

Part 5

The duty to disclose and manage conflicts of interest

This fact sheet covers:

- ▶ What is the duty to disclose and manage conflicts of interest?
- ▶ 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 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 to disclose and manage conflicts of interest, and explain how to meet this duty in your role as a LALC board member.

What is the duty to disclose and manage conflicts of interest?

A conflict of interest is not the same as a disagreement between board members.

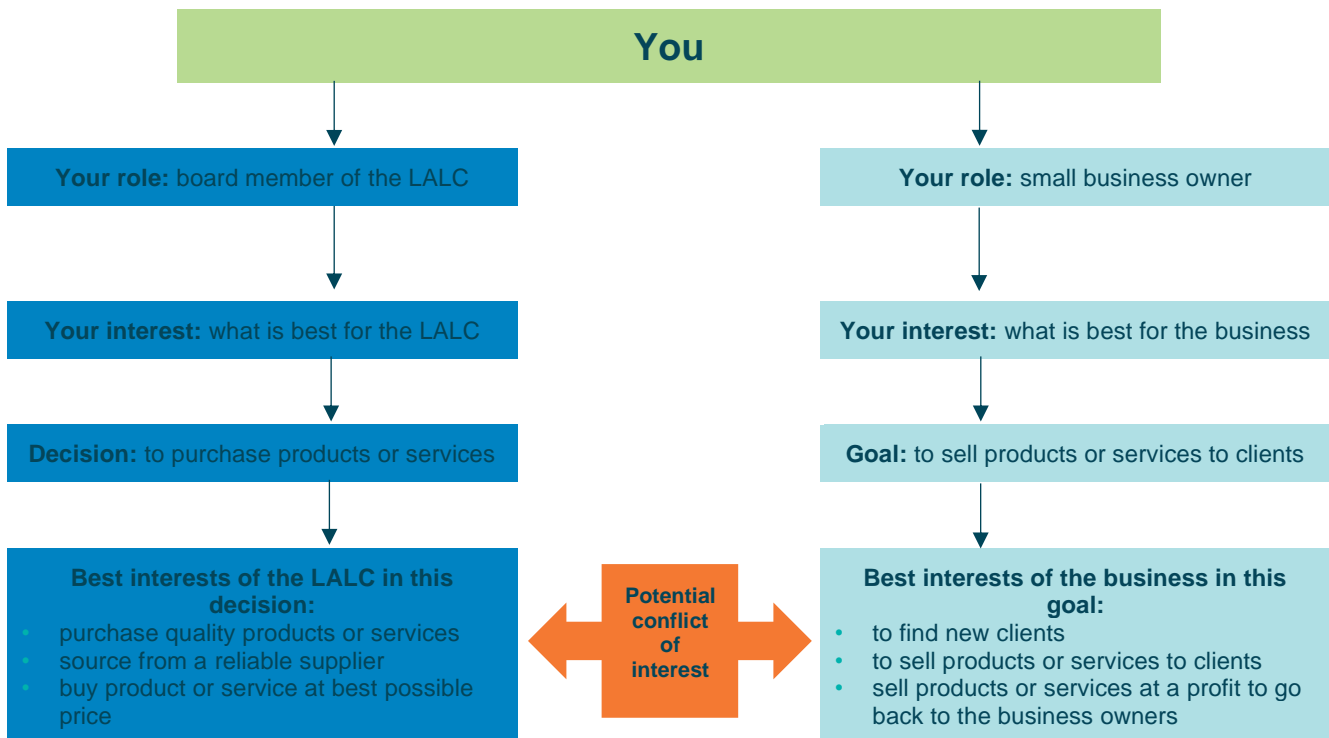
A conflict-of-interest situation arises when a person, who has a duty to act in the best interests of another person or organisation, is presented with the opportunity or potential to 'use' that position in some way for their own personal benefit. The term 'personal benefit' does not need to be your own benefit but may also arise from benefit passing to the interests of your family, friends, or other organisations you are involved with.

Conflicts of interest situations (explained in further detail below) often arise in LALCs. As a board member, you have a legal duty to disclose and manage conflicts of interest in a certain way.

What is a conflict of interest?

A wide range of conflict-of-interest situations can arise in LALCs. A common conflict of interest scenario arises when your LALC is looking to sign a contract with a business or consultant to supply it with certain products or services, and you or your family owns a business that supplies those products or services.

