City **Pacific** Limited

TOWNSVILLE OCEAN TERMINAL

ENVIRONMENTAL IMPACT STATEMENT SUBMISSION RESPONSE

RESPONSE TO THE TOWNSVILLE MOTOR BOAT YACHT CLUB

August 2008

Townsville Ocean Terminal

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RESPONSE TO THE TOWNSVILLE MOTOR BOAT YACHT CLUB

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TOWNSVILLE MOTOR BOAT AND YACHT CLUB

Note: This submission response document has been prepared by means of duplicating the individual submission received and inserting response clauses where relevant.

1.1 EXECUTIVE SUMMARY

The **Townsville Motor Boat and Yacht Club** has serious concerns about the impacts of the Townsville Ocean Terminal (TOT) Proposal as identified in the Environmental Impact Statement (EIS). The Club and its members hold genuine and reasonable concerns about the Proponent's recent proposal to construct a bridge across the Ross Creek and the impact that this will have on the Club, its members and users of the Ross Creek.

The Club has three key concerns about the TOT as proposed in the EIS:

- Restriction of existing use rights, and rights of access through Ross Creek;
- Increased risk of maritime incidents as a result of obstacles to navigation; &
- Devaluation of the Club's existing facilities and approved re-development.

The Club and its members have invested substantially in redevelopment of the Club's marina berths and facilities, and development approval was received in March 2007.

The Proponent's proposal to bridge the Ross Creek represents a major restriction on the ability of vessels to transit Ross Creek to access the Club's marina facilities.

If the TOT as it is proposed in the EIS is approved, the Club and its members will suffer considerable financial and other losses arising directly from the impacts of the Proposed Development, and it is likely that the viability of the Club's investment, together with the Club itself, will be jeopardised.

This Submission made on behalf of the Club and its members sets out the grounds in support of the Club's position, and the impacts that proposed bridging of the Ross Creek will have on the Club's operations, and activities of its members.

Recommendation

That the Proponent be required to ensure and guarantee that there are no adverse impacts on use rights, the safety and access through navigable waters, and devaluation of assets for Ross Creek users.

The Proponent be required to conduct a Supplementary EIS addressing the issues raised in this Submission.

RESPONSE

The Proponent has undertaken a multi-criteria assessment (MCA) of haulage route options as part of this Supplementary EIS process. It is presented at Appendices A7 and A8 in Volume 2.

A detailed consideration of TMBYC issues has been undertaken and is presented at Appendix A29 in Volume 2 (Transpac Consulting Report: *Issues Raised by TMBYC*). The Report finds that:

- **On the basis of the Proponent's commitment to achieving an on-demand outcome for the temporary bridge management, it is doubtful that the proposed temporary bridge represents a significant or likely risk to TMBYC trading activity;**

- **It is unlikely that the temporary bridge will have any long-lasting adverse impacts on the value of marina berths at the TMBYC, wherein berth values are largely driven by market forces of demand supply. It should be noted that in Queensland there is an undersupply of at least 2,000 berths, and therefore, under these conditions it is likely that berth values in Queensland generally will be maintained well into the future; and**

- **Presently the TMBYC charges members ~$4,000 to $5,000 per linear metre for berths whereas the market rate is in the region of $8,000 per linear metre suggesting either that the value ascribed to TMBYC berths are already lower than broader market values for berths either reflecting differences in quality (e.g. design, location, associated services/amenities etc.) or that they are being offered to members at discounted rates.**

As an alternative, a barge option to carry trucks across Ross Creek has been considered by the project Proponent, which would effectively avoid any concerns about the impact of a temporary bridge structure on creek access.

This alternative to the temporary bridge across Ross Creek involves barging the trucks back and forth across the creek to the site. Discussions with the Port and the Regional Harbour Master have confirmed that this option is possible and two barge landing ramp locations have been identified with them and design work has been undertaken to show that the options are viable. The barging option has an advantage over the bridge in that noise on the Strand and Sir Leslie Thiess Drive is minimised.

1.2 INTRODUCTION – TMBYC'S CONCERNS ABOUT THE TOT EIS

The Townsville Motor Boat and Yacht Club ('TMBYC') opposes the proposed temporary and permanent bridging of the Ross Creek. It holds concerns about the impact of the Proposed Development upon the users of the navigable waters of the Ross Creek through which the Club presently enjoys access to the waters of Cleveland Bay, Magnetic and other Islands, the Great Barrier Reef and the Pacific Ocean.

The TMBYC is concerned that the EIS for the TOT avoids assessment of the real impacts of a traffic bridge over Ross Creek to service the Proposed Development. In this respect, the EIS is clearly deficient, inconsistent with the Terms of Reference and its purpose for consultation. As a result, a Supplementary EIS Process is both warranted and appropriate to avoid any approvals being challenged.

The Club is very concerned at the recent change to the Proponent's construction methodology, as first appeared in the EIS that was released for consultation to encompass the Christmas – New Year Holiday period which is widely regarded as a seasonal 'shut down' period for many businesses and residents of North Queensland. Up until the EIS had been released, the Proponent had identified that construction fill and materials would be transported to the site by sea barge, without interruption to the marine access provided by the navigable waters of Ross Creek.

The Club has recently invested significantly in the upgrading of their existing facilities.[1] This followed after the Club had advised the Proponent of its intention to rebuild all facilities and offered to participate in the Proposed Development. In November 1996, the Proponent advised the Club that the Proponent did not support inclusion of the Club into the TOT Proposal as "their plans had been submitted to government."[2]

At this time, and since, the Townsville City Council continued to support the TMBYC in its current location for the civic purposes of maintaining the ambience and vitality within the heart of the city of Townsville, and the entertainment precinct of Palmer Street on the south bank of the Ross Creek. As a result, the Club then made the logical decision to upgrade its existing facilities at the present location on Plume Street and the Ross Creek.

The Club's marina and facilities redevelopment project predates the release of the EIS for the TOT by a significant period: the Club secured both a sea bed lease[3] and Development Approval (in March 2007) prior to awarding a multi-million dollar contract for refurbishment and expansion of the Club's marina berths and onshore facilities (refer to **Attachment 1 –** Photograph of TMBYC and extract of Development Approval). Interruption of the Club's access through Ross Creek associated with the TOT proposal will jeopardise the viability of the existing Club and approved development.

The impact of reduced access through bridging of the Ross Creek for both the initial earthworks and subsequent building phases of the construction period, together with the traffic impacts for the Proposed Development's operational period, have not been properly described or assessed in the EIS. Closure of Ross Creek to navigation as a result of exclusion zones for military ships visiting the TOT is a serious flaw in the Proponent's current configuration, and is another major concern for the TMBYC.

Furthermore, the EIS does not adequately respond to the Queensland Government's Terms of Reference for preparing the TOT EIS in these respects. The EIS also fails to address the disparate traffic data (produced by respected traffic engineers and set out in publicly available documents) relating to the impact of the Proposed Development on the existing road network.

Although it is the responsibility of the Proponent to develop and assess the impacts of design alternatives, the TMBYC has, at its own cost, included within its submission a number of alternative design options for providing vehicular access to the Proposed Development, while preserving the ability of Ross Creek users to access Cleveland Bay and the Pacific Ocean to demonstrate that win/win options (for both the Proponent and the Club) are possible.

As a result of the deficiencies in the process of public consultation and content in the EIS for the TOT, there would be no impediment to the alternatives being considered in a Supplementary EIS process.

RESPONSE

The Proponent has undertaken a multi-criteria assessment (MCA) of haulage route options as part of this Supplementary EIS process. It is presented at Appendices A7 and A8 in Volume 2.

As an alternative to the temporary bridge haulage option, a barge option to carry trucks across Ross Creek has been considered by the project Proponent, which would effectively avoid any concerns about the impact of a temporary bridge structure on creek access.

This alternative to the temporary bridge across Ross Creek involves barging the trucks back and forth across the creek to the site. Discussions with the Port and the Regional Harbour

[1] The refurbishment of the Club's facilities is estimated to cost $8 million – refer to T. Raggatt's article 'Smooth Sailing' published in the *Townsville Bulletin,* on 11 December 2007.
[2] Personal communication from the Commodore of the TMBYC.
[3] The Club received its Development Approval for the refurbishment in March 2007, and the Townsville Port Authority subsequently sold Ross Creek moorings to the Club – refer Townsville Port Authority Press Release 'Ross Creek Moorings Sale' dated 26 November 2007.

