



Family &  
Community Services  
Aboriginal Housing Office

# Aboriginal Housing Office Registration of Interest (s.21) Policy



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# 1 Definitions

The table below is a list of terms, keywords and/or abbreviations used throughout this document.

Term	Definition
AHO	Aboriginal Housing Office
Owning Organisation	The organisation which holds legal title over the said parcel of land
The Act	Aboriginal Housing Act 1998
s.21	Section 21 of The Act
HACP	Housing Aboriginal Communities Program
Capital funding	Funding provided by the AHO for the purpose of construction or refurbishment
Exempt transaction	Where the AHO authorises the transfer or dealing of land in particular circumstances.

## 2 Purpose of policy

### 2.1 Purpose

This Policy outlines the legislative obligations of the Aboriginal Housing Office (AHO) under the NSW *Aboriginal Housing Act 1998* (The Act) to register a Section 21 (s.21) Interest in land under certain circumstances. This Policy also provides guidance on the circumstances and processes regarding the registration and removal of an s.21 Interest.

Registration of an s.21 Interest protects Aboriginal community housing assets from being sold or from being used for a purpose other than social housing, without prior agreement from the AHO. This will ensure the ongoing supply of housing for Aboriginal people and communities into the future.

This policy will ensure that the AHO meets its legislative requirements while remaining transparent and consistent in its decision making practices. In some cases, it can provide an opportunity for Owning Organisations to leverage equity for reinvestment.

The AHO acknowledges that there are certain circumstances which require an s.21 Interest to be removed – for example where an Owning Organisation may be limited in its ability to take advantage of opportunities to improve its business and community, including tenant outcomes. Providing consent in these circumstances will remain at the AHO's sole discretion, unless otherwise specified in an AHO-administered Housing Agreement.

## 2.2 Background and policy links

Under the Act, the AHO is considered to have an Interest in the land of the Owing Organisation, which is referred to in this policy as Interest or s.21 Interest.

Section 18 of The Act outlines the circumstances in which the AHO has an Interest in the land (reproduced in section 4 of this document).

Section 20 of The Act sets out the rights of the AHO in relation to land in which it has an Interest (reproduced in Section 4 of this document).

Section 21 of The Act (reproduced in Section 4 of this document) prescribes the circumstances in which an Owing Organisation must not transfer or otherwise deal with land in which the AHO has an Interest. This means that an Owing Organisation will need to obtain consent from the AHO if it wishes to sell, transfer, mortgage, change the use of, or redevelop the land.

Section 21 of The Act allows the Interest vested in the AHO to be registered. The AHO will lodge an appropriate application with Land & Property Information for the Interest to be registered and thereby recorded on the Certificate of Title of the Owing Organisation's land.

Registration of an s.21 Interest is the main legal instrument available to the AHO to help protect its investment in housing assets. Registering an Interest in land also ensures that the land or investment made in the land is used for the intended purpose of providing housing for Aboriginal people.

An s.21 Interest vested in the AHO, whether registered or not, does not have implications for the ownership of the property. The title of the property will remain with the Owing Organisation.

All requests for consent by an Owing Organisation to deal with land subjected to an s.21 Interest, or for removal of a registered s.21 Interest must be made in writing to the Chief Executive of the Aboriginal Housing Office.

## 3 Scope and application

This Policy applies to all parcels of land which are listed on a property schedule in an AHO-administered Housing Agreement with an Owing Organisation. A standard agreement as such will explicitly state the AHO's right to lodge an s.21 Interest if the land has been subject to AHO capital funding.

The AHO will register and maintain its s.21 Interest on land:

1. where properties have received some form of backlog maintenance or refurbishment works from the AHO. Example: where an Owing Organisation has signed a Head Lease Agreement or Funding Agreement allowing these works to be carried out.
2. which the AHO has purchased and then transferred or sold to an Owing Organisation. Example: where an Owing Organisation has signed an HACP Management Agreement and now wishes for the land to be transferred to its ownership.
3. that the AHO has constructed on, or purchased and then transferred or sold to an Owing Organisation. Example: where an Owing Organisation has signed an HACP Management Agreement and now wishes for the land to be transferred to its ownership.

