CENTRAL LAND COUNCIL

Submission to the
Department of Climate Change, Energy, Environment and Water

Nature Repair Market

Exposure Draft Bill

March 2023

Contents

About the Central Land Council

The Central Land Council (***CLC***) is a Commonwealth corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (***ALRA***), with statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the Northern Territory. It is one of four Aboriginal land councils established under the ALRA.[1] The CLC's functions include ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region as to appropriate legislation concerning their land.

The CLC's area of responsibility spans 780,000 square kilometres – an area almost the same size as New South Wales. Of this, more than half (417,318 km^2) is Aboriginal land under the ALRA. The ALRA was the first Australian Government law to recognise Aboriginal systems of land ownership. Land rights asserted under the ALRA are unique and the strongest form of land rights in the country, being inalienable Aboriginal freehold title. Aboriginal people have the right not just to negotiate interests in that land, but to refuse certain activities and operations on their land. ALRA land is held by Aboriginal Land Trusts (***ALTs***), the functions of which are to hold title to land and exercise their powers over that land for the benefit of Aboriginal people. An ALT is only permitted to exercise its functions relating to land where the CLC has directed it to do so. The CLC is given powers and functions under the ALRA that make them responsible for the management of Aboriginal land.

In addition, Aboriginal people's rights have been asserted and won under the *Native Title Act 1993* (***NTA***). The CLC is a Native Title Representative Body (***NTRB***) established under the NTA for the southern portion of the NT. The CLC provides support to the Prescribed Bodies Corporate (***PBCs***) that are needed to hold native title rights, by assisting with their establishment and fulfilling their obligations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Additionally, Aboriginal people have succeeded in obtaining rights to small areas of land known as Community Living Areas, which are excised from pastoral leases. The map at **Appendix A** illustrates the varied land tenures that exist across our region and the NT as a whole.

Through our elected representative Council of 90 community delegates, the CLC represents the interests and aspirations of approximately 20,000 traditional landowners and other Aboriginal people resident in its region. We advocate for our people on a wide range of land-based and socio-political issues to ensure that our families can continue to survive and thrive on their land. We undertake a range of programs reflecting the priorities of and to the benefit of our constituents, including our ranger program, community development program, and supporting economic participation.

Caring for country in the CLC region

The land in the CLC region is geographically diverse, spanning sand plans, mountain ranges and river channels from the very dry Simpson Desert in the south-east, to relatively wet savannas in the north. This geography has shaped the cultures of Aboriginal people living on different parts of the country over millennia. In the context of the intent of a nature repair market to restore biodiversity and repair our ecosystems, it is essential to recognise that Aboriginal and Torres Strait Islander people are the first land managers. Aboriginal people in Central Australia have managed country for at least 60,000 years, and their knowledge and practices have and continue to sustain its health.

[1] The others being the Northern Land Council, the Tiwi Land Council and the Anindilyakwa Land Council.

The ranger program is the CLC's largest program and one of the most successful Aboriginal employment initiatives in Central Australia. Established more than two decades ago, the program enables traditional owners to work on country, doing work that is important to them: caring for country and passing on knowledge and skills to their young people. Rangers work on country to preserve traditional land management practices, maintain culture and language, and gain contemporary skills in land management. Our 14 ranger groups now work on Aboriginal land, including four Indigenous Protected Areas (***IPAs***), 23 jointly managed national parks, and on pastoral stations.

Despite the growth in the ranger program and workforce, and recent welcome commitments by the Federal Government to increase investment in ranger programs and funding for IPAs, land management effort remains thinly spread across a vast area – now subject to increasing threats.

Following the millennia of sustainable management by Aboriginal people, what was once a thriving managed landscape across the NT is now suffering the effects of around two centuries of non-Indigenous settlement, pastoralism, mining and other land use. The evidence of ecosystem collapse and biodiversity decline is alarming. The western-central arid zone ecosystem, covering the CLC region, is undergoing ecological collapse.[2] Central Australia is at the forefront of the mammalian extinction globally: of the 34 mammals that have been lost in Australia since colonisation (roughly the same number as the world combined over the last 200 years), 10 of these were from Central Australia.[3] In total, there are 141 species of fauna threatened in the Northern Territory, 46 of which are either endangered or critically endangered – that is, facing very or extremely high risk of extinction in the wild.[4] 84 species of flora are threatened, including 26 that are either endangered or critically endangered.[5] The extent of weeds, particularly buffel grass, is an issue of significant concern. In the words of one traditional owner: *"the weeds are still growing. Not enough being done to fix it."*[6]

The impacts of climate change are similarly alarming, and are compounding the threats to our already fragile ecosystems. In Central Australia we are already experiencing – and can expect to increasingly experience – hotter temperatures, more intense heatwaves, harsher and more frequent fire weather, longer periods in drought, more erratic rainfall and aquifer recharge, an increase in the likelihood of major flood events, drier soils, increased evapotranspiration, and increased risk of erosion.[7] Under these conditions, without significant and sustained effort, and adequate resourcing, the ecological decline across Central Australia and the rest of the NT will only accelerate. These impacts are felt deeply by Aboriginal people whose physical, emotional and spiritual health are intimately connected with the health of country.

The need for a substantial and sustained increase in investment in protecting ecosystems in Central Australia is clear, and Aboriginal people must be resourced to lead this work.

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[2] Bergstrom, D, Wienecke, B, van den Hoff, J, Hughes, L, Lindenmayer, D, Ainsworth, T, Baker, C, Bland, L, Bowman, D, Brooks, S, and Canadell, J. 2021. Combating ecosystem collapse from the tropics to the Antarctic. Global change biology, 27(9), pp.1692-1703, see p.1693-4.

[3] Foley, M. (2020) 'Why is Australia a global leader in wildlife extinctions?', Sydney Morning Herald; Morton, A. (2021) 'Australia confirms extinction of 13 more species, including first reptile since colonisation', The Guardian.

[4] Northern Territory Government 2022, 'Threatened animals' (website)

[5] Northern Territory Government 2022, 'Threatened plants' (website)

[6] Traditional Owner, CLC Central Australian and Barkly Region Joint Management Forum, November 2021.

[7] CSIRO (2020) Climate Change in the Northern Territory: State of the science and climate change impacts.

Introduction

The CLC welcomes the opportunity to comment on the exposure draft of the Nature Repair Market Bill. If designed well, the scheme has the potential to promote the repair and protection of our ecosystems, as well as the interests of Aboriginal and Torres Strait Islander peoples.[8] The creation of such a market is not, however without risk. The recommendations set out in this submission reflect the unique interests of Aboriginal people in the CLC region, both in terms of the opportunities and risks to our constituents.

