of conduct

The model code of conduct for LALCs in [Schedule 3](#) of the [Aboriginal Land Rights Regulation 2020 \(NSW\)](#) sets out in further detail how board members must act and behave:

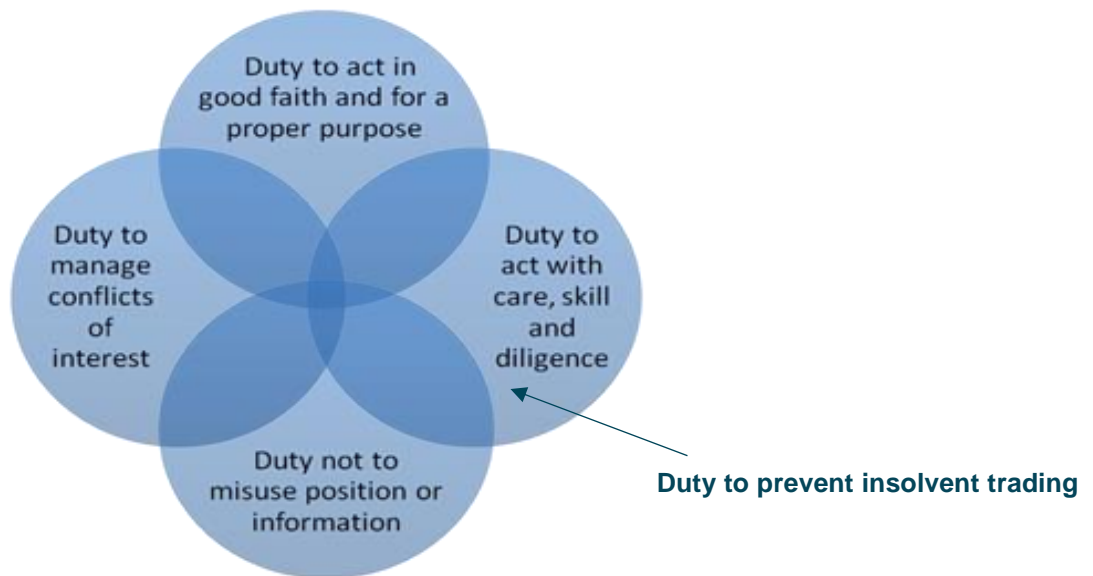
1. *The [name] Local Aboriginal Land Council requires its officers to observe the highest standards of conduct and ethical behaviour in all of their activities. By maintaining such standards, officers enhance their own standing as representatives of the Aboriginal community and increase the public confidence in the management and administration of the [name] Local Aboriginal Land Council.*
2. *Officers must uphold the objectives of the [name] Local Aboriginal Land Council and abide by the Aboriginal Land Rights Act 1983 and associated legislation, as well as policies and procedures established by the New South Wales Aboriginal Land Council.*
3. *As the conduct of an individual officer can reflect on the wider Aboriginal Land Council network as a whole, this Code sets out what are considered to be appropriate standards of conduct by officers.*
4. *Officers must refrain from conduct or action that detracts from the reputation of the [name] Local Aboriginal Land Council.*
5. *Officers are required to exercise complete probity, honesty and diligence in carrying out their duties and responsibilities.*
6. *Officers must at all times safeguard the interests of the [name] Local Aboriginal Land Council and its members, provided that officers must not knowingly be party to any illegal or unethical activity.*
7. *Officers must not enter into any agreement or undertake any activity that may be in conflict with the interests of the [name] Local Aboriginal Land Council, or that would prejudice the performance of their duties.*
8. *Officers must not use confidential information gained in the performance of their duties for any personal gain or in a manner that could be detrimental to the [name] Local Aboriginal Land Council.*
9. *Officers must exercise due care and diligence in performing their duties and ensure that their knowledge, skills and technical competencies suffice to discharge their responsibilities.*
10. *Officers are to acknowledge that this Code is to be adhered to both in spirit and to the letter, so that an officer's conduct is governed by the highest standards of personal and ethical behaviour.*
11. *Officers of the [name] Local Aboriginal Land Council must not, at a meeting of the Council or the Board, do any of the following things:*
 - (a) *assault or threaten to assault another officer or person present at the meeting,*
 - (b) *move or attempt to move a motion or an amendment that has an unlawful purpose or that deals with a matter that is outside the jurisdiction of the Council or Board, or address or attempt to address the Council or Board on such a motion,*
 - (c) *insult or make personal reflections on or impute improper motives to another officer,*
 - (d) *say or do anything that is inconsistent with maintaining order at the meeting or is likely to bring the Council or Board into contempt.*