Master have confirmed that this option is possible and two barge landing ramp locations have been identified with them and design work has been undertaken to show that the options are viable. The barging option has an advantage over the bridge in that noise on the Strand and Sir Leslie Thiess Drive is minimised.

1.3 PERMANENT BRIDGE OVER ROSS CREEK FOR TOT AND IMPACTS

Access is a paramount consideration for a development of major scale and significance such as the proposed TOT. Unfortunately, the EIS does not present sufficient information for the reader to make an informed analysis of the provisions for access without referring to other publicly available documents compiled by the Council and experts in the field of traffic engineering.

The EIS for the TOT does however address the issue of access for the initial construction phase relating to the earthworks and the reclamation, and impacts associated with this aspect of the Proposal is addressed under a separate heading within this submission at Section 4 below.

Although the EIS includes a traffic report produced by Holland Traffic Consulting, based on a model produced by Veitch Lister Consulting, the parts of the road network which are most likely to be affected by traffic associated with the Proposed Development are absent from the traffic report. Other traffic studies undertaken in 2004 by SKM reveal that development of the Breakwater site will result in a significant increase in the traffic load to the road network of South Townsville, which is reflected in Townsville City Council's Breakwater Road Network Headworks Contribution Policy in its planning scheme.

As a matter of law in Australia, it is well accepted that legislation is to be interpreted in a manner that best gives effect to its purpose:- "the purpose of construing the text of a statute is to ascertain the intention of the enacting parliament."[4] Supporting this contextual approach, the High Court "has accepted that it is an error of interpretive approach to take a word or phrase in legislation and to read that word or phrase divorced from its immediately surrounding provisions (and any other relevant *indicia* of meaning such as legislative history, stated purposes and admissible extrinsic materials)."[5]

When this principle of statutory construction is applied to environmental impact assessment processes, it is clear that these must include assessment of the impacts associated with the construction and operation of the development proposal, per the Full Court of the Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc.*[6]

As noted above, the traffic generation data contained in the EIS is unfortunately inadequate and requires the reader to undertake multiple assessments of traffic movements based upon a number of publicly available documents containing traffic data. Similarly, the Proponent's data relating to use of the Ross Creek by vessels is also deficient. The small boat movements survey was undertaken on behalf of the Proponent during the 29th and 30th of August 2007 and the 2nd of September 2007. These were low use days – with the meteorological records showing that Strong Wind Warnings were issued for the 29th and 30th of August 2007, and the 2nd of September 2007 being Fathers Day. Accordingly the boat movement data relied upon by the Proponent in the EIS is flawed.

The disparities in the documents are significant and should have been clarified and final figures compiled into an easily understood and presentable form, before the EIS was made public.

The EIS includes traffic modelling by Veitch Lister Consulting (VLC) and a related analysis by Holland Traffic Consulting (HTC).

The Townsville City Council (TCC) has prepared a Breakwater Road Network Headworks Policy for Contributions. It appears that this Policy is based on traffic growth estimates prepared by Sinclair

[4] Per Brennan CJ at page 504, para 41 in *Project Blue Sky v Australian Broadcasting Authority* (1998) 153 ALR 490.
[5] Per Kirby J at page 19, para 43 in *Chang v Laidley Shire Council* [2007] HCA 37.
[6] [2004] FCAFC 190 – the Nathan Dam case.

Knight Merz (SKM) in their "Flinders Street East Traffic Study" of 2004. In addition there is the "Breakwater & Associated Developments: Assessment of Ultimate Road Network Traffic Volumes 16 July 2007" produced by C & G Horman Pty Ltd.

Those reports each provide different traffic generation figures for the proposed Strand Bridge over Ross Creek and different generation figures attributable to the Breakwater development.

The VLC report identifies 12,784 daily traffic movements over the proposed Strand Bridge at 2025.

The Council Policy estimates the ultimate traffic in vehicles per day as 25,000 daily traffic movements over the bridge (for 2025).

The Breakwater & Associated Developments assessment dated 16 July 2007 (C & G Horman) provides a daily traffic movement over the bridge of 37,950.

As previously indicated, it is unacceptable for such a disparity in publicly available documents to not be addressed and explained in an EIS for a major development of such significance such as the TOT. None of the above-listed documents give any consideration to the impact of the proposed Strand Bridge on the navigability of Ross Creek.

In the circumstances, and at is own cost, our client has undertaken a study of the number of vessels that would use Ross Creek that would be affected by the proposed permanent Strand Bridge. A copy of that document is reproduced at **Attachment 2:** Maunsell Ross Creek Vessel Movements Report – January 2008.

The assessment is taken to 2010. At 2010 it is estimated that 310 vessels that would be berthed in Ross Creek will be affected to the extent that they will require the proposed Strand Bridge to be opened to navigate out of Ross Creek. These numbers are based on current approvals and those known to be before assessment managers.

The greatest potential for conflict between vehicular traffic and vessels will occur on Wednesday between 5pm and 6pm with traditional Wednesday afternoon sailing. It is estimated that 30 sailing boats depart at that time.[7]

Sailing boats cannot queue. It is not expected that the bridge opening arrangements would allow 30 vessels to pass unimpeded by the bridge while it remains open and vehicular traffic blocked. The Proponent for the Breakwater Development estimate bridge opening to allow a vessel to pass taking five to seven minutes.

Using a rough estimate of peak hour vehicular traffic as being 10% of the vehicles per day we make the following calculations of queuing lengths required for vehicular traffic at Ross Creek for the passing of a single vessel (or possibly two vessels) in five to seven minutes.

1. Veitch Lister Consulting (VLC – Proponent's Consultant)

Figures 12,784 x 10% = 1278

Assume a 60/40 split with traffic moving away from the city.

766.8 vehicles in peak hour or 12.78 vehicles per minute.

Say six minutes opening time (closed to vehicles).

[7] It is noted that the EIS proposes that the Proponent will open the Construction Bridge for Wednesday afternoon sailing, though it is not clear what arrangements will apply in respect of the permanent bridge.

6 x 12.78 = 76.68 vehicles queuing.

Allow 5 m per vehicle for queuing.

76.68 x 5 = 383.4 m for queuing for one to six vessels.

2. Council Policy – Breakwater Road Network Headworks Contributions

25,000 x 10% = 2500

Assume a 60/40 split with traffic moving away from the city.

1500 vehicles in peak hour or 25 vehicles per minute.

Say six minutes opening time (closed to vehicles).

6 x 25 = 150 vehicles queuing.

Allow 5 m per vehicle for queuing.

150 x 5 = 750 m for queuing for one to six vessels.

3. Breakwater & Associated Developments Assessment – C&G Horman Report

37,950 x 10% = 3795

Assume a 60/40 split with traffic moving away from the city.

2277 vehicles in the peak hour or 37.95 vehicles per minute.

Say six minutes bridge opening time (closed to vehicles).

6 x 37.95 = 227.7 vehicles queuing.

Allow 5 m per vehicle for queuing.

227.7 x 5 = 1138.5 m for queuing for one to six vessels.

The range of queuing distance required for one or six single vessels in peak hour on the basis of the assumptions set out above varies from 383 m to 750 m to 1138.5 m.

The distances required for queuing for one or six vessels transiting through the open bridge is not acceptable from a traffic engineering perspective. The distance required for queuing is simply not available.

The time required for vehicles to wait is not acceptable.

These basic calculations reveal the difficulties of having 30 vessels seeking to navigate Ross Creek during peak hour with the proposed low level opening Strand Bridge constructed becomes evident.

These desktop assessments of traffic impacts arising from a bridge opening regime, with similar outcomes for marine navigation delays, are supported by the Maunsell model set out at Attachment 2: Maunsell Report on Ross Creek Vessel Movements – January 2008.

The current design for the TOT proposal does not allow navigation and vehicular traffic flows to practically coincide.

As a consequence (irrespective of the figures used for traffic generation) alternative design solutions must be considered to allow Ross Creek users access, and provide the Breakwater Development with vehicular access. Alternative design solutions are presented below at Section 7 though these were not included in the EIS.

