

Managing conflicts of interest – a tip sheet for Local Aboriginal Land Councils

The NSW community expects public officials to perform their duties with honesty and in the best interests of the public. Equally, members of Local Aboriginal Land Councils, (LALCs), expect board members and staff to perform their duties honestly and in the best interests of the LALC.

Corrupt conduct by a public official involves a breach of public trust that can lead to inequity, wasted resources or funds, and reputational damage.

Managing conflicts of interest is an important way of protecting LALCs from corrupt conduct. When a person engages in corrupt conduct, it is frequently motivated by a conflict of interest.

Corrupt conduct

Corrupt conduct is defined in the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”). It occurs when a public official improperly uses, or tries to use, the knowledge, power or resources of their position for personal gain or the advantage of others.

All LALC board members and staff are “public officials” for the purposes of the ICAC Act.¹ Consequently, they are within the jurisdiction of the NSW Independent Commission Against Corruption (“the Commission”).

Corrupt conduct can take many forms.

Many corrupt conduct complaints the Commission receives about LALCs concern board members and staff improperly obtaining corrupt benefits for themselves, their relatives or friends. Examples of such conduct include a LALC:

- CEO using its bank tokens to withdraw money for their own benefit
- board member providing confidential information to a developer intending to confer an improper advantage
- board member dishonestly providing copies of interview questions to their daughter, who will be interviewed for the position of LALC CEO
- staff member using the LALC’s computer, telephone and car to conduct their own private business during the time they are being paid to do LALC work on its premises.

Corrupt conduct can also occur when a member of the public influences, or tries to influence, a public official to act corruptly. Examples of such conduct include:

- a developer offering money and other benefits to LALC members to vote for their proposed land dealing – even if the members reject these offers, the developer has engaged in corrupt conduct²
- a builder adding an extra \$5,000 to their invoice for maintenance work on LALC houses and telling the CEO they will split the difference if the CEO makes sure the invoice is approved by the board – even if the CEO rejects the offer, the builder has still acted corruptly.

¹ Under s 248 of the *Aboriginal Land Rights Act 1983*.

² If any members do accept the bribes, their conduct is also corrupt.

Finally, corrupt conduct can include any person engaging in certain activity specified in s 8(2A) of the ICAC Act where such conduct impairs, or could impair, public confidence in public administration. Examples of such conduct include:

- a person applying for employment at a LALC providing false information about their skills and experience
- adding fraudulent information as part of any application for a dealing approval certificate.

Corrupt conduct also must be serious. For a LALC board member or employee, it needs to be conduct that could constitute or involve:

- a criminal offence
- a disciplinary offence
- reasonable grounds for dismissal or termination of services.

What about negligence and mistakes?

Negligence and mistakes do not generally amount to corrupt conduct. However, they often provide opportunities for corrupt conduct to happen.

This can be seen in the example above about the CEO pressuring board members to approve a builder's invoice, which is based on a real Commission matter. Board members did not check the invoices they signed so they unknowingly helped people get a corrupt benefit.

Conflicts of interest

Unidentified and unmanaged conflicts of interest are often at the heart of corrupt conduct, so it is important to understand how they can be managed.

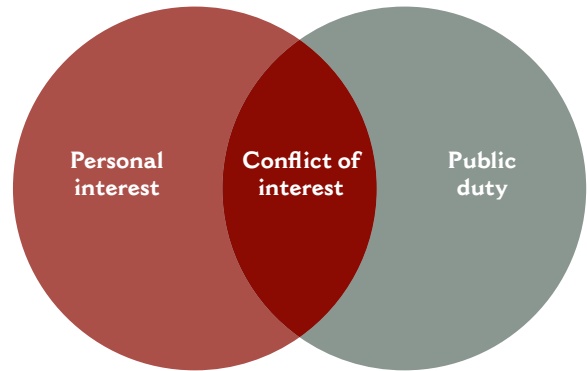
LALCs make important decisions such as allocating houses, negotiating land deals, purchasing goods and services, and recruiting staff. LALC members have a right to expect that these decisions are fair, lawful and in the best interests of all members.

