

Native title and oyster farming tenures on Crown land

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1. Introduction

- DPIE Crown Lands is only responsible granting tenures, i.e. leases and licences, on Crown land. DPI Fisheries is responsible for tenures in waters. This presentation focuses on the native title in relation to issuing tenures on land, such as for 'land base' oyster sites.
- This presentation does not discuss Aboriginal land claims, which can also affect the oyster industry and the capacity for the department to issue tenures.
- This presentation is not advice. You should seek your own advice before undertaking any activities.

2. What is Native Title?

- Native Title describes the rights which Aboriginal people have to land and waters according to their customary laws, but viewed from and recognised by the Australian legal system.
- The nature and extent of these rights can vary from place to place, either due to customary differences or loss of certain rights and practices during European contact.
 - Example: rights to access, hunt, fish, camp, gather resources, and perform ceremonies
- Native Title is recognised and protected by the *Native Title Act 1993*. The Native Title Act does not create any rights or interests, it protects and regulates common law rights and interests determined to already exist.

3. What is Native Title?



4. Native Title v Aboriginal Land Claims

<i>Native Title Act 1993 (Cth)</i>	<i>Aboriginal Land Rights Act 1983 (NSW)</i>
Recognition of rights over land and waters	Grant of land rights (in freehold)
Claim made by native title holders – must establish customary connection to land	Claim made by Aboriginal Land Councils / NSWALC – current day geographic connection
Land held the by native title holding group	Land held by Local Aboriginal Land Councils or the NSWALC
Claims over land where native title rights have not been extinguished and where connection to the land can be established	Claims over Crown land not lawfully used or occupied, or required for an essential public purpose, or for residential land
Non-exclusive rights (typically)	Exclusive rights (typically)
Claim determined by Federal Court	Claim determined by Minister

5. Future Act compliance

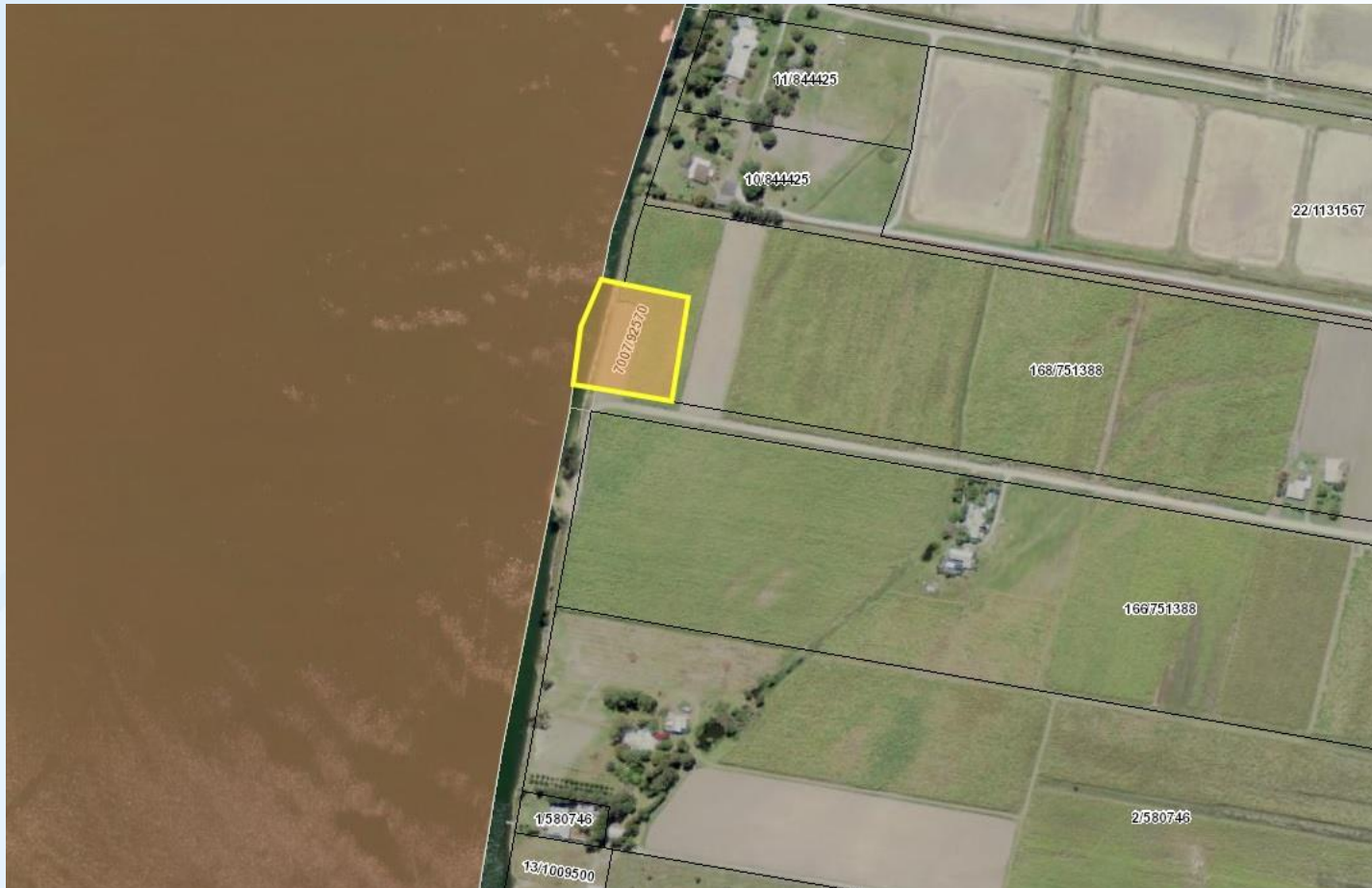
- **Future acts** are acts that ‘affect’ native title by either extinguishing it or are inconsistent with its enjoyment or exercise.
 - Example: Issuing a tenure (licence, lease etc.).
- The Native Title Act prescribes the way in which a future act can occur. Depending on the type of act, there may be different requirements. Sometimes there won’t be an easy solution.
- Future acts only occur where native title or is likely to exist. If native title has been extinguished, there are no future act requirements.
- **For tenures, the granting of the tenure is the future act. Any activities undertaken within the tenure area and subject to the purpose and conditions of the tenure are not future acts.**

