

How native title rights affect oyster farming tenures on Crown land

This fact sheet provides general information on native title rights and interests and how the Crown Lands team in NSW Department of Planning, Industry and Environment considers these when determining whether to grant tenure for land bases for 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.

Native title and the Commonwealth *Native Title Act 1993*

Native title rights are based on the traditional laws of Aboriginal and Torres Strait Islander groups. They include rights such as the right to access or travel through land, to engage in fishing or hunting, or to undertake cultural activities and ceremonies. These rights are usually non-exclusive and coexist with the rights of other people to lawfully access and use Crown land.

Native title rights are recognised and protected through processes set out by the *Native Title Act 1993* (NT Act), which is Commonwealth legislation. The NT Act allows for Indigenous groups to apply to the Federal Court of Australia for their native title rights to be recognised, and also establishes the conditions under which the NSW Government can undertake certain activities on Crown land that might affect native title rights and interests.

The department's approach to native title

We assess all activities relating to the use of Crown land to ensure compliance with the requirements of the NT Act. We won't issue tenures or authorise activities where these are inconsistent with the provisions of the NT Act. We employ the precautionary principle, whereby native title rights are assumed to exist in all Crown land unless sufficient evidence is available to indicate that native title rights have been extinguished.

Native title and oyster farming land base tenures

Issuing licences and leases under the *Crown Land Management Act 2016* (CLM Act) for land base sites subject to native title can be complex. We must assess each lease or licence with reference to the particulars of the site-specific circumstances. As such, we can't make definitive statements regarding the issuing of tenures across all Crown land. However, the following sections give general statements that are applicable in many situations.

Native title assessment process

Before proceeding to grant a tenure that may affect native title, we will generally consider:

- whether the Federal Court has made a determination that native title is extinguished or does not exist over the Crown land (if there is no determination, we will generally assume that native title exists)
- whether the Crown land is subject to a Native Title Certificate (issued under the CLM Act)

- whether the Crown land is within an area subject to an Indigenous land use agreement (ILUA) or protection under section 24FA of the NT Act that, by its terms, enables us to validly issue the tenure
- if none of the above are relevant, then how the proposed Act can be validated under the 'future acts regime' of the NT Act.

We can only issue a tenure in compliance with the NT Act. If, for instance, an ILUA is required to validly grant the tenure, we may decide against issuing the tenure. It will depend on the particular circumstances.

Compliance with the NT Act is one of several things we consider. Compliance with the act does not guarantee that we will agree to issue a tenure.

If s24FA protection is required to issue a tenure, the proponent will be responsible for making submissions to the Federal Court. If an ILUA is required, the proponent will be responsible for negotiating an agreement with the native title claimants or holders. The proponent will be responsible for all costs associated with seeking s24FA protection and negotiating an ILUA.

A proponent considering seeking s24FA protection or negotiating an ILUA should first discuss the matter with the department. Native title is one of many factors that we consider when determining whether to issue a tenure, and there may be other factors that will prevent the issue of a tenure over a particular site.

You can find more information on ILUAs and s24FA protection on the National Native Title Tribunal website at nntt.gov.au/ILUAs and nntt.gov.au/nativetitleclaims

Licences versus leases

One of the key differences between licences and leases is that a lease provides the holder with exclusive possession of the tenure area whereas a licence only gives a non-exclusive right to use land for a specified purpose. Leases typically are for a fixed term and enjoy security of tenure, while licences can be terminated by the minister administering the *Crown Land Management Act 2016*.

As licences only create a non-exclusive right and can be terminated at will, there are circumstances where we may be able to issue a licence but cannot enter into a lease agreement due to native title considerations.

Issuing new licences and leases

Land base leases and licences for oyster farming/aquaculture activities must comply with the NT Act. In some circumstances we may not be able to issue either a lease or licence for a land base site. In others, we may only be able to issue a licence where a lease would be preferable to the holder. This complexity means that we can only assess these matters on a case-by-case basis.

As part of the native title process, the department is often required to provide notification to and consider comments from native title parties. In some circumstances, these comments or other considerations can be reflected in the terms or conditions of a tenure, such as a requirement to undertake activities in a certain way.

Effects of native title on existing land base tenures

While native title may affect our ability to grant tenures, it usually has minimal practical impact on current tenure holders.

What happens if there is a native title determination over my land base site?

A determination of native title may find that native title exists, does not exist or is extinguished. In the latter two instances the determination will have no effect on land base tenures.

If native title is determined to exist, in most circumstances this will not affect existing land base tenures in that they will continue to have effect and you will have the same rights under the tenure as you had prior to the determination. Depending on the nature of the tenure (for example, whether it gives you exclusive possession to the Crown land or not), the native title holders can continue to enjoy and exercise any native title rights and interests that are not inconsistent with your rights.

Where a lease or licence was issued during or prior to 1996, we can generally reissue them on the same terms. Similarly, some leases and licences issued after 1996 can also continue to be reissued, depending on the particulars of the tenure.

In limited and rare circumstances, a determination of native title will affect land base tenures. This may result in the immediate termination of an existing licence, or the department being unable to reissue a tenure on its expiration.

Converting licences to leases

Native title is one of several factors considered by the department when deciding whether to convert a licence to a lease. In some instances, we will not be able to convert a licence to a lease due to the requirements of the NT Act, or other considerations. See the fact sheet *Leases and licences for oyster farming on Crown land* for more information (go to industry.nsw.gov.au/lands and search for the title)

More information

You can find information on native title and the department's work in this area on our website at industry.nsw.gov.au/lands/what-we-do/our-work/native-title.

Contact the department by phone on 1300 886 235.

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