Options for dealing with Native Title and Cultural Heritage for the Broadwater Marine Project Area

Native Title

Introduction
Native title is the recognition by law that Indigenous people have particular rights and interests to land that are sourced from their traditional laws and customs.

The native title rights and interests held by particular Indigenous people will depend on both their traditional laws and customs and what interests are held by others in the area concerned. Generally speaking, native title must give way to the rights held by others. National Native Title Tribunal website, 29 May 2013.

The Native Title Act 1993 (Cth), section 223 states;
(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
   a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
   b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
   c) the rights and interests are recognised by the common law of Australia.

Native Title over the project area
There is not currently a native title claim covering the Native Title Assessment Area. The Gold Coast Native Title Group (GCNTG) (Federal Court number QC06/10) were the registered native title claimants for the area, up until 3 June 2013 when the claim was dismissed by the Federal Court.

The result of the Orders made on 3 June 2013, are that the Federal Court has determined that native title does not exist over part of the claim area (outside of the Native Title Assessment Area] with the claim over the balance of the area being dismissed.

Future Acts
A future act is an act that, although otherwise legal, will affect or extinguish native title, such as a freehold grant or the grant of a lease over Crown land where native title continues to exist.

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Proposed activities or developments that may affect native title are classed as 'future acts' under the Native Title Act 1993 (Cth). The Native Title Act provides for traditional owners and project proponents to negotiate about their interests in the meantime. This is the 'future act process'. (National Native Title Tribunal website, May 2013)

It is assumed the proposed tenures for the project will be exclusive tenures constituting future acts and therefore will affect native title.

Native Title Assessment
The Native Title Assessment provides a conclusion of whether native title does, or does not exist over individual Lots.

For the purposes of this report, we have divided the areas into the following:
- areas where extinguishment has occurred;
- areas where partial extinguishment has occurred; and
- areas where native title may continue to exist.

Note: The areas where extinguishment has occurred is delineated in red on the Native Title Assessment Map in the report, the areas where partial extinguishment has occurred is shown in yellow with all other areas being areas where native title may continue to exist.

Where native title has been fully extinguished
For any area where native title has been fully extinguished for the whole area, by either a previous exclusive possession act (tenure) or a public work, the State can proceed to the granting of the tenure without further recourse to native title.

Where native title may continue to exist
For areas where native title has not been fully extinguished by any previous exclusive possession act (tenure) tenure or public work, native title will need to be addressed prior to the grant of a tenure which may affect native title.

Addressing native title
There are several ways that native title can be addressed which include the following:

1. An ILUA
2. Compulsory Acquisition
3. Non Claimant Application

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1. **ILUA - Indigenous Land Use Agreement**

An ILUA is a contractual arrangement between the proponent and the traditional owners of the area where the future act is proposed.

An ILUA is an agreement between a native title group and others about the use and management of land and waters. An ILUA enables people to negotiate arrangements to their individual circumstances.

An ILUA can be registered whether there is a native title claim over the area or not. When registered with the National Native Title Tribunal (NNTT), ILUAs bind all parties and all native title holders to the terms of the agreement which provides certainty for all parties to the agreement.

**Parties to an ILUA**

The *Native Title Act 1993 (Cth)* sets out who can be a party to an ILUA. All registered claim groups must be a party to an ILUA if the proposed future act covers their claim area. For areas where there is no native title claim, any person who claims to hold native title in relation to land or waters in the area may also be a party.

**Timeframe for ILUA**

There is no set timeframe for the completion of an ILUA, however most ILUAs take approximately 4-5 months to complete the negotiations and authorise the agreement. Once an ILUA is signed by all parties, it must then be lodged with the NNTT for registration which takes approximately 6 months including a 3 month public notification period.

In total, it usually takes approximately 12 months to achieve a registered ILUA. This is an estimate only and in some instances it can take less time. Once registered, the ILUA is placed on the ILUA register kept by the NNTT and becomes a binding agreement on all parties.

**Cost of ILUA**

Again, there is no set cost to complete an ILUA. The cost of obtaining an ILUA will vary according to the number of meetings and the size of the group for the authorisation process.

The standard practice for ILUAs is that the proponent covers the costs for the native title parties in the negotiation and authorisation of the ILUA. An estimated cost of an ILUA is between $50,000 to $100,000. These costs may include the following:
a) Meeting costs;
b) Independent legal representation for the native title parties;
c) Travel to and from meetings for negotiation team members;
d) Sitting fees;
e) Authorisation meeting (see note below); and
f) Land valuations.

**Note:** Authorisation of an ILUA is the process whereby the whole native title group authorises the claimants to enter into the ILUA on their behalf. Although there is no legislative requirement for how authorisation occurs, the standard practice is a meeting of the whole native title group.

2. **Compulsory Acquisition**

In accordance with the *State Development and Public Works Organisation Act 1971*, the State may have the option to compulsorily acquire the land for the proposed project area. The State is the only organisation that can compulsorily acquire land and the State maintains any liability associated with the acquisition of the native title rights and interests in the land. This option will be dependent upon the State’s ability to make the necessary declarations.

It is not the intention of this report to advise on the options available to the State under the *State Development and Public Works Organisation Act 1971* in relation to the proposed project but to merely provide advice on how this option may affect native title.

Compulsory acquisition is available whether a native title claim exists or not. If there is a registered native title claim, the claim group have an interest in the land and therefore are treated as land holders and are provided with a Notice of Intention to Resume. The native title claim group then have an opportunity to object to the proposed acquisition.

