



11 February 2013

**Network Infrastructure
Management**

**Review of communication towers on Crown
land
Independent pricing and Regulatory Tribunal
PO Box Q290
QVB post office NSW 1230**

Level 6, Telstra House
231 Elizabeth Street
SYDNEY NSW 2000
Australia

Online :
**[www.ipart.nsw.gov.au/Home/Consumer_Inf
ormation/Lodge_a_submission](http://www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission)**

Locked Bag 6792
SYDNEY NSW 2001

Telephone (02) 8576 3131
Mobile 0439 988926

bob.j.joice@team.telstra.com

Dear Sir/ Madam,

**Telstra Corporation Limited: Submission into the Review of rental
arrangements for communications towers on crown land.**

Telstra refers to the Issues paper released on 14 November 2012 in regard to this matter.

Please find attached Telstra's submission.

I look forward to your response.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Bob Joice".

**Bob Joice
General Manager, Site Acquisition
Network Infrastructure Management**



1. EXECUTIVE SUMMARY

Telstra appreciates the opportunity to participate in the Independent Pricing and Regulatory Tribunal's ("**IPART**") review of the rental arrangements for Crown land.

Telstra has reviewed the IPART Issues Paper, *Review of rental arrangements for communication towers on Crown land December 2012* ("**Issues Paper**"). This submission sets out Telstra's response to the questions raised by IPART in the Issues Paper as well as setting out Telstra's broader observations in relation to the approach proposed by IPART, including Telstra's proposal for an alternative pricing regime for rental of Crown land for communication towers.

In summary, Telstra's position is that the rent setting mechanism for Crown land:

- (a) ought to be simple, transparent, and equitable for all communications tower site users;
- (b) should provide the State of NSW with a fair commercial return for publically owned land occupied for communications purposes;
- (c) should unambiguously articulate the principles to be used in setting rents to impose appropriate discipline on the three land management agencies ("**LMAs**") responsible for the management of Crown land;
- (d) should impose equivalent rents on all occupiers of land undertaking equivalent land uses, rather than with reference to notions of a land occupier's "willingness to pay";
- (e) should not discriminate against telecommunication carriers in a manner that contravenes clause 44 of Schedule 3 to the *Telecommunications Act 1997* (Cth) ("**Telco Act**");
- (f) should recommend that LMAs set rents for all communication tower lessees on the basis of a fixed percentage of the assessed land value of the area of land occupied.

In Telstra's submission the rent setting mechanism, and rent schedule, set out in IPART's *Review of Rental Arrangements for Crown Land Communication Tower Sites* ("**2005 Report**") was inappropriate, without rationale basis and has led to opportunistic behaviour by LMAs. Telstra submits that IPART ought to move away from the framework developed in the 2005 Report, and adopt the approach recommended by Telstra in this submission. Telstra would be pleased to further engage with IPART in relation to the principles articulated above, and in relation to the more detailed matters set out in the remaining parts of this submission.

2. **CLAUSE 44 OF SCHEDULE 3 TO THE TELCO ACT**

2.1 **Federal Court proceeding**

Clause 44 of Schedule 3 to the Telco Act expressly provides that the law of a State, or a person exercising a power under a law of a State, must not discriminate against telecommunication carriers¹.

In the context of a review of the rental arrangements for communication tower sites, a significant proportion of which are leased to telecommunication carriers, a prohibition on discriminating against telecommunication carriers operates as a critical constraint on the discretion of LMAs in setting rents.

This is more than a theoretical point. In 2012 Telstra commenced proceedings against the State of Queensland in the Federal Court of Australia seeking a declaration that certain parts of the *Land Regulation 2009* (Qld) (the "**Land Regulation**"), are invalid because they discriminate against carriers – specifically Telstra.

The Land Regulation creates a specific category of leases for communications sites which dispenses with the traditional principles of valuing Crown land and then sets effectively the highest rents for Crown land in Queensland. Telstra holds the largest number of Crown leases in Queensland by far. Almost all are communications leases.

The effect of the Queensland legislation is that carriers pay rent based on specific land use, whereas the uses to which commercial and government interests put Crown land is not assessed. The narrow and specific "markets" which are purportedly accounted for in rents for communications sites are ignored when assessing rents for land leased by commercial and government interests.

Effectively, Telstra's claim is that it ought to be charged rent at the same rate other commercial and government entities are charged. If Telstra is successful in this case, the relevant parts of the Land Regulation are likely to be declared invalid, and any rent which Telstra has already paid in excess of the rent it would have otherwise have paid if treated equally to other commercial and government entities is likely to be refunded. A copy of Telstra's Originating Application and Further Amended Statement of Claim in that matter is enclosed as Annexure 2 of this submission.

In Annexure 3 to this submission we set out a more detailed summary of the approach that the Federal Court and the High Court has taken to the interpretation of clause 44.

2.2 **Relevance to the IPART review**

It is Telstra's submission that the adoption, by the LMAs, of the pricing regime recommended by IPART in the 2005 Report, has resulted in contravention of clause 44. This is because clause 44(1)(b) prohibits a person from exercising a

¹ The text of clause 44 is set out in Annexure 1 to this submission.

power under a law of a state where that law has the effect of discriminating against a particular carrier, a particular class of carriers, or carriers generally.

The 2005 Report recommended that communication site users be charged different rents on the basis of those users falling into different communications user categories. This delineation was based on the treatment of those categories as distinct "sub-markets", in order to justify differential pricing by reference to private market rental prices, and particularly, the capacity of certain users to pay higher rentals. In Telstra's view, any basis for distinguishing between land users that treats telecommunication carriers less favourably (in both principle and effect) than other comparable land users, is prohibited by clause 44.

As set out in the Issues Paper, there are four main pieces of legislation that permit the LMAs to set rents for occupation of Crown land in NSW:

- (a) *Crown Lands Act 1989* (NSW): permits the Minister² to grant a lease or license over Crown land in the Eastern and Central Division of the state on such terms, and subject to such rent as the Minister sees fit³.
- (b) *Western Lands Act 1901* (NSW): permits the Minister⁴ to grant leases of land in the Western Division of NSW⁵.
- (c) *Forestry Act 2012* (NSW): permits the granting of permits, licences and leases over Crown land classified or dedicated as state forest⁶.
- (d) *National Parks and Wildlife Act 1974* (NSW): permits the Minister⁷ to grant leases, licences or easements over land in national parks in NSW, for the purpose of the erection, use or maintenance of broadcasting or telecommunications facilities⁸.

Under each of those Acts, the power to grant tenure over Crown land, and to set rent for that tenure, is exercisable by one of the LMAs, either directly or by delegation from the relevant Minister⁹. As detailed further below, since the release of the 2005 Report, the LMAs have been setting rents for communications sites on Crown land on the basis of the fee schedule set out in the 2005 Report.

As such, for the reasons set out above, and as further detailed in Annexures 2 and 3 to this submission, the LMAs have been exercising a power vested in them under a law of the state of NSW, to set rents for Crown land leases in a manner that discriminates against carriers and so is inconsistent with clause 44.

² Jointly the Minister for Primary Industries and the Minister for Regional Infrastructure and Services.

³ *Crown Lands Act 1989* (NSW), sections 34 and 50.

⁴ Jointly the Minister for Primary Industries and the Minister for Regional Infrastructure and Services.

⁵ *Western Lands Act 1901* (NSW), sections 2A and 12A, and generally Parts 5 -7.

⁶ *Forestry Act 2012* (NSW), see in particular - Part 1, Divisions 1 and 5, sections 60 and 62.

⁷ The Minister for the Environment.

⁸ *National Parks and Wildlife Act 1974* (NSW), section 153D.

⁹ *Crown Lands Act 1989* (NSW), section 18; *Western Lands Act 1901* (NSW), section 12A; *Forestry Act 1916* (NSW), Part 2, Division 1; *National Parks and Wildlife Act 1974* (NSW), section 12.

It follows that the current approach to rent setting ought to be abandoned in favour of a regime that provides for equality between all users of Crown land in a similar position. In Part 5 of this submission, Telstra details a proposed pricing model that would not be inconsistent with clause 44, and would achieve the objective of "fair market-based commercial returns".

In Telstra's submission, the 2005 Report inadequately considered the implications of clause 44, and the current review affords IPART with the opportunity to re-assess and consider the implications of clause 44 for the setting of rents for communication sites on Crown land.

3. **PRINCIPLES GUIDING THE REVIEW OF CROWN LAND RENTS FOR COMMUNICATION SITES**

The Issues Paper lists four principles that are proposed to guide the review:

- (a) market return;
- (b) administrative efficiency;
- (c) transparency; and
- (d) consistency.

While Telstra supports the objective behind these four principles, it has been Telstra's experience over the last seven years, that the implementation of the 2005 Report by the LMAs has run counter to each of these four principles.

For example, the background document to the 2005 Report directed IPART to apply price discrimination, or differential pricing, when setting recommended rents. Ultimately, the 2005 Report stated that its approach to recommending rents reflected "a conservative view of recent market prices"¹⁰ in relation to identified areas of land in New South Wales, but that the market price "will be influenced by the site's value to the user"¹¹.

IPART stated that it believed that the fee schedule resulted in site rentals that were reasonably consistent with market-based commercial returns,¹² and reflected rentals for each user in each location category based on the average rental paid in the market.¹³ However, in making these statements, IPART relied on the work of its consultant, BEM Property Consultants ("**BEM**"), who it retained to provide expert advice on the fee schedule, and particularly, the use of user categories and market-rent evidence.

The BEM report to IPART stated that the fee schedule should differentiate between service providers,¹⁴ and categorisation should be expanded to more

¹⁰ Pages 16, 20.

¹¹ Page 18.

¹² Page 20.

¹³ Page 29.

¹⁴ Page 9.

accurately reflect the different users and their capacity to pay rent¹⁵. It appears that BEM treated each proposed category of users as quasi-markets for the purpose of BEM's analysis, although BEM noted that in many instance there was limited market data available¹⁶.

For the reasons set out in Part 2 of this submission, Telstra regards the approach recommended by BEM to contravene clause 44 of the Schedule 3 of the Telco Act, in that it recommends that commercial carriers be treated differently to other organisations using the same land for the same purpose.

Further, the LMAs have implemented the recommendations set out in the 2005 report in a manner that has not achieved the principles stated above. In particular, implementation by the LMAs has been inconsistent with the recommendations made by IPART, and far from transparent. This has led to significant cost and time inefficiency for Telstra and the other carriers, with a related impact on the roll-out of necessary telecommunications infrastructure across NSW. The variable rental regime is also administratively inefficient as carriers, and the LMAs, have to keep track of a large number of sites for which very different rental amounts are payable. This inefficiency has increased since 2009 when the Department of Primary Industries ("**DPI**") conducted a reconciliation and reclassification of Crown land sites, with the result that a large number of carrier sites became subject to the 2005 Report rents (this increase is further addressed in Part 4.1 below).

Any recommendations by IPART arising from this review ought to include a recommendation that the NSW State Government (and the relevant Ministers) issue a directive to the LMAs as to how the rental regime is to be applied, in order to provide the transparency and consistency that has been lacking.

These difficulties have been greatly compounded by the fact that the LMAs, as managers of all Crown land in NSW, operate in near monopolistic circumstances. Over the last few years, because of the problems caused by the implementation of the 2005 report, Telstra has sought to avoid installing infrastructure on Crown land. However, as a result of Telstra's universal service obligations ("**USOs**") under Federal telecommunications legislation, it is often necessary to locate network infrastructure on Crown land. This is particularly true in rural and regional areas. The effect of this is that Telstra is forced to pay rental amounts that are vastly inflated over actual land value in areas where Crown land sites are the only option. It is inequitable for IPART to use a subjective assessment of private market rents as the basis for justifying higher Crown land rents for carriers for those areas where the carrier has no alternative - and where there is no actual or potential "market" for that land.

For the reasons outlined in this document, it is Telstra's submission that IPART should consider afresh the bases on which the State Government sets the rent payable for the occupation of Crown land. The 2005 Report should not be considered a starting point for this review as it was based on a number of

¹⁵ Introduction, page 4 (see also page 33).

¹⁶ Page 38.

inappropriate and discriminatory assumptions, that have led to contravention of clause 44.

4. RESPONSE TO SPECIFIC QUESTIONS RAISED IN ISSUES PAPER

Part 4 of this submission contains Telstra's response to the questions in the Issues Paper to which Telstra is able to comment.

4.1 Increase in site numbers

The Issues Paper suggests that the number of Crown land leases and licences for communication tower sites on LMA controlled land has increased significantly since 2005. However, IPART's interpretation of the base figures does not accurately reflect the reasons for those increases. The majority of the increases can be attributed to two factors:

- (a) A reconciliation by the DPI in 2009 of formal tenure for pre-existing communications sites (ie occupied pre-2005), where no formal lease or licence was established at the time between the parties. This reconciliation followed an extensive review and audit between carriers and DPI and included the payment of back-rent. This has artificially inflated the 2012 revenue figures. This increase is largely not attributable to "new" (that is, post-2005) communications sites being established.
- (b) A policy change by the DPI in relation to the management of Crown land reserve trusts. Previously, rents for occupation of reserve trusts were collected by Local Government Authorities, and also 3rd parties managing the Trust Reserve. Now however, DPI have taken over management of reserve trust land, and set rents based on categorisation of carriers as primary users or co-users – which follows from the location of the carriers' telecommunications equipment. As a result of this policy change DPI, in 2009, issued 111 "new" licences to carriers for pre-existing sites.

In reality, there have been comparatively few "new" telecommunications facilities established on Crown land since 2005. For Telstra's part, it has entered into only 16 "new" licences or leases for the establishment of new telecommunications installations on Crown land since 2005.

This small increase is directly attributable to a policy decision made by Telstra to avoid seeking tenure to occupy Crown land subject to the 2005 fee schedule, as Telstra considers the rental amounts charged to carriers to be excessive and discriminatory.

Continuing increases in demand for fixed wireless services will inevitably require Telstra to install additional tower infrastructure. However, Telstra will not install new towers on Crown land unless this is unavoidable. Further, Telstra expects the deployment of the NBN network to afford Telstra with the opportunity to decommission facilities that support the existing fixed line network.

As a result, any further increase in the number of Crown land sites held by Telstra will be very small, unless there is an appropriate incentive by way of a more equitable pricing scheme.

4.2 Definition of "strategic sites"

The Issues Paper equates the "strategic value" of a site with the number of occupiers that have sought to co-locate at that site.

IPART's statement that "the value of these [strategic] sites stems from their location and, consequently, their suitability for multiple users" demonstrates a flawed understanding of why carriers choose to co-locate.

The Issues Paper reflects IPART's view that it is the inherent characteristics of a site that leads multiple carriers co-locate, and which consequently gives a site its "strategic value". However, many sites that are the subject of co-location (and hence would be deemed strategic sites under the proposed IPART formulation), measure poorly against the criteria of location, elevation, and proximity to population centres, which the Issues Paper asserts is the reason multiple occupiers seek to use these sites.

IPART's analysis of the "strategic" value of certain communications sites does not accurately reflect the reasons why those sites have multiple co-users. It is inappropriate to delineate such sites as "strategic" based merely on co-location of users.

In general, co-location is a practice followed by carriers for a number of reasons that having nothing (or little) to do with the inherent characteristics of the site, including:

- (a) Regulatory obligation – the direction from the Telecommunications Code of Practice that carriers consider co-location first, prior to erecting a new structure.
- (b) Capital expenditure savings – carriers are attracted to an existing structure as it is generally located in an appropriate area for the services required, and co-users are not required to outlay the significant expenditure associated with a new tower.
- (c) Reduced "time-to-market" – planning and installing a communications tower generally takes a significant period of time, co-locating allows carriers to respond to customer needs quickly. This is particularly important for communities in areas that are threatened by bushfires or other natural emergencies.
- (d) Community expectations of enhanced services levels and alternative service providers while mitigating the impact on public amenity

In Telstra's submission, it is not the inherent characteristic of a site that attracts multiple occupants. Rather it is the investment in infrastructure at the site by the original occupier that makes that site attractive to other users. That is, it is the fact that the site has already been developed with a tower and that access, electricity supply and optic fibre for back haul transmission exist at the site that attracts subsequent occupiers. These are all assets owned by the original occupant and ought not bear on whether IPART considers a site to be strategic. It would be inappropriate for the LMAs to leverage higher rents for certain Crown

land sites on the basis of capital investment by the original occupant, which in many instances is Telstra.

The definition of "strategic sites" that is proposed by IPART would mean that, for example, as soon as one co-user located on a primary user's tower in a high density category area, that site would fall within the definition, and therefore be subject to rental negotiations. Given the number of sites that have co-users, this would have the effect of dramatically increasing costs and delaying the roll-out of necessary infrastructure, as is further detailed below.

Adopting IPART's approach to "strategic sites" will lead to a significant increase in the number of sites that would require rental negotiations, with a consequent increase in costs and inefficiency, and much less certainty in rental pricing. This would substantially undermine the main principles underlying this review. In addition it may lead to a proliferation of additional towers which may impact on the public amenity.

Telstra submits that IPART's concept of "strategic sites" should be abandoned as it is premised on a flawed understanding of the strategic value of communications sites, and will act as a major disincentive to carriers using Crown land for communications sites.

In the event that the "strategic sites" proposal was adopted, it is likely that carriers would choose to co-locate on land pursuant to the powers and immunities available to them under Schedule 3 to the Telco Act, without entering into any tenure arrangements with the LMAs.

4.3 Negotiating rental agreements

Telstra has substantial experience in negotiating tenure agreements with each of the three LMAs. In the case of the DPI agencies, one recent example relating to Catchment and Lands involved three years of negotiation for the current version of an agreement (and eight years for the previous version) with costs exceeded \$100,000; and recent negotiations with Forests NSW were in the order of 18 months, with a cost for the template document of approximately \$20,000. Further, previous negotiations with the Office of Environmental Heritage (the "OEH") took approximately 12 months at a cost to Telstra of around \$15,000. It is noted that each party covered their own legal costs but the LMAs recover these through fees for establishment or issue of each site document. While these examples are not universal, it is common for Telstra to incur legal expenses in the order of \$20,000 when negotiating lease agreements with LMAs.

