

Part 4

The duty not to misuse information and position

This fact sheet covers:

- ▶ What is the duty not to misuse information and position?
- ▶ Where can you find this duty in the *Aboriginal Land Rights Act 1983* (NSW) and model code of conduct?
- ▶ What are some tips to help you meet this duty in your role as a LALC board member?

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



Summary

In this fact sheet, we discuss the duty not to misuse information and your position, and explain how to meet this duty in your role as a LALC board member.

What is the duty not to misuse information and position?

As a current or former board member, you must not make improper or inappropriate use of:

- your position as a board member, or
- information you obtain through your position as a board member

to either:

- gain an advantage for yourself or any other person or organisation, or
- cause detriment (ie. harm or disadvantage) to the LALC.

This duty captures the idea that a board member must be loyal to the LALC they serve on the board of. This duty is ongoing – this means that it applies to you while you serve on the board, and continues to apply after you stop being a board member (ie. it also applies to former board members).

When determining whether a board member has breached this duty, the board member's state of mind is irrelevant. A board member's conduct may be considered 'improper or inappropriate' even if the board member believed they were acting properly and appropriately.



Misuse of your position

As a board member you must not improperly use your position on a board. Where you or someone close to you benefits from misuse of your position, this will often also constitute a conflict of interest (for more information, see our fact sheet **Part 5: The duty to disclose and manage conflicts of interest** in this toolkit).

However, even where you or those close to you don't benefit, if improper use of your position causes harm to the LALC, you will have breached this duty.



Examples – misuse of position

The following actions may breach the duty not to misuse position:

- **Accepting 'kick-backs'** – for example accepting free dinners from a business that is tendering for work for your LALC
- **Using your position to 'pull strings' in the LALC** – for example to get a friend's son moved up the waiting list for housing, or to get your daughter a job at the LALC
- **Using your position to intimidate** members, volunteers, employees or other stakeholders in the LALC
- **Making unauthorised public comments** or representing that you speak on behalf of the board, when you have not been authorised to do so

Misuse of information

As a board member, you must also avoid improperly using any information obtained because of your position (for example, information obtained at board meetings or information given to you in your role as board member) to gain a personal advantage or an advantage for another, or to cause detriment to the LALC. A board can breach this duty if the purpose of their action was to cause a detriment, even if the detriment did not happen.



Tip

While the LALC network often works in a very collaborative way, and people who work in it are often close friends and sometimes family members, don't mistake this culture to mean that information can be shared with everyone.

An essential aspect of this duty is that board members do not reveal information which is discussed by the board in confidence – such as client or member details, commercially sensitive plans and information, employee or salary issues etc. While most board decisions can and should be conveyed to members of the LALC where appropriate, there are some discussions that need to remain confidential.

Information is generally considered to be confidential if:

- it is not in the public domain, (including financial or accounting details, unofficial communications, strategic or marketing plans) or the LALC has agreed to keep it confidential
- disclosure of the information could be detrimental to your LALC or advantageous to others
- within the LALC industry, the information would usually be considered confidential or worthy of protection



Tip

If you are ever in doubt about whether information can be disclosed, you should be open and transparent with the other board members, and consider what is best for the LALC.

People who sit on more than one board must be very aware of this duty. You should not reveal information that comes to you in your capacity as a board member of the relevant organisation, with people outside of that organisation. You cannot ignore your primary obligation to the LALC you have been elected to, even if you think the other organisation you are on the board of would benefit from that information. You can only share information outside your LALC board when you are authorised to do so by the rest of the board, and where it does not cause any detriment to the LALC.



Examples – misuse of information

The following actions may breach the duty not to misuse information:

- **Providing details of your board's discussions** – for example, sharing information about an upcoming tender for a government project to another organisation you are involved in
- **Telling someone that the LALC is struggling financially** – without the authorisation of the board to do so, might cause detriment to the LALC and constitute a breach of this duty
- **Disclosing confidential information to people outside the LALC** – such as client lists, employee information, details of contracts, financial information and legal advice

Examples of how this duty works

Examples of situations that involve the duty not to misuse information and position are below.



Example – the board member and the tip-off

Over a series of board meetings, your board has been discussing a plan to expand its services.

The local government council has a building that it has publicly advertised for lease. Your board has been working to put together a proposal for the local government council to consider. Your LALC is looking to secure the lease and, with some additional funding, open a new community welfare service in the building.

Your friend works for another not-for-profit local welfare service. She tells you that her organisation is thinking of expanding and asks you whether you are aware of any suitable premises that are currently available for lease. Should you tell her about the council building up for lease?

The legal duty

You have a duty not to misuse information gained through your position as a board member. If the local government council has publicly advertised the building for lease, this information is 'in the public domain' (ie. publicly available) and therefore not confidential information.

