

Protected and Conserved Areas Policy Section Department of Climate Change, Energy, the Environment and Water By email: <u>NRS.environment@dcceew.gov.au</u>

9 May 2023

To the Protected and Conserved Areas Policy Section,

# Re: Draft principles to guide recognition of other effective area-based conservation measures in Australia

The Central Land Council (CLC) welcomes the opportunity to provide feedback on the draft principles to guide the recognition of other effective area-based conservation measures (OECMs) in Australia.

From the consultation paper provided by the Department of Climate Change, Energy, the Environment and Water (DCCEEW), the CLC understands that the Australian Government wishes to establish a system for recognising OECMs – the key purpose of which is to help Australia achieve our national target to protect 30 per cent of our land and 30 per cent of our oceans by 2030, and in doing so, support the achievement of the global '30 by 30 target' set under the Convention on Biological Diversity's (CBD) *Kunming-Montreal Global Biodiversity Framework*, to which Australia is a party.<sup>1</sup>

We understand that to meet the 30 per cent target for land, Australia needs to protect or conserve an additional 60 million hectares<sup>2</sup> of land. Both protected areas and OECMs can contribute to meeting this target.

This submission provides an overview of the CLC's role and the varied land tenure that exists across our region in the Northern Territory (NT), and makes recommendations to:

- 1. Amplify the opportunities and avoid negative impacts on Aboriginal Torres Strait Islander peoples.
- 2. Ensure the maintenance and strengthening of Indigenous-led land management including through the Indigenous Protected Areas (IPA) program.
- 3. More clearly outline the interaction with the proposed Nature Repair Market.
- 4. Ensure strong governance and accountability in any new system to recognise OECMs.

# About the CLC

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 NT. It is one of four Aboriginal land councils established under the ALRA.<sup>3</sup> 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. The CLC's area of responsibility spans 780,000 square kilometres – an area almost the same size as New South Wales. 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.

<sup>&</sup>lt;sup>1</sup> Australian Government Department of Climate Change, Energy, the Environment and Water (2023) *Other effective area-based conservation measures: principles to guide their recognition in Australia*, Consultation Paper, p.3 (DCCEEW OECM consultation paper) (<u>weblink</u>)

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When considering the development of a system to recognise OECMs, which includes (as discussed below) the involvement of the relevant First Nations governance authorities<sup>4</sup>, it is important to note the unique and varied land tenure that exists in the NT. 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.

## Land tenure in the NT and related legislation

More than half of the land in the CLC region is Aboriginal land under the ALRA (417,318 km<sup>2</sup>). 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 established following a determination of native title and in our region are agents for the native title holders.

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.

## Caring for country in the CLC region

The CLC delivers a number of programs that reflect the aspirations of our constituents. This includes the Ranger Program which is the largest of our programs and one of the most successful Aboriginal employment initiatives in Central Australia. Established more than two decades ago, the Ranger 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.

In addition to ranger groups, the CLC administers four Indigenous Protected Areas (IPAs) and assists traditional owners with respect to 21 jointly managed national parks <sup>5</sup> as well as addressing constituents' concerns with regard to managing their land. Commonly, these are feral animals, fire management, pastoral management and conservation of threatened species, or other species of significance.

<sup>&</sup>lt;sup>4</sup> Relevant to consent principles outlined on page 9 of the department's consultation paper.

<sup>&</sup>lt;sup>55</sup> Subject to formal joint management with Aboriginal traditional owners under the *Territory Parks and Wildlife Conservation Act 1976* (TPWC Act) (S25AO(1), pursuant to s23(2) of ALRA). Traditional owners in the CLC region hold Aboriginal freehold or NT Parks freehold title to 16 these parks and reserves, and have leased these back to the NT Government for the purpose of jointly managing them with the NT Parks and Wildlife Commission, four are jointly managed under Indigenous Land Use Agreements registered with the National Native Title Tribunal, plus Uluru Kata Tjuta, managed jointly with the Commonwealth. The CLC has statutory consultative and representative functions in respect to the joint management of these parks.

#### Key definitions relevant to this submission

In the context of the government's consultation paper and the related international framework, the CLC notes the following definitions:

**'Protected Area'** means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives (*Article 2 of the UN Convention on Biological Diversity*)

'Other effective area-based conservation measures' or OECMs means a geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio–economic, and other locally relevant values (Decision of the fourteenth conference of the parties to the Convention on Biological Diversity (CBD/COP/DEC/14/8)).