LALC board members and staff have a public duty under the *Aboriginal Land Rights Act 1983* ("the ALRA") to make decisions that are in the best interests of the LALC, and abide by the ALRA, employment contracts, and LALC policies. But, of course, they also have private interests, such as family, friends, membership of clubs and employment.

Usually, board members and staff, and their friends and family, live in the LALC community. Therefore, decisions taken by LALC board members and staff often have a direct or indirect effect on themselves, friends and family.

What do we mean by conflict of interest?

A conflict of interest exists when a reasonable person might perceive that a public official's personal interest/s *could* be favoured over their public duty.



When you are making decisions in your LALC, you need to separate:

- your public duty to the LALC, namely, to make decisions to benefit it and comply with relevant requirements (for example, the ALRA) from
- your private interests, namely your obligations to friends, family, employers and other interests.

Don't forget that a personal interest can involve either a positive or negative attitude towards someone or something.

Merely having a conflict of interest does not usually constitute corrupt conduct. However, corrupt conduct can arise when a conflict of interest is concealed, understated, mismanaged or abused.

One test is to consider how your actions or decisions might appear to other people – would a reasonable person think that your personal interest could improperly influence your participation in LALC decisions?

People sometimes think they won't let their personal interests affect the decisions they make at the LALC. But being closely involved means it is difficult to keep things in perspective.

In essence, it means that you have a conflict of interest. That's why these interests need to be declared and managed impartially.

Why conflicts of interest should be declared

Failing to declare, record and manage conflicts of interest can negatively impact on a LALC's operations and damage its reputation.

Moreover, deliberately ignoring or hiding pecuniary interests is a direct breach of the ALRA. It could also constitute corrupt conduct under the ICAC Act.

Conflicts of interest can come in many forms and can be financial or non-financial. The ALRA deals specifically with pecuniary (financial) interests. The ALRA definition of a pecuniary interest is broad, including any interest reasonably likely to bring an appreciable financial gain or loss to:

- a LALC board member or staff
- another person with whom they are associated (for example, their spouse or other relative).

The disclosure provisions concerning pecuniary interests are set out in s 184 of the ALRA:

(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.

Although the ALRA doesn't talk specifically about non-pecuniary (non-financial) interests, the Commission's view is that being transparent about your non-pecuniary interests helps ensure all conflicts of interest are managed effectively.³

The Commission often receives complaints about alleged corruption or a failure to disclose conflicts of interest. Most of these do not require formal investigation. However, the following conduct is likely to be viewed by the Commission as suspicious:

- **Deviations from policy.** For example, if the LALC has a clear recruitment policy but a close friend of the CEO is employed who does not have the necessary skills, or without a formal job interview.
- **Failures to properly document conflict of interest disclosures.** For example, a board member claims to have made a conflict of interest disclosure but the meeting minutes cannot be found.

³ In 2019, the Office of the Registrar of the ALRA prepared *Draft Model Codes of Conduct for Board members, staff and members of Local Aboriginal Land Councils* which discuss both pecuniary and non-pecuniary interests. The introduction to the draft codes states that: "A LALC can choose to adopt these codes of conduct as they are. Alternatively, a LALC can choose to adapt them – add to or change them – to make them their own". The codes can be found at www.oralra.nsw.gov.au.

- **Inconsistency in the way conflicts are managed.** For example, if a staff member discloses a pecuniary interest in a particular land dealing at a meeting but when the same dealing comes up at a subsequent meeting, no disclosure is made.
- **Attempts to avoid scrutiny.** For example, land dealings that are not referred to the NSW Aboriginal Land Council (NSWALC), as required under the ALRA, or where information is kept from the zone office.
- **End-to-end control over a matter.** For example, an officer with a conflict of interest in relation to a procurement matter has exclusive control over selecting the supplier, agreeing the price and approving payment of the invoice.
- **Housing is allocated through favouritism** rather than in accordance with the housing policy.
- **Purchasing goods and services from a business owned by a relative** rather than seeking the best price/s available.
- **Family members of the board always being allocated cultural heritage site work**, even though the policy says that site work should be rotated among qualified members.