By contrast, Telstra generally adopts a standard form of lease or licence when negotiating with private land owners, with an average negotiation cost of approximately \$2,500. When negotiations are undertaken with larger corporations, the costs rarely exceed \$5,000.

Negotiations with NSW State government agencies are almost without exception more difficult, lengthier and involve costs up to about 10 times the cost involved in negotiating similar arrangements in the private market.

If IPART's "strategic site" definition were to be adopted by the LMAs, the result would be a significant increase in the number of sites subject to negotiation,

leading to a significant increase in the cost and time required to acquire these sites. The end result would likely be a negative impact on the provision of communication services, and an increased preference by carriers to locate on non-Crown land sites.

There is a reasonable expectation from the community and LMAs that carriers will co-locate where it is technically and commercially possible, which could be defeated due to the excessive costs that result from this interpretation of strategic sites.

The length of time, and the expense, of negotiating arrangements with the LMAs highlights the importance of IPART providing clear and unambiguous directions to the LMAs, as to when and where the density categories are to apply.

4.4 Implementation of the IPART recommendations by the land management agencies

The intent behind the development of the three land type categories - high, medium and low density - and the adoption of consistent pricing for all sites within each category was to establish a simple method of grouping sites with similar land value, and therefore rental value.

Telstra has experienced significant practical difficulty in relation to the application of the "medium" density rent category. As the 2005 Review (and subsequent correspondence between Telstra and IPART) made clear, the medium density rent category was intended to be applied to sites within the town boundary of towns with a population of 10,000 or more people, with such population figures to be determined with reference to data maintained by the relevant local council.

Telstra's experience has been that the LMAs have generally not applied the medium density category in a manner that reflected IPART's recommendation. Rather, the LMAs have sought to expand the medium category to apply to sites beyond the boundary of towns with a population of 10,000 or more. For instance, Forests NSW and the National Parks and Wildlife Service (the "**NPWS**") sought to apply the medium density category to all sites within a local government area with a population of 10,000 or more.

More recently, Telstra has been involved in negotiating with the DPI in relation to the application of the medium density category to the countryside surrounding towns with a population of 10,000 or more. The DPI had been insisting that Telstra agree to treat all sites within a 30km radius of a town with a population of 10,000 or more as a medium site, notwithstanding this is clearly not the intent of the IPART "medium" density category. The result of this negotiation has been the reluctant agreement by Telstra to treat sites within a 12.5km radius of 26 regional centres as "medium" despite the fact that they are beyond the town boundary of these centres. Please refer to Annexure 4 which depicts the "medium" density radius agreed for the 26 regional centres.

The NPWS has taken a different approach again, and refuses to apply either the IPART approach or the approach agreed with DPI, in determining which sites are "medium" density. Its approach is to determine for itself whether a site falls in the medium density category based on its discretion and the application of the local government boundaries.

4.5 Technological changes

There is currently a trend for increased customer demand for fixed wireless services. As a result, carriers are having to increase the number of base stations in order to satisfy both coverage and capacity shortfalls. Where possible this will be effected through the installation of additional equipment on existing sites. However, it is inevitable that in some circumstances carriers will be required to erect new communications towers to service these growing customer requirements.

While the growing demand for fixed wireless services is driven, at least in part, by the uptake of new devices such as smartphones and tablets, these developments have no bearing on the Crown land sites used or the type of structure required. In Telstra's view, these developments are irrelevant to the IPART user categories.

4.6 NBN Co

NBN Co is a telecommunications carrier, and will occupy a similar area of land as the other mobile carriers, on which they will erect the infrastructure needed to provide a wholesale fixed wireless service. NBN Co will use this infrastructure to provide a wholesale commercial wireless broadband service to carriers providing retail broadband services. As a commercial carrier, the IPART justification for treating public sector organisations differently from private sector organisations would not appear to apply. Further, as NBN Co is a carrier, treating it differently from other carriers would be a clear contravention of clause 44 of Schedule 3 to the Telco Act.

4.7 Rentals for Small Country Automatic Exchange (SCAX) and other similar sites

Telstra supports a proposal that SCAX sites, as well as sites required for fixed repeater equipment (which act in a similar manner to SCAX equipment, and often provide the network connectivity for SCAX), be included in the proposed updated IPART fee schedule but that these be treated differently to other communications sites. This is because these sites are established in order to meet Telstra's Universal Service Obligations (USOs) under Federal telecommunications legislation, and relate solely to the operation of the fixed line network. The USOs require Telstra to provide standard telephone services, payphones and prescribed carriage services to all people within Australia, wherever they reside or carry on business, regardless of location or cost.

Currently, Telstra pays a fixed rent for all SCAX sites regardless of location. For the reasons outlined above it would be more equitable for these sites to be subject to a rental regime consistent with the pricing model proposed by Telstra in Part 5 below.

In the event that IPART is not minded to adopt the pricing model proposed by Telstra, rental amounts for these sites should remain at the current level, for the reason that they are a critical element in the provision of Telstra USOs.

5. TELSTRA'S PROPOSED PRICING MODEL

Telstra submits that the current user categories are discriminatory and unnecessary. To avoid this outcome we submit that the most equitable arrangement is to include all communications site leases and licences in one category for which a single rental mechanism is applied. This would significantly reduce the administrative burden for the LMAs and ensure that the State Government received fair market-based commercial returns.

The most equitable mechanism for determining rental amounts is to set annual rents as a percentage of occupied land value, based on the land value as assessed by the office the NSW Valuer-General. Telstra considers that the rate of 6% of site value would be a fair and reasonable rate of return for occupation of vacant Crown land, particularly given the length of tenure and status of communications user tenants as "blue chip" tenants. As an alternative, communications users could pay the assessed land value (essentially the freehold value of the vacant land to be leased by the land user) as a premium payment in the first year of the occupation, with a further nominal annual payment (for example \$1) for the length of the occupation term of 30 years. At the expiration of the term, the user could then be required to renegotiate a further agreement on the same terms.

6. CONCLUDING REMARKS

In light of the clause 44 litigation currently on foot in the Federal Court in Queensland, Telstra submits that, as part of this review process, IPART should give close consideration to the Telco Act discrimination issues outlined in Part 2 and Part 3 above.

The proceeding is currently listed for hearing in May this year. Consequently Telstra expects judgment to be handed down in the second half of the year.

A favourable result for Telstra in the proceeding will have significant consequences for the validity of the proposed NSW Crown land rental regime. It would, therefore, be inappropriate for the LMAs to implement any revised pricing regime that was potentially unlawful by virtue of clause 44.

Accordingly, Telstra submits that IPART ought to hold off on the finalisation of this review until it has had an opportunity to consider the outcome of the clause 44 litigation currently on foot, and all relevant stakeholders have been able to make further submissions.

If you have any questions in relation to this submission, please do not hesitate to contact Bob Joice on 02 8576 3131

ANNEXURE 1

Text of clause 44 of Schedule 3 to the *Telecommunications Act 1997* (Cth)

44 State and Territory laws that discriminate against carriers and users of carriage services

1) The following provisions have effect:

- (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
- (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
- (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

2) The following provisions have effect:

- (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;
- (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;
- (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an eligible user.

4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- 5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

- 6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.
- 7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Note: The following are examples of a law of a State or Territory:

(a) a provision of a State or Territory Act;

(b) a provision of a legislative instrument made under a State or Territory Act.

ANNEXURE 2

Clause 44 Court documents

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)
QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION**

No: QUD202/2012

NOTICE OF FILING AND HEARING

This application was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/04/2012.

DETAILS OF FILING

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	QUD202/2012
File Title:	Telstra Corporation Ltd v The State of Queensland
District Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Directions
Time and date for hearing:	01/05/2012, 9:30 AM
Place:	Court No. 2, Level 7, Harry Gibbs Commonwealth Law Courts Building Level 6, 119 North Quay, Brisbane



A handwritten signature in black ink, which appears to read 'Warwick Soden'.

Dated: 4/04/2012

Registrar

NOTES

1. This Notice forms part of the application and contains information that might otherwise appear elsewhere in the application. The Notice must be included in the application served on each party to the proceeding.
2. The 'reason for listing' is descriptive and does not limit the issues that might be dealt with, or orders that might be made, at the hearing.

Form 15
Rules 8.01(1); 8.04(1)



Originating application

No. _____ of 2012

Federal Court of Australia
District Registry: Queensland
Division: General

Telstra Corporation Ltd

(ACN 051 775 556)

Applicant

The State of Queensland

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Level 6, Harry Gibbs Commonwealth Law Courts Building, 119 North Quay, Brisbane.

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	The Applicant		
Prepared by (name of person/lawyer)	Jeff Lynn		
Law firm (if applicable)	Ashurst Australia		
Tel	+61 3 9679 3000	Fax	+61 3 9679 3111
Email	jeff.lynn@ashurst.com		
Address for service (include state and postcode)	Level 26, 181 William St, Melbourne VIC 3000		

[Form approved 01/08/2011]



Details of claim

Terms defined in the Statement of Claim have the same meaning in this Originating Application.

On the grounds stated in the Statement of Claim, the Applicant claims:

1. A declaration that Part 4 Division 1 of the 2009 Regulation:
 - 1.1. discriminates or has the effect (whether direct or indirect) of discriminating against carriers generally;
 - 1.2. is inconsistent with cl 44(1)(a) of Schedule 3 to the Telco Act; and
 - 1.3. by reason of s 109 of the Constitution, is invalid to that extent.
2. Further or alternatively to 1, a declaration that Part 4 Division 1 of the 2009 Regulation:
 - 2.1. discriminates or has the effect (whether direct or indirect) of discriminating against a particular class of carriers, consisting of carriers who hold a lease under s 15 of the Land Act that is allocated by the Land Regulation as a "category 15.4 lease" or a "category 15.5 lease" for rent assessment;
 - 2.2. is inconsistent with cl 44(1)(a) of Schedule 3 to the Telco Act; and
 - 2.3. by reason of s 109 of the Constitution, is invalid to that extent.
3. Further or alternatively to 1 and 2, a declaration that Part 4 Division 1 of the 2009 Regulation:
 - 3.1. discriminates or has the effect (whether direct or indirect) of discriminating against the Applicant;
 - 3.2. is inconsistent with cl 44(1)(a) of Schedule 3 to the Telco Act; and
 - 3.3. by reason of s 109 of the Constitution, is invalid to that extent.
4. Further or alternatively to 1, 2 and 3, a declaration that the Respondent's purported exercises of power under s 183 of the Land Act and Part 4 Division 1 of the 2009 Regulation to assess the rent payable by the Applicant in respect of each of its leases of land under the Land Act at the rate applicable to a "category 15.4 lease" or a "category 15.5 lease":
 - 4.1. were contrary to cl 44(1)(b) of Schedule 3 to the Telco Act; and
 - 4.2. by reason of s 109 of the Constitution, were made without jurisdiction.

**Applicant's address**

The Applicant's address for service is:

Place: c/o Jeff Lynn

Partner

Ashurst Australia

Level 26, 181 William Street, Melbourne, VIC 3000

Email: jeff.lynn@ashurst.com

The Applicant's address is Level 41, 242 Exhibition Street, Melbourne, VIC 3000

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 3 April 2012

A handwritten signature in black ink, appearing to read "Jeff Lynn", is written over a horizontal line.

Signed by Jeff Lynn, Ashurst Australia
Lawyer for the Applicant

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)
QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
GENERAL DIVISION**

No: QUD202/2012

NOTICE OF FILING

This document was filed electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/10/2012.

DETAILS OF FILING

Document Lodged: Amended Document
File Number: QUD202/2012
File Title: Telstra Corporation Ltd v The State of Queensland
District Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



★ **Dated:** 15/10/2012

Registrar

Wendy Soden

Note

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the document. The Notice must be included in the document served on each party to the proceeding.



Form 17
Rules 8.05(1)(a)

Further Amended Statement of claim

(Amended pursuant to the order of Greenwood J made on 24 August 2012)

No. QUD202 of 2012

Federal Court of Australia
District Registry: Queensland
Division: General

Telstra Corporation Limited ACN 051 775 556

Applicant

The State of Queensland

Respondent

Cross claim

The State of Queensland

Cross-claimant

Telstra Corporation Limited ACN 051 775 556

Cross-respondent

A. The Applicant

- 1 The Applicant (**Telstra**) was from 1 July 2010 until the date of this pleading (**all relevant times**):
 - (a) a company registered under the *Corporations Act 2001* (Cth), having its registered office at Level 41, 242 Exhibition Street, Melbourne, Victoria; and
 - (b) a "carrier" (**Carrier**) under the *Telecommunications Act 1997* (Cth) (**Telco Act**).
- 2 As a Carrier, Telstra has at all relevant times maintained and operated "facilities" pursuant to the Telco Act that have been installed throughout Australia, including in the State of Queensland, for the purpose of delivering telecommunications services to the public (**Facilities**).

Filed on behalf of the Applicant

Prepared by Justin McDonnell
Law firm **KING & WOOD MALLESONS**
T +61 7 3244 8099
Email justin.mcdonnell@au.kwm.com

F+ 61 7 3244 8099

Address for service

Level 33 Waterfront Place, 1 Eagle Street, Brisbane QLD 4000
JAM:NC: 04-5505-8582

Form approved 01/08/2011

B. Regulation of State land in Queensland

General

- 3 The *Land Act 1994* (Qld) (**Land Act**) has, in relation to State land (**Land**), at all relevant times:
- (a) authorised the Respondent (**State**) to issue leases, licences and permits (**Leases**);
 - (b) provided that the categories into which a Lease may be allocated for rent assessment are the categories prescribed under the regulations (**Prescribed Categories**);
 - (c) provided that the rent for a Lease is:
 - (i) if a regulation prescribes an amount for all Leases in a Prescribed Category – the amount prescribed (**Fixed Rent**); or
 - (ii) otherwise – the amount calculated by multiplying the rental valuation prescribed under a regulation by the rate prescribed under a regulation (**Valuation Rent**);
 - (d) provided that the rent for Valuation Rent Leases must not be less than the minimum prescribed under a regulation (**Minimum Rent**); and
 - (e) provided that a regulation may prescribe the rent for a particular Lease (**Set Rent**).

Particulars

Land Act ss 182(1), 183(1), 183(4)(a), 183A(2)

- 3.2 The *Land Regulation 2009* (Qld) (**Land Regulation**):

- (a) was made, on 3 December 2009, by the Governor in Council pursuant to the powers conferred on the Governor in Council by Land Act s 448;
- (b) commenced on 1 July 2010; and
- (c) has been amended on a number of occasions.

Particulars

Environment and Resource Management Legislation Amendment Regulation (No. 2) 2010 (Qld); *Land Legislation Amendment Regulation (No. 1) 2010* (Qld); *Land Valuation Act 2010* (Qld); *Land Amendment Regulation (No. 1) 2010* (Qld); *Land and Other Legislation Amendment Regulation (No. 1) 2011* (Qld); *Land Amendment Regulation (No. 1) 2010* (Qld); *Environment and Resource Management Legislation Amendment Regulation (No. 1) 2011* (Qld); *Land Amendment Regulation (No. 1) 2012* (Qld); *Land Amendment Regulation (No. 2) 2012* (Qld); *Natural Resources and Mines Legislation Amendment Regulation (No. 1) 2012* (Qld)

Annual rental periods

- 4 The Land Act and Land Regulation have, at all relevant times, provided that:
- (a) the rental periods for Leases are annual in line with the Australian financial year;

- (b) the rental periods for Leases which commence or expire in a rental period become adjusted such that the first or last rental period for the lease begins or ends, respectively, on the day the Lease commences or expires;
- (c) rent must be paid on or before 1 September following the end of the rental period; and
- (d) penalty interest is payable on outstanding rent unless a lessee has a reasonable excuse for not paying the rent.

Particulars

Land Act ss 181(1), 181(3), 190(1), 195(1), 195(4); Land Regulation reg 41

Prescribed rent for communications, business, and government sites

5 At all relevant times, the Prescribed Categories have included (among others):

- (a) a Prescribed Category for leases: (i) that may be used for, or are being used for, a business, commercial or industrial purpose; or (ii) that are held by a government leasing entity and the use of the lease is essential for conducting the lessee's core business (**Business and Government Leases**, described as various category 13 leases – see paragraphs 6 to 7 below); and
- (b) certain Prescribed Categories for leases of land in certain areas that may be used for, or are being used for, the provision, relay or transmission of telephonic, television, radio or other electronic communication services for certain activities (**Communications Leases**).

Particulars

Land Regulation pt 4 div 1

6 As at 30 June 2011, the Land Regulation purported to prescribe Prescribed Categories and to set rent for each Prescribed Category including those set out in the following table:

Prescribed Category	Leases	Rent
Category 13	Business and Government Leases	Valuation Rent (the averaged value of the leased land multiplied by 6%), subject to a Minimum Rent of \$200
Category 15.4	Communications Leases over land in a rural area for a non-community service activity.	Fixed Rent of \$10,000
Category 15.5	Communications Leases over land in an urban area for a non-community service activity.	Fixed Rent of \$15,000

Particulars

Land Regulation (Reprint 1C) regs 27, 30, 33, 36–38

- 7 As at 30 June 2012, the Land Regulation purported to prescribe Prescribed Categories and to set rent for each Prescribed Category including those out in the following table:

Prescribed Category	Leases	Rent
Category 13	Business and Government Leases	Valuation Rent (the averaged value of the leased land multiplied by 6%), subject to a Minimum Rent of \$214
Category 15.4	Communications Leases over land in a rural area for a non-community service activity.	Fixed Rent of \$10,360
Category 15.5	Communications Leases over land in an urban area for a non-community service activity.	Fixed Rent of \$15,540

Particulars

Land Regulation (Reprint 1G) regs 27, 30, 33, 36–38

- 8 Pursuant to the amendments of the Land Regulation made by the *Land and Other Legislation Amendment Regulation (No. 1) 2011* (Qld), on 1 July 2011:
- (a) category 15.2 was renamed category 15.4; and
 - (b) category 15.3 was renamed category 15.5,
- (for the purposes of the pleading, a lease in any of those Prescribed Categories is a **Commercial Communications Lease**).