#### Note on language

The CLC notes that Aboriginal people in our region overwhelmingly prefer the term Aboriginal and Torres Strait Islander, rather than 'First Nations people', which contrasts with the terminology used in the government's consultation paper.

Issue 1: Amplifying the opportunities for and avoiding negative impacts on Aboriginal and Torres Strait Islander peoples

#### **1.1 Defining First Nations governance authorities**

The CLC strongly welcomes the proposed principle of Free Prior and Informed Consent (FPIC). We suggest, however, that this principle requires further work with land councils and other relevant groups to clarify how it will operate.

How First Nations governance authorities are defined and the role they play in the system to recognise OECMs is an issue of central importance in the development of a system of OECMs in Australia, and will be an issue of central concern to traditional owners and native title holders in our region.

It is particularly important given the proposed principles place consent for OECM projects on the shoulders of the governance authorities. The proposed principles state that:

- a) Consent of the site's governance authority must be obtained before an eligibility assessment is undertaken (Consent principle)
- b) Assessment and recognition of potential OECMs governed by First Nations people, requires the free, prior and informed consent of those governance authorities (FPIC principle)

For Aboriginal people, the ownership and management of land, and those who hold authority for that land, is a very important and sensitive issue. The process for establishing First Nations governance authorities requires a deep understanding of connection to the particular country, and existing governance structures, formal or informal.

The principles as currently drafted do not provide sufficient guidance as to who would determine the appropriate governance authority when it comes to land over which there are native title rights, land rights, or where Aboriginal and Torres Strait Islander people have an interest in other forms of land tenure such as Crown land. Reference to land 'governed by First Nations people' (FPIC Principle) is too loose a definition, particularly given that the glossary definition from the consultation paper of *"governance authority"* as the *"institution, individual, indigenous peoples or communal group or other body acknowledged as having authority and responsibility for decision-making and management of an area* (IUCN-WCPA Task Force on OECMs 2019)"<sup>6</sup> does not make reference to the relevant legislation defining that authority under Australian law (i.e. land rights under ALRA or the NTA). The looseness of the definition of a governance authority, and absence of guidance as to how that governance authority would be determined and constituted, is an issue that should be rectified before an OECM scheme is put in place.

To illustrate the potential problems: if we were to consider a proposed OECM over Aboriginal freehold land, would the Aboriginal governance authority be the traditional owners as determined under ALRA, or would it extend to other Aboriginal people living in and/or with connections to that region, or a subset of these groups?

Similarly, it is not clear from the definitions provided above whether in the case of a proposed OECM over native title land, whether the relevant First Nations governance authority would be the native title holders (in the case of exclusive rights) or the native title holders and a pastoralist (in the case of non-exclusive rights), or whether – as currently worded – the authority could extend to other Aboriginal people living in and/or with connections to that region, or a subset of these groups. The proposed principles leave open the possibility of all of these scenarios.

The work to understand who within a region is "acknowledged as having authority and responsibility for decision-making and management of an area" (as per the glossary definition) is no small task. It is therefore essential that persons and institutions with specific knowledge about existing local authority structures and statutory responsibilities in these areas (i.e. land councils) assist the government with this task.

We note that the process for developing appropriate governance structures for IPAs was the product of significant work between land councils, Aboriginal and Torres Strait Islander people, government and other key parties, and suggest similarly considered, collaborative work will be required to guide the recognition and management of OECMs.

**Recommendation 1:** The CLC encourages the government to have further discussions with land councils and NTRBs to develop and explain the operation of the FPIC Principle and how First Nations governance authorities will be determined. This is an issue of fundamental importance to the operation of OECMs.

**Recommendation 2:** Given land councils' statutory functions under ALRA and role as NTRBs, the OECM framework should explicitly acknowledge the land councils' necessary role in facilitating the consent processes for the relevant First Nations governance authorities in the NT.

**Recommendation 3:** The proposal to recognise OECMs must explicitly embed consideration of Aboriginal land rights interests, native title holder and registered native title claim group interests, as well as – in the absence of these interests – other traditional owner groups recognised as stewards, custodians or interest holders in relation to relevant areas or sites (e.g. Indigenous Land and Sea Corporation (ILSC) properties or state, territory or local government arrangements).

<sup>&</sup>lt;sup>6</sup> DCCEEW OECM consultation paper, p.17

## 1.2 Ensuring strong requirements for Free, Prior and Informed Consent (FPIC)

Designation as an OECM is likely to confer benefits for landholders, as it provides recognition of biodiversity protection. For example, a cattle company that gets OECM recognition over some or all of their pastoral lease may be able to charge a premium for the beef they sell.