It is possible to enter into a contract with the native title group for the acquisition of land. This type of contract is not an ILUA, but would include the provision for the native title group to not object to the acquisition and any compensation is in full and final settlement of the effect on native title. There is some risk involved as the validity of these types of agreements has not been tested in the Court and the liability for compensation would ultimately rest with the State.
3. Non Claimant Application

Non-claimant applications are made by someone who does not claim to have native title to
an area and who is seeking to do things in relation to the area and wants ‘clearance’ in
relation to native title.

A non-claimant application is an application to the Federal Court to make a determination
that native title does not exist in the area covered by the non-claimant application.
Non-claimant applications cannot be made in areas where it has already been determined
that native title exists or if there is a current registered native title claim.

Section 24FA protection to do future acts

A future act is an act that, although otherwise legal, will affect or extinguish native title, such as
a freehold grant or the grant of a lease over Crown land where native title continues to exist.

Persons or organisations can make a non-claimant application so long as they hold a non-native
title interest to the whole of the area which is the subject of the application.

Once a non-claimant application has been filed the NNTT will notify the non-claimant application
in order to see if there are any persons who claim to hold native title over the area. The NNTT
will publically advertise and inform any individual or body whose interests may be affected by
the non-claimant application.

Under the Native Title Act 1993 (Cth), the notification period must be set for three months.
The non-claimant application is considered ‘unopposed’ and the future act can be done if:
   a) at the end of the notification period, no claimant application has been made by
      persons claiming to hold native title over the area; or
   b) a claimant application has been made over the area but the claim is not
      accepted for registration by the Registrar (or on review by the Federal Court).
Summary

The 3 options outlined above are;

1. **An ILUA**
   An ILUA provides certainty for all parties. A registered ILUA addresses native title, enabling parties to negotiate agreeable terms and is binding on all parties.

   *Potential risk: Obtaining an ILUA can be lengthy and at a significant cost.*

2. **Compulsory Acquisition**
   This option is only available to the State and the State must make the necessary declarations under the *State Development and Public Works Organisation Act 1971*.

   *Potential risks: The State requires the proponent to attempt to negotiate an ILUA in the first instance. Compulsory Acquisition can be less time consuming than an ILUA, however the liability rests with the State for any future compensation for the acquisition.*

3. **Non-Claimant Application**
   A non-claimant application is only available where there is no registered native title claim. This is not an option where there is a current registered native title claim.

   *Potential risks: A native title claim could be lodged over the area of the non-claimant application resulting in the need to negotiate an ILUA with the new registered native title claimants.*

**Recommendation:**
An ILUA is the recommended course of action in this instance as it will provide the most certainty for the project to proceed.

Morencio Consultancy Services are specialists in the negotiation of ILUAs and cultural heritage agreements and can assist in the negotiation and facilitation of these types of agreements.

Cultural Heritage

The *Aboriginal Cultural Heritage Act 2003* requires that each project proponent and land user has a duty of care and must take all reasonable and practical measures to avoid harming cultural heritage. The Act establishes 'blanket protection' of cultural heritage whether or not it has been identified or registered. Blanket protection is supported by a general duty of care to take all reasonable and practical steps to avoid causing injury, desecration, damage or destruction of Aboriginal cultural heritage.

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Cultural Heritage Body

The registered Cultural heritage Body for the Native Title Assessment Area is:

Name: Jabree Limited
Contact: Mrs. Ally Bennett
Position: Manager
Address: PO Box 1233, Coorparoo DC, Qld 4151
Phone: 1300 558 923
Mobile: 0431 905 666
Email: ally@gcntg.org.au or info@gcntg.org.au

Area: The area covered by the cultural heritage body (registered 8/3/2011) is that part of the now dismissed GCNTG's (QC06/10) claim that falls within the State of Queensland.

Pursuant to section 37 of the Aboriginal Cultural Heritage Act 2003, the function of an Aboriginal Cultural Heritage Body is to identify the Aboriginal parties for an area.

Identified 'Aboriginal party'

Where the area is subject to a native title claim a proponent must contact the Cultural Heritage Body to identify the relevant party to deal with the cultural heritage issues relevant to the project area.

Application of the Duty of Care

The Department of Aboriginal and Torres Strait Islander and Multicultural Affairs has gazetted Duty of Care Guidelines that will assist in understanding the duty of care.

The Duty of Care Guidelines predominately rely on a self-assessment of the potential risks associated with cultural heritage based on:
- previous land use
- the nature of the project
- likelihood of cultural heritage being harmed

Summary

Without knowing the specific details of the activities proposed for the project, it is not possible to provide conclusive advice on the steps required to ensure the protection of cultural heritage for the project area.

When the details of the project are known, Morenci Consultancy Services Pty Ltd would be able to assist in ensuring the requirements of the Cultural Heritage Act 2003 are met.

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Summary of Research Sources

The Native Title Assessment and Report has been compiled from the following files, systems and web sites:

**Queensland State Government Systems:**
- Automated Titles System (ATS);
- Survey Plans – accessed from DNRM through GlobalX Information Pty. Ltd. – RealtyPro;
- Interactive Resource and Tenure Maps; and
- DNRM GIS layers.

**Gold Coast City Council Resources Library:**
- Numerous aerial photographs

**Queensland State Archive Files:**

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Annexure A3 – Sea Way Entrance Opening (1986)
Annexure A4 – Nerang River Entrance Relocation Plans x 3 (1981)
Annexure B1 – Lot 530 on WD6522 (1970)
Annexure B2 – Lot 530 on WD6522 (1981)
Annexure C1 - Lot 1 on SP104014 - bottom of picture, commencing construction of car park and boat ramp facilities (1988)
Annexure C2 – Lot 1 on SP104014 and Lot 528 on WD6624 (1995) – Car parks, Boat Ramps and Toilet Facilities etc.