Prescribed rent for Set Rent Leases

- 9 At all relevant times, the Land Regulation has prescribed rent for Set Rent Leases.

Particulars

Land Regulation reg 38A

C. Leases of communication, business and government sites

- 10 At all relevant times, each Communications Lease was held by either:
- (a) Telstra;
 - (b) persons other than Telstra, acting in their capacity as a Carrier (**Other Carriers**); and

- (c) persons who were not Carriers, or who were not using the leased land in their capacity as a Carrier (**Non-carriers**).
- 11 At all relevant times, each Commercial Communications Lease was held by either:
- (a) Telstra (**Telstra Leases**);
 - (b) persons other than Telstra, acting in their capacity as a Carrier (**Other Commercial Carriers**) (**Other Commercial Carrier Leases**); and
 - (c) Non-carriers (**Non-carrier leases**).
- 12 At all relevant times, of all the Communications Leases:
- (a) Telstra held more than 50%; and
 - (b) Telstra and Other Carriers together held an even greater proportion.
- 13 At all relevant times, of all the Commercial Communications Leases:
- (a) the Telstra Leases comprised more than 65%; and
 - (b) the Telstra Leases and the Other Commercial Carrier Leases together comprised an even greater proportion.

Particulars

An electronic schedule to be provided to the State (**Category 15 Schedule**)

- 14 At all relevant times, persons held Business and Government Leases described by the Land Regulation as category 13 leases.

Particulars

An electronic schedule to be provided to the State (**Category 13 Schedule**)

D. Interaction between the Land Act, Land Regulation, and the Land Valuation Act

- 15 As already pleaded and at all relevant times, all Prescribed Categories had Valuation Rent subject to Minimum Rent except;
- (a) Communications Leases, which had Fixed Rent;
 - (b) category 14.1 leases, which also had Fixed Rent.
- 16 Calculating Valuation Rent required reference to the *Land Valuation Act 2010* (Qld).

Particulars

Land Regulation pt 4 div 1; Land Act s 183

E. Discriminatory laws

- 17 Pursuant to Telco Act cl 44(1)(a) of sch 3, "a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of

discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally”.

18 As pleaded, at all relevant times:

- (a) the Land Regulation purported to establish a different methodology for assessing rent payable for Communications Leases (including Commercial Communications Leases and the Telstra Leases) than for Business and Government Leases;
- (b) the Land Regulation purported to establish a different methodology for assessing rent payable for Commercial Communications Leases (including the Telstra Leases) than for other Communications Leases;
- (c) the rent assessable for each Commercial Communications Lease (including the Telstra Leases) was and is higher than it would have been if each Commercial Communications Lease had instead been allocated as, or had its rent assessed using a methodology equivalent to, a Business and Government Lease; and
- (d) the rent assessable for each Commercial Communications Lease (including the Telstra Leases) was higher, on a per hectare basis, than the rent payable for each of the Set Rent Leases.

19 As pleaded, or as the Court may find otherwise:

- (a) at all relevant times, pt 4 div 1 or ss 33, 37(1) (except insofar as s 37(1) dealt with category 14.1 Leases);
- (b) on and from 1 July 2010 to 30 June 2011, ss 32(2), (3), 37(1)(b), (c);
- (c) on and from 1 July 2011, ss 33(4), (5), 37(1)(d), (e);

of the Land Regulation:

- (d) discriminated, or had the effect (whether direct or indirect) of discriminating, against Telstra, against a particular class of Carriers being Telstra and other Commercial Carriers, or against Carriers generally; and
- (e) was inconsistent with Telco Act cl 44(1)(a) of sch 3; and
- (f) by reason of s 109 of the Constitution, were and remain invalid to that extent.

F. The State’s purported exercises of power without jurisdiction

20 Pursuant to Telco Act cl 44(1)(b) of sch 3, “a person ... must not exercise a power under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally”.

21 The State has purported to exercise power under the Land Act and the Land Regulation, as already pleaded (**Purported Exercises of Power**):

- (a) to allocate each of the Commercial Communications Leases (including the Telstra Leases) and other Leases held by Other Carriers into a Prescribed Category with the features pleaded at paragraph 18 above; and
- (b) assess the rent payable for each of those Leases.

22 By reason of the foregoing, each of the Purported Exercises of Power:

- (a) was contrary to Telco Act cl 44(1)(b) of sch 3; and
- (b) by reason of s 109 of the Constitution, was made without jurisdiction.

G. Telstra is not required to comply with the discriminatory laws

23 Pursuant to Telco Act cl 44(1)(c) of sch 3, *"a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally"*.

24 By reason of the foregoing:

- (a) Land Regulation pt 4 div 1 or the relevant provisions thereof discriminate, or would have a discriminatory effect, in the manner already pleaded; and
- (b) by reason of Telco Act cl 44(1)(c) of sch 3, Telstra was not and is not required to comply with Land Act ss 181, 183 or 190, read with Land Regulation pt 4 div 1 or the relevant provisions thereof, to the extent that those provisions so discriminate, or would have that discriminatory effect.

H. Restitution

25 Telstra has paid money to the State for rent purportedly owing for each Telstra Lease.

26 By reason of the matters alleged above, Telstra has overpaid rent for the Telstra Leases, being the difference between:

- (a) the rent that Telstra has paid; and
- (b) the rent that Telstra is liable to pay which:
 - (i) does not offend Telco Act cl 44 of sch 3; and
 - (ii) applies to the Telstra Leases;

or such other amount as the Court determines Telstra has overpaid (**Overpayments**).

Particulars

Further details will be provided after discovery

27 The State explicitly or implicitly demanded that Telstra make each of the Overpayments (**Demands**).

Particulars

Relevant correspondence includes:

- (a) letter from Greg Coonan of the Department of Environment and Resource Management to Bob Joice of Telstra dated 20 July 2011;
- (b) letter from Greg Coonan of the Department of Environment and Resource Management to Bob Joice of Telstra dated 13 January 2012; and
- (c) letter from Vass Poteri of the Department of Environment and Resource Management to Bob Joice of Telstra dated 16 March 2012.

28 Each of the Demands amounts to improper pressure.

29 Each of the Overpayments was made by Telstra because of the Demands.

30 Telstra made each of the Overpayments because it mistakenly believed that:

- (a) Land Regulation pt 4 and the relevant provisions thereof may be valid; and
- (b) the State's purported exercises of power under the Land Act and the Land Regulation to:
 - (i) allocate the Telstra Leases in the manner described in paragraphs 5–8 above may be valid;
 - (ii) assess the rent payable by Telstra for the Telstra Leases in the manner described in paragraphs 5–8 above may be valid.

I. The State's duty to refund overpaid rent

31 The State is obliged by Land Act s 191 to:

- (a) refund to Telstra each of the Overpayments; and
- (b) pay interest to Telstra for each of the Overpayments.

J. Jurisdiction of the Court

32 The allegations made by Telstra in this pleading in support of the relief sought by the originating application constitute a matter:

- (a) arising under the Constitution or involving its interpretation within the *Judiciary Act 1903* (Cth) (**Judiciary Act**) s 39B(1A)(b); and
- (b) arising under a law made by the Parliament (namely, the Telco Act), within Judiciary Act s 39B(1A)(c).

Date: 12 October 2012



PM Justin McDonnell
Lawyer for the Applicant
King & Wood Mallesons

This pleading was prepared by Peter Hanks QC and Nick Wood, of counsel.

Certificate of lawyer

I, Justin McDonnell, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 12 October 2012



PM Signed by Justin McDonnell
Lawyer for the Applicant

ANNEXURE 3

Summary of clause 44 legal principles

In *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595, the High Court considered the effect of clause 44 in finding that various local governments had discriminated against both Telstra and Optus. Various local governments had purported to impose rates and charges on Telstra and Optus in respect of telecommunications cables installed by those carriers on, under or over land in those local government areas.

In discussing clause 44, the High Court held that the clause was part of a framework "intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community"¹⁷.

The High Court of Australia also said that clause 44 is concerned with the kind of discrimination that involves:

"the subjection of carriers, in that capacity, to a burden of a kind to which others in a similar situation are generally not subject."¹⁸

The Court described discrimination as:

"a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved."

From other cases, it is also clear that clause 44 is directed to the practical operation of State legislation¹⁹ and is not limited to the direct or indirect effect of the exercise of a power under the law. The Federal Court has said that the "proper approach" in assessing discriminatory effect is to examine the operational effect or the result of the exercise of the power²⁰. To this extent, justifications for price discrimination based on capacity to pay, or distinguishing carriers as a "sub-market" (so as to support an argument that each carrier pays "market rent" but the rents differ because the markets differ), or other arguments based on market rent or a purported "fairness" in differentiating telecommunications carriers from other acquirers of essentially identical rights,

¹⁷ *Bayside City Council v Telstra Corporation Ltd* (2003) 216 CLR 595 at [7]

¹⁸ *Bayside City Council v Telstra Corporation Ltd* (2003) 216 CLR 595 at 630- 631.

¹⁹ *Telstra Corporation Ltd v Hurstville City Council* (2001) 118 FCR 198 at [42].

²⁰ *Ibid.*

do not avoid the conclusion that the operational effect of the LMAs adopting the 2005 Report fee schedule is that telecommunications carriers are charged more, and therefore treated differently, than non-carrier communications users, for accessing essentially the same tenure rights.

It is sufficient that the exercise of a discretionary power places a carrier at a negotiating disadvantage to other users of the same space if prior to the exercise of the discretion all users were in the same position²¹.

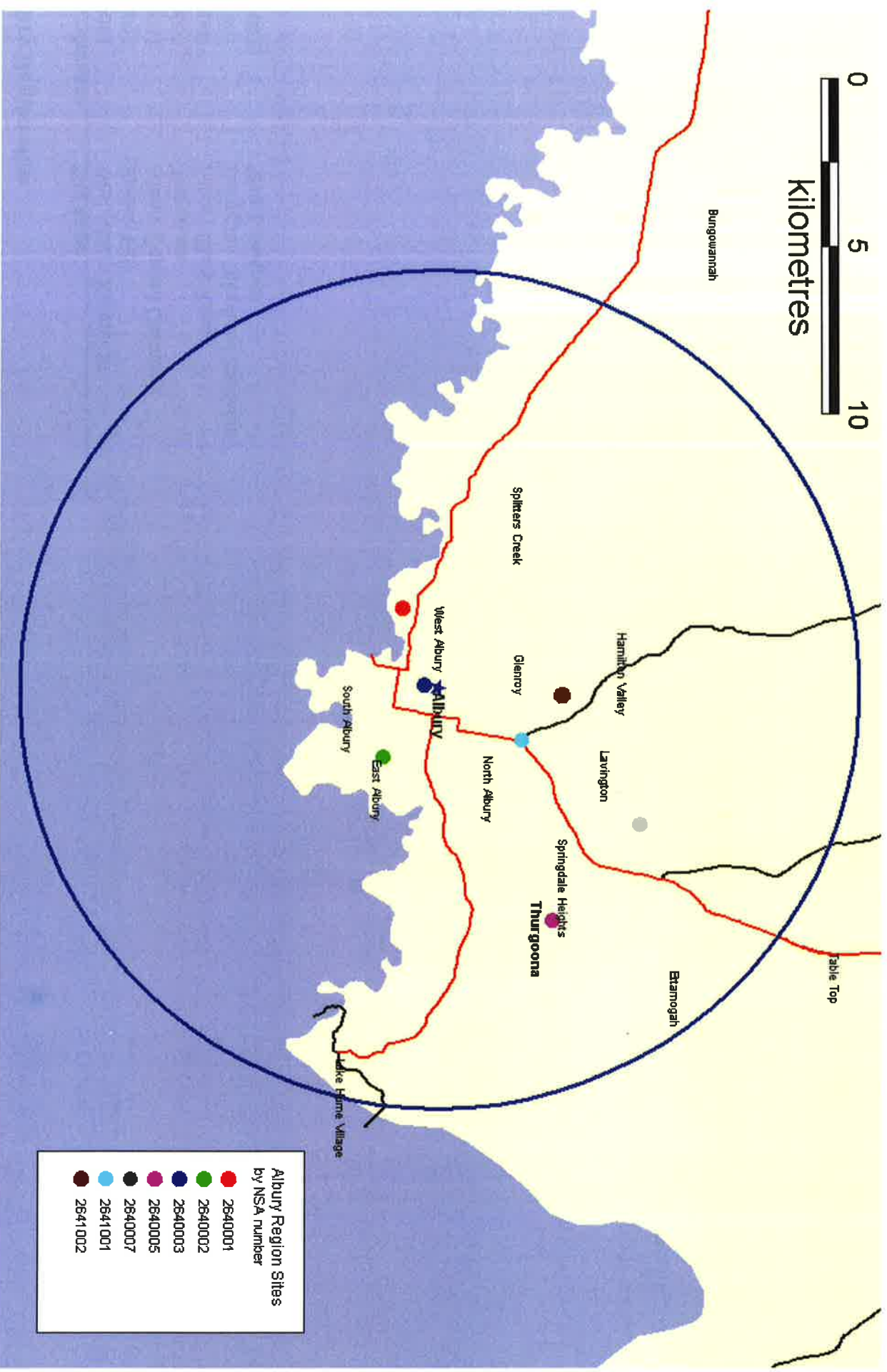
²¹ Ibid at [27].

ANNEXURE 4

Density determination

Albury Regional area

10/08/2010

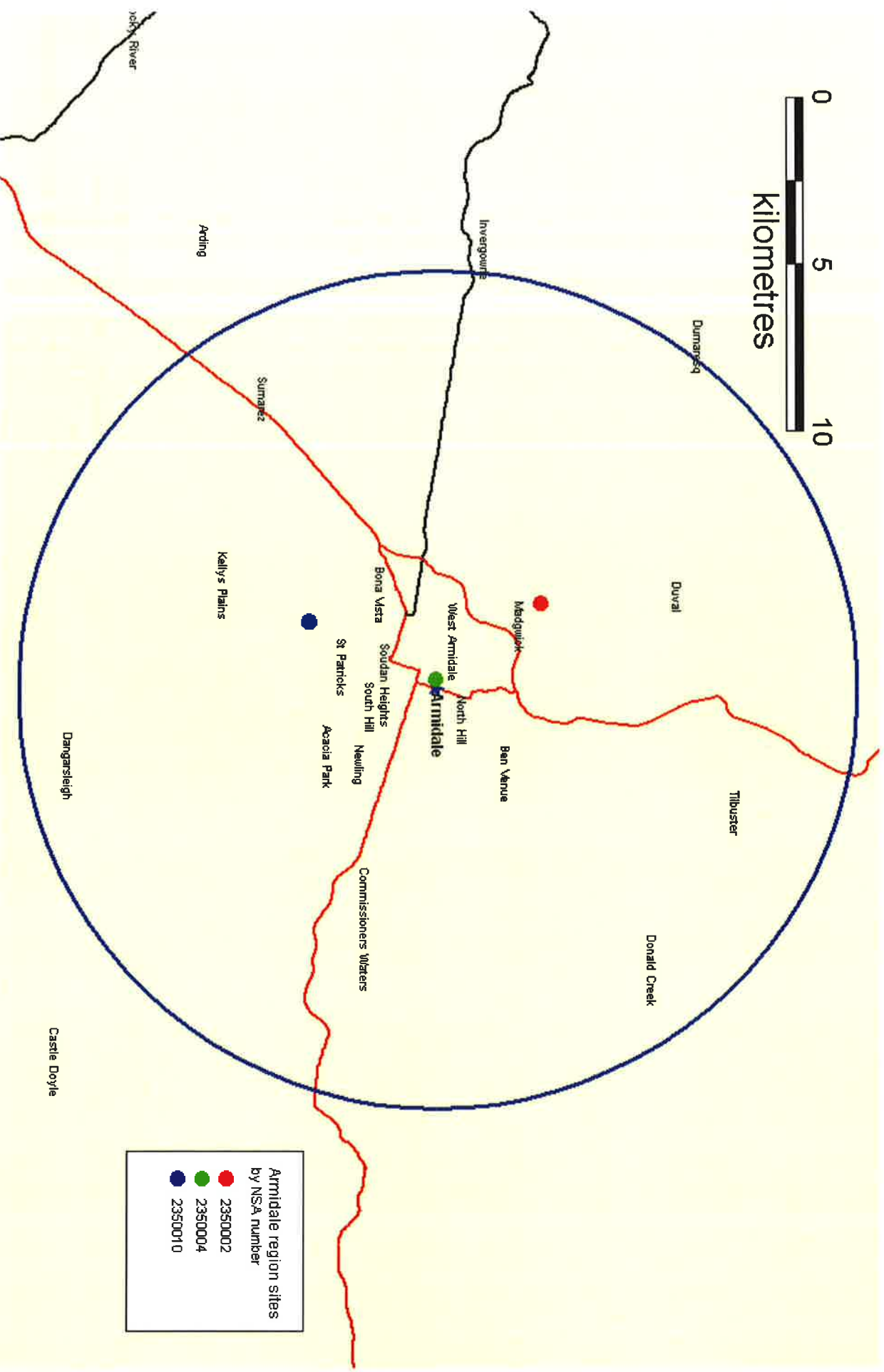


Albury Region sites

NSA reference	Site name
2640001	West Albury Kremur St
2640002	Eastern Hill
2640003	Albury Council Chambers
2640005	Thurgoona
2640007	Albury Black Range
2641001	Lavington Telephone Exchange
2641002	West Lavington

Armidade Regional area

10/08/2010



Armidales Region sites

NSA reference	Site name
2350002	Armidales University of New England
2350004	Armidales Telephone Exchange
2350010	Kellys Plains