Strong FPIC requirements are essential to ensure that Aboriginal and Torres Strait Islander people are not excluded from the benefits that might flow to landholders from having their land recognised as an OECM.

Acknowledging the need to better define 'First Nations governance authorities', the CLC therefore recommends that if a landholder wishes to have their land recognised as an OECM, they must have a written agreement with that governance authority that ensures all benefits that might flow from the OECM recognition have to be negotiated and that they have direct involvement in management of the land if they desire.

The CLC further submits that where there is non-exclusive native title, native title holders should have the right to negotiate for their land to have OECM status recognised over the top of a pastoral lease.

The CLC submits that the principle of FPIC must apply to assessment and recognition of OECMs undertaken by *any* 'governance authority' (not only if the relevant geographic area is on native title or land rights land) – i.e. the class of OECMs attracting FPIC should not be limited to those governed by 'First Nations' people. For example, there are large areas of unallocated crown land in parts of the CLC region that, if they were to be put forward for recognition as an OECM, should require FPIC of interested First Nations people.

**Recommendation 4:** The assessment and recognition of any OECMs must avoid negative impacts on, and amplify opportunities for, Aboriginal and Torres Strait Islander peoples.

**Recommendation 5:** Strong requirements for Free, Prior and Informed Consent are essential.

**Recommendation 6:** Any landholder wishing to have their land recognised as an OECM must have a written agreement with the relevant First Nations governance authority that ensures all benefits that might flow from the OECM recognition have to be negotiated and that they have direct involvement in management of the land if they desire.

**Recommendation 7:** Where there is non-exclusive native title, native title holders should have the right to negotiate for their land to have OECM status recognised over the top of a pastoral lease.

The CLC suggests that the current wording of principle 4.1.1 is circular and could benefit from re-framing i.e. "Assessment and recognition of potential OECMs governed by First Nations people, requires the free, prior and informed consent [(FPIC)] of those governance authorities" appears to require two things of the same group at the same time. Clarifying the intent of the word "governed" in this sentence would be helpful.

## 1.3 Participation of traditional owners and protecting cultural values

Principle 4.2 states that "OECMs must have important biodiversity values, documented in detail at the time of the site assessment. These values are to be maintained in the long-term."<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> p.10 of DCCEEW OECM consultation paper

The consultation paper further proposes that "the identification of areas of particular importance for biodiversity in Australia may assist in guiding prioritisation of areas for assessment and designation as formal protected areas, or recognition as OECMs. Work is underway to assess methodologies for identifying areas of particular importance for biodiversity, for protection and conservation."<sup>8</sup>

The CLC submits that this principle, and related sub-principles (including those related to the prioritisation of areas of particular importance for biodiversity and restorations sites<sup>9</sup>) should expressly refer to Aboriginal and Torres Strait Islander cultural values as well as biodiversity values and operate to promote their protection.

Frequently, the two are intertwined. Recognising cultural as well as biodiversity values acknowledges and underscores the importance of traditional owner participation and respect for traditional ecological knowledge in the management of areas that may be recognised as OECMs.

**Recommendation 8:** That the prioritisation principle operates to protect cultural values, as well as biodiversity values.

FPIC and the involvement of traditional owners in the operation of the OECM scheme is essential to support the protection of cultural values. Given this, CLC makes the following recommendations:

Recommendation 9: Principle 4.5 (Land Tenure), should be updated to ensure that:

- i) FPIC is obtained as a pre-condition to recognition of an OECM on Aboriginal land rights land or native title areas,
- ii) Cultural heritage values are respected, and protection measures complied with, in relation to recognition of any OECM, and
- iii) To be recognised on Crown or public land, conservation measures must demonstrate how they have taken into account the wishes, values and inputs of relevant traditional owner groups, with the consent of those groups – similar to principles underpinning access and benefit sharing arrangements used to implement other aspects of the UN Convention on Biological Diversity.

**Recommendation 10:** Principle 4.7 (Site Management) should be updated to include reference to compliance with national and jurisdictional Indigenous cultural heritage protection and management requirements.

**Recommendation 11:** The OECM framework should set out clear circumstances in which Aboriginal and Torres Strait Islander knowledge in caring for Country should be considered in OECM management arrangements. This should be a minimum requirement for OECMs involving Crown or public land and it should be encouraged and incentivised for private land (freehold) management arrangements.