Considering the material relating to traffic, it would appear that the VLC Report figures have not taken into account growth and are understated when compared to other traffic operation data. The trip generation rates used in those figures do not correspond with the trip generation for different land uses set out in Council's policy "Breakwater Road Network Headworks Contributions Policy" which itself is understated when compared to the traffic generation figures proposed in Council's Road Network Headworks Policy that is broadly applied to the rest of the Townsville Local Government area.

The HTC assessment at paragraph 6 identifies the detached dwellings generation rate as "selected" by "City Pacific" and not by HTC. A comparison of the peak hour generation rate comparing detached houses and apartments is 0.53 vehicles per hour per lot and 0.58 vehicles per hour respectively. This comparison is inconsistent with the typical comparisons where a detached house will generate more traffic than an apartment.

When looking at impacts, HTC rely upon the standard used by Department of Main Roads where the Department considers whether or not there has been more than 5% impact upon an intersection or road. (This is usually the practical trigger point for assessing whether developments have a significant impact and therefore need to take mitigation measures.)

The HTC report then proceeds in paragraph 8 to analyse impacts at Flinders Street East, Denham Street west of Flinders Street East and Denham Street east of Flinders St East. It then indicates that no traffic flows exceed 5% of the background traffic if the Breakwater Development did not proceed.

In the VLC report at page 18 there is an analysis of projected traffic growth with or without the Breakwater development in both 2011 and 2025. By extracting the daily traffic volumes for the proposed bridge identified in scenario 3 from those identified in scenario 5, we can calculate an increase of 2090 trips being generated by the Breakwater development out of a total of 8680 trips. The impact is significantly greater than 5%.

Surprisingly with an increase in traffic the same exercise in relation to the 2025 daily vehicle trip generation identifies only a 1052 trip generation increase. It is difficult to understand how the trip generation numbers could reduce as more of the Breakwater development is used. This raises questions about the veracity of the data used in the VLC model, and the conclusions drawn from both the HTC and VLC reports.

The HTC Report does not articulate the impacts upon South Townsville particularly the extension along McIlwraith Street to Dean Street where significant impacts of greater than 5% occur.

For example, the Council Policy indicates on Figure C2, traffic generated by Breakwater Development VPD as 18,000 VPD at the proposed Strand Bridge. At Figure C3, the Estimated Ultimate Traffic VPD of the proposed Strand Bridge is 25,000. Therefore 18,000 out of 25,000 VPD, or 72% of the traffic on the proposed Strand Bridge will be generated by the Breakwater Development according to the Policy.

Our client is concerned that the interpretation of the traffic figures in the EIS appears to be specifically orientated to demonstrating that the suggested minimalist contribution of traffic arising from the Proposed Development to support an argument as to who should pay for infrastructure such as permanent bridge over the Ross Creek. For example, in the Executive Summary to the EIS under the heading "traffic and transport" the Proponent suggests that the "TOT Project will not materially affect the situation". The Proponent's statement that "traffic modelling and analysis of existing standards of operations and performance indicators conclude that the existing network south of The Strand causes problems, rather than the Breakwater network (existing or proposed) itself"[8] is similarly misleading and is not supported by an objective analysis of the traffic data, including that contained in Appendix 9 to the EIS.9

What the traffic studies are really saying is that without the Proposed Development, an opening permanent bridge across the Ross Creek is not required for many years, but that with the Proposed Development, a need for a permanent bridge is triggered.

This means that in reality, any proposal for a temporary bridge will emerge as a permanent structure. Our client submits that all future planning and approval processes should consider this reality. Restriction of navigation access through Ross Creek is of great concern to the TMBYC and its members.

The Attached Valuer's Report demonstrates the negative effect that a proposal for even a 'temporary' Strand Bridge would have on the value of assets of the TMBYC, the TMBYC's facilities and operations, as well as the marina berths (refer to **Attachment 3**:-Taylor Byrne Valuer's Report on effect of Proposed Bridge on TMBYC).

Recommendation

Current and future planning and approval processes expressly acknowledge that the proposed bridging of Ross Creek is a direct result of traffic generated by the TOT Proposal, including construction and operational phases.

The Proponent be required to undertake a Supplementary EIS process to properly evaluate the impacts associated with the various alternatives for providing traffic access to the Proposed Development.

RESPONSE

The traffic studies undertaken as part of the EIS and the additional traffic studies done for the Supplementary EIS do not support the claims made above, namely that "the proposed bridging of Ross Creek is a direct result of traffic generated by the TOT Proposal". On the contrary, the traffic modelling confirms that *even without the TOT project*, traffic conditions at key intersections such as Flinders Street East and Denham Street will be unacceptable well before 2025.

A crossing of Ross Creek has been part of Council's longer term policy for traffic management in response to growing demands of the city generally, and as a result of development within the CBD and its environs. It is not a proposal associated with, or resulting from, the proposed Townsville Ocean Terminal and Breakwater Cove development.

[8] EIS page ES9, under heading "Traffic and Transport".
[9] Appendix 6 to the EIS:- Holland Traffic Consulting's 'Traffic Report on Proposed Breakwater Development at Entertainment Drive, Townsville for City Pacific' dated 11 October 2007.

The traffic assessments presented at Appendix A21 in Volume 2 of the Supplementary EIS indicate that the project's impact on future road demands is less than the 5% significance threshold as stipulated by Department of Main Roads. This notwithstanding, the Proponent's position has consistently been that it will contribute fairly and equitably to relevant and appropriate infrastructure costs as they arise into the future. This basic position applies to the future costs of a crossing of Ross Creek.

1.4 CONSTRUCTION BRIDGE OVER ROSS CREEK FOR TOT AND IMPACTS

Originally, the proponent had calculated on bringing construction materials to the site via sea barge without interrupting vehicular traffic flows.[10] As discussed below at Section 5 of this submission, the Proponent has changed this proposal to a preferred option of hauling construction materials across a so-called temporary bridge that is an extension of The Strand over Ross Creek.

The haul regime using the temporary Strand Bridge proposed by the Proponent calls for almost continuous streaming of B-Double Trucks or similar Heavy Vehicle traffic for a period of at least three years, 12 hours per day for six days each week.[11] This will be followed by traffic associated with the construction of buildings and facilities on the reclaimed land over an estimated subsequent five to eight year period.

The EIS makes a short statement to the effect that the bascule bridge will remain open during Wednesday afternoon to facilitate access for the traditional twilight sailing, but there is a concern that construction timelines may impinge on the Bridge opening at this time, and at other peak usages.

Practically both vehicular and boat traffic will not 'co-exist' under the temporary Strand Bridge scenario. The Attached report from Maunsell Engineers confirms that interruptions to both boat traffic and vehicle traffic associated with the operation of the bascule bridge will be significant (refer **Attachment 2).**

Originally, the proponent had calculated its project costs on bringing construction materials to the site via sea barge without impacting on the existing amenity at the intersection of The Strand with Sir Leslie Thiess Drive or placing further strain on the local road network and interrupting vehicular traffic flows. The Executive Summary itself makes reference to using barges to deliver the rock for breakwater construction[12], confirming the Proponent's original intention to use barges for construction materials delivery rather than the roads network. There is no persuasive reason why barges cannot be used to deliver all materials to this essentially marine construction site.

At the time of release of the EIS for public comment in December 2007, the Proponent first publicly announced its proposal to provide construction access via a temporary bridge over Ross Creek along an alignment which is an extension of The Strand. This proposal will significantly impede access through the navigable waters of the Ross Creek, and adversely affect all Creek users.

The EIS contemplates that more than 68,500 separate B-double or similar Heavy Vehicle truck loads of materials would be carried over the temporary Strand Bridge at Ross Creek, between the hours of 0700 to 1900 for an estimated period of at least three years.[13] The Proponent estimates that Heavy Vehicles will need to be carting materials to the site at a rate of 1 vehicle every 7 minutes across The Strand Bridge it proposes to construct.

The Proponent's figure of 6.9 Heavy Vehicles per hour requires that any 'opening' bridge be almost constantly in a 'closed' position to allow vehicle transit of the Ross Creek.

