# Legal duties of Local Aboriginal Land Council board members

## A guide

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# Part 1

## Introduction to your legal duties as a LALC board member

# Introduction to your legal duties as a LALC board member

### This part of the guide covers:

- Your role as a LALC board member
- Your legal duties as a LALC board member
- What can happen if you don't follow your legal duties
- The legal protections available to LALC board members

**This part of the guide provides information on the key legal duties of Local Aboriginal Land Council (LALC) board members.**

### Disclaimer

This guide 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 guide is written with LALC board members in mind, your LALC might find it useful to share the guide 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**)

The ALR Act and the ALR Regulations 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 is different from 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.

These responsibilities include:

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- 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.

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 a prescribed example code of conduct (**model code of conduct**) which LALC's **must** use to prepare their own code of conduct.

# Your legal duties under the ALR Act and code of conduct

The ALR Act includes 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 183 of the ALR Act sets out the general duties for an officer, member of staff, or an advisory committee and the way they should act and behave:

*(1) A person who is an officer or member of staff of an Aboriginal Land Council or an advisory committee must:*

*(a) act honestly, in good faith and in the best interests of the Aboriginal Land Council, and*

*(b) exercise a reasonable degree of care and diligence in carrying out in the person's functions under this or another Act, and*

*(c) act for a proper purpose in carrying out the person's functions under this or another Act, and*

*(d) not use the person's position for personal advantage.*

## 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:

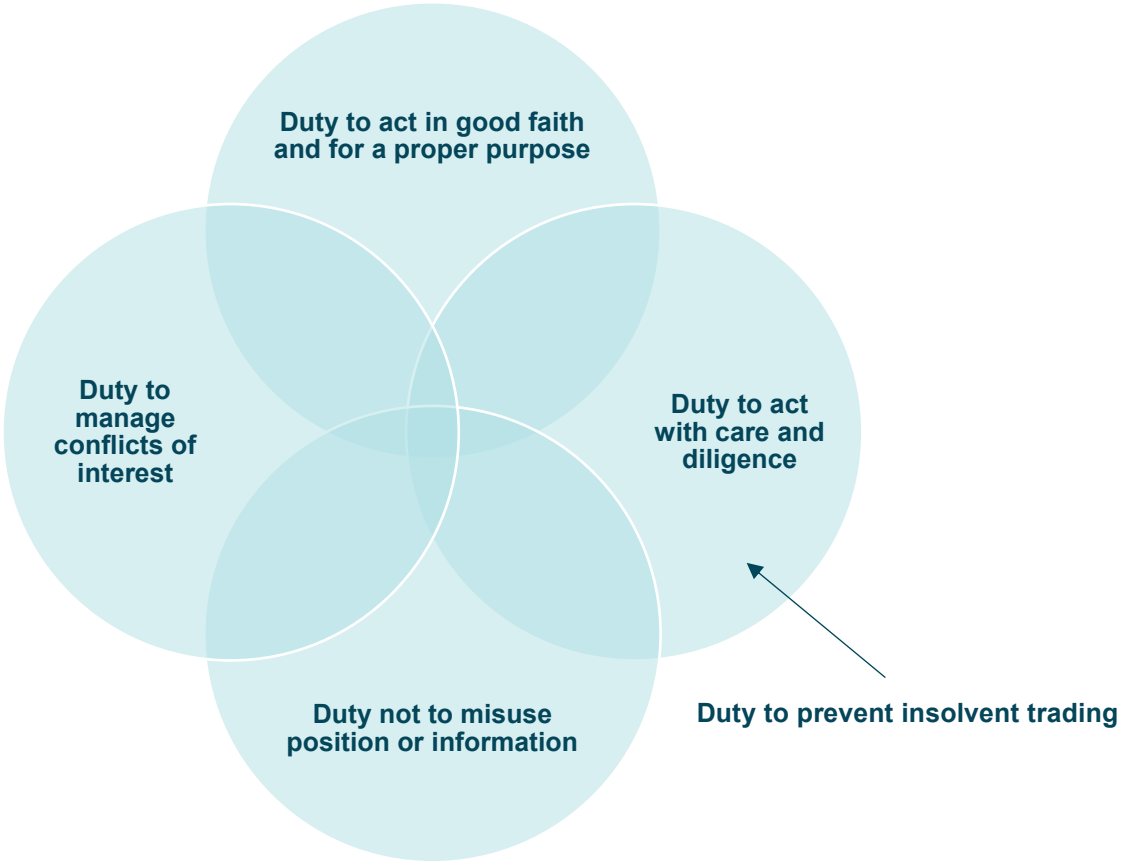
1. *The [name] Local Aboriginal Land Council requires its officers to observe the highest standards of conduct and ethical behaviour in all of their activities. By maintaining such standards, officers enhance their own standing as representatives of the Aboriginal community and increase the public confidence 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 and diligence (including the duty to prevent insolvent trading) |
| 3. | the duty not to improperly use 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 parts of this guide.

