Attachment 2:

Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances: Submissions from Queensland South Native Title Services

March 2010

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT

PROPOSED AMENDMENT TO ENABLE THE HISTORICAL EXTINGUISHMENT OF NATIVE TITLE TO BE DISREGARDED IN CERTAIN CIRCUMSTANCES

Submissions from Queensland South Native Title Services

March 2010

Introduction

Queensland South Native Title Services ('QSNTS') welcomes the opportunity to make submissions on the Attorney-General's proposed amendment to enable historical extinguishment of native title to be disregarded in certain circumstances.

QSNTS generally supports any proposal that could provide opportunities for more claims to be settled by negotiation rather than litigation. As such, we support the Attorney-General's proposal that will allow historical extinguishment to be disregarded by agreement of the parties where the area concerned is part of a National, State or Territory park that is set aside or vested under legislation that is for the purpose of preserving the natural environment of the area.

However, as the explanatory note to the Exposure Draft concedes, the proposed amendment is a 'narrow exception' and we expect that it will have limited scope of application on the ground within QSNTS' claim boundaries. This is because the legislation in Queensland under which protected areas are created[1] does not provide for these forms of tenure to be 'vested' with consequential legal implications.

The submissions below will first discuss the need and justification for a comprehensive provision allowing the Courts to disregard historical extinguishment. It will be argued that a comprehensive

[1] For example, the *Nature Conservation Act 1992* (Qld).

provision allowing the Courts to disregard historical extinguishment would be a minor amendment, yet it would result in a range of benefits to all parties to native title litigation. It would allow parties to avoid protracted arguments over the tenure history of a large number of parcels of land where extinguishment may be disputed. This in turn will lead to significant cost savings because detailed tenure analysis over many blocks of land would not be required in order to reach resolution of claims. The overall effect would be a significant savings in time, resources and money and would accord with the Commonwealth's international obligation to eliminate racial discrimination.

Next, it will be argued that while QSNTS views the provisions outlined in the Exposure Draft as a step in the right direction, we do not consider that they go far enough. The proposed amendment will no doubt assist in negotiations in some instances, but we submit that the amendments ought to go much further and address all forms of historical extinguishment.

This will be followed by some alternative proposals for reform offered by QSNTS. A number of examples of historical extinguishment within QSNTS' claim boundaries will be presented that will highlight the absurdity of the potential for certain historical grants and past acts to adversely affect native title negotiations.

Justification for Disregarding Historical Extinguishment

In *Western Australia v Ward*[2], the High Court declared that '[t]he question of extinguishment of native title rights and interests requires attention to the rights that are asserted rather than the use that is made of the land'.[3] The relevant enquiry is about 'inconsistency of *rights*, not inconsistency of *use*'.[4]

Thus, extinguishment can occur by way of a grant or allocation of land by the Crown under which the land is surveyed and gazetted but where the land was never utilised for that purpose, if at all.

QSNTS' definition of historical extinguishment is that it is extinguishment that occurs purely by the grant of an inconsistent interest, and not by the actual enjoyment of that interest. Examples of historical extinguishment that exist within QSNTS' claim boundaries include:

[2] [2002] HCA 28.
[3] Ibid [216] (Gleeson CJ, Gaudron, Gummow, Hayne JJ).
[4] Ibid [215].

- mining leases that allowed residences to be built on them where those residences are long abandoned;
- grants of freehold that are long abandoned (ie, gold rush towns);
- 'historical townships' which were surveyed and gazetted that simply never came into being; and
- reserves which were set aside for purposes that are no longer relevant (eg, timber reserves, police pastoralist reserves).

Where the sort of grants and past acts listed above have occurred within QSNTS' claim areas, they did so in a way that did not confer *any* interests on the present parties to native title litigation. Given this context, there are a number of justifications for a comprehensive amendment to the Act that would allow the Court to disregard the extinguishing effect of those grants and past acts.