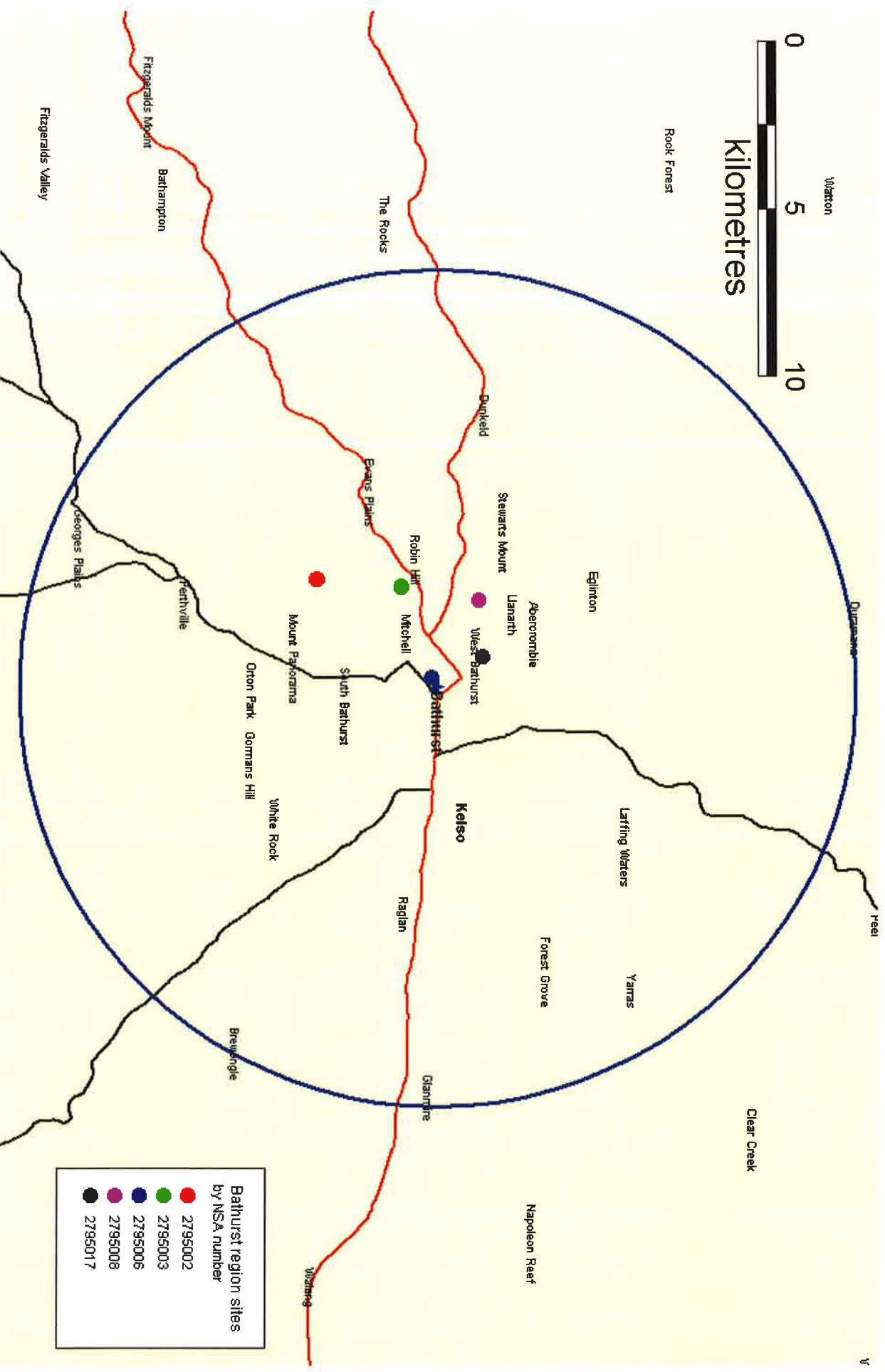
10/08/2010



Ballina Region sites

<u>NSA reference</u>	<u>Site name</u>
2477001	Alstonville Tuckombil Rd
2478001	Lennox Head
2478002	Ballina Reservoir
2478003	West Ballina
2478004	Teven
2478006	Ballina Telephone Exchange
2478010	Ballina Kerr St
2479001	Knockrow Pacific Hwy

10/08/2010

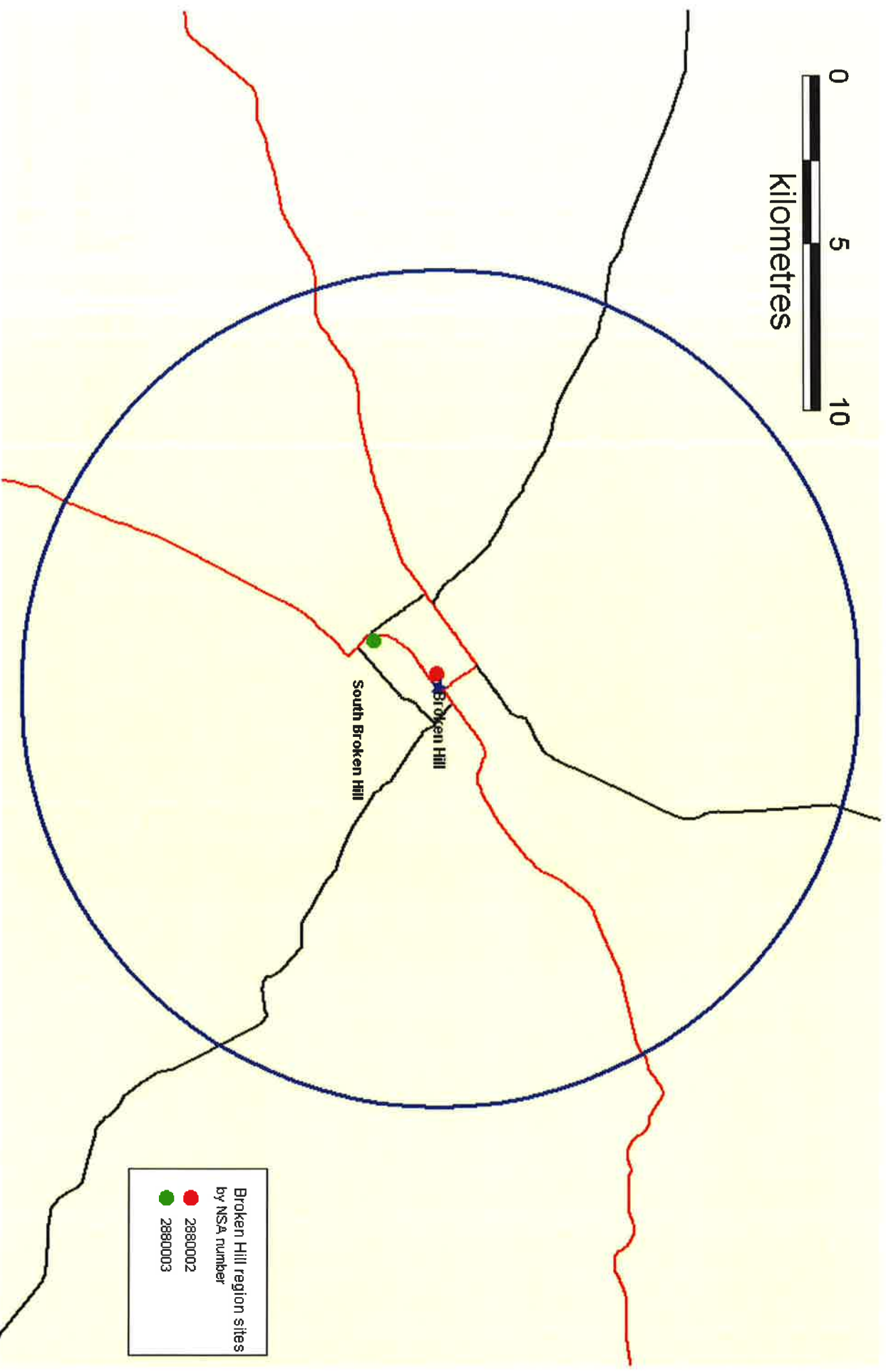


Bathurst Region sites

NSA reference	Site name
2795002	Mt Panorama
2795003	Mitchell Boundary Rd
2795006	Bathurst Government Offices
2795008	Windradyne off Brawardine Rd
2795017	West Bathurst Hospital

Broken Hill Regional area

19/08/2010

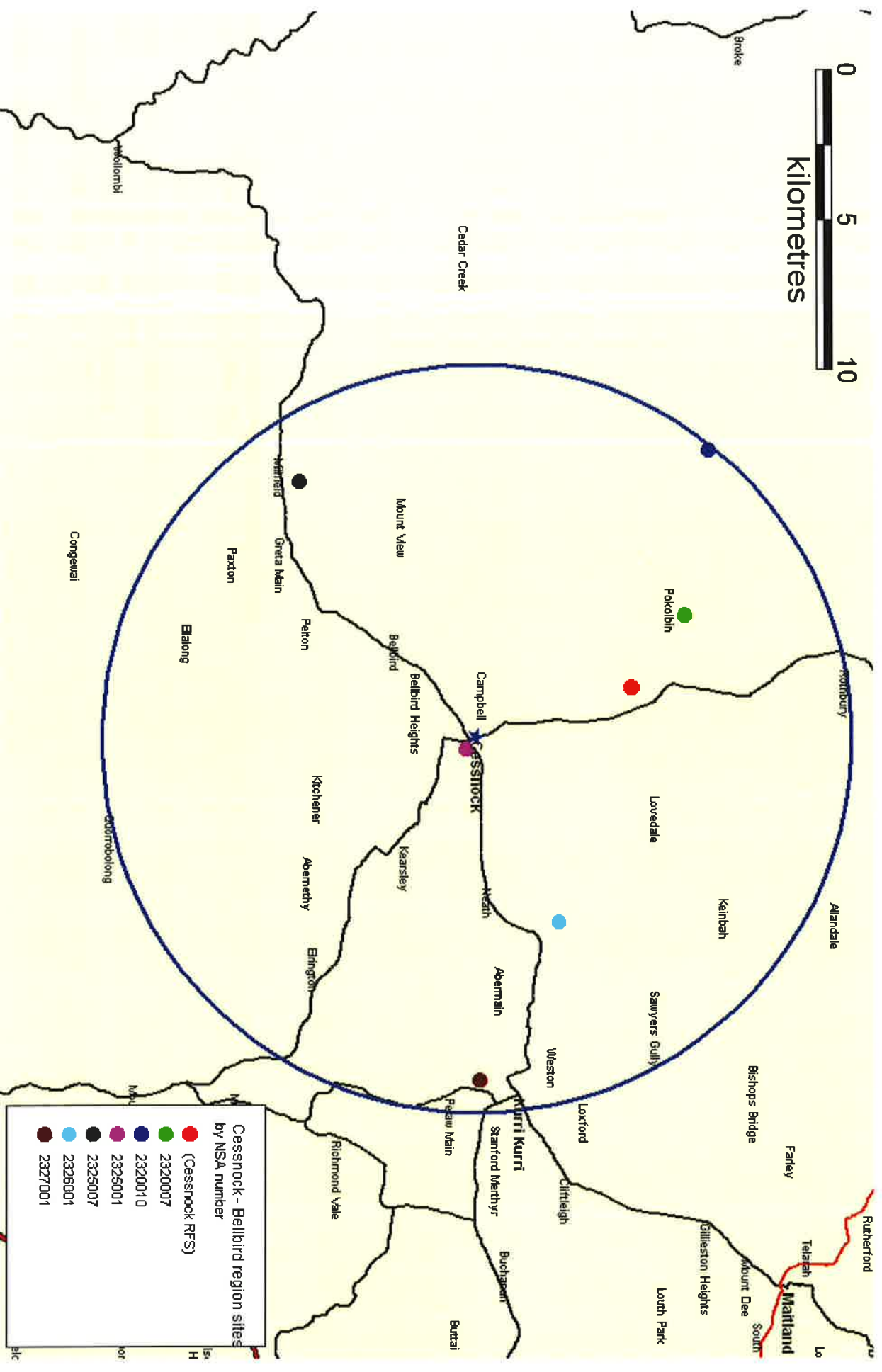


Broken Hill Region sites

<u>NSA reference</u>	<u>Site name</u>
2880002	Broken Hill Telephone Exchange
2880003	Broken Hill Slag Heap

Cessnock - Bellbird Regional area

10/08/2010

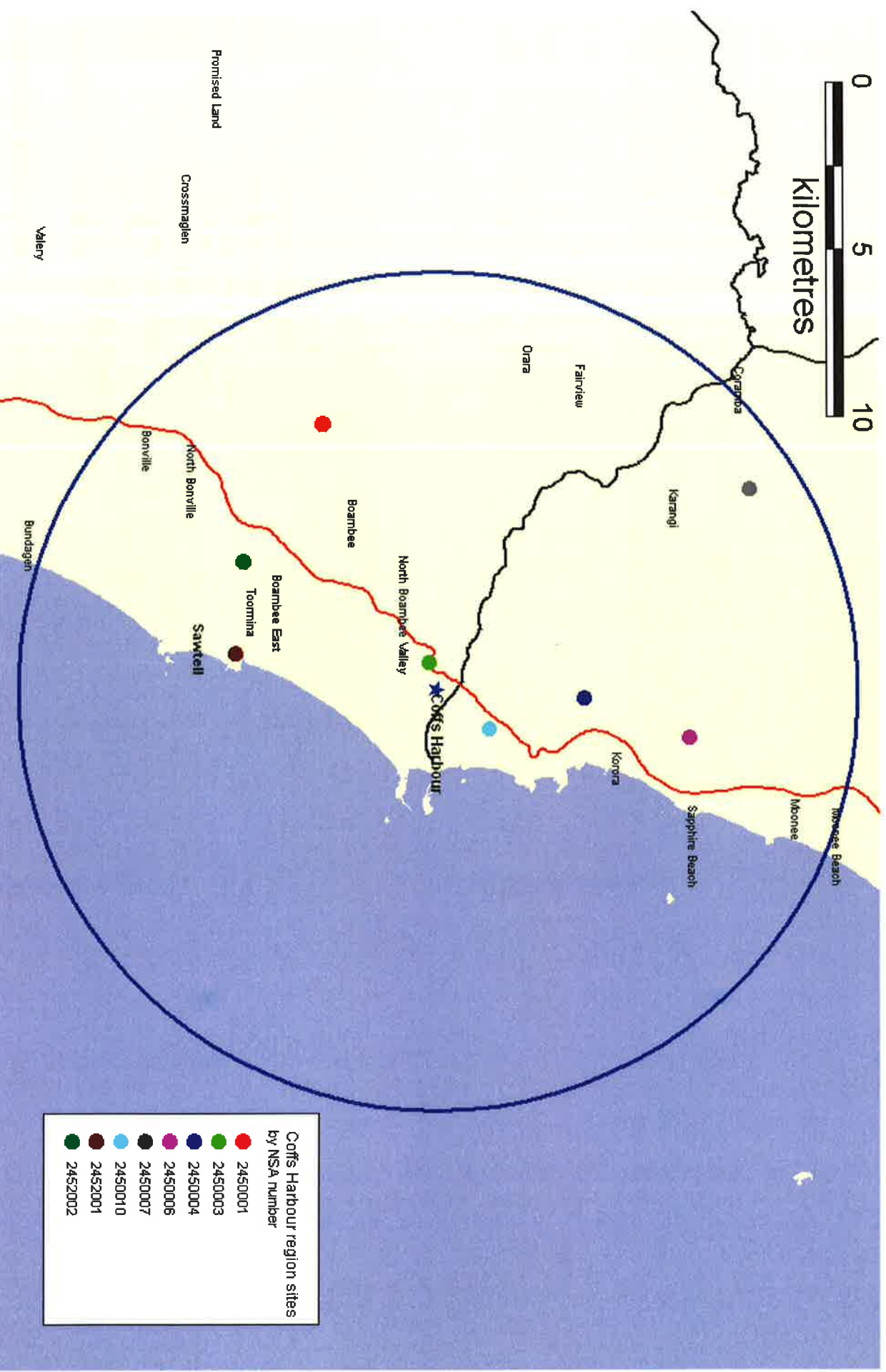


Cessnock - Bellbird Region sites

NSA reference	Site name
2320007	Cessnock Rural Fire Service
2320010	Pokolbin Hope Estate
2325001	Pokolbin Gamde De Juliis Winery
2325007	Convent Hill
2326001	Millfield
2327001	Abermain Albury St Reservoir
	Pelaw Main Reservoir (also within Maitland region)

Coffs Harbour Regional area

10/08/2010



Coffs Harbour Region sites

NSA reference	Site name
2450001	Boambee State Rail Authority
2450003	Thompsons Hill
2450004	Coffs Harbour North
2450006	Sapphire Beach
2450007	Coramba Radio Terminal
2450010	Coffs Harbour East Lawson Cr
2452001	Sawtell Reservoir
2452002	Toormina Reservoir

Dubbo Regional area

10/08/2010



Dubbo Region sites

NSA reference	Site name
2830001	Dubbo Church St
2830005	South Dubbo
2830006	Dubbo West
2830007	Dulhunty
2830009	Buninyong