[10] Personal comment from City Pacific's Mr Peter Trathen on 15 January 2008. Refer also to the Initial Advice Statement (IAS) for the Townsville Ocean Terminal Project.
[11] It should be noted that Construction traffic is defined within the EIS that includes additional traffic (such as contractors and staff vehicles) beyond the Heavy Vehicle movements figures quoted here.
[12] Refer Page ES8, under heading "Construction". See also Page 3:23 of the EIS where barges are intended to be used to transport the rock for the breakwater.
[13] section 3.4.4 and Table 3.4.4.3 of the EIS.

Our clients are further concerned that this figure is an underestimate of the use of the proposed bridge. In this regard, the EIS makes a reference to Construction Traffic including a range of additional vehicles – such as private contractors and staff vehicles, as well as the heavy vehicles used in delivery of construction materials (i.e. including B-Doubles, Semi trailers and non-articulated Heavy Dump trucks).[14] Accordingly, traffic loads on the proposed Strand Bridge will be greater than the figure of 6.9 vehicles per hour as the EIS suggests.

When Heavy Vehicles (as well as lighter traffic) are required to queue while the proposed temporary bridge is opened to allow boat traffic to access the reaches of Ross Creek upstream of the bridge, this will cause significant impacts on amenity through vehicles' emissions.

Given the Proponent's desire to provide the engineering for a short-term bridge only in the EIS, it is inevitable that the resulting form and fabric of the bridge will be rudimentary in nature – without the finesse necessary to ensure either its fast and efficient, or its quiet operation. Not insignificant bridge engineering and construction would be required to minimise the time taken for the opening and closing of the bridge, and to eliminate the loud noises that can be expected to emanate from the operation of a bridge that opens to allow vessels to pass.

The Townsville City Council itself has made submissions against, and is opposed to the Proponent's suggested construction bridge and vehicular access to the Development site over the Ross Creek. The Council instead recommends the Port Access Road as the prime access route with all of the material to be barged across the mouth of the Ross River.[15]

The impedance to access of Ross Creek users described above at Section 3 of this submission apply equally to the Construction Bridge proposal.

Approval, construction and operation of these aspects of Proposed Development are capable of giving rise to causes of action sounding in negligence and nuisance.

The Attached Valuer's Report demonstrates the negative effect that a proposal for even a 'temporary' Strand Bridge would have on the value of assets of the TMBYC, the TMBYC's facilities and operations, as well as the marina berths (refer to **Attachment 3**:-Taylor Byrne Valuer's Report on effect of Proposed Bridge on TMBYC).

Our client instructs us that it and its members would seek to pursue actions for damages if necessary.

Recommendation

The Proponent be required to barge the substantial volumes of fill materials required directly to the site without using a temporary construction bridge over the Ross Creek, as part of any approval for the TOT.

The Proponent must be required to undertake a Supplementary EIS examining in detail the impacts associated with the various alternatives for providing construction and on-going access to the Proposed Development.

RESPONSE

The Proponent has undertaken a multi-criteria assessment (MCA) of haulage route options as part of this Supplementary EIS process. It is presented at Appendices A7 and A8 in Volume 2. One of the key preferred haulage options requires a temporary bridge across Ross Creek.

[14] Page 3:43 under heading "construction traffic".
[15] See L.McKinnon 'Doubts raised on port project' published on page 7 of the *Townsvile Buletin* Wednesday, 30 January 2008, copy reproduced at **Attachment 4.**

This approach was articulated to the TMBYC Board in January 2008, together with an in-principle commitment to achieving a bridge operations/management plan that met the needs of water traffic (including TMBYC members) including proper consideration of achieving an effective 'on demand' regime. This has been considered in more detail in the Supplementary EIS and the details of this assessment are presented in the Flanagan Consulting Group report at Appendices A7 and A8 in Volume 2. This report is based on a revised approach to the operation of the temporary bridge from that set out in the EIS. It is proposed that the bridge will be default open and close for vehicular traffic. This will mean that marine traffic will have priority with bridge opening on demand.

As an alternative, a barge option to carry trucks across Ross Creek has been considered by the project Proponent, which would effectively avoid any concerns about the impact of a temporary bridge structure on creek access.

This alternative to the temporary bridge across Ross Creek involves barging the trucks back and forth across the creek to the site. Discussions with the Port and the Regional Harbour Master have confirmed that this option is possible and two barge landing ramp locations have been identified with them and design work has been undertaken to show that the options are viable. The barging option has an advantage over the bridge in that noise on the Strand and Sir Leslie Thiess Drive is minimised.

1.5 INSUFFICIENT CONSULTATION ON 'LAST MINUTE' PROPOSAL FOR BRIDGING ROSS CREEK

The TMBYC has not been adequately consulted in relation to the Proponent's comparatively 'last minute' proposal to provide vehicle access to the site by bridging the Ross Creek. Previously, the TMBYC and its members were of the understanding that construction materials would be delivered to the Proposed Development site by way of sea barge. This has been widely understood to be the construction methodology since at least October 2006 – as indicated in the Proponent's *Initial Advice Statement for the Townsvile Ocean Terminal Project ('IAS')* at section 2.3.1.

While no prospect of carting fill to the site by truck is identified in the IAS, the IAS does however state that the EIS will address "Transportation issues including the impact on the existing transport network" – and unfortunately for the TMBYC and its members, the Proponent's EIS fails to address this requirement.

Up until the last minute (i.e. 15 January 2008) the Proponent had not directly consulted with the TMBYC who's members access to Cleveland Bay and beyond through Ross Creek will be directly impacted by the proposed change in transport method (discussed below), and the establishment of a bridge extending along the alignment of The Strand to the other side of Ross Creek.

The TMBYC first became aware of the Proponent's changed proposal to truck fill to the Development site following release of the EIS with the realisation that access to the Club's berths would be restricted by the Proponent's proposal to bridge the Ross Creek.

This experience has led to our clients' collectively forming the belief that there has been a deliberate attempt by the Proponent to obfuscate the public's awareness[16] and minimise the process of consultation relating to the 'last-minute' proposal to deliver materials to the site by truck over a temporary bridge and the associated severe impacts on access in the navigable waters of Ross Creek. Clearly the Proponent's decision to release the EIS for public consultation in early December and directly encompassing the Christmas – New Year holiday period and seasonal closure when many North Queensland residents are unavailable is far from best practice environmental impact assessment – and is unacceptable for a development of this scale and magnitude.

[16] for example, many of the Figures in the EIS deliberately cut to exclude that portion of The Strand that would be affected by both construction and operational traffic– see Figures in Section 3 generally (particularly all plates and figures included in The Executive Summary), and this approach is also taken in the Consultants' reports comprising the Appendices to the EIS – see for example Figure 1.3 Proposed Ocean Terminal Project in Appendix 13 'Coastal Engineering Study'.

Of particular concern in this regard is the Proponent's election to use Plate 3.4, Plate 3.5 and Plate 3.6 in the body of the EIS and the Executive Summary for the EIS showing an artist's perspective of the TOT, absent any crossing over the Ross Creek to provide access to the site. Understandably, after viewing these pictures in the Executive Summary to the EIS, or for that matter Section 3.0 of the EIS itself, many Creek users considered that there would be no interruption to their access. A closer reading of the text of the EIS is required to discover otherwise. Relevantly, the detail of the Proposal in this regard is buried in Appendix 6 to the EIS.

In terms of public consultation and attitude surveys conducted by the Proponent's consultants, the survey undertaken is both inadequate and biased. The survey undertaken on behalf of the Proponent was limited to around 400 residents of Townsville and Thuringowa, with a 'local survey' reply-paid mail-out survey targeted at 120 residents near the existing Port operations, on the south bank of the Ross Creek.[17] Thuringowa residents are sufficiently remote from the site that many of the emissions and traffic impacts associated with the development will not be experienced in that area.

Accordingly, it is clear that the sample area was inadequate and should have focussed on nearby stakeholders, particularly users of the Ross Creek, that are most likely to be impacted by the Proposed Development especially given the direct acknowledgement by the Proponent that:

> "An increase in traffic congestion in The Strand precinct and increased pressure on essential services and infrastructure also figured prominently as reasons for opposing the integrated development and each of its components."[18]

The Proponent's own consultants, Transpac Consulting Pty Ltd, acknowledged at a public meeting on 16 January 2008 that the degree of opposition to the TOT Project intensified among residents closer to the Project site. This statement is supported by the TMBYC and its members.

