

# FEDERAL COURT OF AUSTRALIA

## Weetra on behalf of the Nauo People v State of South Australia (No 2)

[2024] FCA 1077

File number(s): SAD 188 of 2016

Judgment of: **O'BRYAN J**

Date of judgment: 23 September 2024

Catchwords: **NATIVE TITLE** – consent determination of native title under s 87 of the *Native Title Act 1993* (Cth)

Legislation: *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)  
*Federal Court of Australia Act 1976* (Cth) ss 37M, 37N  
*Harbors and Navigation Act 1993* (SA) s 15(1)(a)  
*Native Title Act 1993* (Cth) ss 23EBA, 47B, 55, 56, 57, 59, 66, 68, 87, 94A, 223(1)(c), 225, Div 3 of Pt 2  
*Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)

Cases cited: *Agius v State of South Australia (No 6)* [2018] FCA 358  
*Brown v Northern Territory of Australia* [2015] FCA 1268  
*Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2)* [2016] FCA 724  
*Freddie v Northern Territory* [2017] FCA 867  
*Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487  
*Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365  
*James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208  
*Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479  
*King (on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group) v State of South Australia* [2011] FCA 1387  
*Lander v State of South Australia* [2012] FCA 427  
*Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474  
*McNamara (Barngarla Southern Eyre Peninsula Native Title Claim) v State of South Australia* [2020] FCA 1875

*Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109  
*Prior on behalf of the Juru (Cape Upstart People) v State of Queensland (No 2)* [2011] FCA 819  
*Weetra on behalf of the Nauo People v State of South Australia* [2022] FCA 828  
*Weetra-Height on behalf of the Nauo People v State of South Australia* [2023] FCA 454  
*Wilson on behalf of the Wirangu People and Weetra on behalf of the Nauo People v State of South Australia* [2023] FCA 60  
*Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993

Division:	General Division
Registry:	South Australia
National Practice Area:	Native Title
Number of paragraphs:	51
Date of last submission/s:	18 September 2024
Date of hearing:	Determined on the papers
Counsel for the Applicant:	S Phillips
Solicitor for the Applicant:	South Australian Native Title Services Ltd
Counsel for the State of South Australia:	S Whitten
Solicitor for the State of South Australia:	Crown Solicitors Office
Solicitor for the Commonwealth of Australia	Australian Government Solicitor
Solicitor for the District Council of Lower Eyre Peninsula	Mellor Olsson
Solicitor for the Commercial Fishing Respondents	Mellor Olsson
Solicitor for Telstra Corporation Ltd and Amplitel Pty Ltd	King and Wood Mallesons

## ORDERS

**SAD 188 of 2016**

**NAUO #2 NATIVE TITLE CLAIM**

**BETWEEN:** **BRENTON WEETRA, PAULINE BRANSON, CYNTHIA  
WEETRA-BUZZA and JODY MILLER**  
Applicants

**AND:** **STATE OF SOUTH AUSTRALIA**  
Respondent

**COMMONWEALTH OF AUSTRALIA**  
Respondent

**DISTRICT COUNCIL OF LOWER EYRE PENINSULA** (and  
others named in the Schedule of Parties)  
Respondents

**ORDER MADE BY: O'BRYAN J**

**DATE OF ORDER: 23 SEPTEMBER 2024**

**THE COURT NOTES THAT:**

- A. Native Title Determination Application No SAD 188 of 2016 (**Nauo #2 Application**) was filed in the Federal Court of Australia on 21 June 2016 and an amended application was filed with leave of the Court on 8 December 2021.
- B. The Applicant, the State of South Australia and the other respondents have now reached an agreed settlement of the Nauo #2 Application without the need to proceed to trial.
- C. The terms of the agreed settlement are recorded in:
  - (a) an Indigenous Land Use Agreement between the Applicant, the State and the Nauo Aboriginal Corporation ICN 9948 (**Nauo #2 Settlement ILUA**); and
  - (b) agreed terms of a proposed order of the Court in relation to a determination of native title in respect of the Nauo #2 Application.
- D. The Nauo #2 Settlement ILUA provides, among other matters, that upon its registration the vesting of adjacent land and subjacent land in the Minister under s 15(1)(a) of the *Harbours and Navigation Act 1993* (SA) is a valid act to which the non-extinguishment principle applies.
- E. The determination of native title made pursuant to these orders will take effect upon the registration of the Nauo #2 Settlement ILUA under Div 3 of Pt 2 of the *Native Title Act 1993* (Cth) (**NTA**).

- F. The Applicant and the State have carried out a comprehensive analysis of the tenure records for the Nauo #2 Application areas. The tenure position reflected in this determination and the Nauo #2 Settlement ILUA represents a negotiated outcome that has been agreed between the parties.
- G. The Applicant and the State have entered into discussions in relation to a potential agreement to be made pursuant to s 47C(1)(b) of the NTA over Park Areas within the determination area. Upon the making of an agreement an application to vary the determination to reflect any such agreement in accordance with s 13 and s 47C of the NTA will be made.
- H. The parties acknowledge that, when the determination takes effect, the members of the native title claim group, in accordance with the traditional laws acknowledged and the traditional customs observed by them, will be recognised as the Native Title Holders for the Native Title Land.

**BEING SATISFIED** that a determination in the terms sought by the parties would be within the power of the Court and it appearing to the Court appropriate to do so pursuant to s 87 of the NTA:

**THE COURT ORDERS THAT:**

- 1. There be a determination of native title in the Nauo #2 Application in the terms set out at paragraphs 5 to 19 below (the **Determination**).
- 2. The Determination will take effect upon the Nauo #2 Settlement ILUA being registered on the Register of Indigenous Land Use Agreements.
- 3. In the event that the Nauo #2 Settlement ILUA is not registered on the Register of Indigenous Land Use Agreement within eight months of the date of this Order, or such other later time as the Court may order, the matter is to be listed for further directions.
- 4. The Applicant, the State or any other respondent have liberty to apply on 14 days' notice to a single judge of the Court:
  - (a) if that party considers it unlikely that the Nauo #2 Settlement ILUA will be registered on the Register of Indigenous Land Use Agreements within eight months of the date of this Order;
  - (b) to establish the precise location and boundaries of any Public Works and adjacent land and waters referred to in item 2 of Schedule 6; and
  - (c) to determine the effect on native title rights and interests of any Public Works referred to in item 2 of Schedule 6.



## THE COURT DETERMINES THAT:

### Interpretation & Declaration

5. In this Determination, including its schedules:
- (a) unless the contrary intention appears, the words and expressions used have the same meaning as they are given in Pt 15 of the NTA;
  - (b) **adjacent land** and **subjacent land** have the meaning given to them in the *Harbors and Navigation Act 1993* (SA);
  - (c) **Native Title Holders** has the meaning given in paragraph 11 of these orders;
  - (d) **Native Title Land** means the land and waters referred to in paragraphs 7, 8 and 9 of these orders; and
  - (e) ‘**Natural Resources**’ means:
    - (i) any animal, plant, fish and bird life found on or in the land and waters of the Native Title Land, including but not limited to medicinal plants, wild tobacco, feathers and resin; and
    - (ii) any clays, soil, sand, gravel, rock or ochre found on or below the surface of the Native Title Land;that have traditionally been taken and used by the Native Title Holders, but does not include:
    - (iii) animals that are the private personal property of another;
    - (iv) crops that are the private personal property of another; and
    - (v) minerals as defined in the *Mining Act 1971* (SA) and petroleum as defined in the *Petroleum and Geothermal Energy Act 2000* (SA);
  - (f) in the event of an inconsistency between a description of an area in a schedule and the depiction of that area on the maps in Schedule 2, the written description shall prevail.

### Determination Area

6. The **Determination Area** comprises all of the land and waters within the external boundary of the Nauo #2 Application as described in Schedule 1.

### Areas within Determination Area where native title exists (Native Title Land)

7. Subject to Schedule 6, native title exists in the land and waters described in Schedules 3, 4 and 5.

8. Section 47B of the NTA applies to those parcels or parts of parcels described in Schedule 4. The prior extinguishment of native title over those areas is disregarded for the purpose of this Determination and native title exists in those parcels or parts of parcels in accordance with the terms of these orders.
9. In accordance with the agreement recorded in the Nauo #2 Settlement ILUA, native title exists, subject to the terms of these orders, in adjacent land and subjacent land within the Determination Area that is vested in the Minister under s 15(1)(a) of the *Harbors and Navigation Act 1993* (SA), including the areas identified in Schedule 5 but excluding those areas identified in Schedule 6.

**Areas within Determination Area where native title does not exist by virtue of extinguishment**

10. Native title has been extinguished in those areas described in Schedule 6.

**Native Title Holders**

11. Under the traditional laws and customs of the Nauo People, the Native Title Holders are those living Aboriginal people who are the descendants whether by birth or traditional adoption from any of the following Nauo antecedents:
  - (a) Topsy Ahang;
  - (b) Mother of Elizabeth Anderson;
  - (c) Mary, mother of Henry Weetra; and
  - (d) Frederick Milerahand who identify as Nauo and are recognised by the other Native Title Holders under those traditional laws and customs as having rights and interests in the Determination Area (together the **Native Title Holders**).

**Rights and Interests**

12. Subject to paragraphs 13, 14 and 15, the nature and extent of the native title rights and interests of the Native Title Holders in the Native Title Land are the non-exclusive rights to use and enjoy those lands and waters, being:
  - (a) the right of access, to be present on, move about on and travel over the Native Title Land;
  - (b) the right to take, enjoy, share and exchange the Natural Resources of the Native Title Land for traditional purposes;

- (c) the right to use the natural water resources of the Native Title Land for traditional purposes;
- (d) the right to conduct ceremonies on the Native Title Land;
- (e) the right to maintain and protect sites and places of cultural significance under the traditional laws and customs of the Native Title Holders on the Native Title Land;
- (f) the right to teach on the Native Title Land the physical and spiritual attributes of the Native Title Land;
- (g) the right to hold meetings on the Native Title Land;
- (h) the right to light fires on the Native Title Land for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation; and
- (i) the right to be accompanied onto the Native Title Land by those people who, although not Native Title Holders, recognise and are bound by the traditional laws and customs of the Native Title Holders and who are:
  - (i) spouses of Native Title Holders; or
  - (ii) people required by traditional law and custom for the performance of cultural activities on the Native Title Land.

### **General Limitations**

- 13. The native title rights and interests described in paragraph 12 do not confer possession, occupation, use and enjoyment of the land and waters on the Native Title Holders to the exclusion of others.
- 14. The native title rights and interests set out at paragraph 12 are subject to and exercisable in accordance with:
  - (a) the traditional laws acknowledged and traditional customs observed by the Native Title Holders; and
  - (b) the laws of the State and Commonwealth.
- 15. For the avoidance of doubt, the native title interest expressed in paragraph 12(c) (the right to use natural water resources) is subject to the *Landscapes South Australia Act 2019* (SA).

### **Other Interests and Relationship with Native Title**

- 16. The nature and extent of other interests in the Native Title Land are:
  - (a) the interests of the Crown in right of the State of South Australia;

- (b) the interests of the Crown in right of the Commonwealth of Australia;
- (c) in relation to reserves as defined in the *National Parks and Wildlife Act 1972* (SA) and wilderness protection areas and wilderness protection zones as defined in the *Wilderness Protection Act 1992* (SA):
  - (i) the rights and interests of the Crown in right of the State of South Australia pursuant to the *National Parks and Wildlife Act 1972* (SA) and the *Wilderness Protection Act 1992* (SA);
  - (ii) the rights and interests of any person or persons validly granted or created in accordance with the *National Parks and Wildlife Act 1972* (SA) and the *Wilderness Protection Act 1992* (SA); and
  - (iii) the rights and interests of the public to use and enjoy those reserves, wilderness protection areas and wilderness protection zones consistent with the *National Parks and Wildlife Act 1972* (SA) and the *Wilderness Protection Act 1992* (SA) ;
- (d) the rights and interests of the Crown in right of the State of South Australia pursuant to the *Harbors and Navigation Act 1993* (SA);
- (e) the interests of the Aboriginal Lands Trust in the lands set out in Schedule 4 pursuant to the *Aboriginal Lands Trust Act 1966* (SA);
- (f) interests of persons to whom valid or validated rights and interests have been granted or recognised by the Crown in right of the State of South Australia or by the Commonwealth of Australia pursuant to statute or otherwise in the exercise of executive power including, but not limited to, rights and interests granted or recognised pursuant to the *Crown Land Management Act 2009* (SA), the *Crown Lands Act 1929* (SA), the *Native Vegetation Act 1991* (SA), the *Fisheries Management Act 2007* (SA), the *Marine Parks Act 2007* (SA), the *Coast Protection Act 1972* (SA), the *Landscape South Australia Act 2019* (SA), the *Mining Act 1971* (SA) and the *Petroleum and Geothermal Energy Act 2000* (SA), all as amended from time to time;
- (g) rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth;
- (h) the rights to access land by an employee or agent or instrumentality of the State, Commonwealth or other statutory authority as required in the performance of his or her statutory or common law duties where such access would be permitted to private land;

- (i) the rights and interests of the Australian Fisheries Management Authority in relation to plans of management made under the *Fisheries Management Act 1991* (Cth), including for the Southern Bluefin Tuna Fishery, the Western Tuna and Billfish Fishery, and permits issued for the Western Skipjack Tuna Fishery;
- (j) the rights and interests of the State and the Native Title Holders pursuant to the Nauro #2 Settlement ILUA;
- (k) the rights and interests of Telstra Corporation Limited (ACN 051 775 556), Amplitel Pty Ltd (ACN 648 133 073), any related bodies corporate and successors in title:
  - (i) as the owner or operator of telecommunications facilities within the Determination Area;
  - (ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth), including rights:
    - A. to inspect land;
    - B. to install, occupy and operate telecommunications facilities; and
    - C. to alter, remove, replace, maintain, repair and ensure the proper functioning of its telecommunications facilities;
  - (iii) for its employees, agents or contractors to access its telecommunications facilities in and in the vicinity of the Determination Area in performance of their duties; and
  - (iv) under any lease, licence, permit, access agreement or easement relating to its telecommunications facilities within the Determination Area;
- (l) the rights and interests of each of the District Council of Lower Eyre Peninsula and the City of Port Lincoln in their relevant local government areas in the Native Title Land:
  - (i) under the *Local Government Act 1934* (SA) and the *Local Government Act 1999* (SA);
  - (ii) as an entity exercising statutory powers in respect of land and waters within the Native Title Land; and

- (iii) in relation to dedicated land placed under its care, control and management pursuant to the *Crown Lands Act 1929* (SA) or the *Crown Land Management Act 2009* (SA).
  - (m) the interests of persons to whom valid or validated interests have been granted by a Council under the *Local Government Act 1934* (SA) or the *Local Government Act 1999* (SA).
17. The relationship between the native title rights and interests in the Native Title Land that are described in paragraph 12 and the other rights and interests that are described in paragraph 16 (**Other Interests**) is that:
- (a) to the extent that any of the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency during the currency of the Other Interests;
  - (b) the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the Other Interests, and the Other Interests, and the doing of any activity required or permitted to be done by or under the Other Interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but, subject to any application of the NTA or the *Native Title (South Australia) Act 1994* (SA), do not extinguish them;
  - (c) in relation to the land and waters set out in Schedule 4, the non-extinguishment principle applies in relation to the grant or vesting of the land or the creation of any other prior interest in the land.

**AND THE COURT MAKES THE FOLLOWING FURTHER ORDERS:**

18. The native title is to be held on trust.
19. The Nauo Aboriginal Corporation RNTBC (ICN 9948) is to:
- (a) be the prescribed body corporate for the purposes of ss 56(2) and 56(3) of the NTA; and
  - (b) perform the functions mentioned in s 57(1) of the NTA after becoming the registered native title body corporate in relation to the Native Title Land.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## SCHEDULE 1

### External boundary description of the Determination Area

Commencing at a point being the intersection of a line 10 metres seaward of Lowest Astronomical Tide with a straight line between Longitude 135.400967 East, Latitude 34.817477 South and Longitude 135.627920 East, Latitude 34.812759 South; then easterly, north-easterly and northerly in straight lines passing through the following points:

Longitude East	Latitude South
135.627920	34.812759
135.642908	34.802285
135.643266	34.748119

Then north-westerly in a straight line towards the point Longitude 135.674630 East, Latitude 34.742974 South to its intersection with the south-western boundary of the north-eastern portion of Section 39, Hundred of Uley [being a point on the external boundary of Barngarla Native Title Claim Determination Area (SCD2016/001)] [being along a portion of the southern portion of the external boundary of native title claim Naou (SAD6021/1998)].

Then south-easterly along the south-western boundary of the north-eastern portion of Section 39, Hundred of Uley; south-easterly and easterly along the south-western and southern boundaries of the north-eastern portion of Section 38, Hundred of Uley; southerly and easterly along the western and southern boundaries of Section 642, Hundred of Lincoln; generally northerly along the eastern boundary of said Section 642 to its intersection with the prolongation westerly of the southern boundary of Section 495, Hundred of Lincoln; easterly along said prolongation to the south-western-most corner of Section 495, Hundred of Lincoln; easterly and generally north-easterly along the southern and eastern boundaries of said Section 495 to an eastern corner of said Section 495 closest to the south-western-most corner of Section 535, Hundred of Lincoln; easterly in a straight line to the south-western-most corner of Section 535, Hundred of Lincoln; easterly along the southern boundary of said Section 535; southerly and south-easterly along the western and southern boundaries of Section 95, Hundred of Lincoln; south-easterly along the southern boundary of Section 191, Hundred of Lincoln to the southern-most corner of said Section 191; south-easterly to the north-western-most corner of Section 467, Hundred of Lincoln; generally easterly, generally north easterly, south-westerly

and south-easterly along the northern and eastern boundaries of Section 467, Hundred of Lincoln to the south-eastern-most corner of said Section 467; south-easterly in a straight line to the closest corner of Section 669, Hundred of Lincoln; south-easterly along a north-eastern boundary of Section 669, Hundred of Lincoln and along the prolongation of said boundary to its intersection with a line 10 metres seaward of Lowest Astronomical Tide [being along a portion of the southern portion of the external boundary of Barngarla Native Title Claim Determination Area (SCD2016/001)].

Then along said prolongation to its intersection with a line 50 metres seaward of Lowest Astronomical Tide [being the coastal boundary commencement point].

Then then generally south-westerly, generally north-easterly, generally southerly, generally north-westerly, generally southerly, generally westerly and generally north-westerly along a coastal boundary inclusive of the following:

- all waters and natural features 10 metres seaward of Lowest Astronomical Tide;
- all waters and natural features 50 metres seaward of Lowest Astronomical Tide of easily accessible beaches as identified by the State and applicants as defined in the following table (coordinates are approximate and subject to survey):

Accessible Beach	Longitude East	Latitude South	Longitude East	Latitude South
1	Coastal boundary commencement point		135.792986	34.810260
2	135.854839	34.811947	135.927626	34.769443
3	135.936826	34.768454	135.987607	34.765016
4	135.987125	34.762694	135.984889	34.758314
5	135.985788	34.755856	135.989743	34.747192
6	135.987525	34.743329	135.983010	34.735667
7	135.987359	34.727694	135.990793	34.727776
8	135.996065	34.729587	135.998944	34.734038
9	136.010418	34.749017	136.011314	34.752316
10	136.011860	34.762881	136.003099	34.776959
11	136.002526	34.780420	136.005899	34.791398
12	136.009021	34.794553	136.004237	34.801645



13	136.004478	34.806402	136.002778	34.808027
14	135.988927	34.827114	135.964067	34.877004
15	135.989841	34.961208	135.991928	34.962091
16	135.973840	34.991929	135.959609	34.992288
17	135.887710	34.930086	135.872866	34.922284
18	135.854604	34.889546	135.853091	34.886647
19	135.850800	34.886850	135.798838	34.862601
20	135.792384	34.861385	135.789098	34.860641
21	135.774529	34.858457	135.749496	34.856955
22	135.742922	34.857709	135.721265	34.862434
23	135.718600	34.864102	135.717401	35.864329
24	135.715953	34.864912	135.712773	34.866002
25	135.701353	34.906125	135.698591	34.905943

- all waters and natural features within Fishery Bay enclosed by a straight line extending from Longitude 135.690097 East, Latitude 34.913571 South to Longitude 135.685118 East, Latitude 34.918346 South;
- to the point of commencement.

### Data Reference and source

Cadastral and Lowest Astronomical Tide data sourced from Attorney-General's Department (19 April 2022).

### Reference datum

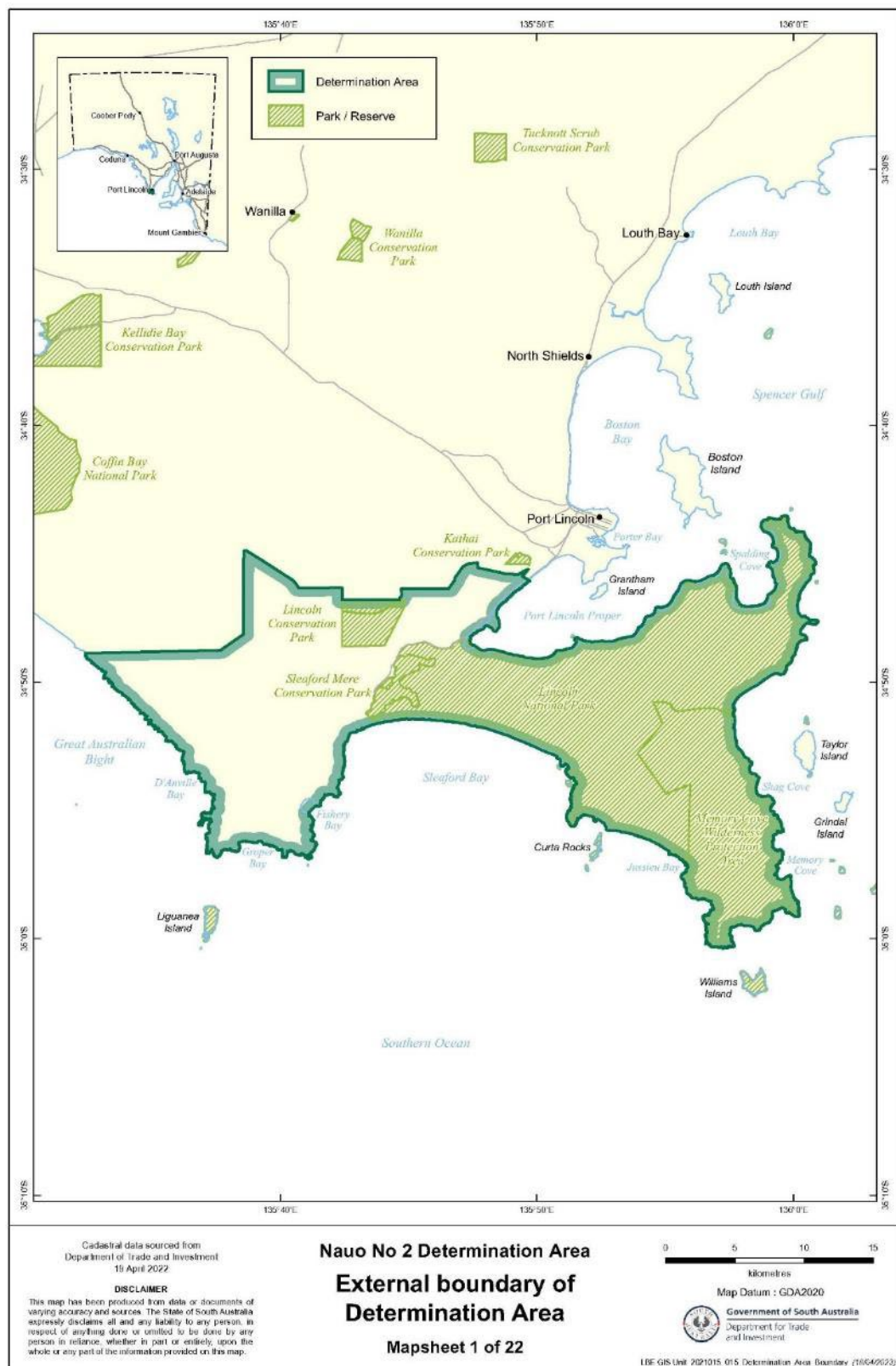
Geographical coordinates are referenced to the Geocentric Datum of Australia 2020 (GDA2020), in decimal degrees.

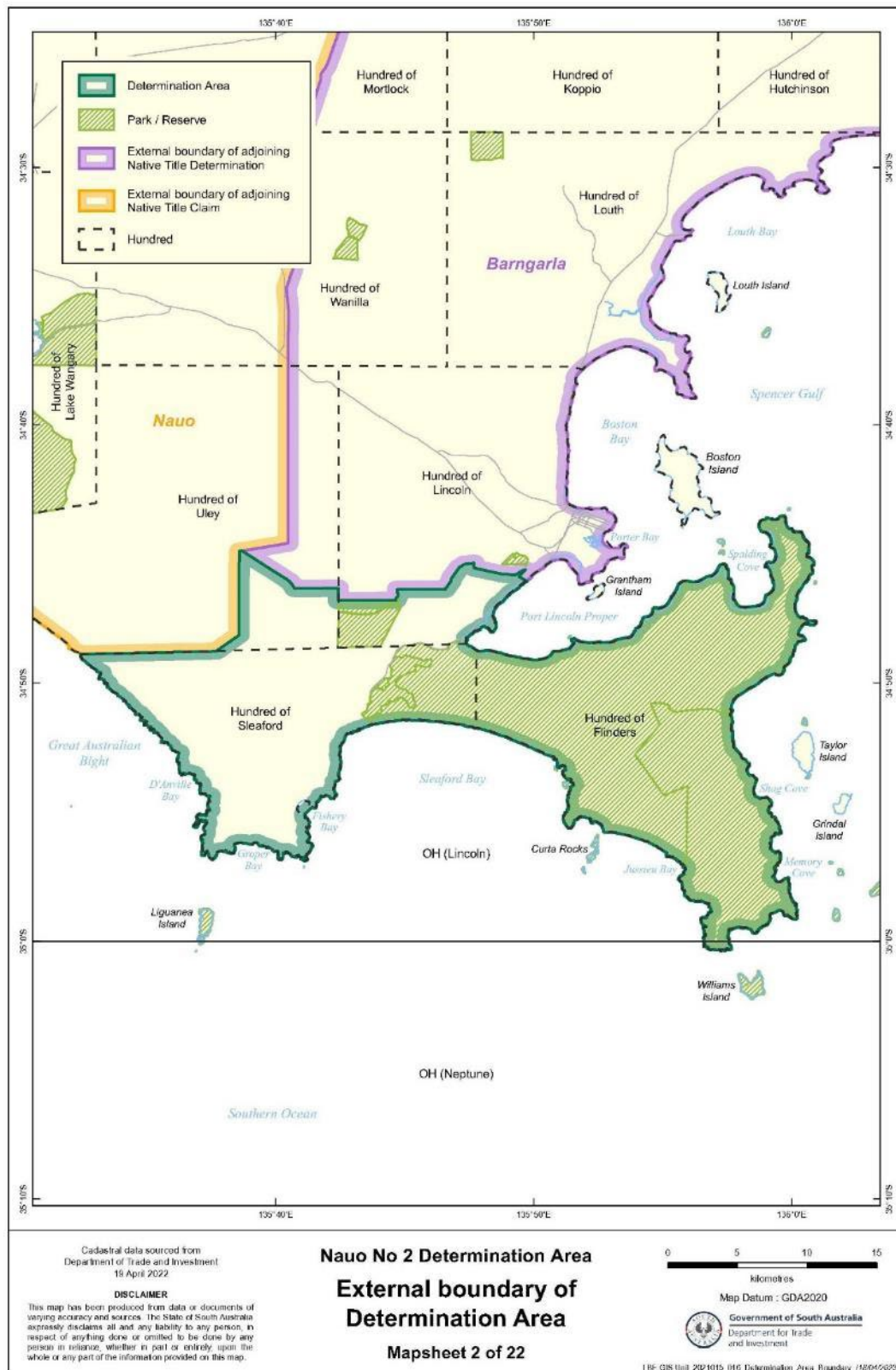
### Use of Coordinates

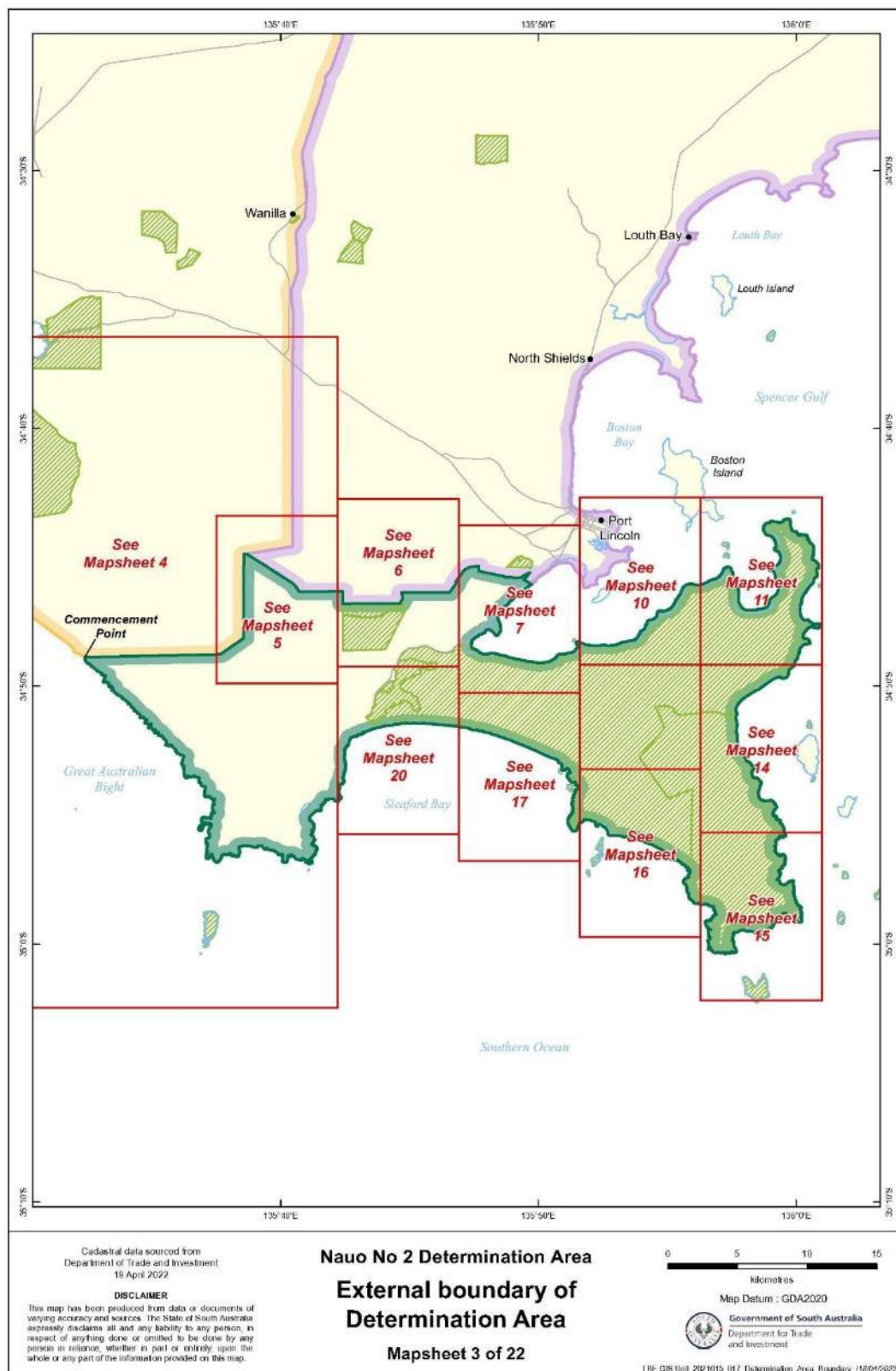
Where coordinates are used within the description to represent cadastral or topographical boundaries or the intersection with such, they are intended as a guide only. As an outcome of the custodians of cadastral and topographical data continuously recalculating the geographic position of their data based on improved survey and data maintenance procedures, it is not possible to accurately define such a position other than by detailed ground survey.

## **SCHEDULE 2**

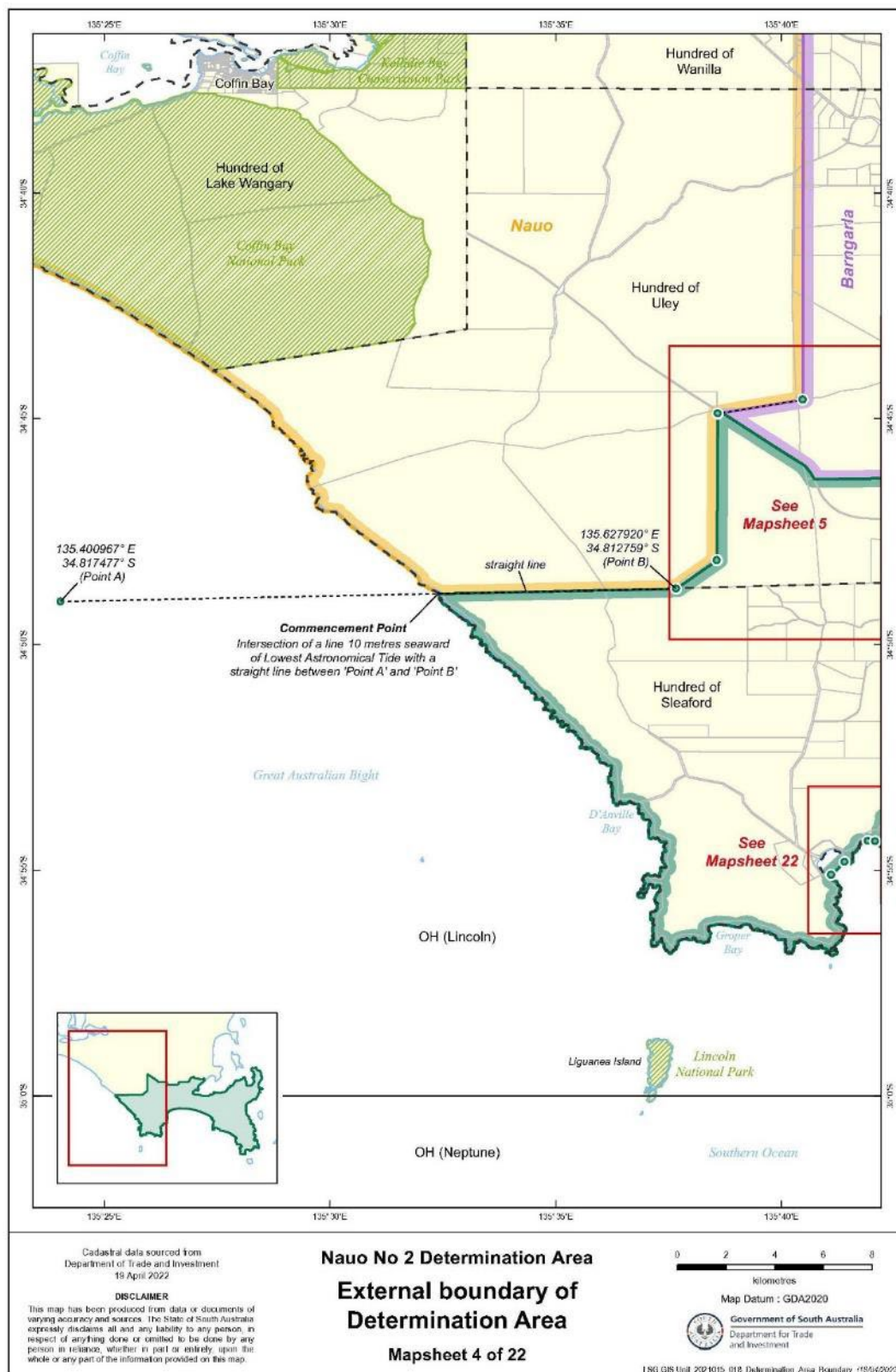
### **Part A: Map of the External Boundaries of the Determination Area**