The stated focus on the participation of Aboriginal and Torres Strait Islander peoples in the scheme and ensuring their free, prior and informed consent[9] is welcome, and reflective of the Federal Government's overarching commitment to the promotion of the rights of Aboriginal and Torres Strait Islander peoples through the implementation of the Uluru Statement from the Heart and the National Partnership Agreement on Closing the Gap.

The CLC is concerned, however, that the speed of the process to date has compromised the quality of engagement with Aboriginal and Torres Strait Islander peoples in the creation of the market which so directly affects them, as the first managers of the ecosystems across Australia, and the continuing custodians of our lands and waters. The uncertainty around what nature repair projects will look like on the ground at this early stage and the lengthy time commitment to the projects necessitates the legislation being more carefully considered than is currently the case. This submission is provided with the expectation that substantially more thorough and thoughtful engagement with Aboriginal and Torres Strait Islander groups will be facilitated in the next phase of market design.

We would like to emphasise in particular that:

- The establishment of a nature repair market also does not diminish the need to strengthen our environmental laws. The market legislation should be also complementary to these laws to ensure that there is an overall increase in biodiversity conservation nationally.
- The establishment of the market does not diminish the need for ongoing and increased government investment in land management, particularly Indigenous-led land management.
- The objects of the bill must explicitly acknowledge the rights and interests of Aboriginal and Torres Strait Islander people to participate in and benefit from a nature repair market. Aboriginal and Torres Strait Islander peoples have unique and pre-existing rights in natural and biological resources and are not just 'market participants'. The bill must make this clear distinction.
- The Federal Government must appropriately resource the participation of Aboriginal and Torres Strait Islander peoples in the design, implementation and ongoing operation of the market.

[8] The CLC notes that Aboriginal people in our region overwhelmingly prefer the term Aboriginal and Torres Strait Islander, rather than 'First Nations people' and therefore will use these terms throughout.
[9] Australian Government Department of Climate Change, Energy, the Environment and Water, Nature Repair Market Draft Bill Factsheet: Supporting the participation of First Nations people (weblink).

To this end, as reflected in our recommendations, the CLC calls for:

- The Federal Government to resource a First Nations Engagement Strategy to both promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design, and ongoing. This should include resourcing the participation of land councils, other Indigenous representative bodies, and relevant Indigenous land and sea networks.
- At least two (male and female) *mandated* Aboriginal and/or Torres Strait Islander-identified positions on the Nature Repair Market Committee (***NRMC***).
- An all-Indigenous sub-committee or working group of the NRMC that is geographically representative to provide ongoing guidance to the committee.
- Federal Government resourcing of Aboriginal and Torres Strait Islander groups to co-design methodologies, reflecting the success of this approach in the design of the savanna fire methodologies. Echoing the recommendations of the Indigenous Carbon Industry Network (***ICIN***)[10], this should include funding for Aboriginal and Torres Strait Islander co-design case studies to test and inform this work. Consideration should be given to geographic representation and the CLC proposes at least one methodology development project be undertaken in Central Australia and methodology development must capture cultural as well as environmental goals.
- Federal Government makes resources available to traditional owners who wish to consider and develop biodiversity projects, demonstrating commitment to the prioritisation of Indigenous-led land management and acknowledging the particular challenges and inequity in the 'playing field' of potential project proponents.

Acknowledging the extremely short timeframes for consultation and development of the Nature Repair Market legislation, the CLC additionally recommends a *one year* review of the legislation to identify, early, any unintended consequences of the market design, and ensure it is promoting the objects of the bill.

Overall the scheme must be well resourced, ensure free and prior informed consent processes for Aboriginal and Torres Strait Islander peoples, and provide transparency and clear integrity safeguards.

A summary of our recommendations is provided below.

[10] Of which CLC is a member.

Recommendations

Recommendation 1: The establishment of a nature repair market does not diminish the need to strengthen our environmental laws. Substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should remain a priority for the Federal Government.

This must include the establishment of legally enforceable National Environmental Standards, an independent and well-resourced national Environmental Protection Agency, and the expansion of the water trigger, and strong national protections for First Nations cultural heritage.

Recommendation 2: The establishment of the market does not diminish the need for ongoing and increased government investment in land management for conservation, particularly Indigenous-led land management. There must also be adequate, newly allocated funding for the implementation of the nature repair market (including assistance with early consent processes).

Recommendation 3: The Federal Government must appropriately resource the participation of Aboriginal and Torres Strait Islander peoples in the design, implementation and ongoing operation of the market.

Recommendation 4: The Federal Government should resource a First Nations Engagement Strategy to promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design, and beyond. This should include resourcing the participation of land councils, other Indigenous representative bodies, and relevant Indigenous land and sea networks.

Recommendation 5: The Nature Repair Market Committee should include at least two (male and female) *mandated* Aboriginal and/or Torres Strait Islander-identified positions.

Recommendation 6: An Indigenous sub-committee of the NRMC should be established that is geographically representative to provide ongoing guidance to the committee.

Recommendation 7: The Federal Government should resource Aboriginal and Torres Strait Islander groups to co-design biodiversity methodologies. This should include funding for Aboriginal and Torres Strait Islander co-design case studies to test and inform this work. Consideration should be given to geographic representation and the CLC proposes at least one methodology development project be undertaken in Central Australia, with CLC as a key partner. Methodology development must capture cultural as well as environmental goals.

Recommendation 8: The Federal Government should make resources available to traditional owners who wish to consider and develop biodiversity projects, demonstrating commitment to the prioritisation of Indigenous-led land management and acknowledging the particular challenges and inequity in the 'playing field' of potential project proponents. The resources required for methodology and up-front project development are beyond the means of most Indigenous groups, often necessitating partnerships that would diminish the benefits to the group.

Recommendation 9: The objects of the Act should be amended to explicitly recognise and promote the unique rights and interests, and promote the participation, of Aboriginal and Torres Strait Islander people in biodiversity projects. Also, the reference to Australia's obligations under international law in the draft objects should be amended to include reference to free and prior informed consent, consistent with the UN Declaration on the rights of Indigenous Peoples.

Recommendation 10: Ensuring benefits accrued by projects on or in relation to Aboriginal and Torres Strait Islander land, waters or cultural landscapes flow to Aboriginal and Torres Strait Islander people, should be a clear and central feature of the scheme. Measurement of the social and cultural impacts should be built into the monitoring of the scheme.