Such an amendment would allow parties to avoid protracted arguments over the tenure history of a large number of parcels of land where extinguishment is in dispute. For example, where a town has been gazetted, but nothing was ever built, or where a town has been long abandoned, it arguably does not serve the best interests of any party to enter into what Chief Justice French described as 'arcane argument over long dead town sites'.[5]

The avoidance of 'arcane argument' is a justification for the amendment in and of itself because it would help to prevent negotiations from being sidetracked or blocked by technical issues related to tenure that arise from historical tenure analysis. Parties could then focus on the more important issues of the co-existence of the existing rights and interests resulting in faster resolution of claims. Significant time, resources and cost savings would be realised because detailed tenure analysis over many blocks of land would not be required.

In addition to the justifications outlined above, an amendment to allow historical extinguishment to be disregarded would accord with the Commonwealth's international obligation to eliminate racial discrimination. Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, addressed the issue of historical extinguishment in his *2009 Native Title Report*. Commissioner Calma argues that 'the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations'.[6] Furthermore, 'it is

[5] Justice Robert French, 'Lifting the burden of native title - some modest proposals for improvement'. Speech delivered at Federal Court Native Title User Group, Adelaide (9 July 2008).
[6] Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (December 2009) 110.

also an unnecessary approach, without a satisfactory policy justification'.[7] Calma concludes that the Government 'should explore alternatives to current approaches to extinguishment'.[8]

The preamble to the *Native Title Act* states that 'where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect'.[9] However, in a speech in February 2009, Tom Calma pointed out that this is not what occurs in practice.[10]

The Commissioner noted that the 1998 amendments to the Act 'significantly expanded the situations in which native title rights are extinguished permanently'.[11] He argued that 'amendments that limit extinguishment to the current tenure extinguishment and repeals the provisions that validate past extinguishment would go a long way to addressing this inequity'.[12]

QSNTS submits that Commissioner Calma's comments about Australia's international human rights obligations ought to be fully considered by the Attorney-General in making the proposed amendments. The additional burden posed by historical extinguishment compounds the injustice to native title holders and claimants whose land is already the subject to a plethora of forms of extinguishment provided for under an Act which is supposed to *protect* native title.

QSNTS further submits that a provision for disregarding historical extinguishment would advance the Commonwealth's obligation to uphold the rights of its Indigenous citizens without infringing on the rights of any other citizen. This is because, in the context of native title litigation, it is only their *current* legal interests that parties seek to protect. An order of the Court that allows the disregarding of historical interests that either have never vested or are not currently vested is unlikely to prejudice the interests of any living person.

Since it is only the current legal interests that parties seek to protect, the validity or extinguishing effect of acts that created those interests would not be affected. Instead, it would remove a potential impediment to the resolution of claims and would lead to fairer outcomes for native title claimants.

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[7] Ibid.
[8] Ibid.
[9] *Native Title Act 1993* (Cth) Preamble.
[10] Tom Calma, speech delivered to the Informa 3rd Annual Negotiating Native Title Forum, Vibe Savoy Hotel, Melbourne, 20 February 2009.
[11] Ibid.
[12] Ibid.

The Proposed Amendments (Exposure Draft)

The Exposure Draft sets out a new section 47C which would provide a mechanism by which parties could agree to disregard historical extinguishment over areas set aside or vested by a Government law for the purpose of preserving the natural environment of the area, such as a State or Territory park or reserve.

The explanatory note to the Exposure Draft refers to Chief Justice French's speech to the Federal Court Native Title User Group held in Adelaide on 9 July 2008 and it appears that His Honour's suggestion in relation to historical extinguishment was a catalyst for the current proposed amendments.

Justice French (as he then was) put forward the following proposal:

> The second suggestion, by way of modest amendment to the NTA, would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss 47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements. Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.

QSNTS considers that the proposed provisions in the Exposure Draft are a step in the right direction. In proposing the amendments the Attorney-General has acknowledged the need to address the issue of historical extinguishment.

However, the proposed amendments arguably fall short of His Honour's suggestion by not dealing with the issue of 'long dead town sites' and other such forms of historical extinguishment. Consequently, what would otherwise have been a 'modest amendment to the NTA' under His

Honour's suggestion is now proposed to be something even more modest – almost to the point that it will have an almost negligible effect within QSNTS' area.

QSNTS submits that if the Attorney-General's Department wants to implement Chief Justice French's suggested amendments as His Honour intended, then the proposed amendments ought to address the full range of situations where historical extinguishment arises rather than limiting the area affected to parks and reserves set up for environmental protection purposes.