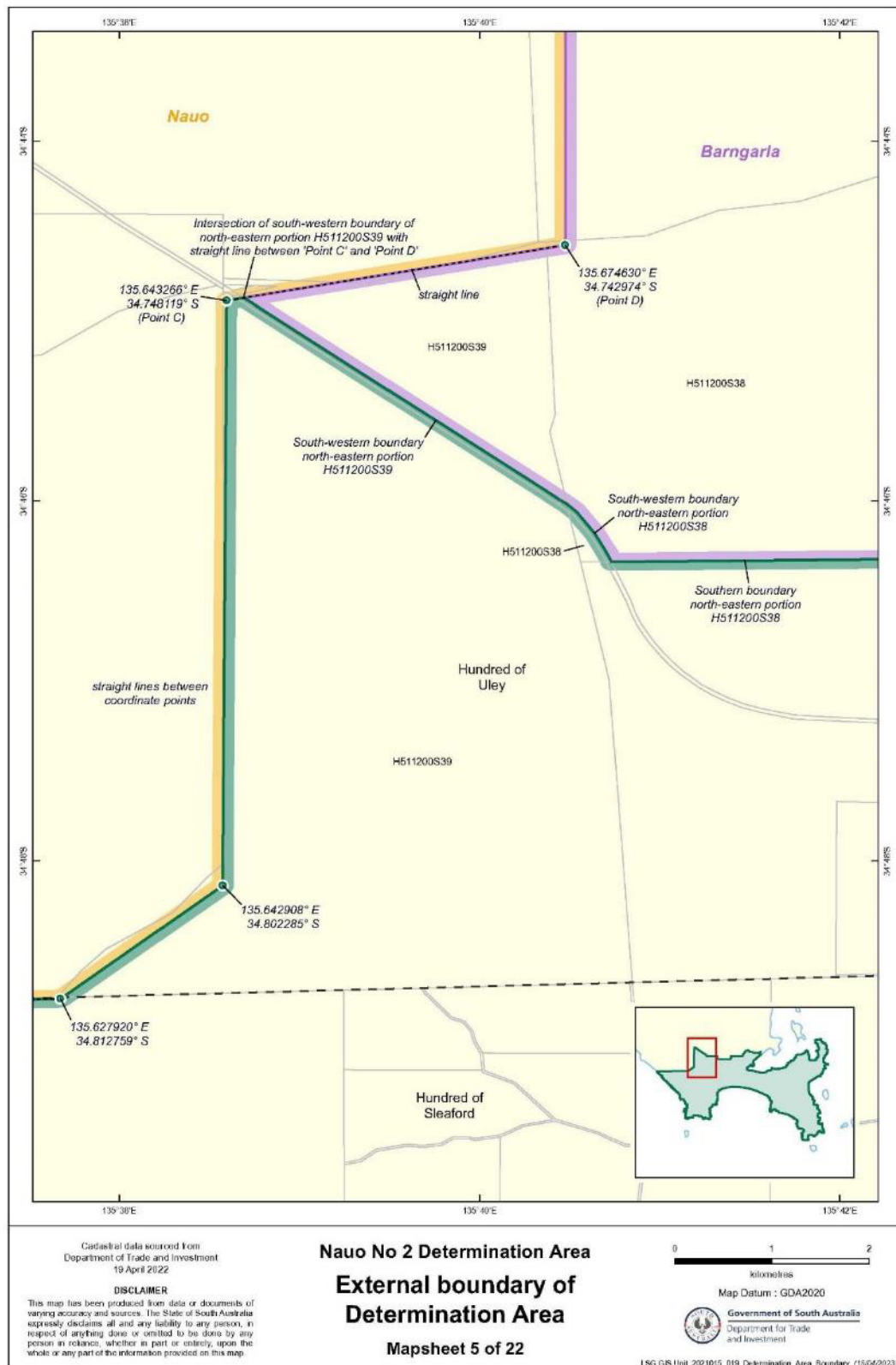


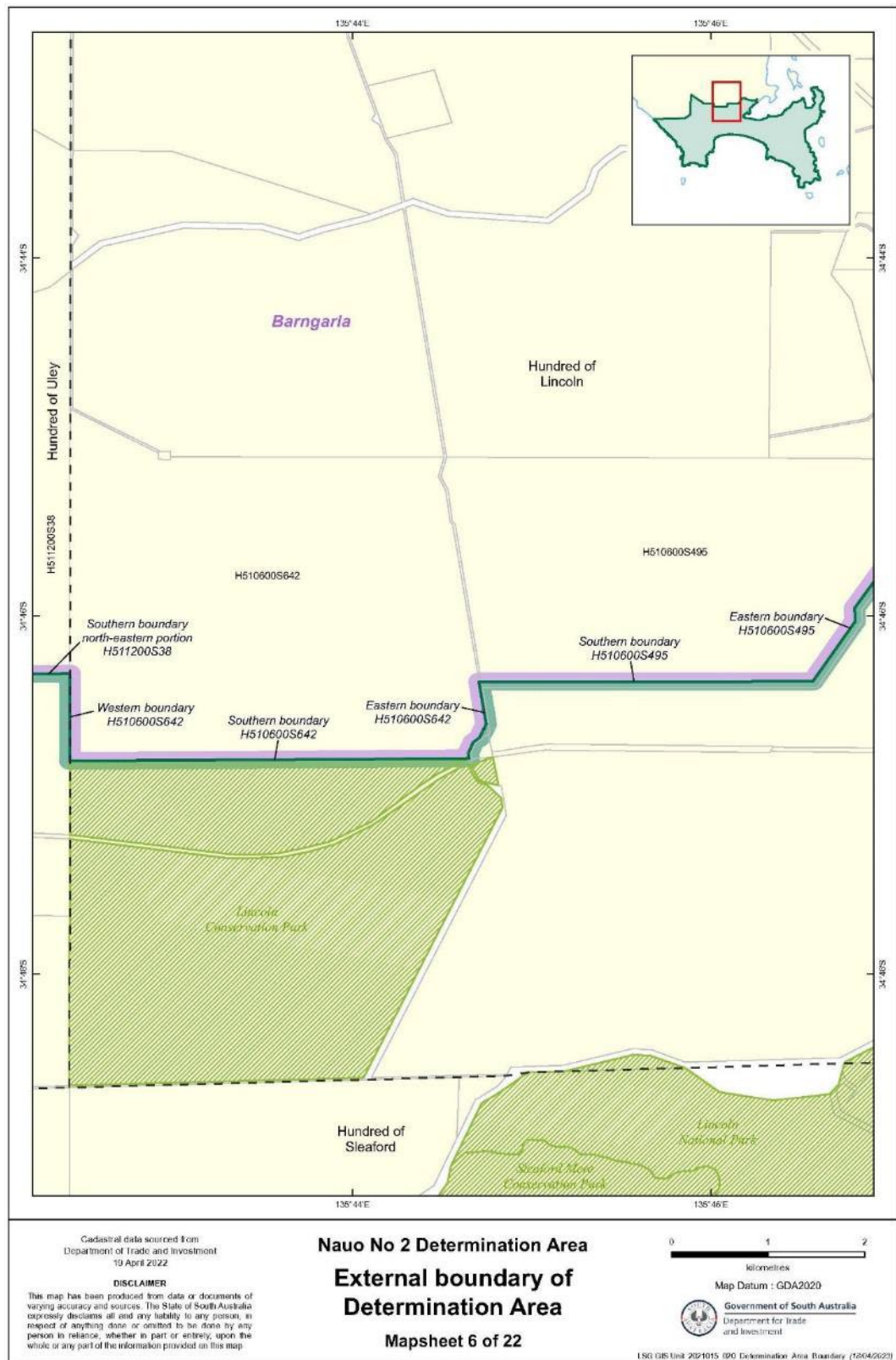




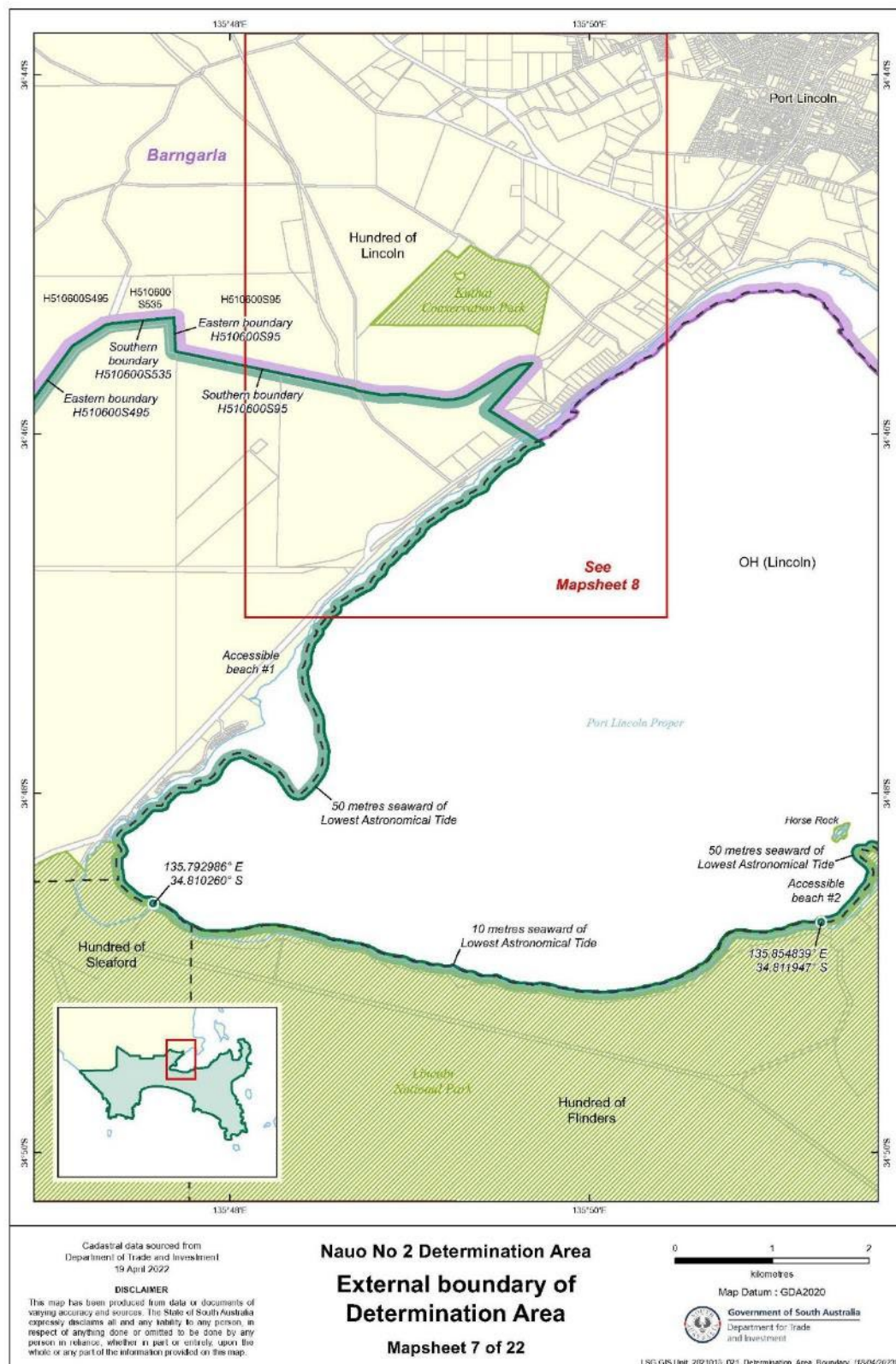


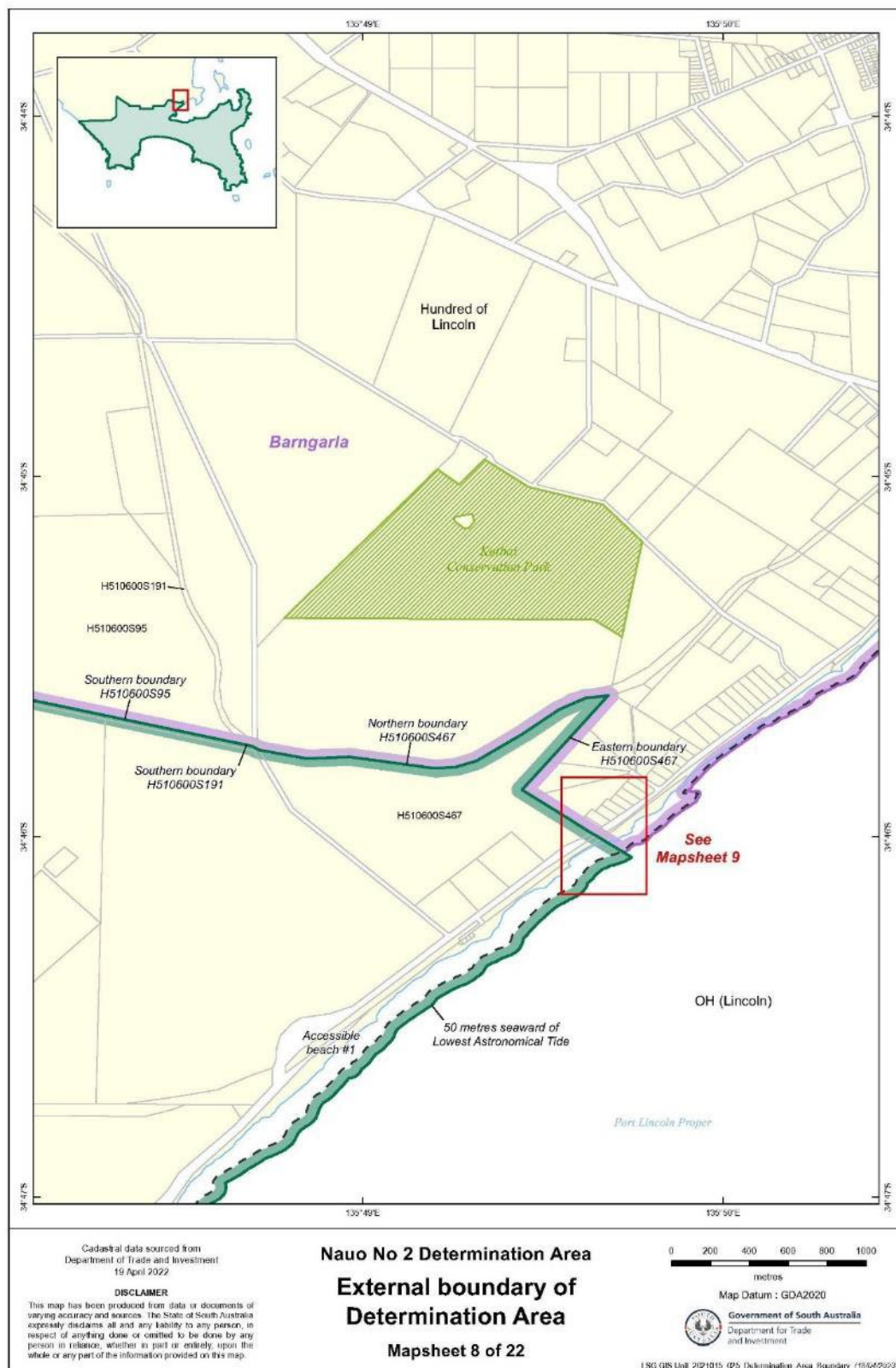


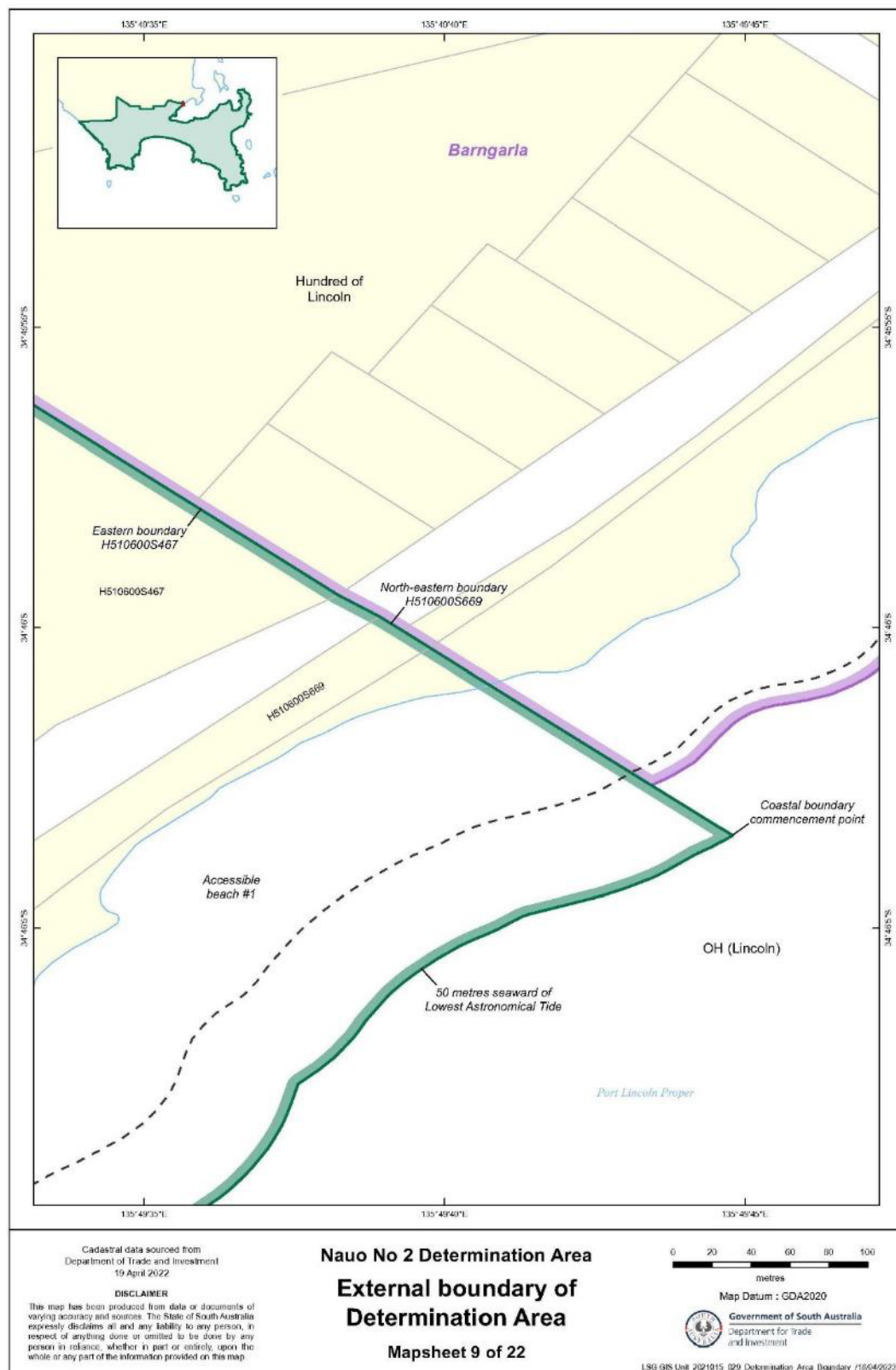




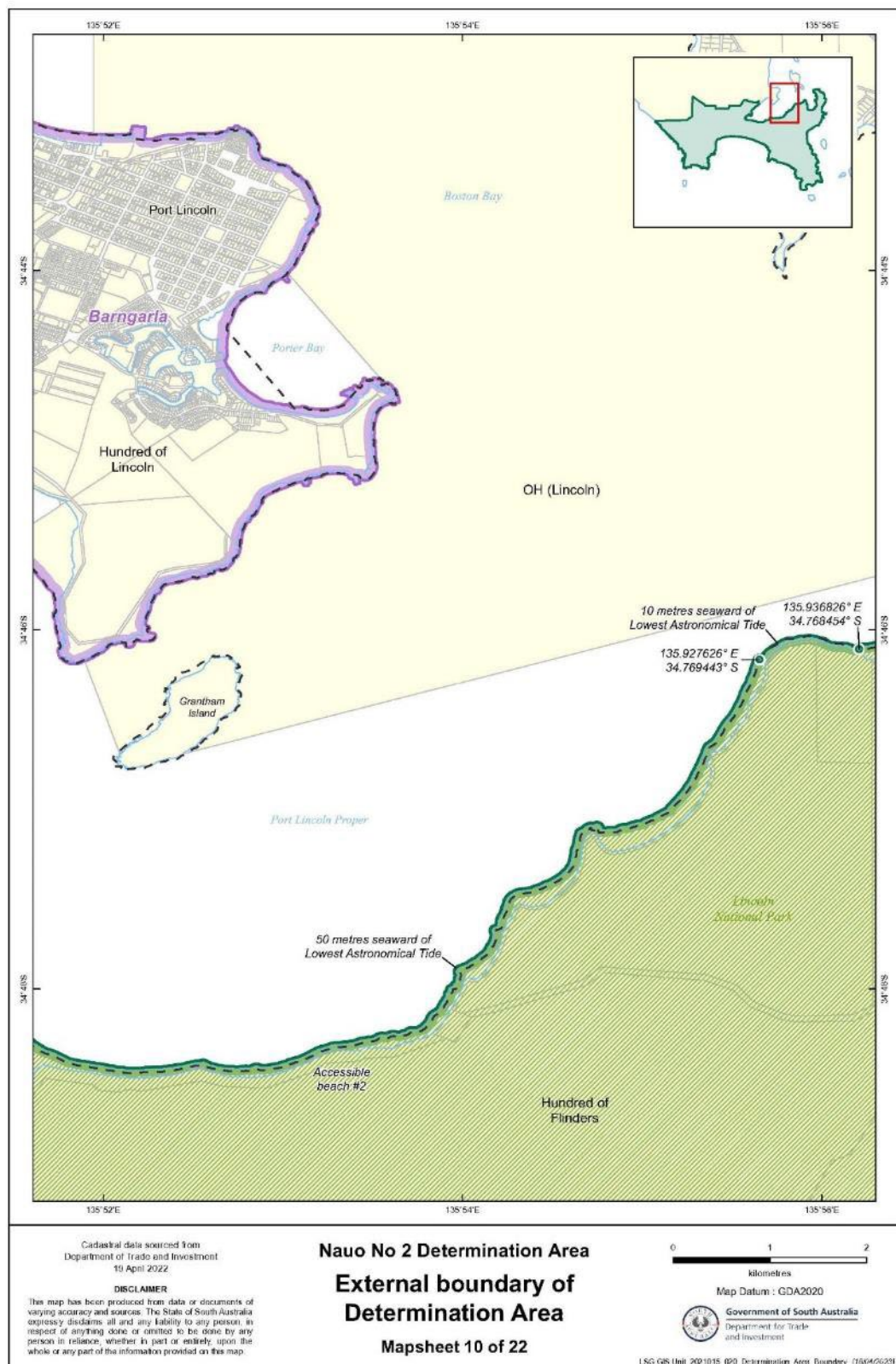


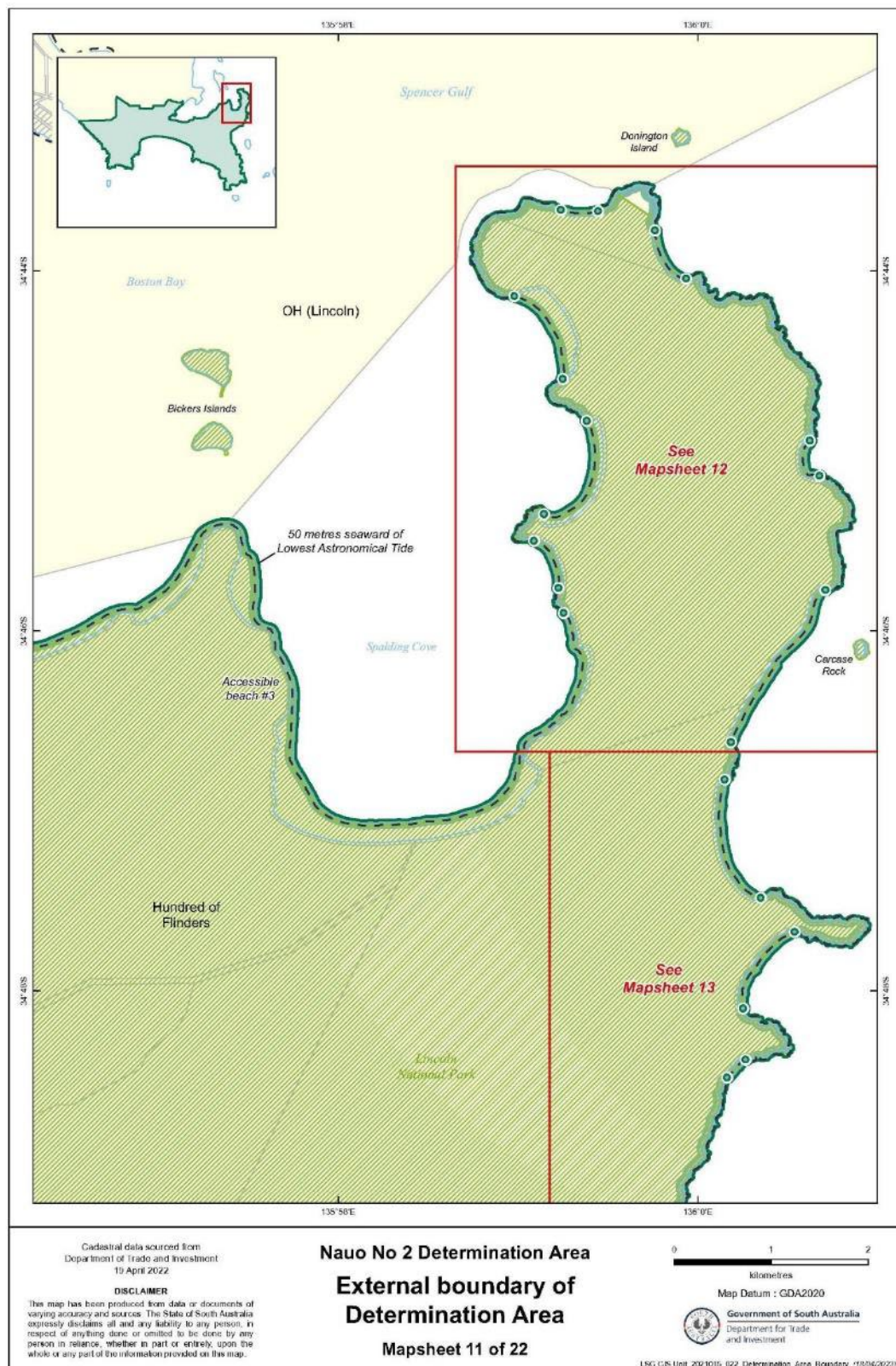




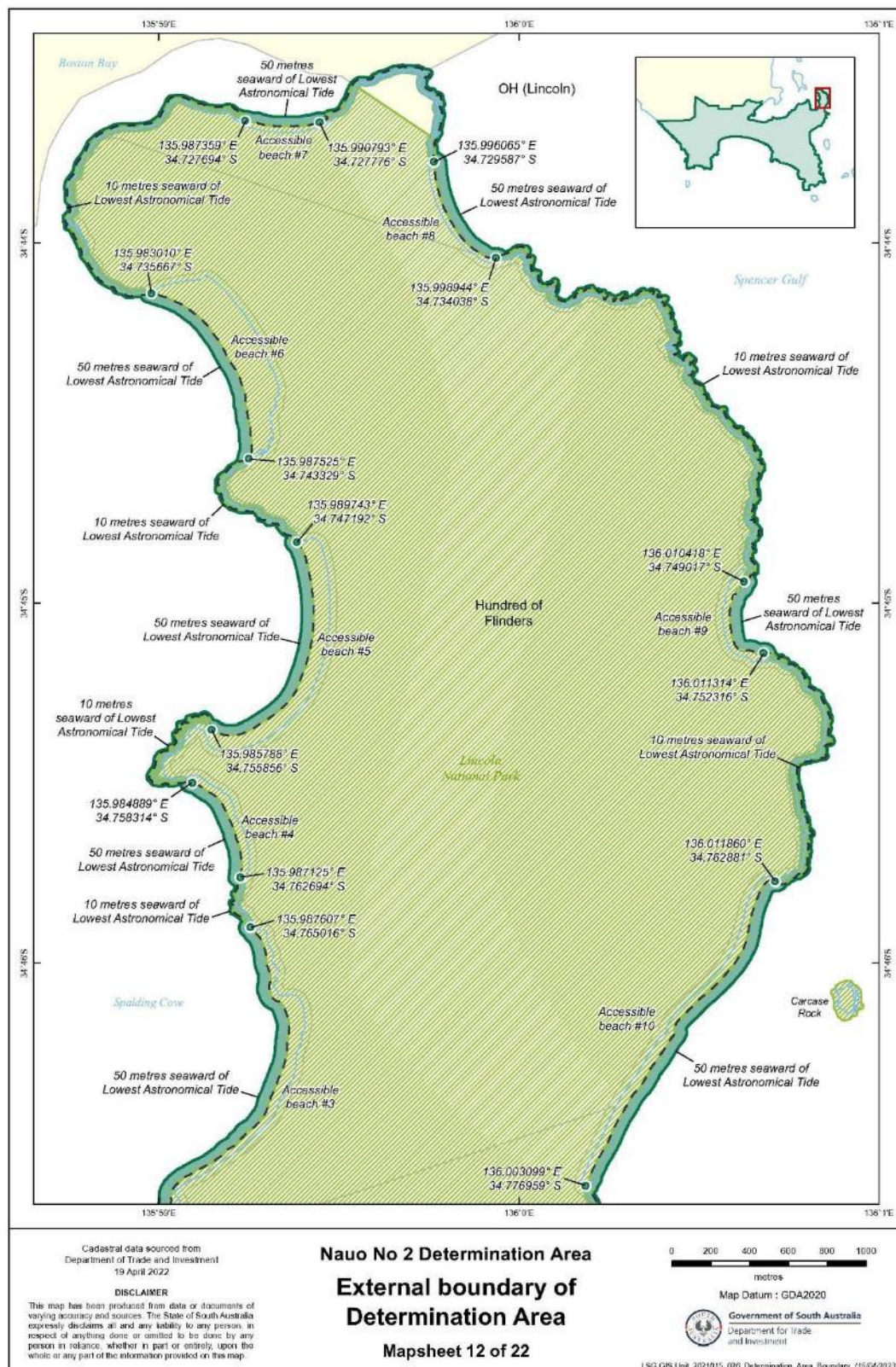


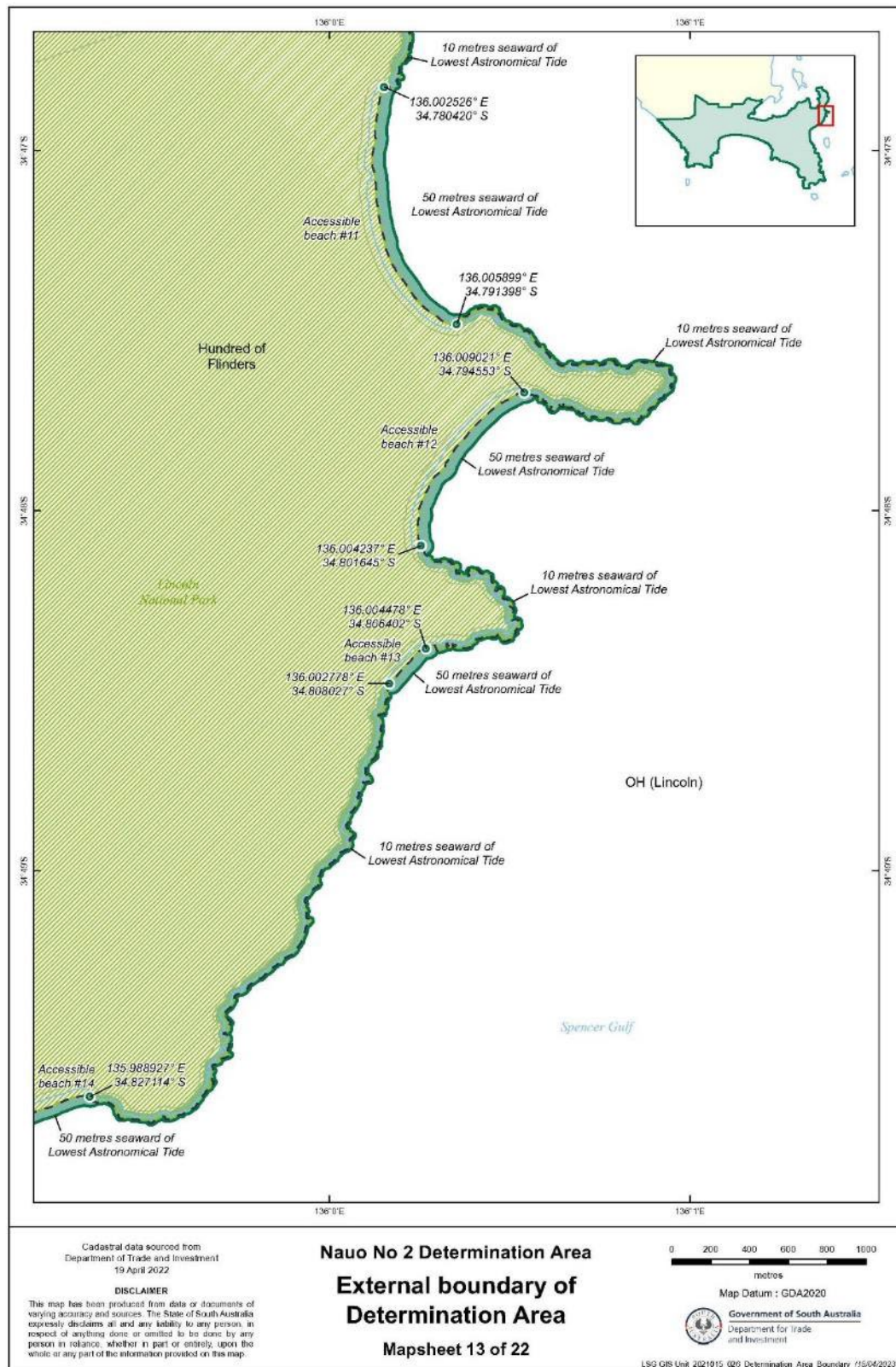




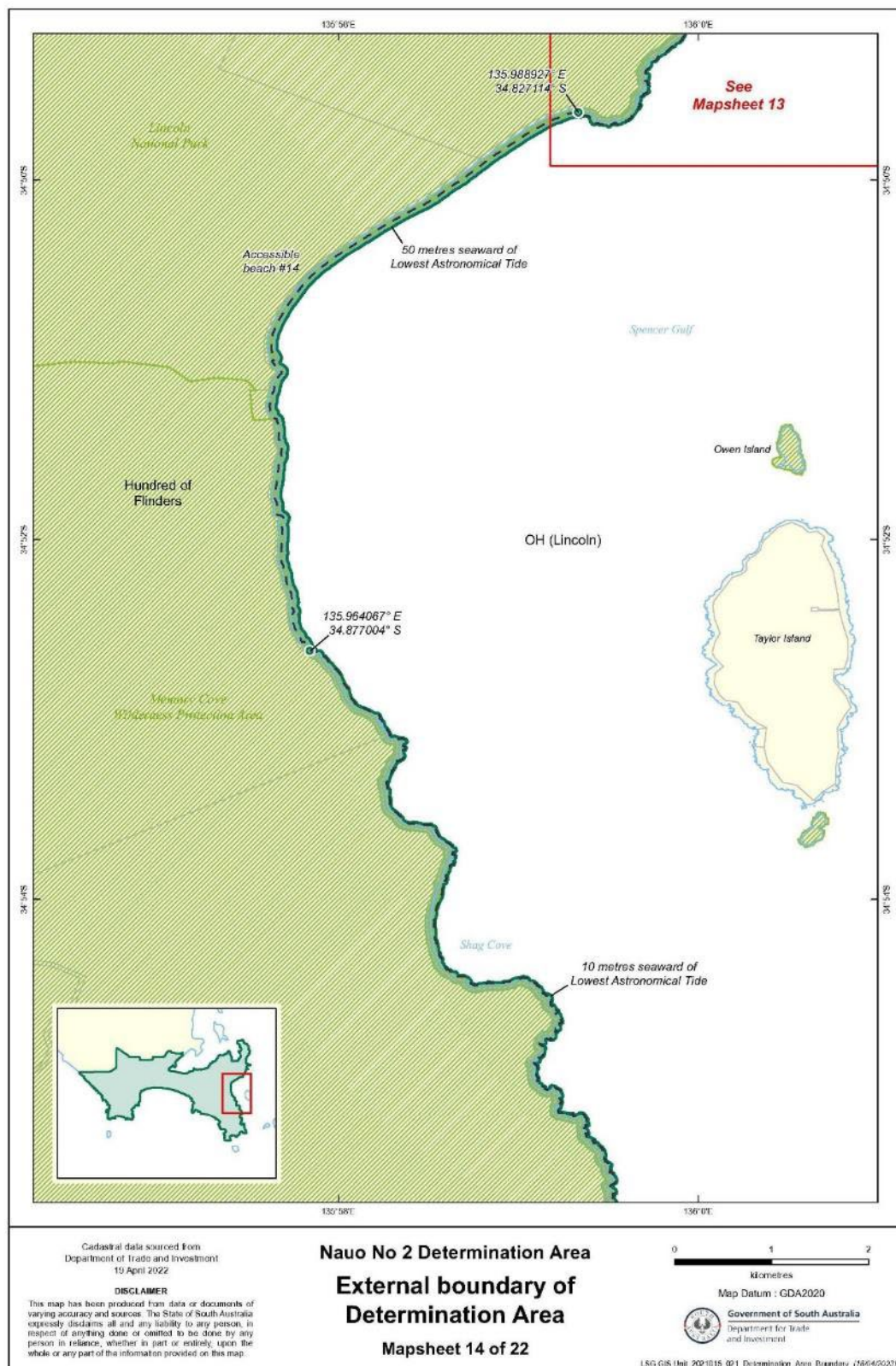




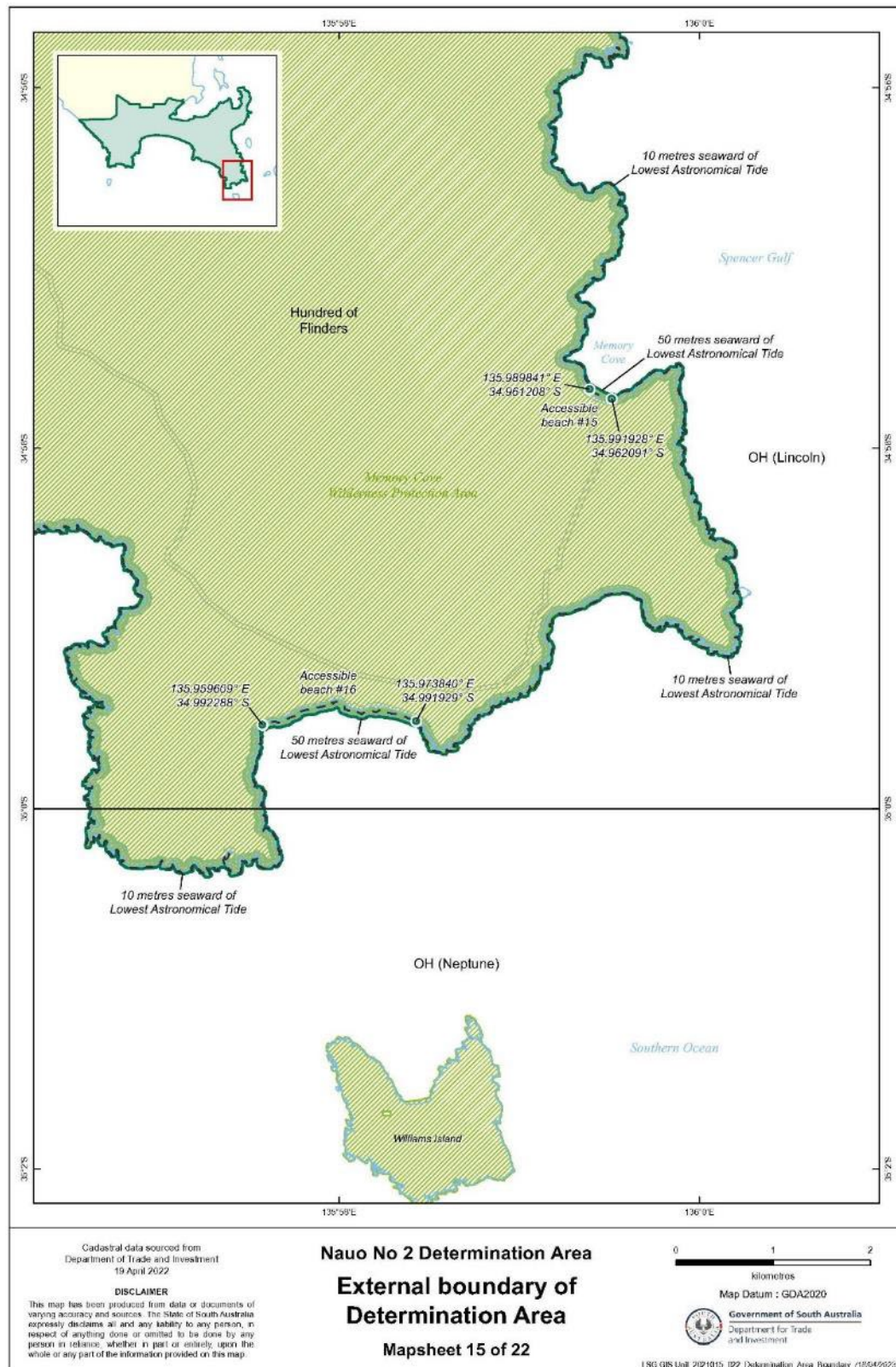


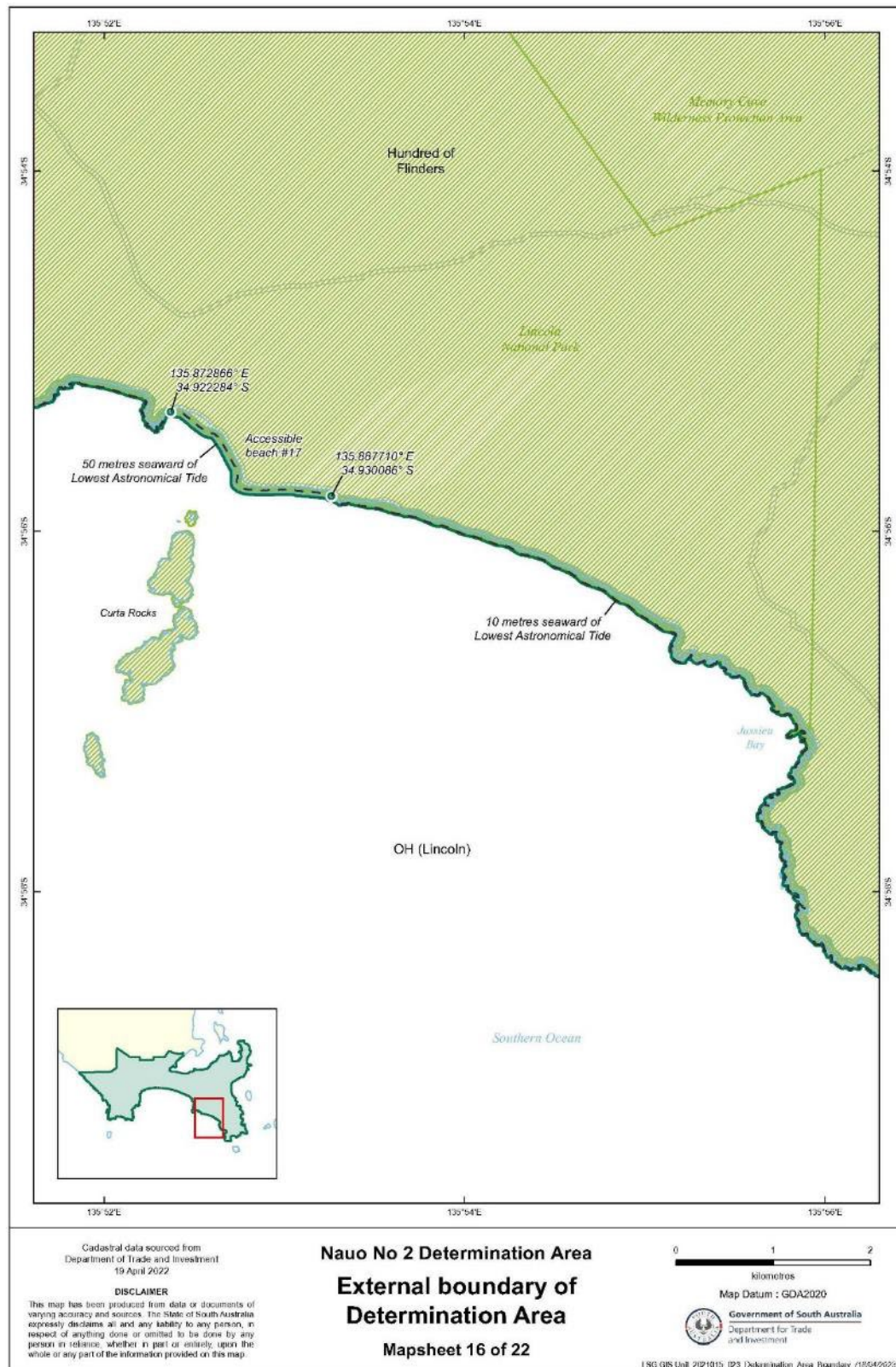