Forster - Tuncurry Regional area

10/08/2010

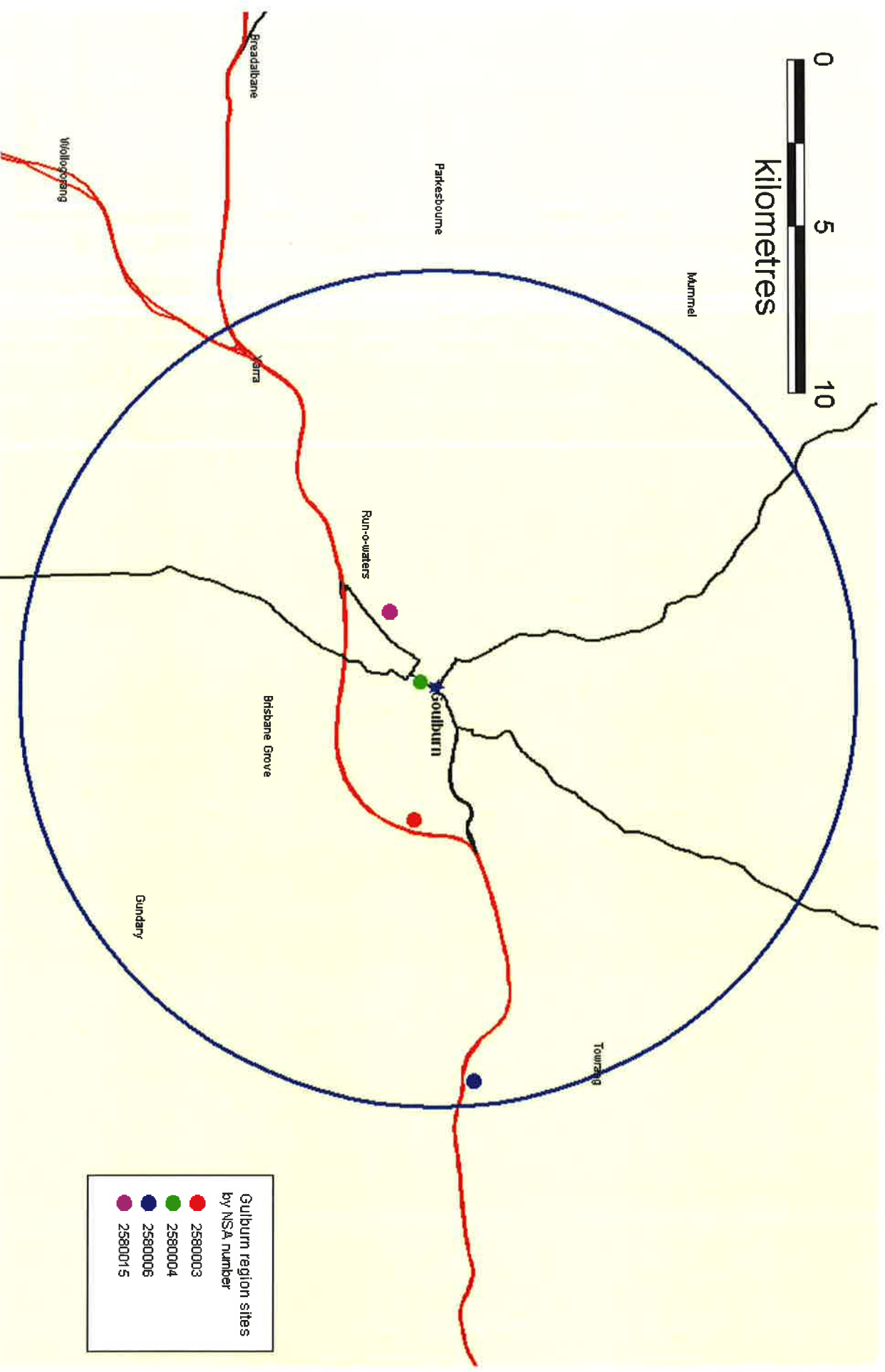


Forster - Tuncurry Region sites

NSA reference	Site name
2428002	Forster Reservoir
2428003	Tuncurry
2428005	Forster Telephone Exchange

Goulburn Regional area

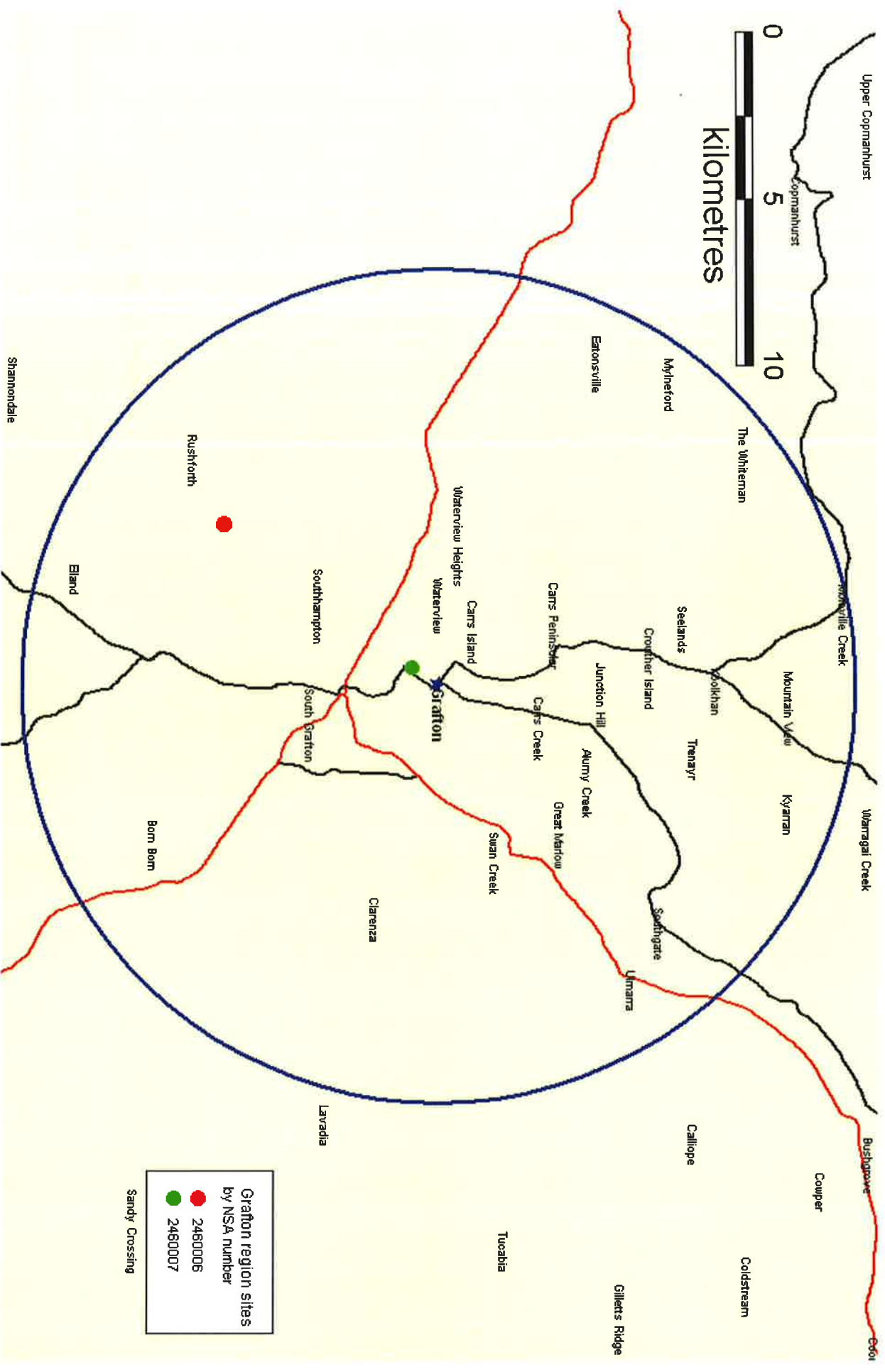
10/08/2010



Goulburn Region sites

NSA reference	Site name
2580003	Mt Gray Radio Terminal
2580004	Goulburn Telephone Exchange
2580006	Towrang Hume Hwy
2580015	Goulburn Knox St

10/08/2010

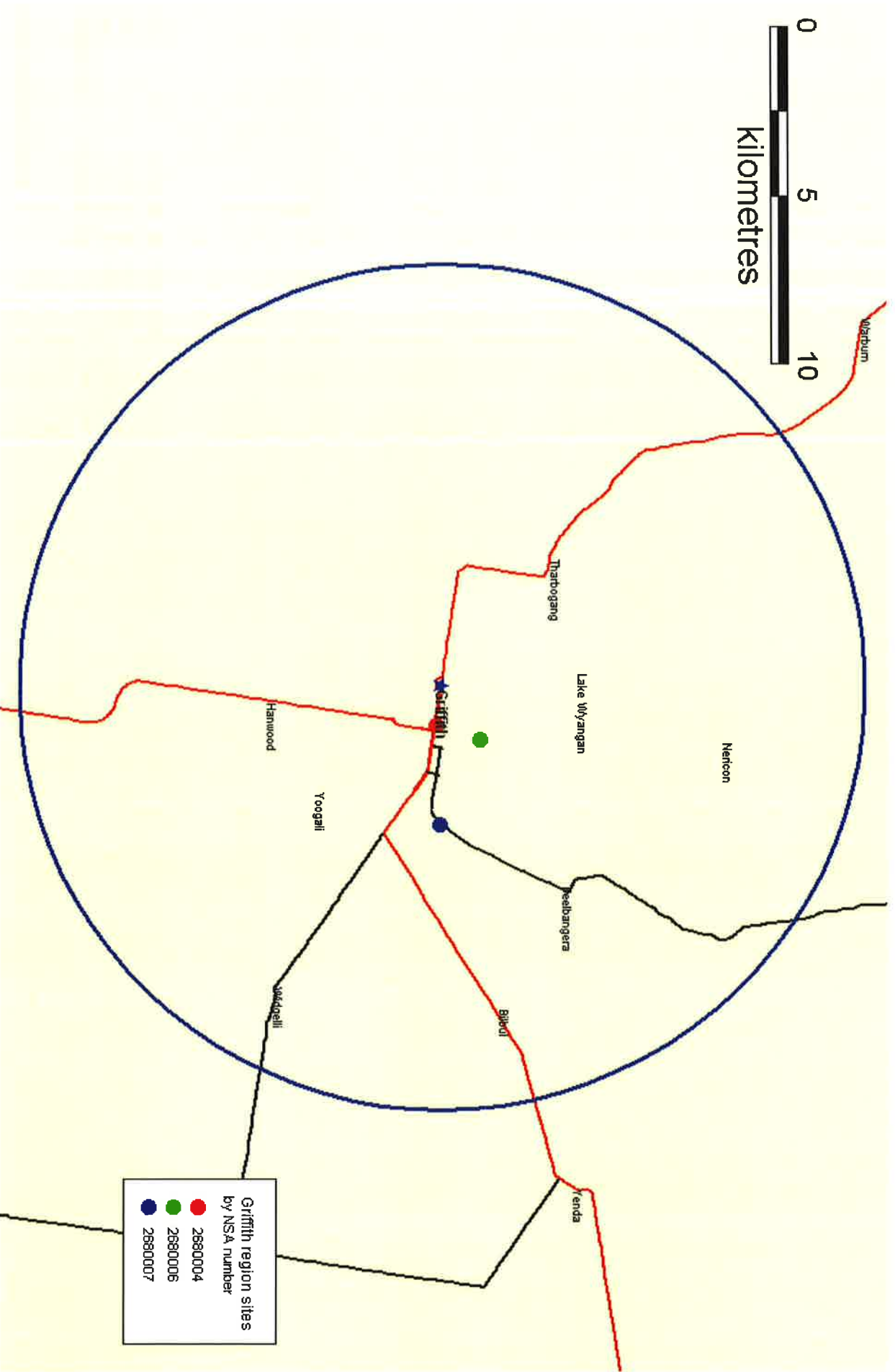


Grafton Region sites

NSA reference	Site name
2460006	South Grafton
2460007	Grafton Telephone Exchange

Griffith Regional area

10/08/2010

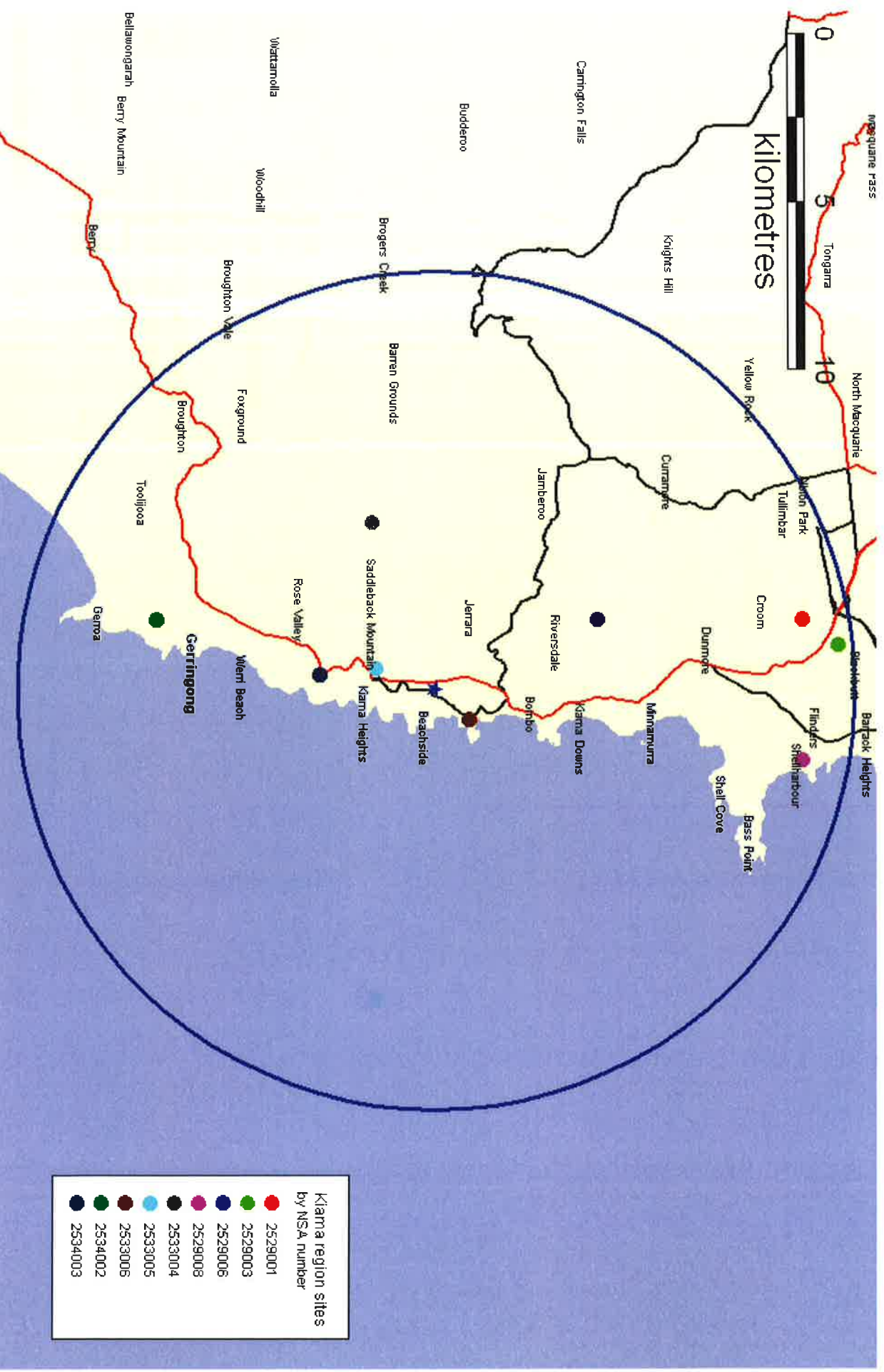


Griffith Region sites

NSA reference	Site name
2680004	Griffith Telephone Exchange
2680006	Griffith Scenic Hill
2680007	Griffith Whybrow St

Kiama Regional area

10/08/2010

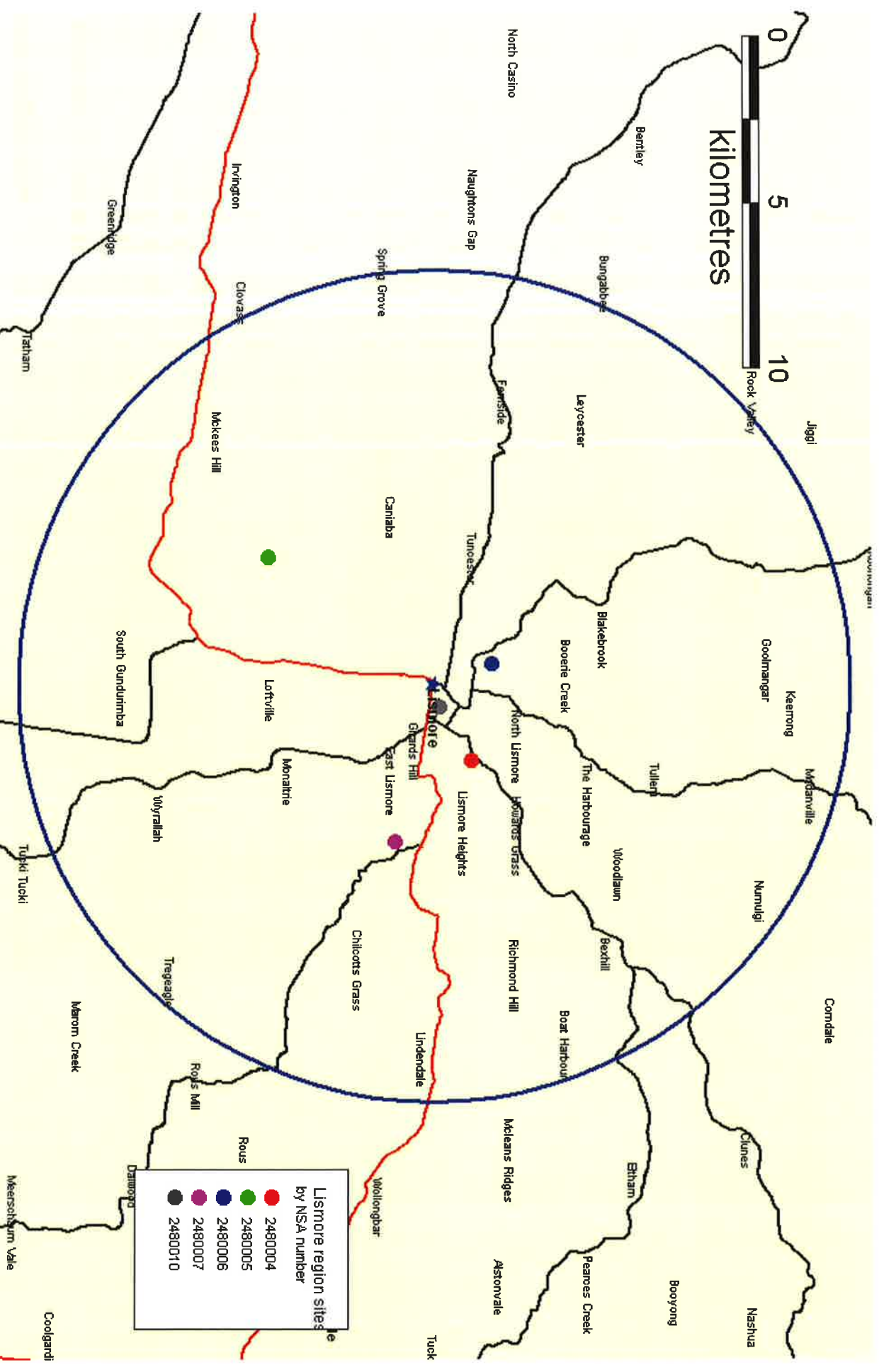


Kiama Region sites

NSA reference	Site name
2529001	Signal Hill
2529003	Blackbutt Reservoir
2529006	Kiama Downs Dunmore
2529008	Shellharbour Ron Costello Oval
2533004	Saddleback
2533005	Kiama Heights
2533006	Kiama Telephone Exchange
2534002	Gerringong Fern St
2534003	Mt Pleasant Gerringong