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:

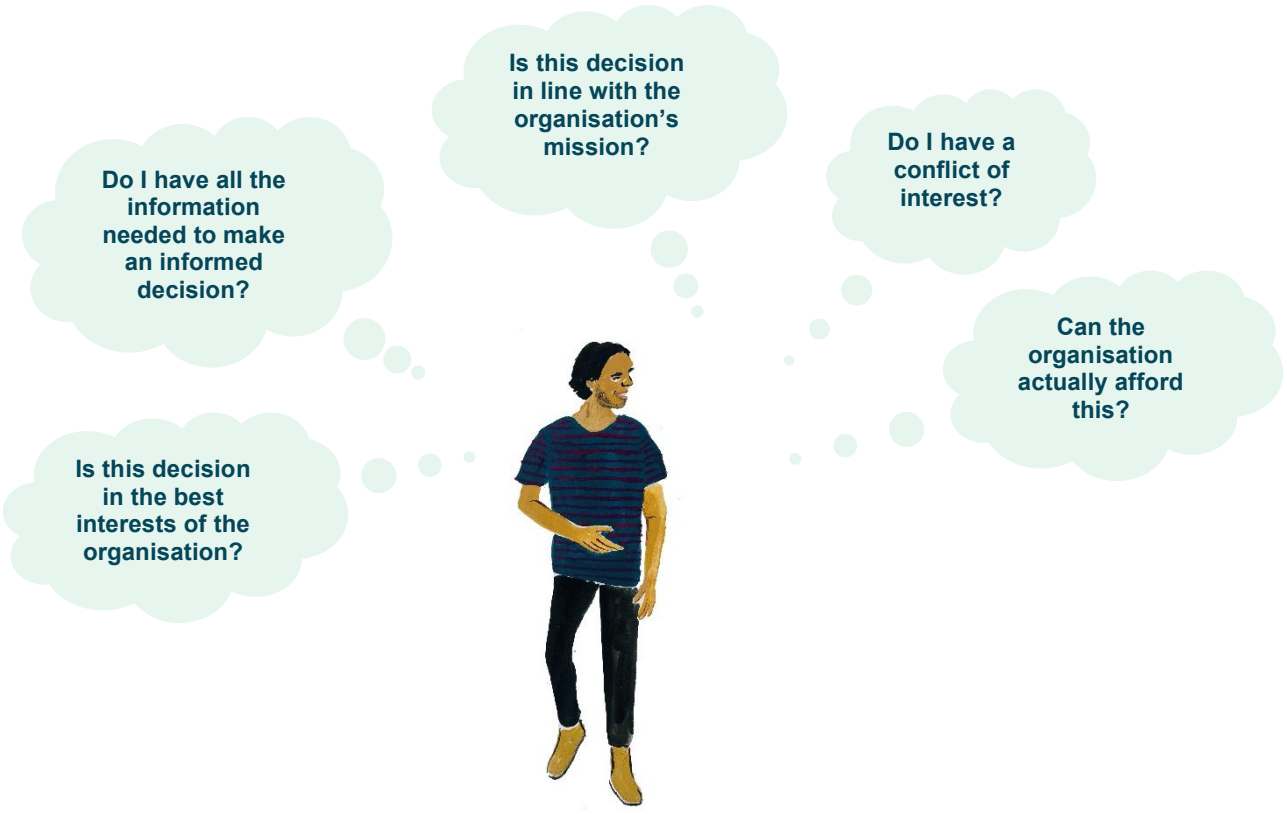



For example, failing to act for a proper purpose can also be a breach of the duty not to improperly use your position.

### 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 this guide explains 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:




# 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.

Under the *Work Health and Safety Act 2011* (NSW) (section 27(5)), **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, hazards, and risks 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.

# The legal duties of a board member of a registered charity

## Governance standards

Board members of LALCs that are registered charities under the ACNC Act must 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 People) 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 perceived 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 people' of registered charities, which includes board members.

