

Leases and licences for oyster farming on Crown land

This fact sheet provides general information for the oyster farming industry on the issue of land tenures (leases and licences) for land-based oyster farming/aquaculture activities on Crown land.

This fact sheet does not discuss aquaculture leases (water leases) or permits under the *Fisheries Management Act 1994*, which is the responsibility of the Department of Primary Industries—Fisheries.

NSW Department of Planning, Industry and Environment issues land tenures under the NSW *Crown Land Management Act 2016* (CLM Act) and is committed to working with the oyster industry to provide opportunities for oyster farming/aquaculture activities on Crown land.

Applications for use of Crown land for oyster farming/aquaculture activities are assessed on merit. We consider a range of factors when making an assessment, such as compliance with the CLM Act, land capability, native title, Aboriginal land claims, the Crown land Community Engagement Strategy and the Department of Primary Industries' Oyster Industry Sustainable Aquaculture Strategy (OISAS).

We have streamlined our lease and licence processes for oyster farming/aquaculture activities to improve the consistency of new tenure agreements.

While applicants may prefer a lease to a licence, it may not be possible to lease certain Crown land sites. This fact sheet provides information to the industry on contributing factors and other considerations we take into account when leasing or licensing Crown land.

Leases

A Crown land lease provides exclusive possession to the holder to occupy and use Crown land for a specified term and purpose.

A lease is a registrable dealing, which means that it can be recorded on the title for the land. Generally, to be registered, the leased area must be identified as one or more lots in a registered plan of the land. If a site has not been surveyed and is not identifiable in a registered deposited plan, we are unable to lease the site. Environmental planning restrictions to the subdivision of land may also prevent the creation of a title for the land by registered plan, and therefore restrict our ability to lease the Crown land.

If you are proposing a substantial development on the Crown land that involves significant capital investment, a lease may be more appropriate than a licence, providing there are no constraints that preclude the department granting a lease.

The consent of the minister is usually required prior to the transfer of a lease, and you can't transfer a lease if there is any debt to the Crown outstanding on the lease.

You can find more information on leases on department's website at industry.nsw.gov.au/lands/use/leases

Licences

Generally, a Crown land licence does not provide for exclusive use and possession of Crown land. It provides an authority to occupy and use Crown land for a specified purpose and term. Usually,

licences can be terminated at will by the minister administering the *Crown Land Management Act 2016*.

Unlike leases, licence areas do not need to be identified by surveyed lot boundaries and may be defined by diagram. Licences may accompany a lease site to authorise jetties or infrastructure connected with oyster farming operations that extend outside of the leased area, such as below the mean high-water mark.

Licences are generally not transferable. An application must be lodged and determined before a new licence can be considered for offer to a new holder (see the *Revocation of existing tenure and issue of a new licence* form on the department's website).

You can find more information on licences on the department's website at industry.nsw.gov.au/lands/use/licences

Considerations for leasing and licensing Crown land

Native title

Native title is the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs. The Commonwealth *Native Title Act 1993* (NT Act) sets out how native title rights are recognised and protected in Australia.

When assessing Crown land tenure applications, we consider whether there is evidence that native title is extinguished or the proposed use is permissible under the NT Act. We assess whether there are any procedural requirements relating to native title groups or representative bodies, such as notification requirements or a right to comment.

Native title can be a key reason why we cannot issue a lease over Crown land. In such cases, it may be possible to issue a licence to authorise occupation of a site required for oyster farming/aquaculture activities. Refer to the fact sheet *How native title rights affect oyster farming tenures on Crown land* (go to industry.nsw.gov.au/lands and search for the title) for more information about native title and how this relates to oyster farming/aquaculture activities on Crown land.

Aboriginal land claims

The NSW *Aboriginal Land Rights Act 1983* recognises the rights of Aboriginal people in NSW.

The legislation allows Aboriginal Land Councils to lodge land claims over Crown land, which are determined by the relevant minister.

The department generally will not authorise any dealing, such as a lease or licence, in land that is subject to an Aboriginal land claim that will:

- prevent the land being transferred to a claimant Land Council in the event it is found to be claimable
- impact on the physical condition of the land.

For sites already developed for oyster farming/aquaculture activities, we would generally only consider a Crown land application if the applicant has obtained a letter of consent from the claimant Land Council. The claimant Land Council is under no obligation to grant such a request and may prefer to have the claim fully investigated and determined.

Refer to the fact sheet *Information for Crown land tenants about Aboriginal land claims* for more information about Aboriginal land claims on Crown land (go to industry.nsw.gov.au/lands and search for the title).