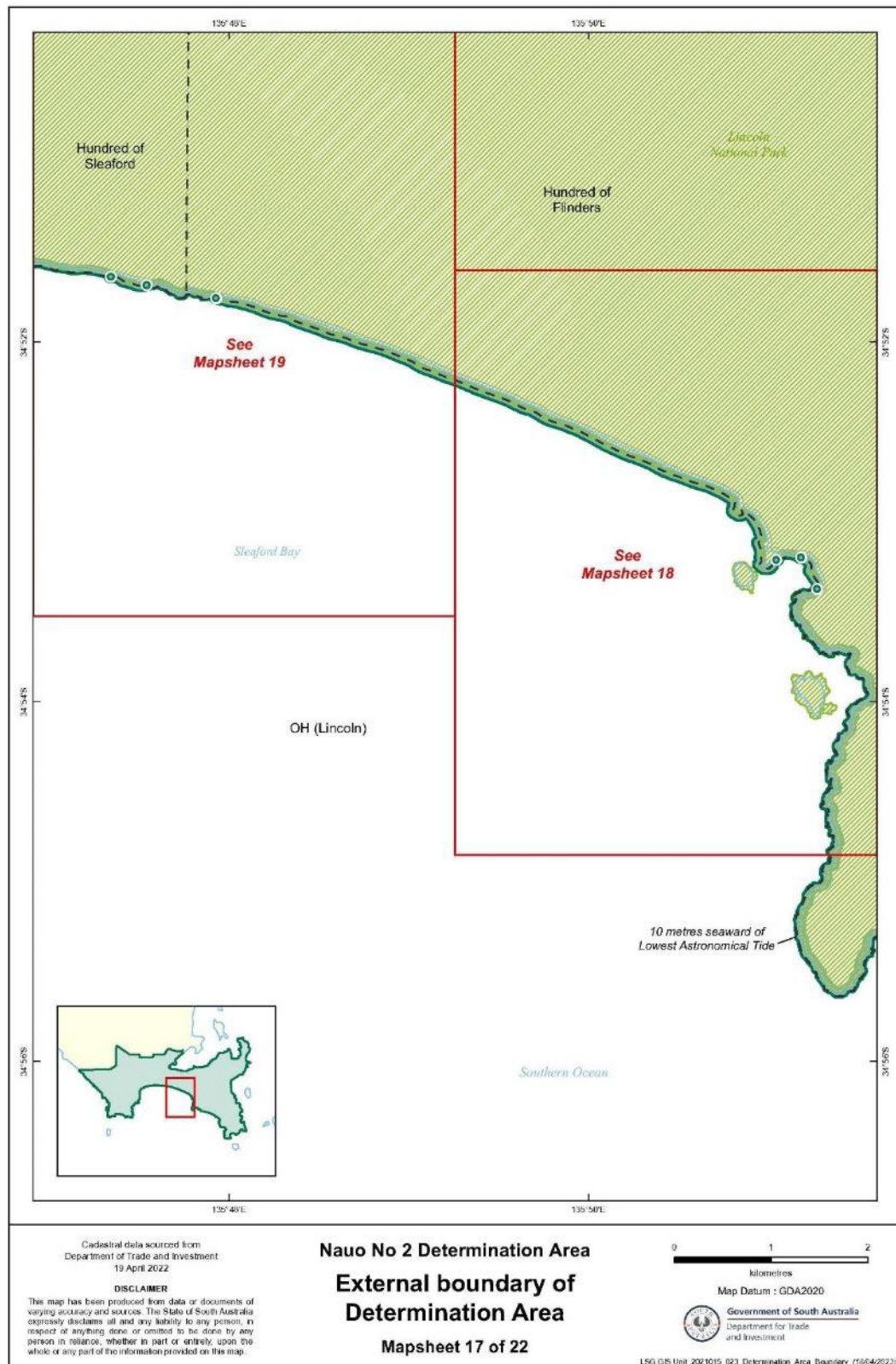


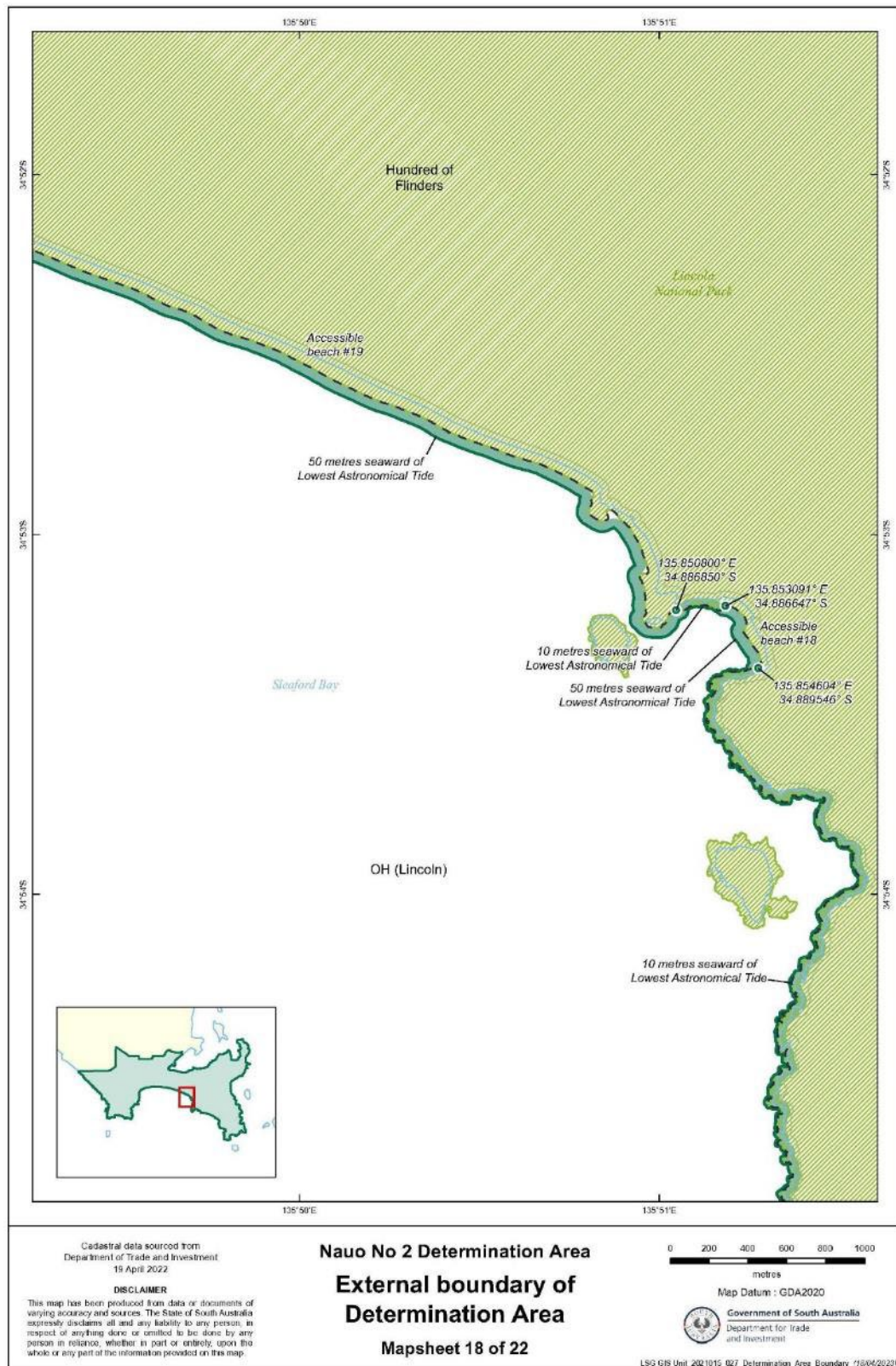




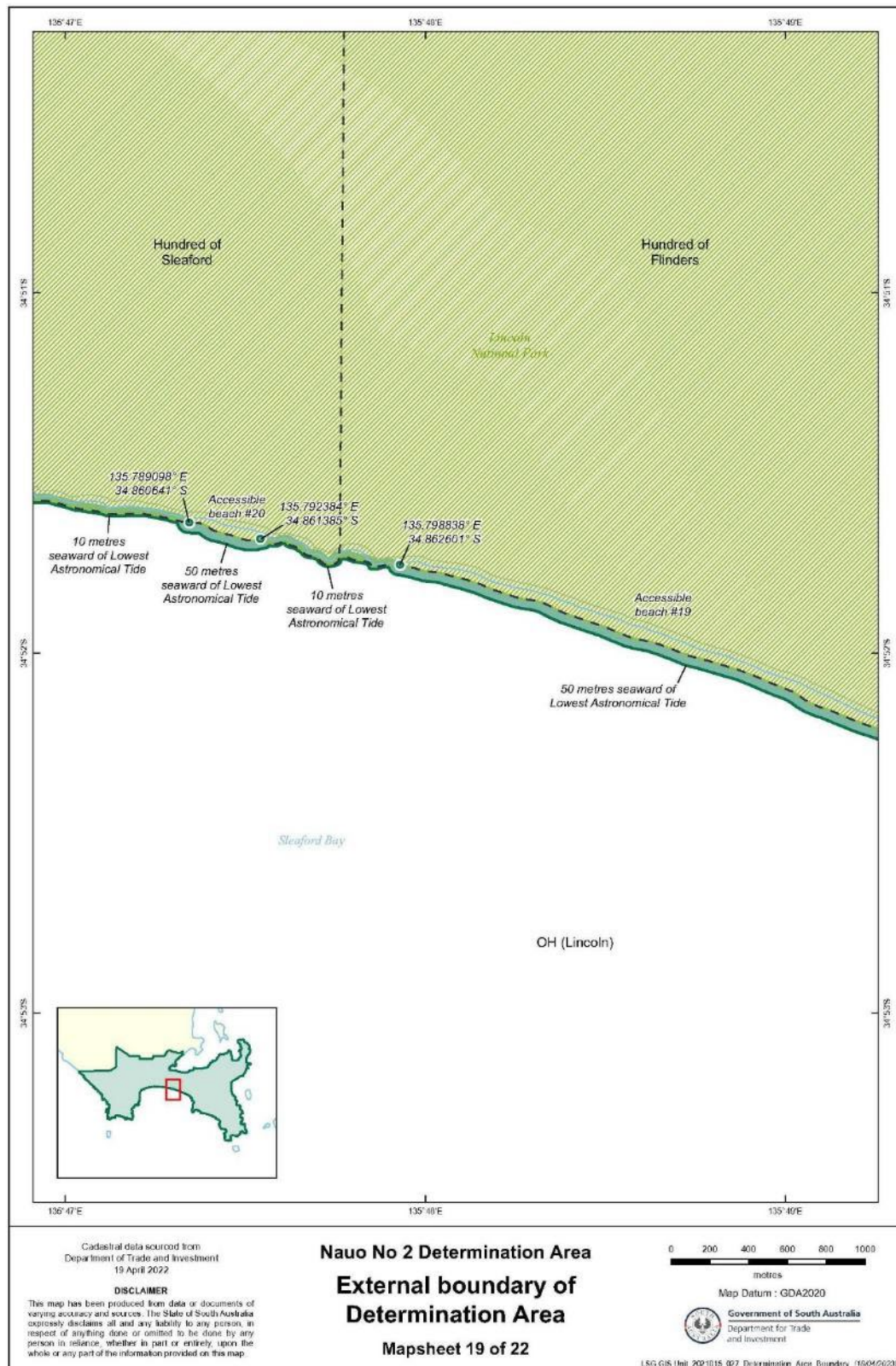


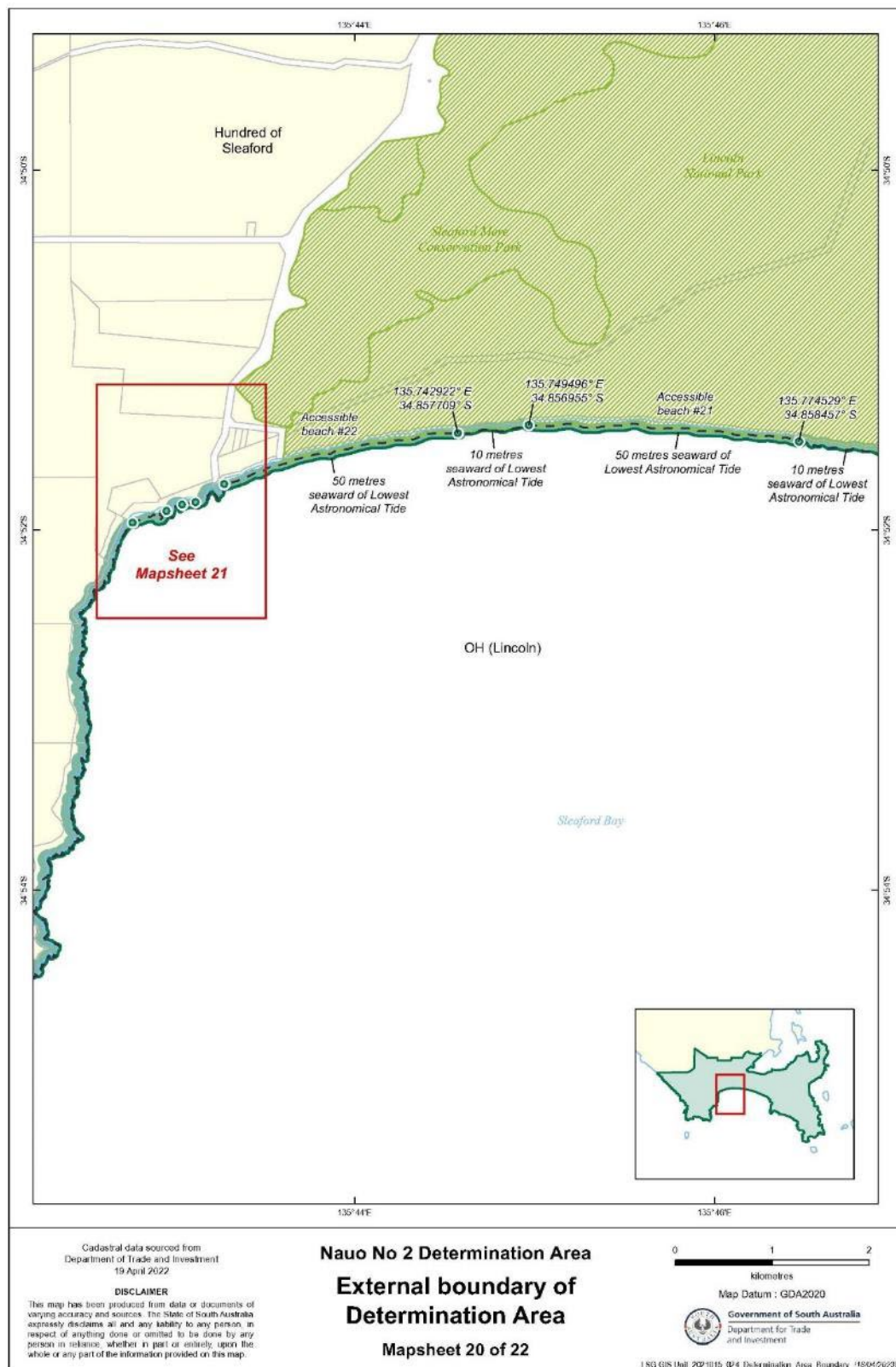






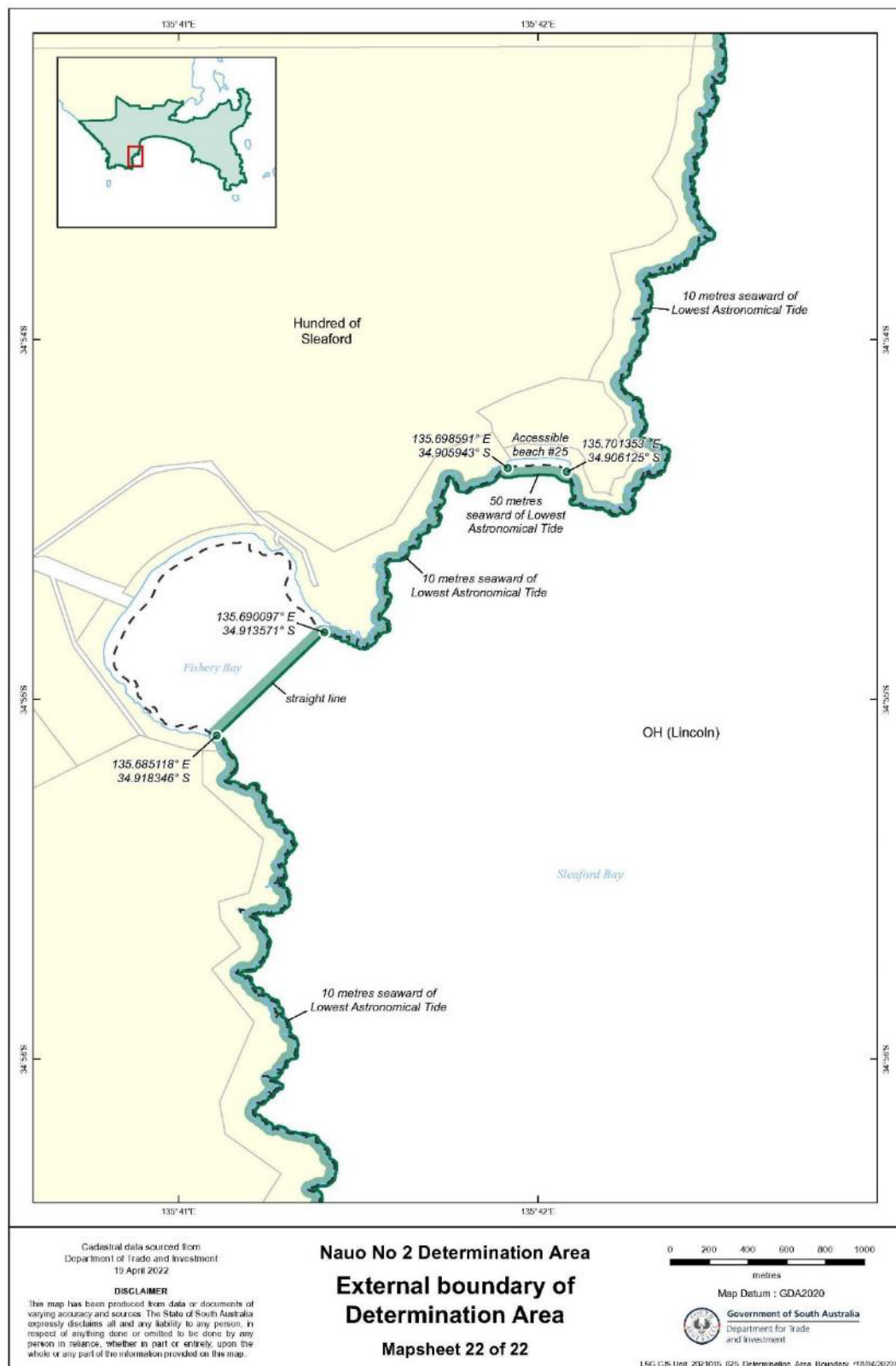








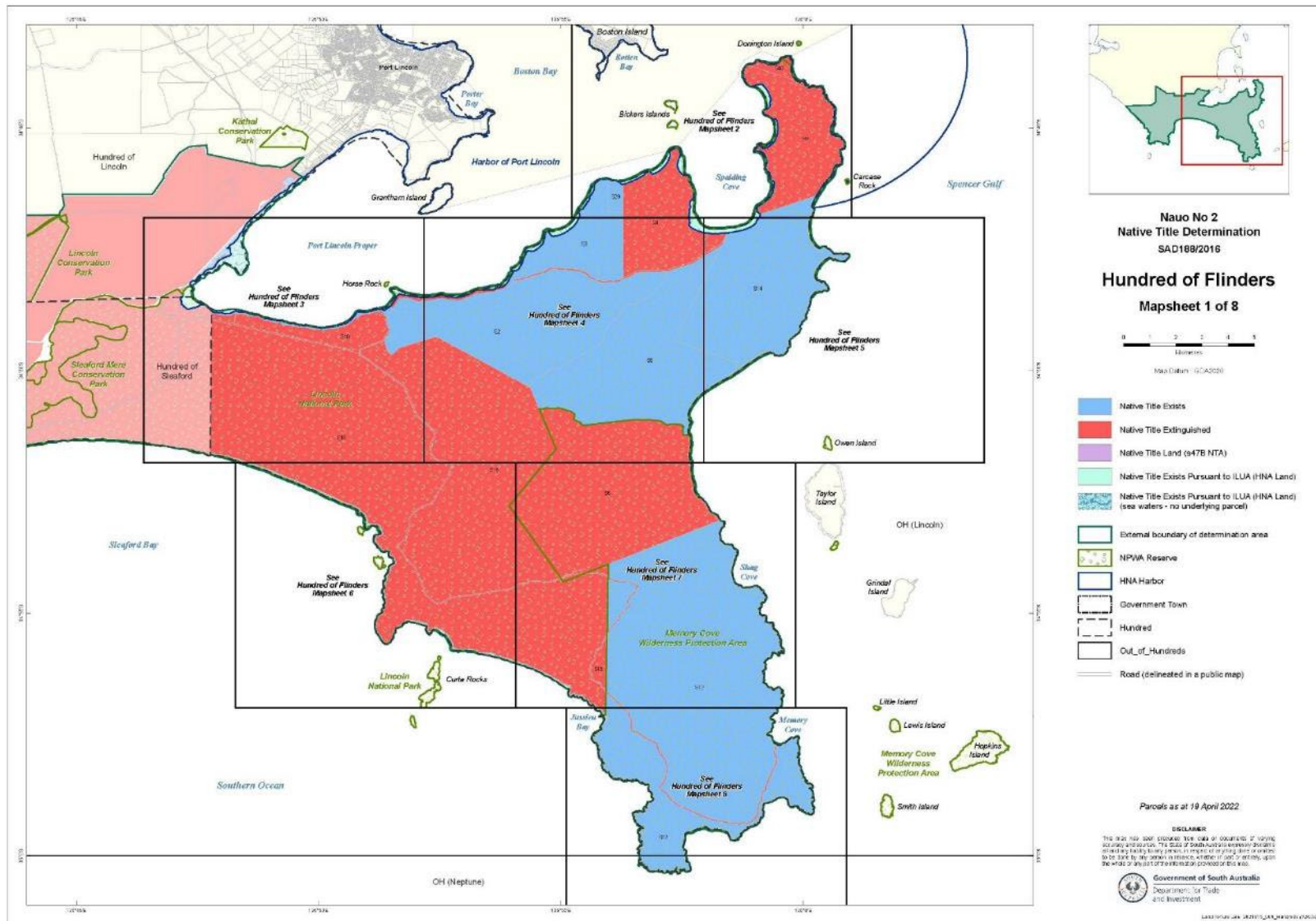


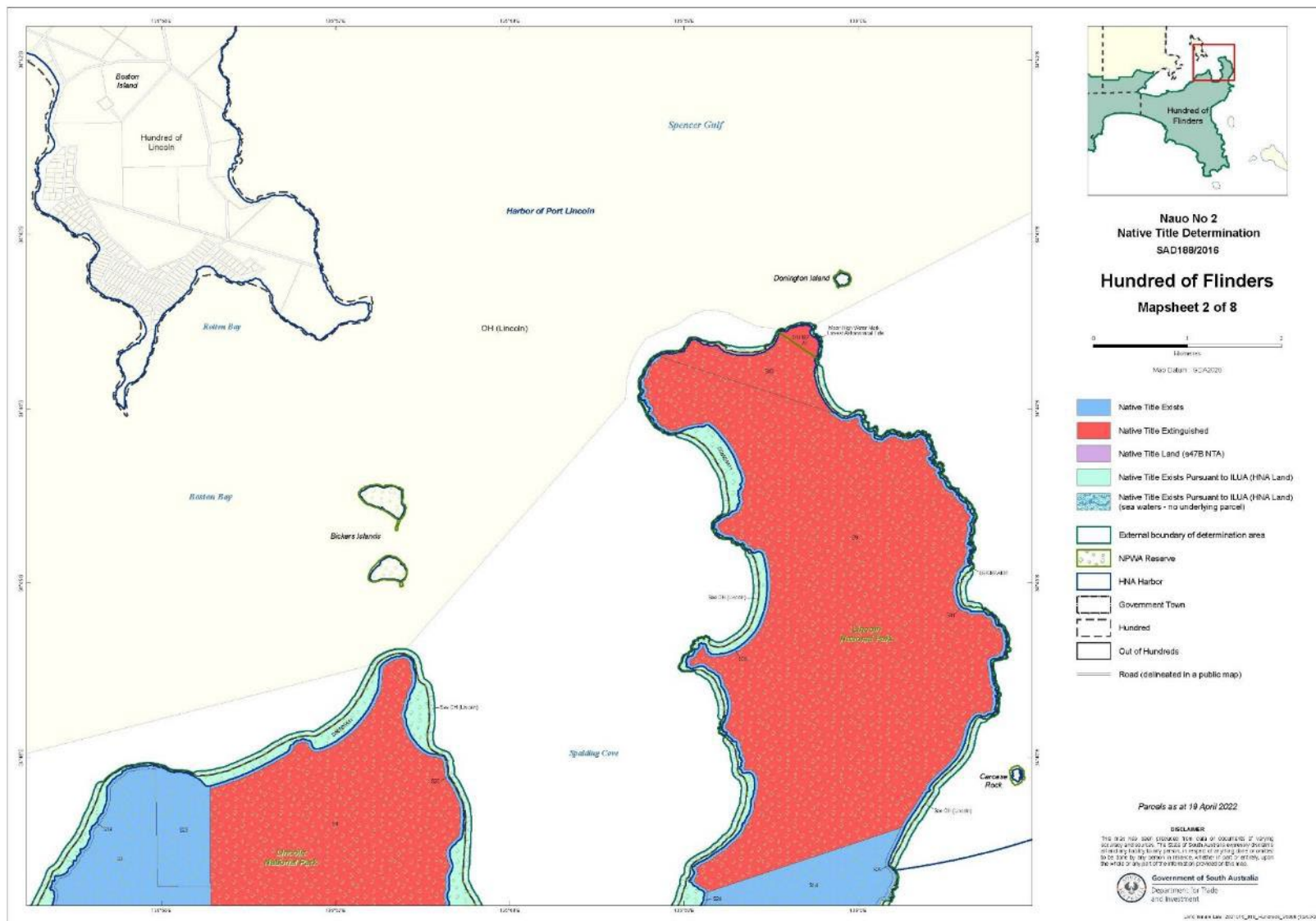


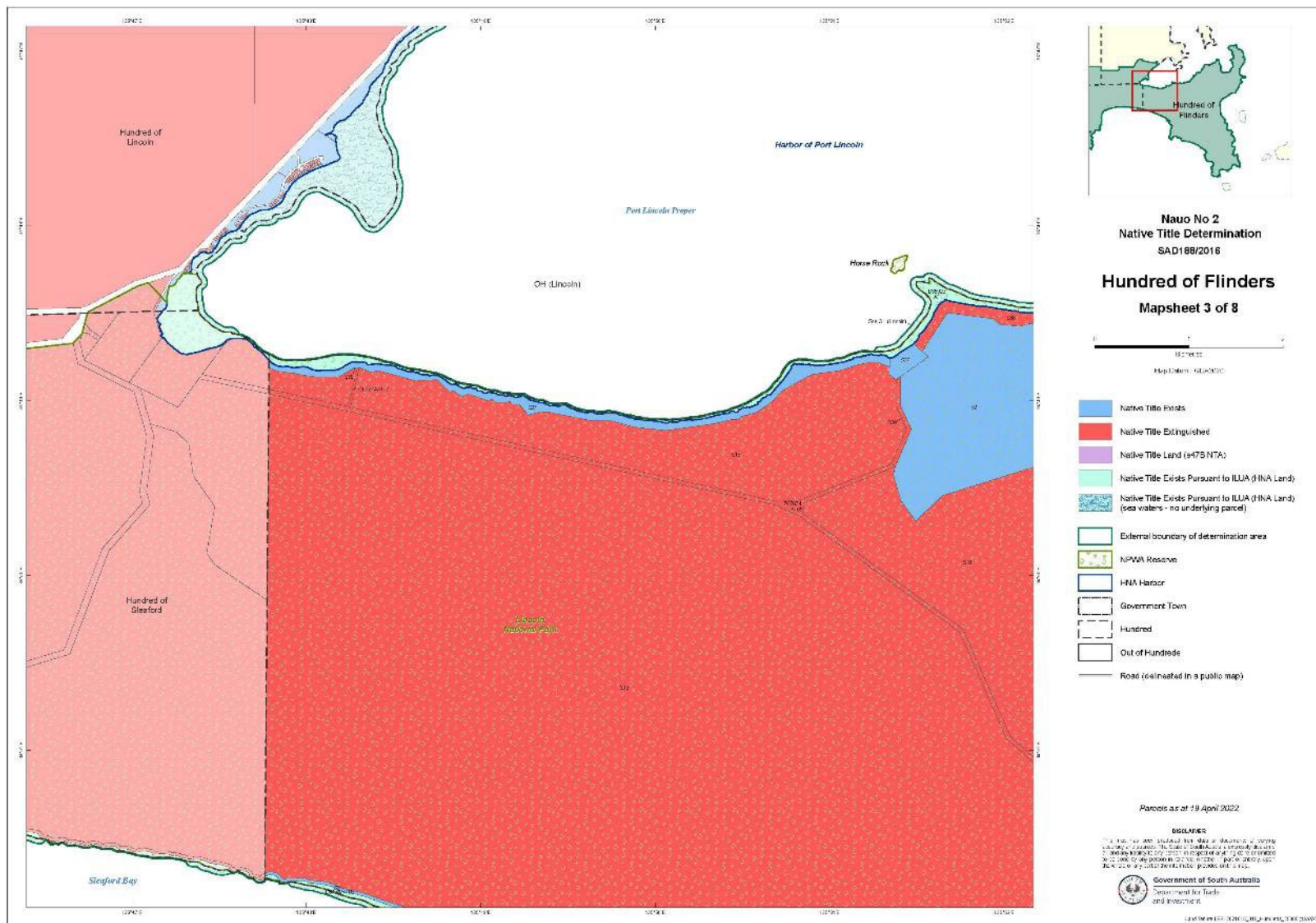


## **SCHEDULE 2**

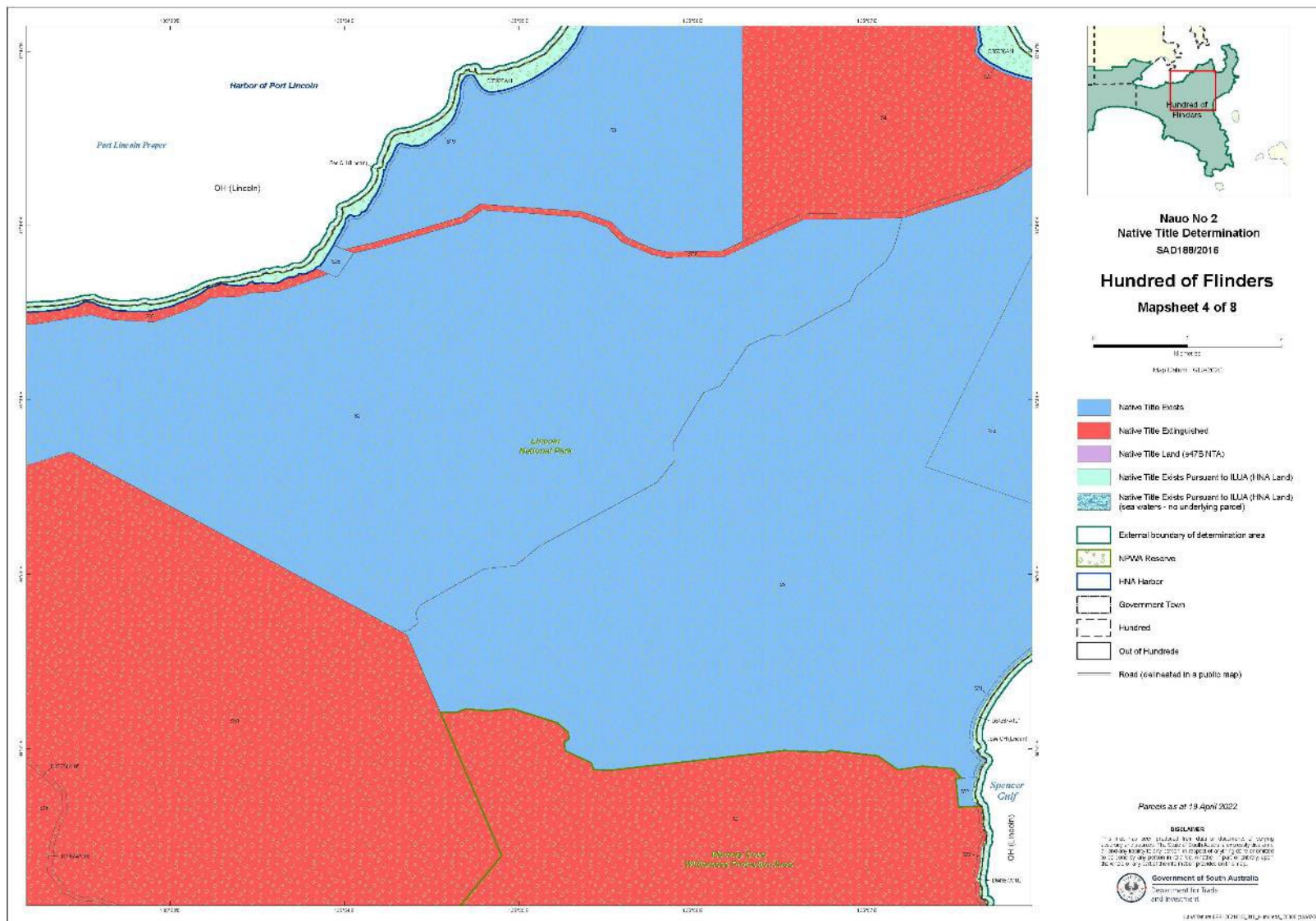
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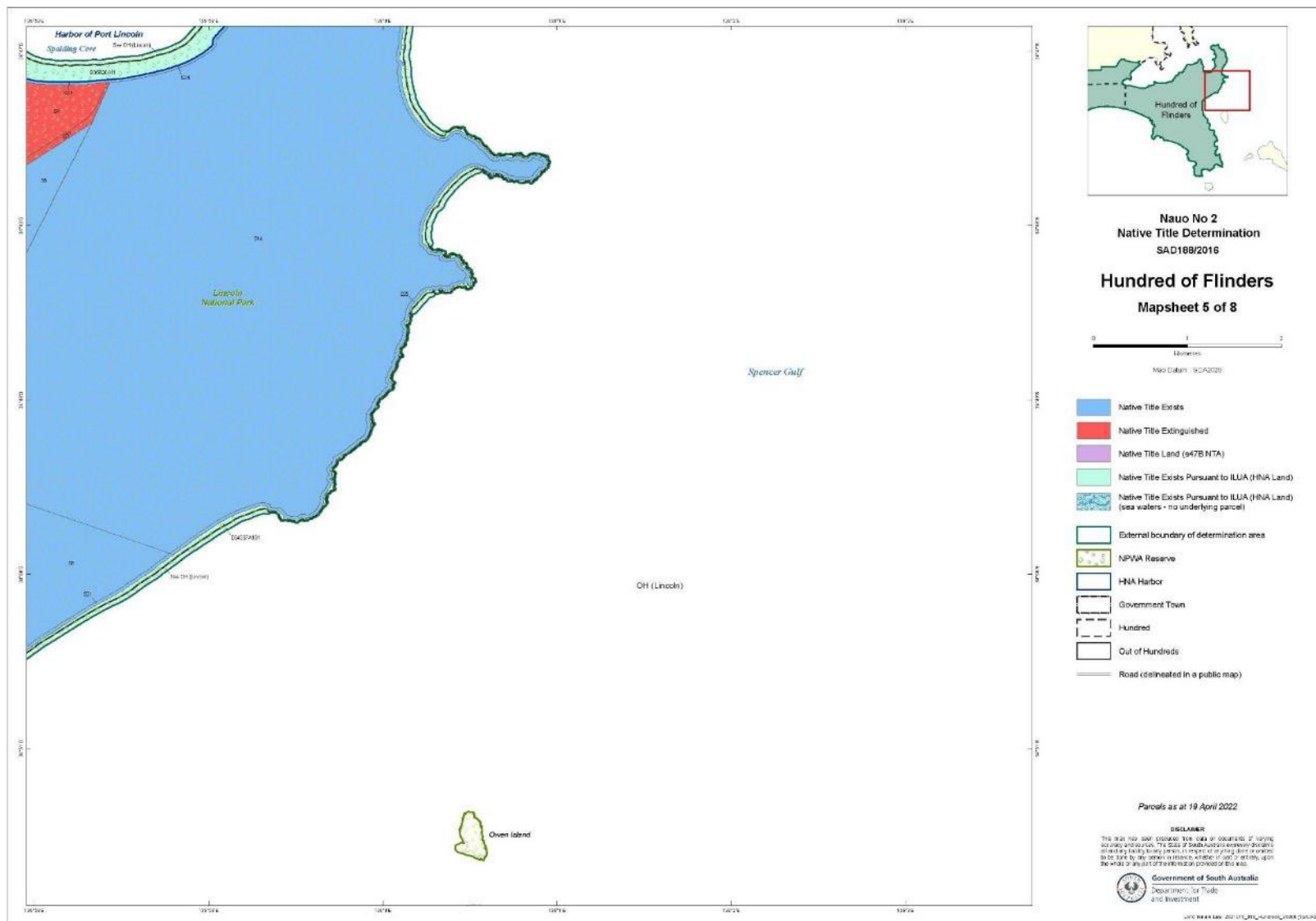