- Check if your LALC is a registered charity by searching the ACNC charity register
- 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 resource 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 investigate 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 guide 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 **part 2 of this guide: The duty to act in good faith and for a proper purpose**.

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See the Australian Indigenous Governance Institute's (**AIGI**) Indigenous Governance Toolkit, an online resource to help Indigenous organisations, communities, nations and individuals build, strengthen and evaluate their governance.

# Part 2

## The duty to act in good faith and for proper purpose

# The duty to act in good faith and for proper purpose

### This part covers:

- What the duty to act in good faith and for a proper purpose is
- Where you can find this duty in the *Aboriginal Land Rights Act 1983* (NSW) and model code of conduct
- Tips to help you meet this duty in your role as a LALC board member

**In this part of the guide we discuss the duty to act in good faith and for proper purpose and explain how to meet this duty in your role as a LALC board member.**

## What is the duty to act in good faith and for proper purpose?

The duty to act in good faith and for proper purpose is a two-part duty which includes:

1. the duty to act 'in good faith' in the best interests of the LALC, **and**
2. the duty to act for a proper purpose and within the powers given to the board

## What does acting in good faith in the best interests of the LALC mean?

### In good faith

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

If you act dishonestly or if you disregard the legitimate interest of the LALC, you could be acting in bad faith.

As a board member, it's important that your decisions are made based on what is best for your LALC. To do this, you should consider the objectives of the LALC under section 51 of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) (see below) and the interests of its membership as a whole, as well as its finances and operations.

You should not be making decisions based on your own personal interests, preferences or alliances - or those of particular members of the LALC, other people or organisations you are involved in.

As a board member it's important that you do not allow a particular member, another person or organisation (including any people or groups that voted for you to be on the board) to dictate how you should vote at board meetings.

### Objectives of LALCs under the ALR Act

Section 51 of the ALR Act sets out the objects of each LALC:

> *The objects of each Local Aboriginal Land Council are*
>
> *(a) to improve, protect and foster the best interests of Aboriginal persons within the Council's area and other persons who are members of the Council, and*
>
> *(b) to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within the Council's area.*

## What does acting for a proper purpose mean?

As a board member you must make decisions that help the LALC to achieve its objectives (or purposes) under the ALR Act - to improve, protect and foster the best interest of all Aboriginal people within the LALC's area and members of the LALC.

To be able to ensure you are making decisions for a proper purpose, you should make sure you are familiar with the objectives of your LALC under the ALR Act and those set out in your LALC's Community Land and Business Plan (**CLBP**), so you can make decisions which guide your LALC towards achieving these objectives.

### Note – requirements for registered charities

The duties of board members of LALCs are similar and inclusive of those duties of responsible people as set out in the ACNC governance standards (and reflective of the fiduciary duties found at common law). The ACNC governance standards apply to LALCs that are registered charities.

ACNC governance standard 5 requires the responsible people (including board members) of a charity to act honestly and fairly in the best interests of the charity and for its charitable purposes.

### Examples of how this duty works

Examples of situations that involve the duty to act in good faith and for proper purpose are below.

### Example – Who comes first – family or the LALC?

You are on the board of a LALC which offers services to community members.

Your LALC has employed your cousin as a service manager for a number of years. Unfortunately, the organisation has received major funding cuts and must close some of its services.

After taking a hard look at the finances, it seems that closing the service managed by your cousin is the best option to keep the LALC out of financial trouble. You are obviously personally extremely disappointed with this news.

**The legal duty**

As a board member you may be called on to make difficult decisions and sometimes these decisions may negatively impact on your personal situation (for example, as a relative of a LALC employee).

While you may ask questions, and seek further information about other options the LALC could take to manage the funding cuts, ultimately your legal duty is to make a decision in the best interests of the LALC's future – not in your or your cousin's personal interests.

### Example – the board member and the loud, young LALC members

You are a board member of a LALC which aims to engage youth in the community in LALC activities and membership.

Recently, a group of young adults became members of the LALC and have attended some of the LALC's community activities and meetings held outside working hours.

While many in the LALC are excited to have younger members of the community interested in taking an active role in the LALC, you and a few members have found the group to be quite loud and annoying, and at times even pushy.

You know that most of the trouble makers work full time, so if you can come up an excuse to convince the rest of the LALC board to move the LALC's activities and meetings to working hours only, then you probably wouldn't have to put up with the group much anymore.

**The legal duty**

As a board member, your duty is to act in the best interests of your LALC (and all the LALC's membership and all Aboriginal people living within the LALC's area), not your own personal preferences, or in a way that disadvantages one group of the LALC's membership.