In this situation, your differing interests could be shown like this:



As shown in this diagram, the same person can have different roles and different interests, which could possibly conflict. While it may be possible that your business is a reliable supplier and offers the lowest price for the product in the region, because you stand to benefit personally from a decision, a conflict-of-interest situation arises.

The conflicting interest does not have to be a financial interest (which is also known as a 'pecuniary' interest) for a conflict situation to arise. If, as a board member, you could influence a decision that would in any way benefit you, a relative, a friend or an organisation you own, work for or are on the board of, then you are in a potential conflict of interest situation.



Example – conflict of interest situations

- Your board is in the process of hiring a new CEO and one of the applicants is a relative of yours.
- You are on the board of an LALC which is considering entering into a joint venture with a local property development company, and you are employed as a senior manager of that company.
- You are on the board of a LALC and the board of another local Aboriginal community organisation and both organisations regularly apply for the same grants, or submit bids for the same tenders or projects.
- You need to organise some building repairs to your LALC's stock of social housing and your cousin, who is a builder, has asked if he can do the work.
- Your board is making a decision about who to award a scholarship to, and one of the applicants is your godson.

Note – the existence of a conflict of interest is not usually, in and of itself, a problem.

Conflicts of interest are common. Inevitably there will be times when your duty to the LALC will come into conflict with your personal interests or other duties you have. This is especially so in small communities or sectors where everyone knows each other and people might have a number of different roles in the community.

Conflicts of interest, if managed appropriately, do not have to be a problem for your LALC.

The legal duty relates to how the conflict-of-interest situation is disclosed and managed.

Disclosing conflicts of interest

The legal duty about conflicts of interest requires board members to disclose to the board conflicts of interest that arise in relation to their role as a board member. You must disclose the conflict at the earliest possible opportunity, and when telling the board about the conflict (or potential conflict) you must be open and honest about the nature and extent of the interest, and how it relates to the affairs of the LALC.

The importance of full disclosure of direct (or even potential or perceived) conflicts of interest cannot be overstated. If you are unsure of whether something is a conflict, stay on the safe side and disclose it to your board. This way the board has a chance to deal with it in the proper way. LALCs rely heavily on their reputation in the community and outside perceptions that the LALC is operating professionally and legally are very important.

In certain situations, you do not have to disclose a conflict of interest. This is when you have an interest only because:

- you are one of many in a group of people for whose benefit the organisation is established, or
- you have an interest in common with all, or a substantial proportion, of the members of the organisation (for example, you will benefit if your LALC arranges a native tree planting program along the streets of your community but so will all members of the local community)



Tip – keep a register of interests

It's best practice to keep a standing register of interests. This is a document where board members record all of their relevant personal interests (for example, employment with other organisations, businesses they or their family own, other board positions etc.) when they join the board. The register of interests should be updated regularly. If you haven't noted an interest on the register, as soon as you become aware of an interest you should disclose it and add it to the register.

The Australian Charities and Not-for-profits Commission (**ACNC**) has a [template register of interests](#) in their [guide to managing conflicts of interest](#).

Managing conflicts of interest

Once you have disclosed a conflict at the earliest possible opportunity, your next step is to manage the conflict by not participating in the decision-making process about that issue.

We recommend the following best practice approach, which will ensure you comply with requirements under the [Aboriginal Land Rights Act 1983 \(NSW\) \(ALR Act\)](#), discussed in further detail below.

Checklist: dealing with conflicts of interest

A board member (or staff member) who has a personal interest in a matter that is being considered at a board meeting or member meeting:

- must disclose the nature of their interest to the meeting as soon as practicable
- must not be present at the meeting while the matter is being discussed
- must not vote or be present for a vote on the matter, and
- must ensure that the minutes of the meeting record the fact that a conflict was declared by them, the time they left and returned to the meeting, and the fact that they were not involved in the decision or vote

Major or repeated conflicts of interests

It may be the case that a conflict of interest is so far reaching, or occurs so often, that you may have to seriously consider whether it is possible for you to remain on the board. An example may be where you are on the board of a LALC and another organisation that are regularly competing for the same grants or projects. In such a case it may become too difficult for you to act in the best interests of both organisations. Also, if it gets to a stage where you have to step out of the room for many of the board's discussions, then the situation is probably unworkable and you may need to consider resigning from one of the boards.

Perceived conflicts of interest and the reputation of your LALC

Perception is a big issue with conflict of interests - reputation is extremely important for LALCs. It is important for a board member to avoid not only actual and potential conflicts of interest, but also the perception of a conflict of interest. This means that you should be aware of and consider how a situation may appear to someone from outside the LALC board.