Recommendation 11: Eligible interest provisions proposed in section 18 of the draft Bill should be revised to explicitly preserve the operation of the proposed consent requirements under section 15(6).

Recommendation 12: The defined terms 'freehold land rights land' and 'land rights land' must be included as a mandatory up-front consent requirement, similar to proposed native title consents under s15(6)(b).

Recommendation 13: Proposed section 12(6), the 'opt out' deeming provision for registered native title body corporates (***RNTBCs***), is unnecessary and may create issues for RNTBCs.

Recommendation 14: The definition of 'regulatory approval' should be amended to explicitly refer to cultural heritage.

Recommendation 15: Variations to a project that either enlarge the project area or will or could have a detrimental impact on the project should not be made without the consent of eligible interest holders, including native title holders, freehold land rights land holders and land rights land holders.

Recommendation 16: An appropriate Indigenous body (such as the Indigenous Advisory Committee operating under the EPBC Act) should be actively notified of proposals to make or vary methodology determinations and more culturally appropriate alternatives should be available for feedback and consultation with Aboriginal and Torres Strait Islander peoples on proposed methodology determinations.

Recommendation 17: It should be mandatory, not discretionary, for the Minister to have regard to significant adverse environmental, economic or social impacts, as well as cultural impacts or impacts on Aboriginal and Torres Strait Islander peoples' rights and interests, when making or varying methodology determinations (see proposed sections 47(1)(b) and 48(2)(b)).

Recommendation 18: The NRMC should also consider and advise the Minister about whether a proposed methodology determination or variation is consistent with the objects of the Act.

Recommendation 19: The findings of the Chubb Review into carbon market should be reflected in any updated Bill, particularly with respect to transparency, data and information availability. Further, the scheme should require upfront identification (at the time an application is made for registration) of any existing carbon or biodiversity projects within the same project area.

Recommendation 20: Consistent with the approach taken in the CFI Act and in line with the principle of additionality, project-based assessments of additionality and newness should occur for proposed biodiversity 'enhancement' projects when an application is made to register such a project.

Recommendation 21: The legislation should be reviewed after *one year* of operation to identify, early, any unintended consequences of the market design, and ensure it is promoting the objects of the bill.

Recommendation 22: The definition of 'biodiversity project' needs to be altered to give proper effect to compliance and enforcement safeguards under the proposed scheme.

Recommendation 23: The proposed biodiversity integrity standards should be tightened.

Recommendation 24: Proposed section 84(3) should be amended to explicitly allow for project co-benefits to be taken into account in purchasing processes.

Recommendation 25: Additional information should be required as entries on the Biodiversity Market Register to provide greater the public assurance and transparency, and for consistency with the CFI Act, as outlined at [10.5].

Section 1: Stronger laws and increased public investment in protecting nature

1.1 The Federal Government has acknowledged the scale of the challenge we face in reversing the extinction crisis, protecting threatened species, and restoring biodiversity. The establishment of a Nature Repair Market to facilitate private investment in biodiversity protection and enhancement is one strategy that may be effective over the long term to address these challenges.

1.2 **It does not, however, diminish the need to strengthen our environmental laws. The CLC welcomes the Federal Government's commitments made in the *Nature Positive Plan* (2022), and urges substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).**

Recommendation 1: The establishment of a nature repair market does not diminish the need to strengthen our environmental laws. Substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should remain a priority for the Federal Government.

This must include the establishment of legally enforceable National Environmental Standards, an independent and well-resourced national Environmental Protection Agency, and the expansion of the water trigger, and strong national protections for First Nations cultural heritage.

1.3 The CLC anticipates that the Government will need to allocate significant funding and resources to implement the proposed nature repair market. It is critical that funds applied to the implementation of the nature repair market, including conservation contracting, are **adequate and newly allocated, to ensure that the Government is not detracting or reallocating funds from other programs that support Indigenous conservation programs and partnerships, or conservation projects more generally**.

1.4 Noting the current biodiversity crisis, it would be counterproductive to reallocate focus and resources, rather than increase effort and resources across the board. **The establishment of the market does not diminish the need for ongoing and increased government investment in land management, particularly Indigenous-led land management.**

Recommendation 2: The establishment of the market does not diminish the need for ongoing and increased government investment in land management for conservation, particularly Indigenous-led land management. There must also be adequate, newly allocated funding for the implementation of the nature repair market (including assistance with early consent processes).

1.5 As noted above, new funds should be appropriated for the proposed purchasing of biodiversity certificates (conservation contracting) by the Secretary to ensure funds for existing projects are not diminished as a result. The proposed biodiversity market should not negatively impact on funding for environmental projects under existing schemes important to the region, in particular carbon and savanna burning projects. In addition, funding will need to be designated to assist parties involved in up-front consents for registration and eligible interest holder consents. Providing proponents, landholders and Aboriginal and Torres Strait Islander communities with access to information and adequate resources is critical in supporting free and prior, informed consent.

Section 2: Engagement with Aboriginal and Torres Strait Islander people

2.1 The speed of the development of the draft legislation has compromised the quality of engagement with Aboriginal and Torres Strait Islander peoples in the process to date.

2.2 Noting the recommendation 9 below in relation to more fully reflecting the promotion of the rights and interests of Aboriginal and Torres Strait Islander peoples in the objects of the bill, the Federal Government must ensure that Aboriginal and Torres Strait Islander peoples are more fully engaged in the design, implementation and ongoing operation of the market from this point onwards.

Recommendation 3: The Federal Government must appropriately resource the participation of Aboriginal and Torres Strait Islander peoples in the design, implementation and ongoing operation of the market.

2.3 In particular, the CLC recommends that Federal Government resource a First Nations Engagement Strategy to both promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design and beyond. This should include resourcing the participation of land councils, other Indigenous representative bodies, and relevant Indigenous land and sea networks.

Recommendation 4: The Federal Government should resource a First Nations Engagement Strategy to promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design, and beyond. This should include resourcing the participation of land councils, other Indigenous representative bodies, and relevant Indigenous land and sea networks.

2.4 The proposed Indigenous representation on the Nature Repair Market Committee (***NRMC***) is not sufficient. The draft bill does not propose any Indigenous-identified positions, only that "Indigenous knowledge relevant to the functions of the Committee" is one of the fields of expertise that *may* be held by Committee members (s198(2)(f)). **There should be at least two (male and female) *mandated* Aboriginal and/or Torres Strait Islander-identified positions on the *NRMC*.**

2.5 **The CLC additionally recommends the establishment of an Indigenous sub-committee of the NRMC that is geographically representative to provide ongoing guidance to the committee.**

Recommendation 5: The Nature Repair Market Committee should include at least two (male and female) *mandated* Aboriginal and/or Torres Strait Islander-identified positions.