To continue with your plan of trying to convince the board to move meetings and activities to working hours, for a made-up reason, may be a breach of your duty to act in good faith and for a proper purpose.

# Where can you find this duty in the ALR Act and model code of conduct?

The wording of this duty may not be exactly the same, but its elements can be found in section 183 of the ALR Act and in the model code of conduct.

### Requirements under section 183 of the ALR Act

Section 183 of the ALR Act sets out how every board, advisory committee and staff member must act and behave.

The duty to act in good faith and for proper purpose is reflected in the wording of this section by requiring board and advisory committee members to act honestly, and for a proper purpose:

> *(1) A person who is an officer or member of staff of an Aboriginal Land Council or an advisory committee must:*
>
> *(a) act honestly, in good faith and in the best interests of the Aboriginal Land Council, and*
>
> *(b) exercise a reasonable degree of care and diligence in carrying out the person's functions under this or another Act, and*
>
> *(c) act for a proper purpose in carrying out the person's functions under this or another Act, and*
>
> *(d) not use the person's position for personal advantage.*

## 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 act in good faith and for proper purpose is reflected in the following clauses of the model code of conduct:

- **Clause 5** requires officers of the LALC to exercise complete probity, honesty and diligence in carrying out their duties and responsibilities, and
- **Clause 6** requires officers to at all times safeguard the interests of the LALC and its members, as long as they are not knowingly part of any illegal or unethical activity

## Note

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.

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

## Tips

- **Read and understand your LALC's objectives** - Make sure you understand the objectives your LALC is aiming to achieve. It is a good idea to have a copy of the CLBP and the ALR Act at all board meetings to check that your decisions are in line with your LALC's CLBP and the objectives and functions of all LALCs under the ALR Act.
- **Don't let personal interests affect your decisions** - When making decisions, ask yourself 'Am I deciding this issue based on what is in the best interests of the current and future operation of the LALC – or am I deciding this based on my own personal interests or in the interest of a select group of members or other people that I favour?'
- **Don't let others dictate how you vote at board meetings** - If a particular group of members voted for your election to the board, remember that once you are on a board your duty is to act in the best interests of the LALC, and not those who voted for you. This does not prevent you from advising the board about the views of members or certain groups.
- **Apply the 'how will it look later' test** – If someone were to analyse your decision later, would they think 'This was the decision of a reasonable, honest person who, with the knowledge they had at the time, was trying to act in the best interests of the LALC'? Or could they possibly conclude that the decision was irrational, partial, and dishonest or made for with some other motive in mind?
- **Beware of conflicts of interest** - There is a close link between the duty to act in the good faith and for proper purpose and another legal duty - the duty to disclose and manage conflicts of interest. Consider whether some conflict of interest is involved in making a decision and whether action needs to be taken to disclose and manage an actual, potential or perceived conflict of interest – see **part 5 of this guide: The duty to disclose and manage conflicts of interest for further information on this duty**

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# Part 3

## The duty to act with reasonable care and diligence

# The duty to act with reasonable care and diligence

### This part covers:

- What the duty to act with reasonable care and diligence is
- Why taking care of the LALC's financial position (and preventing insolvent trading) is an important part of this duty
- Where you can find this duty in the *Aboriginal Land Rights Act 1983* (NSW) and model code of conduct
- Tips to help you meet this duty in your role as a LALC board member

**In this part of the guide, we discuss the duty to act with reasonable care and diligence and explain how to meet this duty in your role as a LALC board member.**

## What is the duty to act with reasonable care and diligence?

This duty requires you to, at all times:

- take your role as a board member seriously
- use any skills and experience you have for the benefit of the LALC
- give sufficient time, thought and energy to any tasks you undertake and to decisions you are required to make, and
- monitor the affairs, activities, strategic direction and financial position of the LALC

This duty is particularly important when it comes to the financial affairs of the LALC.

The duty requires you to:

- understand the LALC's current financial position at all times, and
- prevent the LALC from continuing to take on debts if you know, ought to know or suspect that the LALC can't meet its current debts when they fall due (the 'duty to prevent insolvent trading')

## How should you use your skills and knowledge in your role as a board member?

You don't need to have any particular skills or qualifications to be a board member. However, you do need to use whatever skills and experience you have for the benefit of the LALC and put reasonable effort into tasks you take on as a board member.