**Recommendation 12:** Related to the points above, the assessment of a site under restoration for recognition as an OECM (Principle 4.2.2: Restoration Sites) should include consideration of the extent to which relevant traditional owners have been involved in the design and execution of restoration actions and intended outcomes.

<sup>&</sup>lt;sup>8</sup> p.11 <sup>9</sup> 4.2.1. and 4.2.2 on pp.10-11

The CLC also submits that native title holders should be able to apply to place an OECM over an area to protect a specific cultural value. That is, cultural values should not just be considered alongside biodiversity values: they should have their own status and be equal in their level of importance. For example, in the case of a cultural value such as a spring on a pastoral estate where there is non-exclusive native title, native title holders should be able to apply to have an OECM over the relevant area and be able to attract resources to protect and maintain that site.

**Recommendation 13:** Cultural values should be regarded with equal importance as biodiversity values. Where native title holders wish to apply for OECM recognition to protect cultural values on areas of native title land with non-exclusive possession, they should be able to do so under the framework.

## **1.4 Further issues**

## Opportunities for traditional owners in the NT

The CLC notes that OECM recognition has the potential to benefit traditional owners of country that is Crown Land (for example the Simpson Desert and the Barkly) that have potential for conservation and management by traditional owners, but are currently inaccessible and unmanaged.

## Protected area consideration

The CLC generally supports the principle that "a site's suitability for protected area designation should be considered first, and suitability for OECM recognition should be considered in circumstances where formal protected area designation is not appropriate, achievable or desirable"<sup>10</sup>.

However, the principle should not operate to *exclude* recognition of an area as an OECM if it is eligible to be a protected area. If this were to be the case, it would exclude large areas of Aboriginal land.

In the CLC region there are extensive Aboriginal landholdings with high biodiversity and cultural value that are not part of the Parks system and not IPAs. Formal protected area designation for these areas could be "appropriate, achievable and desirable" *if* adequate funding were available – but the chronic underfunding of the NT Parks system and IPAs means that this is usually not the case.

This principle should be updated to explicitly provide traditional owners and native title holders with the discretion to determine whether they consider it is desirable for an area to become a 'protected area' (where it may be eligible) or be recognised as an OECM. This enables traditional owners to make informed decisions about funding availability and/or other desirable productive land uses in areas concerned.

**Recommendation 14:** The principle of Protected Area Consideration should not operate to *exclude* recognition of an area as an OECM if it is eligible to be a protected area.

<sup>&</sup>lt;sup>10</sup> DCCEEW OECM consultation paper, p.11

#### **Issue 2: Indigenous Protected Areas**

#### 2.1 Clarify the interaction with Indigenous Protected Areas

IPAs are important vehicles for Indigenous-led management in Australia. They are voluntary agreements with the Australian Government that enable land and sea country to be managed by Indigenous groups in accordance with traditional owners' objectives. A key strength of IPAs is that they provide a management system that is culturally appropriate: including culturally appropriate representation on governance committees, management approaches, and the equitable distribution of management between family groups to align with cultural boundaries within a region.

As noted above, there are four IPAs in the CLC region. These are the Northern Tanami IPA, Southern Tanami IPA, Angas Downs IPA, and the Katiti-Petermann IPA, and Haasts Bluff IPA under development, covering a total of 230,100 km<sup>2</sup> (see maps at **Attachments B** and **C**). Guided by the traditional owners, the CLC manages these IPAs with the input of five ranger groups.

The CLC notes that the effectiveness of IPAs and Indigenous ranger initiatives contrasts with the frequent failures of joint management efforts in the NT to achieve core objectives, which reflects the fact that the former do far better in ensuring a voice for traditional owners and the participation of Aboriginal and Torres Strait Islander people.<sup>11</sup> This is the key to their success.

Given the value of IPAs as a land management system, the government must ensure that the vehicle of IPAs remain and work with land councils and other Indigenous stakeholders to clarify their interaction of the proposed system of recognition of OECMs.

**Recommendation 15:** The Australian Government should work with land councils and other Indigenous stakeholders to confirm:

- a) Whether or not IPAs are considered to be OECMs, noting that some IPAs are already recognised as part of the National Reserve System (accounting for 50 per cent of NRS<sup>12</sup> and Australia already reports on IPAs to the UN Convention on Biological Diversity<sup>13</sup>)
- b) What measures are proposed and will be implemented to preserve the success and operation of IPAs, as well as promote and grow opportunities for Aboriginal and Torres Strait Islander peoples under OECMs.