Pressure by family and friends

Sometimes board members and staff can be pressured by family and friends to abuse their conflicts of interest in a way that might constitute corrupt conduct, as per the following example.

Case study 1: An unreasonable request

After commencing as the CEO of a LALC, Sam was approached by his uncle who demanded that Sam put him into a LALC house. Sam explained that he couldn't do that because he was required to follow the housing policy, which said that the next person on the waiting list would be eligible.

His uncle just became angry and said Sam wasn't showing him the proper respect. Sam's uncle bad-mouthed him to the family and around the community, and it was a while before things calmed down.

It was a difficult time for Sam, but members told him they were glad he followed the policy because it gave them confidence that applications for housing would be assessed in a fair and transparent manner.

It's tough to say "no" to a relative or elder, particularly as this may cause problems in the family and people might be angry with you. But saying "yes" in breach of the proper processes is unfair to the LALC members and community.

Is it wrong to have a conflict of interest?

Conflicts of interest are not wrong in themselves. It is how they are managed that is important.

Most people have personal interests, so it is normal that a conflict of interest may arise when you are doing your job. In fact, in a small community, it would be almost impossible not to eventually find yourself having a conflict of interest. This is especially so for LALCs where all members may belong to only a few families.

Case study 2: But everyone's my cousin!

A Commission officer was talking about managing conflicts of interest at a workshop for LALCs when one of the participants said: "But everyone's my cousin!" His view was that because he had connections with everyone in his community, even if he wasn't actually related to them, that it would be impossible to manage these conflicts of interest.

The interesting thing about conflicts of interest in LALCs is that often everyone knows about them, particularly in smaller communities. But this is also an advantage, as the more people know about a conflict of interest the more transparently it can be managed. The important thing is that actions and decisions must be made in the best interest of the LALC members, not yourself or your family or associates.

So, if we all have conflicts of interest, what can we do about it?

While conflicts cannot always be avoided, they must still be managed. The Commission's advice is to always disclose your conflict of interest and have this recorded in the board meeting minutes and/or Register of Conflicts. This can include making a general disclosure under s 186 of the ALRA.

Recordkeeping is also very important for accountability.

When Commission officers make enquiries about allegations concerning unmanaged conflicts of interest, they usually ask to see meeting minutes and personnel records to check whether conflicts of interest have been declared and a management plan put in place. If there is no record that conflicts have been declared, the Commission may suspect that someone is deliberately hiding something for a corrupt reason.

There are four stages to managing conflicts of interest.⁴

1. Assess the risk of the conflict of interest

Is the relevant LALC function vulnerable to corruption or biased decision-making, and what would be the consequences if a decision were improperly influenced by a conflict of interest?

Potential high-risk functions include:

- land dealings, given the cultural and commercial value of the land and the potential complexity of these transactions
- procurement, including purchasing goods and services, and engaging contractors to work on LALC properties
- recruiting staff and engaging consultants
- allocation and maintenance of housing
- any other activity where the LALC intends to spend a large amount of funds.

The Commission recommends that LALCs establish documented policies and procedures for these high-risk areas to help deter and detect misconduct. For example, a typical recruitment policy might describe the need for a position description, desirable qualifications, selection criteria and an interview process. If a LALC officer then tried to appoint a relative to a job, any favouritism that involved a breach of policy would be easier to identify.