The main legal duties that relate to the conduct of board members are:

1. the duty to act in good faith and for a proper purpose
2. the duty to act with reasonable care, skill and diligence (including the duty to prevent insolvent trading)
3. the duty not to misuse information or position
4. the duty to disclose and manage conflicts of interest

Each of these legal duties is explained in more detail in the other fact sheets in this toolkit.

Although we look at them separately in each fact sheet, in reality the duties often overlap, and a number of different duties might apply in one situation:



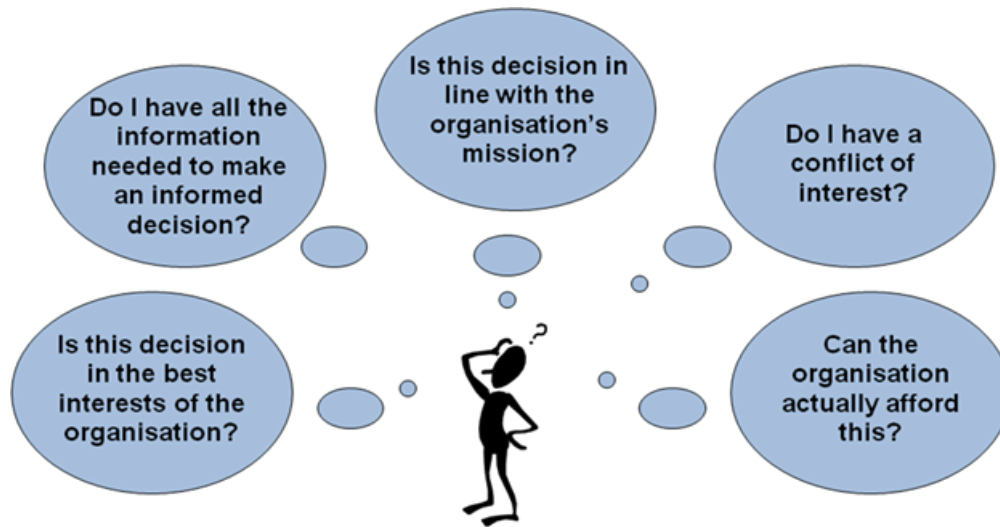
For example, failing to act for a proper purpose can also be a breach of the duty not to misuse your position.



Note

While it's important that you understand these duties and how they operate, also remember that these duties are not hard to comply with.

While the fact sheets in this toolkit explain each of the four main duties in further detail – always keep the following five summary questions in mind when you are acting in your position as a LALC board member:



What are your legal duties under other laws?

In addition to the four main legal duties explained above, LALC board members should also be aware of other legal duties that may apply to them through other laws, including laws relating to:

- tax
- employment
- work health and safety (**WHS**)
- consumer protection and trade practices
- environmental protection, and
- privacy laws

Often, legal requirements are imposed on the LALC as a whole (rather than individual board members), but the board will have a key role in making sure the organisation complies with the relevant laws.

Some laws in Australia can apply to board members or senior staff personally – in these cases – board members can be personally responsible (as well as the LALC itself) if the LALC or its employees breaches these laws.