Recommendation 6: An Indigenous sub-committee of the NRMC should be established that is geographically representative to provide ongoing guidance to the committee.

2.6 While the co-design of methodologies with Aboriginal and Torres Strait Islander peoples is welcome, the timeframes and process for this is unclear. The co-design of methodologies has been very successful in the development of savanna fire methodologies and, reflecting the success of this approach, **the CLC recommends dedicated resourcing of Aboriginal and Torres Strait Islander groups to facilitate such co-design for biodiversity methods.**

2.7 **This should include funding for traditional owner co-designed case studies to test and inform this work. Consideration should be given to geographic representation and the CLC proposes at least one methodology development project be undertaken in the Central Australian region, with CLC as a key partner. Methodology development must capture cultural as well as environmental goals.** The CLC welcomes further conversation with government about this.

2.8 There are many reasons to prioritise the development of desert methodologies. Eighty percent of the Australian landscape is arid land. Aboriginal people make up a much larger proportion of the population living in the arid zone, and Aboriginal people living in these regions experience the highest rates of poverty and far more limited opportunities for economic participation than other Australians.[11] The lack of development of desert methodologies has limited the ability of traditional owners in our region to participate in the carbon market and seize the economic opportunities that it has presented for many traditional owner groups in the Top End and other parts of northern Australia. Prioritising the development of desert biodiversity methodologies will help ensure that traditional owners in our region have the opportunity to benefit economically from the Nature Repair Market, in a context where economic opportunities are scarce. Further reason to prioritise desert methodologies include the high concentration of Indigenous Protected Areas (***IPAs***) in the central desert. See here and at **Appendices B and C**. Desert methodologies will strongly benefit protected areas.

2.9 In developing methodologies, it is important to recognise that from an Aboriginal perspective, people's connection to country is integral to the health of country; healthy country requires people to *spend time* on country. As can be seen with carbon methodologies, different biodiversity methodologies will facilitate this to a greater or lesser degree. Co-design with traditional owners is therefore critical to ensure methodologies capture what is important to Aboriginal people and that cultural as well as environmental goals are achieved. Partnering with strong Aboriginal organisations, including but not limited to the CLC in the central desert region, will help ensure that cultural values are foregrounded in methodology development.

2.10 The CLC also refers the Department to our submission to the current *Inquiry into Northern Australia Workforce Development* which emphasises that traditional owners must have a central role in the Nature Repair Market. The submission can be accessed on our website.

[11] The NT's Indigenous employment rate continues to be the lowest in the country – and the gap is widening. Over the last decade we have seen a decline from 42.8 per cent of Indigenous people aged 25-64 employed in 2011, to 35.4 per cent in 2016 and 34.3 per cent in 2021, and the employment rate is even lower in remote areas. This is well below the national Indigenous employment rate of 55.7 per cent and even further below the Closing the Gap target to see 62 per cent of Aboriginal and Torres Strait Islander people aged 25-64 employed by 2030. The lack of employment opportunities is a key contributor to the high rates of poverty. A snapshot of 28 remote communities in the NT prepared by the NT Government in 2018 showed that, on average, there are only 0.3 jobs available for every person in the community. See CLC's submission to the *Inquiry into the extent and nature of poverty in Australia* (February 2023) accessed via the CLC website. See pages 7-8.

Recommendation 7: The Federal Government should resource Aboriginal and Torres Strait Islander groups to co-design biodiversity methodologies. This should include funding for Aboriginal and Torres Strait Islander co-design case studies to test and inform this work. Consideration should be given to geographic representation and the CLC proposes at least one methodology development project be undertaken in Central Australia, with CLC as a key partner. Methodology development must capture cultural as well as environmental goals.

Recommendation 8: The Federal Government should make resources available to traditional owners who wish to consider and develop biodiversity projects, demonstrating commitment to the prioritisation of Indigenous-led land management and acknowledging the particular challenges and inequity in the 'playing field' of potential project proponents. The resources required for methodology and up-front project development are beyond the means of most Indigenous groups, often necessitating partnerships that would diminish the benefits to the group.

Section 3: Objects

3.1 The draft objects of the proposed bill are:

a) "to facilitate the enhancement or protection of biodiversity in native species in Australia; and
b) to contribute to meeting Australia's international obligations in relation to biodiversity; and
c) to promote engagement and co-operation of market participants (including First Nations people, governments, the community, landholders and private enterprise) in the enhancement or protection of biodiversity in native species in Australia; and
d) to contribute to the reporting and dissemination of information related to the enhancement or protection of biodiversity in native species in Australia."

3.2 The objects of the proposed Act should recognise and reinforce a presumption that Aboriginal and Torres Strait Islander peoples' rights and interests exist in relation to natural and biological resources. Further, these rights should be distinguished from other stakeholders to reflect their unique and pre-existing nature (for example, First Nations peoples are more than market participants whose engagement should be promoted).

3.3 In *Mabo v Queensland (No. 2)* [1992] HCA 23, the High Court of Australia recognised the prior rights of Australia's First Peoples to occupy, use and enjoy their traditional rights and interests.

> *"It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown." (per Justice Brennan at paragraph [62] Mabo v State of Queensland (No. 2) [1992] HCA 23)*

3.4 The CLC reserves its position and the position of traditional owners in relation to their inherent rights and interests and the Government's legal power to create personal property in biodiversity. This submission focuses on ensuring appropriate safeguards and protections exist in the proposed bill for Aboriginal and Torres Strait Islander peoples and that there is clear recognition of their rights and interests, as well as pathways to realise opportunities.

3.5 Native title litigation has confirmed that the right to take and use resources of the land (and waters) may include use for any purpose (see for example *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33).

3.6 The proposed objects should be amended to better reflect the unique and existing rights and interests of Aboriginal and Torres Strait Islander peoples, including native title rights and interests that continue to be used and enjoyed in relation to natural and biological resources. Accordingly, **an additional object should be added to the proposed legislation:**

> *(e) to acknowledge, support and protect the rights and interests of Aboriginal and Torres Strait Islander people and to promote opportunities for Aboriginal and Torres Strait Islander people to participate in the enhancement or protection of biodiversity and the associated market.*

3.7 **In addition, reference in the draft objects to Australia's obligations under international law should expressly include reference to commitments to free and prior informed consent, consistent with the UN Declaration on the rights of Indigenous Peoples.** This aspect of the draft objects should also reflect the promotion of equitable access and benefit sharing agreements with First Peoples (consistent with principles expanded under the Nagoya Protocol to the UN Convention on Biological Diversity with respect to genetic information).