2. Consider how the conflict of interest can be managed

The option chosen should depend on the risk of the conflict of interest and any requirements for managing the conflict of interest under the ALRA (that is, pecuniary interests in Division 4 of Part 10 of the ALRA):

- for many low-risk conflicts, no management action is required beyond documenting the disclosure and the LALC's decision to take no further action
- where the conflict of interest entails high risk, the LALC should consider removing the official from the relevant LALC duties. Given that LALCs usually only have a small number of board members

⁴ You can read more about these on pages 19 to 23 of *Managing conflicts of interest in the NSW public sector*, NSW Independent Commission Against Corruption, Sydney, April 2019.

and staff, other management options can be implemented including:

- limiting the person's involvement in certain aspects of their duties, which can then be delegated to another staff or board member (see case study 3 below)
 - bringing in an independent person, for example a zone officer, to sit in on a board meeting, or on a recruitment panel
 - having a board member play a role in supervising staff who are closely related to the CEO. The zone office can give advice about supervision procedures
- strengthening recordkeeping practices around decision-making, including audio recording board meetings and resolutions.

Case study 3: Limiting involvement in certain aspects of their duties

A LALC is planning some excavation and clean-up work on a property it owns. They plan to fence the property and hire it out for agisting cattle or horses.

The board appoints Sue, the CEO, to manage the project. Sue begins by compiling lists of all the local plant equipment operators, fencing contractors, and farmers who may want to agist their stock.

Sue takes this information to the next board meeting. All of the six local plant equipment operators are on the list. This includes her husband, Kevin, who owns and operates a bobcat. This means Sue has a pecuniary conflict of interest regarding this aspect of the project. She formally discloses this interest, in accordance with s 184 of the ALRA, and it is recorded in the minutes.

The board discusses how to manage this situation. They decide that Sue can continue to work on the other parts of the project and that a board member will undertake the tasks concerning the plant equipment. The board also informs Sue that (in accordance with s 184(2) of the ALRA) she will need to leave meetings when the board is discussing, and making decisions about, the plant equipment quotes, and that her absences from the room will be recorded in the minutes.

3. Document a management response

Just as a conflict of interest disclosure must be in writing, so must the management response. In many low-risk cases, this will be a simple document that records the decision taken. Where it is decided that no further action is required or the conflicted official is to be removed, a detailed plan of action is usually unnecessary.

However, where the conflicted official is to remain involved in the matter in some way, a more detailed plan of action is usually required. The documented management response should typically detail the measures that will be undertaken to manage the conflict.

For example, in case study 3, the board decided to manage Sue's conflict by limiting her involvement in the project, allocating someone to undertake the tasks that gave rise to her conflict, and recording that they informed Sue that she must absent herself from future meetings during discussions about hiring plant equipment.

4. Implement and monitor

LALC boards are responsible for implementing management options for conflicts of interest that board members and the CEO have, and the CEO is responsible for implementing management options for conflicts of interest that staff members have.

Boards also need to monitor and document any changes in a conflict of interest and/or how it is managed, as conflicts of interest can change over time. One option is to have this discussed in a standing item on board meetings agendas.

If conflicts of interest are not managed, it can appear that there was corrupt conduct even if the relevant decision was otherwise made properly.

How to protect yourself from allegations of misconduct

As set out earlier, under s 184 of the ALRA, a board or staff member with a pecuniary interest in a matter must disclose that interest and "must not be present at, or in sight of, the meeting" while the relevant matters are discussed or voted upon. However, the ALRA is silent on what should happen outside the meeting.

The Commission's advice is that any person who is excluded from a meeting should also not have any informal influence over the outcome of the matter. This means the person with the conflict of interest should avoid:

- attempting to have the matter dealt with outside of an official LALC meeting
- having input into the content of business papers
- trying to persuade their colleagues how to vote
- working behind the scenes to try and influence the outcome.

Case study 4: The costs of not managing a conflict of interest

A LALC decides to refurbish its meeting room. It has a policy that it will engage Aboriginal tradespeople where possible and asks the three Aboriginal carpenters in the area to quote for the job. The carpenters each submit a quote and the matter is put on the agenda for the next board meeting.

Bill is one of the carpenters and his mother, Gina, is a board member of the LALC.