Lismore Regional area

10/08/2010

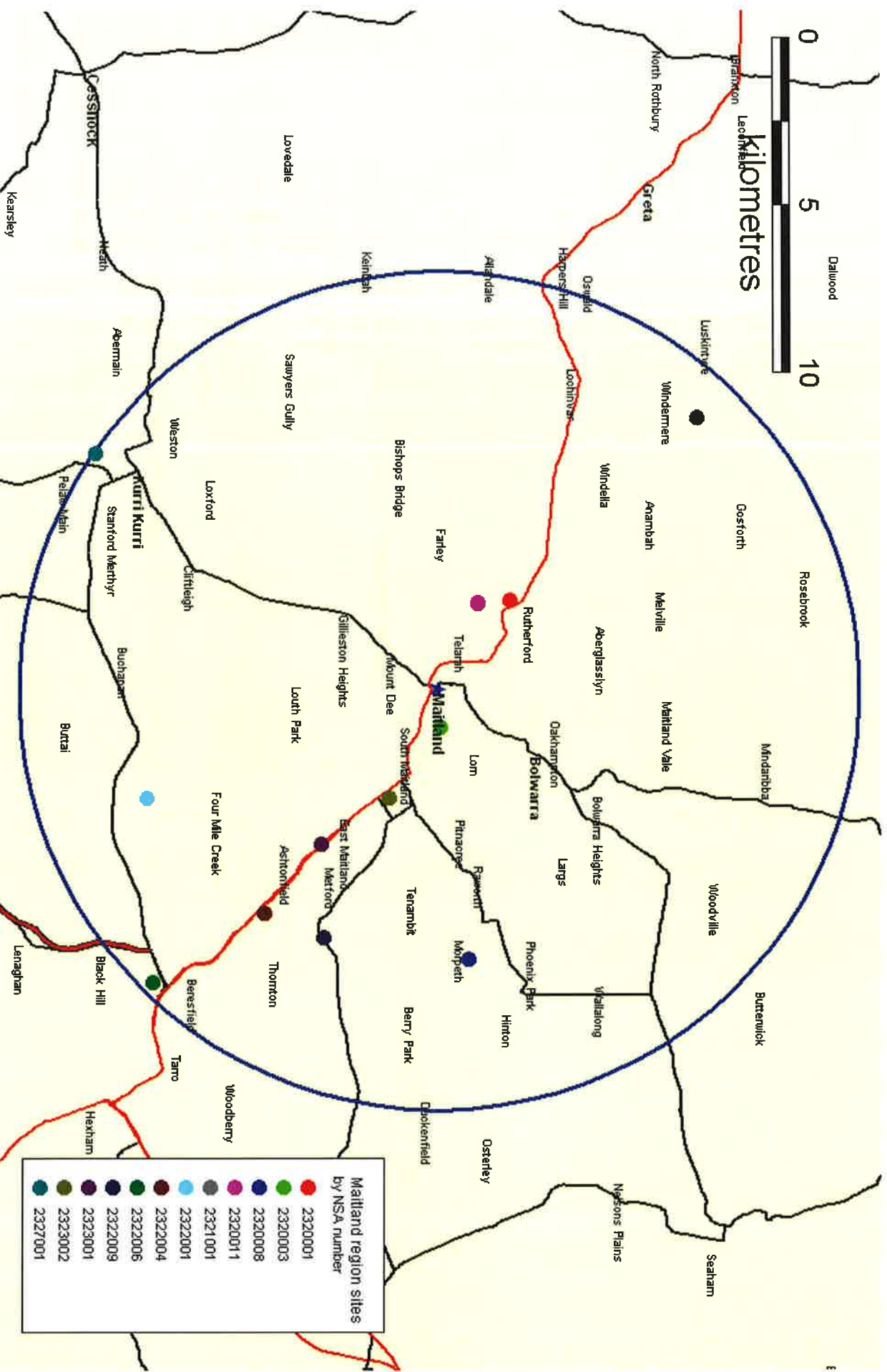


Lismore Region sites

NSA reference	Site name
2480004	East Lismore
2480005	Parrots Nest
2480006	North Lismore
2480007	Goonellabah
2480010	Lismore Telephone Exchange

Maitland Regional area

19/08/2010

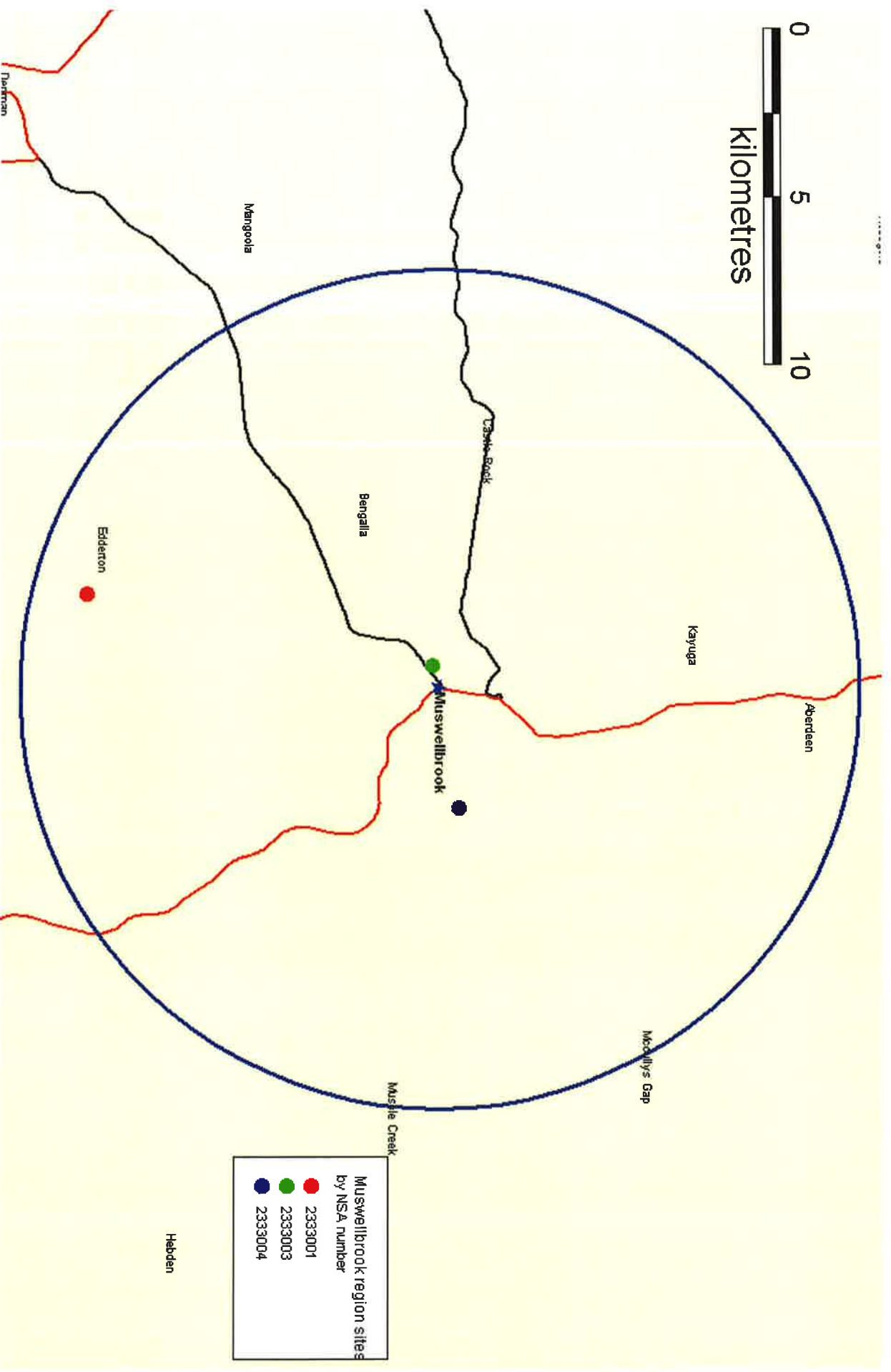


Maitland Region sites

NSA reference	Site name
2320001	Rutherford
2320003	Maitland James St
2320008	Morpeth (also in Raymond Terrace region)
2320011	Telarah
2321001	Winders Hill Radio Terminal
2322001	Stoney Pinch Reservoir
2322004	Thornton
2322006	Beresfield
2322009	Parkwood Village
2323001	Ashtonfield Reservoir
2323002	Hexham Galleghan St
2327001	Pelaw Main Reservoir (also in Cessnock – Bellbird region)

Muswellbrook Regional area

10/08/2010

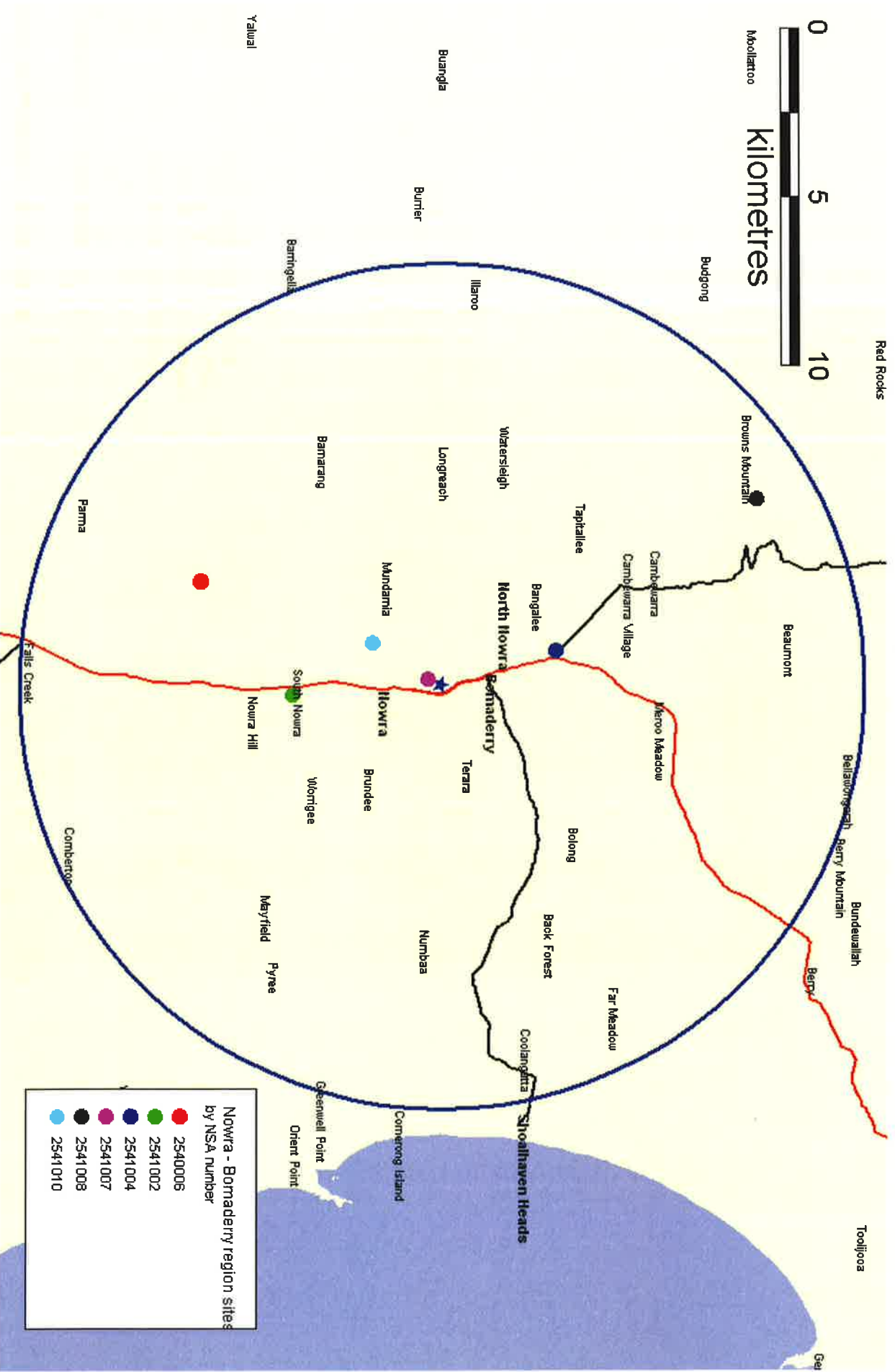


Muswellbrook Region sites

NSA reference	Site name
2333001	Mt Arthur Ayredale Rd
2333003	Muswellbrook Line Yard
2333004	Skeletal Radio Terminal

Nowra - Bomaderry Regional area

10/08/2010

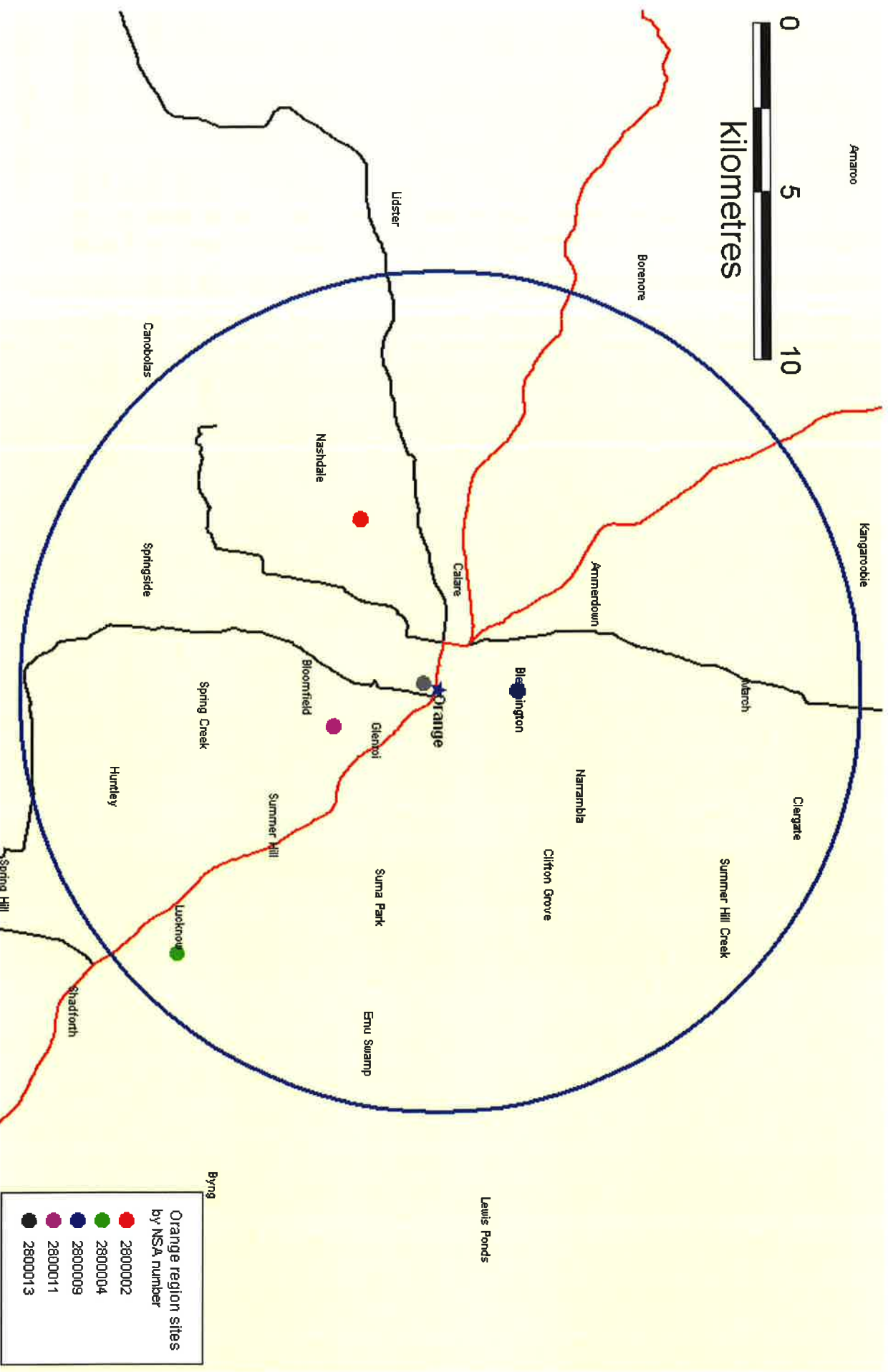


Nowra - Bomaderry Region sites

NSA reference	Site name
2540006	Nowra Hill
2541002	South Nowra
2541004	Bomaderry Princes Hwy
2541007	Nowra Telephone Exchange
2541008	Red Rocks Radio Terminal
2541010	West Nowra Yalwal Rd