The following paragraphs will outline a range of proposals for disregarding historical extinguishment that go beyond what is contained in the Exposure Draft but which QSNTS submits ought to be considered. References to actual examples within Queensland are used where relevant.

QSNTS' Suggested Further Amendments

'Fictional' Townships and Suburbs

QSNTS is aware of a number of cases of townships and suburbs within Queensland that were declared, but were never built. By way of example, Appendix A(i) displays a map of a subdivision at Midge Point within the Mackay Regional Council area. While the map of this section of the township of Midge Point shows the boundaries of more than 40 town blocks of approximately 600 square metres or more, in reality no such subdivision exists or has ever existed. This is shown at Appendix A(ii) which displays a recent aerial photograph of the same land. This is not an isolated example and QSNTS is aware of many more such instances.

QSNTS considers that these declared townships and subdivisions are legal fictions. Even though they are materially non-existent, the legal consequences that result from their declaration are very real because, as described in *Ward*, it is inconsistency of *rights*, not inconsistency of *use* that may result in whole or partial extinguishment. Thus, where these 'fictional' areas exist on paper only, their declaration causes extinguishment.

QSNTS submits that this is perhaps the most absurd of the possible forms of historical extinguishment because it gives primacy to what can be characterised as an overly-ambitious or unduly optimistic administrative act at the expense of native title.

Further, in QSNTS' experience, where these sorts of 'fictional' grants exist within native title claim boundaries, they do not confer *any* legal interests on the present parties to native title litigation.

While no party enjoys any legal interest resulting from these 'fictional' places, it is clear that the State and other respondents benefit from their official declarations. This is because the State owes no obligation to native title holders and claimants due to the extinguishing effect of the historical tenures created by those declarations.

By contrast, the rights of native title claimants are greatly prejudiced by the same declarations. It is perhaps ironic that the Act, and its associated jurisprudence, allows for extinguishment where an inconsistency of *rights* exists even where no party has exercised – nor may *ever* exercise – actual enjoyment of those rights and no party asserts to protect any rights conferred under the relevant grants. QSNTS considers that this situation unnecessarily and unfairly burdens native title claimants with unjustified incidents of extinguishment contrary to the objects of the Act.

QSNTS submits that any amendments to the Act that propose to deal with historical extinguishment should at *minimum* include provisions to allow the Court to disregard extinguishment resulting from 'fictional' places such as the suburb at Midge Point described above. That is, where a use of land is declared or gazetted by a past act creating a right or interest that is wholly or partially inconsistent with native title, but no person or body has ever in fact exercised or enjoyed that right or interest, the Court should be empowered to (with agreement of the parties) disregard any extinguishment that may arise as a result of that past act.

Activities Out of Alignment

In addition to the 'fictional' townships described above, QSNTS is also aware of many cases of activities on land such as roads, infrastructure and pastoral leases that have been built or pegged out of alignment from their actual grants.

Appendix B(i) shows the tenure boundaries of an aircraft reserve located adjacent to a township reserve and a number of road reserves. Appendix B(ii) shows the same tenure boundaries superimposed onto an aerial photograph. The photo shows in the top right corner a road that has been constructed out of alignment from the road reserve where it should have been built. Similarly, the airstrip reserve at the bottom of the photo is in a different location to the actual airstrip. The actual airstrip is only partially within its intended reserve and cuts across a township reserve while also encroaching on an unused road reserve.

Appendix C shows satellite imagery of a pastoral lease pegged out of alignment to its grant. There is a one hectare incursion of a sugar cane crop into a reserve. QSNTS is aware that there

are numerous such pastoral leases that are pegged out of alignment to their actual grants. The difference between the grant and the actual activity can be quite significant and when the difference is multiplied by the frequency of the anomalies, the magnitude of the amount of land where native title has been technically extinguished becomes significant.

Extinguishment arising out of situations such as the examples described above is similar in character to that resulting from the declaration of 'fictional' townships and suburbs. But instead of resulting from over-ambitious or unduly optimistic planning they likely occur as a consequence of administrative error.