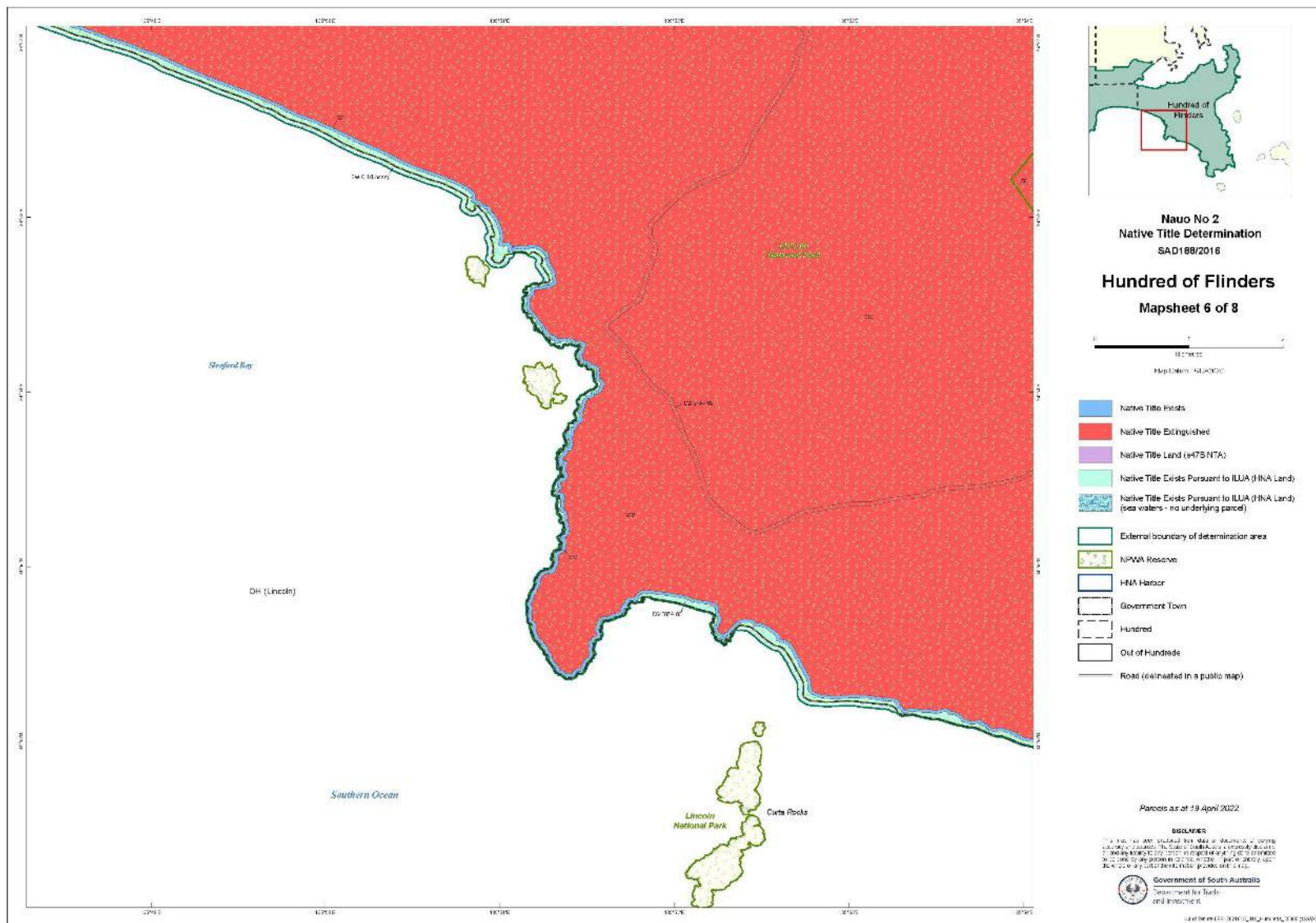




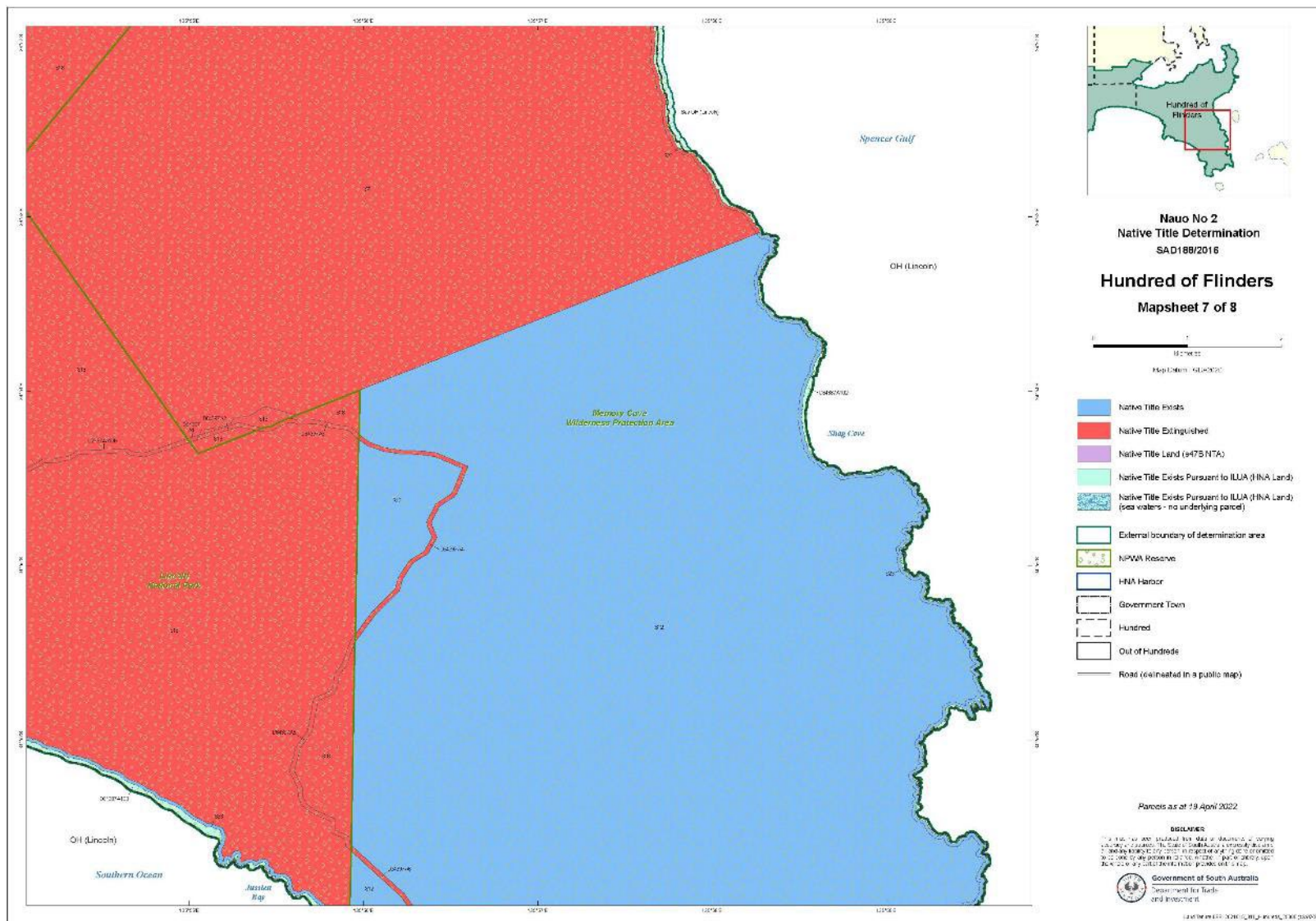




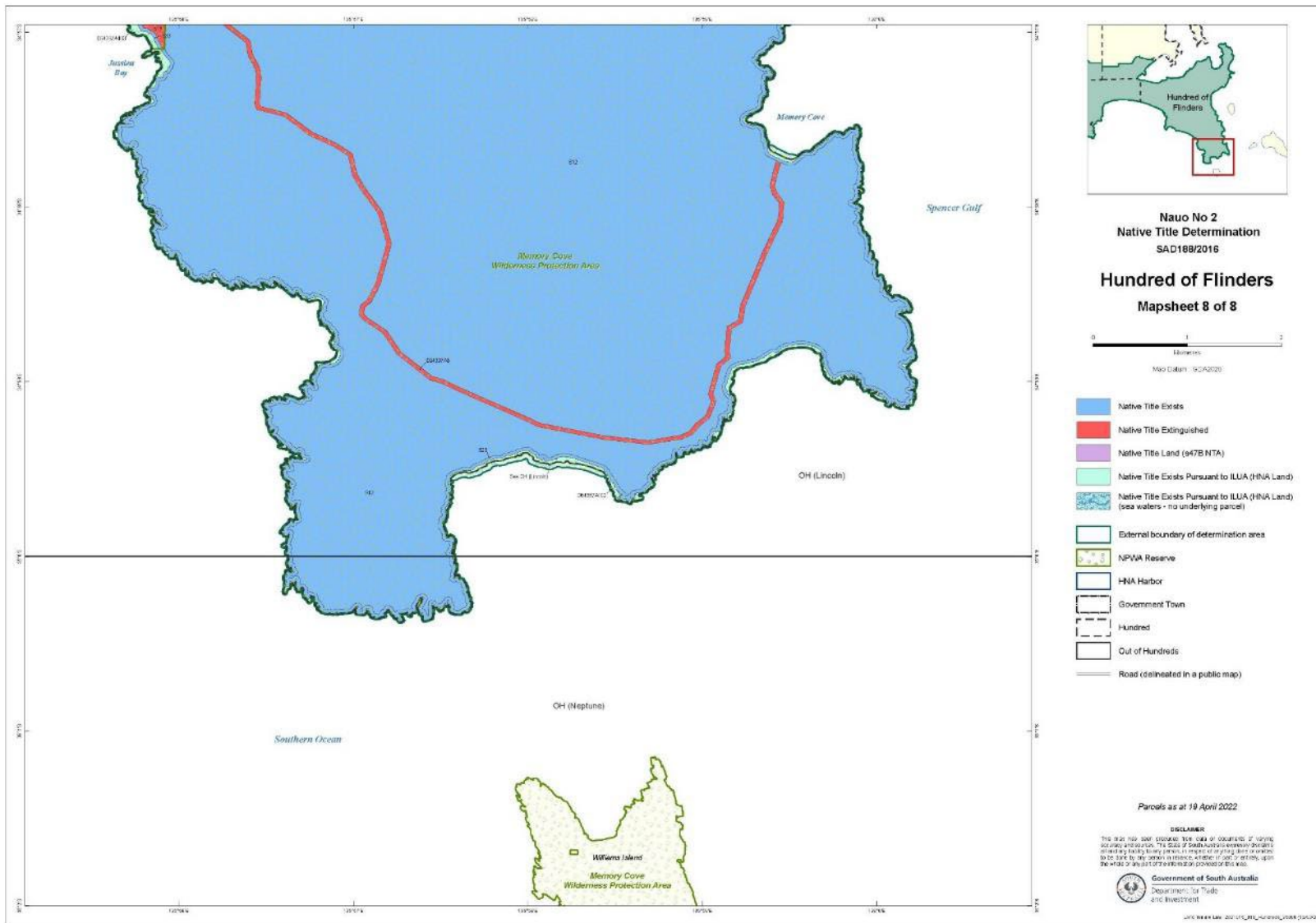


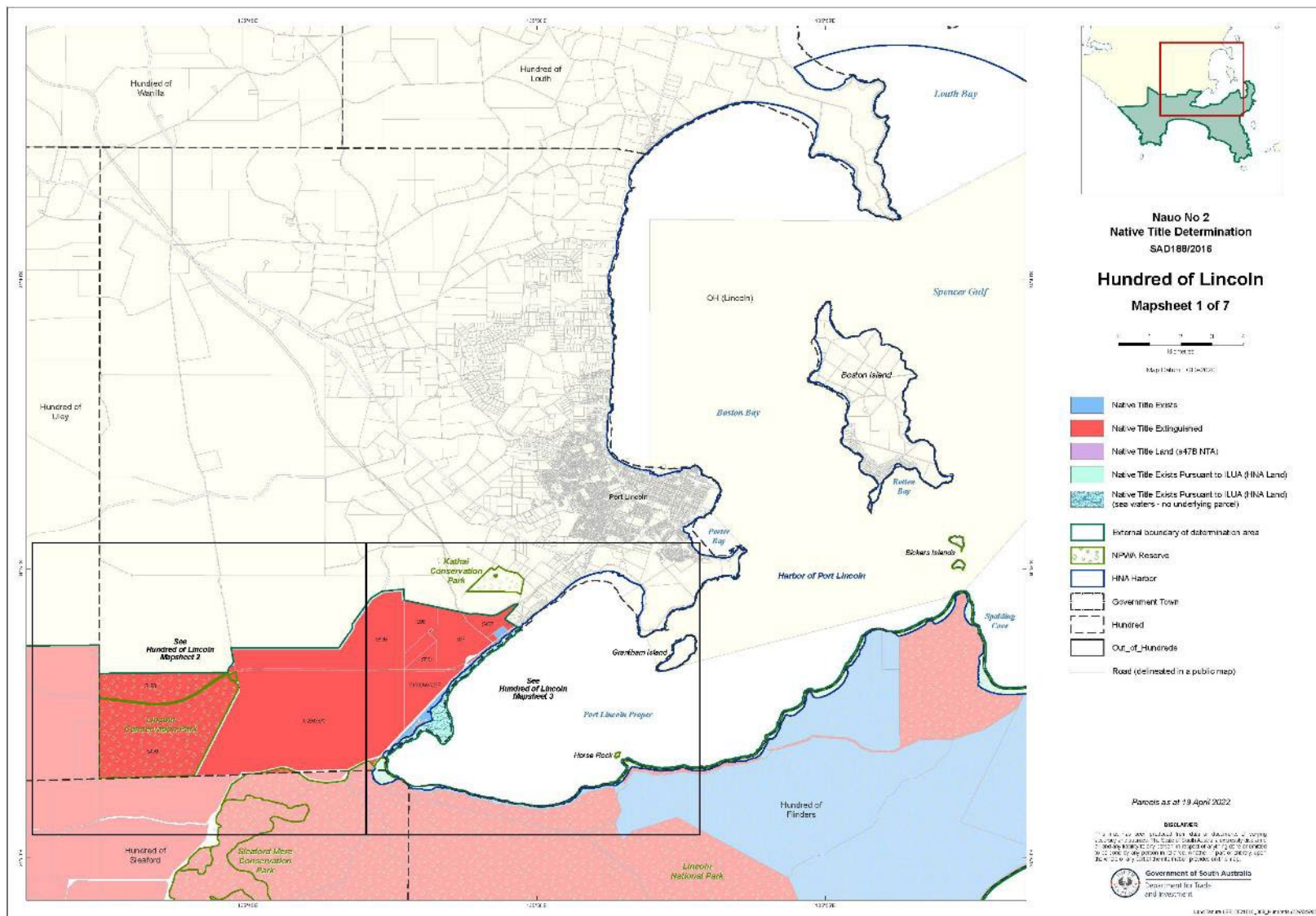


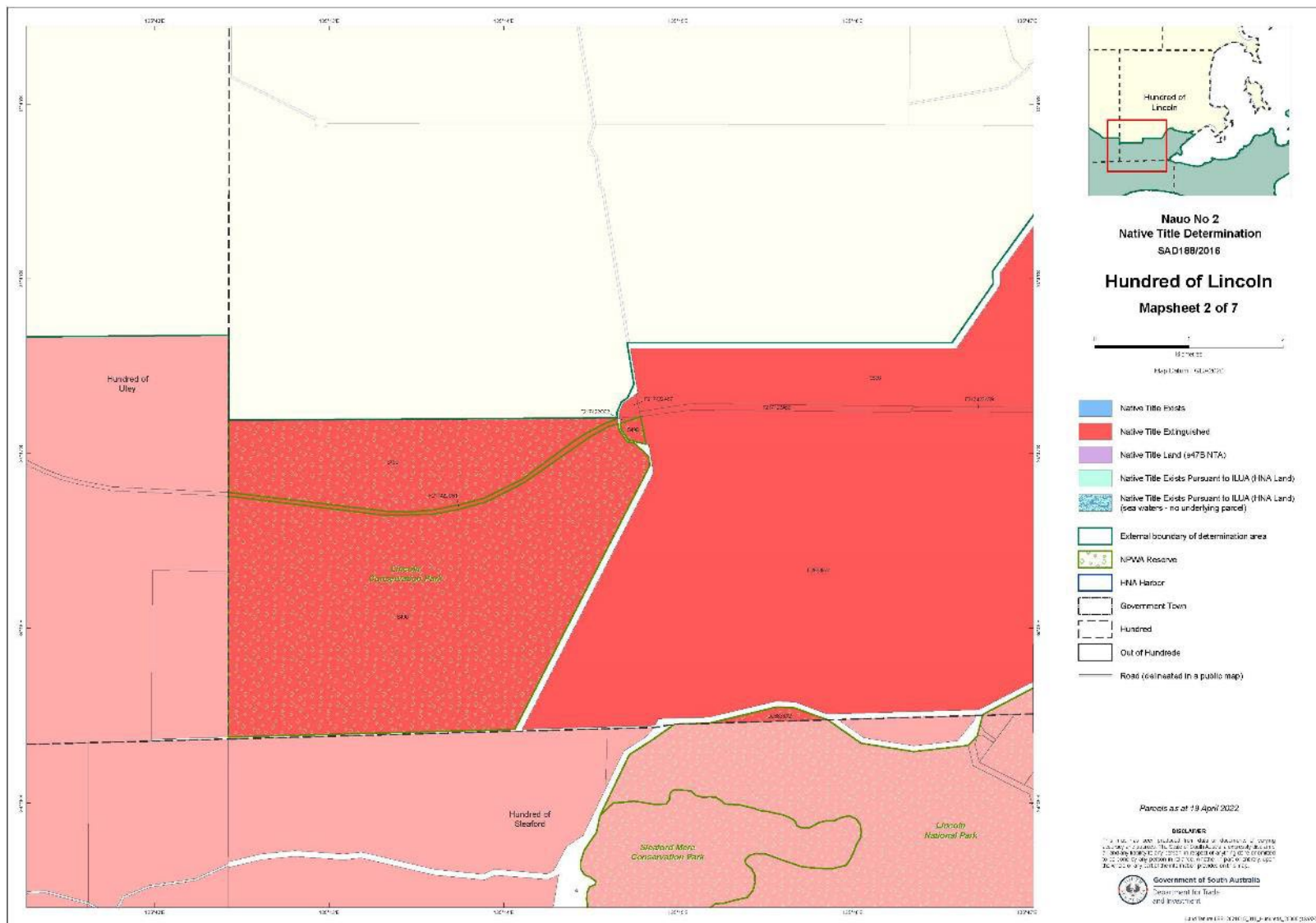




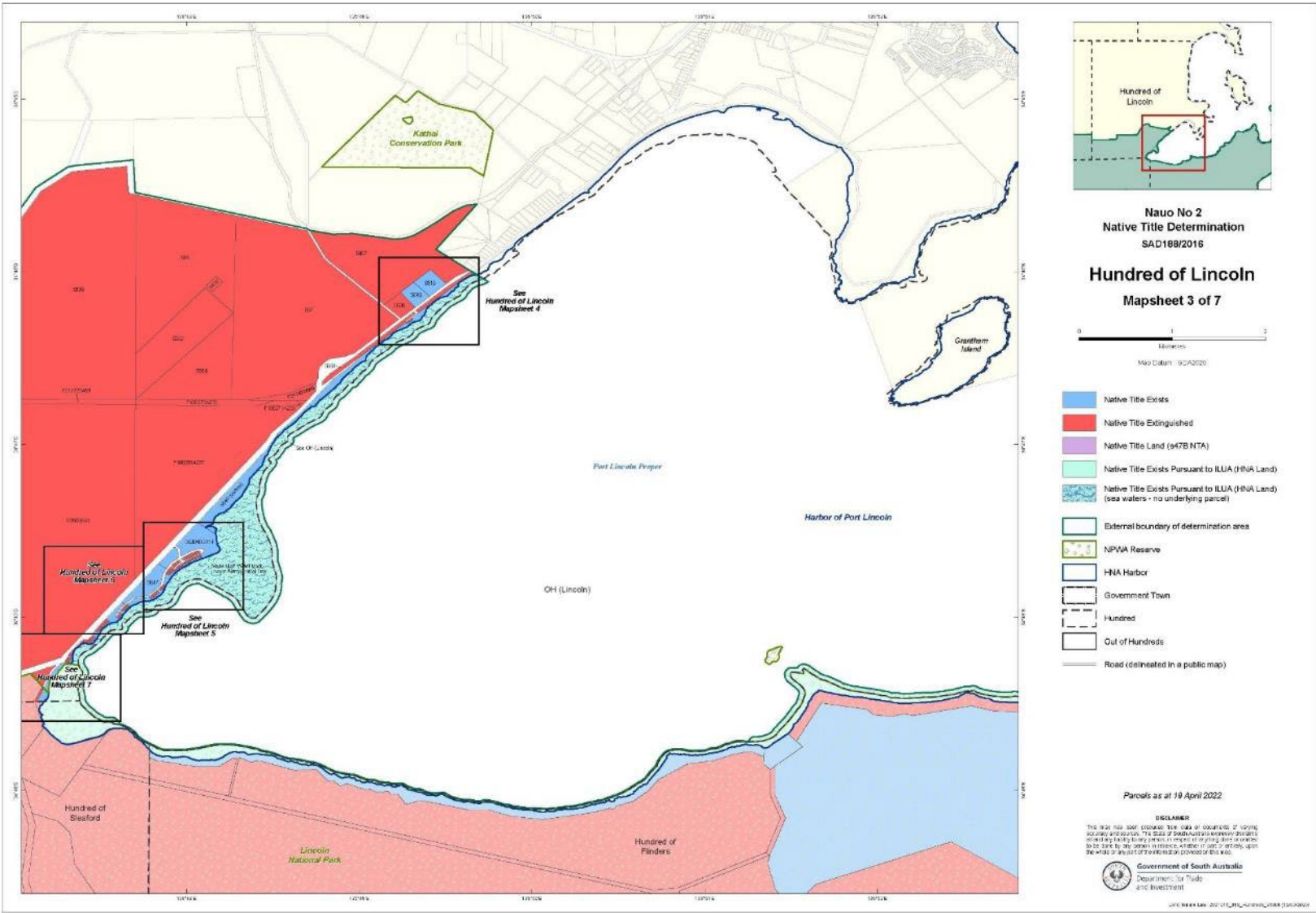




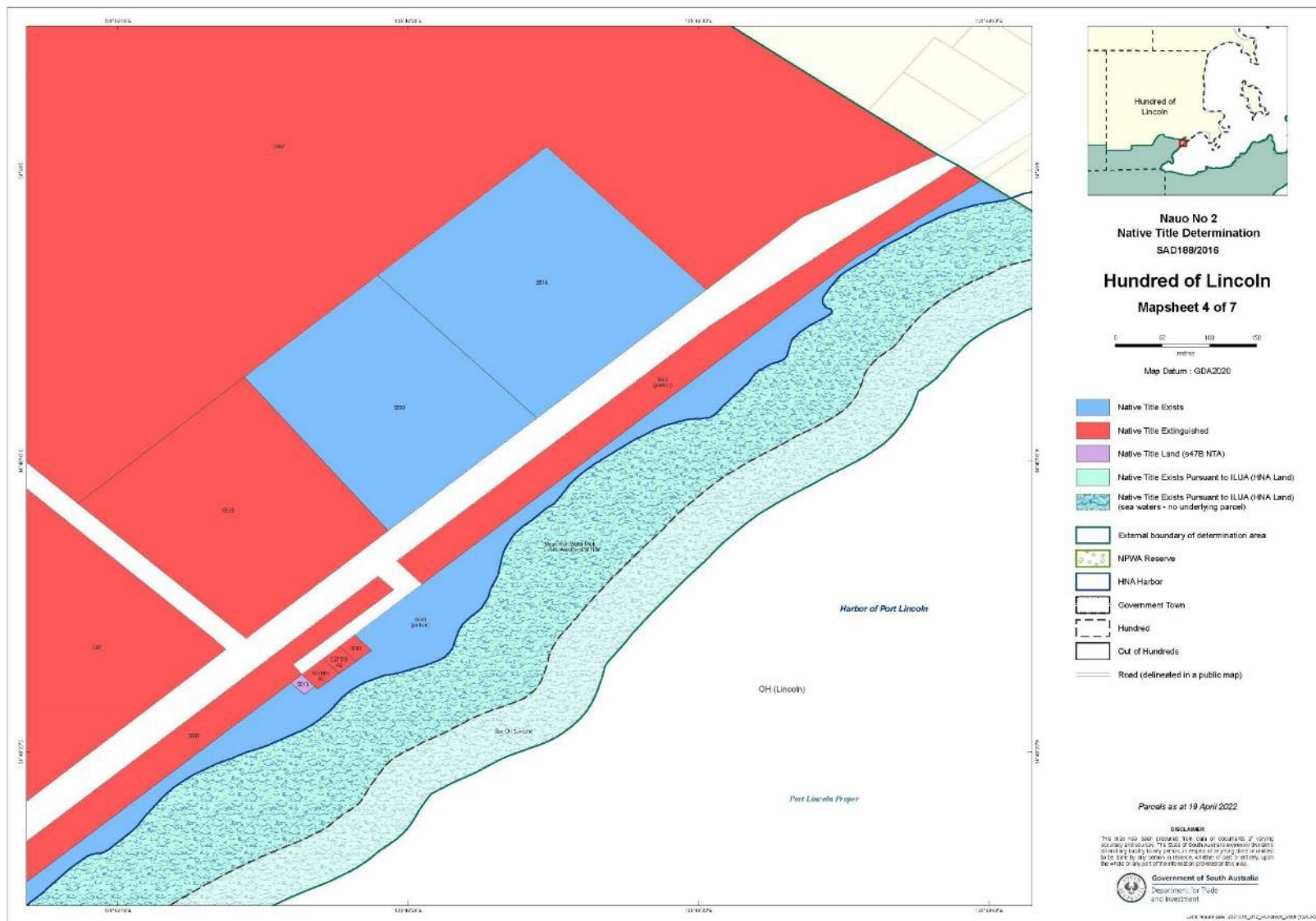


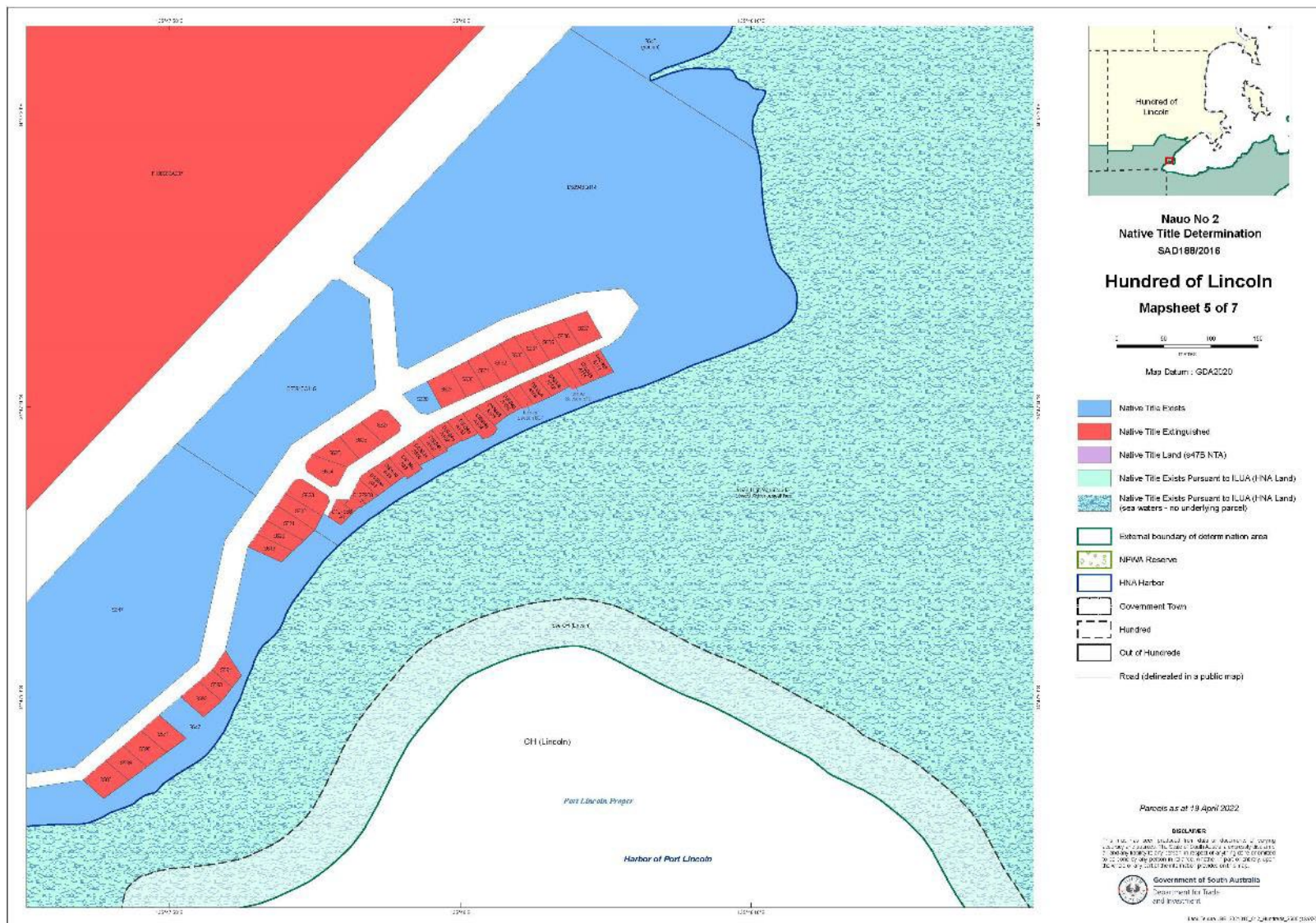


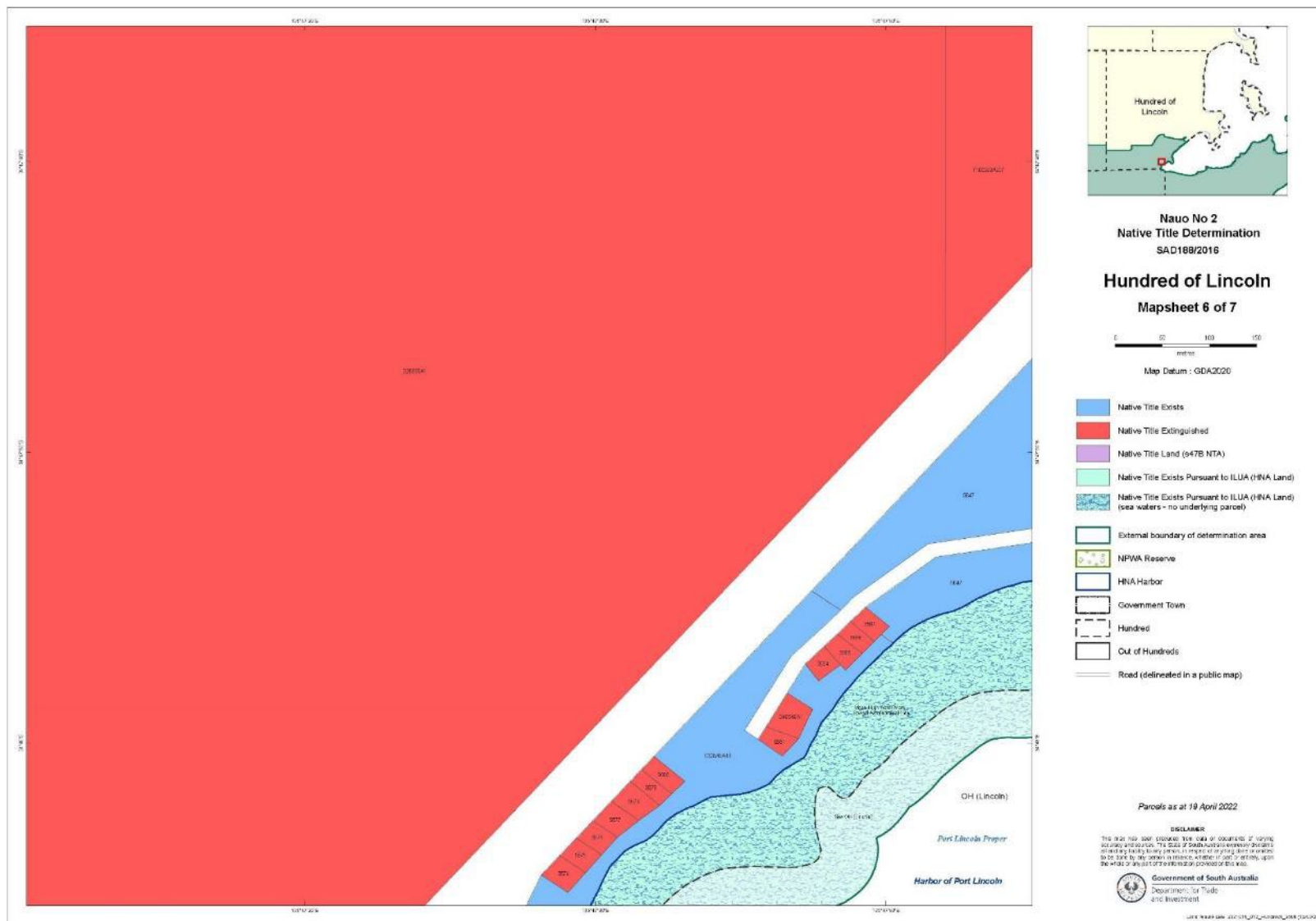




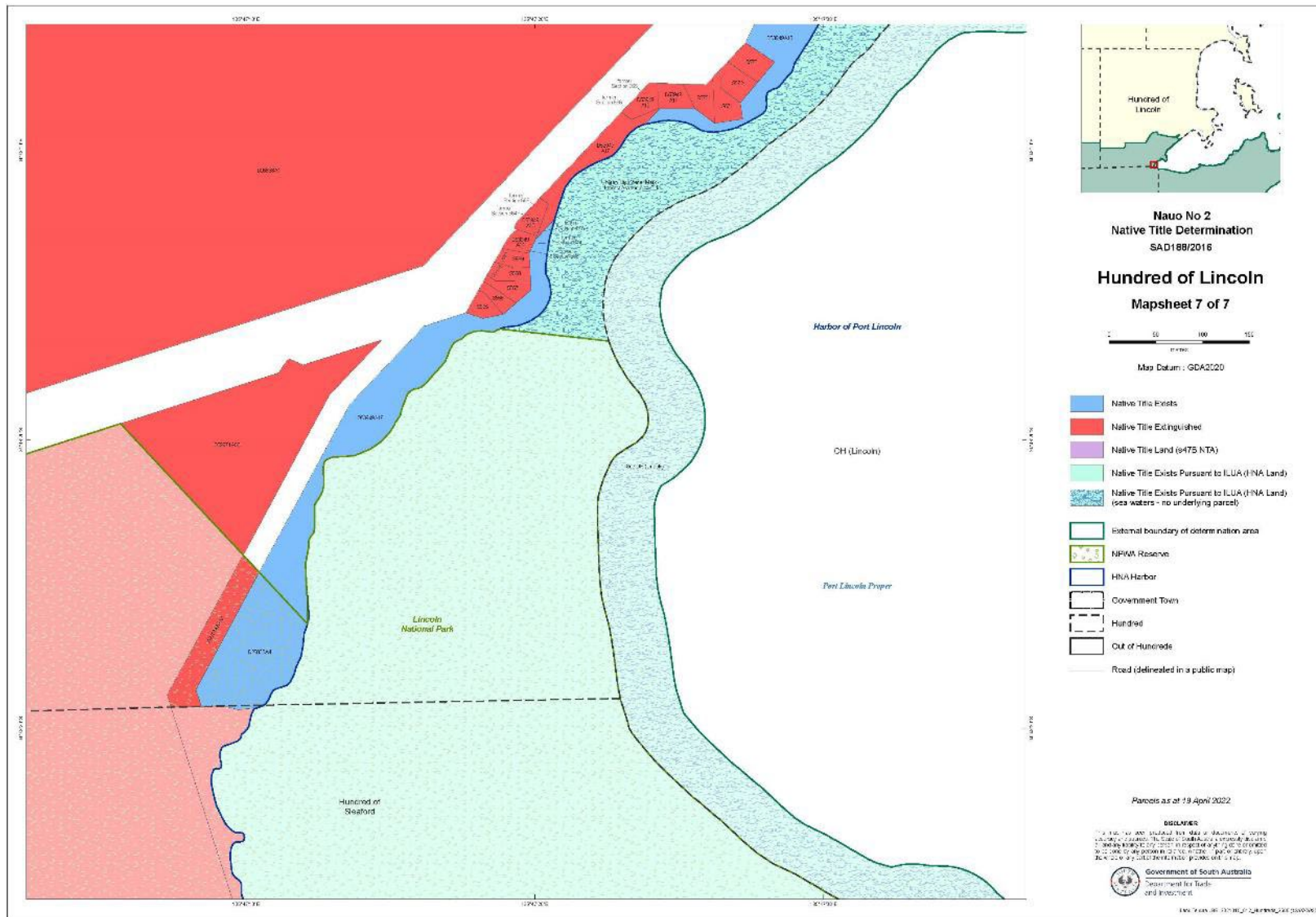




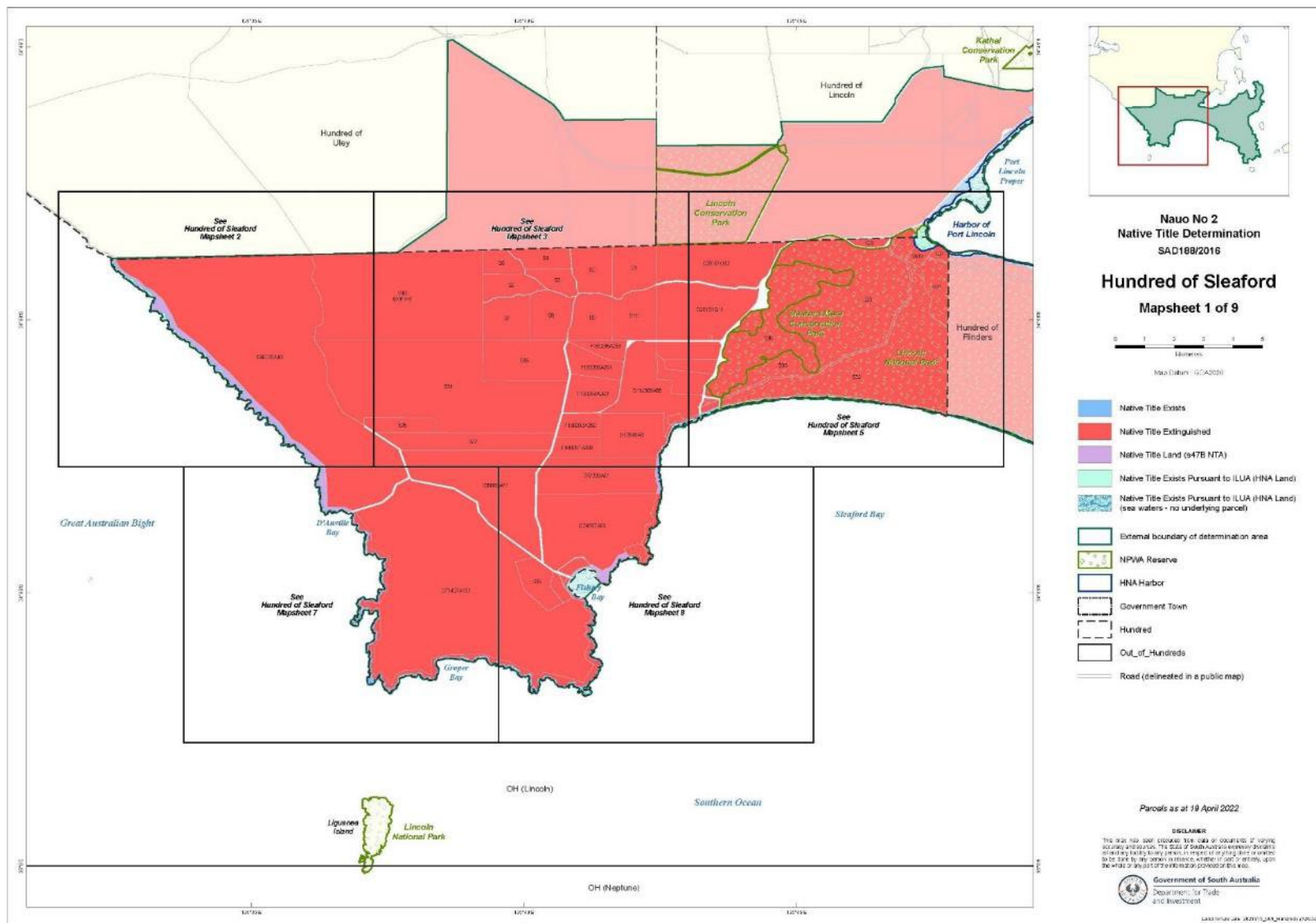


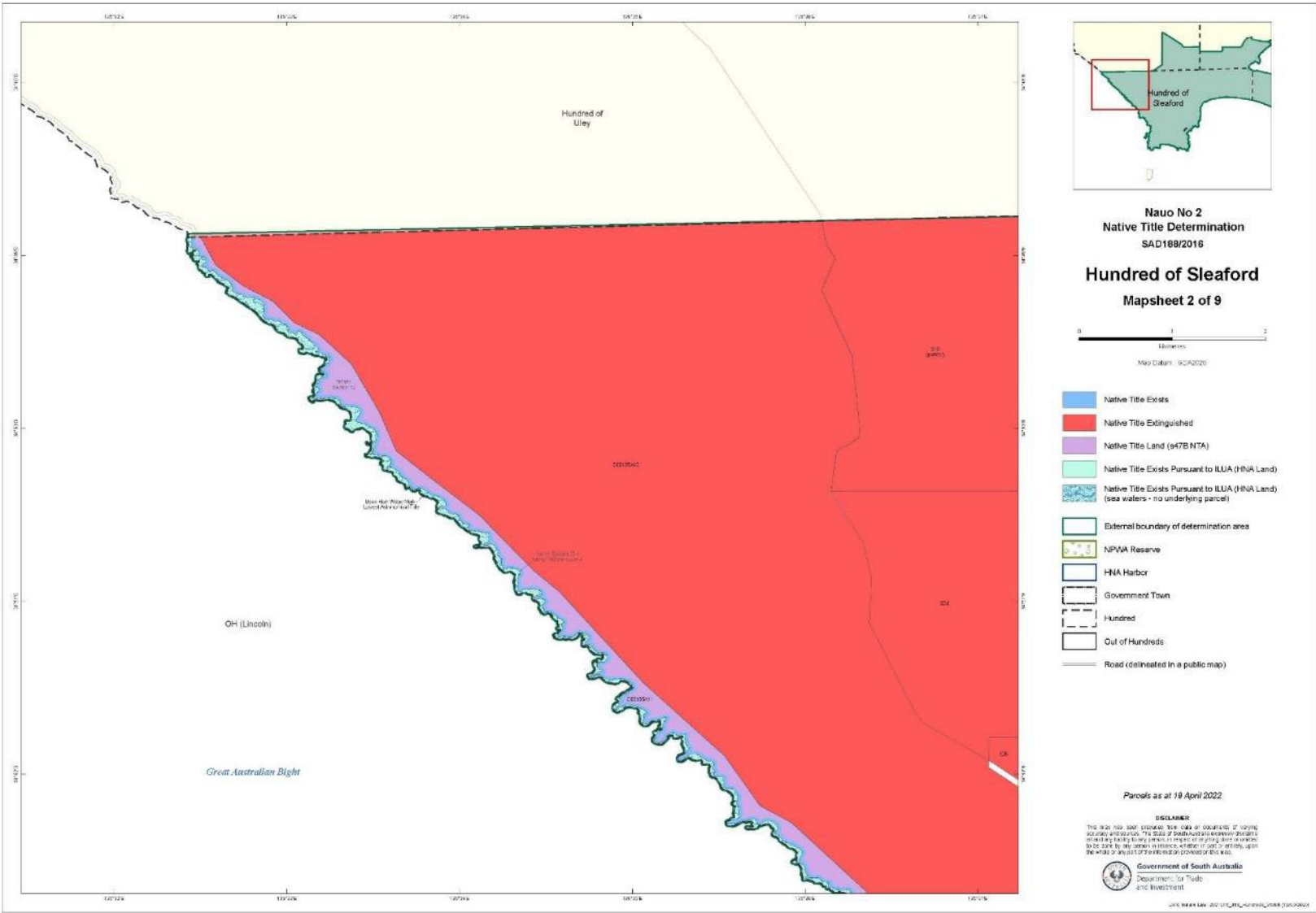


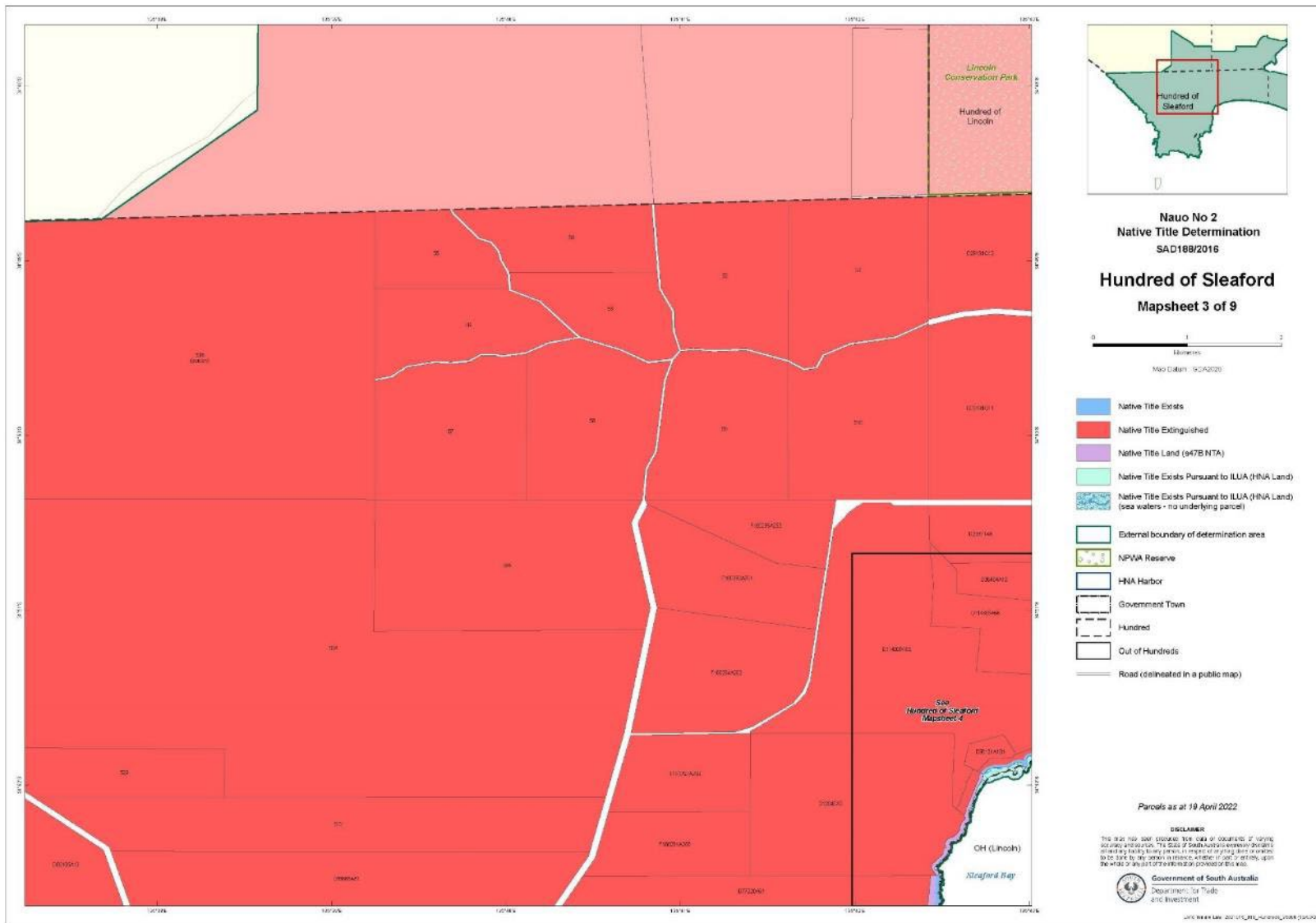


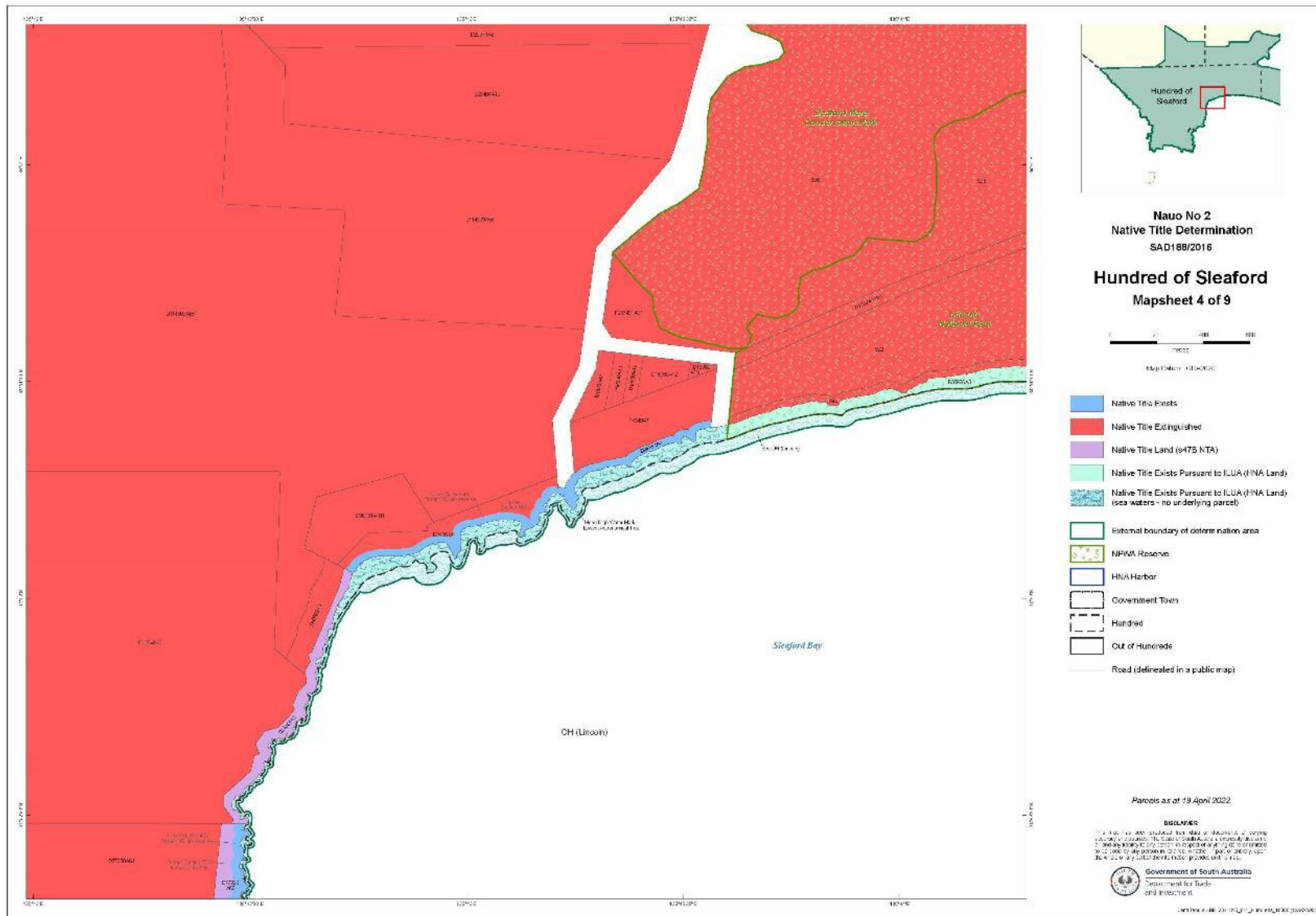




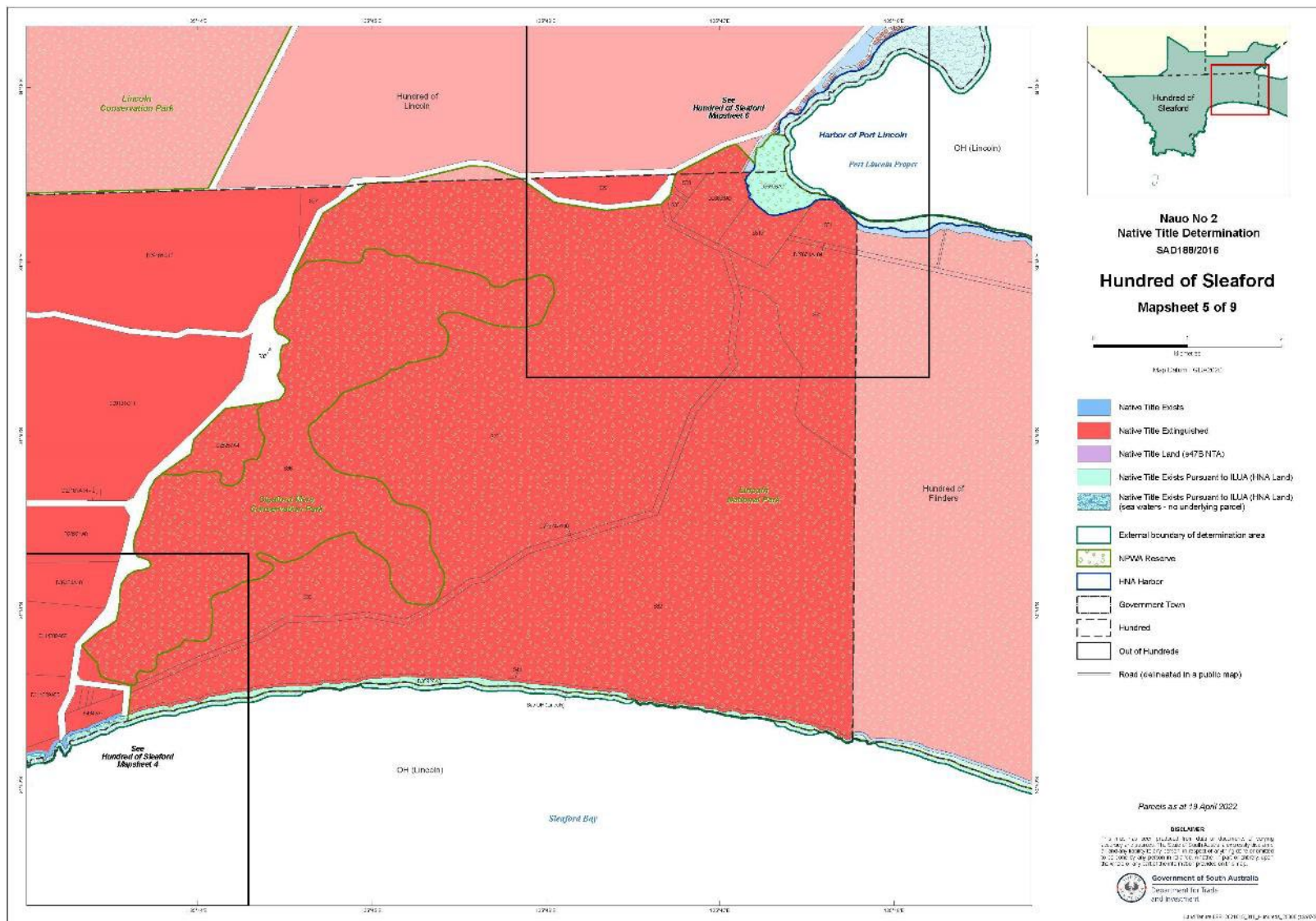