Orange Regional area

10/08/2010

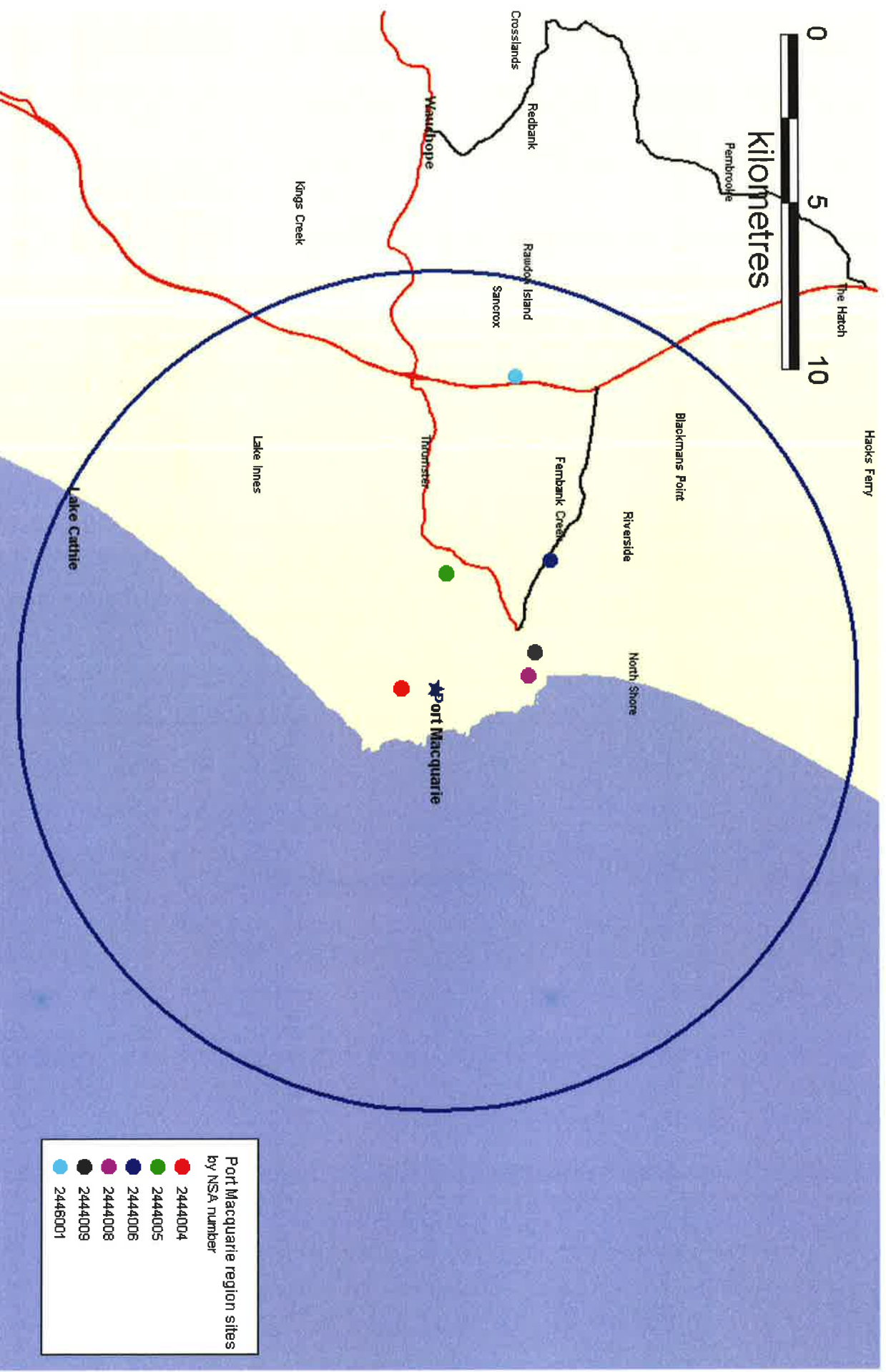


Orange Region sites

NSA reference	Site name
2800002	West Orange Telephone Exchange
2800004	Lucknow
2800009	Orange Clover Hill
2800011	Orange Leewood
2800013	Orange Telephone Exchange

Port Macquarie Regional area

10/08/2010

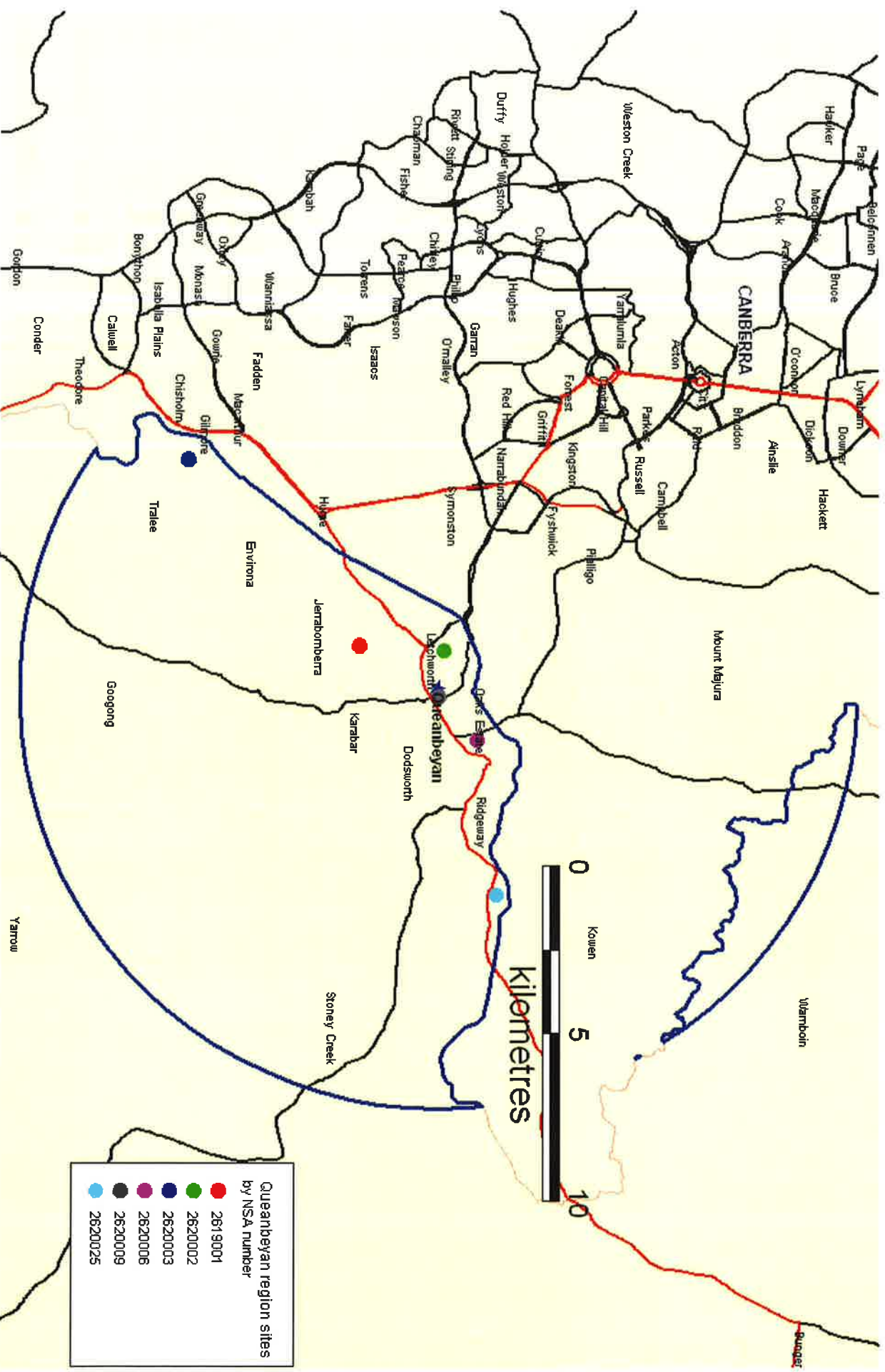


Port Macquarie Region sites

NSA reference	Site name
2444004	Transit Hill
2444005	Port Macquarie Uralla Rd
2444006	Hibbard Hastings River Rd
2444008	Port Macquarie Telephone Exchange
2444009	Port Macquarie T-Shop
2446001	Sancrox

Queanbeyan Regional area

10/08/2010

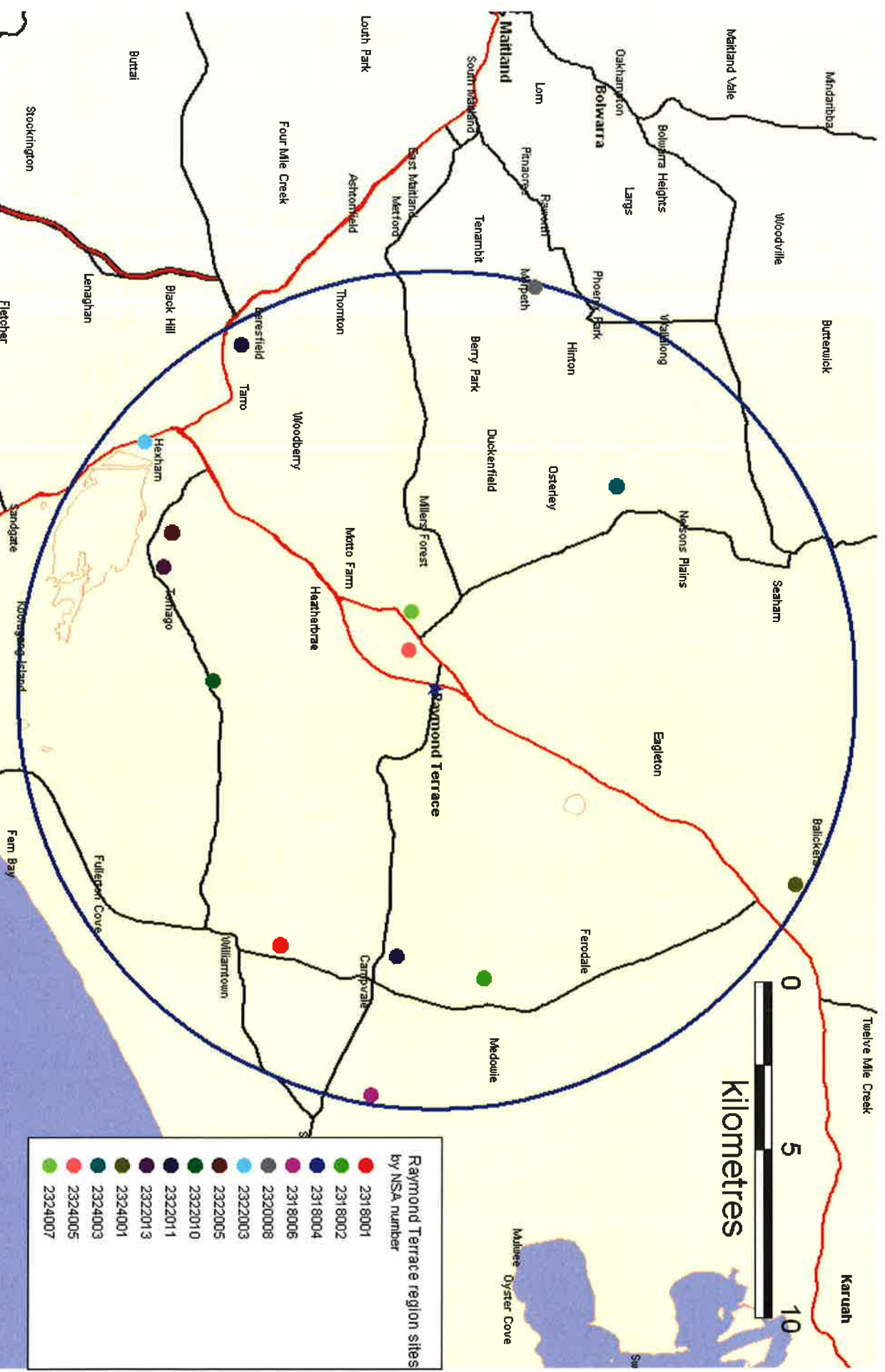


Queanbeyan Region sites

NSA reference	Site name
2619001	Jerrabomberra Hill Rd
2620002	Queanbeyan Water Board
2620003	Sandra's View
2620006	Larmer Silva Ave
2620009	Queanbeyan Morrisset St
2620025	Carwoola Kings Hwy

Raymond Terrace Regional area

10/08/2010

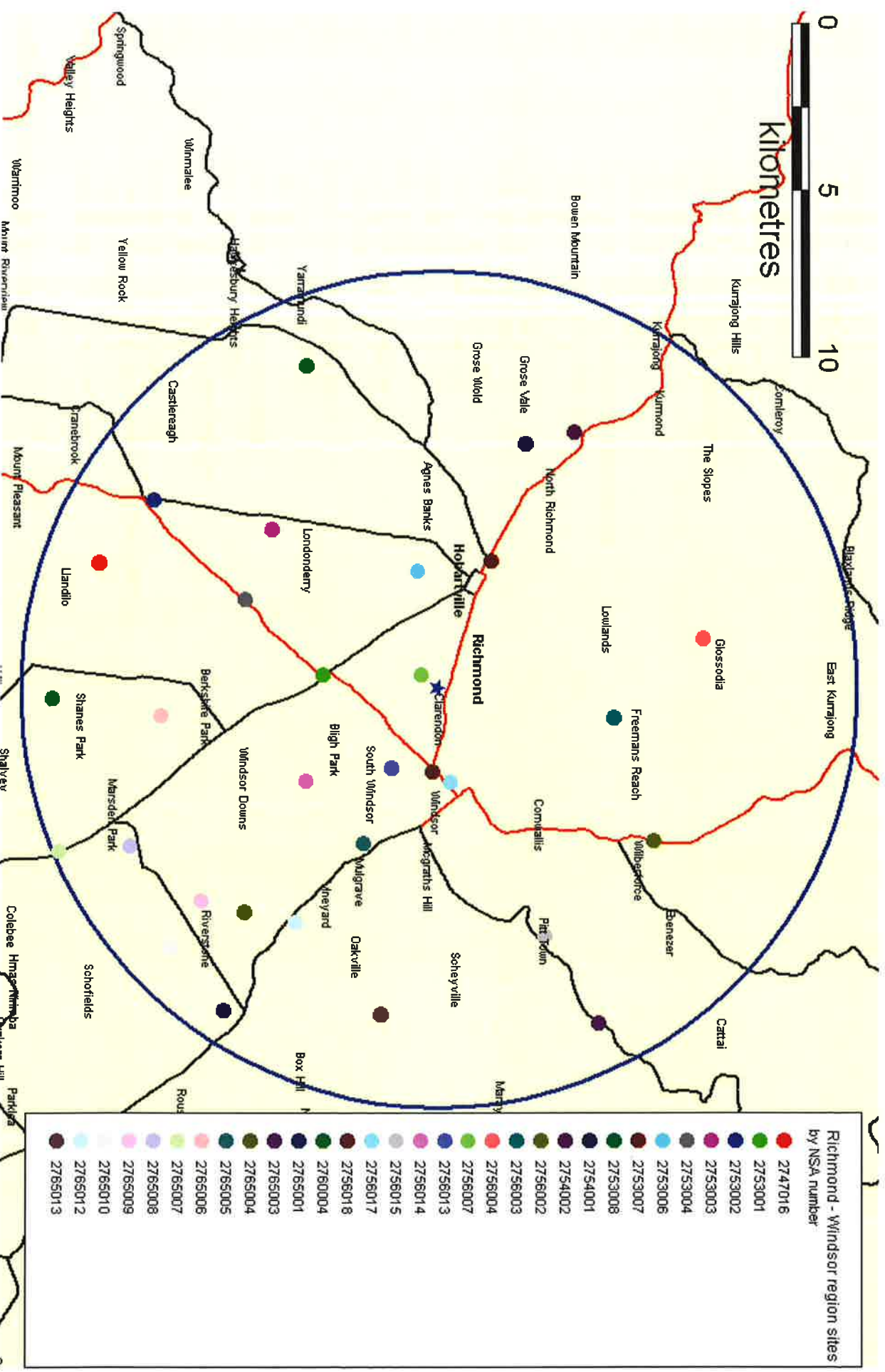


Raymond Terrace Region sites

<u>NSA reference</u>	<u>Site name</u>
2318001	Williamtown RAAF Base
2318002	Medowie Ferodale Rd
2318004	Medowie Richardson Rd
2318006	Salt Ash Water Board
2320008	Morpeth (also in Maitland region)
2322003	Hexham Gallegghan St
2322005	Tomago Aluminium
2322010	Tomago
2322013	Tomago Varley Group
2324001	Wallaroo Hill
2324003	Nesons Plains
2324005	Raymond Terrace East
2324007	Raymond Terrace Telephone Exchange

