

# Hiring checklist for Local Aboriginal Land Councils

## Legal information for Local Aboriginal Land Councils

### This fact sheet covers:

- ▶ steps your LALC should take when hiring new workers

Your Local Aboriginal Land Council (LALC) should take certain steps to avoid legal risks when hiring new workers.



### Disclaimer

The information in this checklist is designed to give you an overview of these important points, and further information is available on [our website](#). This information is 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 fact sheet.

## What steps should your LALC take when hiring new workers?

Recruitment of a worker usually involves:

- advertising the position
- conducting interviews
- screening candidates, and
- making an offer of employment

At each of these stages, your LALC should consider its legal obligations under relevant laws, including:

- the [Aboriginal Land Rights Act 1983 \(NSW\) \(ALR Act\)](#) and [Aboriginal Land Rights Regulation 2020 \(NSW\) \(ALR Regulation\)](#)
- [Fair Work Act 2009 \(Cth\) \(Fair Work Act\)](#)
- anti-discrimination laws
- Australian Consumer Law
- laws relating to screening checks for applicants, and
- privacy laws



## Step 1: Advertising the position

- **Have you considered whether the position to be advertised is for a contractor or an employee?**

The law requires that employers provide employees with certain benefits and entitlements (for example, paid annual leave).

Independent contractors are not owed all the same entitlements as employees, so it's important to be clear about the classification of the position.

If your LALC incorrectly classifies an employee as an independent contractor, you may fail to:

- provide them with their legal entitlements, or
- meet your obligations under the Fair Work Act, or tax, insurance and superannuation laws,

which could result in legal claims against your LALC.



### Example

A LALC proposes to engage Jane as a contractor to perform administrative services.

If Jane operates a business in the local community that provides these services to other companies for a fee (plus GST) and can delegate the work to others, Jane may be a contractor. If, however, Jane will perform the services under the LALC's CEO's direction on a full-time basis, Jane is more likely to be an employee.



For more information, see:

- our guide: [employee, contractor or volunteer?](#)
- The [Australian Tax Office's webpage](#) on employees and contractors

- **Have you considered whether the position will be full-time, part-time, or casual, and whether it will be for a specific period of time?**

**Full-time** and **part-time** employees are employed on a continuous basis and work each week for a number of hours agreed between the employee and the employer.

Full-time employees are contracted to work, on average, 38 hours per week. Part-time employees are contracted to work, on average, less than 38 hours per week. Full-time and part-time employees receive certain paid leave entitlements (for example, sick and carer's leave and annual leave) and are entitled to written notice, or payment instead of notice, if their employer terminates their employment.

**Casual** employees are generally entitled to a higher hourly wage because they are paid a casual loading in place of entitlements such as sick leave and annual leave. Casual employees don't have guaranteed hours of work or ongoing employment, and notice is not usually required to terminate their employment.

**Fixed-term** (or maximum term) employees are employed on a full-time or part-time basis for a specified period of time or task (for example, a six month contract where employment ends after six months), and generally receive the same entitlements as permanent full-time and part-time employees.



### Example

A LALC gives an employee a casual contract of employment to work eight hours on Monday and Tuesday each week. As hours of work are determined in advance and are regular, the employee may be deemed a part-time employee and not a casual employee.



For more information, see the [Fair Work Ombudsman's webpage](#) on types of employees.

- **Have you checked whether the position being filled is subject to a modern award or enterprise agreement?**

**Modern awards** contain the minimum employment entitlements for employees, depending on their industry or occupation.

**Enterprise agreements** (made between an employer and its employees) contain agreed employment conditions that are better off overall compared to a modern award. An enterprise agreement is approved by the Fair Work Commission. When an enterprise agreement is in place, a modern award will not apply (except that the base rate of pay can't be less than the modern award) and the National Employment Standards (under the Fair Work Act) continue to apply.



For more information, see:

- [our webpage on the Fair Work system](#), which include a [fact sheet on modern awards and enterprise agreements](#), and
- the [Fair Work Ombudsman's webpage](#) on types of employees

If you need legal advice, you can [apply for help from our lawyers](#)

- **Have you considered whether an Aboriginal person is required for the position?**

**For example**, if an Aboriginal person is required to liaise directly with Aboriginal communities, the LALC may create the role of an 'Aboriginal Liaison Officer' for the purposes of developing and implementing a service targeting Aboriginal users or providing general information to Aboriginal people and staff.

Limiting a work opportunity to a person of a particular race or ethnic group is generally unlawful discrimination. However, the law recognises that there are some groups who are affected by past or continuing disadvantage, and that sometimes work must be performed by a person of a particular race or ethnic group.

