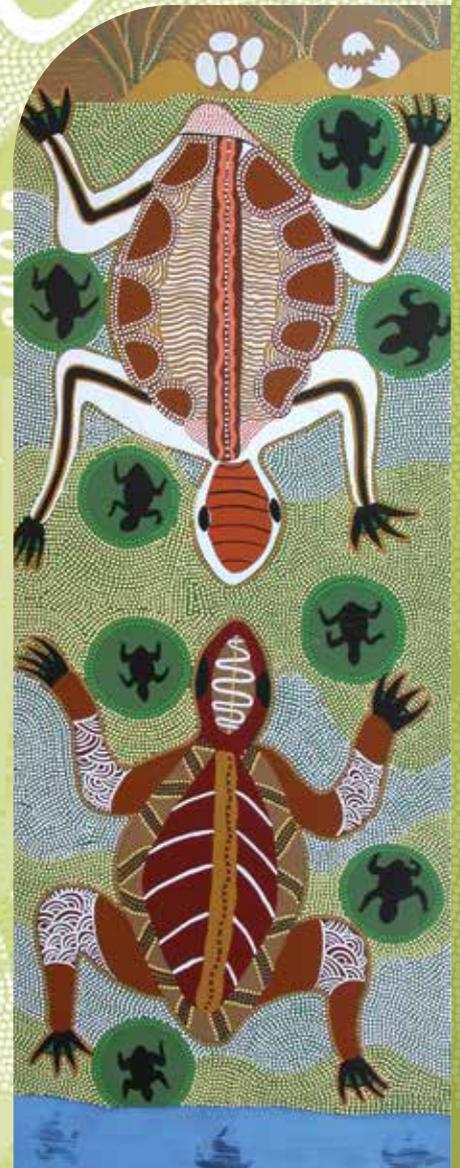




Family &  
Community Services  
Aboriginal Housing Office

Aboriginal Housing Office  
The *Build and Grow*  
**Head Lease Policy**



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## BUILD AND GROW HEAD LEASE POLICY

### Key terms

- Head Lessor** The organisation that owns the properties and signs a Head Lease Agreement. The Head Lessor is referred to as the **“Owning Organisation”** in this policy document.
- Sublessee** An Aboriginal Community Housing Provider (ACHP) registered with the AHO as an Approved Provider who signs a Sublease Agreement with the AHO. This Approved Provider manages the head leased properties and is referred to as the **“Managing Provider”** in this policy document.

## INTRODUCTION

Head leasing forms a key part of the Build and Grow Aboriginal Community Housing Strategy (*Build and Grow*) currently being implemented by the NSW Aboriginal Housing Office (AHO).

*Build and Grow* aims to develop an Aboriginal community housing sector which is financially sustainable and better able to meet the housing needs of Aboriginal people in NSW. It will do this by helping the sector to improve its standard of housing and tenancy management and by encouraging growth.

Under a Head Lease Agreement, the Owning Organisation transfers housing management of their dwellings to the AHO. The AHO then subleases the management of the properties to an Approved Provider registered with the AHO. The Head Lease Agreement is the legal document whereby an Owning Organisation passes responsibility for the management of their properties to the AHO.

Owning Organisations who sign a Head lease Agreement with the AHO will be registered for head leasing purposes. The signed Head Lease Agreement is the legal mechanism that enables those properties listed in the agreement to be upgraded using monies available under the National Partnership Agreement on Remote Indigenous Housing (NPARIH).

## 1. SCOPE AND OPERATION OF THE HEAD LEASE AGREEMENT

Once signed, the Head Lease Agreement transfers the tenancy and property management functions from the Owning Organisation to the AHO, and then to the Managing Provider through a Sublease Agreement.

The Owning Organisation can be a Local Aboriginal Land Council or an Aboriginal controlled corporation, co-operative or association. Title to the properties remains with the Owning Organisation, but the Head Lease Agreement creates a registrable leasehold interest in the land pursuant to Part 4 of the *NSW Aboriginal Housing Act 1998*.

Part 4 deals with AHO Housing Agreements and Deeds. Section 18 of Part 4 defines the circumstances under which the AHO is considered to have an interest in land, while Section 21 gives the AHO certain rights over land in which the AHO is defined as having an interest. This includes provisions that allow the AHO to record its interest in the land with the Registrar-General. See the *NSW Aboriginal Housing Act 1998* for further details.