As a result, the Proponent's figure of "55% of residents" being "favourable to the TOT Project", as given at page 14 of the Executive Summary and again at page 1:16 of the EIS itself, is not a true reflection of community concerns. Similarly, the Proponent's statement that "the overall tenor of the survey results indicate that the majority of residents believe that the TOT Project will lead to improvements in public amenity" is also flawed, particularly where access is curtailed or impeded. With the inclusion of the Proposed Strand Bridge – impacts upon access through the Ross Creek will be severe, as outlined in section 6 of our clients' Submission.[19]

In relation to the traffic assessment, the Proponent states that "The TOT will not materially affect the existing situation."[20] Under the words "major issues and potential impacts investigated" on page 15 of the Executive Summary, the Proponent suggests that there will be a "temporary increase in traffic to the local road network", and the Proponent notes this as "acceptable". This proposition is demonstrably untrue where the Proponent intends to create a haul route along The Strand with three years of Heavy Vehicle construction traffic operating 12 hours per day, 6 days a week, together with an expected further five years to eight years of traffic associated with construction of buildings and facilities, and the additional strain of post-construction, 'operational' traffic generated by the Breakwater precinct. Our clients submit that these impacts of the TOT Proposal cannot be described as temporary by any stretch, and are certainly not "acceptable". Similar issues arise for the operational phase of the development.[21]

It seems that in terms of addressing traffic and Creek user-related impacts of the TOT proposal, the Proponent has simply discarded the matter as virtually irrelevant and as a result, it has not been properly addressed in the EIS process.

[17] Refer sections 3.3.2 and 3.3.3 of the Report 'Social Impact Assessment: Volume1' by Transpac Consulting and included as Appendix 21 to the EIS.
[18] Page 1:17 of the EIS.
[19] Refer also to the Attached Maunsell Report.
[20] Page ES9, under heading "Traffic and Transport".
[21] Refer above to Section 3 of this submission.

Again this raises the question of whether the Proponent has deliberately taken steps to minimise the public's awareness of aspects of the TOT proposal and thereby skew the results of its consultation.

It is simply unacceptable that the absence of direct consultation and publicity undertaken by the Proponent has resulted in so little public understanding awareness of this aspect of the Proposal. Similarly, it is unacceptable for an EIS for such a major project of state significance as the TOT to fail to properly address the significant impacts associated with the interruption to users of the Ross Creek, particularly in circumstances where our client has obtained approval for, and outlayed many millions of dollars to upgrade its marina berths and clubhouse facilities.

Recommendation

The Proponent be required to barge the substantial volumes of fill materials required directly to the site without using a temporary construction bridge over the Ross Creek, as part of any approval for the TOT.

The Proponent must be required to undertake a Supplementary EIS examining in detail the impacts associated with the various alternatives for providing construction and ongoing access to the site.

RESPONSE

The Proponent acknowledges that greater effort could have been made to achieve earlier engagement with TMBYC. However, it should be noted that at least one project consultant sought on at least 3 occasions to arrange meetings with then Commodore Wayne Miller. Unfortunately, despite a number of efforts to achieve a suitable meeting time, no such meeting took place. Correspondence inviting Commodore Miller to provide comment was also issued as part of this effort.

This notwithstanding, the Proponent is committed to working collaboratively with all relevant stakeholders to achieve an acceptable outcome for all concerned. It is hoped that the revised philosophy of the operation of the bridge set out in the report by Flanagan Consulting Group at Appendix A7 in Volume 2 which was a direct result of the discussions held with the Board of TMBYC, will resolve the concerns of the TMBYC and its members. It was in fact at the meeting with the TMBYC Board that the concept of opening on demand was canvassed and discussed. The current approach is a further improvement on this.

It is believed that a further improvement will result if an alternative was implemented. The alternative is a barge option to carry trucks across Ross Creek has been considered by the project Proponent, which would effectively avoid any concerns about the impact of a temporary bridge structure on creek access.

This alternative to the temporary bridge across Ross Creek involves barging the trucks back and forth across the creek to the site. Discussions with the Port and the Regional Harbour Master have confirmed that this option is possible and two barge landing ramp locations have been identified with them and design work has been undertaken to show that the options are viable. The barging option has an advantage over the bridge in that noise on the Strand and Sir Leslie Thiess Drive is minimised.

1.6 LIABILITIES AND CAUSES OF ACTION RE NAVIGABLE WATERS AND OBSTRUCTING STRUCTURES

Our client is very concerned by the increased risk to navigation, and consequent increased likelihood of maritime incidents (i.e. groundings and collisions) that will arise as a result of unsafe situations created by the Proponent's proposal to bridge the Ross Creek (described in detail in sections 3 and 4 of this submission).

The Maunsell engineering report at **Attachment 3** confirms that there is both an increased risk and likelihood of accidents occurring. This is graphically demonstrated in the two figures included at **Attachment 5:-** Diagrams of Marine Risk Assessments for Ross Creek users.

The Proponent's own risk assessment in this respect is demonstrably incorrect, and severely plays down the likelihood and consequences of the safety risks to navigation posed by the proposal to construct a bascule type bridge over Ross Creek. The Proponent's risk assessment is set out in the 'EIS: Construction Risks' table in Appendix B of the EIS Operation Risk Register[22] and suggests that for the risk 'EC7 – potential impact on existing marine users during construction' with the consequence of 'impairment of operations of existing Ross Creek users' that:

- the likelihood of the risk occurring is 'rare';
- the consequence of the risk occurring is 'minor'; and that
- risk rating is therefore 'negligible'.

This is demonstrably untrue – the risk is high, the consequences are catastrophic and the overall risk rating should at least be 'high' – as supported by both **Attachment 3** and **Attachment 5** of this submission.

There is a strong argument in law that the Ross Creek users have the right to navigation of the Ross Creek waterway, and this is discussed in detail below. Queensland's State Policy for Coastal Management – the State Coastal Management Plan 2001 – is also relevant in this regard and is discussed below at section 8 of this submission.

Our client instructs us that TMBYC will be vigorously defending its rights, and the rights of its members in this regard.

RESPONSE

The comments of the TMBYC are noted. The design of the temporary bridge has been reviewed with the Acting Harbour Master. He was comfortable that the bridge design would adequately meet safety standards provided navigational beacons and lights were provided. In addition he required as a safety precaution, that a pontoon be installed upstream of the bridge.

1.6.1 Right to use Navigable Waters as a Highway.

"Public rights in navigable waters date from Roman times."[23] The lineage of that right has been examined in numerous cases including in our Supreme Court in *Ball v Consolidated Rutile Ltd*[24] referring back to a passage in the *De Jure Maris* of Lord Hale to the effect that:

> "But their Lordships are in entire agreement with him on his main proposition, namely, that the subjects of the Crown entitled as of right not only to navigate but to fish on the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in the very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right in which this practice has crystallised resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity the Crown as *parens patriae* no doubt regarded itself bound to protect the subject in exercising it, and the origin

[22] in Appendix 24 to the EIS: Hazard and Risk Assessment by Hyder Consulting.
[23] 'The Public Trust in Tidal Areas' (1970) 79 *Yale Law Journal*, 762 at 763-64.
[24] [1991] 1 Qd R 524. See also *Far North Queensland Electricity Board v Masterwood Pty Ltd* [1998] QCA 431.

and extent of the right as legally cognizable probably attributable to that protection, protection which gradually came to be recognised as establishing a legal right enforceable in the Courts."[25]

RESPONSE

The opportunity to navigate up and down Ross Creek is not being removed. The temporary bridge will change the way mariners navigate the creek in much the same way that existing restrictions which control speed and control vessel movement within channel markers. The opening in the bridge is a narrowing of the channel over a short distance for a period. All bridges across waterways impede vessel movement in some way and the temporary bridge in question has been redesigned and the operation of it amended to minimise the impact on passing vessels.

1.6.2 Impedance of Navigable Waters and Public Nuisance

A cause of action based on public nuisance can arise where the right to navigate navigable waters is impeded.