Aboriginal land claims are a separate and distinct issue to that of native title.

Competitive processes

Fair and transparent decision-making processes are integral requirements of government. Generally, a new opportunity to lease or licence Crown land requires a competitive process, such as calling for expressions of interest, where there is a demand for Crown land sites.

It may be appropriate in some circumstances for us to negotiate directly with an applicant to grant or renew a Crown land tenure. The department's policy *Sale or lease of Crown land by direct negotiation 2016* (go to industry.nsw.gov.au/lands and search for the title) outlines the criteria under which direct negotiations may be permitted.

Do not assume that we will be able to enter into direct negotiations to issue a new licence where an oyster business has changed hands. Consult with the department prior to considering a sale.

Term of lease or licence

The term of a land base lease for oyster farming/aquaculture activities is 25 years, as outlined in the Department of Primary Industries' OISAS. Leases for oyster farming/aquaculture activities may also have an option for a further 25 years, subject to criteria set out in the lease.

With regard to licences, we are working towards adopting a standard term for land base oyster licences of 25 years, consistent with OISAS and the term for leases for oyster farming/aquaculture purposes.

Generally, licences cannot be transferred. Instead, a licence holder applies to revoke the existing tenure and have a new licence issued to a new holder. During this process, any new licence we issue will generally commence with a new 25-year term.

Work plans

Leases and licences for oyster farming/aquaculture activities must have work plans associated with them. Work plans are documented agreements developed by the department in consultation with the tenure holder to ensure that sites are managed appropriately and in an environmentally sustainable manner.

The department may impose a security bond for the site if you do not fulfil the requirements of a work plan and we may also undertake a range of compliance actions. The work plan template will soon be streamlined to ensure that new work plans are developed consistently across the state.

Tenure holder responsibilities

Tenure agreement

A tenure holder has responsibilities under the terms and conditions of their tenure agreement. This includes using the site in accordance with the permitted use, paying rent, complying with environmental obligations and other relevant laws, and holding current insurances.

A holder of a Crown tenure for oyster farming/aquaculture activities must be a bona fide oyster farmer and hold a current:

- aquaculture permit under the *Fisheries Management Act 1994*
- Food Authority Licence under the Food Regulation 2015 to cultivate and/or harvest oysters (including spat).

Subletting or sale

We encourage you to have early discussions with us if you are considering selling or subletting leased premises, or wish to sell your business when you hold either a Crown land lease or licence. Sublicensing is not permitted on sites licenced for oyster farming/aquaculture activities. In many cases, tenures are not directly transferrable.

Environmental planning approvals

As a tenure holder, you are responsible for obtaining all necessary environmental planning, development, building, and operating approvals relating to structures and activities on tenured Crown land.

Any proposed construction or demolition of buildings, retaining walls, jetties, tar pits, onsite sewerage management system, etc. may require development consent or other approvals from local councils. Applications will generally require landowner's consent from the department before they are lodged. The *Landowner's consent application form* outlines the requirements and is available from industry.nsw.gov.au/lands/what-we-do/fees-and-forms/forms

Agency approvals

You may require approvals from other authorities such as Roads and Maritime Services or Department of Primary Industries (Fisheries, NSW Food Authority) to carry out activities associated with oyster farming/aquaculture. As the tenure holder, it is your responsibility to ensure you are aware of these requirements and hold all required approvals.

Work plan compliance

The tenure holder is responsible for ensuring that they meet obligations outlined in their work plan agreements. We may initiate compliance actions if you do not comply with work plan requirements or tenure conditions, or if you do not pay rent. Actions include lease forfeiture or licence revocation.

Hardship

The department may consider financial hardship applications relating to rent payments. Apply for this consideration as soon as you experience difficulties in meeting rent payments in order to negotiate an appropriate payment plan with the department.

Prospective tenants

Due diligence

It is the responsibility of a purchaser to ensure that they undertake appropriate due diligence investigations before buying an oyster farming business or land base tenure. Consult with the department early in the process to ensure that we are able to consider an application to transfer or reissue a tenure to occupy Crown land.

Due diligence enquiries may also include:

- conducting an identification survey to check that all existing occupation and structures are within the approved tenure area
- investigations to ensure that any access to the site is within a legal access corridor
- checking that all structures and uses have appropriate planning and building consents and approvals and there are no contamination or waste issues on site.

More information

You can find general information about leases and licences on the department's website at industry.nsw.gov.au/lands. Contact the department by phone on 1300 886 235.

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