### Example – using your skills

- If you are a nurse on the board of a LALC, you do not need to use your nursing skills to provide medical services to members – but you do need to use your knowledge to help the board make good decisions about health service provision in the community.
- If you are a builder on the board of a LALC, you do not need to be out fixing all the LALC's properties – but you should advise the board on any basic issues on maintaining safe building standards.

If your board does not have the required skills on a particular matter, the duty of care and diligence means you need to ask for help from someone who does have the relevant skills and expertise.

### Example – getting expert advice

- Your board may need to ask an accountant or auditor to help the board understand a complex financial transaction (such as a land development deal).
- Your board may need to consult a building surveyor to advise the board on whether the structure of a property is safe for occupants.
- Your board may need to ask a lawyer to review a contract for a property lease transaction.

## What actions should you take to meet this duty?

As a board member, you must take your responsibilities seriously and put the required effort into the tasks you take on. Board members who are acting diligently will be well prepared for meetings, and will make sure they are properly informed about their LALC's operations and activities by:

- being familiar with your LALC's Community Land and Business Plan (**CLBP**), Rules and Code of Conduct
- reading board papers before board meetings
- reviewing board papers and minutes for meetings you were unable to attend, and
- following up on tasks from previous meetings you have agreed to do

You must understand the issues the board is making decisions on – you can't just rely on the opinions of others on the board and become a 'rubber stamp'. All board members have a duty to make inquiries and satisfy themselves that the LALC is being run well and is operating in a safe and efficient manner.

## How does this duty apply to the decisions a board makes?

The duty of reasonable care doesn't mean that all the decisions your board makes have to be perfect. 'Reasonable' in this sense means the degree of care and diligence that a reasonable person in a like position in a LALC would exercise in the same circumstances.

Sometimes, even though a board has thoroughly researched, discussed and come to a decision on a matter (for example, approved a contract for a developer to build properties on LALC land), the outcome does not turn out as the board had hoped (for example, the project stalls due to unforeseen environmental issues).

The law recognises that often boards must make difficult operational decisions, and that no one has the ability to accurately predict the future. Just because a decision turns out not to have been beneficial for the LALC, does not mean the LALC's board members have breached their duty to act with reasonable care in making the decision. A decision about a matter will be considered to be made with reasonable care if the board can show that:

- the decision was made in good faith (ie. honestly) and for a proper purpose
- there was no conflict of interest affecting the decision
- they informed themselves about the subject matter to an appropriate extent, and
- they rationally believe that the decision was in the best interests of the LALC

This is known as the 'business judgment rule'.

### Remember

Taking calculated risks that might not work out is OK – but making reckless, ill-informed decisions without thinking about the consequences could be a breach of this duty.

## Examples of how this duty works

Examples of situations that involve the duty to act reasonable care and diligence are below.

### Example – the proud but busy board member

You were delighted when your LALC's members elected you to the board. It's a LALC with a strong reputation in the network, and you are proud to be involved in governing the organisation.

You eagerly attended your first few monthly board meetings. Since then, however, things have become busy in your work and family life and you are finding it hard to attend regular meetings. You turn up when you can, but even then you have rarely had time to look at the board minutes and paperwork. You console yourself by thinking 'Oh well, I'm just a volunteer' and occasionally say to yourself 'They are lucky to even have someone with my business experience on the board anyway'. Also, you feel that the Chairperson is a smart woman so the decisions the board are making in your absence are probably fine.

**The legal duty**

If you accept a position as a board member (even if reluctantly!) you have a legal duty to exercise reasonable care and diligence in governing the LALC.

Not being able to attend an occasional board meeting is OK, but failing to attend regular meetings, without approved leave of absence, and failing to pay attention to the 'goings-on' of the board and the LALC, could be indicators of a breach of this duty.

If anything goes wrong in the LALC (for example, it gets into financial trouble and starts to trade while insolvent, or someone starts to defraud the finances) you could be legally responsible. It will not be a defence to say, 'I wasn't at the meeting when they made that decision' or 'I'm just a volunteer'.

If you can no longer commit to giving the board and your role the time required, you should carefully consider whether you should remain on the board.

### Example – the worried board member and an inaccurate media release

You are on the board of a LALC involved in a dispute with a local government council that is getting lots of media attention.

At a board meeting, the CEO hands around a number of papers, including a media release about the dispute for the board's approval. You are not quite sure if the media release is accurate and you are concerned that some of the statements in the media release are not backed by fact or possibly are an exaggeration. However, there is a lot of business to get through at the meeting and you decide not to speak up and make an issue of it.