However, you have a duty to keep discussions of board meetings confidential. You should not tell your friend about your board's plans to lease the building, how much they are offering to pay the local government council, or their proposal for a new service. This is confidential information and disclosing it might cause a detriment to your LALC (for example, your friend's organisation might use the information to put up a more competitive proposal). To do so would be a breach of the duty to not to misuse information and your position.



Example – the board member and the annoying local

You really don't like Geoff Smith. His football team beat yours twice this season and he has been a real show off about it. There is also a rumour going around town that Geoff has ripped off a mate by selling him a dodgy piece of machinery and is boasting to everyone about it. This also makes you really annoyed.

You happen to be on the board of the LALC that Geoff works for.

At the pub on the weekend you hear him bragging about himself. You are just sick of it! You tell him – at first kind of jokingly but later more aggressively – that if he doesn't be quiet and 'pull his head in a bit' you will arrange to have him sacked. You mention how close you are to the CEO and how influential you are on the board.

When Geoff looks scared and suggests that you couldn't do that, you retaliate by threatening 'just one phone call and I can make sure you are out the door tomorrow'.

The legal duty

You must not use your position as a board member for an improper purpose.

In this situation, your actions are potentially in breach of this duty. You have used your position as a board member to intimidate an employee of the LALC for your own personal reasons. If it can be proved that you have done so for your own benefit, or your actions have caused detriment to the LALC, you may have breached this duty.



Example – the chatty board member at a BBQ

At a BBQ you tell people sitting around the table that, after 6 years of service on the board, you have just retired as the Chairperson of a LALC that runs anger management programs. A number of people are interested in your work on the board and ask you questions about the LALC and its programs. You get slightly carried away and start to tell a few of the 'personal stories' that you learnt about in the time you were on the board.

You think of telling them about a local sporting personality who has recently sought services from the anger management program.

The legal duty

As a current or former board member, you have a duty not to make improper use of information you have gained in your position on the board.

The fact that a person has sought anger management services is confidential information. If you were to reveal this information it would be a breach of your duty. You might also be in breach of privacy laws.

The fact that you have not made any personal financial gain out of the disclosure (for example, you told the story at a BBQ, not sold it to the media) is not a relevant defence. The revelation would cause detriment to the LALC and its reputation and this would be enough to show a breach of this duty. As this duty applies to former board members, the fact that you have stood down from the board recently is no defence to a breach of this duty.



Example – the board member with a cafe business

You are on the board of a LALC that is looking to set up a business – a community supermarket. Your LALC is currently looking for a venue for the business.

One day the local real estate agent approaches you in the street and tells you about a well-placed premises which is becoming vacant and might be perfect for the community supermarket.

You know the premises well as it is one that you always thought would be the perfect place to open a franchise of the café business you own. You wonder whether you could not tell the board about the real estate opportunity, and instead put in an offer for the lease on behalf of your café business.

The legal duty

You have a duty not to misuse your position or information gained in your position.

This includes the duty not to divert an opportunity for your own personal gain. To do so might not only breach this duty, but also the duty to act in the best interests of the LALC. As such, you have a duty to inform your LALC's board of the real estate opportunity.

Where can you find this duty in the *Aboriginal Land Rights Act 1983 (NSW)* and model code of conduct?

The wording of this duty may not be exactly the same, but its elements can be found in [section 176 of the *Aboriginal Land Rights Act 1983 \(NSW\)* \(ALR Act\)](#) and in the [model code of conduct](#).



Requirements under section 176 of the ALR Act

[Section 176 of the ALR Act](#) sets out how every LALC board and staff member must act and behave. The duty to not to misuse information and position is reflected in the wording of this section by requiring board members to not use their position for personal advantage, or to the detriment of the LALC:

- (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 ALR Regulation](#) sets out in further detail how board members must act and behave.

The duty not to misuse information and position is reflected in the following clause of the model code of conduct:

- **Clause 8** states that 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 LALC.

Tips to help you meet this duty in your role as a LALC board member



Tips

- **Induct new board members** – explain how your board works and the expectations your LALC has about the use of information and position. Also, make them aware of their legal duties as board members (give them a copy of this toolkit and the LALC's code of conduct and rules).
- **Put a confidentiality agreement or policy in place** – consider whether all board members in your LALC should sign a confidentiality agreement or policy to reinforce this duty. This document could provide further details about what the LALC considers to be the improper use of a board member's position and information. It could also set out disciplinary or other actions that might be taken against board members for certain kinds of behaviour. Consider getting legal advice to assist with the drafting of the confidentiality agreement or policy.
- **Take extra care with personal or sensitive information** – make sure you take care with all board papers and minutes and any paperwork that contains personal information about people involved in the LALC or other sensitive information.
- **Avoid gossip** – don't get into conversations about board happenings and make sure you maintain the confidentiality of board discussions around sensitive matters (like employee performance management issues).
- **Use information for its authorised purpose only** – do not use any information through your position on the board in any way other than how it was intended you use it.



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](#).