6. Future Act compliance

- **For the Department** this means that before granting any tenure, we must comply with the NT Act, which means:
 - Checking whether we hold adequate evidence of extinguishment; or
 - complying with the future act regime in the Native Title Act.
- **How is native title extinguished?**
 - **PEPAs** (previous exclusive possession acts) such as the issuing of an exclusive tenures (pre 23 December 1996) or valid public works.
- **If NT is extinguished over a parcel of land, the Department can issue tenures without being impeded by the NT Act.**

- ***Native title is extinguished:*** A tenure can be granted:
 - if there has been a native title determination confirming native title is extinguished; or
 - if the State holds adequate evidence that native title has been extinguished.
- ***Native title is not extinguished:*** A tenure can only be granted if there is:
 - a relevant future act category available to support the grant.
 - a non claimant process is successfully pursued – s24FA protection – only available if there is no native title claimant.
 - an indigenous land use agreement (ILUA) is negotiated.
- **If there is not a suitable way to validate a tenure under the NT Act the Department will decline to issue a tenure.**

9. Issuing tenures



- **Tenures can only be issued if they can be validated under the Native Title Act.** For tenures, the Department may follow the below pathways :
 - 24GD – Acts permitting off-farm activities that are directly connect to primary production.
 - 24H – Management of water and airspace.
 - 24I – Renewals and extensions.
 - 24J – Reservations.
 - 24K – Facilities for services to the public.
 - 24L – Low impact acts.
 - 24M – Acts that pass the ‘freehold test’.

- **Where none of the above provisions are applicable, it may be possible to issue a tenure if:**
 - the land is subject to s24FA protection under a successful non claimant application. This is only available if there is no native title claim.
 - an ILUA is negotiated with the native title claimants/holders.
- Both S24FA protection and ILUAs require a substantial investment of time and resources and neither have a guaranteed outcome.
- Native title is one of many things Crown lands considers when deciding whether to issue a tenure. You should discuss any proposed tenure with Crown lands before commencing any proceedings or negotiations.
- **It is the responsibility of the proponent to either seek 24FA protection or to negotiate an ILUA. The proponent will bear all costs in relation to these processes.**

12. Summary - Things to consider

- Native Title is a complicated and evolving area of law. Sometimes there are no easy solutions.
- In some circumstances, it is worth considering locating operations on land that is not subject to native title (e.g. freehold land).
- Seeking s24FA protection and negotiating ILUAs require time and money and do not have guaranteed outcomes. Before deciding to undertake these actions, consider whether the expense justifies the benefit.
- Before making any submissions to a court or entering into negotiations, seek legal advice.