## 4 Legislation

This Policy should be read in conjunction with the *Aboriginal Housing Act 1998*.

AHO Housing Agreements are dealt with in Part 4 of the *Aboriginal Housing Act 1998*.

Section 18 states in part:

### **“18 Circumstances in which AHO is considered to have interest in certain land”**

For the purposes of this Part, the Aboriginal Housing Office is taken to have an interest in land of a registered Aboriginal housing organisation in the following circumstances:

- (a) if the land is transferred to the registered Aboriginal housing organisation by the AHO,
- (b) if the land is acquired by the registered Aboriginal housing organisation wholly or partly with funding provided by the AHO,
- (c) if the AHO constructs housing or makes other improvements on the land,
- (d) if an AHO housing agreement with the registered Aboriginal housing organisation identifies the land as being land in which the AHO has an interest.”

Section 20 sets out the rights of the AHO in relation to land in which it has an interest:

**“20 Rights of AHO in relation to land in which it has an interest”**

- (1) An AHO housing agreement may include conditions relating to any land of the registered Aboriginal housing organisation in which the AHO has an interest, including conditions that have effect if:
  - (a) the registered Aboriginal housing organisation fails to use the land for the purposes contemplated by the agreement, or
  - (b) the registered Aboriginal housing organisation proposes to sell or otherwise dispose of the land, or
  - (c) the registration of the registered Aboriginal housing organisation is revoked under this Act.
- (2) For example, the conditions may:
  - (a) confer on the AHO an option or right to reacquire land transferred to the Aboriginal housing organisation, and
  - (b) confer on the AHO an option or right to acquire land purchased by the registered Aboriginal housing organisation with funding provided by the AHO, and
  - (c) require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement if the AHO does not exercise the option or right referred to in paragraph (a) or (b), and
  - (d) require the registered Aboriginal housing organisation to pay to the AHO a sum determined in a manner specified in the agreement for housing or other improvements made to the land by the AHO.

Section 21 gives the AHO certain rights over land in which it is defined as having an Interest:

**“21 No dealings in land in which AHO has an interest without consent of AHO”**

- 1) A registered Aboriginal housing organisation must not transfer or otherwise deal with land in which the Aboriginal Housing Office has an interest unless:
  - (a) the AHO consents to the transfer or other dealing, or
  - (b) the transfer or other dealing is authorised, or is of a class that is authorised, by an AHO housing agreement with that registered Aboriginal housing organisation ("***an exempt transaction***"), or
  - (c) an AHO housing agreement with the registered Aboriginal housing organisation provides that this section does not apply to the land concerned.”

Section 21 also includes provisions that allow the AHO to record its Interest in the land with The Registrar-General. In this event:

“(4)...the Registrar-General is not to register under the *Real Property Act 1900* a transfer of that land or any other dealing that is otherwise registrable under that Act unless:

- (a) the consent of the AHO to the transfer or other dealing has been endorsed on the transfer or other dealing, or
- (b) the transfer or other dealing is an exempt transaction (as notified to the Registrar-General by the AHO), or

the recording has ceased to have effect (as recorded by the Registrar-General under subsection (5).”

## 5 Policy statement

### 5.1 Length of an s.21 Interest

The transferring of title by the AHO to an Owning Organisation will warrant an indefinite registration of an s.21 Interest on the land. This will ensure that the intention of an Owning Organisation to provide social housing to Aboriginal communities, continues to be met.

In instances where an Owning Organisation has received improvements to existing dwellings on the land, an s.21 Interest will remain registered for the time period stated in the AHO-administered Housing Agreement, usually 10 years.

### 5.2 Requests to remove s.21 Interest

The AHO Housing Agreement may set out exempt transactions that allow for removal of an s.21 Interest. The AHO recognises however, that there may be other circumstances in which it would consider removal of an s.21 Interest on land.

The AHO will only consider requests to remove s.21 interest if it is provided by the Owning Organisation in writing.

The AHO will consider a request made by an Owning Organisation in relation to a proposed sale of the land to an Aboriginal tenant. In this instance, the AHO will undertake relevant checks at its discretion, and pay costs (legal and disbursements) associated with the registration and removal of an s.21 Interest.

Requests for removal of an s.21 Interest will be considered on a case-by-case basis and is at the sole discretion of the AHO.