Recommendation 9: The objects of the Act should be amended to explicitly recognise and promote the unique rights and interests, and promote the participation, of Aboriginal and Torres Strait Islander people in biodiversity projects. Also, the reference to Australia's obligations under international law in the draft objects should be amended to include reference to free and prior informed consent, consistent with the UN Declaration on the rights of Indigenous Peoples.

3.8 Ensuring benefits accrued by projects on or in relation to Aboriginal and Torres Strait Islander land, waters or cultural landscapes flow to Aboriginal and Torres Strait Islander people, should be a clear and central feature of the scheme.

Recommendation 10: Ensuring benefits accrued by projects on or in relation to Aboriginal and Torres Strait Islander land, waters or cultural landscapes flow to Aboriginal and Torres Strait Islander people, should be a clear and central feature of the scheme. Measurement of the social and cultural impacts should be built into the monitoring of the scheme.

Section 4: Consents

4.1 The CLC supports the inclusion of an up-front requirement for consent from native title holders for projects in native title areas. However, **the CLC submits that eligible interest provisions proposed in section 18 be revised to provide explicit consistency with the proposed consent requirements under section 15(6).** Proposed section 18 should clearly state that it does not limit or derogate from requirements under sections 15(4) and 15(6).

Recommendation 11: Eligible interest provisions proposed in section 18 of the draft Bill should be revised to explicitly preserve the operation of the proposed consent requirements under section 15(6).

4.2 In addition, proposed section 28(2) provides for unilateral cancellation of registration of a biodiversity project if eligibility requirements set out under section 15(4) (criterial for approval) are not met. The drafting of proposed section 28(2) creates ambiguity, as section 15(4) provides that the Regulator must not approve the registration of a biodiversity project unless it is satisfied of the matters set out in section 15(4) (and section 15(4) includes the consent requirements at s15(4)(l), expanded upon in section 15(6)). Together, proposed sections 18 and 28(2) create confusion about up-front native title consents, which supporting materials confirm is a key feature of the proposed bill.

4.3 Further, proposed section 15(6) contains provisions that appear intended to ensure that the project proponent has the relevant legal right to access land/waters and carry out the proposed project. This approach departs from that under the CFI Act, which defines the 'project proponent' as "… *the person who has the legal right to carry out the project*". While the nature of the interests set out in proposed section 15(6)(a) may potentially capture 'freehold land rights land' and some 'land rights land', the current drafting at section 15(6)(a) provides options which create uncertainty (including future rules).

4.4 The draft bill creates some ambiguity in relation to Aboriginal Land, and the particular role of land councils. **The CLC submits that the defined terms ''freehold land rights land' and 'land rights land' be included as a mandatory up-front consent requirement, similar to proposed native title consents under s15(6)(b).**

Recommendation 12: The defined terms ''freehold land rights land' and 'land rights land' must be included as a mandatory up-front consent requirement, similar to proposed native title consents under s15(6)(b).

4.5 This division is evident in the interplay of sections 89 and 92, the former defining eligible interests in relation to 'Torrens system land' and the latter doing so in relation to 'Land Rights land'. It is unclear whether Torrens system land under s 15(6)(a) would properly require the engagement of the CLC and other Land Councils, as the unique communal title and land council administration of land under ALRA is not distinguished from other, "standard" forms of Torrens title.

4.6 The above issues must be addressed and must not erode the clear requirement for consent from native title holders and traditional Aboriginal owners under the ALRA before a project can be registered.

Section 5: Registered Native Title Body Corporate deeming provisions

5.1 Proposed draft section 12(6) of the bill provides that, where an applicant (applying to register a biodiversity project) is a native title holder for an exclusive possession native title area, and the proposed project area is as exclusive possession native title area, then the application must specify the registered native title body corporate (***RNTBC***) as the proposed project proponent. The proposed draft provisions enable the registered native title body corporate to 'opt out' by providing written notice to the applicant that it does not consent to being the project proponent.

5.2 Generally, in the CLC region, activities such as undertaking land management projects, carbon projects and similar activities, particularly those carrying economic or commercial risk, are undertaken by entities established or nominated by a RNTBC (rather than the RNTBC itself). While the proposed provisions provide flexibility for the RNTBC to opt out of being a project proponent, the proposed drafting overlaps with eligible interest holder consent requirements. In practice, a small group of native title holders (e.g. a ranger group) would need consent from the RNTBC before a project can be registered in a native title area pursuant to proposed section 15(6)(b). Further, in the event that an individual native title holder was to put down a RNTBC as co-applicant and thus expose it to the attendant risks of being a project proponent, the RNTBC must consent to being a proponent under s 12(3)(b). **The CLC submits that proposed section 12(6) is not needed and may create issues for RNTBCs.**

Recommendation 13: Proposed section 12(6), the 'opt out' deeming provision for registered native title body corporates (***RNTBCs***), is unnecessary and may create issues for RNTBCs.

Section 6: Cultural heritage

6.1 Proposed section 17 of the bill enables the Regulator to register a project subject to the condition that a biodiversity certificate is not to be issued with respect to the project until all regulatory approvals are obtained. This presents two issues in relation to cultural heritage:

6.2 'regulatory approval' is defined to mean an approval, licence or permit that… relates to '*land use or development, the environment or water' (emphasis added)*; and

6.3 from experience with carbon projects, traditional owners in various parts of Australia have found that proponents or land managers often commence works for the project (such as fencing, new dams or irrigation infrastructure / water points for stock etc.) which involve ground disturbance, under broad and ambiguous exemptions for farming activities.

6.4 **The CLC submits that the definition of 'regulatory approval' be amended to explicitly refer to cultural heritage (as a relevant law of a State, Territory or Commonwealth) and also refer to a plan, agreement or sacred site clearance (to ensure that any requirements for a sacred site clearance, cultural heritage management agreement or plan are captured by the definition).**

Recommendation 14: The definition of 'regulatory approval' should be amended to explicitly refer to cultural heritage.

6.5 Further, the CLC submits that prescribed forms and practical guidance materials supporting any nature repair market should require applicants for a project to consider and confirm cultural heritage checks that have been undertaken and strongly encourage project proponents to engage with relevant Aboriginal and Torres Strait Islander organisations (RNTBCs, land councils, native title representative bodies etc.) to confirm the presence, or likely presence, of cultural heritage places, sacred sites or objects in the proposed project area.