**The legal duty**
As a board member you have a duty to make proper inquiries when you are unsure about something.

Don't rely on others, especially when you have a feeling something is wrong, or you need more information to satisfy yourself of the right decision to make. The media release could contain inaccurate or untrue statements and could leave your LALC open to complaints, damage to its reputation or even legal action. Your duty is to ask probing questions, and guide and protect the LALC and its reputation.

## Why is taking care of the LALC's financial position (and preventing insolvent trading) an important part of this duty?

A key aspect of the duty of reasonable care and diligence is your legal responsibility to understand the finances of the LALC and exercise overall control over its financial affairs. Board members are accountable for a LALC's solvency (which means the LALC's ability to pay its debts when they are due).

### Note

You need to understand your LALC's current financial position so you can make informed decisions about whether the LALC can responsibly enter new transactions, contracts or take on other financial commitments or debts.

It's unacceptable to think 'Oh I don't have to think about the dollars, that is the CEO and Chairperson's job!'– **all board members have a duty to properly inform themselves about the LALC's financial position and take part in financial decisions**.

While this duty applies to all board members, the actions required to comply with the duty will be affected by your LALC's financial size.

If you are on the board of a small LALC that has limited funding and assets and spends very little money from month-to-month, the financial reports will probably not be very complicated and you should be able to understand your LALC's financial position.

Alternatively, if you are on the board of a large, well-funded LALC which owns many properties, runs a number of community services and has a number of employees and a large annual turnover, your responsibility to understand the finances is going to be correspondingly larger and may therefore require more of your time and attention.

An important aspect of the duty to use reasonable care when dealing with the finances of the LALC is the requirement to prevent insolvent trading. While the term 'trading' is a business term that does not necessarily fit well into the LALC environment, the duty still applies to LALCs. **Read the box below carefully so you understand this duty.**

## Caution – the duty to prevent insolvent trading

As a board member, your key duty regarding the finances of your LALC is to make sure it's solvent – that is, that it's able to pay its debts when they are due.

You must not allow your LALC to continue to take on further debts if you know or reasonably suspect that the LALC can't pay its current debts when they are due, or will be unable to do so if it takes on the further debt.

Many LALCs operate on a very tight budget and sometimes sail 'close to the line' in terms of their finances. For example, income may fluctuate from year to year, or a funding stream that your LALC relies heavily on may be cut without much notice. These circumstances make it very difficult to gauge a LALC's true financial position at any point in time.

Occasionally LALCs get into financial trouble. As a board member, it can be very difficult to distinguish between a temporary lack of cash flow and a dire financial situation. (For more information on this topic, see our fact sheet on insolvency and your organisation).

Some of the potential warning signs or indicators of insolvency may include, but are not limited to:

- continuing losses over successive financial reporting periods
- overdue tax debts, for example 'pay-as-you-go' (PAYG) instalments, GST, and superannuation guarantee contributions
- increasing levels of bad or doubtful debts, the collapse of a significant creditor or withdrawal of a major source of funding
- inability to borrow funds or get loan approvals
- cheques issued by the LALC being returned dishonoured, cheques being issued post-dated (that is, dated after the date on which they are actually written), or not being sent out on time
- delays in paying suppliers resulting in stricter credit terms or suppliers insisting on 'cash on delivery'
- payment to creditors outside trading terms
- payment to creditors of rounded sums which are not reconcilable to specific invoices
- legal proceedings being initiated or threatened by creditors, including the Australian Taxation Office or court decisions being made against the LALC, and
- inability to produce timely and accurate information on the organisation's financial performance and position

If your LALC has any of the above indicators of insolvency, your legal duty is to:

- **Take action immediately** – do not do nothing and hope for the best.
- **Inform yourself of the LALC's financial situation** – stay informed about the financial affairs of the LALC, and regularly assess the LALC's solvency. Investigate and fully understand the financial difficulties your LALC is experiencing.
- **Seek professional advice** – ask an accountant, insolvency expert or auditor to look over your LALC's finances (again, do this as early as possible as a professional may be able to advise of immediate actions you can take to address the situation). Consider and act appropriately on any advice received in a timely manner.
- **Do not approve any further debts** – this includes not entering into transactions, contracts or arrangements requiring payment (for example, contracts for buying goods and services, hiring staff).
- **Agree as a board on a plan of action and implement it (based on professional advice)** - this may include making hard but necessary decisions, for example to close services, reduce staff hours or hold-off on projects. It may also include an agreement about at what point the board might need to seek advice on other options.