In *Hole v The Sittingbourne and Sheerness Railway Co*[26] the Court was asked to consider the liability of a Railway Corporation which had constructed an opening bridge over a public navigable channel where a failure of the opening mechanism had prevented travel along the navigable river. This caused delay to a shipping merchant moving goods along the river. As a result of the blockage of the navigable channel the shipping merchant suffered damages in relation to the cost of alternative transporting of goods to their destination. The bridge was constructed under an act of Parliament which provided that it was not lawful to stop a vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge and for opening it to admit such a vessel. The pleading for the plaintiff was that the channel "was and is a public navigable channel and passage for all the liege subjects of our lady the Queen to pass and repass with their ships and vessels at their free will and pleasure".[27] The court held that the Act only authorised a bridge of a certain character to be constructed. Specifically that character was one that would not impede, to any degree greater than specified, the passage of shipping along the navigable channel. As the bridge that was constructed impeded navigation to a greater degree, the defendant had created a nuisance which was actionable by the shipping merchant whose progress along the navigable waters was impeded.

As a result of the construction and operation of the temporary and permanent bridges, the passage of vessels along Ross Creek will be impeded as confirmed by both the Maunsell Report **(Attachment 3)** and Risk Assessment diagrams at **Attachment 5.** A public nuisance will occur as a result of that impedance. That public nuisance will be actionable and we are instructed to put on notice each of the decision makers and those involved in the development and construction that our client will bring such an action in the event that approvals are given taking away the right to pass and re pass the navigable waters of Ross Creek.

RESPONSE

The impedance of access for marine users of Ross Creek has been removed by amending the operating philosophy. In addition the failure of power to the bridge will result in the bridge defaulting to open unlike the Hole vs The Sittingbourne and Sheerness Railway Co case where a failure in the operation of the bridge resulted in the river being blocked to marina traffic.

The ability for mariners to navigate the creek is not being blocked - rather it is being defined. Mariners will still be able to pass and in most cases there will be minimal delays.

[25] [1991] 1 Qd R 524 at 538.
[26] (1861) 6 H & N 488.
[27] (1861) 6 H & N 488 at 489.

1.6.3 Structures & Public Nuisance caused to users of Navigable Waters

Public authorities commit a nuisance to users of navigable waters where permitting structures to be built in and around those navigable waters without due care and skill for safety of others. Public authorities, developers and constructors commit a nuisance to users of navigable waters where constructing structures in and around those navigable waters without due care and skill for safety of others.

Highway authorities decisions are numerous and to the point.

The liability of the Gold Coast City Council arising from construction which created a public nuisance was considered in *Plunkett's* case[28]:

> "The decision in this respect takes up one of the possibilities of "misfeasance" outlined by Dixon J in *Buckle* at 283:
>
> "But while a road authority owes to the members of the public using a highway no duty to undertake active measures whether of maintenance, repair, construction or lighting in order to safeguard them from its condition, on the other hand it possesses no immunity from liability for civil wrong. It is, of course, a civil wrong to cause particular damage by obstructing a highway, or by making it unsafe or dangerous. Interferences with a highway which in themselves would be unlawful in a stranger are as a rule authorized acts when done by a road authority. But a road authority in doing them must take due care for the safety of those using the highway and is not protected if it creates dangers which reasonable care and skill could avoid. Because the road is under its control, it necessarily has an opportunity denied to others for causing obstructions and dangers in highways. But when it does so, the road authority is liable, not, I think, under any special measure of duty which belongs to it, but upon ordinary principles. These principles include the rule that to render the highway unsafe is to commit a nuisance, and that to execute authorised works without due care and skill for the safety of others leaves an action to anyone who suffers a consequential injury. It is evidence that even if what otherwise might be an obstruction or danger is created on the highway, it may be made relatively harmless by the use of some additional precaution, such as guarding or lighting. If the precaution is discontinued, consequences may ensue which up to that time had been intercepted. For these consequences the road authority will be liable in damages. But it will be liable not on the ground that it failed to exercise its powers so as to prevent them, but on the ground that it was the active agent in causing an unnecessary danger in the highway."[29]

The liability of the Mount Isa City Council was considered in *Desmond's case*[30] arising from permitting works which created a public nuisance:

> "..that a duty arose in this case because the local authority had permitted sub-division on the basis of a road layout which inevitably had the dangerous features which materialised in this case unless it either sealed, kerbed and channelled the side of a road leading to the intersection or took appropriate steps by warning the public and cleaning the intersection as early as practicable to guard against the hazard."

The general highway authority decisions are also supported with specific decisions relating to liability for creating a danger in navigable waters.

In *Merrin*[31] the Queensland Court of Appeal articulated the character of navigable waters:

[28] Plunkett v Council of the City of Gold Coast [2000] QDC 414
[29] Buckle v Bays water Road Board (1936) 57 CLR 259
[30] Desmond v Mt Isa City Council (1991) 2 Qd R 482
[31] Merrin & Anor v Cairns Port Authority [2001] QCA 178

> "The defendant admitted in its defence that it owed a duty of care to the plaintiffs. It was not much of a concession because it has long been settled that navigable waters bear the character of a public highway along which mariners are entitled to pass, and that creating a danger to use by shipping constitutes a public nuisance in respect of which persons damaged by its presence there are entitled to sue. See Halsbury's *Laws of England,* vol 49(2), (4th ed) §725, and, for example, *White v Phillips* (1853) 15 CB (NS) 245; 143 ER 778. The plaintiffs' amended statement of claim was framed in negligence, but would also have sustained a claim in nuisance. In any event, as Halsbury says, the owner of a wreck or other obstruction to safe navigation is liable for damage to a vessel if it could have been prevented by the exercise of reasonable skill and care: see *Halsbury,* vol 49(2), §725, at p 688."[32] (author's underlining added).

The identification of the height above navigable waters which ought not be impeded has largely been assumed. In *Masterwood's case*[33] consideration was given to the height to which that impedance had to be avoided in relation to an aircraft seeking to land on a stretch of navigable waters. In considering that matter, the Court of Appeal articulated the height which ought not be impeded for the purpose of vessels navigating navigable waters:

> "It is a matter open to some doubt, on which I have not succeeded in locating any authority, whether the air space at a sufficient height above navigable waters to be beyond the level at which a marine vessel or its masts; or superstructure might be expected to intrude, also constitutes a public highway for the purpose of the common law principle. If it does, then it would logically apply with equal force to the air space above roads or public highways on land, through which it is a matter of notoriety that power lines and other such obstructions commonly intrude. A conclusion to that effect does not seem tenable."[34]

The TMBYC have identified 22 m HAT as the height to which masts or superstructure of marine vessel are expected to intrude into airspace above navigable waters (refer to section 7 below).

As indicated previously in this submission and in particular in the risk analysis prepared by Maunsell (refer **Attachment 3** and **Attachment 5),** the proposed temporary and permanent bridges create significant risks to vessels using Ross Creek. In the event that damage is sustained by any member of the TMBYC, (or for that matter, other users of Ross Creek) as a result of those structures, the TMBYC will make available this submission for use in any action commenced by its Club members or others.

RESPONSE

The comments by the TMBYC are noted. The Proponent has reviewed the bridge design and considered the matter of safety carefully. In this regard it has sought the advice of the Acting Harbour Master as to whether the design of the structure is safe for marine vehicles. The Acting Harbour Master has confirmed that he considered the safety issues of the revised design to be adequate with the addition of navigational beacons. It is also noted that the final design of the bridge will be subject to the assessment by the TCC after the lodgement of an application for its construction.

The Proponent does not accept that the temporary bridge will in any legal sense create a nuisance or a risk to vessels using Ross Creek. If it proceeds the temporary bridge would be the subject of further consultation with mariners - it will be designed to accommodate safe and easy passing and will be adequately identified by marking and a public awareness campaign to overcome any claim that presence was not noted.

[32] Merrin & Anor v Cairns Port Authority [2001] QCA 178 at [6].
[33] Far North Queensland Electricity Board v Masterwood Pty Ltd [1998] QCA 431.
[34] Far North Queensland Electricity Board v Masterwood Pty Ltd [1998] QCA 431, per McPherson J.A. at [6].

As for impeding high masted vessels, the opening section of the bridge has been designed to specifically allow high masted vessels to pass.