The intent of the 'registration of interest' is to provide a measure of protection for the financial investment made not just through the backlog maintenance or refurbishment of head leased properties, but also via the Head Lease and Sublease Agreements themselves. These Agreements require both the AHO and Managing Organisations to accept a variety of responsibilities in regard to the properties for the life of the Head Lease and Sublease Agreements. For that reason, the period of the 'registration of interest' is linked to the head lease period.

Creation of an 'interest in title' through the Head Lease Agreement means that an Owning Organisation will need to seek permission from the AHO if it wishes to transfer, change purpose or otherwise deal with the land. The AHO will not unreasonably withhold its agreement in dealing with the property.

## 2. PURPOSE

This policy outlines what is involved when properties are head leased to the AHO, including the roles and responsibilities of both the Owning Organisation and the AHO.

Head leasing is where an Aboriginal Community Housing Provider (ACHP) which does not wish to, or is unable to achieve performance based registration, transfers the management of its houses to the AHO. The AHO then subleases management of the houses to an Approved Provider registered with the AHO. Information on subleasing is available in the Build and Grow Sublease Policy document.

This process allows the Owning Organisation to be registered under the *NSW Aboriginal Housing Act 1998* and to have its properties upgraded using monies provided under the National Partnership Agreement on Remote Indigenous Housing (NPARIH) as available. It ensures that the properties are properly managed and allows for the progressive introduction of Build and Grow rents, thus aiding longer term sustainability. It also provides an opportunity for Approved Aboriginal Community Housing Providers to increase the scale of their operations, thus aiding viability.

### 3. DURATION AND APPROVAL OF THE HEAD LEASE AGREEMENT

#### 3.1 Form and Duration

The Head and Sublease Agreements provide the formal legal structure for the relationship between the Owning Organisation, the AHO and the Managing Provider. The AHO uses standard templates for both the Head Lease and Sublease Agreements.

Copies of the templates can be obtained from the Aboriginal Housing Office.

The Head Lease Agreement will generally apply for an initial period of five (5) years. There is an option for the AHO to renew the agreement for a further five (5) years. After ten (10) years, the Owning Organisation can enter into a new Head Lease Agreement with the AHO.

During the term of the Head Lease Agreement, the Owning Organisation may choose to undertake performance assessment to be able to apply for registration as an Approved Provider. If successful, the Owning Organisation would be able to take over management as an Approved Provider following expiry of the Head Lease Agreement.

Should the head lease not be renewed or a new head lease not entered into, management of the properties returns to the Owning Organisation. However, the Owning Organisation will cease to be registered under the *NSW Aboriginal Housing Act 1998* unless it becomes an Approved Aboriginal Community Housing Provider.

Under the standard Head Lease Agreement, the AHO can end the agreement at any time giving the Owning Organisation three (3) months notice in writing.

A Head Lease Agreement may also be terminated if the AHO has committed a fundamental breach of the agreement and has not remedied the breach within a reasonable time frame after a written notice has been served on the AHO by the Owning Organisation requiring the breach to be remedied, the Owning Organisation may commence its formal dispute resolution process in accordance with the Head Lease Agreement.

An Owning Organisation or the AHO may also end the head lease in the event of property damage by natural causes. However, where an individual property is involved, this would normally be done through mutual agreement by excising that property from the properties listed in Schedule 1 of the Head Lease and Sublease Agreements.

#### 3.2 Properties Subject to the Head Lease Agreement

Owning Organisations will lease all their residential properties to the AHO with the exceptions of vacant land and houses that are deemed by the AHO to be unsuitable for head leasing.

Properties deemed unsuitable for head leasing include houses assessed as being beyond economic repair, or not structurally sound. The AHO will determine which properties are unsuitable for head leasing by conducting a detailed inspection using a qualified assessor.

Where the Owning Organisation is under administration or properties owned by the organisation are subject to a mortgage or caveat, decisions about whether the AHO will head lease the properties will be made on a case-by-case basis.

Local Aboriginal Land Councils (LALC) with properties located in discrete communities will need to work with the AHO to ensure that all properties are appropriately described in the Head Lease Property Schedule. Properties that are not specifically listed in the schedule will not be included in the Head Lease Agreement.

The schedule of properties listed in the Head Lease Agreement may be amended by agreement between the Owning Organisation and the AHO subject to relevant legislation.

The AHO will 'register an interest on title' for all properties listed for a period of ten (10) years from the commencement date of the Head Lease Agreement. Should the Head Lease Agreement not be renewed at the end of the initial five (5) year period, the AHO will usually lift the 'registration of interest' provision.

### **3.3 Head Leases Between the AHO and a Local Aboriginal Land Council (LALC)**

The Head Lease Agreement between a LALC and the AHO represents a 'land dealing' under the *Aboriginal Land Rights Act 1983*, requiring approval from LALC members and the New South Wales Aboriginal Land Council (NSWALC).

