

How native title rights affect oyster farming tenures on Crown land

Important

This fact sheet gives general information on native title rights and interests. It explains how Crown Lands, within the NSW Department of Planning, Housing and Infrastructure, considers these when determining an application for a tenure for land-based oyster farming activities on Crown land.

This fact sheet does not cover aquaculture leases (water leases) or permits under the *Fisheries Management Act 1994*. Please visit the NSW Department of Primary Industries and Regional Development – Fisheries website for information about [aquaculture leases and permits](#).

Native title and the *Commonwealth Native Title Act 1993*

Native title is the recognition by Australian law that some Indigenous people have rights to and interests in their land that come from their traditional laws and customs.

They include rights to access or travel through Crown land, to fish and hunt, or to hold 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.

Processes set out in the *Commonwealth Native Title Act 1993* (NT Act) recognise and protect these native title rights. The NT Act allows Indigenous groups to apply to the Federal Court of Australia for recognition of their native title rights. It also sets the conditions under which the NSW Government can do certain activities on Crown land that might affect native title rights and interests.

The department's approach to native title

We assess all activities for the use of Crown land to make sure they comply with the NT Act. We will not issue tenures or authorise activities if they are inconsistent with the provisions (legal conditions) of the NT Act.

We assume native title rights exist on all Crown land unless there is enough evidence to show these rights have been extinguished. If the rights have been ‘extinguished’, it means native title holders cannot fully exercise their traditional rights in the area.

Native title and land-based tenures for oyster farming

Issuing licences and leases under the *Crown Land Management Act 2016* (CLM Act) can be complex for land-based sites where native title applies. We must assess each lease or licence in line with the specific circumstances of the site and its proposed use. Because of this, we cannot make definitive statements about issuing tenures across all Crown land. However, the following sections give general statements that apply in many situations.

Native title assessment process

Before granting a tenure that may affect native title, we will consider if:

- 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)
- an Indigenous land-use agreement or protection under section 24FA of the NT Act applies to the Crown land that, by its terms, allows us to validly issue the tenure
- none of the above applies, how the proposed act can be validated under the ‘future acts regime’ of the NT Act.

We can only issue a tenure if it is in keeping with the NT Act. If, for example, an Indigenous Land Use Agreement (ILUA) is needed to validly grant the tenure, we may decide against issuing the tenure. It will depend on the 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 you are applying for a lease or licence and are told section 24FA protection is needed to issue a tenure, you will be responsible for making submissions to the Federal Court. If an ILUA is needed, you will have to negotiate an agreement with the native title claimants or holders. You will have to pay all costs associated with seeking 24FA protection and negotiating an ILUA.

If you are considering seeking section 24FA protection or negotiating an ILUA, discuss this with the department first. Native title is one of many factors that we consider when deciding if we will issue a tenure. There may be other factors that will prevent us from issuing a tenure over a particular site.

For more information on ILUAs and section 24FA protection, visit: [ILUAs | PBC](#)
(nativetitle.org.au)

Licences compared to leases

One of the key differences between licences and leases is that a lease gives the holder 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 ended by the minister administering the CLM Act.

As licences only create a non-exclusive right and the minister can end them at any time, there are circumstances where we may be able to issue a licence but cannot enter into a lease agreement because of native title considerations.

Issuing new leases and licences

Land-based leases and licences for oyster farming 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-based site. In others, we may only be able to issue a licence even though the holder would prefer a lease. We can only assess these matters on a case-by-case basis.

As part of the native title process, the department must often notify the groups involved and consider their comments. In some cases, these comments or other considerations may affect the terms and conditions of a tenure, such as a requirement to do activities in a certain way.

Effects of native title on existing land-based tenures

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

When there is a native title determination over a land-based site

A determination of native title may find that native title exists, does not exist or is extinguished. If it does not exist or is extinguished, the determination will have no effect on land-based tenures.

If native title is determined to exist, in most cases this will not affect existing land-based tenures. You will have the same rights under the tenure as you had before the determination.

Depending on the nature of the tenure (for example, whether it gives you exclusive possession of 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 before 1996, we can usually reissue it on the same terms. Similarly, we can also continue reissuing some leases and licences that were issued after 1996, depending on the particulars of the tenure.

In limited and rare circumstances, a determination of native title will affect land-based tenures. This may mean that we terminate the existing tenure, or that we cannot reissue a tenure when it expires.

Converting licences to leases

Native title is one of several factors the department considers when deciding whether to convert a licence to a lease. In some cases, we will not be able to convert a licence to a lease because of 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.

More information

For general information about leases and licences, visit the Crown Lands website at crownland.nsw.gov.au or call 1300 886 235.