Section 7: Variations to biodiversity projects

7.1 Proposed Part 2, Division 3 of the bill deals with variations to registered biodiversity projects. These proposed provisions are very broad enabling provisions and require additional statutory safeguards. For example, proposed section 20 enables rules to be established to empower the Regulator (on application by the project proponent) to vary the registration of a project in respect of the project area, methodology determination that covers the project, project permanence period and project activity period.

7.2 These changes can materially affect other interest holders in the project area (existing or varied project area) and could materially influence commercial risks associated with a project. **The CLC submits that variations to a project that will either expand the project area, or will or could have a detrimental impact on the project area (or new project area), should not made without the consent of eligible interest holders, including native title holders, freehold land rights land holders and land rights land holders.**

Recommendation 15: Variations to a project that either enlarge the project area or will or could have a detrimental impact on the project should not be made without the consent of eligible interest holders, including native title holders, freehold land rights land holders and land rights land holders.

7.3 Any changes to the project area to increase that area should require consent of land holders and native title holders (consistent with section 15(6)) and eligible interest holders with respect to the new or expanded area. For certainty, these protections should be included in the proposed Act rather than subordinate rules.

Section 8: Methodology determinations and the role of the NRMC

8.1 Proposed Part 4 of the draft bill sets out several provisions relating to the making, varying and revocation of methodology determinations and the role of the nature repair market committee (***NRMC***). This Part provides that the Minister must seek and receive advice from the NRMC before making, varying or revoking a methodology determination and that the NRMC must publish a proposed determination or variation on the Department's website and seek public comment before providing advice to the Minister.

8.2 The proposed approach places the onus on Aboriginal and Torres Strait Islander peoples to monitor websites (which can be difficult in remote parts of Australia), become aware of proposals, and then respond to these via the proposed submission process. In the context of traditional responsibilities to cultural landscapes and homelands, this approach presents unique and significant language, administrative, technological and telecommunication challenges for Aboriginal and Torres Strait Islander peoples.

8.3 **The CLC submits that the proposed statute require an appropriate Indigenous body (such as the Indigenous Advisory Committee operating under the EPBC Act) to be actively notified of proposed determinations or variations and that more culturally appropriate alternatives be available for feedback on proposed methodology determinations (e.g. meetings or web-based discussions).** While details can be flexibly provided in subordinate legislation and rules, the Act

should contain the enabling requirement for consultation with relevant Aboriginal and Torres Strait Islander peoples via culturally appropriate means.

8.4 The CLC notes that the Indigenous Advisory Committee does not currently include representation for the NT and this should be rectified.

Recommendation 16: An appropriate Indigenous body (such as the Indigenous Advisory Committee operating under the EPBC Act) should be actively notified of proposals to make or vary methodology determinations and more culturally appropriate alternatives should be available for feedback and consultation with Aboriginal and Torres Strait Islander peoples on proposed methodology determinations.

8.5 In relation to the making and variation of a methodology determination, the Minister has a discretion to have regard to whether the kind of projects covered by the determination are likely to give rise to '*significant adverse environmental, agricultural, economic or social impacts*' (see proposed sections 47(1)(b) and 48(2)(b)). The CLC submits that it should be a mandatory requirement for the Minister to have regard to these matters, as well as significant adverse impacts on cultural heritage and Aboriginal and Torres Strait Islander peoples' rights and interests. **The CLC submits that these important interests should be mandatory not discretionary matters considered by the Minister in making or varying a methodology determination**.

Recommendation 17: It should be mandatory, not discretionary, for the Minister to have regard to significant adverse environmental, economic or social impacts, as well as cultural impacts or impacts on Aboriginal and Torres Strait Islander peoples' rights and interests, when making or varying methodology determinations (see proposed sections 47(1)(b) and 48(2)(b)).

8.6 **Further, the CLC submits that the NRMC should also consider and advise the Minister about whether a proposed methodology determination or variation is consistent with the objects of the Act.**

Recommendation 18: The NRMC should also consider and advise the Minister about whether a proposed methodology determination or variation is consistent with the objects of the Act.

Section 9: General Matters

9.1 Many lessons have been learnt from the establishment and operation of the carbon market that must be reflected in the design of the nature repair market.

9.2 **The findings of the recent Chubb Review (into carbon market integrity) should be incorporated in the design of the proposed nature repair market, including with respect to transparency, data and information availability and the role of the Clean Energy Regulator.** Project data, reporting and transparency will be essential to the integrity of the scheme, particularly given the proposal to allow concurrent and sequential biodiversity projects on the same area of land or waters (and potentially concurrent carbon and biodiversity projects on the same area of land or waters).

9.3 The Chubb Review recommended that the Clean Energy Regulator be responsible for fewer roles to ensure transparency. Assigning the Clean Energy Regulator as the administrator of the Nature Repair Market goes directly against this recommendation.

Recommendation 19: The findings of the Chubb Review into carbon market should be reflected in any updated Bill, particularly with respect to transparency, data and information availability. Further, the scheme should require upfront identification (at the time an application is made for registration) of any existing carbon or biodiversity projects within the same project area.

9.4 CLC submits that the draft Bill be amended to require upfront, at the time of application for registration of a project, identification of any existing carbon or biodiversity projects in a proposed project area (including the presence of any existing projects under other schemes within the same project area). As noted below, for transparency, this information should also be captured on the Biodiversity Market Register (the existence of other biodiversity projects or a carbon project on all or part of a project area).

9.5 Methodology determinations have a central and critical role under the proposed scheme. Methodology development will be important to designing methods appropriate to biodiverse and cultural landscapes in various areas, including central Australia. Many Aboriginal communities within the CLC's region have had limited opportunity to participate in carbon projects due to method prioritisation and limitations. However, central Australia has unique and important ecosystems that can and should benefit from (and be prioritised under) the proposed nature repair market scheme. The CLC would welcome the opportunity to assist traditional owners' work on the culturally appropriate design and efficient delivery of such methods, and as outlined at paragraphs 2.6 and 2.7, recommends the resourcing of traditional owners to co-design methodologies, including case study projects to inform this work. As noted below, consultation on proposed methodologies should be culturally accessible (rather than rely on a single public process).

9.6 The CLC is concerned that sufficient project-based 'additionality' safeguards are not included in the draft bill for biodiversity 'enhancement' projects. It is understood a biodiversity 'protection' project may enable active management of existing high-value biodiversity to be covered by a methodology. However, it is imperative that 'enhancement' projects (which are understood to be projects intended to regenerate or return biodiversity to a project area) are 'additional' (when assessed against 'business as usual' activities, particularly if there is a concurrent carbon project). The proposed statute should ensure each such project is new (is not already being undertaken) and is not required to be carried out under a law of the Commonwealth, State or Territory (regulatory additionality). These additionality and newness requirements should be applied at a project-level are consistent with the approach under the CFI Act.