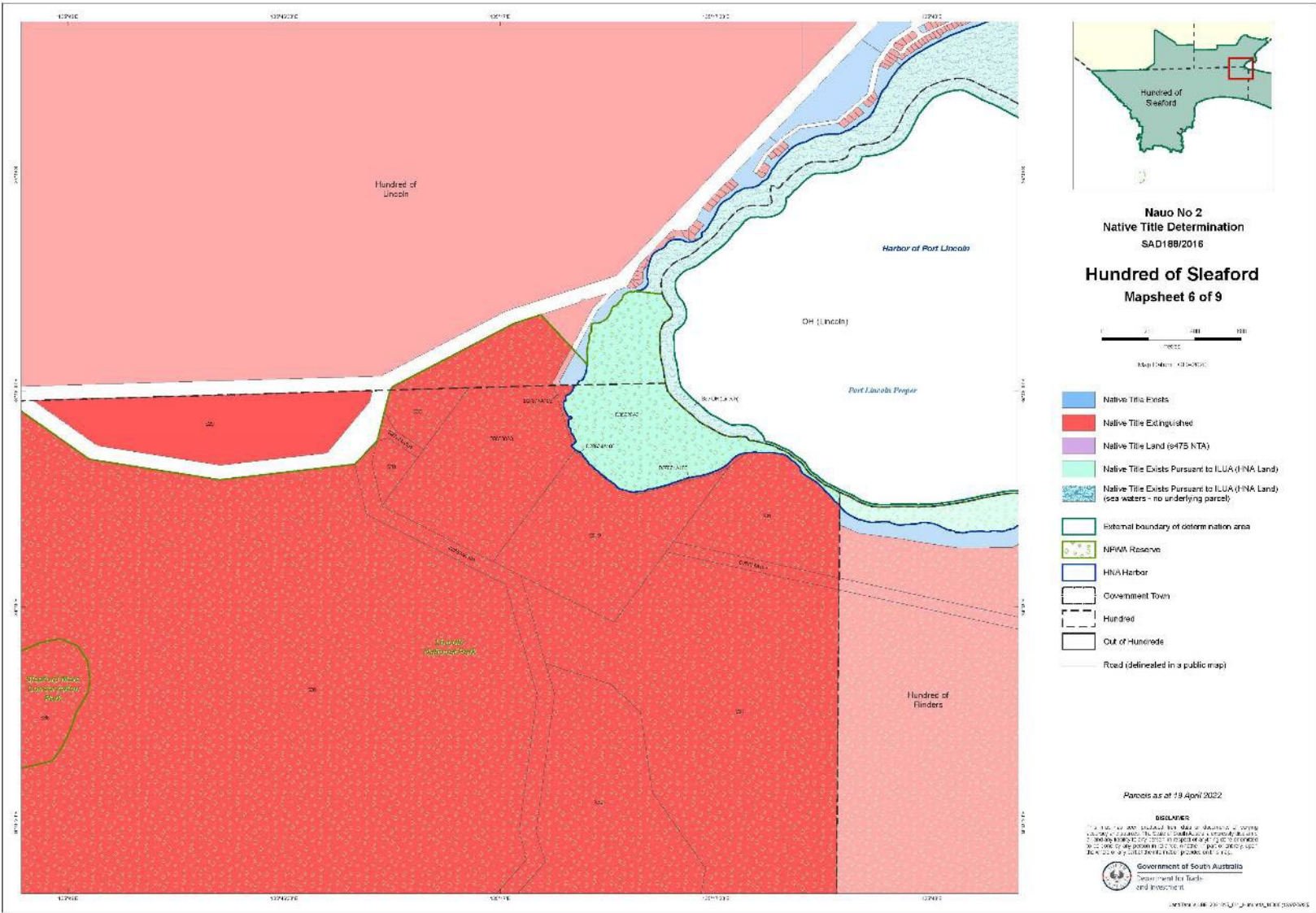


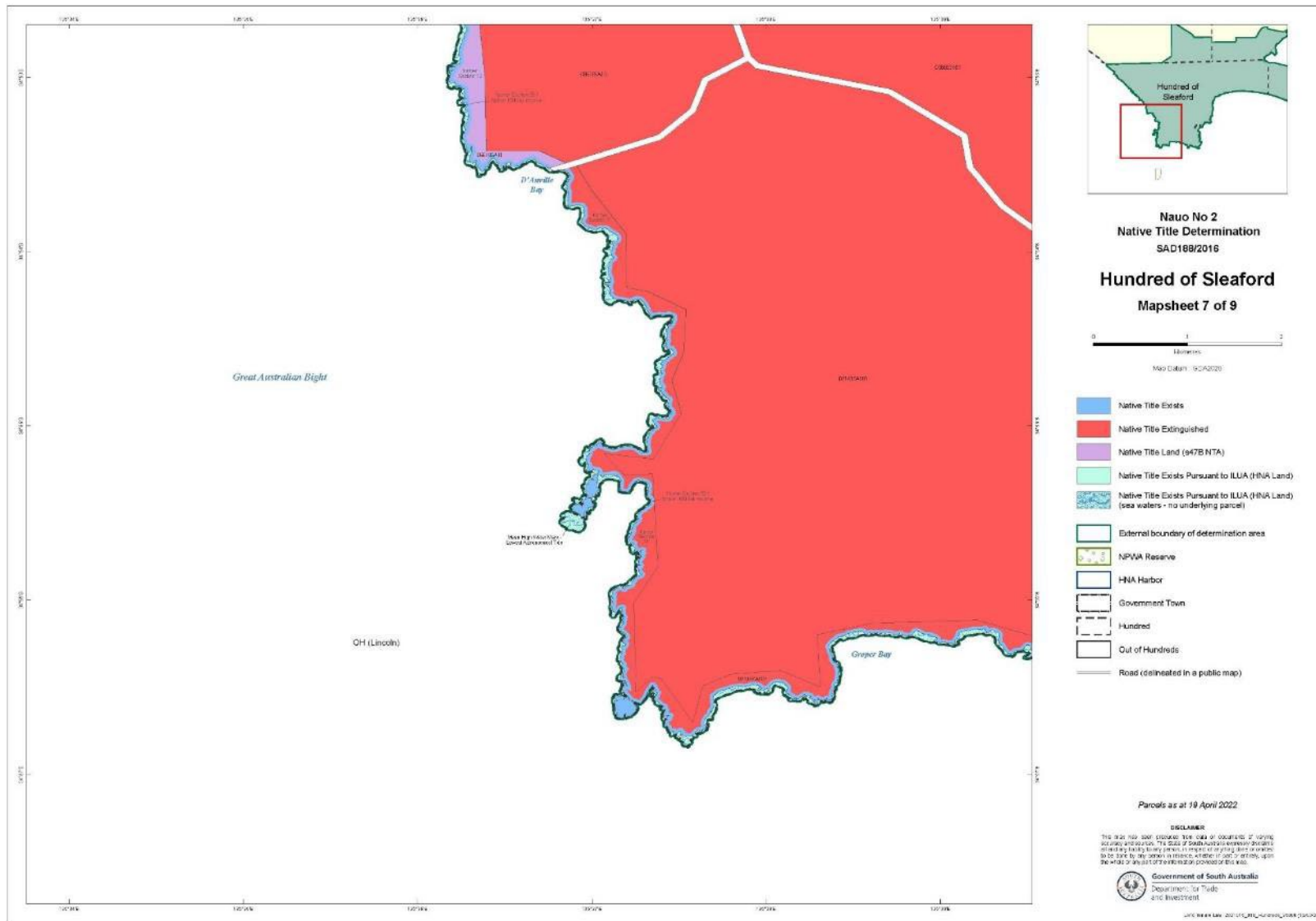




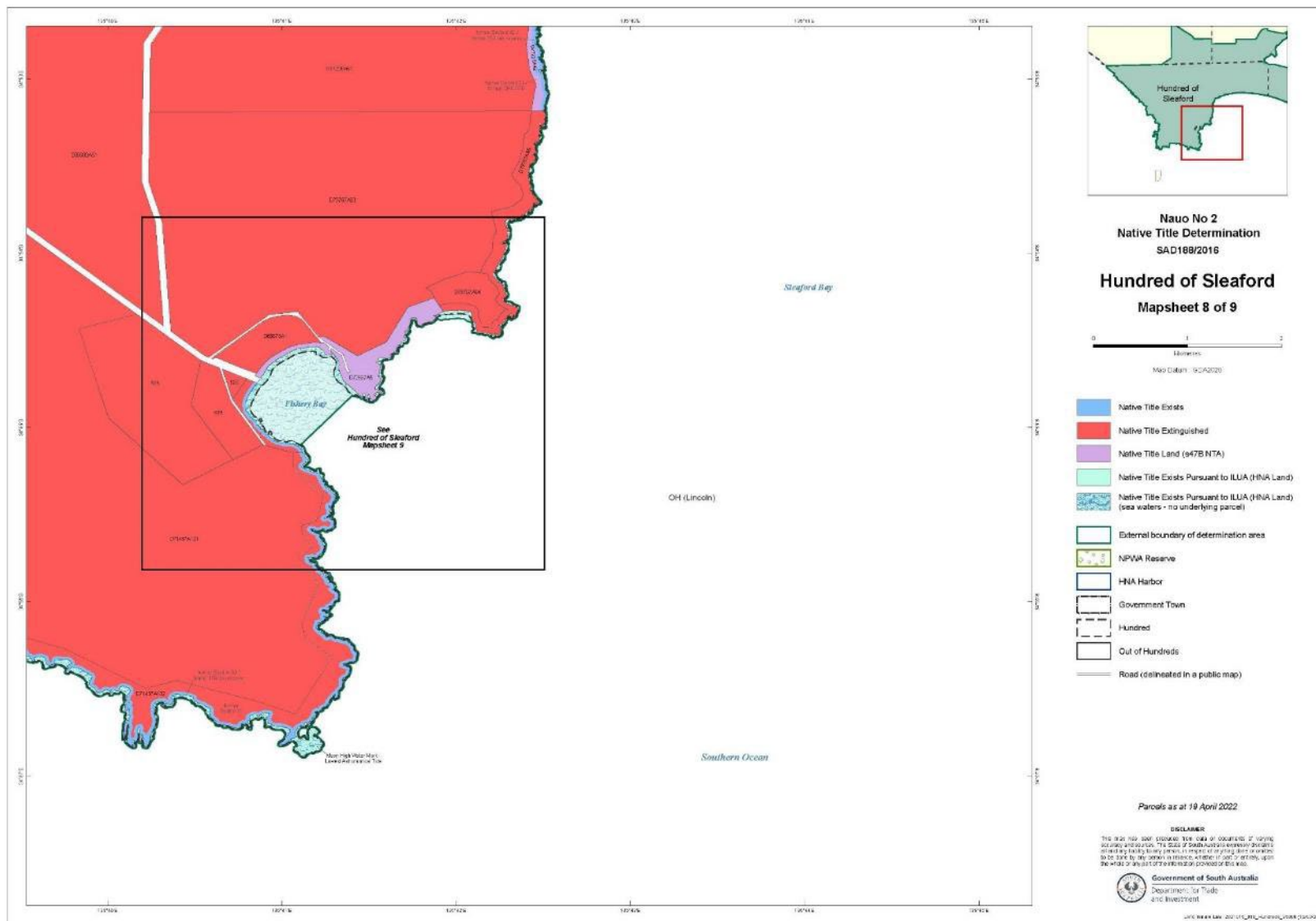




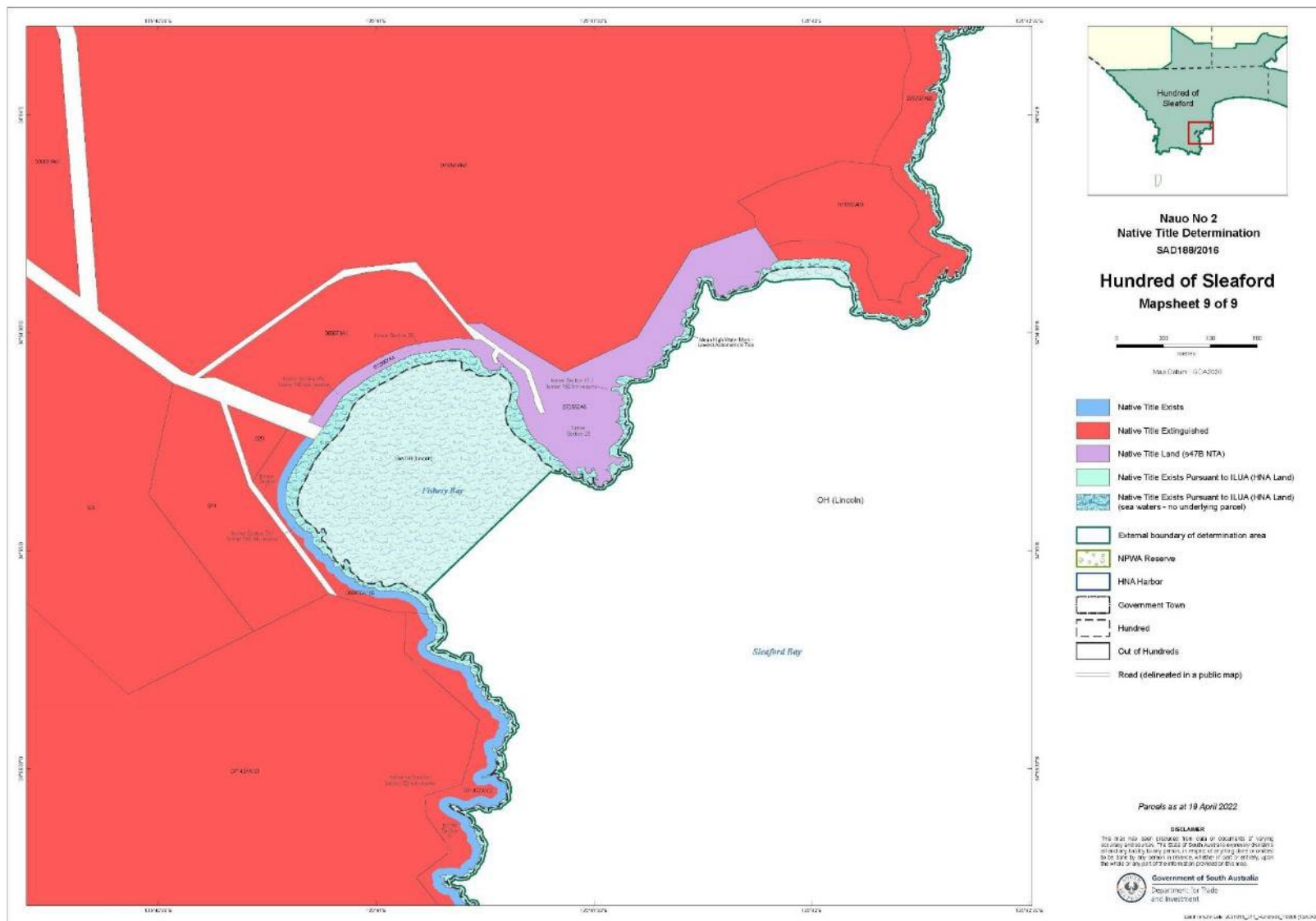


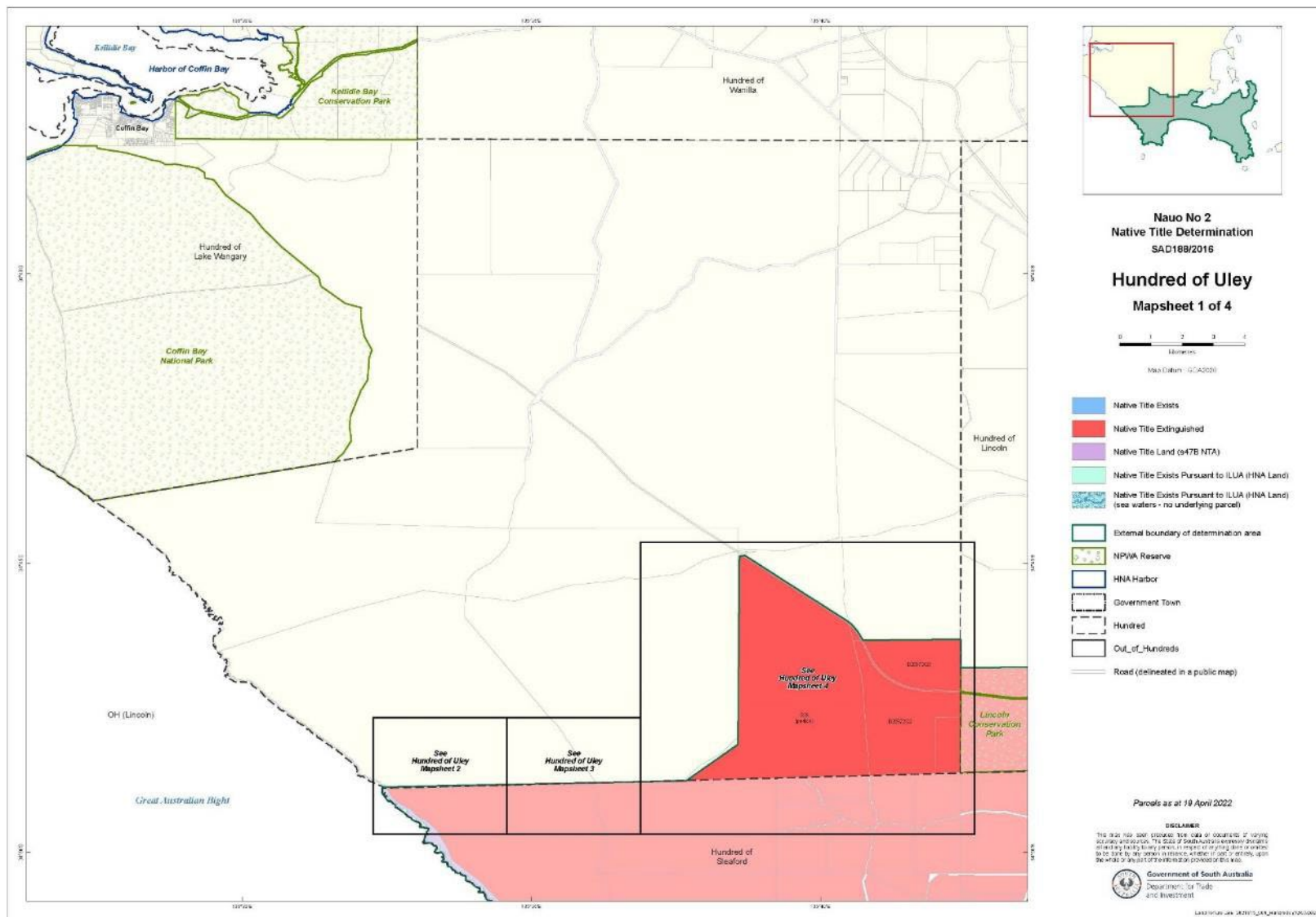


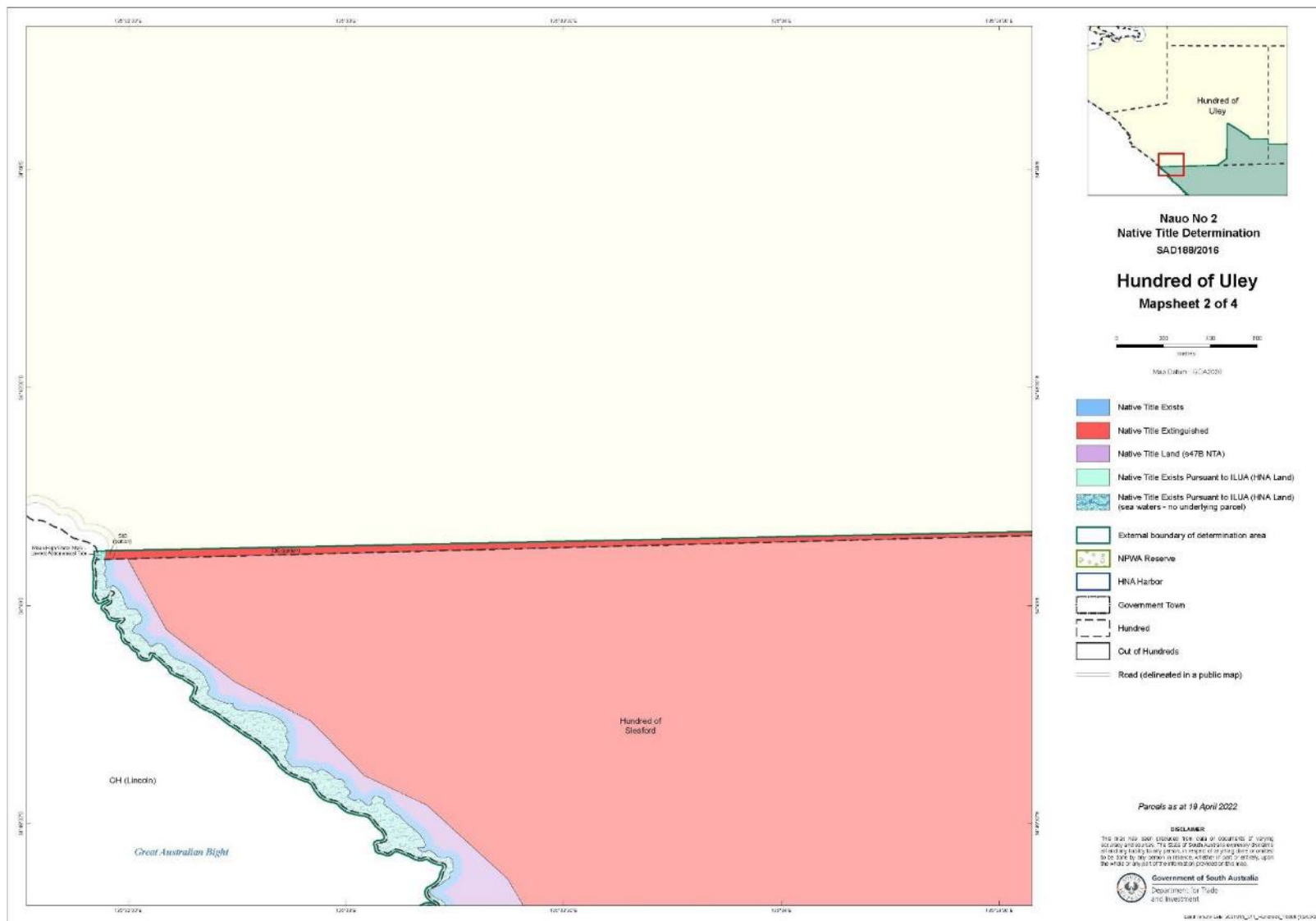


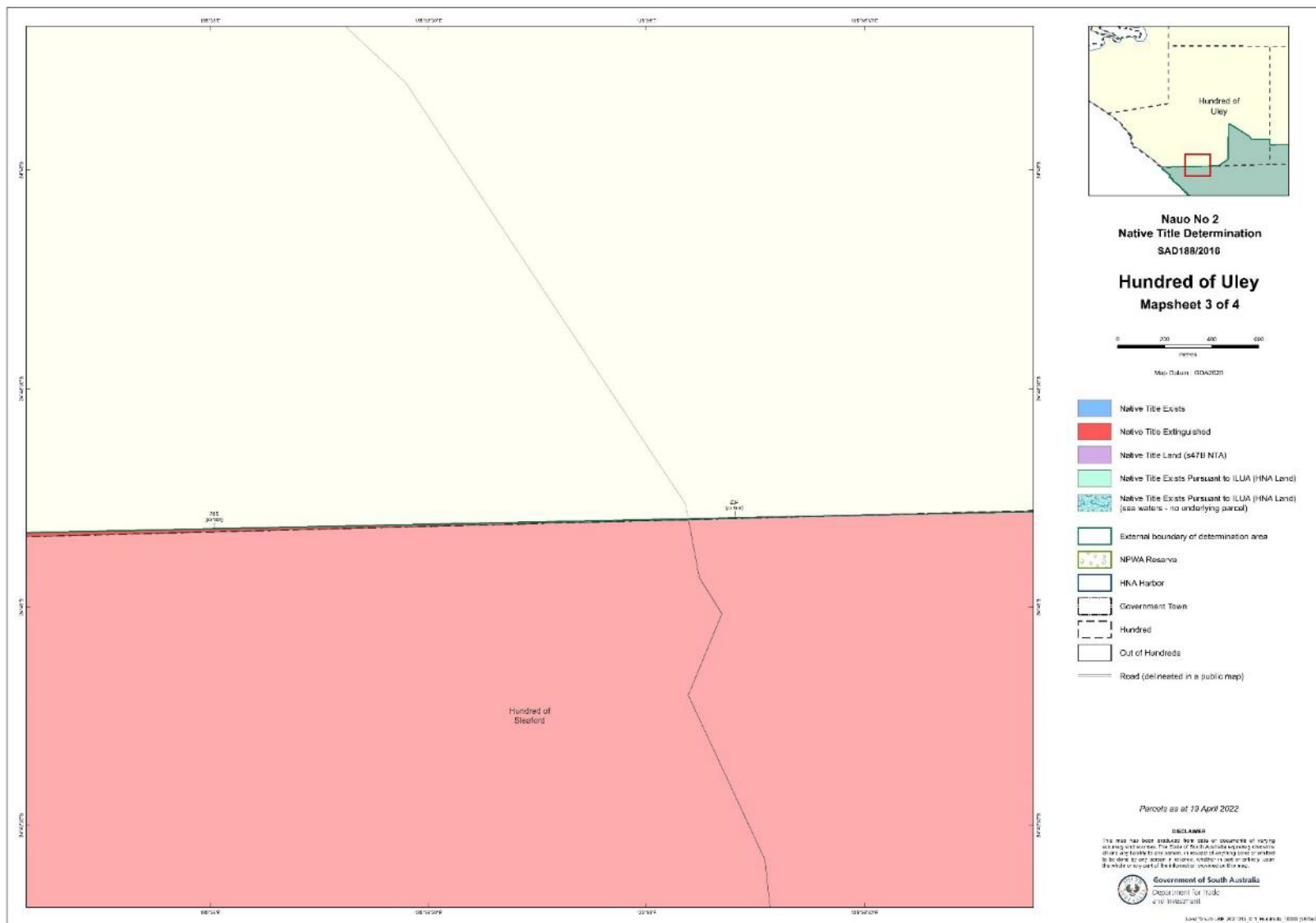




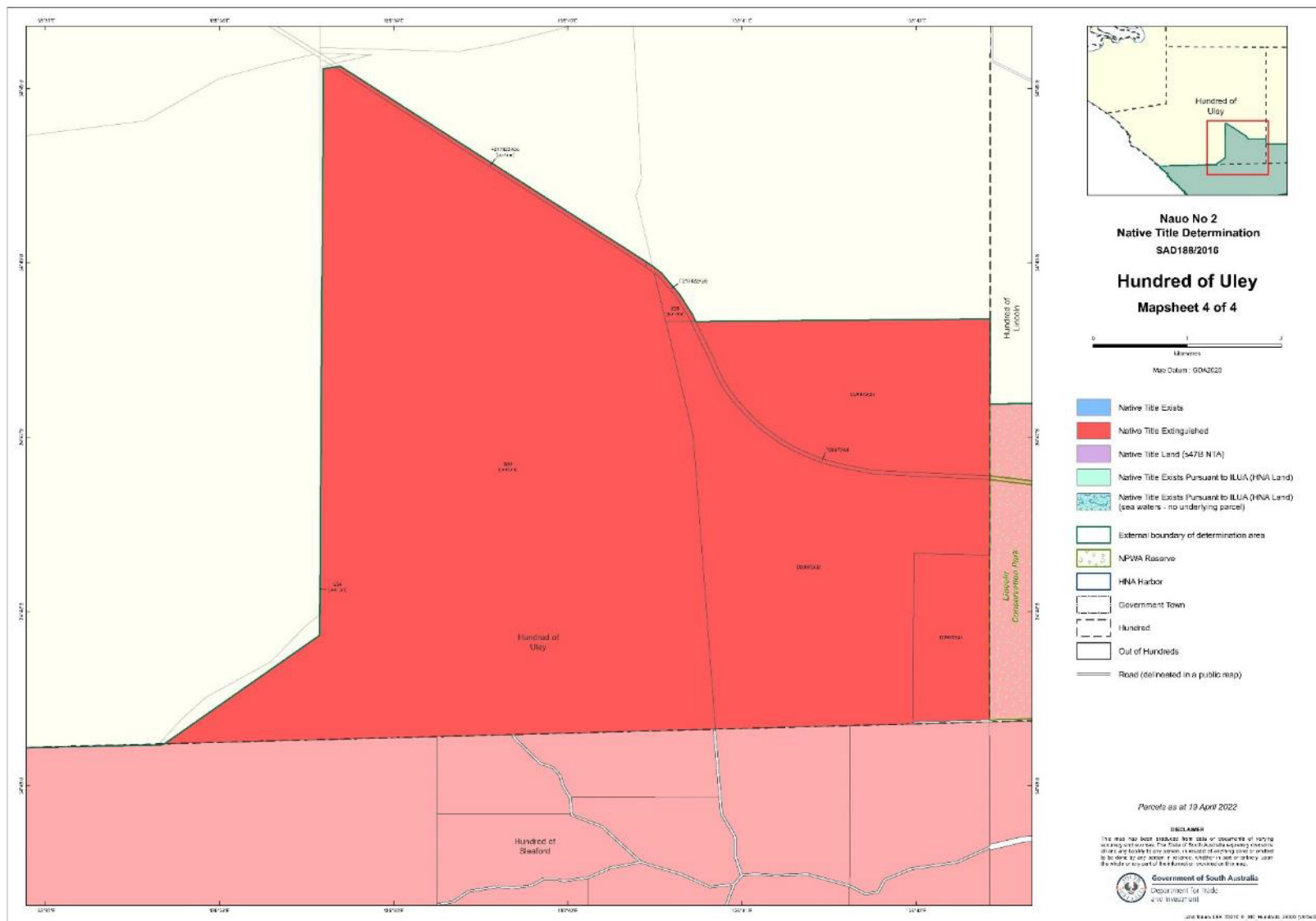


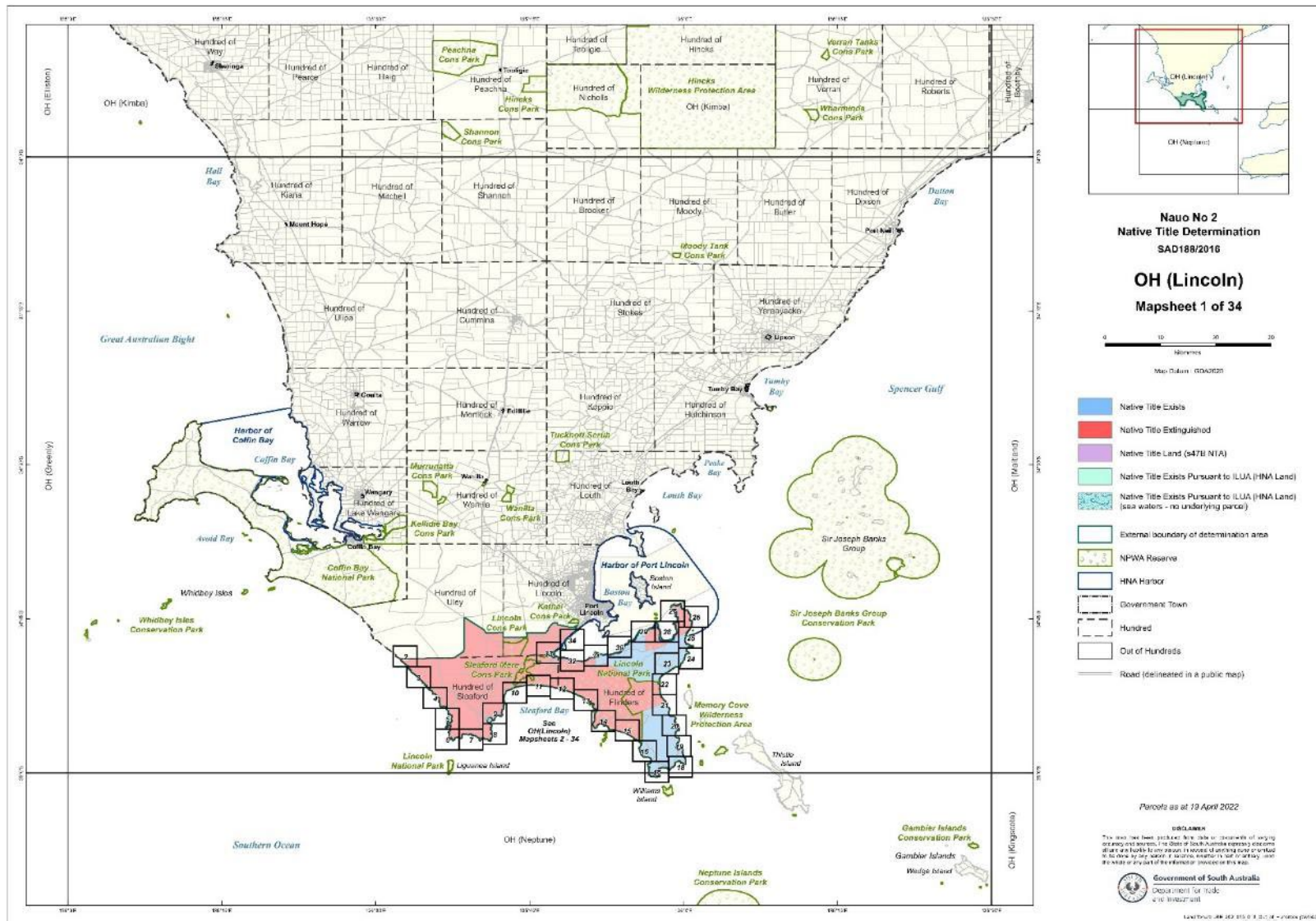


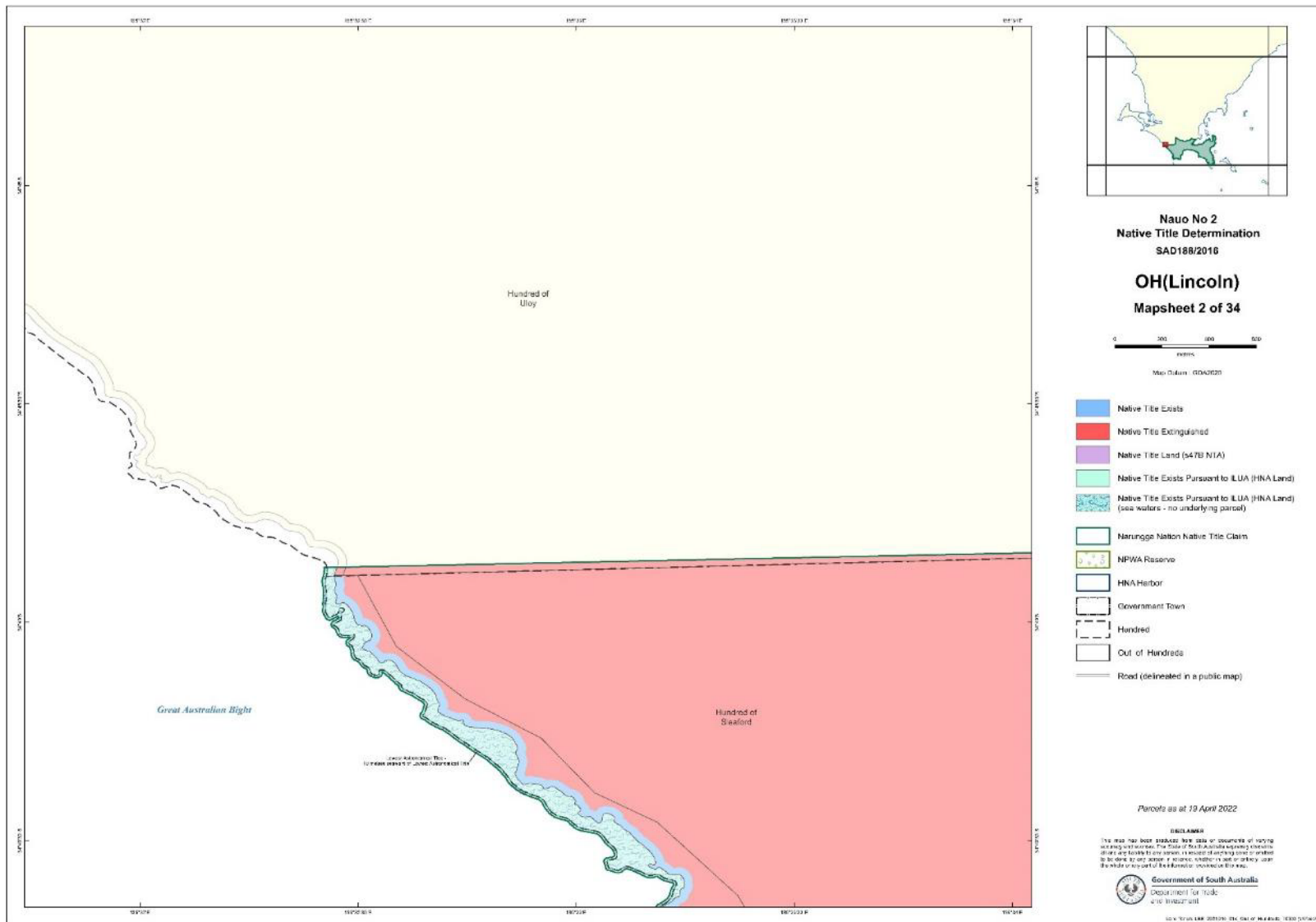


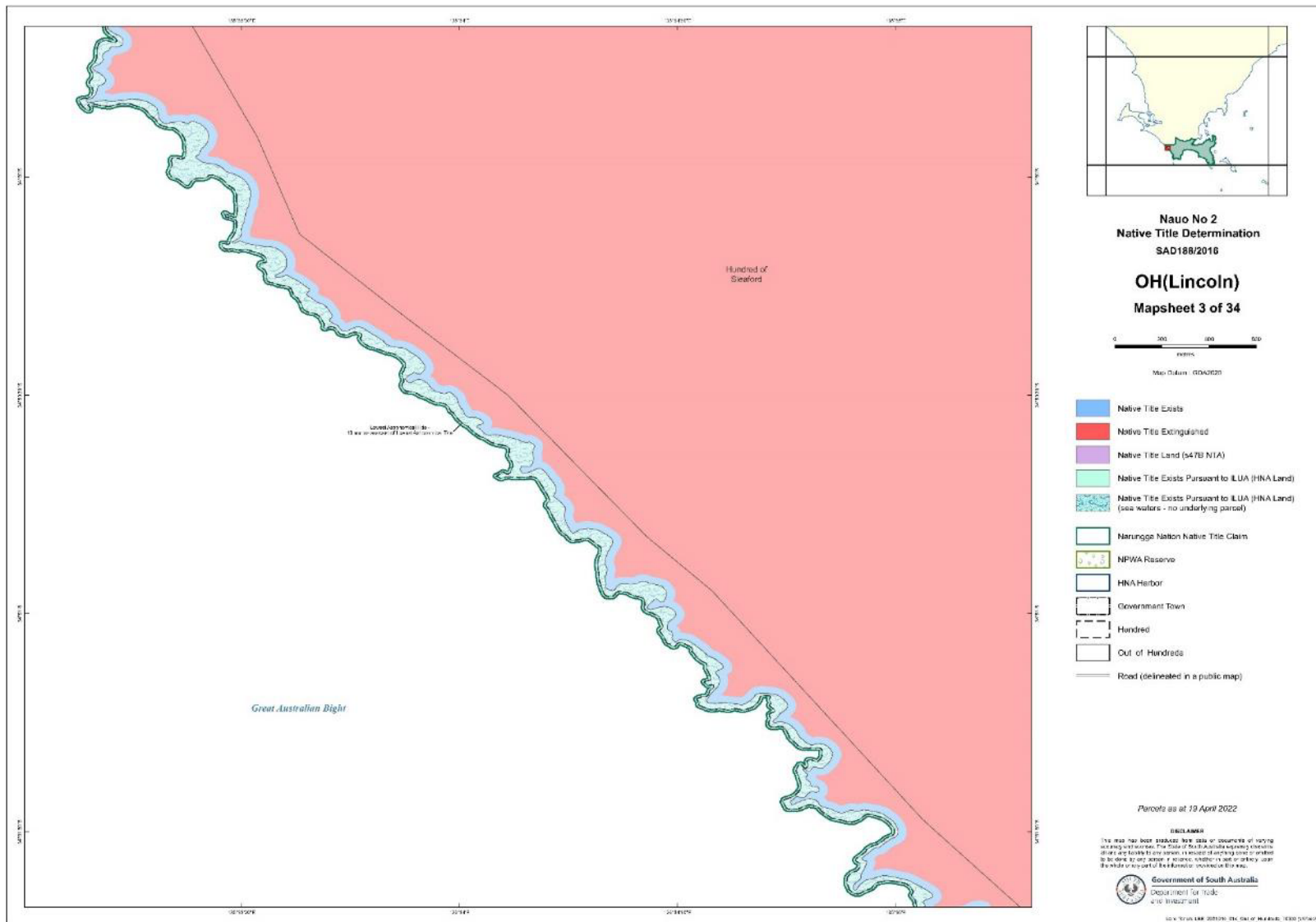




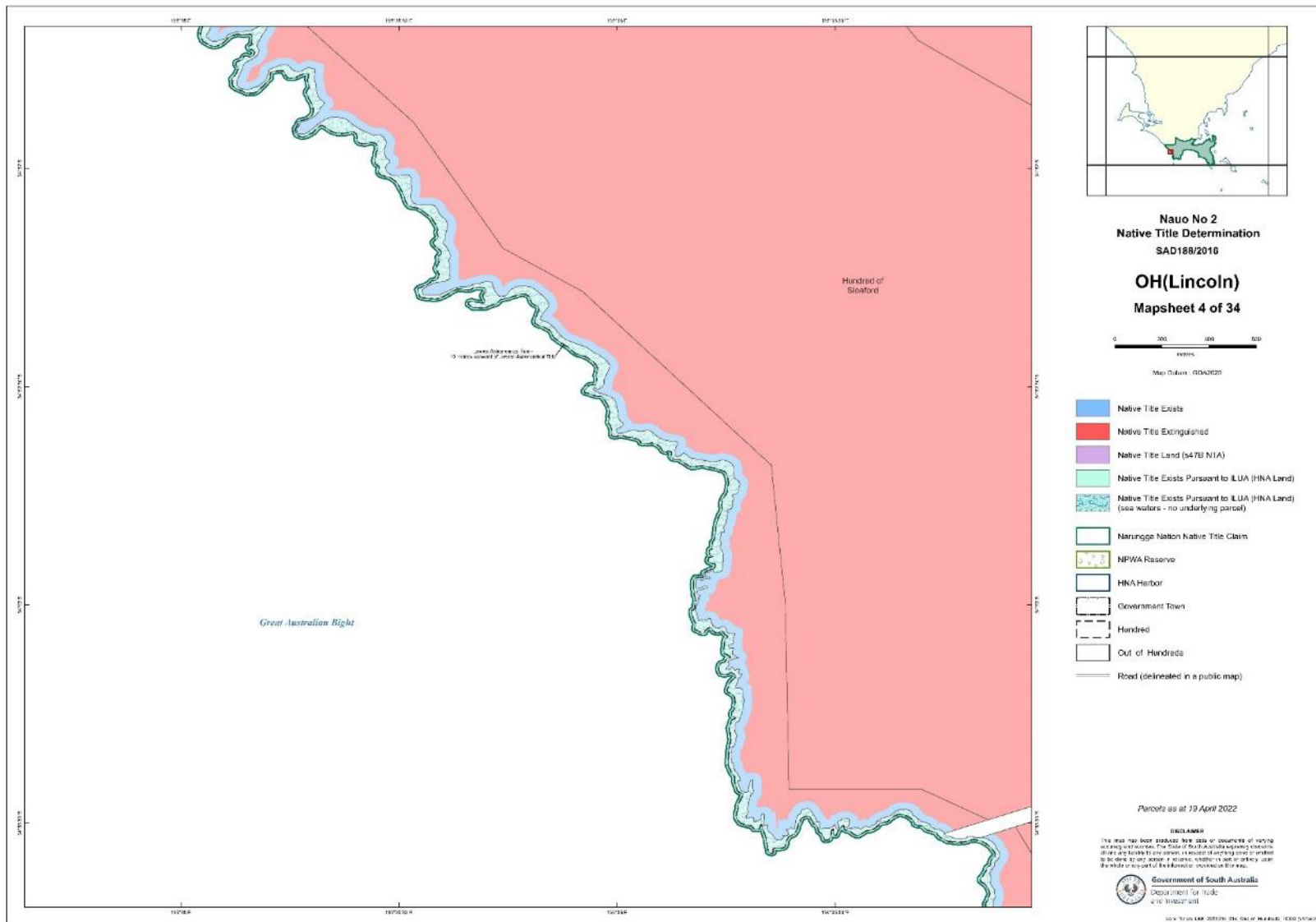


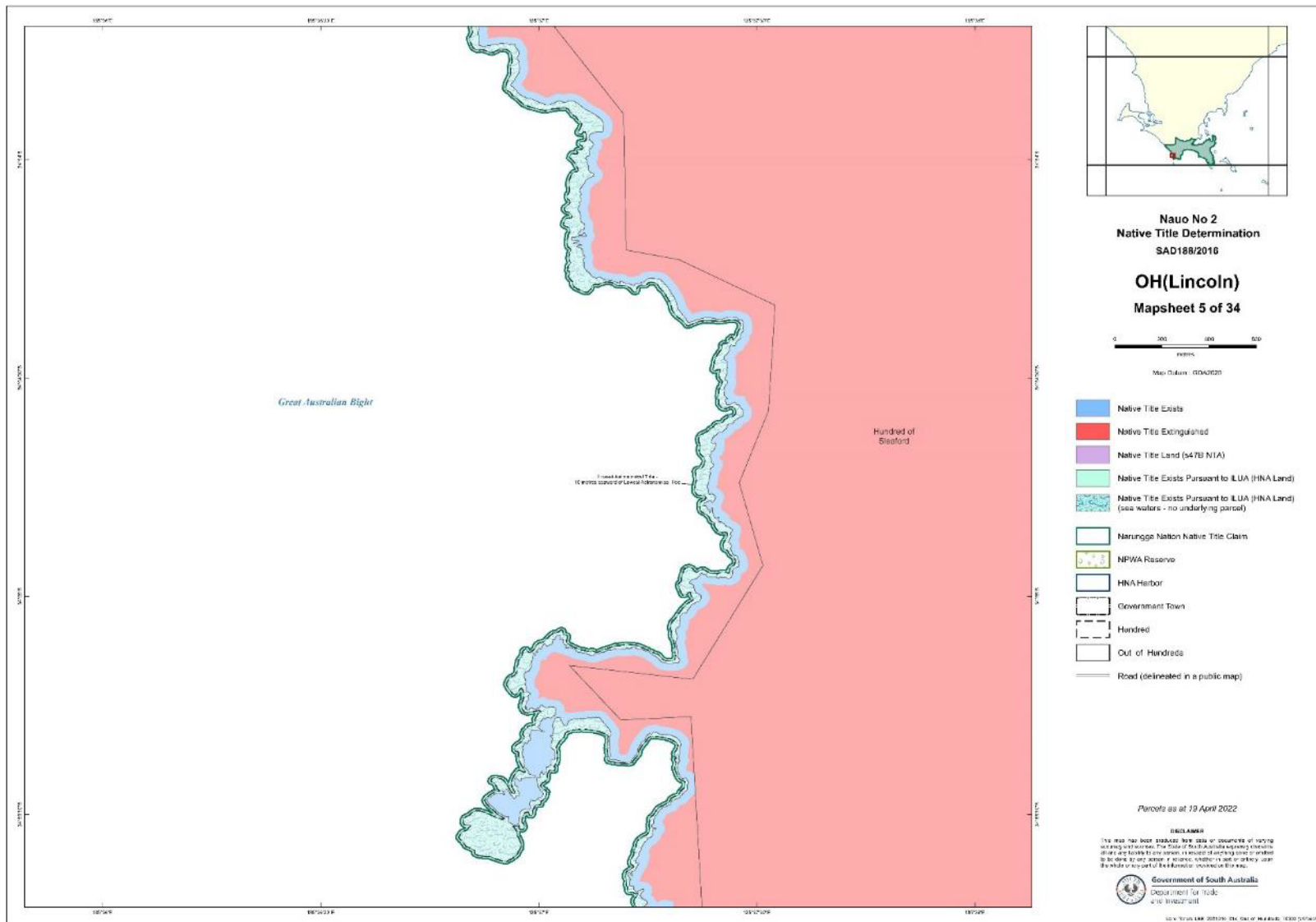


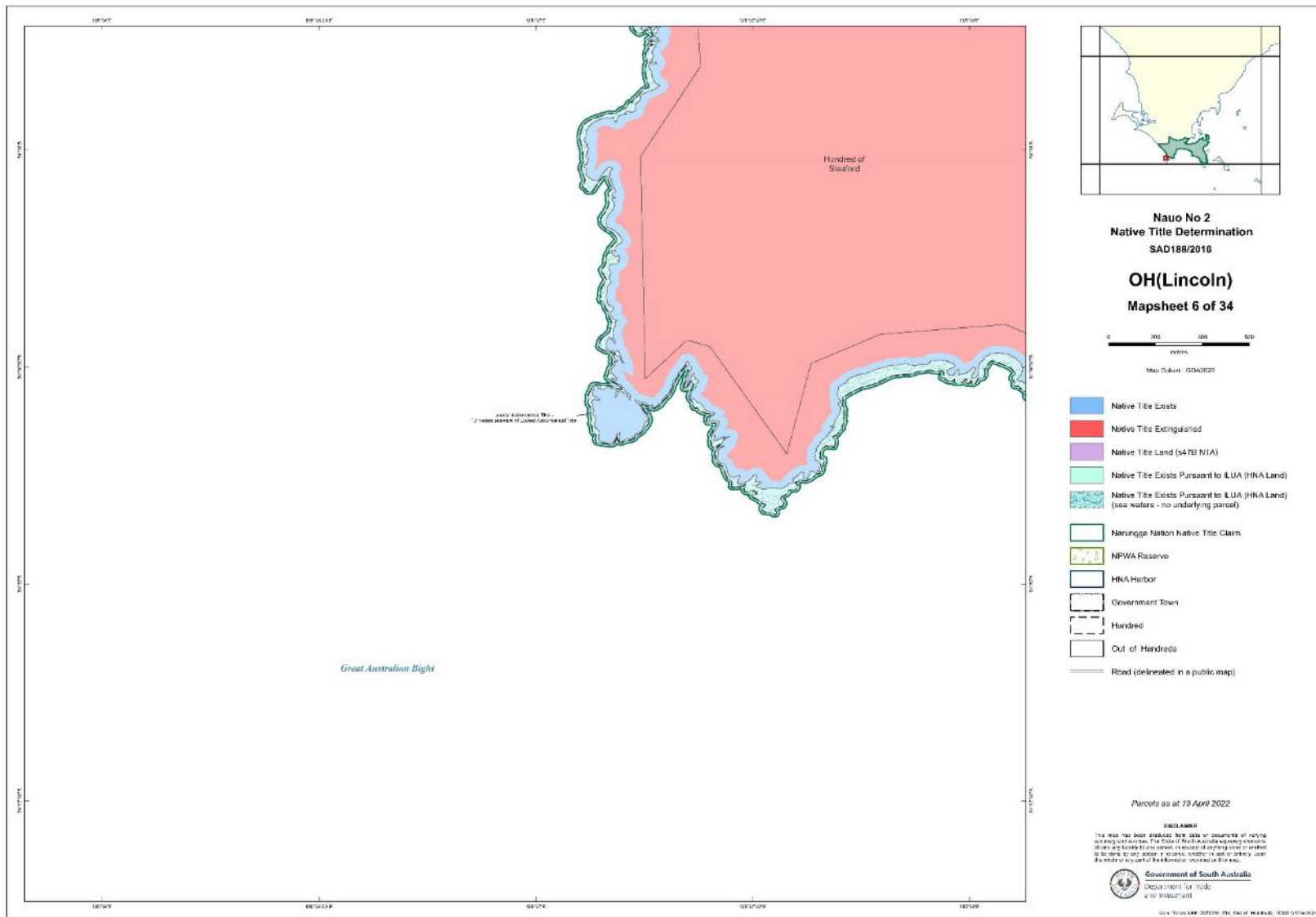


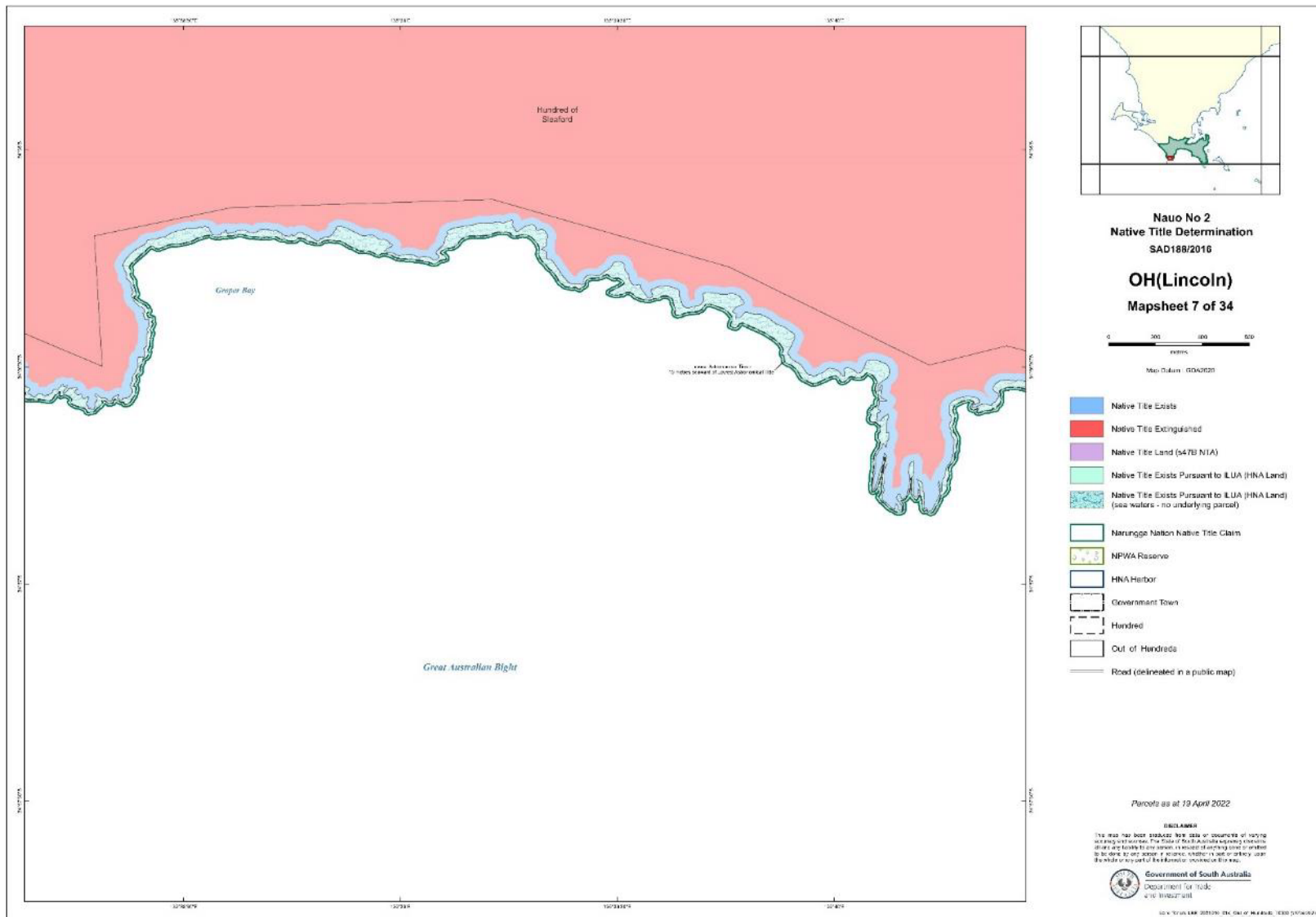