The following sections outline some of the circumstances in which the AHO will consider a request for the removal of its s.21 Interest.

### **5.2.1 Home ownership**

Home ownership is strongly encouraged by the AHO as a way for Aboriginal people to move out of social housing.

If an Owing Organisation wishes to sell a property to an Aboriginal person, the Owing Organisation must provide to the AHO:

- a) Documentation supporting and confirming the request from a relevant party such as the tenant and/or real estate agent.
- b) Documentation from any guarantors/creditors such as Indigenous Business Australia, a bank, or other relevant firms acknowledging and approving the sale, should there be an outstanding mortgage or caveat on the property.

### **5.2.2 Leveraging equity for reinvestment**

Where an Owing Organisation provides a written request to the AHO to remove its s.21 Interest for the purpose of selling the property and reinvesting the profits from sale, the AHO will consider the request if:

- a) it is demonstrated, and the AHO is reasonably satisfied, that the proceeds of the sale will be reinvested back into the community for infrastructure or for other means of progressing the standard of living and/or access to opportunities for Aboriginal people; and
- b) there is a clear and demonstrable correlation to community benefit and this is articulated in a business plan or other formal written document.

Where an Owing Organisation is required to mortgage the land, the AHO may consent to temporary removal of an s.21 Interest to allow the mortgagee of the Owing Organisation to register a mortgage on the title as security.

### **5.2.3 Sale to pay off arrears**

The AHO acknowledges that an Owing Organisation may find itself in financial difficulty, and therefore may want to sell a property to pay off existing arrears or debts.

Where an Owing Organisation provides a written request to the AHO to remove its s.21 Interest for the purposes of sale to pay off arrears or debts, the AHO will consider the request if it is found that the Owing Organisation's governance is at risk of serious financial detriment i.e. dissolution, liquidation, insolvency or bankruptcy. In this instance, the AHO reserves the right to conduct its own financial health checks on the Owing Organisation at its discretion.

### **5.2.4 Commercial use**

Where an Owning Organisation provides a written request to the AHO to remove an s.21 Interest to allow a property, or the land covered by that title reference, to be used for a commercial purpose, the AHO will consider the request if:

- a) The commercial use supports housing or housing related opportunities, and
- b) The commercial purpose provides cultural and/or economic benefits to the local Aboriginal community and
- c) Community members have been notified through the proper processes and are in support of the established or proposed commercial purpose.

### **5.2.5 Common title**

In instances where a common title is listed on the property schedule of an AHO-administered Housing Agreement, the AHO will register its s.21 Interest on the whole parcel of land.

Where a property has not received any type of funding, but is part of the common title, the AHO will issue a notice to the property owner confirming that the property is not bound by s.21 restrictions.

## **6 Appeals**

If an Owning Organisation is concerned about the AHO's decision to lodge or remove an s.21 Interest, it should contact the AHO in the first instance in writing.

The Owning Organisation and the AHO should make all reasonable efforts to discuss the decision and address the concern. If this results in a dispute, the Owning Organisation and the AHO must adopt the process for dispute resolution in accordance with the terms and conditions of the relevant AHO-administered Housing Agreement.

## **7 Roles and responsibilities**

The main roles and responsibilities for the implementation of this policy are as follows:

1. The AHO Chief Executive will endorse and approve the policy and all related documents necessary to implement the policy.
2. The AHO Director Housing Client Services and Director Strategic Finance and Assets Management are responsible for ensuring that this policy is adhered to.

## 8 Monitoring, evaluation and review

It is the responsibility of the AHO to monitor and update this policy when required.

This policy will be reviewed in one year from date of publication, and at other times if and when any significant new information, legislative or organisational change warrants amendments to this document.

Reviews will be conducted in collaboration with other AHO units, and external stakeholders, and may require consultation with the Aboriginal housing sector.

## 9 Support and advice

Advice and support about this policy can be obtained from:

- AHO Policy, Programs and Design Innovation unit which has carriage of this document; or
- AHO regional offices.

If reviewing a printed version of this document, please refer to the website to confirm that it is the most recent version of the policy.

Following any subsequent reviews and approval, this policy will be uploaded to the AHO website and will replace the previous version.

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