9.7 While the proposed Biodiversity Integrity Standards provide a broad and predictive consideration of whether an enhancement or protection would be unlikely to occur in the absence of the project (at a methodology level), **it is critical to the credibility and integrity of the scheme that project-based assessments of additionality and newness occur under the Act when an application is made to register an 'enhancement' biodiversity project.** This is consistent with the approach in the CFI Act (which has a similar broad and predictive integrity standard requirement for methodologies, supplemented by a project-based newness and additionality assessment). Leaving these matters to be addressed solely in subordinate legislation, rules and instruments carries risk of uncertainty and inconsistency.

Recommendation 20: Consistent with the approach taken in the CFI Act and in line with the principle of additionality, project-based assessments of additionality and newness should occur for proposed biodiversity 'enhancement' projects when an application is made to register such a project.

9.8 Acknowledging the extremely short timeframes for consultation and development of the Nature Repair Market legislation, the CLC additional recommends a *one year* review of the legislation to identify, early, any unintended consequences of the market design, and ensure it is promoting the objects of the bill. This is in addition to the five year review proposed in the current draft bill.

Recommendation 21: The legislation should be reviewed after *one year* of operation to identify, early, any unintended consequences of the market design, and ensure it is promoting the objects of the bill.

Section 10: Drafting and technical issues

10.1 The definition of '*Biodiversity project'* should be amended to refer to the 'project area' rather than 'a particular area'. Also, the bracketed content regarding the '*effect on biodiversity occurring inside or outside the area'* should be removed. **These changes are needed to ensure that a biodiversity certificate (and associated benefits and responsibilities) can be properly enforced under the scheme (with appropriate consents etc. for interests in a project area).** If a biodiversity certificate can be issued for 'offsite' outcomes, it is unclear how consents and protections will apply to that 'offsite' area. These changes to the definition are also needed for consistency with the definition of '*project area'* and proposed section 12(2) (regarding the requirements for an application to register a biodiversity project). Further, they are needed to give proper effect to the proposed operation of relinquishment requirements and a 'biodiversity maintenance declaration' (which can apply to all or part of a project area for a biodiversity project).

Recommendation 22: The definition of 'biodiversity project' needs to be altered to give proper effect to compliance and enforcement safeguards under the proposed scheme.

10.2 The proposed requirements for biodiversity project applications (proposed section 12) should require information be provided about whether the proposed project area (all or part of the project area) is subject to a native title determination, registered native title claim, land rights claim, or registered Aboriginal cultural heritage or sacred sites (in all or part of the proposed project area). These are important matters that should be mandated by, and brought forward under, the proposed Act rather than be left to resolve through subordinate legislation or prescribed forms.

10.3 **The biodiversity integrity standards should be tightened**. While some elements need to be forward looking and based on probability, other elements are drafted too broadly. For example, a project carried out in accordance with a methodology should simply not have a *significant adverse impact* on biodiversity in a native species protected under a federal, state or territory law (rather than be designed to prevent such occurrence – e.g. section 57(1)(b)). The current drafting of most integrity standards creates material risk, as the focus is on how a project should be designed (when the ultimate design can't be assessed). The vagueness of the current drafting also

limits the advice that can be provided by the NRMC to the Minister regarding compliance of a proposed methodology with the integrity standards. The proposed standards should also import greater consideration of impacts of methodologies and associated activities and project plans on the rights and interests of Aboriginal and Torres Strait Islander peoples.

Recommendation 23: The proposed biodiversity integrity standards should be tightened.

10.4 Provisions relating to the conduct of biodiversity conservation contract purchasing by the Secretary should be amended to allow for project co-benefits, such as a cultural co-benefit (or Aboriginal or Torres Strait Islander co-benefit), to be taken into account as an explicit principle in conducting a purchasing process. This should be included in the proposed Act to ensure requisite enabling provisions are clear. **The CLC submits that proposed section 84(3) be amended to allow for project co-benefits to be taken into account in purchasing processes**.

Recommendation 24: Proposed section 84(3) should be amended to explicitly allow for project co-benefits to be taken into account in purchasing processes.

10.5 Proposed sections 162 and 164 set out proposed entries in the Register (Biodiversity Market Register). It is important for public assurance and transparency that these are set out in the Act, rather than included as requirements in subordinate law or rules (as contemplated by proposed section 162(l)). For transparency, the Register should also set out the following information as entries on the Register (in addition to the items set out in proposed sections 162 and 164):

- whether a project area also subject to a carbon project under the CFI Act;
- whether it is subject to more than one biodiversity project;
- whether the project is intended to achieve co-benefits and the broad nature of these co-benefits (in a similar way to the Queensland Government's land restoration fund project register);
- whether a project is subject to a biodiversity conservation contract and the date on which that contract was entered into with the Secretary (similar to information about the carbon abatement contracts in the CFI Act registers); and
- for a biodiversity certificate issued for a project, the project area to which it relates (not just the project).

The CLC submits that proposed sections 162 and 164 be amended to include the above items. Further, the CLC submits that all information be included in the Register be readily accessible, searchable across all entries and easily reviewed for due diligence or other purposes (preferably with all information in a single location or repository).