Unlike the 'fictional' towns and suburbs, the examples above demonstrate actual use of land. However, the use of the land is not in accordance with the underlying grants. Consequently, the effect on native title is potentially doubled. The underlying grant may wholly or partially extinguish or suspend native title rights and interests over the areas that are declared. But simultaneously, the practical use or enjoyment of native title rights and interests is curtailed or substantially disrupted by the activities that take place in the wrong location. QSNTS considers that this is akin to double-extinguishment.

QSNTS considers that this sort of 'double extinguishment' is unjustified and contrary to the objects of the Act. It unnecessarily and unfairly burdens native title claimants as a result of historical errors which have no bearing on the parties' interests.

Consequently, QSNTS submits that the Attorney-General should consider making the following additional amendment to the Act:

- Where:
    - an area of land is granted or declared for a future activity; and
    - the actual future activity takes place out of alignment from the grant;
- The Court is empowered to (with agreement of the parties) disregard any extinguishing effect of the grant or declaration.

The Attorney-General may also wish to consider a provision allowing the parties to negotiate compensation for the loss or suspension of enjoyment of native title rights and interests over the land that is actually affected by the activity.

Ghost Towns

Ghost towns or 'long dead town sites' are numerous within Queensland, especially in the mineral provinces. By way of example, Mary Kathleen, the site of a former uranium mining town, is situated in the Selwyn Range between Cloncurry and Mount Isa. The town, first settled in the 1860s, was named by the Surveyor-General in 1958 and is still a declared town despite laying idle for the majority of its existence before finally being closed down in 1982 and emptied out the following year.

A recent aerial photograph of the central area of Mary Kathleen is displayed at Appendix D. The photo shows a number of now vacant blocks that once contained residential dwellings, commercial buildings and public infrastructure. All buildings and infrastructure have been long removed.

It is apparent that when Chief Justice French made his suggestion in 2008 for a provision to deal with historical extinguishment, His Honour specifically directed attention to 'long dead town sites' such as Mary Kathleen. While the extinguishing effect of the grants that created the ghost towns in the first place is not in dispute, there is the potential for negotiations to be stalled or derailed by technical arguments over tenure histories.

Consequently, QSNTS suggests that the Attorney-General introduce an additional amendment that may assist parties to avoid such arguments. The amendment could provide that where a declared town is no longer in use or inhabited, the Court may (with agreement of the parties) disregard any extinguishment caused by past grants.

A Broad Approach

In a similar manner to the explanatory note to the Exposure Draft, Commissioner Calma's *Native Title Report* refers to the Chief Justice's 2008 speech. But the Commissioner goes further than the Attorney-General by calling for the full depth of reform suggested by His Honour. Calma suggests that the *Native Title Act* could be amended to provide a *greater number of specific circumstances* in which extinguishment may be disregarded.[13]

In fact, the Commissioner has suggested that amendments could be made to allow historical extinguishment to be disregarded over:[14]

[13] Tom Calma, above n 6, 111.
[14] Tom Calma, above n 10.

- all Crown land
- other identified classes of land and waters
- any other area which the relevant government decides.

This is a broad approach and would not require compartmentalising all the sorts of historical extinguishment that may arise. Arguably, it would be broad enough to deal with any form of historical extinguishment with a single provision.

Commissioner Calma points out that:[15]

> [t]here will be a number of considerations if this path were followed including:
>
> - the need for a transition process
> - an understanding that such an approach will not do away with all historical tenure research that is required

In addition:

> ... any extinguishment of native title that occurred after the enactment of the Racial Discrimination Act 1975 (Cth) will still need to be examined closely in order to determine whether compensation is payable to the claimants under that Act. But overall, a rule which disregards historical extinguishment should reduce the number of circumstances in which compensation under the Racial Discrimination Act may apply.[16]

The Commissioner concludes his argument about the need for a broad range of circumstances where historical extinguishment should be disregarded by stating that If the extinguishment provisions were amended along the lines of his suggestion (above), the cost and resources required to undertake historical tenure research would be reduced significantly and native title proceedings would be simpler and faster to resolve.[17]

<u>Agreement of the Parties</u>

The proposed amendment requires that historical extinguishment is disregarded only when there is written agreement of the parties. However similar provisions in 47, 47A and 47B do not require

[15] Ibid.
[16] Ibid.
[17] Ibid.

agreement. QSNTS submits that, in relation to the proposed section 47C dealing with areas set aside or vested for the purpose of preserving the environment of an area, the power of the Court to disregard historical extinguishment should *not* be dependent on obtaining the consent of the State and other respondent parties.