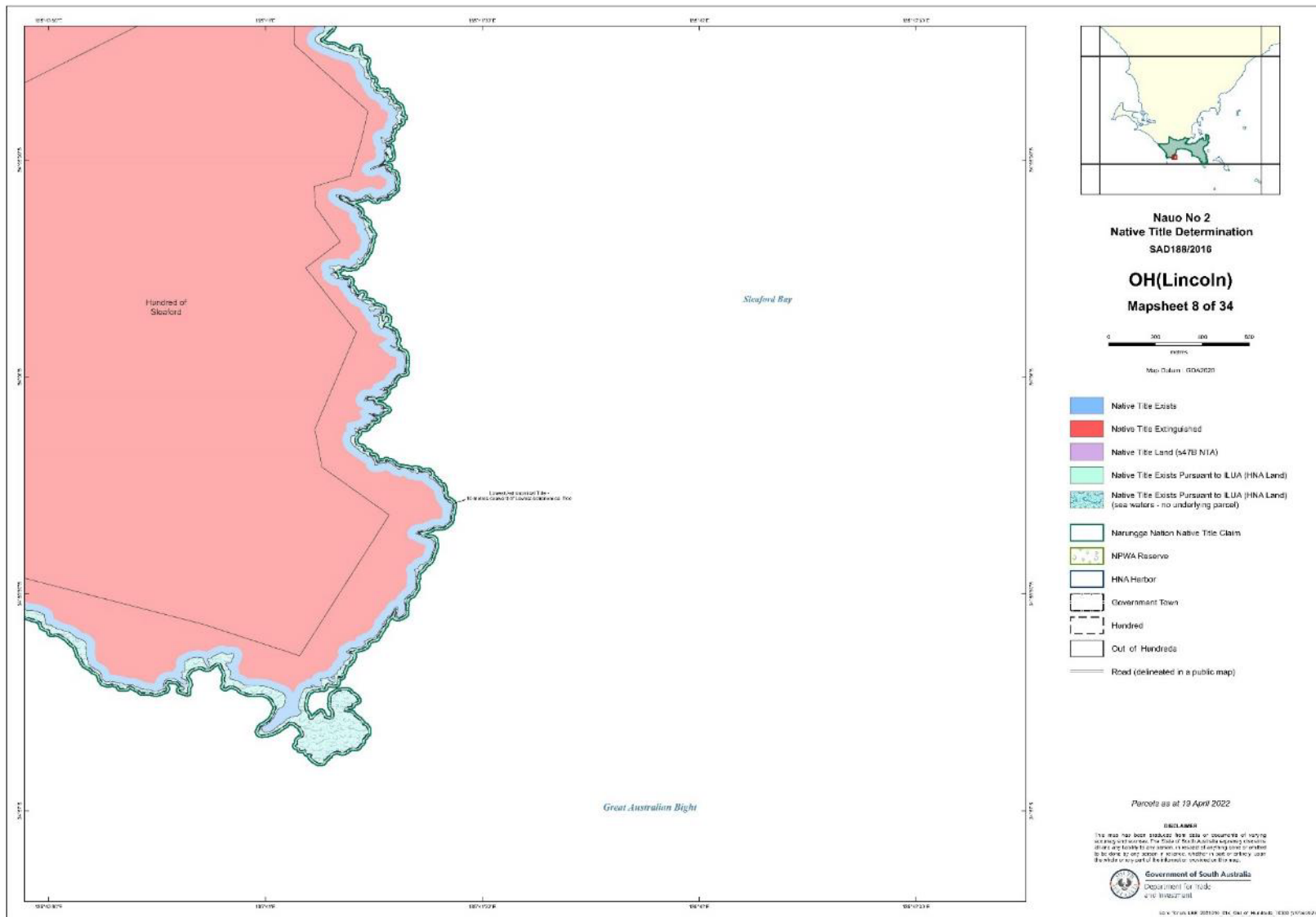


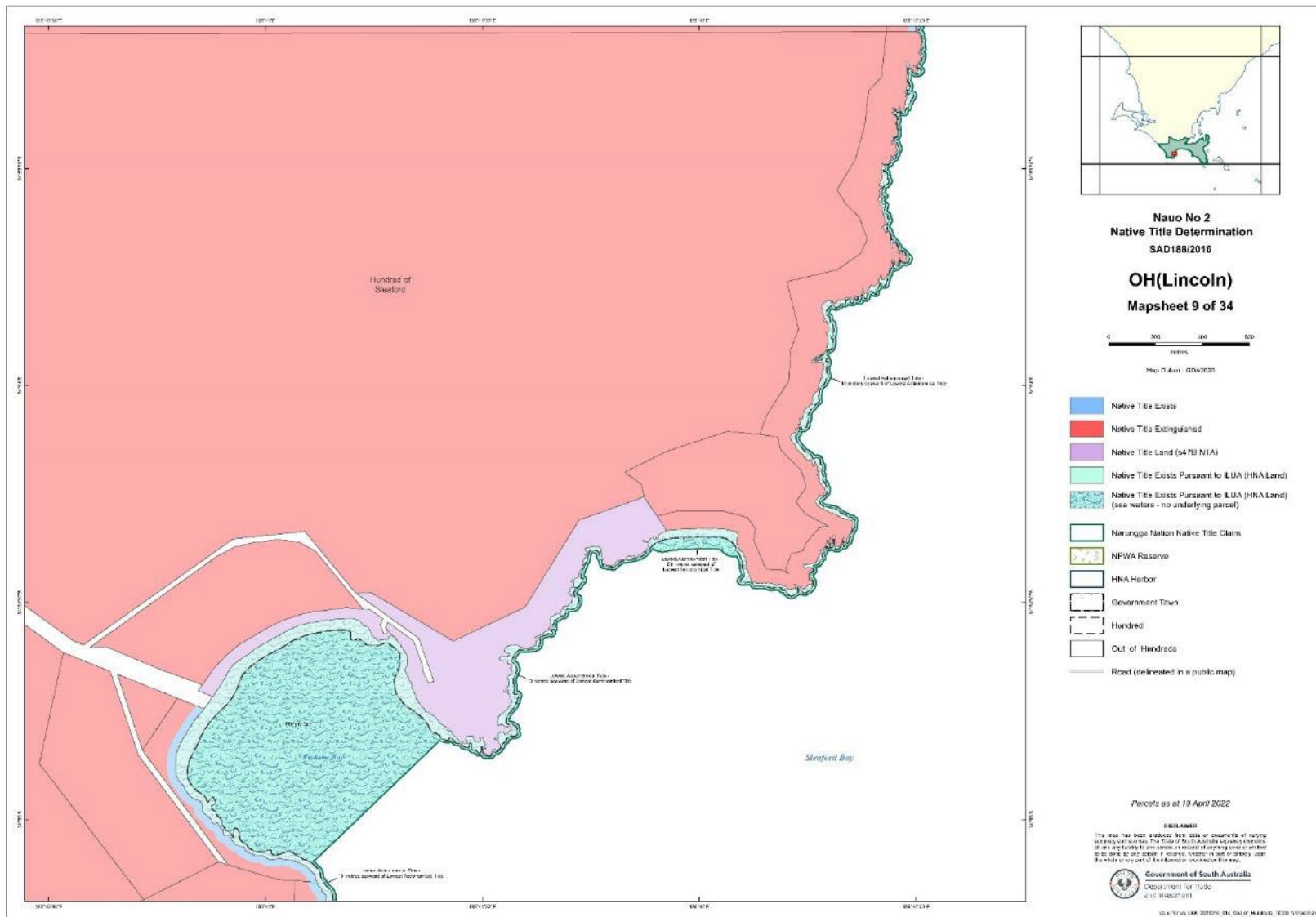


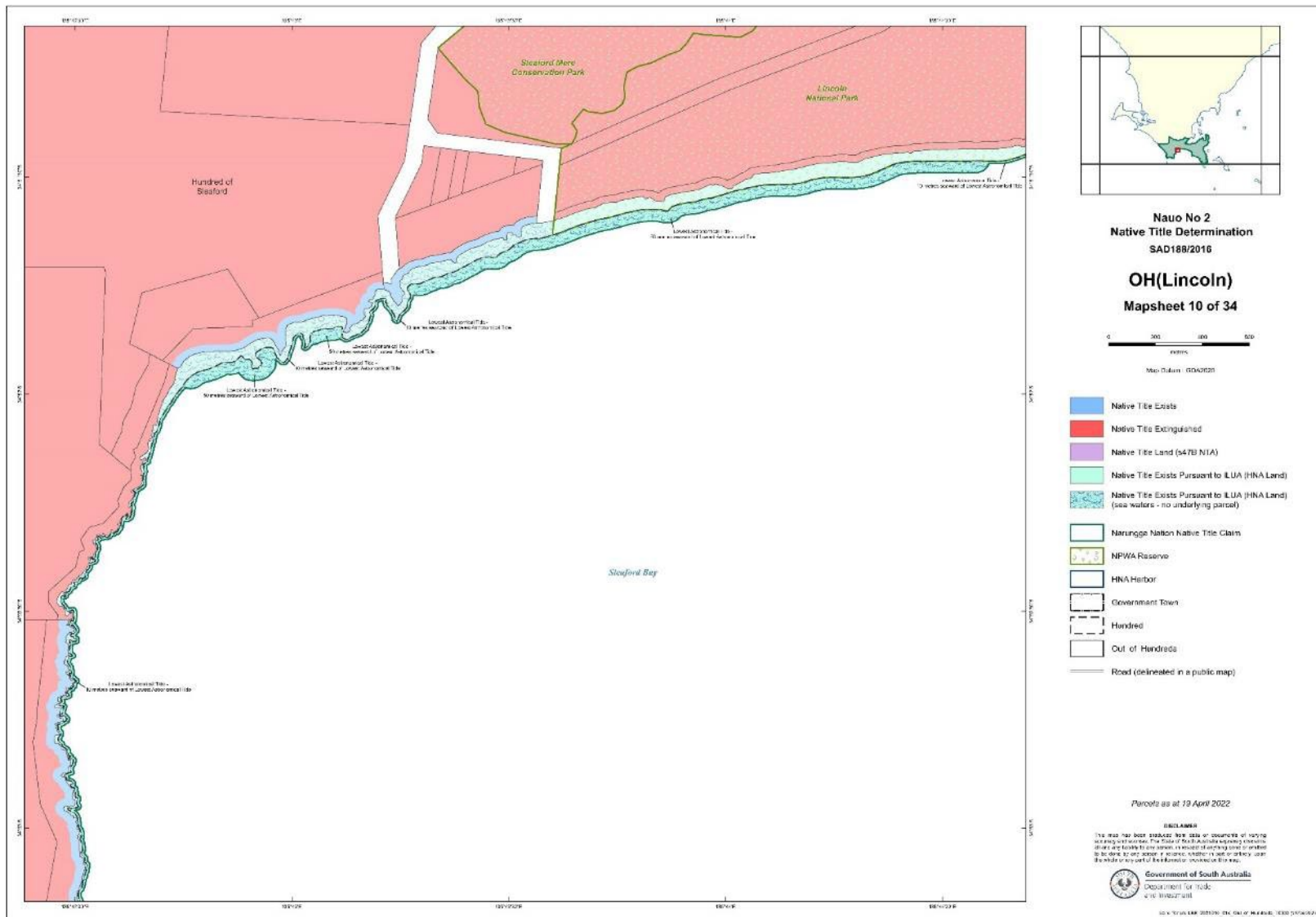


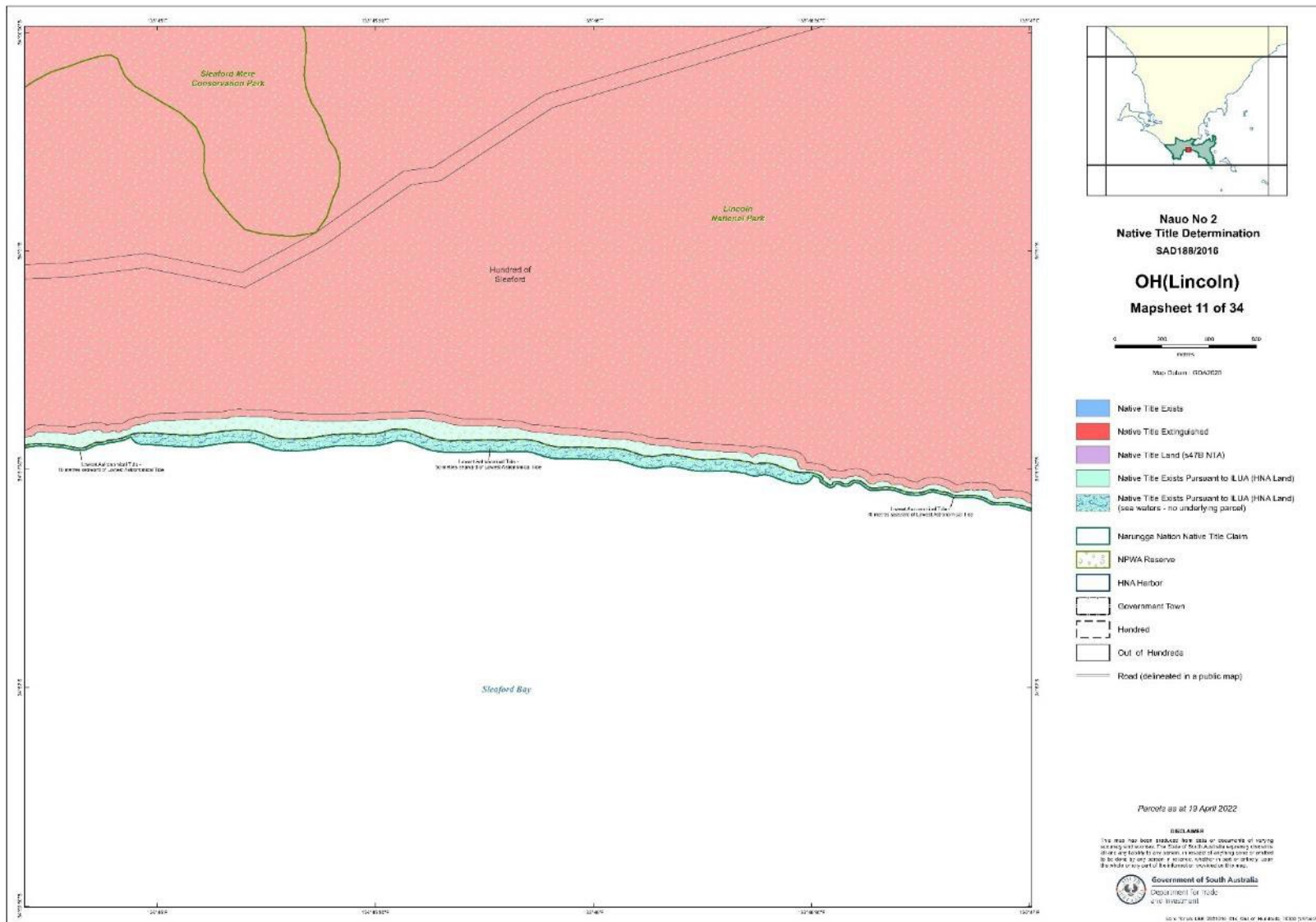




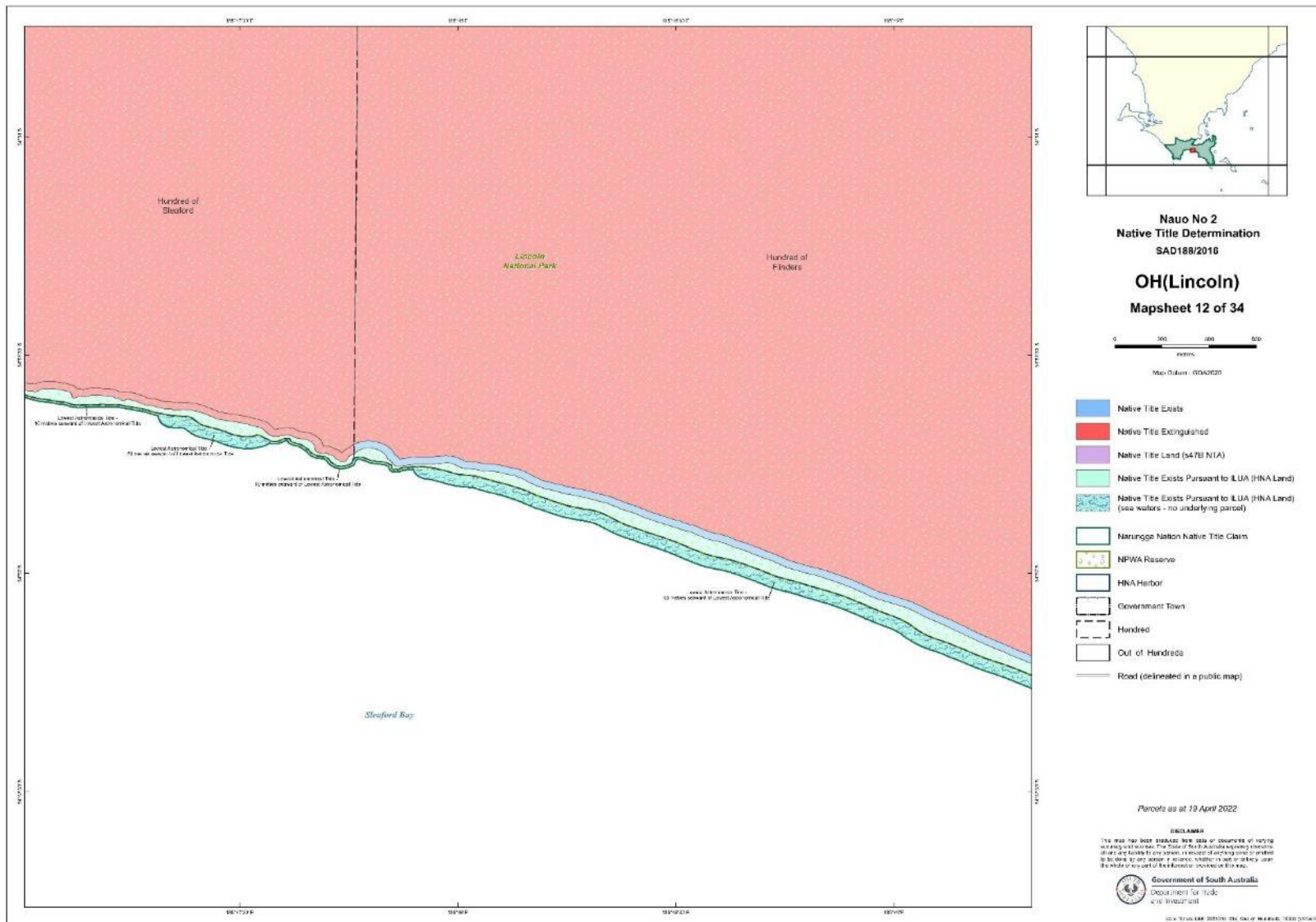


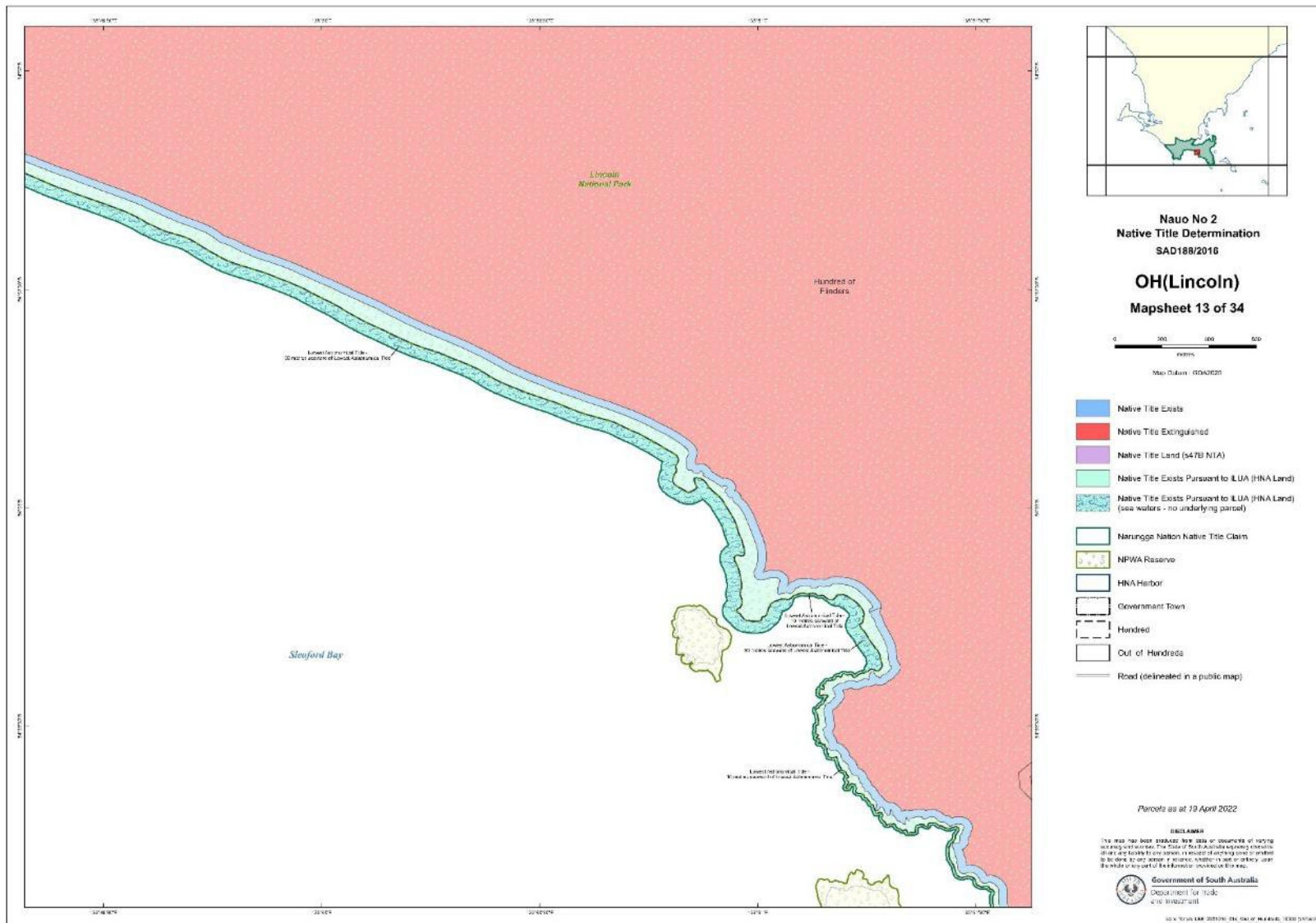






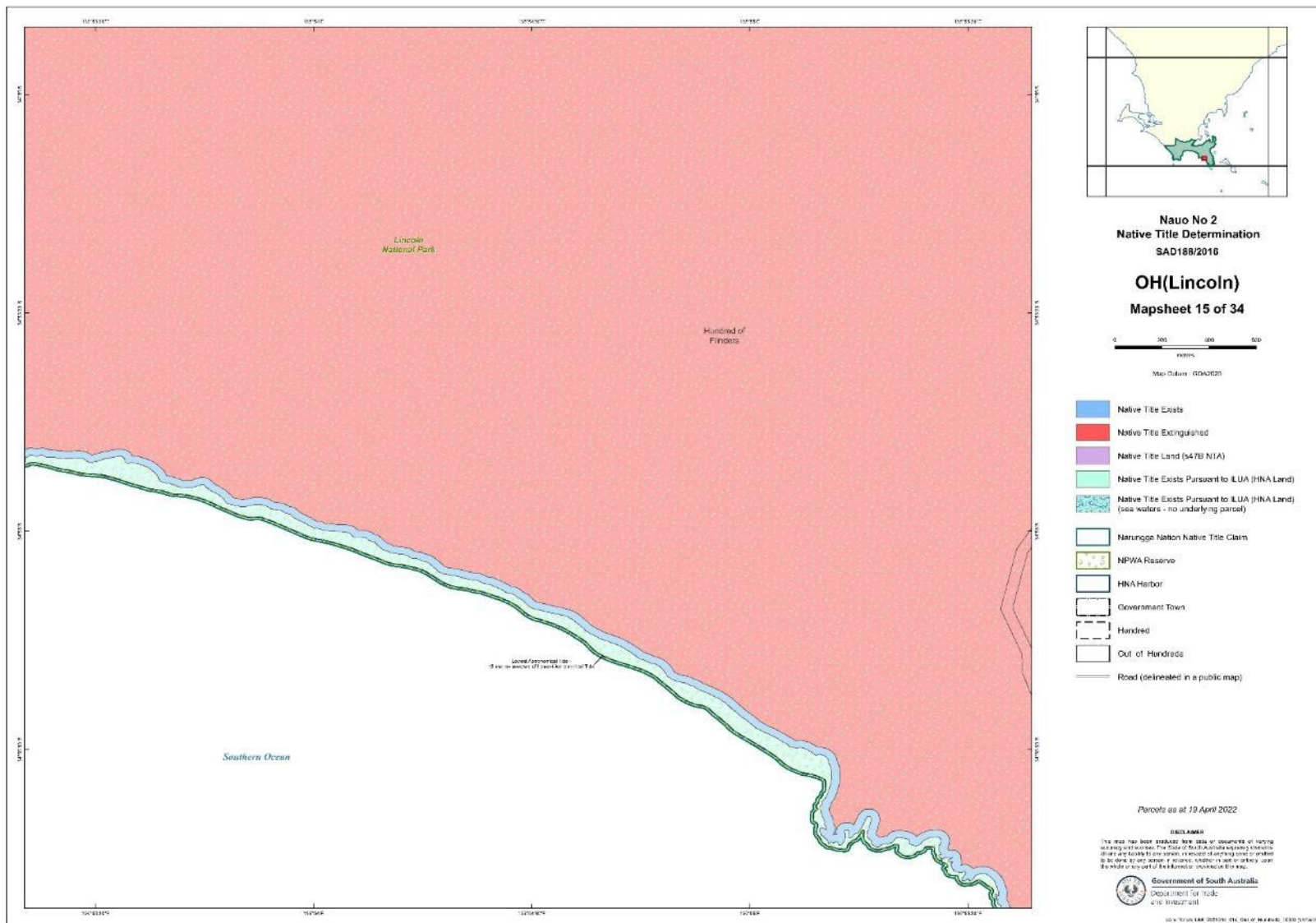




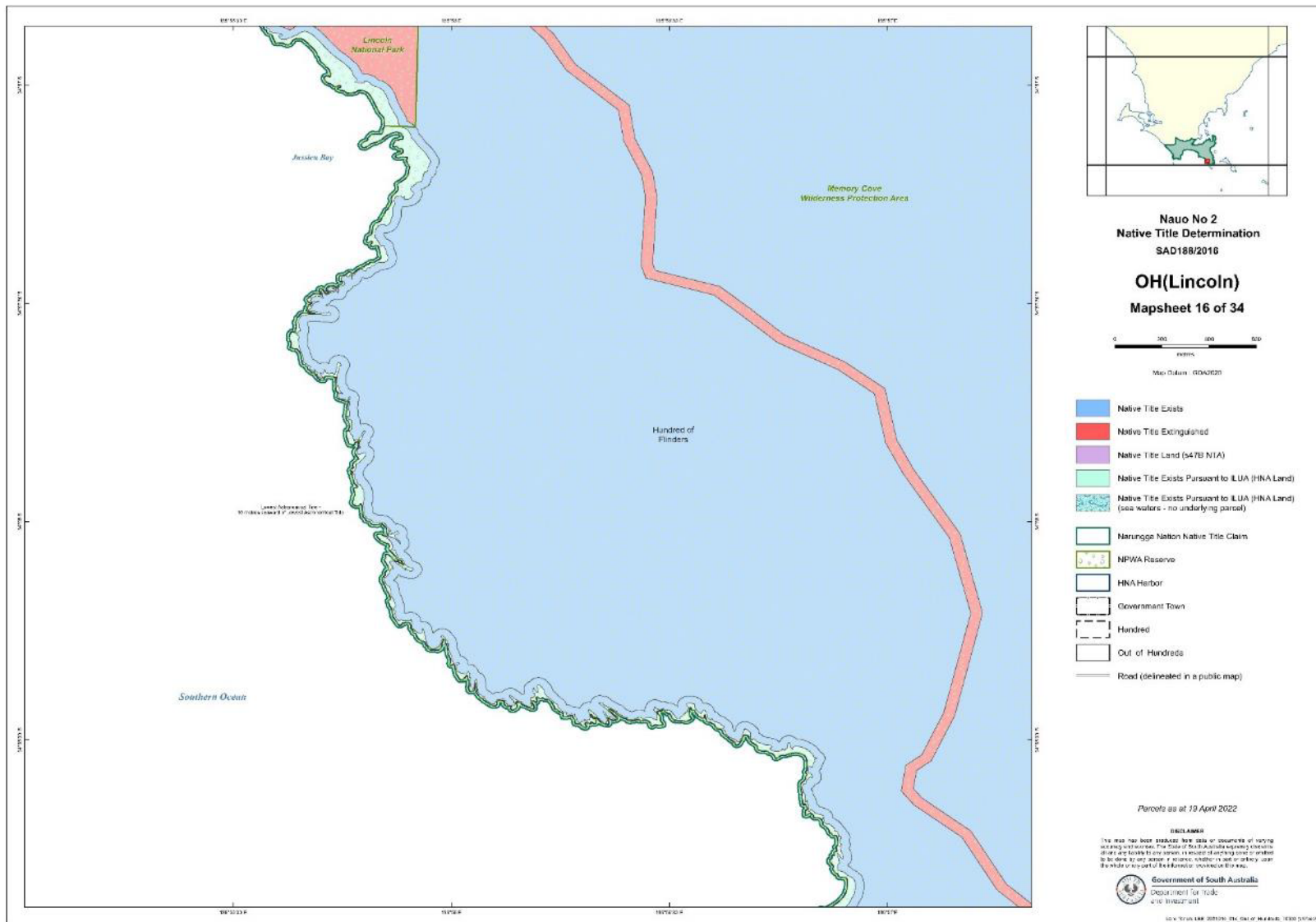


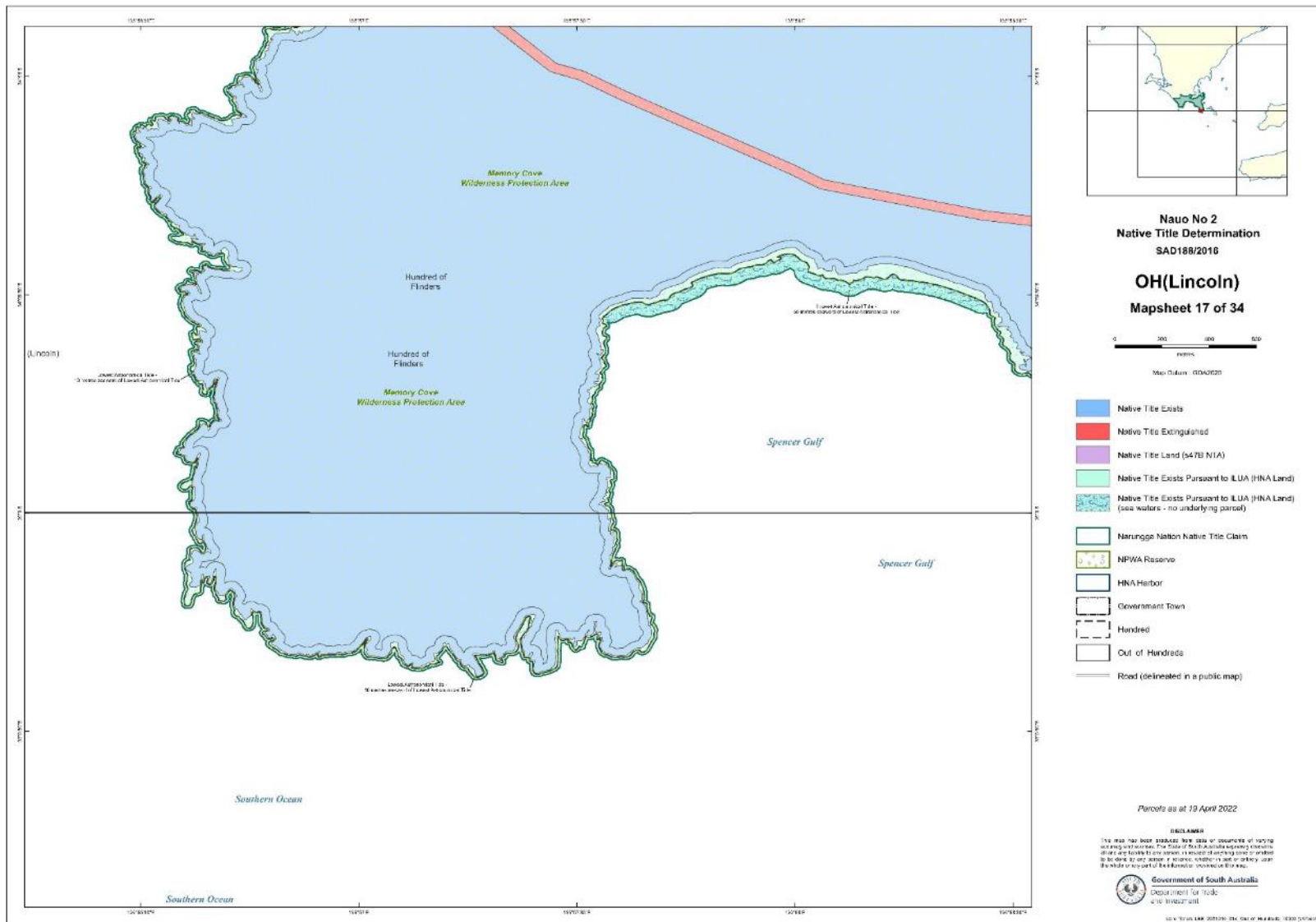


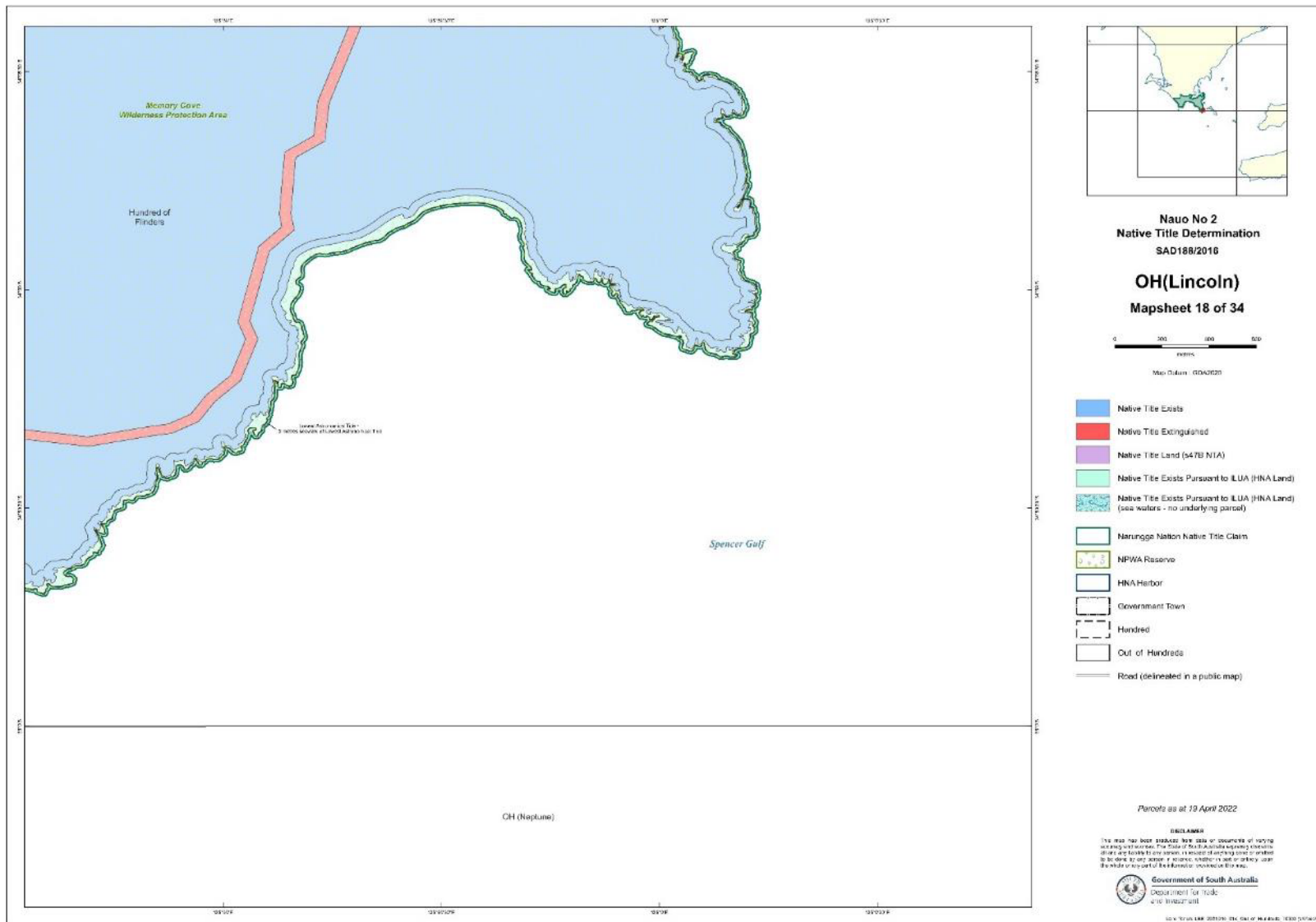






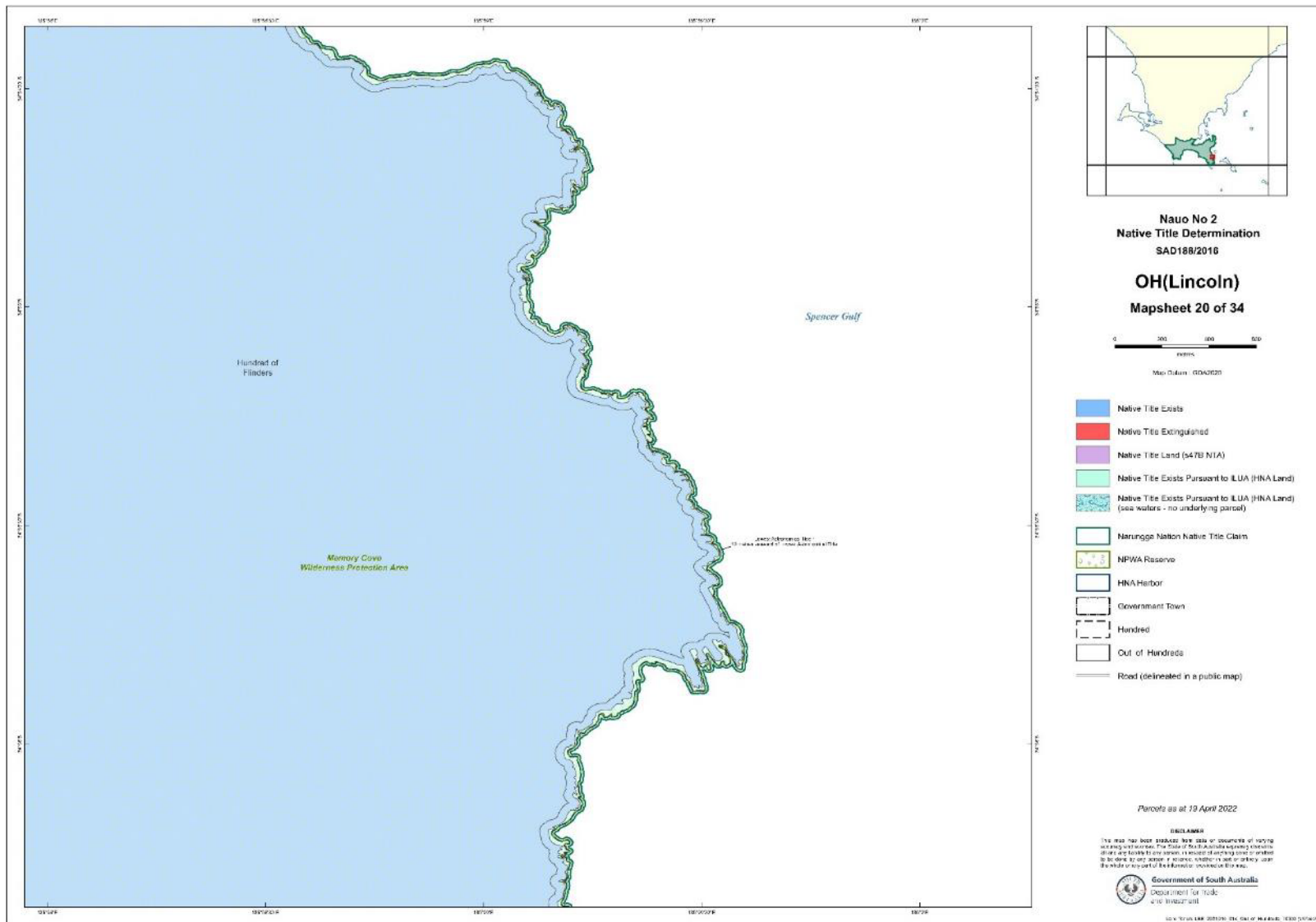


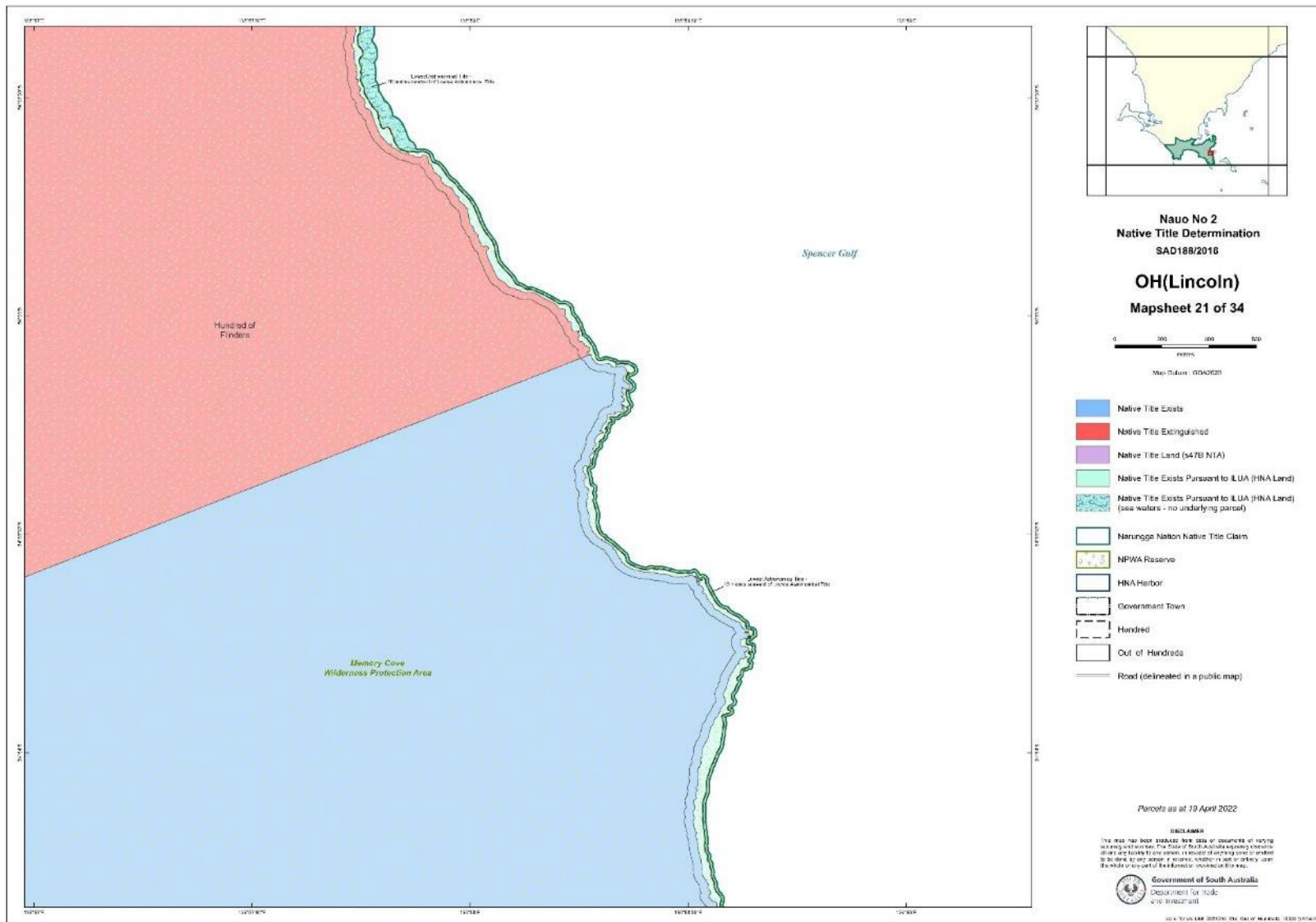


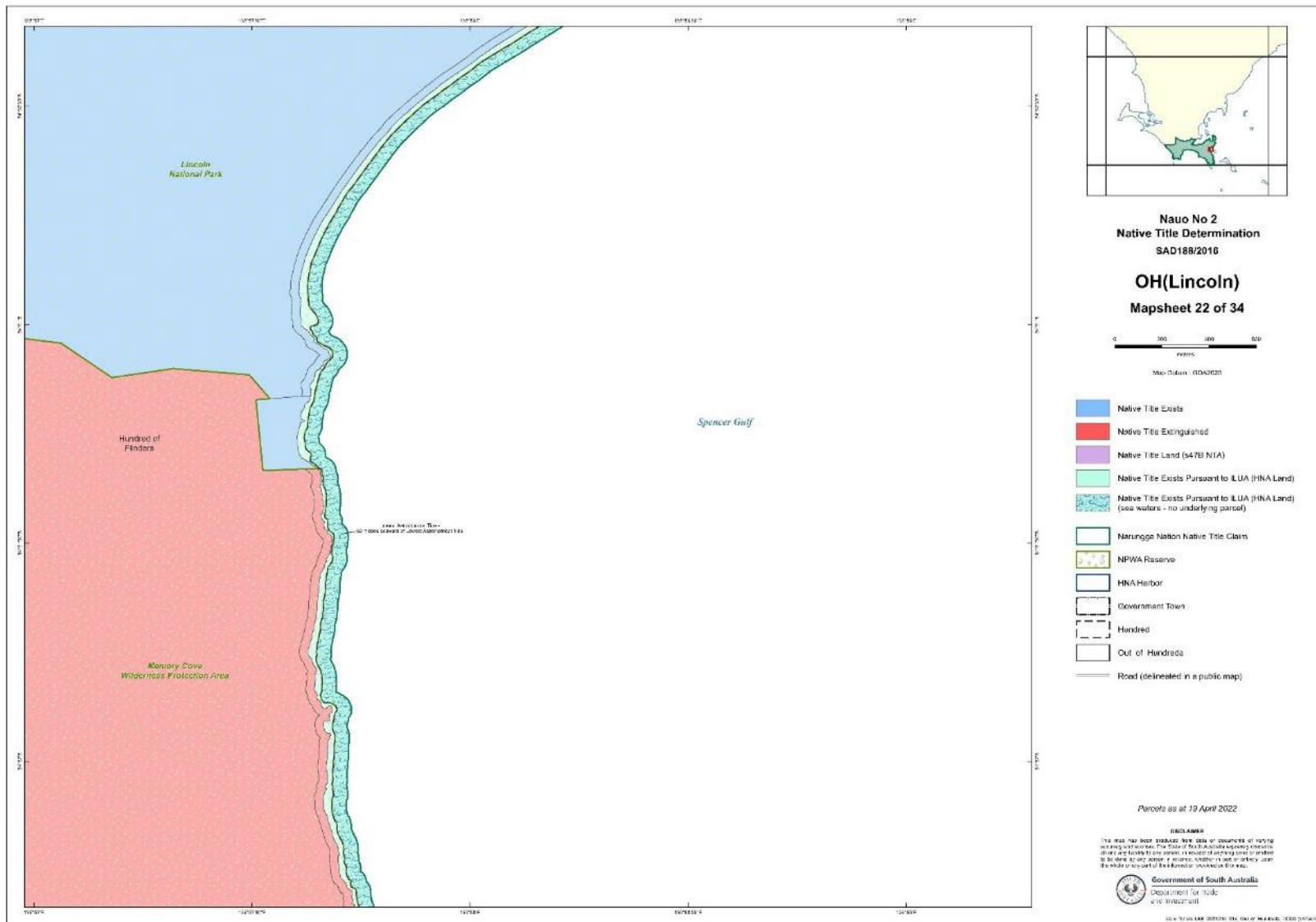


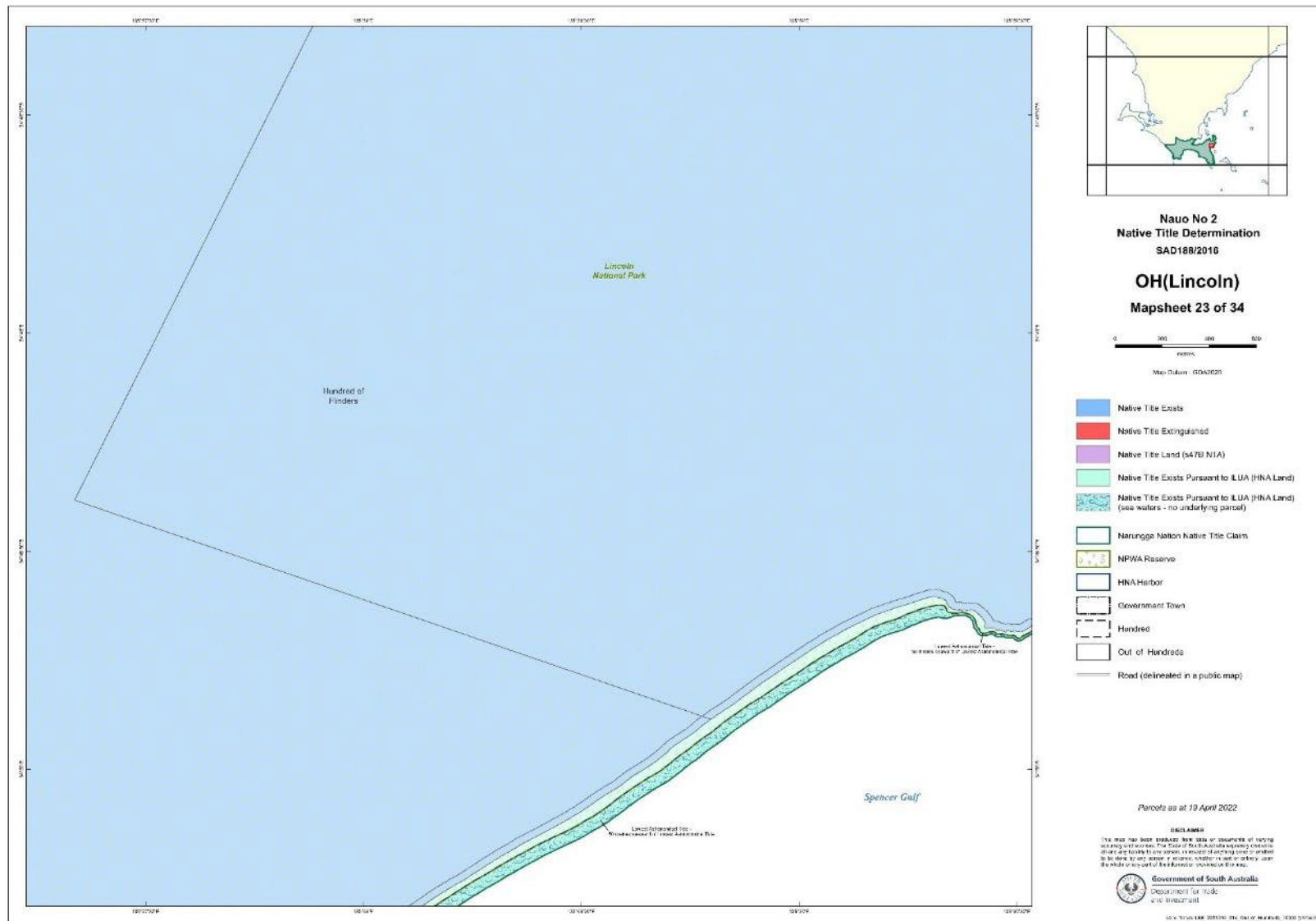




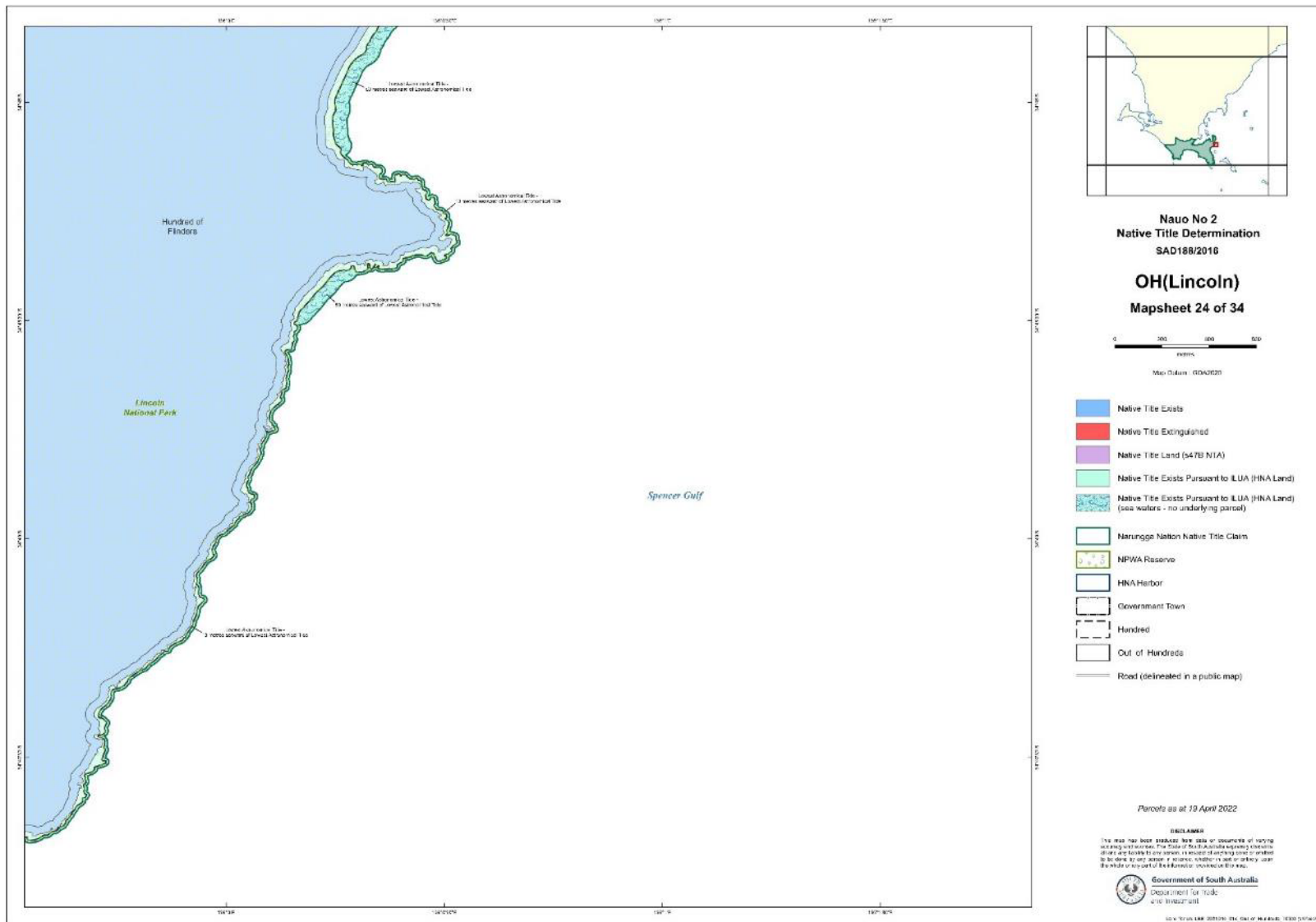


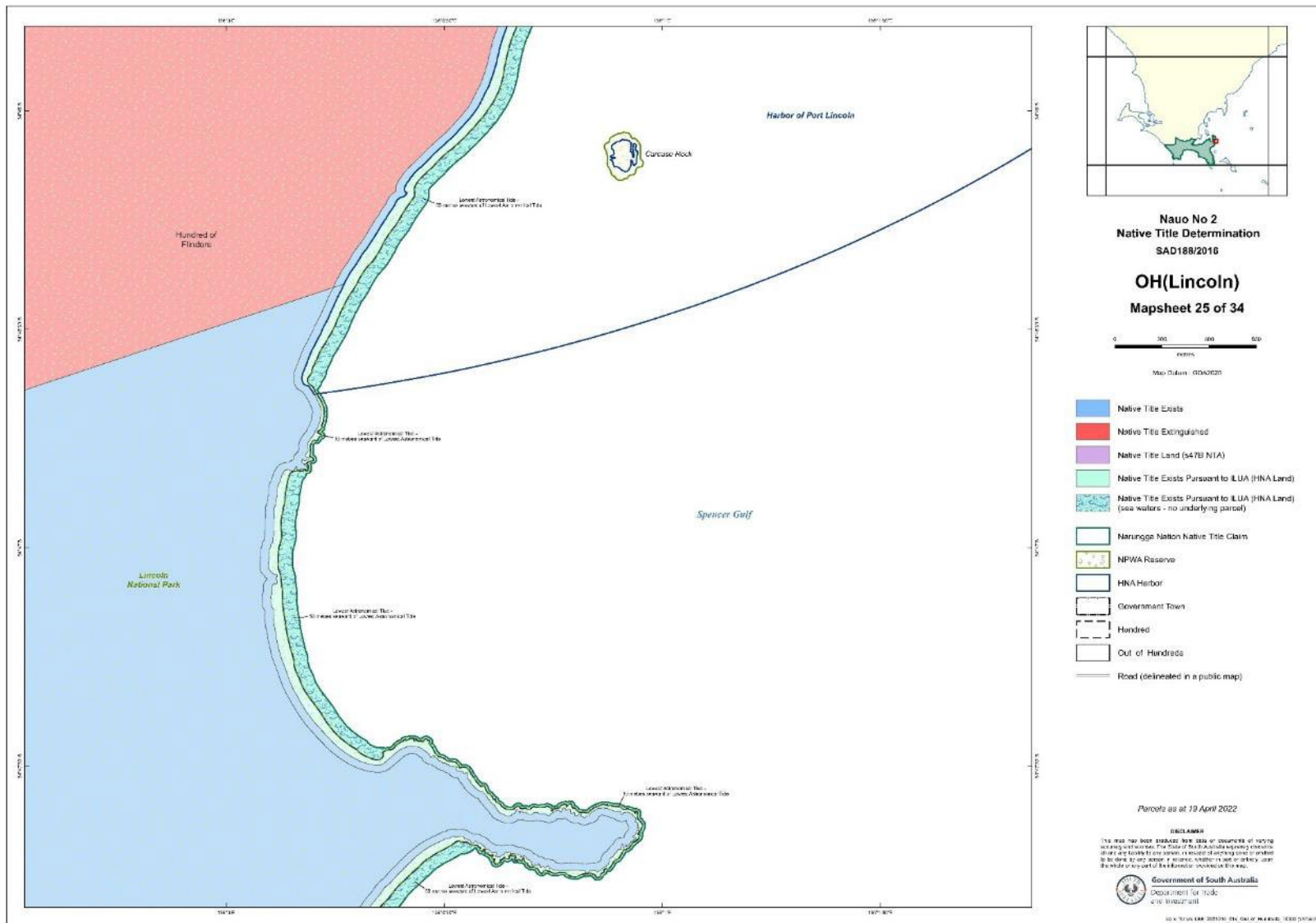