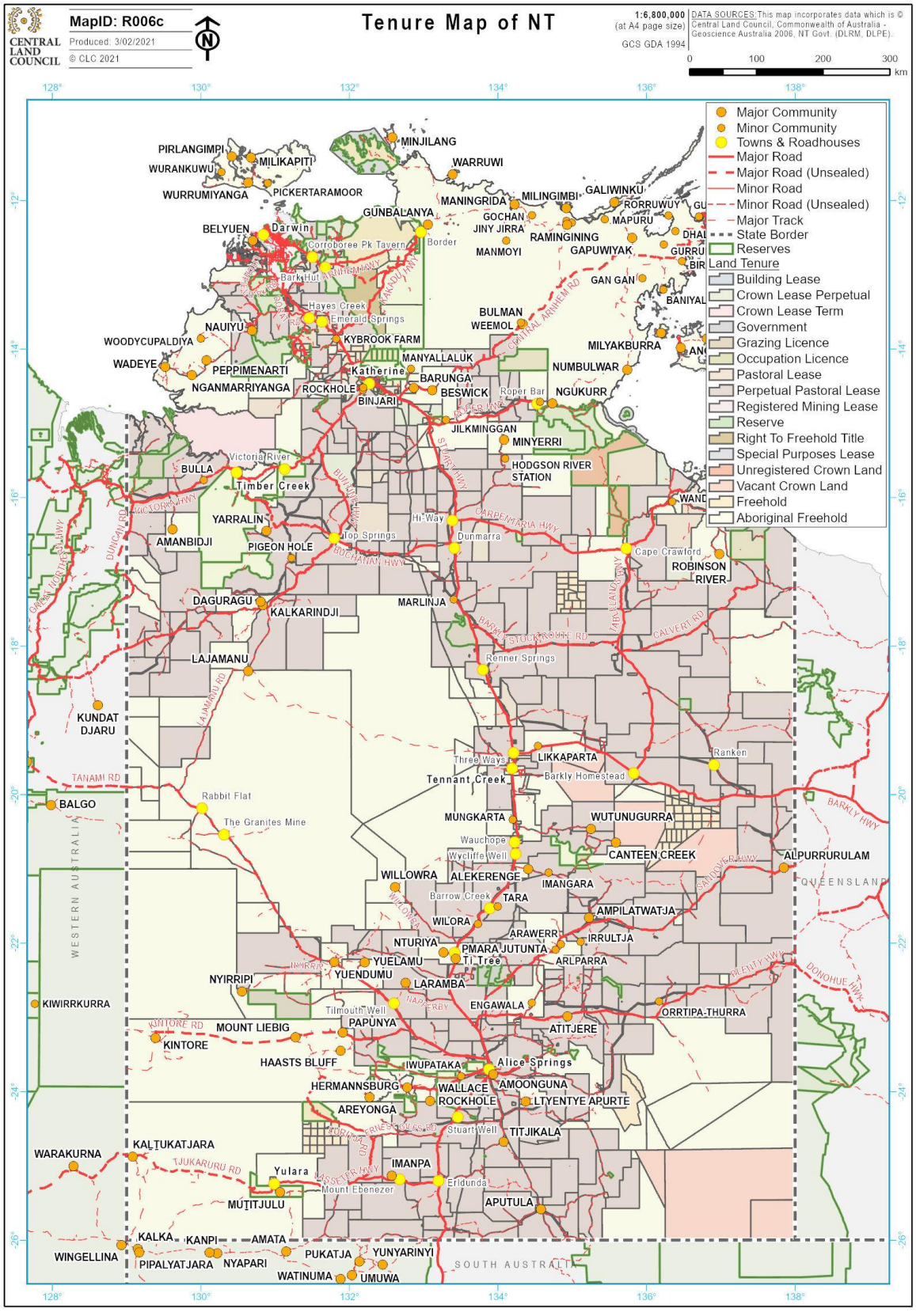
Recommendation 25: Additional information should be required as entries on the Biodiversity Market Register to provide greater the public assurance and transparency, and for consistency with the CFI Act, as outlined at [10.5].

10.6 There is a definition for First Nations people. The CLC notes that Aboriginal people in our region overwhelmingly prefer the term Aboriginal and Torres Strait Islander, rather than 'First Nations People'.

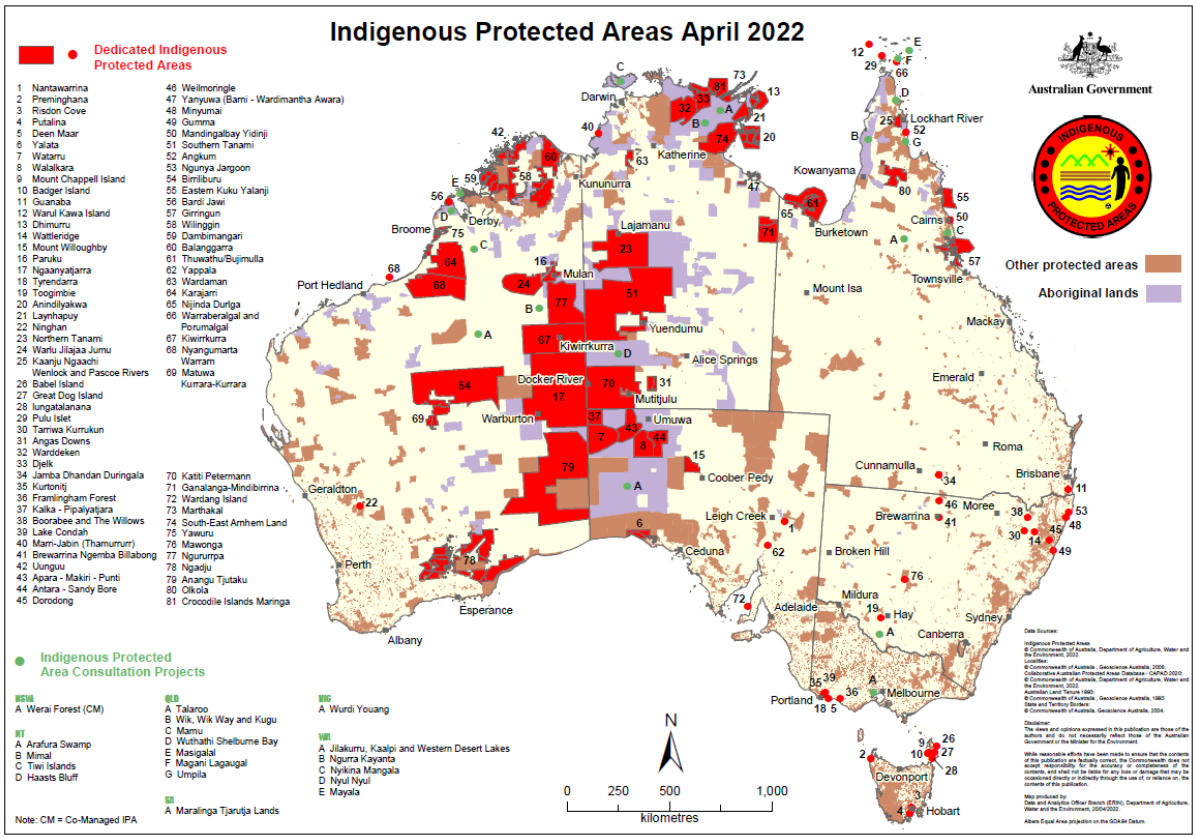
Conclusion

Thank you for the opportunity to provide input on the exposure draft of the *Nature Repair Market* bill. The CLC would welcome further discussion with the Department on any aspect of our submission.

Appendix A. Land tenure in the NT



Appendix B. Indigenous protected areas national map



Appendix C. Indigenous Protected Areas in the CLC region