However, in relation to the *additional* amendments suggest by QSNTS above, we consider that a requirement for the agreement of the parties may be beneficial for the reasons that follow.

Firstly, a requirement for agreement of the parties fits well with the underlying principle of the Native Title Act that claims should be resolved through negotiation rather than litigation. As previously stated, QSNTS supports any amendment that could provide opportunities for more claims to be settled by negotiation rather than litigation.

Second, requiring the agreement of the parties will create a degree of confidence that historical extinguishment will not be disregarded in circumstances that would prejudice the rights or interests of any current party to the claim.

Third, the relationship and rapport between the parties is strengthened by entering into negotiations in good faith, especially where the goal of those negotiations is to avoid protracted technical arguments over tenure and to bring about a faster resolution of the claim.

Conclusion

While QSNTS supports the principle behind the proposed amendments in the Exposure Draft, we do not consider that the amendments go far enough to bring about the necessary reforms relating to historical extinguishment.

QSNTS views the ability to disregard historical extinguishment as an important tool in the suite of options needed to make negotiated outcomes more attractive. There are many extinguishing tenures that could be characterised as 'historical extinguishment', not just those related to parks and reserves created for the purpose of the protection of the environment. The preceding section highlights a number of examples within the QSNTS' claim boundaries and there are many more.

QSNTS submits that additional amendments to those contained in the Exposure Draft are necessary. Firstly, historical extinguishment arising from the declaration or gazettal of 'fictional' towns should be disregarded. Secondly, where activities on land take place out of alignment from their grants, the extinguishing effect of those grants should be allowed to be disregarded. Thirdly,

an amendment could be made to allow for the disregarding of extinguishment over 'long dead town sites'. Lastly, the Attorney-General may consider introducing a broadly worded amendment that would allow for historical extinguishment to be disregarded by the Court in circumstances where the parties agree.

As French CJ pointed out, disregarding extinguishment is in no way novel. Indeed, the then Attorney-General in the first reading of the Native Title Amendment Bill 1997 which introduced ss 47A and 47B stated his belief that those provisions 'met the argument that the bill failed to take account of the issue of 'historic' pastoral leases'. In his speech, the Attorney-General described how the adoption of these beneficial provisions enabled 'the court [to] disregard the tenure history of the area in determining the claim'.

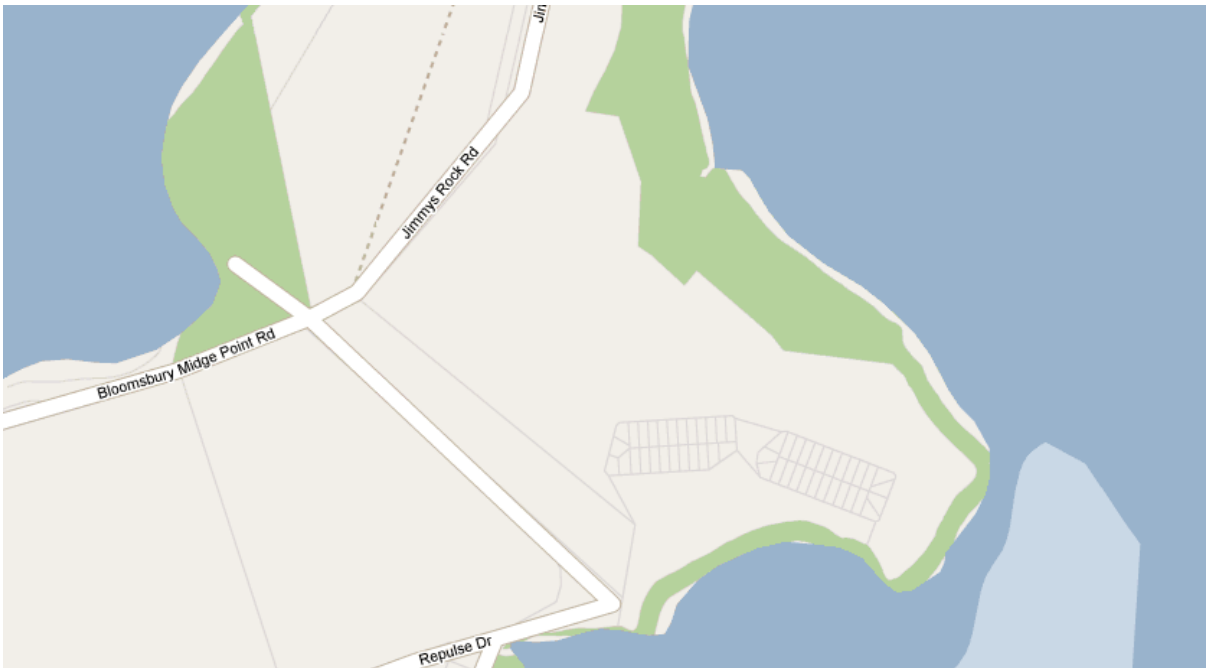
To use the language of the former Attorney-General, the provisions proposed by QSNTS would operate to disregard the extinguishing effect of additional categories of 'historic' tenure. In doing so, it will not affect the validity or extinguishing effect of acts that created the current legal interests that the parties to the proceedings are seeking to protect. It will simply allow the court to disregard the extinguishing effect of past acts which did not confer interests of any kind on the current parties.