Richmond - Windsor Regional area

10/08/2010

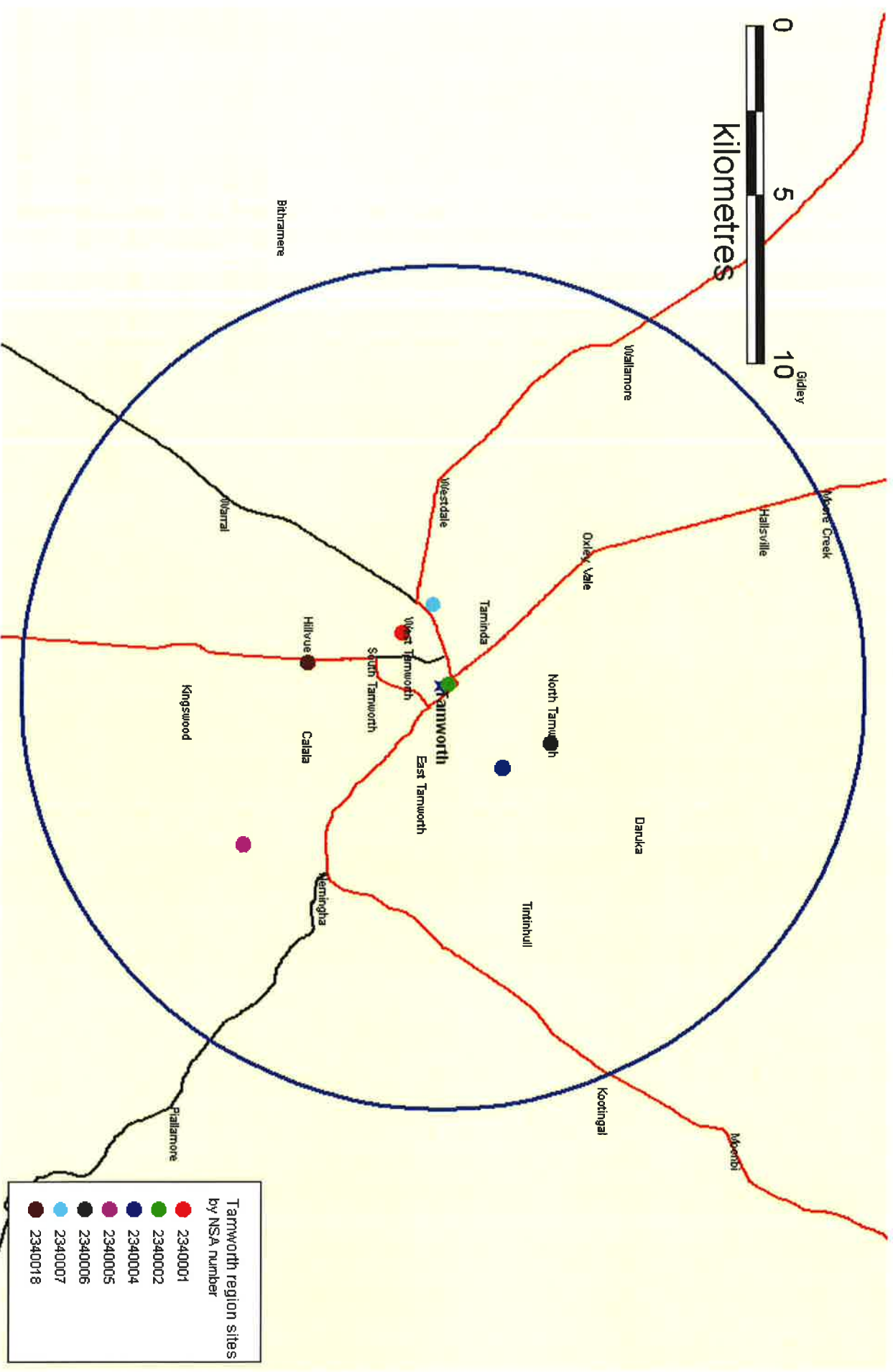


Richmond - Windsor Region sites

NSA reference	Site name
2747016	Llandilo Sixth Ave
2753001	Londonderry cnr The Northern Rd & Blacktown Rd
2753002	Londonderry Londonderry Rd
2753003	Londonderry
2753004	Londonderry 331 The Northern Rd
2753006	Richmond Poultry Lane
2753007	Richmond Telephone Exchange
2753008	Agnes Banks
2754001	North Richmond Reservoir
2754002	North Richmond Rural Press
2756002	Wilberforce
2756003	Freemans Reach Burgess Rd
2756004	Glossodia
2756007	Clarendon
2756013	South Windsor Fairey Rd
2756014	South Windsor Reservoir
2756015	Pitt Town Cattai Rd
2756017	Windsor George St
2756018	Windsor Mileham St
2760004	Shanes Park Stoney Creek Rd
2765001	Riverstone cnr Windsor Rd & Garfield Rd
2765003	Maraylya Miller Rd
2765004	Riverstone Edward St
2765005	Vineyard Railway Rd
2765006	Marsden Park 1270 Richmond Rd
2765007	Marsden Park 870 Richmond Rd
2765008	Marsden Park Jackson St
2765009	Riverstone Riverstone Pde
2765010	Riverstone
2765012	Vineyard Windsor Rd
2765013	Oakville

Tamworth Regional area

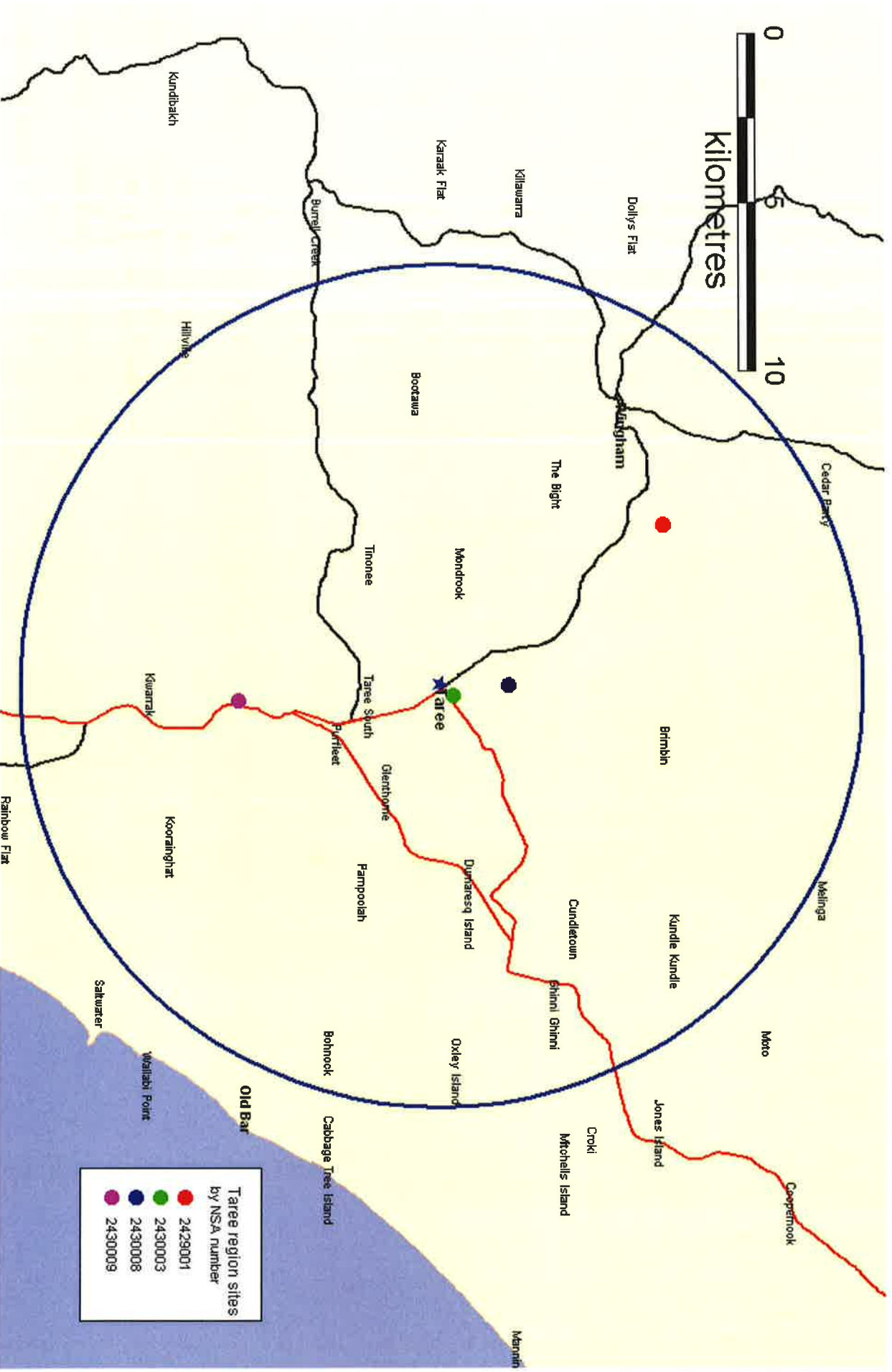
10/08/2010



Tamworth Region sites

NSA reference	Site name
2340001	West Tamworth Telephone Exchange
2340002	Tamworth Telephone Exchange
2340004	Bald Hill
2340005	Tamworth Calala Lane
2340006	Daves Hill
2340007	Taminda Gunnedah Rd
2340018	Tamworth Prime TV

10/08/2010

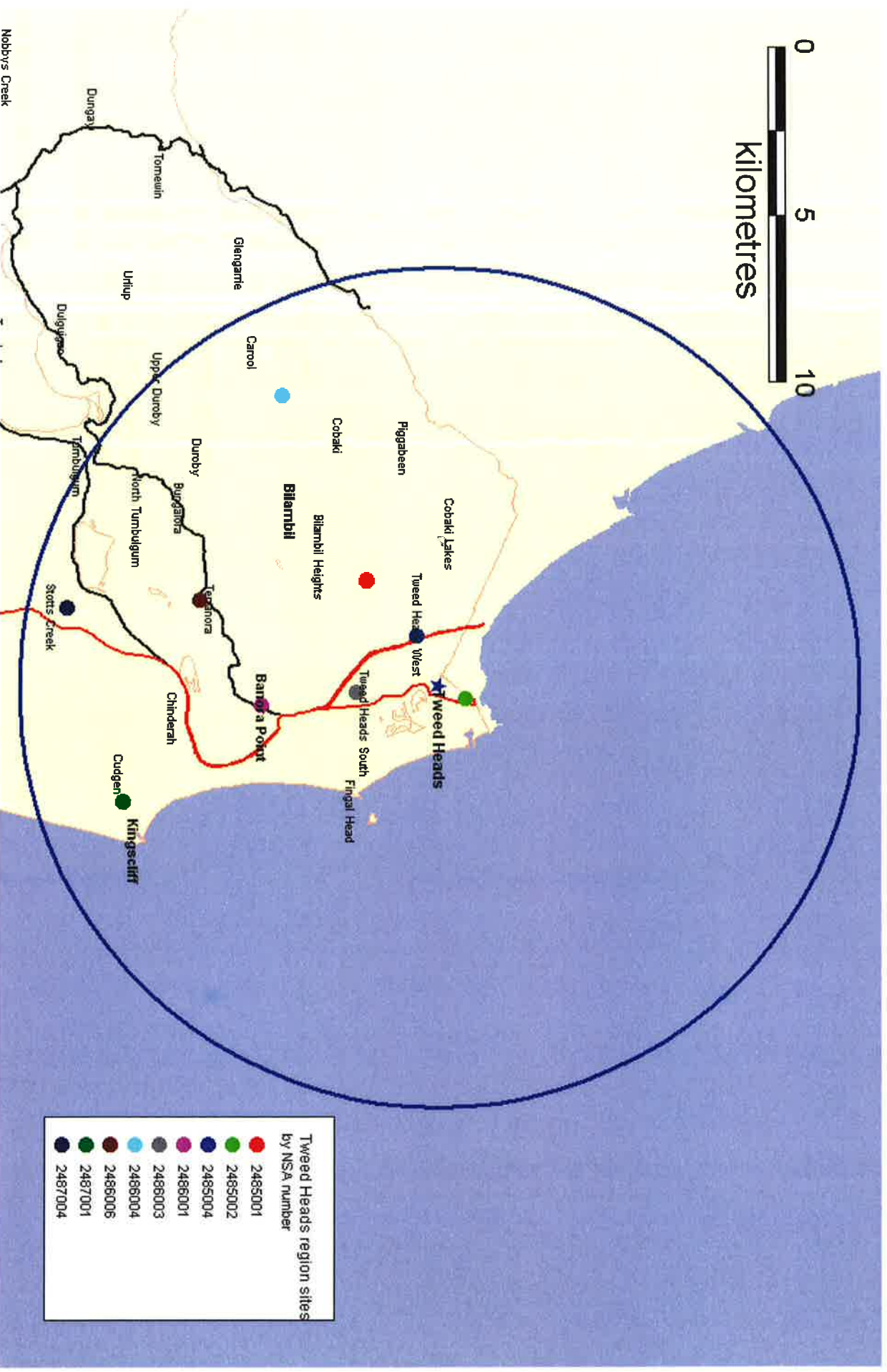


Taree Region sites

NSA reference	Site name
2429001	Wingham
2430003	Taree Telephone Exchange
2430008	Taree Muldoon St
2430009	Taree South Pacific Hwy

Tweed Heads Regional area

10/08/2010

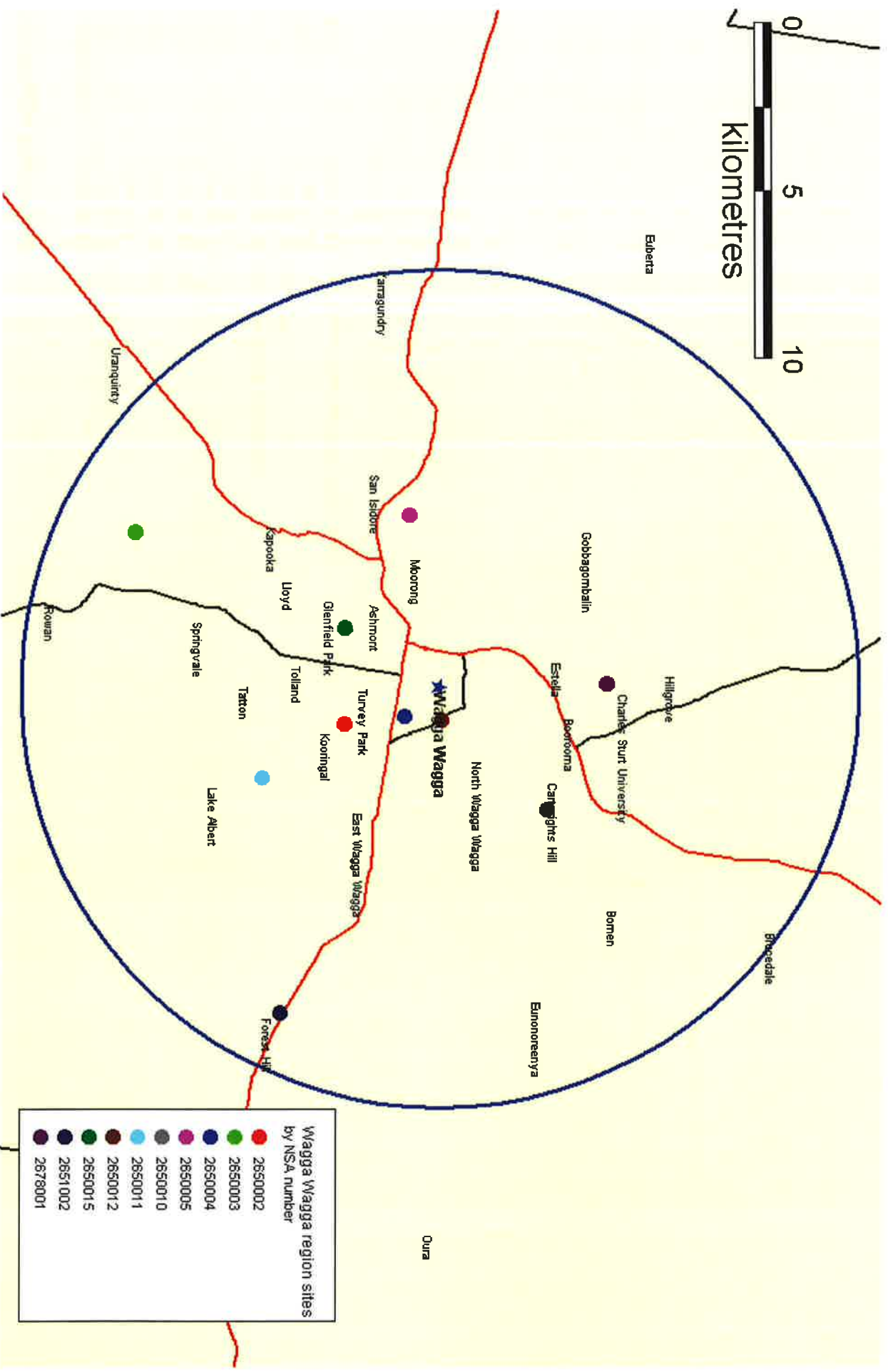


Tweed Heads Region sites

NSA reference	Site name
2485001	Bilambil Heights Radio Terminal
2485002	Tweed Heads Telephone Exchange
2485004	Tweed Heads West
2486001	Banora Point Reservoir
2486003	South Tweed Heads Radio Terminal
2486004	Bilambil
2486006	Terranora Lodge
2487001	Kingscliff Radio Terminal
2487004	Stotts Creek Pacific Hwy

Wagga Wagga Regional area

10/08/2010



Wagga Wagga Region sites

NSA reference	Site name
2650002	Willans Hill Radio Terminal
2650003	Clearview
2650004	Wagga Wagga
2650005	Moorong Trig
2650010	Bomen East St
2650011	Lake Albert
2650012	Wagga Wagga Telephone Exchange
2650015	Wagga Wagga West
2651002	Forest Hill
2678001	North Wagga Wagga Charles Sturt University

LPMA DENSITY DETERMINATION

Town	Population	Additional Detail
Sydney	3,641,422	HIGH DENSITY
Newcastle	288,732	HIGH DENSITY
Central Coast	282,726	HIGH DENSITY
Wollongong	234,482	HIGH DENSITY

High Density includes sites within the coastal strip from Newcastle to Wollongong

Maitland	61,431	MEDIUM DENSITY
Tweed Heads - Gold Coast	51,788	MEDIUM DENSITY
Wagga Wagga	46,735	MEDIUM DENSITY
Albury	43,787	MEDIUM DENSITY
Port Macquarie	39,219	MEDIUM DENSITY
Queanbeyan (NSW)	34,084	MEDIUM DENSITY
Tamworth	33,475	MEDIUM DENSITY
Orange	31,544	MEDIUM DENSITY
Dubbo	30,574	MEDIUM DENSITY
Bathurst	28,992	MEDIUM DENSITY
Nowra - Bombaderry	27,478	MEDIUM DENSITY
Lismore	27,069	MEDIUM DENSITY
Coffs Harbour	26,353	MEDIUM DENSITY
Richmond-Windsor	25,011	MEDIUM DENSITY
Goulburn	20,127	MEDIUM DENSITY

Medium Density includes sites within a 12.5Klm radius of the Town centre - refer Maps

Armidale	19,485	MEDIUM DENSITY
Broken Hill	18,854	MEDIUM DENSITY
Forster - Tuncurry	18,372	MEDIUM DENSITY
Cessnock-Bellbird	18,316	MEDIUM DENSITY
Grafton	17,501	MEDIUM DENSITY
Taree	16,517	MEDIUM DENSITY
Ballina	16,477	MEDIUM DENSITY
Griffith	16,182	MEDIUM DENSITY
Raymond Terrace	12,700	MEDIUM DENSITY
Kiama	12,286	MEDIUM DENSITY
Muswellbrook	10,222	MEDIUM DENSITY

ALL Sites within the State which
do not fall under the above
categories of HIGH or MEDIUM

		LOW DENSITY
--	--	-------------