### Note – requirements for registered charities

The duties of board members of LALCs are similar and inclusive of those duties of responsible people as set out in the ACNC governance standards (and reflective of the fiduciary duties found at common law). The ACNC governance standards apply to LALCs that are registered charities.

ACNC governance standard 5 requires the responsible people (including board members) of a charity to act with reasonable care and diligence, to ensure that the financial affairs of the charity are managed responsibly, and not to allow the charity to operate while it is insolvent .

## Example of how this duty works

An example of a situation that involves the duty to prevent insolvent trading is below.

### Example – the board member and the urgent repairs

You are a board member for a LALC which employs 15 staff.

You had a fair understanding of the financial position of your LALC in July last year, when the board approved the yearly financial statements.

At that time, the CEO gave a detailed briefing to the board about the finances and you understood that, although the organisation had 'sailed pretty close to the wind' all year, at the end of the financial year the organisation managed to achieve a surplus of $20,000.

Eight months later, you attend a board meeting and the CEO tells you and the other board members that the LALC needs to enter into a contract to get substantial repairs done to two LALC properties at a cost of $50,000. The CEO tells you that the repairs are extremely urgent and asks the board to approve the signing of the repair contracts there and then, so the works can begin immediately.

You feel that if you asked any questions you would be seen to be holding up the process, and would frustrate the CEO and the Chairperson, who look stressed.

**The legal duty**

The legal duty to act with reasonable care and diligence includes a duty to monitor the financial situation of your LALC – and in particular a duty to not incur new debts if you know or suspect your LALC can't meet them when they are due.

The only way you can be sure not to breach this duty is to ensure you have a clear understanding of the LALC's current financial position. It is not sufficient to rely on your financial knowledge from eight months ago as it may no longer be reflective of LALC's current financial position.

The CEO may well be focussed on the day-to-day running of the LALC, and that's why it's your duty to look at the bigger picture. Ask for the financial information you need to confirm that the LALC can afford these renovations. Get professional advice if needed. Be satisfied that the LALC can meet all its debts – this is a duty of all board members, not just the Chairperson.

This situation might also require you to exercise your duty to use reasonable care and diligence to inquire about current health and safety issues arising out of the need for urgent maintenance works. Are the tenants safe in the properties? Does the LALC need to re-accommodate them while you work out the finances and arrange for the repairs? What are the risks currently posed by the repair work? What can be done to eliminate these risks while you work out a feasible plan to get the repair work done?

# Where can you find this duty in the ALR Act and model code of conduct?

The wording of this duty may not be exactly the same, but its elements can be found in section 183 of the *Aboriginal Land Rights Act 1983* (NSW) (**ALR Act**) and in the model code of conduct.

## Requirements under section 183 of the ALR Act

Section 183 of the ALR Act sets out the general duties for an officer, member of staff, or an advisory committee and the way they should act and behave:

*(1) A person who is an officer or member of staff of an Aboriginal Land Council or an advisory committee must:*

*(a) act honestly, in good faith and in the best interests of the Aboriginal Land Council, and*

*(b) exercise a reasonable degree of care and diligence in carrying out the person's functions under this or another Act, and*

*(c) act for a proper purpose in carrying out the person's functions under this or another Act, and*

*(d) not use the person's position for personal advantage.*

## Requirements under the model code of conduct

The model code of conduct for LALCs in Schedule 3 of the ALR Regulations sets out in further detail how board members must act and behave.

The duty to act with reasonable care and diligence is reflected in the following clause of the model code of conduct:

- **Clause 9** requires officers of the LALC to exercise due care and diligence in performing their duties and ensure that their knowledge, skills and technical competencies suffice to discharge their responsibilities.