In addition to significant savings in time, resources and money and the advancement of the Commonwealth's international obligation to eliminate racial discrimination, QSNTS submits that amending the Act to enable the Court to disregard historical extinguishment will create a level of confidence and flexibility in the system that will drive different, more constructive ways of resolving native title claims.

QSNTS welcomes the opportunity to discuss any aspect of the above submissions.

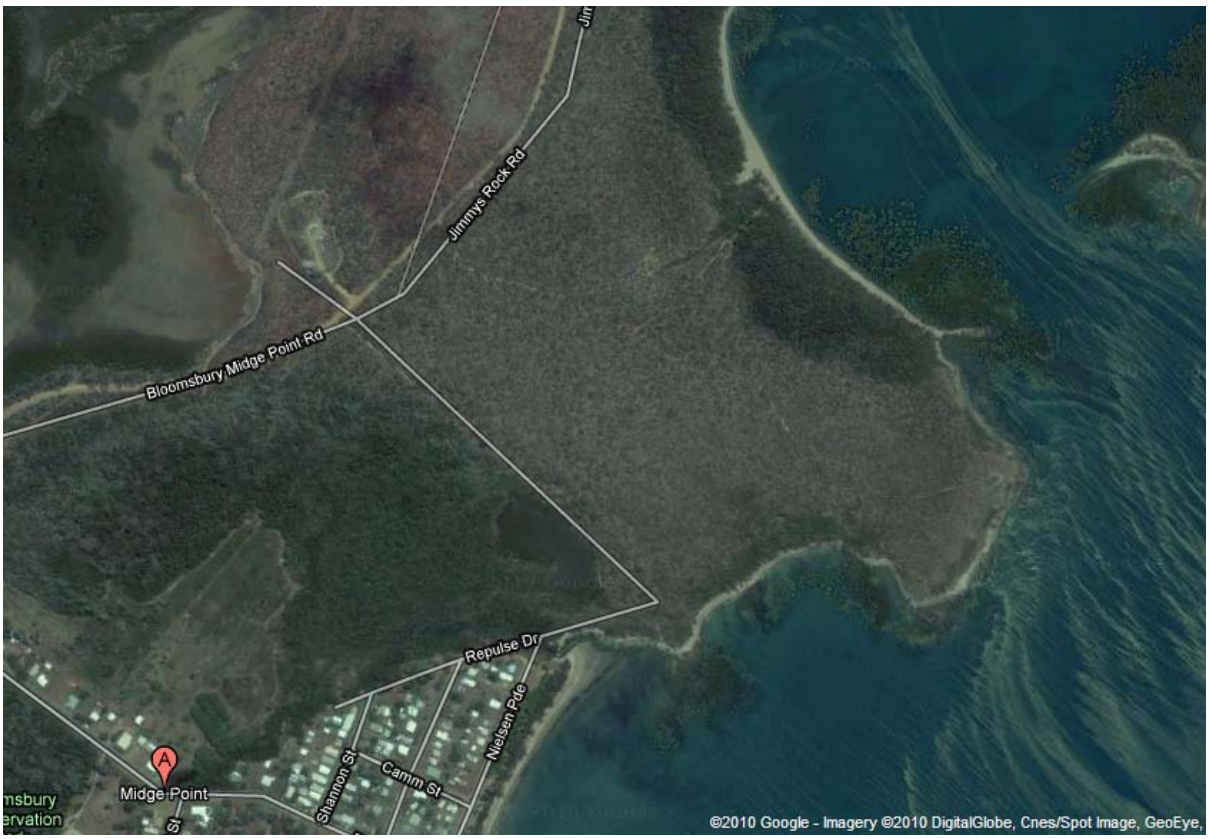
APPENDIX A(i)