<sup>&</sup>lt;sup>11</sup> The failures of joint management in the NT reflect both the chronic under-resourcing of NT parks and the failure for the operation of joint management to live up to the stated goal under legislation to operate as an *equal partnership* (between traditional owners and the government). For more detail, refer to the CLC's submission on the draft NT Parks Masterplan 2022-2052 on our <u>website</u>.

<sup>&</sup>lt;sup>12</sup> National Indigenous Australians Agency, Indigenous Protected Areas (weblink)

<sup>&</sup>lt;sup>13</sup> See for example the Australian Government's Sixth National Report to the Convention on Biological Diversity 2014-2018, dated 24 March 2020 (p115 - Aichi Biodiversity Target 18, among other references).

## 2.2 Expanding Indigenous Protected Areas

Recognition and support for OECMs should not detract from, or create disincentives to, the ongoing support and expansion of IPAs and the IPA program. This includes not just maintaining but increasing Australian Government funding for IPAs.

We note that Australia's current National Reserve System covers almost 20 per cent of the country<sup>14</sup> – that is, we have 10 per cent to go. Given the value of the IPA program as a vehicle for Indigenous-led land management that operates in accordance with traditional owners' wishes, the CLC suggests that a priority for reaching the '30 by 30' target should be to expand the IPA program. The CLC has welcomed the commitment by the Australian Government to expand investment in IPAs by \$10 million per year, which we understand includes funding to establish 10 new IPAs, and suggest that this public investment be further increased.

With regards to opportunities to expand the IPA program in the CLC region, the CLC is currently undertaking pre-planning operations with traditional owners from the Simpson Desert region and intend to further investigate an IPA adjacent to Watarrka National Park on the Urrampinyi Iltjiltjarri ALT. Other Aboriginal Land Trusts in the CLC region also have potential as IPAs.

We note that the expansion of the IPA program should not compromise investment in *existing* IPAs, acknowledging that IPAs are chronically underfunded compared to other protected areas. Current resourcing is restricting the environmental, cultural, social and economic outcomes that could be achieved with more adequate levels of investment.

**Recommendation 16:** Recognition and support for OECMs should not detract from, or create disincentives to, the ongoing support and expansion of IPAs and the IPA program.

**Recommendation 17:** The expansion of IPAs, supported by adequate Australian Government investment, should be a priority in achieving the '30-by-30' target.

**Recommendation 18:** That the Australian Government increase public investment to support the expansion of IPAs.

**Recommendation 19:** The expansion of the IPA program should not compromise investment in existing IPAs.

#### **Issue 3: Interaction with Nature Repair Market**

The interaction with the Nature Repair Market should be outlined in more detail, noting that the ability to profit from OECM recognition reinforces the importance of FPIC. Interactions with other national, state and territory schemes must also be addressed through further consultation and engagement with key stakeholders, including Land Councils and Aboriginal and Torres Strait Islander representative bodies and organisations. Robust and transparent processes and reporting is needed to avoid double counting or double claiming of conservation outcomes. For example, 'project areas' subject to carbon and/or biodiversity projects must be carefully and transparently scrutinised, or potentially excluded from recognition as an OECM.

**Recommendation 20:** The interaction of the OECM system with the Nature Repair Market should be outlined in more detail.

<sup>&</sup>lt;sup>14</sup> As at 30 June 2020 Australia's National Reserve System included 13,540 protected areas covering 19.75 per cent of the country (over 151.8 million hectares), Australian Government Department of Climate Change, Energy, the Environment and Water (DCCEEW), National Reserve System (weblink)



#### **Issue 4: Governance**

The consultation paper states that that implementation issues including monitoring, recording, compliance and reporting are under consideration and that consultation on these issues will occur in the coming months. The development of a system for OECM recognition must include adequate resourcing for management and robust governance. This includes resourcing for the development of management plans, monitoring and evaluation. We hope that these discussions will take place in the next phase of consultation – it will be essential to the integrity of the scheme. Without adequate resourcing to support effective management and governance, it is difficult to see how a system of OECM recognition will contribute to material improvements in biodiversity in Australia at the rate or level needed to address the ecosystem decline and collapse we are currently facing. We refer the department to CLC's submission on the exposure draft of the Nature Repair Market Bill highlighting the extent of ecosystem decline in the CLC region.<sup>15</sup>

**Recommendation 21:** That governance and accountability mechanisms for the OECM system are robust and adequately resourced.