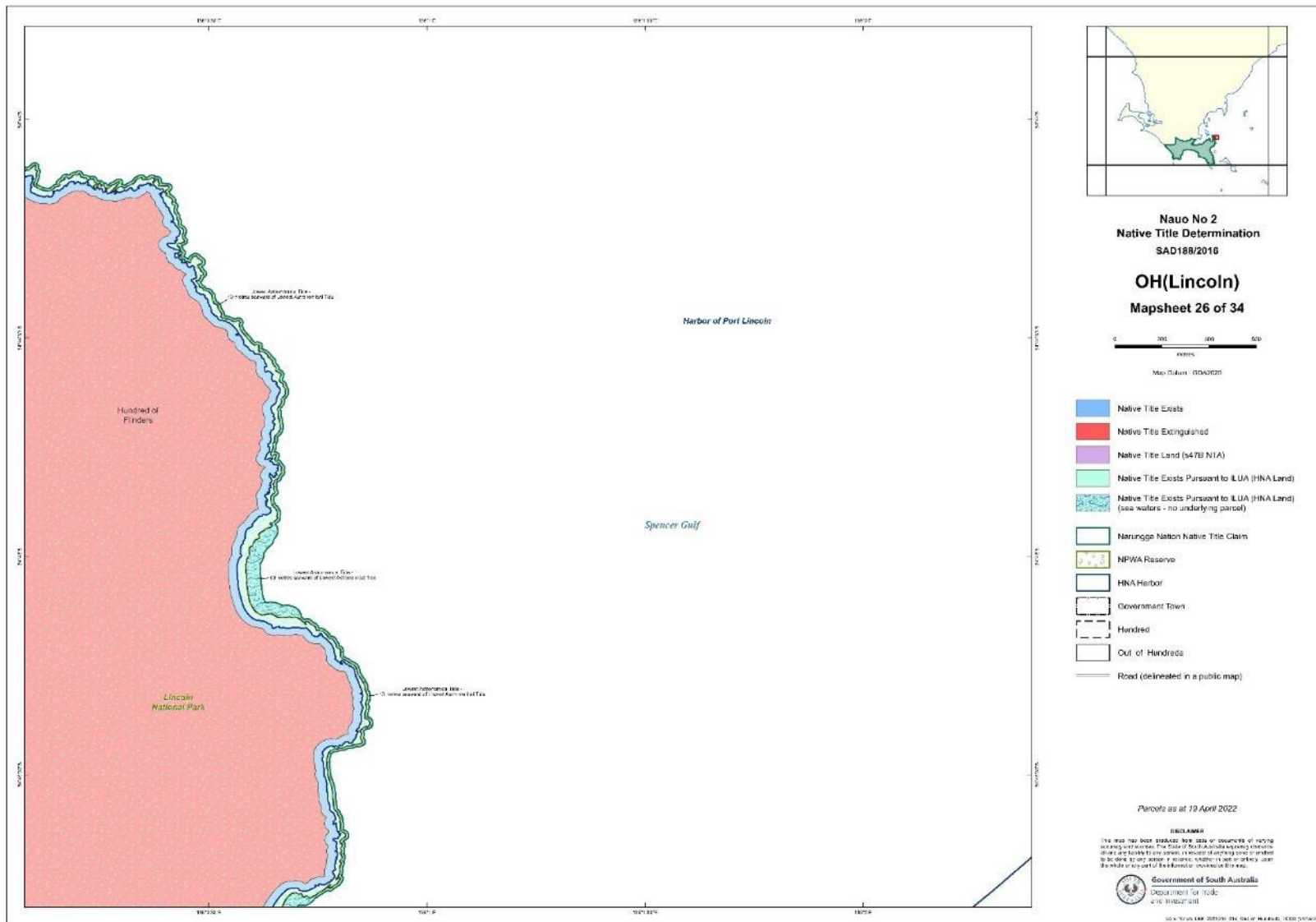


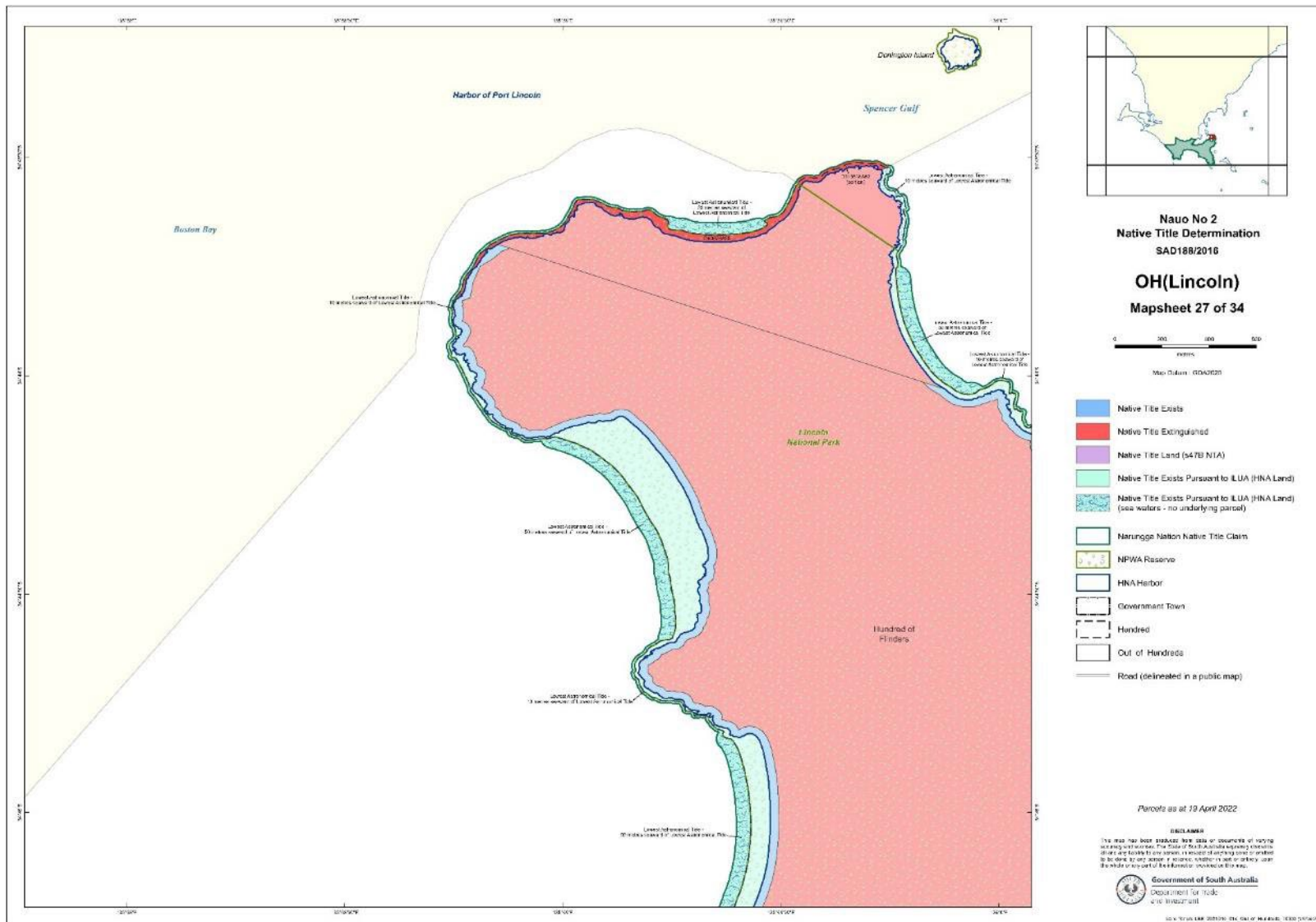




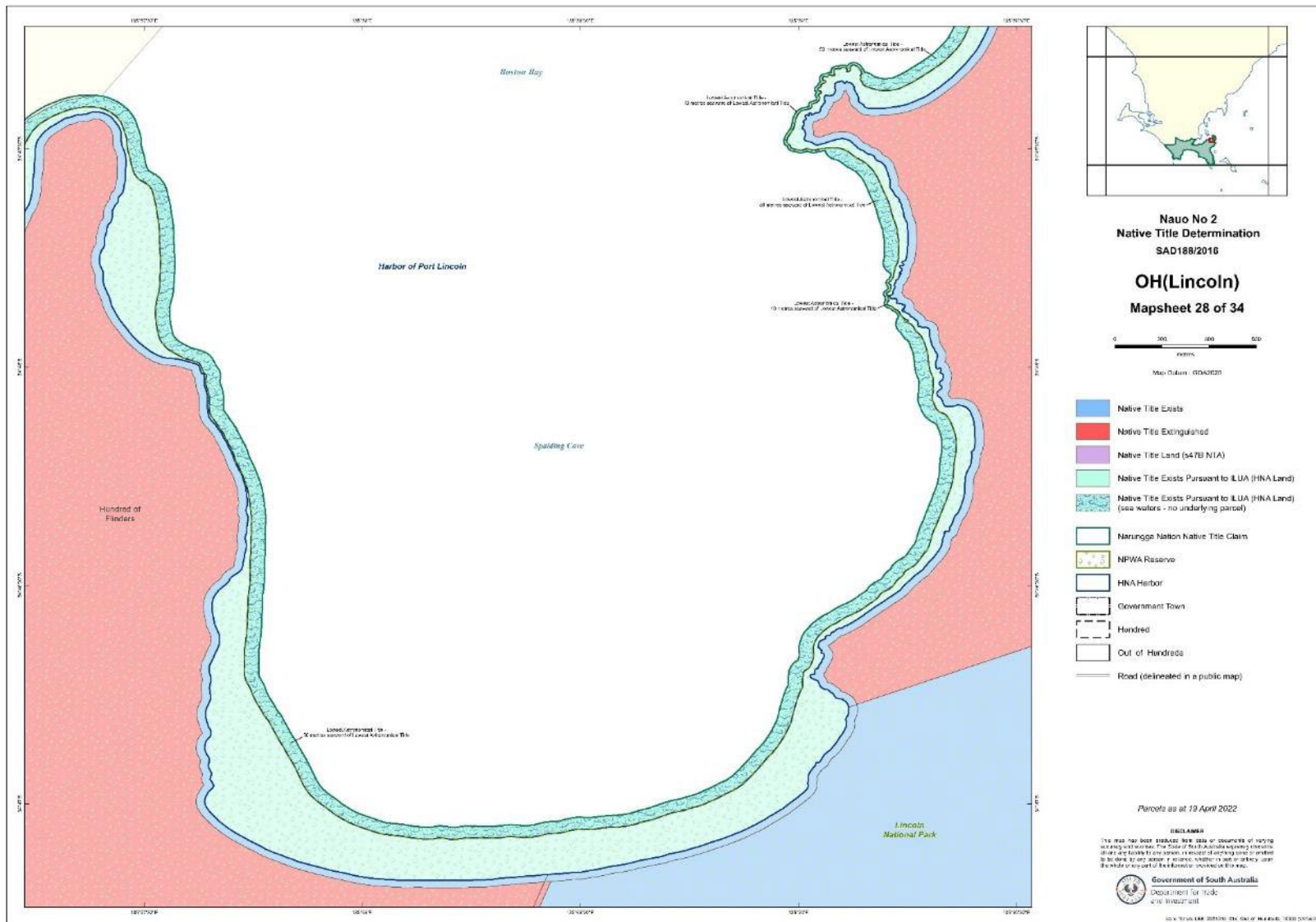


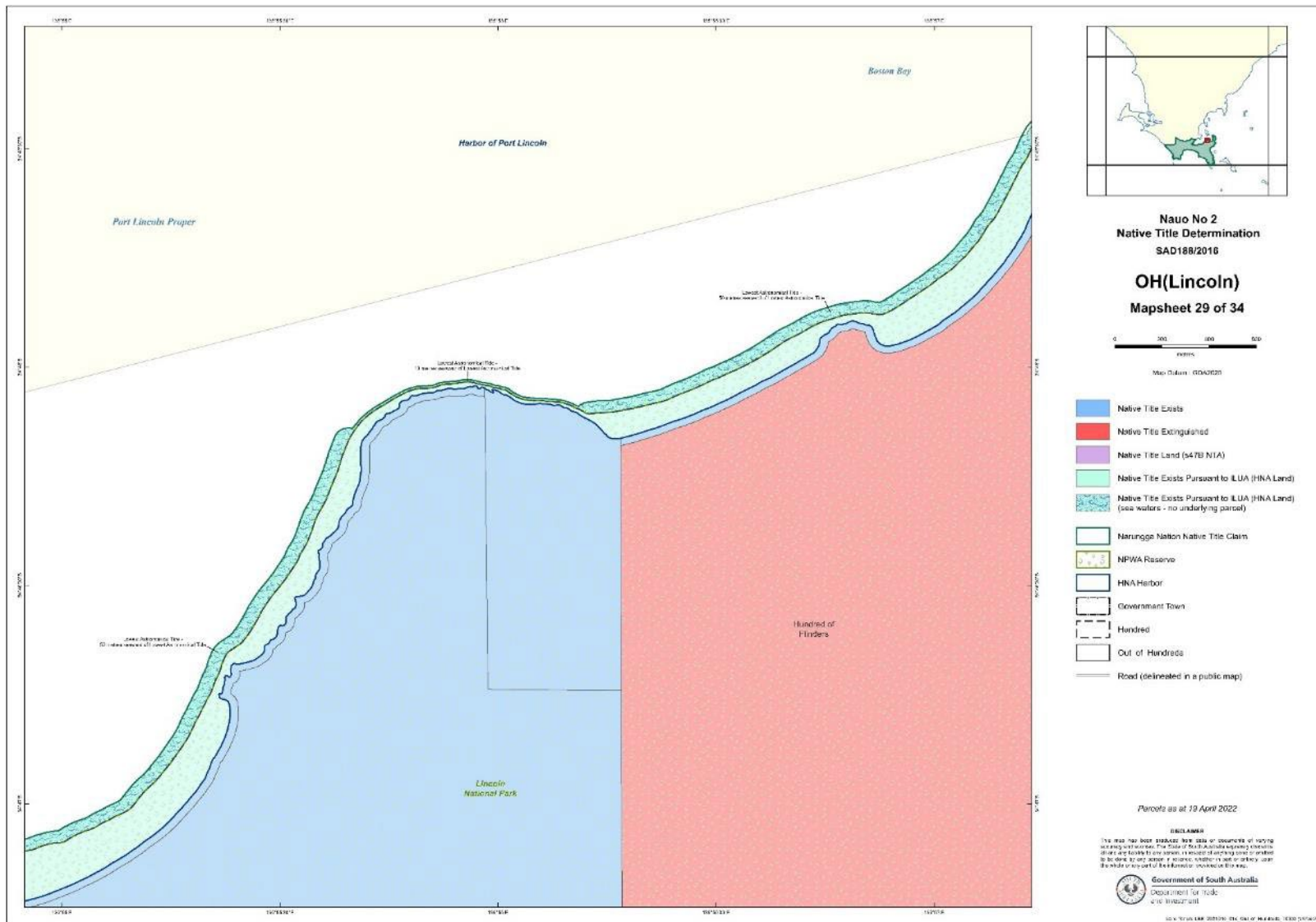


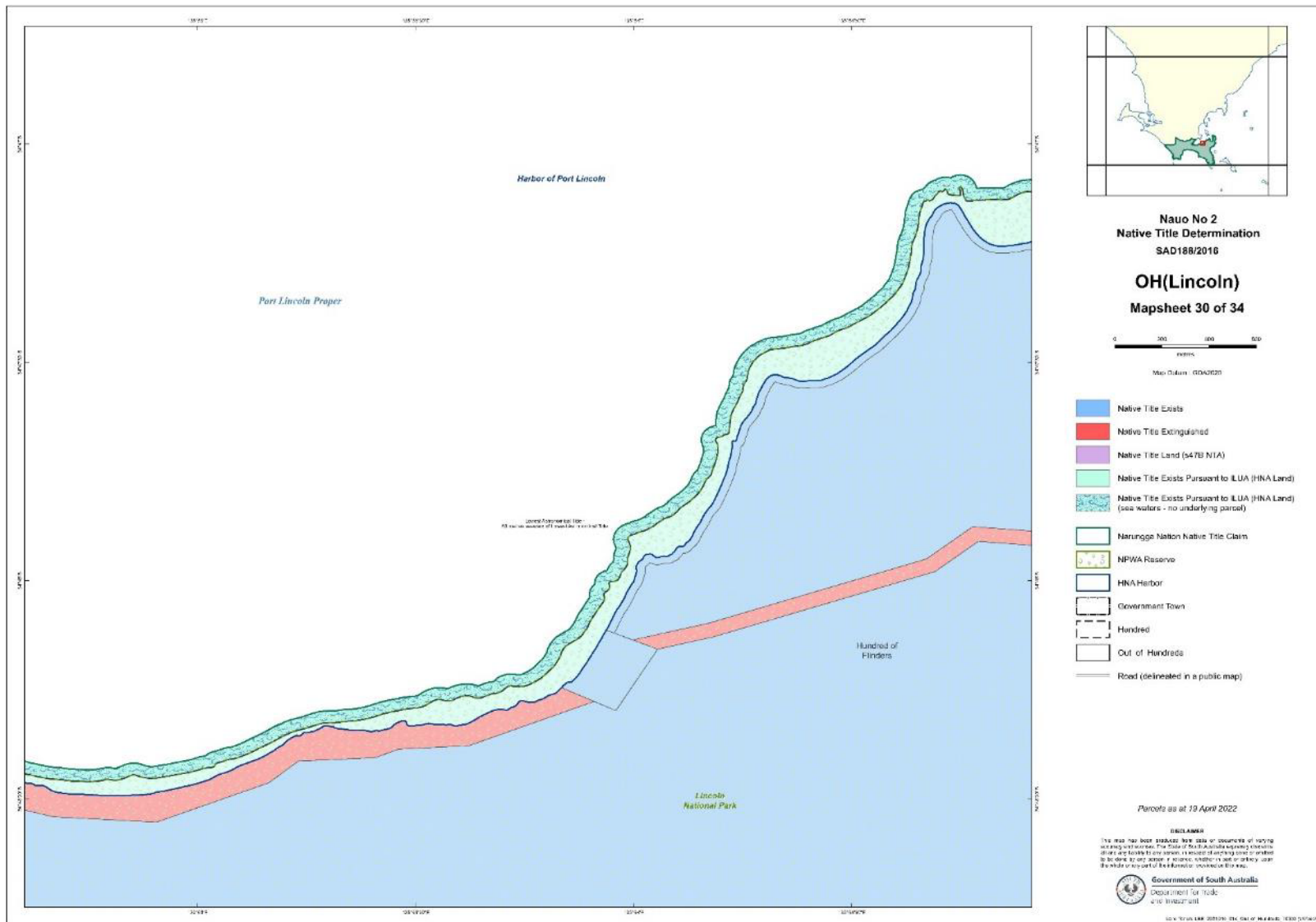






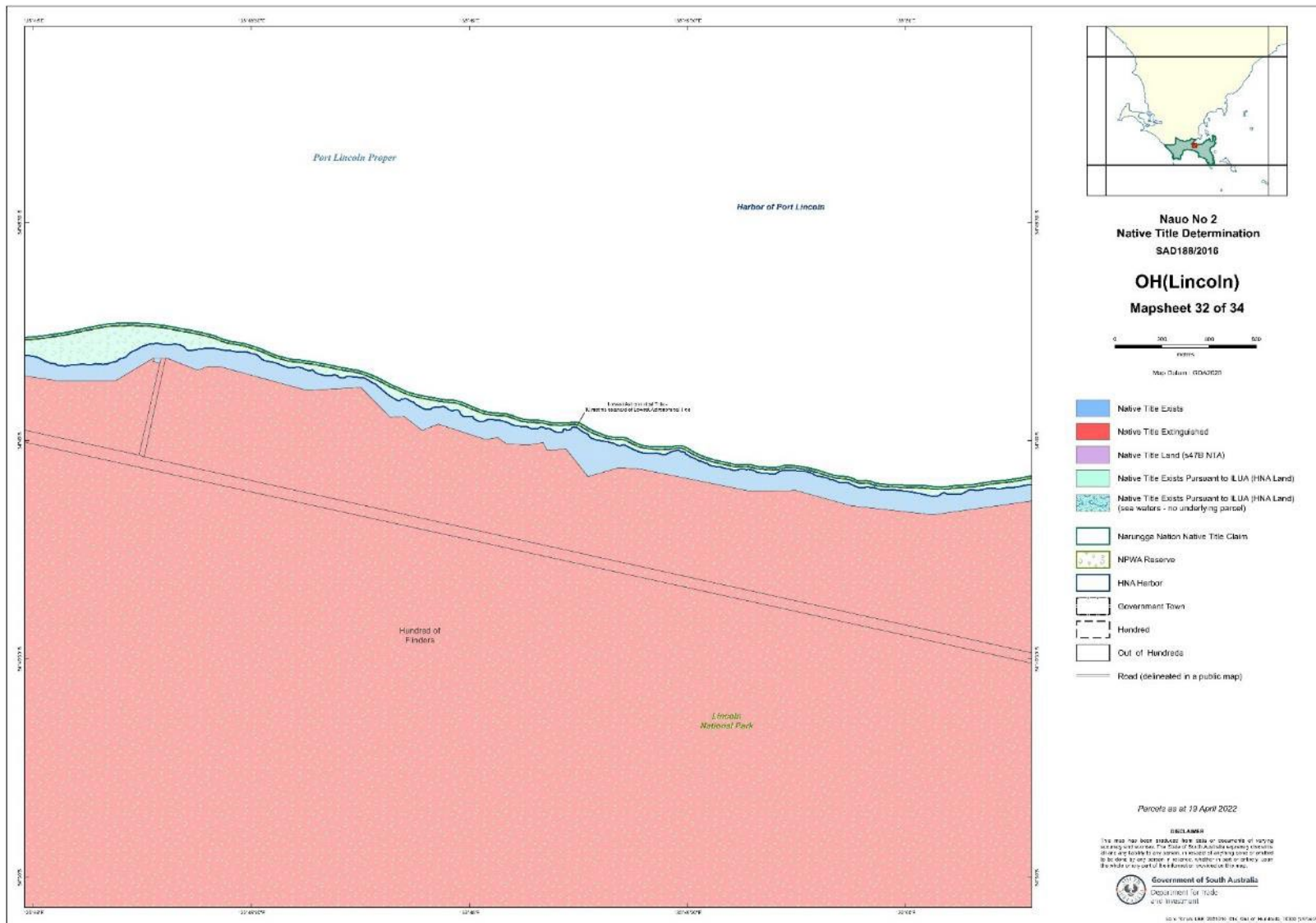


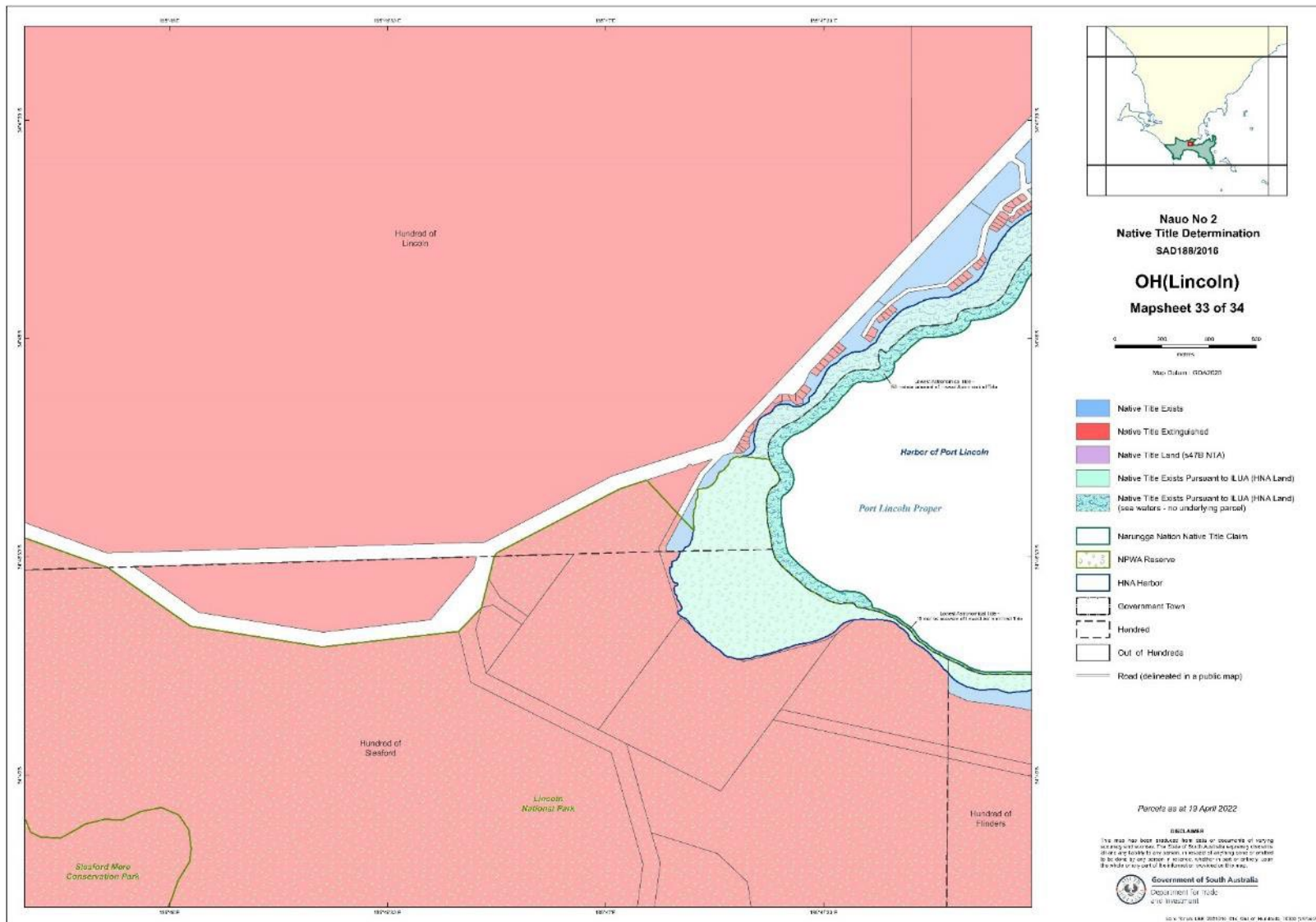


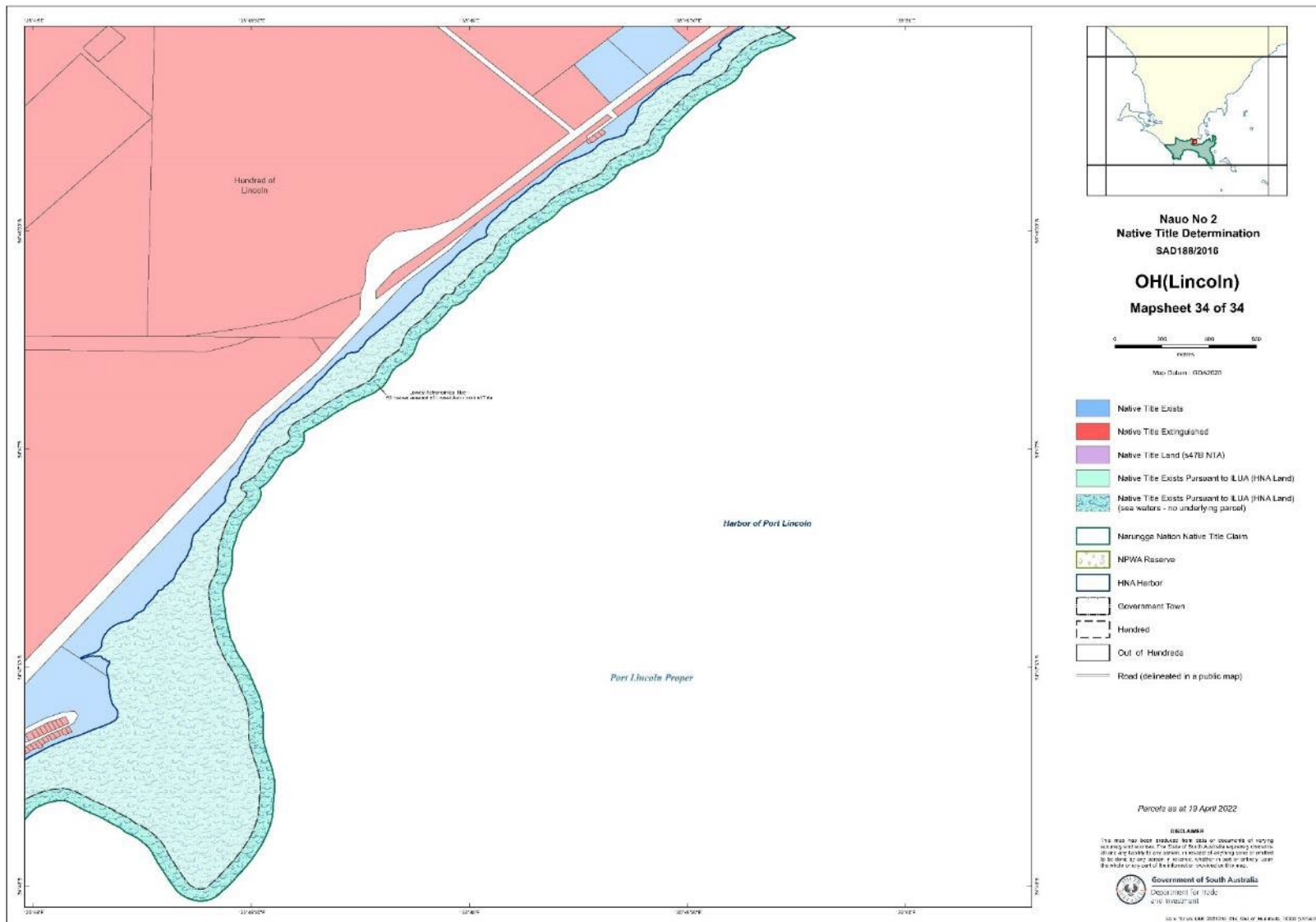


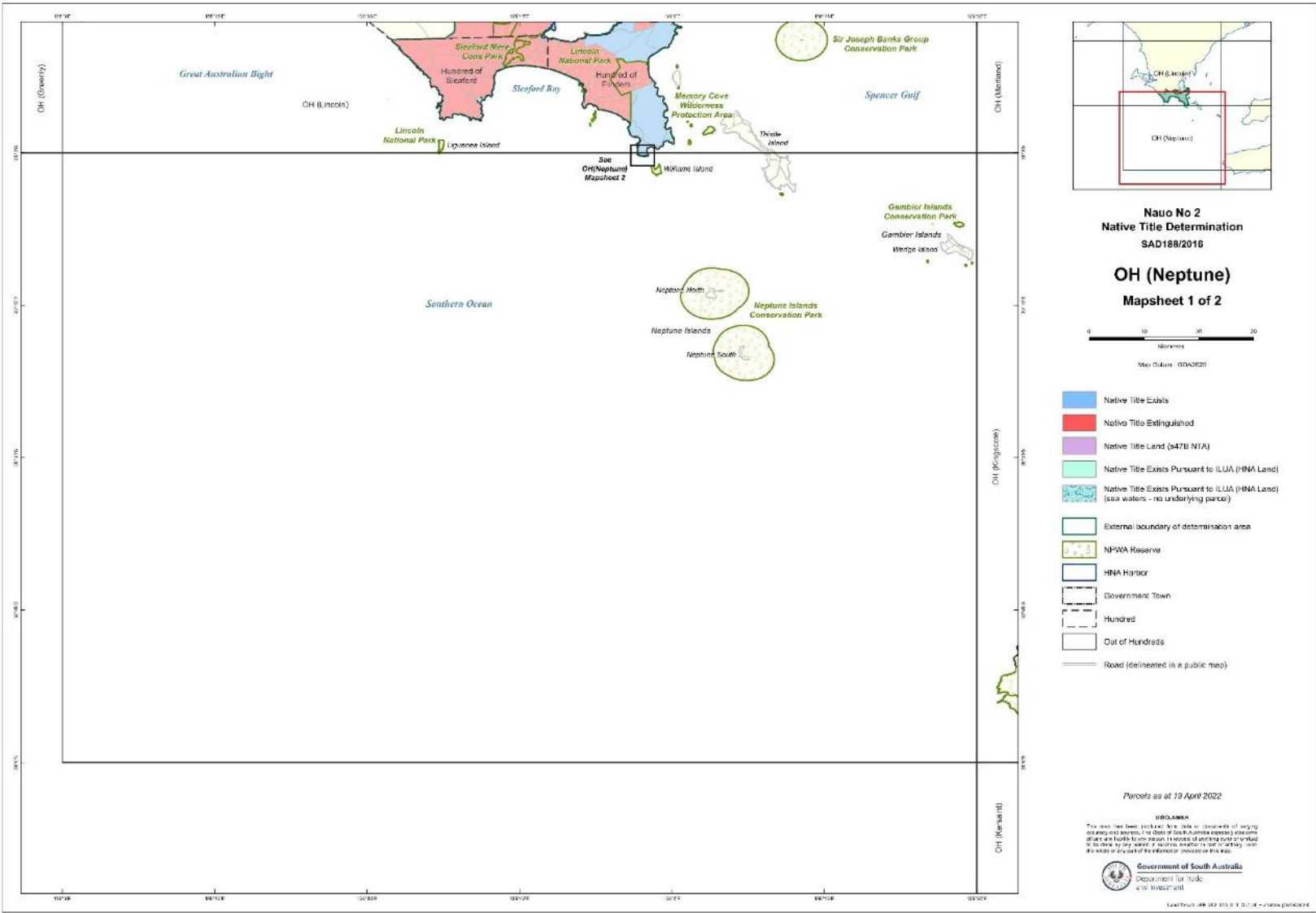




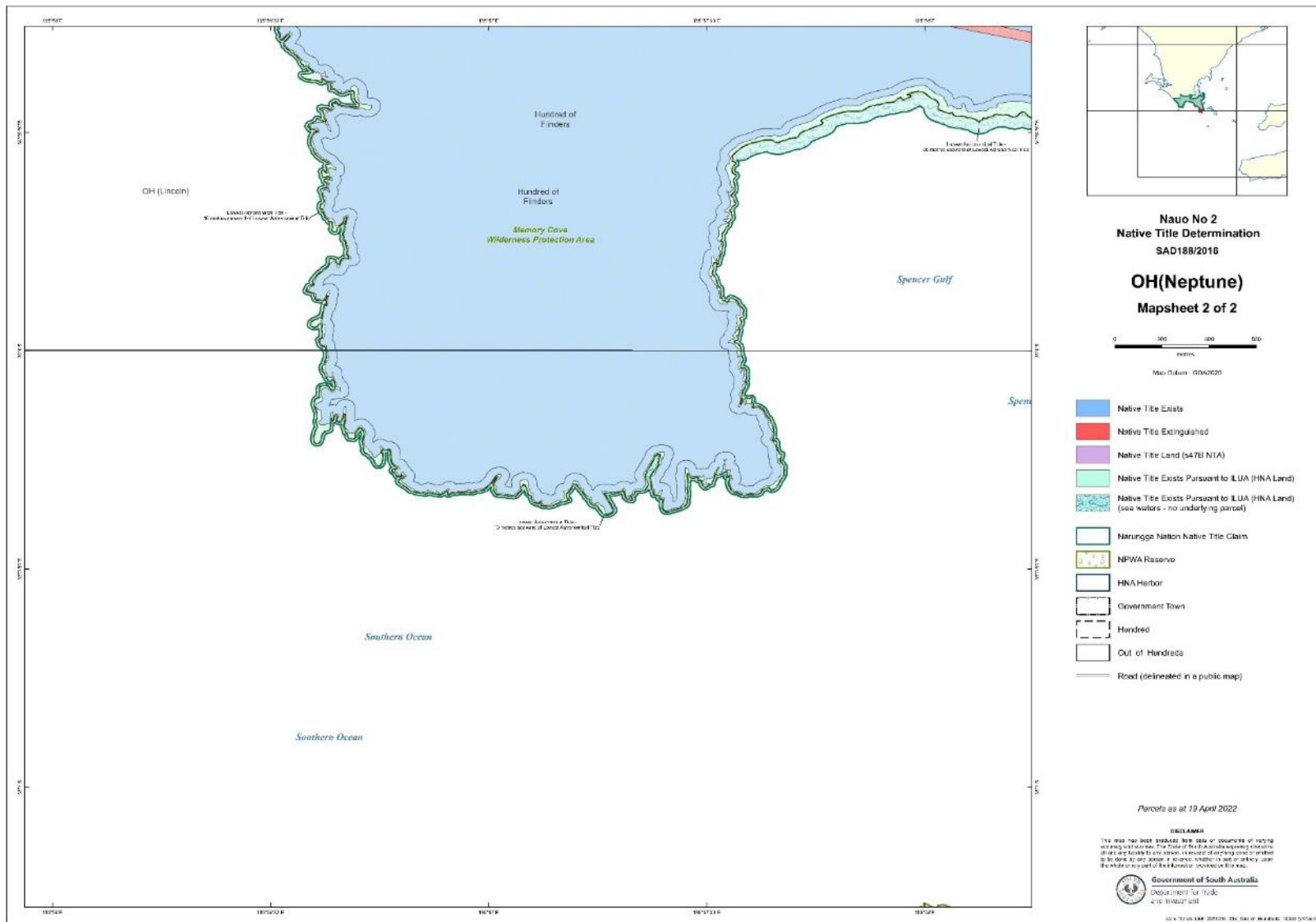












### SCHEDULE 3

#### Land and waters where native title exists (Native Title Land)

Note: Please refer to maps provided in Schedule 2 Part B for further detail where a portion of a parcel is indicated.