Map of Midge Point, Queensland.



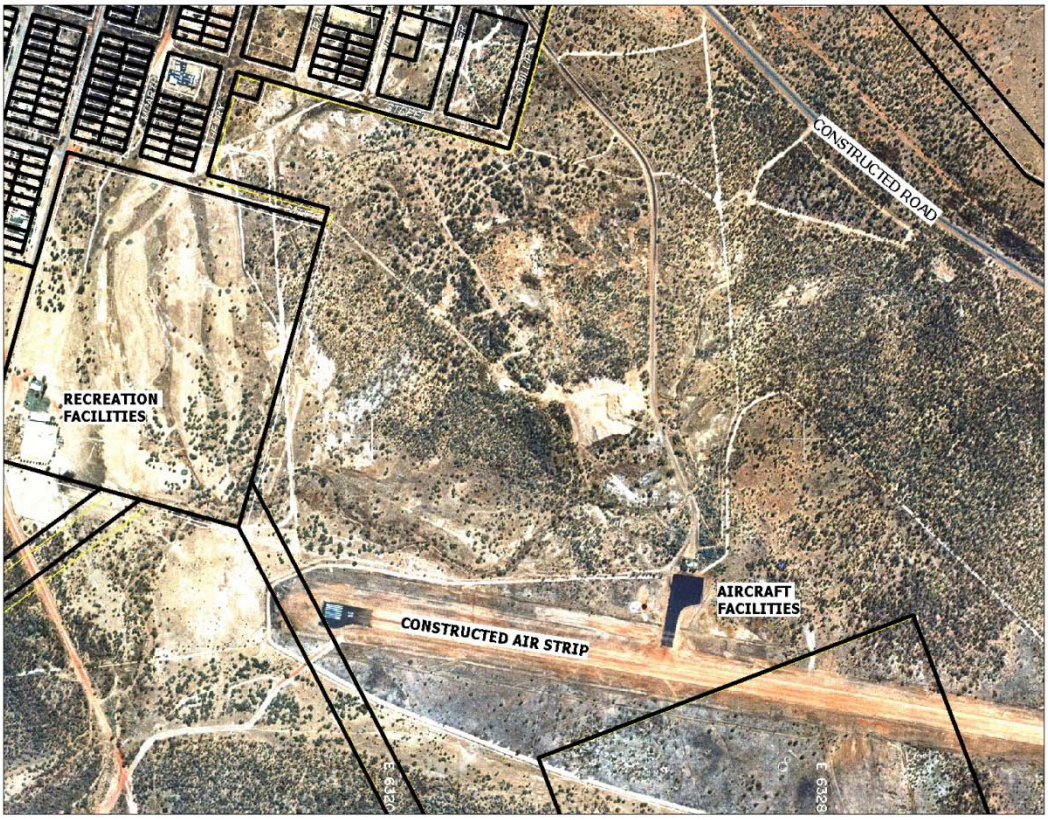
APPENDIX A(ii)

Current aerial photo of Midge Point, Queensland.



APPENDIX B(i)

APPENDIX B(ii)



APPENDIX C

APPENDIX D

Aerial photograph of Mary Kathleen, Cloncurry Shire.