In principle, head leasing to the AHO would satisfy NSWALC requirements to run a social housing scheme. Each Head Lease Agreement requires approval from NSWALC.

### **3.4 Head Leases between the AHO and Aboriginal Housing Organisations, Aboriginal Cooperatives, Aboriginal Controlled Corporations, Aboriginal Associations and Aboriginal Companies**

The Head Lease Agreement between Aboriginal organisations and the AHO will require appropriate approval from the constituted organisation consistent with the relevant Act under which they are constituted and their own rules or constitution.

## **4. FINANCIAL ARRANGEMENTS**

### **4.1 Revenue Held by an Owning Organisation**

Any revenue accumulated by an Owning Organisation prior to the signing of the Head Lease Agreement remains the property of that Organisation. This may include reserves for future maintenance accumulated by Owning Organisations from rental collection prior to head leasing.

At their discretion, Owning Organisations may choose to transfer such funds, in whole or part, to the Managing Provider to be held in trust for subsequent maintenance of the properties covered by the Head Lease Agreement.

In the event of such a transfer, the Managing Provider must separately record the funds transferred in its accounts as an opening balance on the portfolio covered by the Sublease Agreement.

### **4.2 Existing Debts**

Under the terms of the Head Lease Agreement, debts that have been incurred prior to head leasing, remain the responsibility of the Owning Organisation. This includes any rental arrears owed by tenants to the Owning Organisation. Any existing repayment plans between Owning Organisations and tenants will continue to operate after the Head Lease Agreement is entered into and are the responsibility of the Owning Organisation to manage.

## 4.3 Management of Existing Debts Owed by a Provider

In some cases, Owing Organisations will have existing property-related debts such as council or water rates, unpaid maintenance or utility costs, insurance premiums, tax bills or unpaid debts to trades and suppliers. Details of any such debts must be provided to the AHO prior to the signature of the Head Lease Agreement. Debts that potentially threaten the security of the assets must be discharged prior to head leasing. In some cases Owing Organisations may have the capacity to pay all or some of these debts prior to head leasing. Any disposal of assets to liquidate debts should have regard to the long-term impact of such disposal.

The AHO has the discretion to negotiate payment arrangements applicable to housing-related debts with the Owing Organisation.

## 4.4 Rent Levels for Head Leased Properties

Tenants of head leased properties will be charged rents in accordance with the *Build and Grow Rent Policy* following completion of any required building works. Under the *Build and Grow Rent Policy*, tenants will generally pay a 'household rent'. Household rents are based on household composition and are set at a level that attracts maximum Commonwealth Rent Assistance. (See *Build and Grow Rent Policy* for details.)

## 4.5 Ongoing Costs for Owing Organisations

Once properties are head leased to the AHO and subsequently subleased to an Approved Provider, the Owing Organisation will lose access to rental income. The Owing Organisation retains responsibility for organisational-related costs, including constitutional and statutory compliance required for its continuance as an entity.

Where the Owing Organisation does not have an income stream, it may request appropriate funds from the AHO to cover costs required for the continuation of the organisation. This could include audit fees, Annual General Meeting costs, reporting costs and rates on vacant land. Generally these costs should be agreed at the time the Head Lease Agreement is signed and will then be included in the costs to be recovered from rental income by the Managing Provider.

## 4.6 Funds Transfer at the End of a Head Lease Agreement

At the end of the Head Lease Agreement, any funds set aside by the Managing Provider for responsive and planned (cyclical) maintenance will be returned to the Owing Organisation via the AHO.

Where a new Head Lease Agreement is signed, the AHO will ensure this money is transferred to the new sublessee to enable them to continue the planned maintenance program.

## 5. TENANCY MANAGEMENT

Once the Head Lease and Sublease Agreements have commenced, the Managing Provider will provide tenancy management in accordance with its internal tenancy management policies and procedures, taking into account any specific conditions negotiated with the Owing Organisation under the Head Lease Agreement and referred to in the Sublease Agreement. As an Approved Provider, the Managing Provider's policies and procedures will be consistent with the broader policy context as outlined by the AHO.

## 6. PROPERTY MANAGEMENT

### 6.1 Liability of the Owning Organisation

Upon signature of the Head Lease Agreement, the Owning Organisation ceases to be liable for any of the costs associated with the management of the housing portfolio from the commencement date of the Head Lease Agreement.