Parcel ID	Hundred	Title Ref.	Native Title Status	Native Title Status - Portion Remainder	Park Name
H510200S12	FLINDERS	CR5910/81	NT Exists		Memory Cove Wilderness Protection Area
H510200S14	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S19	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S2	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S20	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S21	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S23	FLINDERS	CR5910/81	NT Exists		Memory Cove Wilderness Protection Area
H510200S24	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S25	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S26	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S27	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S28	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S29	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S3	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S30	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S31	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S32	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S33	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S34	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S35	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
H510200S5	FLINDERS	CR5910/82	NT Exists		Lincoln National Park
D26838A4	LINCOLN	CR5910/82	NT Exists		Lincoln National Park
D53948Q114	LINCOLN	CR5831/617	NT Exists (portion)	NT Extinguished	
D53948Q115	LINCOLN	CR5831/617	NT Exists		
D53949A16	LINCOLN	CR5857/756	NT Exists		
D53949A18	LINCOLN	CR5857/756	NT Exists		
H510600S516	LINCOLN	CR5757/940	NT Exists		
H510600S628	LINCOLN	CR5750/28	NT Exists		
H510600S640	LINCOLN	CR5768/497	NT Exists		
H510600S647	LINCOLN	CR5831/618	NT Exists		
H510600S690	LINCOLN	CR5747/680	NT Exists		
D24351A1	SLEAFORD	CR5752/772	NT Exists (portion)	NT Extinguished	
D24351A3	SLEAFORD	CR5763/696	NT Exists		
D66185A11	SLEAFORD	CR5939/128	NT Exists (portion)	NT Land (s47B NTA)	

D71437A102	SLEAFORD	CR5993/375	NT Exists (portion)	NT Extinguished	
D77220A62	SLEAFORD	CR6018/364	NT Exists (portion)	NT Land (s47B NTA)	
D84975A116	SLEAFORD	CR6081/883	NT Exists (portion)	NT Extinguished	

## SCHEDULE 4

### Areas where extinguishment of native title is to be disregarded due to the operation of s 47B of the Native Title Act 1993

Note: Please refer to maps provided in Schedule 2 Part B for further detail where a portion of a parcel is indicated.

Parcel ID	Hundred	Title Ref.	Native Title Status	Native Title Status - Portion Remainder
H510600S613	LINCOLN	CR5750/27	NT Land (s47B NTA)	
D24351A2	SLEAFORD	CR5763/695	NT Land (s47B NTA)	
D66185A11	SLEAFORD	CR5939/128	NT Land (s47B NTA) (portion)	NT Exists
D72567A4	SLEAFORD	CR6006/254	NT Land (s47B NTA)	
D72567A5	SLEAFORD	CR6006/255	NT Land (s47B NTA)	
D77220A62	SLEAFORD	CR6018/364	NT Land (s47B NTA) (portion)	NT Exists



## SCHEDULE 5

### Areas where native title exists pursuant to the Nauo Settlement ILUA

Note: Please refer to maps provided in Schedule 2 Part B for further detail where a portion of a parcel is indicated.

Parcel ID	Hundred	Title Ref.	Native Title Status
D35926A11	FLINDERS	CR5910/82	NT Exists pursuant to ILUA (HNA Land)
D64387A101	FLINDERS	CR5919/926	NT Exists pursuant to ILUA (HNA Land)
D64387A102	FLINDERS	CR5919/927	NT Exists pursuant to ILUA (HNA Land)
D64387A103	FLINDERS	CR5919/928	NT Exists pursuant to ILUA (HNA Land)
MHWM-LAT_FLINDERS	FLINDERS		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)
MHWM-LAT_LINCOLN	LINCOLN		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)
SeaWaters_OH(LINCOLN)	OH(LINCOLN)		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)
SeaWaters_OH(NEPTUNE)	OH(NEPTUNE)		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)
D35926A2	SLEAFORD	CR5910/82	NT Exists pursuant to ILUA (HNA Land)
D35926A3	SLEAFORD	CR5910/82	NT Exists pursuant to ILUA (HNA Land)
MHWM-LAT_SLEAFORD	SLEAFORD		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)
MHWM-LAT_ULEY	ULEY		NT Exists pursuant to ILUA (HNA Land) (sea waters - no underlying parcel)

## SCHEDULE 6

### Areas where native title does not exist

Note: Please refer to maps provided in Schedule 2 Part B for further detail where a portion of a parcel is indicated.

1. Native title rights and interests do not exist in:
  - (a) minerals as defined in section 6 of the *Mining Act 1971* (SA);
  - (b) petroleum, as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA);
  - (c) a naturally occurring underground accumulation of a regulated substance as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), below a depth of 100 metres from the surface of the earth;
  - (d) a natural reservoir, as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), below a depth of 100 metres from the surface of the earth;
  - (e) geothermal energy, as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA) the source of which is below a depth of 100 metres from the surface of the earth.

For the purposes of this item 1 and the avoidance of doubt:

- (f) a geological structure (in whole or in part) on or at the earth's surface or a natural cavity which can be accessed or entered by a person through a natural opening in the earth's surface, is not a natural reservoir;
- (g) thermal energy contained in a hot or natural spring is not geothermal energy as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA);
- (h) the absence from this Order of any reference to a natural reservoir or a naturally occurring accumulation of a regulated substance, as those terms are defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), above a depth 100 metres below the surface of the earth or geothermal energy the source of which is above a depth of 100 metres below the surface of the earth is not, of itself, to be taken as an indication of the existence or otherwise of native title rights or interests in such natural reservoir, naturally occurring accumulation of a regulated substance or geothermal energy.

2. Native title rights and interests have been extinguished in the areas of Native Title Land covered by Public Works (including the land and waters defined in section 251D of the NTA) which were constructed, established or situated prior to 23 December 1996 or commenced to be constructed or established on or before that date.
3. Public Works constructed, established or situated after 23 December 1996 on Native Title Land have had such effect as has resulted from Part 2, Division 3, of the NTA.
4. Native title rights and interests have been extinguished over all roads which have been delineated in a public map pursuant to section 5(d)(ii) of the *Crown Lands Act 1929* (SA) or section 70(3) or (4) of the *Crown Land Management Act 2009* (SA) or which have otherwise been validly established pursuant to South Australian statute or common law.

Parcel ID	Hundred	Title Ref.	Native Title Status	Native Title Status - Portion Remainder	Park Name
D14467A1	FLINDERS	CT5757/650	NT Extinguished		
D27674A105	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
D27674A106	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
D27674A107	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
D64397A1	FLINDERS	CR5918/369	NT Extinguished		Memory Cove Wilderness Protection Area
D64397A2	FLINDERS	CR5918/369	NT Extinguished		Memory Cove Wilderness Protection Area
D64397A3	FLINDERS	CR5918/370	NT Extinguished		Lincoln NP
D64397A4	FLINDERS	CR5918/369	NT Extinguished		Memory Cove Wilderness Protection Area
D64397A5	FLINDERS	CR5918/370	NT Extinguished		Lincoln NP
D64397A6	FLINDERS	CR5918/369	NT Extinguished		Memory Cove Wilderness Protection Area
H510200S13	FLINDERS	CR5910/81	NT Extinguished		Memory Cove Wilderness Protection Area
H510200S18	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
H510200S22	FLINDERS	CR5910/81	NT Extinguished		Memory Cove Wilderness Protection Area
H510200S37	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
H510200S38	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
H510200S39	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
H510200S4	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP
H510200S40	FLINDERS	CR5910/82	NT Extinguished		Lincoln NP

H510200S6	FLINDERS	CR5910/81	NT Extinguished		Memory Cove Wilderness Protection Area
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D26838A2	LINCOLN	CR5910/82	NT Extinguished		Lincoln NP
D27069A1	LINCOLN	CT5388/836	NT Extinguished		
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D27674A102	LINCOLN	CR5910/82	NT Extinguished		Lincoln NP
D40346A1	LINCOLN	CT6159/178	NT Extinguished		
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D53948A104	LINCOLN	CT5852/742	NT Extinguished		
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D53948A108	LINCOLN	CT5852/189	NT Extinguished		
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D53948A112	LINCOLN	CT5848/173	NT Extinguished		
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D53948Q114	LINCOLN	CR5831/617	NT Extinguished (portion)	NT Exists	
D53949A11	LINCOLN	CT5879/822	NT Extinguished		
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D53949A13	LINCOLN	CT5862/25	NT Extinguished		
D53949A14	LINCOLN	CT5883/571	NT Extinguished		
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D89971A50	LINCOLN	CT6101/171	NT Extinguished		
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F180270A238	LINCOLN	CT5875/701	NT Extinguished		
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F217422A57	LINCOLN	CT6190/100	NT Extinguished		
F217422A58	LINCOLN	CT6190/100	NT Extinguished		
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F217422Q61	LINCOLN	CT6190/100	NT Extinguished		
F217422Q62	LINCOLN	CT6190/100	NT Extinguished		
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H510600S567	LINCOLN	CT5228/780	NT Extinguished		
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H510600S570	LINCOLN	CT5389/142	NT Extinguished		
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H510600S581	LINCOLN	CT6171/680	NT Extinguished		
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H510600S594	LINCOLN	CT6159/141	NT Extinguished		
H510600S618	LINCOLN	CT5365/250	NT Extinguished		
H510600S619	LINCOLN	CT6159/172	NT Extinguished		
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H510600S621	LINCOLN	CT6159/174	NT Extinguished		
H510600S622	LINCOLN	CT6171/686	NT Extinguished		
H510600S623	LINCOLN	CT5201/508	NT Extinguished		
H510600S624	LINCOLN	CT5460/44	NT Extinguished		
H510600S625	LINCOLN	CT5453/883	NT Extinguished		
H510600S626	LINCOLN	CT5416/5	NT Extinguished		
H510600S627	LINCOLN	CT5425/241	NT Extinguished		
H510600S629	LINCOLN	CT5394/189	NT Extinguished		
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H510600S631	LINCOLN	CT5215/220	NT Extinguished		
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H510600S633	LINCOLN	CT5457/228	NT Extinguished		
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H510600S635	LINCOLN	CT6159/170	NT Extinguished		
H510600S636	LINCOLN	CT6159/266	NT Extinguished		
H510600S637	LINCOLN	CT5225/266	NT Extinguished		
H510600S638	LINCOLN	CR5754/985	NT Extinguished		
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H510600S669	LINCOLN	CL6221/531	NT Extinguished		
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D18980A10	SLEAFORD	CT5773/662	NT Extinguished		
D18980A11	SLEAFORD	CT5231/505	NT Extinguished		
D18980A12	SLEAFORD	CT5155/37	NT Extinguished		
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D27674A101	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
D27674A103	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
D27674A104	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
D28257A4	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
D29181A14	SLEAFORD	CT5860/778	NT Extinguished		
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D29181Q12	SLEAFORD	CT5931/770	NT Extinguished		
D36404A10	SLEAFORD	CT5222/323	NT Extinguished		
D36683A51	SLEAFORD	CT5691/896	NT Extinguished		
D66185A10	SLEAFORD	CT5962/128	NT Extinguished		
D68673A1	SLEAFORD	CT5959/562	NT Extinguished		
D71437A101	SLEAFORD	CT5993/374	NT Extinguished		
D71437A102	SLEAFORD	CR5993/375	NT Extinguished (portion)	NT Exists	
D77220A61	SLEAFORD	CT6018/363	NT Extinguished		
D79767A63	SLEAFORD	CT6040/530	NT Extinguished		
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D79767A65	SLEAFORD	CR6040/531	NT Extinguished		
D80082A3	SLEAFORD	CT6036/391	NT Extinguished		
D84975A116	SLEAFORD	CR6081/883	NT Extinguished (portion)	NT Exists	
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H510900S18	SLEAFORD	CT5456/329	NT Extinguished		
H510900S19	SLEAFORD	CT5365/423	NT Extinguished		
H510900S2	SLEAFORD	CT5967/862	NT Extinguished		
H510900S20	SLEAFORD	CT5545/323	NT Extinguished		
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H510900S26	SLEAFORD	CT5926/546	NT Extinguished		

H510900S27	SLEAFORD	CR5757/953	NT Extinguished		
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H510900S30	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
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H510900S36	SLEAFORD	CR5772/860	NT Extinguished		Sleaford Mere CP
H510900S37	SLEAFORD	CT5521/837	NT Extinguished		
H510900S4	SLEAFORD	CT5967/862	NT Extinguished		
H510900S44	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
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H510900S519	SLEAFORD	CR5910/82	NT Extinguished		Lincoln NP
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H510900S8	SLEAFORD	CT5967/862	NT Extinguished		
H510900S9	SLEAFORD	CT5174/808	NT Extinguished		
D28972A1	ULEY	CT6157/528	NT Extinguished		
D28972A4	ULEY	CT5875/700	NT Extinguished		
D28972Q2	ULEY	CT5910/434	NT Extinguished		
D28972Q3	ULEY	CT5910/434	NT Extinguished		
F217422A55	ULEY	CT6190/100	NT Extinguished		
F217422A56	ULEY	CT6190/100	NT Extinguished		
H511200S34	ULEY	CT6028/666	NT Extinguished		
H511200S35	ULEY	CT6028/666	NT Extinguished		
H511200S38	ULEY	CT6070/867	NT Extinguished		
H511200S39	ULEY	CT6031/661	NT Extinguished		
H511200S40	ULEY	CR5768/520	NT Extinguished		

## **SCHEDULE 7**

No:(P) SAD188/2016

Federal Court of Australia

District Registry: South Australia

Australia Division: General

### **NAUO #2 NATIVE TITLE CLAIM**

Respondent:	SIMON ABBOTT
Respondent:	MARK ANDREWS
Respondent:	AQUACULTURE RESEARCH PTY LTD
Respondent:	AUSTRALIAN FISHING ENTERPRISES PTY LTD
Respondent:	AUSTRALIAN TUNA FISHERIES PTY LTD
Respondent:	BASCOZ PTY LTD
Respondent:	JOHN CALLAGHAN
Respondent:	DADEETON PTY LTD ACN 007 996 581
Respondent:	DEEMON DIVERS PTY LTD
Respondent:	DEEP VENTURE NOMINEES PTY LTD
Respondent:	DINKO TUNA FARMERS PTY LTD
Respondent:	BRADLEY GOVAN
Respondent:	JULIE GUBB
Respondent:	PAUL GUBB
Respondent:	HOWARD RODD NOMINEES PTY LTD
Respondent:	JILL SCHWASS COMPANY LTD
Respondent:	KINNOCK PTY LTD
Respondent:	LOCK MINDERS LTD
Respondent:	BRUCE LOCK
Respondent:	SANDRA LOCK
Respondent:	MARK STANLEY ANDREWS PTY LTD
Respondent:	KYM DOUGLAS PENALURICK
Respondent:	ANDREW PUGLISI
Respondent:	SOUTH AUSTRALIAN SEAFOODS
Respondent:	TERRY SCHWASS COMPANY LTD
Respondent:	THE PROMISED LAND 2005 LIMITED



Respondent: TRANSTASMAN FISHERIES PTY LTD  
Respondent: WILDCATCH FISHERIES SA INC  
Respondent: TELSTRA CORPORATION LIMITED ABN 33 051 775 556  
Respondent: AMPLITEL PTY LTD

## REASONS FOR JUDGMENT

**O'BRYAN J:**

### Introduction

- 1 This proceeding concerns a native title determination application made on behalf of the Nauro people and is known as the **Nauro #2 application**. By that application, the Nauro people seek a determination of native title under the *Native Title Act 1993* (Cth) (**NTA**) in respect of an area of land and waters at the most southerly tip of the Eyre Peninsula in South Australia. The area includes Lincoln National Park and within it the Memory Cove Wilderness Protection Area.
- 2 The Nauro #2 application is the last of the native title determination applications brought on behalf of the Nauro people to be resolved. The applications brought on behalf of the Nauro people in respect of land and waters that lie to the north of the Nauro #2 determination area were earlier resolved by the native title determinations made by the Court in:
  - (a) Wirangu No 2 (Part B) (SAD64/2022), Wirangu No 3 (Part B) (SAD228/2019), Wirangu Sea Claim #2 (SAD84/2021) and Nauro #3 (SAD63/2018), with reasons published on 10 February 2023 as *Wilson on behalf of the Wirangu People and Weetra on behalf of the Nauro People v State of South Australia* [2023] FCA 60; and
  - (b) Nauro #1 (SAD65/2022) and Nauro #4 (SAD185/2021), with reasons published on 15 May 2023 as *Weetra-Height on behalf of the Nauro People v State of South Australia* [2023] FCA 454.
- 3 The parties to the Nauro #2 application have reached agreement on the terms of a native title determination (**proposed consent determination**) for the areas of the land and sea the subject of the application (**determination area**) and a form of orders regarded as appropriate to provide recognition of the native title rights and interests held by the Nauro people in the determination area. The agreement was initially recorded in a document filed with the Court on 16 July 2024 which was signed by or on behalf of each party to the proceeding. On 18 September 2024, an amended agreement was filed with the Court.
- 4 The parties have applied to the Court for an order in, or consistent with, the terms of the proposed consent determination pursuant to s 87 of the NTA. In support of that application, the parties filed joint submissions dated 15 July 2024 (**joint submissions**).

- 5 By orders made today, a determination of native title has been made in respect of the Nauo #2 application pursuant to the powers conferred on the Court by s 87 of the NTA. These are my reasons for making the determination sought by the parties.

### **The native title application**

#### ***Filing and notification of the application***

- 6 The Nauo #2 application was filed on 21 June 2016. The claim was entered on the Register of Native Title Claims on 6 July 2017 and has remained registered since that date. It was notified between 20 September 2017 and 19 December 2017. As part of the resolution of the collective Nauo proceedings by agreement, final amendment of the claim with respect to the claim group description and the offshore boundary was filed in December 2021.

#### ***The claim area***

- 7 The claim area covers 535 square kilometres of the land and waters of the most southerly tip of the Eyre Peninsula. It includes Lincoln National Park and within it the Memory Cove Wilderness Protection Area. The claim area covers all the land and waters within the external boundary which includes a 10 metre buffer seaward of the Lowest Astronomical Tide (**LAT**) along the shoreline. From the western coastline of Sleaford, the claim boundary runs inland north-easterly to meet the southern boundary of the Barngarla native title determination. It follows that boundary east to the shoreline of Boston Bay at Tulka. The claim then includes the coastline of Boston Bay, rounding Cape Donington in the east to head south to the most southerly point of Lincoln National Park at Cap Turenne where the coastline then turns north following the long arc of the beach where the wreck of the Mary Ellis still lies just south of Sleaford Mere. The coastline turns south past Fishery Bay and Whalers Way to Cape Wiles turning west past Flinders Crevasse then north to the commencement point on the soaring cliffs of Sleaford.
- 8 The coastal boundary is 10 metres seaward of the LAT but also includes all internal waters of Fishery Bay enclosed by a line that extends across the bay from headland to headland. The offshore boundary extends to 50 metres seaward of all easily accessible beaches as defined by the latitude and longitude co-ordinates of those beaches in a table set out in the written description of the proposed determination area.
- 9 Lincoln National Park surrounds Boston Bay, the largest natural harbour in Australia, with granite headlands, sheltered bays and offshore islands. The Park features an unspoilt eco system

covered in eucalypt and sheoak woodlands, harbouring a wide variety of birds, including the bush stone-curlew and the rare western whipbird. The Park includes the wind-sculpted sand dunes of the Sleaford-Wanna dune system. The coastline is exposed to the driving force of the Southern Ocean with spectacular cliffs and wave formations. In the waters offshore from the Peninsula's southern shoreline lies Thorny Passage Marine Park where up to 13 species of whales gather in the area, including the southern right whale. Seals, dolphins and the great white shark are found in the waters abutting the claim area. The marine environment of this part of their traditional country has always been of great significance to Nauo people.

- 10 Outside the conservation areas, the land and waters within the claim boundary support pastoral, agricultural, fishery and tourism industries.
- 11 The claim area has a Mediterranean climate with warm to hot dry summers and cool, wet winters. It is rich in bird life with osprey, sea eagles, plovers, oyster catchers and other unique species such as the Port Lincoln parrot making their homes in the many unspoilt parts of the claim areas.

***European settlement of the claim area***

- 12 From 1788 to 1825 the British colony of New South Wales extended westwards to 135° east longitude (about 10 km east of the township of Elliston). The land further to the west was known as New Holland and was unclaimed by any foreign power. In 1825 the western boundary of New South Wales was extended to 129°, placing it at what is now the border between South Australia and Western Australia.
- 13 Effective sovereignty for this part of the Eyre Peninsula began from about 1839–40, when the first Europeans explorers ventured into the area, or the early 1850s, when the first sheep stations were carved out and a police station was established north of Elliston at Venus Bay in 1853. Pastoralists and others followed, establishing pastoral stations across the claim areas from the 1860s onwards. Settlement of the area was a contested and often violent frontier for a long period of time, severely impacting the Nauo people.
- 14 Many Nauo people live in Port Lincoln and small townships north of the Nauo #2 claim area and coastal settlements such as Coffin Bay, to be close to the lands and waters covered by the claim area. As shown by the statements made by members of the claim group (listed below), the claimants, their families and forebears have remained substantially connected to the claim



area since colonists arrived, overcoming the removal of many Nauo people to Point Pearce in the early 1900s through their determined return to their traditional country.

- 15 In 1997, following the commencement of the NTA on 1 January 1994, Nauo people commenced their efforts to secure recognition of their native title rights and interests, held under their traditional laws and customs, in the claim area. Since prior to the filing of their claims and continuously since then, Nauo people have engaged in the native title process with the support of representative bodies for the region, first the Aboriginal Legal Rights Movement and subsequently South Australian Native Title Services.

### ***Parties to the application***

- 16 By the end of the notification period for the claim, persons who provided Forms 5 within the notification period were joined as parties to the proceedings including local government bodies, and parties with fishing, pastoral or commercial interests within the claim area. In the course of the claims some parties have withdrawn, some have been added and others removed. A copy of the proposed consent determination signed by or on behalf of all current parties to the proceeding has been filed with the Court.

### ***Progress of the claim***

- 17 The efforts made by the Nauo people for recognition of their native title rights and interests in the area that is the subject of the Nauo #2 application has a lengthy history.
- 18 A native title claim to the most southern part of the Eyre Peninsula was originally made by Nauo people on 17 November 1997 as part of the Nauo #1 application. That part of the Nauo #1 application was overlapped by a native title determination application filed by the Barngarla People (SAD6011/1998, lodged on 4 April 1996). Pursuant to efforts to resolve overlapping claims in the Eyre Peninsula by agreement, in 1999, 2000 and 2012, the Nauo #1 application was amended to withdraw its boundary from the most southern parts of the Eyre Peninsula so that it no longer overlapped the Barngarla claim.
- 19 The Barngarla claim was determined by Mansfield J in *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2)* [2016] FCA 724 (***Croft***). In *Croft*, expert evidence was given that, at sovereignty, and during the settlement of the Eyre Peninsula, Nauo people held core rights to country in the southern part of the Eyre Peninsula (see for example *Croft* at [697]-[702] and [704]-[706]). Mansfield J was ultimately not satisfied on the evidence that the area of the Eyre Peninsula south of Port Lincoln was Barngarla country, and his Honour

dismissed the claim by Barngarla people to hold native title south of Port Lincoln (see *Croft* at [683], [696], [702] and [703]).

20 Following the decision in *Croft*, Nauo people restored the Nauo claim to the southern part of the Eyre Peninsula by filing the Nauo #2 application on 21 June 2016.

21 On 19 February 2020, a new claim was filed on behalf of Barngarla people called the Barngarla Southern Eyre Peninsula Native Title Claim (SAD26/2020) (**BSEP claim**) which entirely overlapped the Nauo #2 claim area. On 24 December 2020, Charlesworth J dismissed the BSEP claim as an abuse of process because it constituted an attempt to relitigate matters that had been finally determined in the earlier Barngarla proceedings: *McNamara (Barngarla Southern Eyre Peninsula Native Title Claim) v State of South Australia* [2020] FCA 1875.

22 On 19 July 2022, the Court made orders removing two respondents, who opposed the Nauo #2 claim, as parties to the proceeding on the basis that they did not have an interest that may be affected by a determination in the proceeding: *Weetra on behalf of the Nauo People v State of South Australia* [2022] FCA 828.

***Evidence relied on by the State and active respondents***

23 The parties, by way of their joint submissions, informed the Court that the applicant had made available to the State and other respondents a number of outlines of evidence and/or s 47B affidavits from the following claimants: Brenton Weetra, Danielle A’Hang, Jody Miller, Pauline Branson, Jo-Anne Miller, Michael Miller, David Buzza, Jason Ramp, Mark Larking and Cynthia Buzza. In addition, in the course of resolving the Nauo #1 and #3 claims, expert anthropological reports of Dr Scott Cane and Dr Belinda Leibel were prepared, and the State obtained a responsive report of Dr Kingsley Palmer, as well as a historical report by Mr Tom Gara.

24 The State and respondents have given careful consideration to the evidentiary material provided by the applicant and have also had regard to the expert reports. On the basis of that material, the State and respondents reached agreement with the applicant with respect to the recognition of the native title rights and interests of the Nauo people in the determination area in the form of the proposed consent determination and an Indigenous land use agreement, discussed below.

### ***Prescribed body corporate***

- 25 By affidavit affirmed 18 July 2024, Mr Andrew Beckworth (Principal Legal Officer for South Australian Native Title Services Limited and the legal representative for the applicant) deposed that, at a meeting held on 14 March 2024, members of the Nauo native title claim group unanimously resolved to nominate the Nauo Aboriginal Corporation RNTBC (ICN 9948) to be the prescribed body corporate to hold their native title in respect of the determination area on trust. Mr Beckworth also deposed that the Nauo Aboriginal Corporation Board of Directors has accepted the nomination to be the prescribed body corporate for the Nauo #2 determination.
- 26 The Nauo Aboriginal Corporation is registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) and was previously appointed as the prescribed body corporate in respect of the Nauo #1 and Nauo #4 native title determinations: *Weetra-Height on behalf of the Nauo People v State of South Australia* [2023] FCA 454.

### ***Indigenous Land Use Agreement***

- 27 By their joint submissions, the parties have informed the Court that the applicant, the State and the Nauo Aboriginal Corporation have agreed to enter into an Indigenous land use agreement (**Nauo #2 Settlement ILUA**) as part of the resolution of the Nauo #2 application. Among other things, the Nauo #2 Settlement ILUA provides that, upon its registration, the vesting of adjacent land and subjacent land in the Minister under s15(1)(a) of the *Harbors and Navigation Act 1993* (SA) (**Harbors Act**) is a valid act to which the non-extinguishment principle applies. It also provides for validation of potentially invalid previous exclusive possession acts and compensation of the applicant for prior extinguishment of native title over certain parcels in the claim area. The State and the applicant have agreed that the Nauo #2 native title determination will take effect upon the registration of the Nauo #2 Settlement ILUA under Div 3 of Pt 2 of the NTA.

### ***Statutory requirements***

- 28 The parties seek orders by consent from the Court pursuant to s 87 of the NTA. Under s 87, the Court is empowered to make an order in, or consistent with, the terms agreed between the parties without holding a hearing (s 87(2)) if the following conditions are satisfied:
- (a) the period specified in the notice given in the proceeding under s 66 has ended (s 87(1));
  - (b) agreement has been reached on the terms of an order of the Court between the parties to the proceeding (and, if the Commonwealth Minister is intervening at the time the

agreement is made, the Commonwealth Minister) (s 87(1)(a) and (aa)), and the terms of the agreement, in writing signed by or on behalf of the parties (and, if the Commonwealth Minister is intervening at the time the agreement is made, the Commonwealth Minister) have been filed with the Court (s 87(1)(b));

- (c) the Court is satisfied that an order in, or consistent with, the terms agreed between the parties would be within the power of the Court (s 87(1)(c)); and
- (d) the Court is satisfied that it is appropriate to make the order (s 87(1A)).

See generally *Munn for and on behalf of the Gunggari People v State of Queensland* (2001) 115 FCR 109 (**Munn**) at [4]-[5].

***Condition (a) – period specified in notice under s 66***

- 29 As set out earlier in these reasons, the notification period in this proceeding under s 66 was between 20 September 2017 and 19 December 2017. That period has ended. Accordingly, condition (a) is satisfied.

***Condition (b) – agreement has been reached and the terms filed with the Court***

- 30 A minute of consent determination in respect of this proceeding was filed with the Court on 18 September 2024. The minute records that:

- (a) the parties have reached agreement on the terms of orders of the Court in relation to the Nauro #2 claim; and
- (b) the terms of the agreement are that each party consents to the making of orders pursuant to s 87 of the NTA and a determination of native title in the terms that were distributed by the State on 17 September 2024, including the maps distributed on 13 July 2023 and the tenure schedules distributed on 17 September 2024.

- 31 A copy of the proposed consent determination, referred to in the minute, has also been filed with the Court and is the basis for this determination by the Court. Accordingly, condition (b) is satisfied.

***Condition (c) – proposed order would be within the power of the Court***

- 32 In order to be satisfied that the proposed orders are within the power of the Court, consideration must be given to other restrictions or requirements in the NTA applicable to any determination of native title: *Freddie v Northern Territory* [2017] FCA 867 (**Freddie**) at [15]. In that regard, I have considered the following requirements:



- (a) the requirement in s 68 that the area covered by the determination cannot be the subject of a previously approved determination of native title;
- (b) the requirement in s 94A that the determination set out the details of the matters required by s 225;
- (c) the requirement in s 223(1)(c) that the determination concerns rights and interests which the Australian common law is able to recognise; and
- (d) the requirement in s 55 for the Court to make such determinations as are required by ss 56 and 57 at the same time as, or as soon as practicable after, the Court makes the determination, including:
  - (i) specifying whether the native title is to be held in trust and, if so, by whom;
  - (ii) if the native title is to be held in trust by a body corporate, that a representative of the native title holders has given the Court a written nomination of a prescribed body corporate together with the written consent of the body corporate to be the trustee; and
  - (iii) if the native title is not to be held in trust, that a representative of the native title holders has given the Court a written nomination of a prescribed body corporate together with the written consent of the body corporate to be a non-trustee prescribed body corporate.

*Section 68 (overlap with previous determination)*

- 33 Based on the records of the National Native Title Register kept under Pt 8 of the Act, I am satisfied that there is no determination of native title in existence over the area the subject of this proposed consent determination.

*Section 94A (details required by s 225) and s 223(1)(c)*

- 34 Section 225 defines a “determination of native title” as follows:

A **determination of native title** is a determination whether or not native title exists in relation to a particular area (the **determination area**) of land and waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and

- (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

35 I have examined the proposed consent determination. I am satisfied that each of the matters referred to in s 225 is appropriately articulated in those orders and the rights and interests so described are recognisable by the common law of Australia (as per s 223(1)(c)). I note the following matters in particular:

- (a) The determination area is defined at paragraph 6 of the proposed determination by reference to Schedule 1, with paragraph 7 defining the areas of land and water within the determination area in which native title exists by reference to Schedules 3, 4 and 5.
- (b) A description of the native title holders is set out in paragraph 11 of the proposed determination.
- (c) A description of the nature and extent of the native title rights and interests in relation to the determination area is set out in paragraphs 12 to 15 of the proposed determination. Paragraph 13 stipulates that the native title rights and interests do not confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.
- (d) A description of the nature and extent of other interests in relation to the determination area is set out in paragraph 16 of the proposed determination.
- (e) The relationship between the native title rights and interests and the other interests is set out in paragraph 17 of the proposed determination.

*Section 55 (whether native title held in trust and prescribed body corporate)*

36 Section 55 of the NTA stipulates that, if the Court proposes to make an affirmative determination of native title it must, at the same time as, or as soon as practicable after, it makes the determination, make such determinations as are required by s 56 (which deals with the determination of a prescribed body corporate to hold the native title in trust for the common law holders) or s 57 (which deals with the determination of a prescribed body corporate to perform the non-trust functions specified in s 57(3)).

37 The parties seek a determination that the native title the subject of this determination is to be held on trust by the Nauo Aboriginal Corporation RNTBC.

38 Before making a determination to that effect, s 56(2) requires that the Court receive a written nomination from a representative of the native title holders of the Nauo Aboriginal Corporation to be a trustee of the native title, together with the written consent of that body corporate. The Court must also be satisfied that the Nauo Aboriginal Corporation is a prescribed body corporate within the meaning of the NTA. Section 59 provides that regulations may prescribe the kinds of body corporate that may be determined under s 56(2)(b). Regulation 4 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) sets out the requirements for a body corporate to be a prescribed body corporate for that purpose.

39 As set out earlier, evidence has been filed by the applicant concerning the nomination by the Nauo native title holders of the Nauo Aboriginal Corporation to hold their native title in trust, the company's consent to act as a prescribed body corporate and its registration under, and satisfaction of the relevant requirements of, the CATSI Act. I am therefore satisfied that the Court is empowered to make the determinations sought by the parties under s 56.

#### *Other orders*

40 One of the orders sought by the parties requires specific reference. Paragraph 9 of the proposed consent determination provides as follows:

The Court notes that the State and the Applicant have entered into the Nauo #2 Settlement ILUA. In accordance with the agreement recorded in that ILUA, native title exists, subject to the terms of these Orders, in Adjacent land and Subjacent land within the Determination Area that is vested in the Minister under section 15(1)(a) of the *Harbors and Navigation Act 1993* (SA), including the areas identified in Schedule 5 but excluding those areas identified in Schedule 6.

41 The first sentence of that proposed order has no operative effect. The balance of the order records part of the agreement between the parties under the Nauo #2 Settlement ILUA, that the vesting of adjacent land and subjacent land in the Minister under s 15(1)(a) of the *Harbors Act* is a valid act to which the non-extinguishment principle applies. Once the Nauo #2 Settlement ILUA is registered on the Register of Indigenous Land Use Agreements, the parties' agreement is given statutory effect for the purposes of the NTA pursuant to s 24EBA. The intended effect of proposed paragraph 9 of the proposed consent determination is to recognise, within the determination of native title, the statutory effect of the parties' agreement under the Nauo #2 Settlement ILUA (noting that the determination will not come into effect until the Nauo #2

Settlement ILUA has been registered). I consider it is within the power of the Court to make an order of the kind sought by paragraph 9 (albeit that I will exclude the first sentence which has no operative effect).

***Condition (d) – it is appropriate to make the proposed order***

- 42 As noted above, in exercising its power under s 87 of the NTA, the Court must be satisfied that it is appropriate to make an order in, or consistent with, the terms agreed between the parties. Factors that may be relevant to the exercise of the Court's discretion to make a determination of native title under ss 87 and 87A have been considered in many cases, including *Munn* at [28]-[33]; *Kelly on behalf of the Byron Bay Bundjalung People v NSW Aboriginal Land Council* [2001] FCA 1479 at [20]-[23]; and *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 at [4]. In *Freddie and Agius v State of South Australia (No 6)* [2018] FCA 358 (***Agius***), Mortimer J (as her Honour then was) examined in detail the issue of appropriateness in the context of s 87(1A). At [63] of *Agius*, her Honour observed:

The Court's function where there is agreement as to a determination of native title, and its discretion, must also be understood in the context of the Native Title Act's emphasis on negotiation and alternative dispute resolution, whereby one particular object of the Native Title Act is to resolve claims to native title without judicial determination in a contested proceeding: see *Munn (for and on behalf of the Gunggari People) v Queensland* [2001] FCA 1229; 115 FCR 109 at [28] (Emmett J). I note in this context that the Preamble to the Act envisages that:

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, *this is done by conciliation* and, if not, in a manner that has due regard to their unique character.

(Emphasis added)

- 43 Her Honour summarised the role of the Court as follows:
- (a) The s 87(1A) role is quite different from the Court's role in contested hearings. The Court's focus is on the agreement between the parties: *Lander v State of South Australia* [2012] FCA 427 at [11]; *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474 at [36] (*Agius* at [62]).
  - (b) Satisfaction as to appropriateness must take into account the nature of the rights sought to be recognised in the determination, having operation against the whole world, including rights *in rem*. The orders should be clear in their terms and the process one which observes procedural fairness and is supported by the State's agreement that a "credible and rational basis" for the determination has been made out (*Agius* at [64]).

- (c) The discretion as to appropriateness is wide but the Court must focus on the individual circumstances of each determination: *Hayes on behalf of the Thalanyji People v State of Western Australia* [2008] FCA 1487 at [18] (*Agius* at [65]).
- (d) The Court must also consider ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) and pursue the objectives of those provisions promoting the just resolution of disputes, according to law, and as quickly, inexpensively and efficiently as possible (for example *Yaegl People #2 v Attorney General of New South Wales* [2017] FCA 993 (*Yaegl*)) (*Agius* at [66]).
- (e) There must be some probative material to allow the Court to satisfy itself that the requirements of s 225 of the Act are met. However, there is no requirement to file all of the material as the determination is based on the agreement entered into on a free and informed basis: *Hughes (on behalf of the Eastern Guruma People) v State of Western Australia* [2007] FCA 365 at [9] (*Agius* at [68] to [69]).
- (f) The Court is not required to conduct an enquiry on the merits, but must still be satisfied that the State made a reasonable and rational decision in entering the s 87 agreement: *Brown v Northern Territory of Australia* [2015] FCA 1268 at [23]; *King (on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group) v State of South Australia* [2011] FCA 1387 at [21] (*Agius* at [70] to [71]).
- (g) The Court should be satisfied that the State came to the agreement after discharging its public responsibilities to the community it represents, including the claimants: *Yaegl* at [16] (*Agius* at [72]).
- (h) The public interest in a settled outcome as opposed to an exhaustive contested process is considerable: *Prior on behalf of the Juru (Cape Upstart People) v State of Queensland (No 2)* [2011] FCA 819 at [26] (*Agius* at [74]).
- (i) The flexibility of a settled outcome allows the State to take into account a wide range of matters including, for instance, the history of dispossession (*Agius* at [75]).

44 In the present case, I am satisfied that it is appropriate to make the consent determination for the following reasons.

45 First, the agreement reached between the parties is a culmination of a lengthy period of investigation and negotiation.



46 Second, all parties have been legally represented and there is no reason to doubt that the parties  
have made an informed decision to resolve the application by agreement.

47 Third, the State, in its role of protecting the interests of the community generally, has been an  
active participant in the investigation and negotiation of the proposed consent determination.

48 Fourth, the joint submissions of the parties have identified the lay and expert evidence that  
provides a proper basis for the State to reach the conclusion that the proposed consent  
determination has a rational and reasonable basis.

### **Conclusion**

49 In conclusion, I am satisfied that the proposed consent determination should be made. The  
native title rights and interests of the Nauo people in the areas of land and sea that are the  
subject of this proceeding should be formally recognised in the proposed consent determination  
under the NTA.

50 It is important to observe that this determination of native title does not create native title in  
the determination area. Instead, it constitutes the recognition by the Australian legal system of  
the Nauo people's long held native title in the determination area which has existed, according  
to the traditional laws and customs of the Nauo people, since long before this determination  
today and before the assertion of British sovereignty over the land and waters of Australia.

51 The parties and their representatives are to be congratulated on bringing this matter to a  
conclusion by way of agreement.

I certify that the preceding fifty-one  
(51) numbered paragraphs are a true  
copy of the Reasons for Judgment of  
the Honourable Justice O'Bryan.

Associate:

Dated: 23 September 2024