In New South Wales, the *Anti-Discrimination Act 1977 (NSW)* (section 14) allows employers to target a particular race or ethnic group in a recruitment process where being of a particular race or ethnic background is a 'genuine occupational qualification' for the position. This provision is an exception to the general rule that people must be given the same opportunities regardless of their race, and **the LALC must apply for the exemption to the NSW Anti-Discrimination Board.**



In applying for the exemption to the NSW Anti-Discrimination Board, the LALC must (among other things) explain why it is applying for an exemption, and how the proposed exemption meets the required criteria by addressing each of the following factors:

- whether the proposed exemption is appropriate or reasonable
- whether the proposed exemption is necessary
- whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought
- whether the proponent of the proposed exemption has taken reasonable steps, or is able to take any reasonable steps, to avoid or reduce the adverse effect of a particular act or action before seeking the exemption
- the public, business, social or other community impact of the granting of the proposed exemption, and
- any conditions or limitations to be contained in the proposed exemption

If being Aboriginal is a genuine occupational qualification for the position your LALC is recruiting for, the job advertisement must include the following wording:

*[Name of your LALC] considers that being Aboriginal is a genuine occupational qualification of this position for the purposes of s 14 of the Anti-Discrimination Act 1977 (NSW).*



For more information, including how to apply for an exemption, see the Anti-Discrimination New South Wales [webpage 'Exemptions and certificates'](#).

**Note** – it can take up to 60 days for an exemption application to be processed.



If you are unsure whether being Aboriginal is a genuine occupational qualification for the position your LALC is recruiting for, contact:

- Justice Connect for legal advice, or
- the [Anti-Discrimination NSW's Aboriginal and Torres Strait Islander service](#), before going ahead with the advertisement.

• **Have you reviewed your recruitment materials to ensure they are not unlawfully discriminatory?**

Discrimination occurs in the recruitment process when a candidate or applicant for a position is treated less favourably than another person or group because they have (or are believed to have) a certain protected attribute (for example, race, sex, age, disability).

Generally, an employer bound by anti-discrimination laws must not discriminate against a person:

- in determining who should be offered employment
- in the terms on which employment is offered
- by refusing or deliberately omitting to offer employment, or
- by denying the person access to an occupational training program



Consider whether the recruitment material to be advertised places any unreasonable restrictions, conditions or requirements on candidates which might be directly or indirectly discriminatory.

Make sure any specific requirements for the position relate to the skills and experience needed for the position, and avoid references to personal attributes that a person may or may not have.



### Case example – age discrimination

Peter Selsmark, applied for a role with Gunalda the (prospective employer) advertised by Corestaff (a labour hire and recruitment agency).

In email correspondence between Corestaff and Gunalda about suitable candidates for the role, Gunalda's Human Resource advisor wrote that Selsmark had 'all the tickets' however his age was a 'concern'. Mr Selsmark was 70 years old at the time.

Gunalda rejected Mr Selsmark's application for the role and Corestaff advised Mr Selsmark that he had been unsuccessful due to his age.

The Court held that the Corestaff had discriminated against Mr Selsmark.

[Australian Building and Construction Commissioner vs Corestaff WA Pty Ltd \[2020\] FCA 893](#)



For more information, see [our webpage on recruitment and engagement of employees](#).

- **Have you followed the requirements under the ALR Act and Regulation in relation to advertising and recruiting for the position?**

Division 5 of Part 5 of the ALR Act and the ALR Regulation contain requirements for advertising and recruiting LALC staff, including requirements on:

- people who must not be employed as a LALC's Chief Executive Officer
- people who must not be employed in other LALC positions (including as a consultant)
- the manner in which a Chief Executive Officer position must be advertised by a LALC, and
- the basis on which a LALC may appoint staff and consultants



## Step 2: Conducting interviews

- **Have you avoided making any recruitment decisions on the basis of an applicant's protected attributes (for example, race, sex, age, disability)?**

Prepare a list of questions for the interview that relate directly to the position requirements and avoid asking questions that:

- may be interpreted to be relevant only to certain people, or
- relate to irrelevant details about a candidate's personal life

For example, a potentially discriminatory question would be asking a female applicant questions about her marital status, whether she has any children in the future, or her current childcare arrangements.

Instead, ask prospective workers whether they can fulfil the key requirements of the position, noting the skills and experience the position requires and the duties the candidate would be required to undertake if they were employed.



### Case example – disability discrimination

Damien Vickers, a registered nurse, applied for a position with the Ambulance Service of New South Wales. Vickers was required to pass a medical assessment as a step in the requirement process. He didn't pass the test because he had type 1 diabetes and was not allowed to proceed with the application process.

The Court held, on the evidence presented, that the Ambulance Service discriminated against Vickers by deciding not to proceed with the next stage in the selection process by reason of his disability.

If interviewing a person with a disability for a position, it is essential to openly discuss with the person any lack of capacity they may or may not have. However, to decide that a person is not suitable for a position based on assumptions and guesses about their capacity will be open to challenge as a discriminatory decision.

*Vickers v Ambulance Service of NSW [2006] FMCA 1232*

- **Have you avoided making any misleading or deceptive representations during the recruitment process?**

Under the Australian Consumer Law, your LALC must be truthful and not mislead or deceive applicants or candidates throughout the recruitment process about:

- the terms and conditions of employment (for example, the salary on offer)
- the availability of work
- the work conditions and nature of work
- key duties that the worker will be expected to perform, or
- future employment or promotion prospects

Vague advertisements or statements that are not clear about the nature of the position or other important details may attract significant legal and financial risks if your LALC is found to have breached the Australian Consumer Law.