It is also worth noting that many of the vessels which currently navigate Ross Creek will be able to pass under the temporary bridge at any time.

1.6.4 Impeding access to a seaport is contrary to the Commonwealth Constitution

The High Court in *Theophanous*[35] recognised implied rights in the Constitution including the right to use navigable waters of the Commonwealth for the purposes of trade and commerce:

> "In *Smithers*,[36] Griffith CJ found it unnecessary to rely on the express provisions of either s 92 or s 117 to explain the limitation under the Constitution of the former powers of the Australian colonies to exclude persons thought to be undesirable. His Honour commented that the continuance of such a power to its full extent after Federation was "inconsistent with the elementary notion of a Commonwealth" and quoted and adopted the following passage from the judgment of the United States Supreme Court (delivered by Miller J) in *Crandall v Nevada*:[37]
>
> > "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it."[38]
>
> Not one of those "rights" is expressly conferred by any provision of our Constitution. They are, to the extent that they exist, all implied. For his part, Barton J commented that the reasoning of the United States Supreme Court in *Crandall v Nevada* was "as cogent in relation to the Constitution of this Commonwealth, as it was when applied to the Constitution of the United States". (author's underlining).

There is no need to transcend to argument about whether the waters of Ross Creek are Commonwealth waters when consideration is given to the basis of the right expressed.[39]

It follows that any attempt to construct a bridge which doesn't allow "free access" to Ross Creek would be contrary to the Commonwealth Constitution and unlawful irrespective of any State law.

Whether free access is provided to Ross Creek would be a question of fact and degree. The proposal of both of the temporary and permanent bridge cause such delay in entry to a sea port to be inconsistent with "free access". The impedance caused by the conflict between vehicular traffic, vessel manoeuvring and bridge opening outlined above cannot sensibly constitute "free access".

The reference to access to "sea-ports" should be read bearing in mind the purpose. It is not only those seaport activities which require access to other areas of the Port of Townsville, but must necessarily include navigable waters. Not only is this interpretation consistent with the purpose identified, is also consistent with the *Transport Infrastructure (Ports) Regulation 2005* identification of the "Port of Townsville"[40] which includes "the area covered by waters of navigable rivers and creeks flowing directly or indirectly into waters within the boundary."

[35] Theophanous v the Herald & Weekly Times (1993) 182 CLR 104
[36] R v Smithers (1912) 16 CLR 99 at 108, 109-110.
[37] (1867) 73 US at 44.
[38] Theophanous v the Herald & Weekly Times (1993) 182 CLR 104, per Deane J at 170.
[39] See for example the decision of the Queensland Supreme Court in R v Jimmy (1875) 4 SCR 130.
[40] Per Schedule 1, Transport Infrastructure (Ports) Regulation 2005.

RESPONSE

The comments of the TMBYC are noted. The revised operating philosophy changes the dynamic of access from that which was outlined in the EIS. The revised operating procedure does constitute free access for users on Ross Creek.

The Proponent does not accept that the temporary bridge, which will accommodate the passing of vessels with minimal inconvenience, could be seen to be unlawful or contrary to the Commonwealth Constitution.

1.6.5 Corollary of legal rights

If approved, each of the temporary bridge and permanent bridge structures will be open to a Constitutional challenge, as well as an action for damages for the public nuisance of the impedance of navigable waters. Those actions would primarily lie against those making decisions approving the construction of both or one of the temporary or permanent bridge.

If constructed, each of the temporary bridge and permanent bridge structures will be open to a Constitutional challenge, as well as an action for damages for the public nuisance of the impedance of navigable waters. Further, if damage is occasioned as a result of the construction and actions for damages for framed in both public nuisance of creating unsafe situations in navigable waters and negligence.

Recommendations

Approval of structures, and operation of structures of that interfere with navigable waters are actionable under the common law, and for this reason “free access” to navigable waters should be maintained.

Barging of materials to the Project site should be required as a condition of approval.

In the event of a marine incident (i.e. grounding or collision), those responsible for structures that cause obstructions are potentially liable for damages. A bascule bridge across the Ross Creek interfering with access to navigable waters is not appropriate and should be expressly discounted as part of any approval for the TOT.

RESPONSE

The comments of the TMBYC are noted. This EIS does not propose the construction of a permanent bridge. This is a matter for the Council, the concept of which has been public knowledge for some years. As the operation of the temporary bridge will allow free access for boats, it is hoped this will satisfy the TMBYC members.

The temporary bridge represents only a short term alteration of navigatable channel in Ross Creek - with the appropriate design and operational management plan, the structure will not create a hazard or nuisance for mariners and will at worst create only minimal inconvenience to mariners.

As an alternative, a barge option to carry trucks across Ross Creek has been considered by the project Proponent, which would effectively avoid any concerns about the impact of a temporary bridge structure on creek access.

This alternative to the temporary bridge across Ross Creek involves barging the trucks back and forth across the creek to the site. Discussions with the Port and the Regional Harbour Master have confirmed that this option is possible and two barge landing ramp locations have been identified with them and design work has been undertaken to show that the options are viable. The barging option has an advantage over the bridge in that noise on the Strand and Sir Leslie Thiess Drive is minimised.

1.7 ALTERNATIVES FOR ACCESS

In an effort to promote a win-win situation for both the Proponent and the users of the Ross Creek, the TMBYC has identified alternative traffic access options for further consideration.

Three possible design solutions in this regard are suggested as appropriate for consideration in a Supplementary EIS. These are:-

1) creating a channel in the existing breakwater and directing vessels through that break and out of the proposed Breakwater development to access Cleveland Bay (Refer **Attachment 6 – Access Alternative A);** or

2) constructing an elevated bridge at Ross Creek which will not impede vessels navigating Ross Creek (Refer **Attachment 6 – Access Alternative B** and the example provided at **Attachment 7);** or

3) constructing a tunnel under the Ross Creek to allow vehicle access directly to the site – for example in a similar fashion to traffic tunnels in Sydney and Brisbane.

None of these alternatives were presented to members of the public by the EIS.

Although the Proponent will likely not appreciate interference with its proposed construction methodology, there are clear community benefits accruing from the various alternatives for traffic to access the Proposed Development as proposed by the TMBYC.

Some of these are:

- With Option 1 above, there is the benefit of allowing Navy and other Military Ships to access the TOT, with the required 100 m exclusion zone around visiting US Ships not having the effect of closing access through Ross Creek as would result from the current configuration proposed by the Proponent. It is noted that the EIS forecasts that there will be 30-40 Military Ships visiting the TOT each year – with each visit having the potential to completely close the Ross Creek to vessel traffic for a number of days;

- With Option 1 above, there is a benefit accruing to the Townsville Port Authority in that the Port will be able to effectively exclude all vessel through-traffic from transiting through the harbour area, and thereby better delineate and patrol the marine areas of the non-secure and secured parts of the Port;

- With Option 1 above, Commercial Ferries servicing Magnetic Island and beyond will be able to have separate access to the waters of Cleveland, without transiting through secure Port operations areas, as occurs presently at the mouth of the Ross Creek.

Recommendation

That the Proponent investigate ways of accommodating both the 100 m exclusion zone for visiting US warships, and maintaining access through Ross Creek for other vessel traffic.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the impacts of the proposed configuration of the TOT and the exclusions zones of visiting US warships upon the users of Ross Creek.

The Proponent be required to undertake a Supplementary EIS Process examining the costs and benefits for the various options for providing traffic access to the Proposed Development with particular reference to users of Ross Creek.

RESPONSE

Consultations with the Acting Harbour Master and the US Navy (via Admiral R. Natter Retired) indicates that the 100m exclusion zone is not an inflexible requirement that would result in navigation impediments.

The Report from Admiral R Natter US Navy Retired (R Natter & Associates) at Appendix A23 in Volume 2) indicates that the 100m exclusion zone is an 'ideal' or preferred security perimeter but would be applied with due consideration to the physical characteristics of individual port environments and broader security assessments pertinent at the time of a visit to Port.

Discussions with the Acting Harbour Master also concluded that the application of an exclusion zone around naval vessels did not pose insurmountable or unmanageable barriers to civilian vessel access up and down Ross Creek.