Example – perceived conflict of interest

A perceived conflict is a conflict that does not necessarily exist, but it may appear to others like a conflict.

For example, Bob is on the board of a LALC. Bob's granddaughter, Leanne, is appointed as the new CEO of the LALC. While Leanne was appointed after a competitive recruitment process, and Bob was not on the selection panel or involved in any of the decisions about the recruitment, people on the outside might think that Leanne got the job because Bob is her grandfather.

Even if, as a board member, you might never even think of using your position to influence a particular situation for your own (or someone else's) benefit, because not everyone is present at your board meetings it might look to an outsider like you have done so.

As LALCs rely heavily on their reputation in the community and with their members, the need to deal with conflicts of interest in a transparent way is critical. If you are in a conflict-of-interest situation, the key thing to remember is to act with absolute transparency, and adopt a high degree of caution, to protect the interests of the LALC.



Note – requirements for registered charities

The ACNC governance standards, which apply to LALCs that are registered charities, require the responsible persons (including board members) of a charity to disclose any situation where they may appear to have a conflict between their duty to act in the best interests of the charity (ie. the LALC), and a personal or private interest.

In other words, under the ACNC governance standards, board members are required to disclose 'perceived conflicts', as well as actual conflicts of interest.



More information

The ACNC has published resources to assist with managing conflicts of interest, including a [guide to managing conflicts of interest](#) and a [template register of interests](#). While these resources are aimed at charities, they are useful for all boards.

For further examples of conflicts of interest policies, see the website of [the Centre for Philanthropy and Non-profit studies at QUT](#).

Examples of how this duty works

Examples of situations that involve the duty to disclose and manage conflicts of interest are below.



Example – the board decision to purchase office supplies

You are on the board of a small LALC that regularly needs office supplies and equipment. Previously, the LALC has purchased office supplies as needed from the local newsagency, but to become more efficient and cost-effective, the board is considering having a preferred supplier. As it happens, your partner Sally owns the town's only stationery supply company.

The legal duty

This situation is a potential conflict of interest. If your partner decides to bid to become the LALC's stationery supplier, and your LALC awards the business to her, you may receive a financial gain from this transaction (for example, you are likely to personally benefit from the profit of your partner's business). Therefore, a conflict-of-interest situation arises. In this scenario, you would also be deemed to have a pecuniary interest under the ALR Act because your partner owns the company that stands to obtain a financial benefit if the LALC becomes a customer.

However, this situation does not mean that your LALC must arrange to source office supplies from another out-of-town supplier, or that you have to resign from the board. Remember it is not the (actual or potential) conflict of interest that is the problem, so much as how it is disclosed and managed.

If you:

- tell the board that your partner Sally owns the stationary company (disclosing the conflict of interest)
- leave the room when the board discusses the stationary contract (managing the conflict of interest)
- do not vote on the decision and leave the room when the board are voting (managing the conflict of interest), and
- have the disclosure and the above process noted in the board's minutes,

then you will have acted appropriately and will not be in breach of this duty because the conflict of interest has been avoided.

The rest of the board may call for quotes and investigate and compare possible suppliers, and then make a decision without your input.

In the end, if your board is satisfied that Sally's bid is the best, the board could legally award the contract to Sally. Should anyone assert that Sally got the contract because she is your partner, you and the other board members can inform them of the proper process that was followed to disclose and manage your conflict of interest.



Example – the arts scholarship and your step-son

You are a board member of a LALC that promotes Aboriginal artists in your region. The board is meeting to discuss awarding three scholarships for talented artists to attend a very prestigious national arts school course. Peter, your step-son, is one of the candidates for the scholarship.

The legal duty

Peter is your step-son and therefore you have a conflict of interest as you are in a position where your actions could cause him to benefit. You must disclose and manage this conflict of interest. Even if, instead of being a step-son, Peter was a close friend of yours, you should still disclose and manage the conflict of interest.

Although the law does not state in detail how close the relationship needs to be for a conflict of interest to arise (the ALR Act does provide some guidance on this as detailed below), consider the perception in the local community if you are involved in a decision to award a large prize to your close friend. If in doubt about disclosing an interest, stay on the safe side and disclose it.



