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fact sheet

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Disclosure of pecuniary interests under *Aboriginal Land Rights Act 1983 (NSW)*

Overview

Under section 176 of the *Aboriginal Land Rights Act 1983 (ALRA)* there is a duty on every Councillor, Board member and member of staff of an Aboriginal Land Council or advisory committee to:

- Act honestly
- Exercise a reasonable degree of care and diligence in their functions
- Act for a proper purpose in carrying out their functions
- Not use their office or position for personal advantage
- Not use their office or position to the detriment of an Aboriginal Land Council.

To ensure that this conduct is promoted and enforced, and to encourage good governance and transparency generally, the ALRA creates duties of disclosure which provide that the 'pecuniary interests' of certain people must be disclosed. The ALRA defines pecuniary interests, when people have pecuniary interests, and when they must be disclosed.

Failure to disclose pecuniary interests when required to do so may lead to investigation by the Registrar and legal action including reprimand, suspension or recommended dismissal by the Pecuniary Interest and Disciplinary Tribunal.

What is a pecuniary interest?

Section 182(1) of the ALRA defines '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*'. This is a very broad definition. It is important to remember that pecuniary interests are interests that may influence decisions made by the person who holds them. This is confirmed by s 182(2), which states that a person does not have a pecuniary interest if 'the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to the matter'.

Note: the content of this fact sheet is intended for information purposes only. It is not intended as advice and should not be relied upon as advice. All parties should seek independent advice that is suited to their own specific circumstances.

When does a person have a pecuniary interest?

Under s 183(1) of the ALRA a person has a pecuniary interest in a matter if the pecuniary interest is held by the person themselves, or by a person they are “associated with”. This is subject to overcoming the remoteness test in s 182(2) meaning that if an interest is so remote or insignificant that it could not reasonably be regarded as likely to influence the decision being made then it is not considered to be a pecuniary interest for the purposes of the ALRA.

If a person can have a pecuniary interest because a person they are “associated with” holds the pecuniary interest, how are the words “person associated with” defined in the ALRA?

Section 183(2) of the ALRA defines when a person is “associated with” with another person who holds a pecuniary interest and gives a broad definition of “associated”.

A person will be taken to have a pecuniary interest if their spouse, de facto partner, relative, partner or employer has a pecuniary interest in the matter.

A person will also have a pecuniary interest if they themselves, or their nominee, partner or employer is a member of a company or body that has a pecuniary interest in the matter.

The extension of persons having pecuniary interests to people “associated with” certain people and bodies that have a pecuniary interest is to ensure that transactions and decisions are made with the utmost transparency.

The extension of pecuniary interest to pecuniary interest by association does **not** apply where the association to the interest is insufficient to establish the reasonable likelihood that a person’s decision-making will be affected.

Section 183(3) of the ALRA provides that persons do **not** have a pecuniary interest where they are **unaware** of the interest held by their spouse, de facto partner, relative, partner, employer or company. Also, no interest will be found to exist where:

- a person is a member of, or employed by, a council or statutory body or is employed by the Crown;
- a person is a member of, or council delegate to, a company or other body that has a pecuniary interest in the matter, as long as the member or delegate has no beneficial interest in any shares of the company or body.

Who has to disclose a pecuniary interest and when do they have to disclose it?

Officers and **members of staff** of Aboriginal Land Councils, and **Councillors**, who have a pecuniary interest in a matter, **must** disclose their interest as soon as practicable at any Council meeting where the matter is being considered.

Officers, staff and Councillors who have disclosed their interests **must not** be present at, or in sight of, the meeting at any time the matter is being considered, discussed or voted on, unless the Aboriginal Land Council determines otherwise. Any disclosures made **must** be recorded in the minutes of the meeting.

Who is an “officer”?

Officers of Aboriginal Land Councils are the Board members of Local Aboriginal Land Councils (**LALCs**), and the Chairperson and Deputy Chairperson of the New South Wales Aboriginal Land Council (**NSWALC**).

Officers, members of staff and Councillors can also give a general disclosure notice in writing to the relevant Aboriginal Land Council stating that they themselves, or their spouse, de facto partner or relative are either a:

- member, or in the employment, of a specified company or other body; or
- partner, or in the employment, of a specified person.

This written notice will be sufficient disclosure of the interest in a matter relating to the specified company, body or person if the company, body or person is ever the subject of consideration by the Council after the general disclosure is made.

Consultants engaged by Aboriginal Land Councils must also disclose any pecuniary interest they have in the matter they are consulting on. Disclosure must be made to the meeting at the same time the advice is given by the consultant.

It is important to note that a person does not breach the ALRA if they did not know and could have reasonably been expected to have known that they had a pecuniary interest in a matter under consideration at a meeting they attended. Whether or not a person could have reasonably been expected to know of their interest will be determined objectively on the facts of each case, based on whether a reasonable person would have known of the interest.

Summary

The general purpose of disclosure requirements is to ensure transparency in decision making and encourage good governance of Aboriginal Land Councils. It is important to keep these objectives in mind when determining whether or not there is a need to disclose a pecuniary interest, and to be aware of the requirements of sections 182 and 183 of the ALRA as well as the code of conduct.

In order to assist a person to consider whether or not they have a pecuniary interest in a matter, it is suggested that the person ask themselves whether a bystander uninvolved in the transaction at hand could reasonably or objectively consider that the person's decision could be affected in any way by the pecuniary interest they hold personally or by association. If a bystander could consider that the person's decision may be affected by the pecuniary interest, the person more than likely will have a pecuniary interest. If the situation is uncertain, seek independent advice.