The report by Flanagan Consulting Group at Appendix A8 in Volume 2 has considered the costs and benefits of various routes for haulage. In addition changes to the temporary bridge and the operation of it are expected to resolve the access concerns of the users of Ross Creek. An alternative barging option across Ross Creek has also been investigated and delivers benefits.

The alternatives put forward by the TMBYC have been considered. The creation of a channel through the eastern breakwater is not viable as it merely moves the bridge location or provides an access to the TOT and residential development which is circuitous and inappropriate.

An elevated bridge or tunnel is clearly not practical as a temporary structure but it is considered that a tunnel could be considered by the Council as a permanent crossing solution. The Proponent has however considered further alternatives in response to the suggestions of TMBYC and others. The barging option across Ross Creek is put forward as a way of satisfying the concerns of all.

1.8 OTHER ISSUES

As discussed above in section 7, there is problem with the Proponent's current configuration for the location of the TOT ship berth in relation to access for Ross Creek users. There is effectively a closure of marine access when US Navy ships visit the TOT with the required 100 m exclusion zone around visiting US Ships having the effect of closing access through Ross Creek. It is noted that the EIS forecasts that there will be 30-40 Military Ships visiting the TOT each year – with each visit having the potential to completely close the Ross Creek to vessel traffic for a number of days;

There are significant other issues which affect the wider community as well as our clients. For example it seems that the cost of transport infrastructure (i.e. Strand Bridge) for the development is being transferred to the Council and therefore the community, rather than being borne by the developer. This is particularly the case when impacts to amenity are also considered.

Height above sea-level and consequent ability to withstand storm surge and cyclonic conditions is questioned. There is no capacity for the TOT Development to respond to expected sea level changes resulting from climate change.

Emergency access and escape from proposed development is inadequate, creating a dangerous and unsafe situation with a single egress road. It is irresponsible from a safety perspective as one significant traffic accident has prospect of shutting down whole local road network. The likelihood of a traffic accident occurring will greatly increase as a result of the Proposed Development, both during the construction and operational phases.

The State Coastal Management Plan is the Queensland Government's State Planning Policy for coastal areas. The Proposed Development is largely at odds with most aspects of the State Coastal Management Plan, including the following:

- Policy 2.1.1 'Areas of State significance (social and economic)' as the Proposed Development is inconsistent with the operation of infrastructure of State Significance – the Townsville Port and the heavy industries it services;

- Policy 2.1.2 'Settlement pattern and design' as it is policy that growth of urban settlements should not occur in areas "identified as having or the potential to have unacceptable risks from coastal hazards" which would include cyclones and storm surge;

- Policy 2.1.3 'Coastal-dependant land uses' which provides that "preference should be given to necessary coastal-dependent land uses ahead of other urban land uses." The Proposed Development is largely an urban use and is for residential purposes;

- Policy 2.1.4 'Canal and dry land marinas' which specifically states that "further developments of canals and dry land marinas should only proceed if it does not adversely affect coastal resources and their values, in particular if it does not contribute to …. (a) degradation of water quality …";

- Policy 2.2.1 'Adaptation to climate change' which states that planning for the coast must follow a hierarchy of approaches which commence with "(a) avoid – focus on locating new development in areas not vulnerable to the impacts of climate change; … ";

- Policy 2.2.4 'Coastal hazards' which provides that "Where areas vulnerable to storm tide inundation have been developed, further development in these areas needs to address: its vulnerability to sea-level rise and storm tide inundation; and the proposed access to and protection of evacuation routes;" (underlining added); and

- Policy 2.3.1 'Future need for access' provides that "In planning for new urban land uses on the coast, the following additional matters are to be considered with respect to public access and use of the foreshore: …. (c) the safety of the public, if access is provided". Navigation risks associated with the bridging of Ross Creek interfere with the public's access to the coast.

Recommendation

That the Proponent investigate ways of accommodating both the 100 m exclusion zone for visiting US warships, and maintaining access through Ross Creek for other vessel traffic.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the impacts of the proposed configuration of the TOT and the exclusions zones of visiting US warships upon the users of Ross Creek.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the safety issues around having such a large and risk-exposed development (cyclones & storm surge, Port incidents and fires) with a single egress road. Specifically the Proponent should address all aspects of the State Coastal Management Plan, as identified above.

RESPONSE

Consultation with the Acting Harbour Master and the US Navy (via Admiral R. Natter Retired) indicates that the 100m exclusion zone is not an inflexible requirement that would result in navigation impediments.

The Report from Admiral R Natter US Navy Retired (R Natter & Associates) at Appendix A23 in Volume 2 indicates that the 100m exclusion zone is an 'ideal' or preferred security perimeter but would be applied with due consideration to the physical characteristics of individual port environments and broader security assessments pertinent at the time of a visit to Port.

Discussions with the Acting Harbour Master also concluded that the application of an exclusion zone around naval vessels did not pose insurmountable or unmanageable barriers to civilian vessel access to and from Ross Creek.

The Proponent has considered the risk matters outlined in this TMBYC point. Meetings were held with members of the emergency services agencies and a proposed Disaster Management Plan (DMP) was developed and drafted and a copy can be found at Appendix A15 in Volume 2. The DMP will be further expanded and finalised prior to occupation in the Breakwater Cove area.

1.9 CONCLUDING REMARKS

Summary of Recommendations

The Proponent be required to ensure and guarantee that there are no adverse impacts on use rights, the safety and access through navigable waters, and devaluation of assets for Ross Creek users.

The Proponent should be required to barge materials directly to the construction site, without impacting on the ability of vessels to use the navigable waters of the Ross Creek.

Current and future planning and approval processes expressly acknowledge that the proposed bridging of Ross Creek is a direct result of traffic generated by the TOT Proposal, including construction and operational phases.

The Proponent should be required to undertake a Supplementary EIS that meaningfully examines the impacts associated with various alternatives for providing traffic access to, and from, the Proposed Development, including construction access.

Approval of structures, and operation of structures of that interfere with navigable waters are actionable under the common law, and for this reason "free access" to navigable waters should be maintained.

Barging of materials to the Project site should be required as a condition of approval.

In the event of a marine incident (i.e. grounding or collision), those responsible for structures that cause obstructions are potentially liable for damages. A bascule bridge across the Ross Creek interfering with access to navigable waters is not appropriate and should be expressly discounted as part of any approval for the TOT.

That the Proponent investigate ways of accommodating both the 100 m exclusion zone for visiting US warships, and maintaining access through Ross Creek for other vessel traffic.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the impacts of the proposed configuration of the TOT and the exclusions zones of visiting US warships upon the users of Ross Creek.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the safety issues around having such a large and risk-exposed development (cyclones & storm surge, Port incidents and fires) with a single egress road. Specifically the Proponent should address all aspects of the State Coastal Management Plan, as identified above.

Submission concludes.

If the TOT is approved, the Proponent should be required to barge materials directly to the construction site, without impacting on the ability of vessels to use the navigable waters of the Ross Creek.

The Proponent should be required to undertake a Supplementary EIS that meaningfully examines the impacts associated with various alternatives for providing traffic access to, and from, the Proposed Development, including construction access.

That the Proponent investigate ways of accommodating both the 100 m exclusion zone for visiting US warships, and maintaining access through Ross Creek for other vessel traffic.

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the impacts of the proposed configuration of the TOT and the exclusions zones of visiting US warships upon the users of Ross Creek

The Proponent be required to undertake a Supplementary EIS that meaningfully examines the safety issues around having such a large and risk-exposed development (cyclones & storm surge, Port incidents and fires) with a single egress road. Specifically the Proponent should address all aspects of the State Coastal Management Plan, as identified above.

RESPONSE

The Proponent acknowledges Ross Creek users as important stakeholders, and notes the concerns and issues raised in the Submission. In response, detailed investigations have been undertaken in relation to haulage route options, the design of the temporary bridge as well as consideration to operational parameters and requirements of such a temporary bridge together with an alternative haulage method and the impact that security at the cruise terminal will have on the members of the TMBYC who use Ross Creek.

The Proponent believes that a temporary bridge does not pose insurmountable or unmanageable challenge to Ross Creek users, and that in fact a satisfactory outcome can be achieved through collaboration and negotiation. The alternative barging option may very well be a much more acceptable option to the TMBYC and other parties.