Caution – WHS laws that apply to board members personally

Under WHS laws, board members of LALCs must exercise 'due diligence' to ensure that the LALC complies with its WHS obligations. Due diligence requires taking reasonable steps to:

- acquire and keep up-to-date knowledge on WHS matters
- gain an understanding of the nature of the LALC's operations and the risks and hazards associated with those operations
- ensure the LALC uses appropriate resources and processes to eliminate or minimise health and safety risks
- ensure the LALC has appropriate processes for receiving and considering information regarding incidents and hazards, and responding to that information in a timely way, and
- ensure that the LALC implements processes for complying with any duty or obligation under WHS laws

Under WHS laws, board members can be found to have failed to exercise due diligence regardless of whether the organisation has or has not complied with its own duties. Prosecutions for serious breaches of WHS laws can lead to large fines for both individual board members and organisations.

What are your legal duties as a board member of a registered charity?

Governance standards

Board members of LALCs that are registered charities under the ACNC Act will need to meet the Australian Charities and Not-for-profits Commission's (**ACNC**) six governance standards, which are a set of minimum requirements for the governance of a charity.

Standard 5 (Duties of Responsible Persons) sets out the following duties (similar to the main legal duties discussed above):

- to act with reasonable care and diligence
- to act honestly and fairly in the best interests of the charity and for its charitable purposes
- not to misuse position or information they gain as a responsible person
- to disclose actual or potential conflicts of interest
- to ensure that the financial affairs of the charity are managed responsibly, and
- not to allow the charity to operate while it is insolvent

The duties in the governance standards relate to 'responsible persons' of registered charities, which includes board members.



More information

You can:

- check if your LALC is a registered charity by searching the [ACNC charity register](#), and
- find more information about the governance standards on the [ACNC website](#)



What can happen if you don't follow your legal duties?

Legal action against board members is rare. Don't let fears of legal action stop you from being an active, involved board member, or from enjoying your important role in governing your LALC.



Tip

Follow the guidance in this toolkit to meet your legal duties under the ALR Act and model code of conduct.

Good governance processes are the safest, cheapest and most effective protection against any legal action. They are also the best way to protect the reputation of your LALC.

Legal and disciplinary action can be taken against board members who do not follow their legal duties.

Legal or disciplinary action in response to a breach of legal duties under the ALR Act, ALR Regulations, the code of conduct, common law or other legislation could possibly be taken by:

- a regulator (for example, Registrar of the ALR Act, the ACNC)
- someone the LALC owes money to (for example, a creditor in the case of insolvent trading)
- someone appointed to look into the finances of a LALC that is in severe financial trouble (for example, an administrator)
- the board of a LALC (for example, against a current or former LALC board member), or
- members of a LALC (for example, as a group, not individually)

A breach of the ALR Act, ALR Regulations or the code of conduct by a LALC board member constitutes misconduct under the ALR Act and may result in disciplinary action, which could include any of the following:

- formal censure, reprimand or counsel
- recommendation to dismiss the member of staff
- recommendation to take other action against the officer or member of staff
- in case of an officer, suspension or disqualification from office
- a direction to comply
- an order for the payment of a fine of up to \$11,000, or
- an order to pay back a LALC for loss incurred by the LALC



Remember

The legal duties discussed in this toolkit represent best practice in governance.

A LALC that has an honest, diligent and compliant board will be more likely to be financially stable, and enjoy the support of its members and the community. In contrast, a LALC that has a disorganised, careless, irresponsible board is more likely to end up with internal disputes, financial difficulties and lose standing in the community.

While legal and disciplinary actions may be rare, they are possible. Fulfilling your legal duties is not difficult and protects your LALC's reputation – so why risk it?



What legal protections are available to LALC board members?

Section 242 of the ALR Act protects LALC board members (and others) from being found personally legally responsible for their actions (or inactions), provided their actions (or inactions) were done 'in good faith' for the purpose of executing the ALR Act or any other Act.



In good faith

The phrase 'in good faith' generally means that you must act honestly, fairly and loyally when making decisions for your LALC.

For further information on acting in good faith, see our fact sheet **Part 2: The duty to act in good faith and for a proper purpose** in this toolkit.



More information

Justice Connect's LALC Service provides free legal information, training and advice to LALCs. To find out more visit [our website](#) or [contact the LALC Service](#).