Scenario 1: At the board meeting, Gina says she wants to be part of the decision about the quotes. She says she knows Bill is a good carpenter because he has recently built cupboards in her kitchen. Gina says she won't be influenced by the fact that he is her son. The board decides that Gina can stay for the meeting.⁵ Gina takes part in the discussion and decision about the carpenters, including saying how great Bill is at his job.

After looking at the three quotes, the board is most impressed by Bill's expression of interest. While not the lowest quote, it is quite detailed, and Bill has considerable experience in the kind of work needed. The board chooses Bill and the reasons for the decision are recorded in the minutes of the meeting.

Wayne is one of the carpenters who missed out. He badmouths the board, saying they are all corrupt and that Gina talked them into choosing Bill. Some people believe Wayne and the situation gets out of hand with people taking sides. Complaints are made to NSWALC, the Registrar of the ALRA and the Commission. Everything becomes such a mess that the refurbishment of the meeting room is delayed.

Scenario 2: The board informs Gina that she is required to leave the meeting. They point out to her that under the ALRA, she had a pecuniary interest because Bill is her son, and he will financially benefit from the work. Gina is unhappy about this decision, but knows she must comply with the ALRA once the board decides against allowing her to remain in the meeting. Her absence is recorded in the minutes.

The board looks at the three quotes and decides to choose Bill because of his experience. As in scenario 1, Wayne is angry and tells everyone Gina and the board are corrupt and everything gets out of hand. But the board is able to show the minutes of the meeting to Wayne and the members which record that Gina declared her pecuniary interest and wasn't involved in the decision. The gossip eventually dies down, Gina is glad that she didn't take part in the decision, and Bill gets on with refurbishing the meeting room.

What about LALC members who are not office holders or staff?

Members are involved in important decisions concerning land dealings and approving their Community Land and Business Plans. The ALRA is silent on the issue of members' conflicts of interest and how they are declared and managed. But the Commission advises that LALCs ask members to declare their interests when they are involved in voting on land dealings – for example, members might work for the developer who has approached the LALC about the proposed land dealing. It doesn't always mean that the person will need to leave the meeting – this will depend on the issue – but the minutes of the meeting will show that conflicts of interest have been discussed.

Key actions

- Develop a conflict of interest policy (the Commission can provide advice about this).
- Keep a conflict of interest register and make declaring conflicts of interest a standard item on all board and members' meeting agendas.
- Record whether conflicts of interest are pecuniary or non-pecuniary, and how they are being managed.
- Provide information and practical examples to board and LALC members about identifying and managing conflicts of interest.
- Refer to conflicts of interest in your policy documents (for example, housing and employment policies) and in any codes of conduct the LALC develops under s 177 of the ALRA.

Remember: Having a conflict of interest is not wrong in itself – we all have a private life – it is how it is managed that is important.

⁵ Section 184(2) gives a LALC discretion to allow a person with a pecuniary interest in a matter to remain in the meeting.

If in doubt, get advice by contacting:

- your zone office
- the Registrar of the ALRA, on (02) 8575 1160 or email adminofficer@oralra.nsw.gov.au
- the Commission, for corruption prevention advice, advice@icac.nsw.gov.au.

Resources

NSW Aboriginal Land Rights Act 1983

Model code of conduct for Local Aboriginal Land Councils, Schedule 3, NSW Aboriginal Land Rights Regulation 2020

Managing conflicts of interest in the NSW public sector, NSW Independent Commission Against Commission, Sydney, April 2019

Sample conflict of interest policy for NSW public sector agencies, NSW Independent Commission Against Commission, Sydney, January 2020

Draft Model Codes of Conduct for Board members, staff and members of Local Aboriginal Land Councils, Registrar of the Aboriginal Land Rights Act 1983, 2019. (The Registrar's codes of conduct were prepared as a resource for LALCs to adopt, or adapt, as required when preparing their own codes of conduct.)



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Notes