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

## Tips

- **Prepare for and attend board meetings** - read the papers and financial statements before the meeting. If you regularly find you can't do this, consider whether you should continue to serve on the board, as you may risk breaching this duty.
- **Ask questions and speak up** - if you don't understand something or want further information, make sure you speak up. Ask questions and seek clarification about matters, discussions or proposed resolutions. Don't simply go along with the rest of the board if you disagree with their views or decision.
- **Take action** – make sure you follow up on things you said you would do between meetings. Adopt a culture of having 'action' items in your minutes and reviewing the status of actions items at the following meeting. Follow up immediately on any problems identified in the financial statements or audits. Make sure the board takes action if there is a concern about whether debts can be paid on time.
- **Make considered decisions** - when making a decision or taking action, ask yourself, 'Have I exercised the degree of care and thoroughness that a reasonable person in my position would give to this kind of decision or situation?' If you need more information to make your decision, speak up and make sure you get it. You don't need to make perfect decisions, but you do need to make thoughtful, considered ones.
- **Keep yourself informed** - know what events and activities are being undertaken by the LALC and ensure that proper care has been taken to protect the LALC and all those involved (for example, making sure health and safety matters have been addressed, checking that insurance is up to date).
- **Understand financial information** - make sure you are receiving clear information about the finances of your LALC. If they are presented in a format that you find confusing, ask that they be presented in a basic overview or simplified format. If you need to, get training in basic financial literacy so you can improve your understanding of the LALC's finances. If you don't receive any financial information at all, consider your position carefully. You could be at risk of breaching this duty – and ignorance is not a defence.
- **Proceed with caution** - take special care when committing to large contracts, spending funds of the LALC or borrowing funds for the LALC to use. Avoid undertaking activities that might place undue risks on the LALC's funds or assets.

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# Part 4

## The duty not to misuse information and position

# The duty not to misuse information or position

### This part covers:

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

**In this part of the guide, we discuss the duty not to misuse information or 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:

- 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 **part 5 of this guide: The duty to disclose and manage conflicts of interest**.

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

### Note – requirements for registered charities

The duties of board members of LALCs are similar and inclusive of those duties of responsible people as set out in the ACNC governance standards (and reflective of the fiduciary duties found at common law). The ACNC governance standards apply to LALCs that are registered charities.

ACNC governance standard 5 requires the responsible people (including board members) of a charity not to misuse their position or information they gain as a responsible person.

## 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 ALR Act and model code of conduct?

The wording of this duty may not be exactly the same, but its elements can be found in section 183 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 183 of the ALR Act sets out how every LALC board, advisory committee 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) A person who is an officer or member of staff of an Aboriginal Land Council or an advisory committee must:*
>
> *(a) act honestly, in good faith and in the best interests of the Aboriginal Land Council, and*
>
> *(b) exercise a reasonable degree of care and diligence in carrying out the person's functions under this or another Act, and*
>
> *(c) **act for a proper purpose in carrying out the person's functions under this or another Act**, and*
>
> *(d) **not use the person's position for personal advantage**.*

### 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 guide 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 to be used.

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# Part 5

## The duty to disclose and manage conflicts of interest

# The duty to disclose and manage conflicts of interest

### This part covers:

- What the duty to disclose and manage conflicts of interest is
- Where you can find this duty in the *Aboriginal Land Rights Act 1983* (NSW) and model code of conduct
- Tips to help you meet this duty in your role as a board member

**In this part of the guide, 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.

### What is a conflict of interest?

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.

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:**

In your role as **board member** of the LALC:

**Your interest is:** what is best for the LALC

**Best interests of the LALC in making the to purchase products or services are:**

- purchase quality products or services
- source from a reliable supplier
- buy product or service at best possible price

**Potential conflict of interest**

In your role as a **small business owner**:

**Your interest is:** what is best for the business

**Best interests of the business in the goal of sell products or services to clients are:**

- to find new clients
- to sell products or services to clients
- sell products or services at a profit to go back to the business owners

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 a 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.

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.

### Note

The existence of a conflict of interest is not usually, in and of itself, a problem.

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 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 any discussion or 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 people (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 ACNC governance standard 5, board members are required to disclose 'perceived conflicts', as well as actual conflicts of interest.

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.

## 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 ALR Act 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 184 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 184 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 185 of the ALR Act

Section 185 of the ALR Act sets out sets out how every board and staff member must disclose and manage 'pecuniary' interests:

*(1) A person who is an officer or member of staff of an Aboriginal Land Council must disclose the nature of a pecuniary interest in a matter if—*

(a) the Council is considering or discussing the matter, and

(b) the person is present at a meeting of the Council, or the Board of the Council, at which the matter is being considered or discussed.

*(2) The person must make the disclosure to the meeting as soon as practicable.*

*(3) The disclosure must be recorded in the minutes of the meeting.*

*(4) Unless the Aboriginal Land Council decides otherwise, the person must not be present at, or in sight of, the meeting of the Aboriginal Land Council—*

*(a) when the matter is being considered or discussed by the Council, or*

*(b) when the Council is voting on a question in relation to the matter.*

*(5) A person does not breach this section if the person did not know and could not reasonably be expected to have known that the matter considered or discussed was a matter in which the person had a pecuniary interest.*

**Note** – section 185 of the ALR Act 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.

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