Example – the board member and the tenant

You work for a local law firm. You are also on the board of a LALC. At a board meeting the CEO tells the board that the LALC is facing legal action from a tenant who was recently evicted. The CEO is seeking a decision from the board on whether to defend the case or try to settle it. As the paperwork is circulated, you recognise some familiar letterhead and realise your employer law firm is representing the tenant.

The legal duty

The conflict of interest does not have to be about a financial interest and it also doesn't have to be an actual conflict of interest. You might not have even been aware that your employer (the law firm) was acting for the former tenant, but as soon as you find out, you are in a difficult position where a conflict of interest arises. Although it is unlikely that you will find out any details about the tenant's case when you are at work, there is a possibility that you may do so.

In a situation like this, think about the perceived conflict of interest and the effect of this if the tenant (or your employer) found out. In this situation it would be best to disclose the conflict straight away, leave the room for both the discussion and the vote, and have this recorded in the meeting minutes.

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 184 of the *Aboriginal Land Rights Act 1983 \(NSW\)* \(ALR Act\)](#) and in the [model code of conduct](#).

There are special requirements set out in the ALR Act for disclosing and managing 'pecuniary' interests (pecuniary is another way of saying monetary or financial).

Under [section 182 of the ALR Act](#) (detailed below), a pecuniary interest arises where you or someone else close to you (ie. a relative or business partner) stands to obtain a financial gain or loss in a matter.



What is a 'pecuniary' interest?

Section 182 of the ALR Act defines a pecuniary interest as:

'an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person, or another person with whom the person is associated'

Under section 183 of the ALR Act, you are deemed to have a pecuniary interest in a matter if:

- your spouse, de facto partner, relative, (business) partner or employer has a pecuniary interests in the matter, or
- you, your nominee, (business) partner or employer is a member of a company or other body (and has beneficial interests in shares of that company or body) that has a pecuniary interest in the matter



Requirements under section 184 of the ALR Act

Section 184 of the ALR Act sets out sets out how every board and staff member must disclose and manage 'pecuniary' interests:

- (1) *An officer or member of staff of an Aboriginal Land Council who has a pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.*
- (2) *Unless the Aboriginal Land Council determines otherwise, the officer or member of staff must not be present at, or in sight of, the meeting of the Aboriginal Land Council:*
 - (a) *at any time during which the matter is being considered or discussed by the Council, or*
 - (b) *at any time during which the Council is voting on any question in relation to the matter*

Section 185 of the ALR Act also requires that any disclosure made at a meeting of a LALC must be recorded in the minutes of the meeting.



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 to disclose and manage conflicts of interest is reflected in the following clause of the model code of conduct:

- **Clause 7** states that officers must not enter into any agreement or undertake any activity that may be in conflict with the interests of the LALC, or that would prejudice the performance of their duties.

If you have a pecuniary interest in a matter being discussed at a board or member meeting, you should follow the process set out in the checklist above to ensure that the interest is disclosed and managed in line with the requirements set out in the ALR Act.

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



Tips

- **Conflicts of interest are common** – remember that it is how you disclose and manage them that matters.
- **Stay alert to possible conflicts of interest** – advise your LALC of any actual, potential or perceived conflicts of interest as soon as you become aware of them. Create and foster a culture within your LALC's board where it is normal practice for board members to disclose and manage potential, perceived and actual conflicts of interest.
- **When making a decision as a board member, ask yourself** – 'Am I making this decision based only on what will lead to the best outcome for the LALC?'. If the answer is that you are also considering whether the decision would lead to a favourable outcome for you (or a relative, close friend or another organisation or person), then there is a good chance you might have a conflict of interest in the matter that you need to disclose and manage.
- **Check meeting agendas for discussions that might raise conflicts** – it is good practice at the beginning of a board meeting to check the agenda and declare any private interests which you may have in any items for discussion. You should declare it before any discussion of the item itself occurs, or as soon as you realise the conflict arises.
- **Proceed with caution** – if in doubt about a possible conflict of interest, stay on the safe side and disclose it. It is very important to keep the trust of fellow board members, the LALC's members and the wider community. Remember, even perceived conflict of interests can damage a LALC's reputation.
- **Check your LALC's Rules, Code of Conduct and policies** – they might detail further requirements on how conflicts of interest should be disclosed and managed. Consider whether your LALC needs a specific policy on how it will deal with any conflicts which arise as a result of the work your LALC undertakes. A policy can help remind you of the legal process that the law requires you to take.
- **Have a standing register of interests** – to allow any actual or potential conflicts of interest to be identified more easily. The register should be regularly updated.



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](#).