### 6.2 Role of the Managing Provider

After the properties are head leased and then subleased, the Managing Provider will be responsible for tenancy and property management over the life of the Sublease Agreement. This includes collection of all rental revenue and the application of this revenue to meeting the costs of property and tenancy management including rates, insurance, responsive maintenance, planned (cyclical) maintenance, staffing and administration.

### 6.3 Costs Paid by the Managing Provider

The Managing Provider is required to meet all ongoing property and tenancy management costs once the property has been subleased to it. These amounts will need to be separately reported to the AHO. See Section 7 in this Policy, and Section 7 in the Sublease Policy for more details.

### 6.4 Providing for Maintenance

Managing Providers are required to set aside sufficient funding to allow for responsive and planned maintenance of properties that they have subleased from the AHO.

### 6.5 Management Fees

Managing Providers may deduct a management fee to cover staffing and administration costs associated with management of the head leased properties. Should there be insufficient funds available to meet this fee at any point the deficit may be carried forward for recovery from later rental income.

Any management fees intended to cover staffing and administrative costs must be separately identified in the property reports provided to AHO so that it can report on them to Owning Organisations.

### 6.6 Insurance

The various subclauses of the Head Lease Agreement place an obligation on the AHO to ensure that the property is insured against damage and any other insurable events considered necessary by the AHO. The AHO is also required to ensure that a public liability insurance policy is in place. The subclauses allow the AHO to self-insure if it considers this to be appropriate. However, this would only be done where normal insurance was not available.

Similarly, the sublease places responsibility upon the Managing Provider to insure for public liability, against damage to property and any other insurable events considered necessary by the AHO.

In respect to insurance for natural causes; a natural cause would include fire, flood, lightning, storm, tempest, earthquake or other disabling natural cause.

Because of the high cost of insurance for natural causes, under the Head Lease Agreement the AHO is not obliged to arrange and pay for insurance covering damage from natural causes. As such, under the Sublease Agreement the Managing Provider is not required to arrange and pay for such insurance.

If the property is damaged or destroyed by natural causes, the Sublease Agreement gives the AHO absolute discretion on whether or not to rebuild, repair or replace the property.

Should damage by natural cause render the property unfit for use and occupation, and the AHO considers it not desirable to rebuild, repair or replace the property, then either party has the option to end the lease. Should this outcome occur the AHO will use its best endeavours to relocate the residential tenant to another property.

## 6.7 Management of Head Leased Properties by a Non-Aboriginal Housing Provider

It is intended that housing management is undertaken by Aboriginal Community Housing Providers registered with the AHO as an Approved Provider. If no Approved Provider is available when the Head Lease Agreement is signed, the head leased properties may be managed by a registered mainstream community housing provider for a limited time, typically from six (6) to twelve (12) months. The management of the properties will transfer to an Aboriginal Community Housing Approved Provider under a Sublease Agreement when that option becomes available, and in discussion with the Owning Organisation.

## 7. REPORTING

The AHO will provide a written report to the Owning Organisation regarding its properties every six (6) months. This report will include; statement of income and expenditure, vacancy rates, rent charged and received, information on any rental arrears, expenditure on repairs and maintenance, and rental income put aside for costs of managing the properties. See also Section 7, Sublease Policy.

## 8. DISPUTE RESOLUTION

Where an Owning Organisation is concerned about the property or tenancy management under the Head Lease and Sublease Agreements, the Owning Organisation should contact the AHO in the first instance. If the AHO is concerned about a matter, it will contact the Owning Organisation.

Should a dispute arise, the Head Lease Agreement requires that the Owning Organisation and the AHO must make all reasonable efforts to resolve the dispute between themselves within twenty one (21) days of the dispute arising.

If this is not successful, the dispute should be escalated as follows:

- If the Owning Organisation is a Local Aboriginal Land Council, the matter should be referred to the NSW Aboriginal Land Council, in accordance with the *Aboriginal Land Rights Act 1983* (NSW). If the NSW Aboriginal Land Council does not refer the dispute to mediation, conciliation or arbitration by the Registrar within a reasonable time, a qualified arbitrator with experience in the Aboriginal sector will be appointed. The arbitrator's decision on the dispute will be accepted as final and binding.
- If the Owning Organisation is not a Local Aboriginal Land Council, and the AHO and the Owning Organisation cannot resolve the matter, a qualified arbitrator with experience in the Aboriginal sector will be appointed. The arbitrator's decision on the dispute will be accepted as final and binding.

Each party must pay its own costs and expenses for mediation, conciliation or arbitration.



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## 9. EVALUATION AND REVIEW

This Policy will be formally reviewed in consultation with stakeholders at the end of twelve (12) months from the release of the Policy.