### Case example – misleading and deceptive conduct

A recruiter approached Ms Maxutova about potential positions with Nunn Media. Later, after going through an interview process Maxutova, accepted an employment position with Nunn Media. Maxutova's employment was terminated by Nunn Media during her probation period due to poor performance.

Maxutova took legal action against Nunn Media alleging that Nunn Media had engaged in misleading and deceptive conduct in breach of the Australian Consumer Law because the recruiter, on behalf of Nunn Media, had made representations during the recruitment process that Nunn Media was looking for a long-term position and the hire would be a long-term commitment by Nunn Media.

The Court found that the representations made by the recruiter were general in nature and there was no evidence to suggest they were untrue. There was also no evidence that Maxutova relied on the representations made in leaving her previous employment to join Nunn Media. Maxutova's action was unsuccessful.

*Maxutova v Nunn Media Pty Ltd [2017] FCCA 2336*



For more information, see [the Australian Competition and Consumer Commission's webpage](#) on misleading job advertisements.

- **Have you considered how your LALC uses, stores and discloses personal information about applicants obtained through the recruitment process?**

If your LALC is covered by the Commonwealth privacy laws, you must have a privacy policy. Even if your LALC is not covered by privacy laws, it's good practice to have a privacy policy in place which sets out how your LALC uses, stores, and discloses personal information about job applicants.

The way your LALC uses, stores, and discloses personal information about job applicants might also impact your reputation, so it's worth considering the best way to approach information that might be private or sensitive. If an applicant has applied for a position and is unsuccessful, but you wish to keep their details on file in case another position arises in the future, you should advise the applicant and seek their consent before you do this.



For more information, see [our privacy webpage](#).



### Step 3: Screening candidates

- **Have you carried out any necessary pre-employment checks and checked the applicant's references and job history?**

Certain types of pre-employment screening checks are required by law, while others are discretionary and may include:

- a criminal record check (conducted by the [Office of the Registrar for the Aboriginal Land Rights Act 1983](#) for LALC staff)
- a Working With Children Check (conducted by the [New South Wales Office of the Children's Guardian](#)), and
- reference checks (generally conducted by your LALC)



For more information, see our webpages on [recruiting employees](#) and [background checks](#).

- **Have you that the applicant has the right to work in Australia?**

In addition to the above screening checks, you must also ensure that that the applicant has the right to work in Australia.



See the [Department of Home Affairs website](#) for further information about visas, including the types of work-related conditions that might be attached to a particular visa subclass.

- **Have you asked if the prospective worker is subject to any restraints or other impediments to them working for your LALC?**

You should confirm with the applicant that their employment with your LALC will not be restrained or otherwise affected by an existing or past employment agreement with another employer (for example, by an agreement which restrains the prospective worker from engaging in certain activities that they would otherwise be required to perform for your LALC).





## Step 4: Making an offer of employment

- **Have you reviewed the employment agreement to ensure it is appropriate and contains all the necessary terms?**

An employment agreement usually consists of a letter of offer, an employment contract and a position description which together detail the terms and conditions of employment that will exist between a worker and your LALC, including the rights and obligations of both parties.

In addition to any specific terms and conditions that you believe are relevant to the position (for example, a requirement that non-Aboriginal staff undertake cultural awareness training), certain minimum entitlements must be provided for in the employment agreement.

The employment agreement may not provide for entitlements that don't meet the minimum requirements set out in the National Employment Standards (under the Fair Work Act), which cover matters including maximum weekly hours of work, leave entitlements and notice of termination.

Employees are also entitled to any entitlements set out in any applicable modern award (see above for further information on modern awards).



### Example

Jane is employed as a secretary for 38 ordinary hours a week plus overtime. Under the modern award, Jane must be paid overtime rates for all hours worked over 38 hours a week. The LALC must make sure Jane is paid for overtime hours at no less than the amount she would have received for overtime under the modern award.



For See the [Fair Work Ombudsman's webpage](#) for further information on the NES and [our webpage](#) for further information on employee entitlements.

- **Have you provided the worker with the Fair Work Information Statement (or the Casual Employment Information Statement for casual employees)?**

The Fair Work Information Statement (or Casual Employment Information Statement for casual employees) contains information on conditions of employment, including modern awards, workplace rights and termination of employment.

Employers must provide every new worker with a copy of these statements before, or as soon as possible after, the worker commences their employment.



See the [Fair Work Ombudsman's webpage](#) for further information more information and for a copy of the statements.



## More information

See our [Legal resources for LALCs webpage](#) to find resources specifically targeted to LALCs. In particular, see:

- [Performance Management Checklist for LALCs](#)
- [Termination Checklist for LALCs](#)

[Our website](#) also has resources for not-for-profit community organisations on a range of related topics which may be useful to your LALC:

- Our [managing people webpage](#) – This part of our website covers the relationships your organisation will have with clients, employees, members and volunteers, including recruitment, resignations and disputes. In particular, see:
  - [What are our legal obligations when recruiting an employee?](#)
  - [Discrimination in recruitment](#)
  - [Screening Checks Guide for NSW community organisations](#)