Thank you for considering our submission. While it appears from the consultation paper that the development of the system for recognising OECMs is moving relatively quickly, we urge government to give due time to the issues raised above to ensure that – as we have recommended – the OECM system amplifies rather than detracts from opportunities for traditional owners, and is not considered a substitute for continued public investment in Indigenous-led land management as a key means to reach Australia's biodiversity protection goals. If you wish to discuss any aspects further, please contact Nicola Flook, Senior Policy Officer at <u>nicola.flook@clc.org.au</u>. The CLC looks forward to being part of the next stage of consultation.

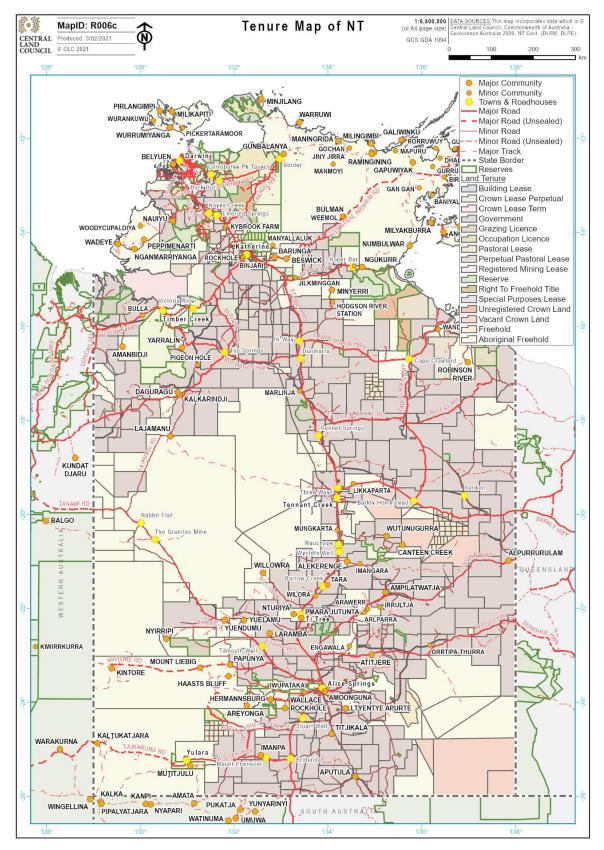
Regards,

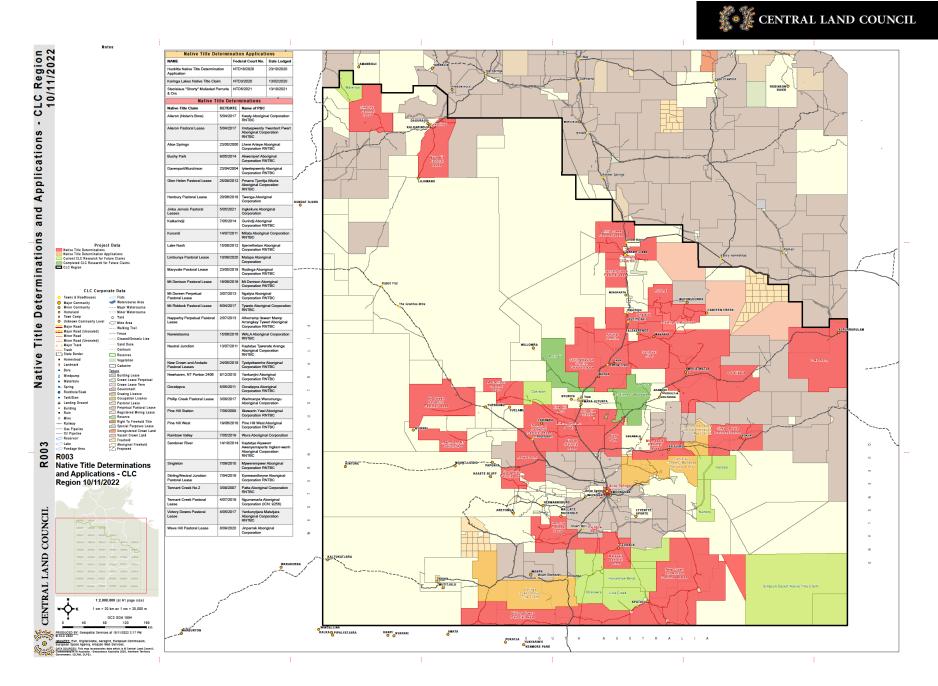
Lesley Turner Chief Executive Officer

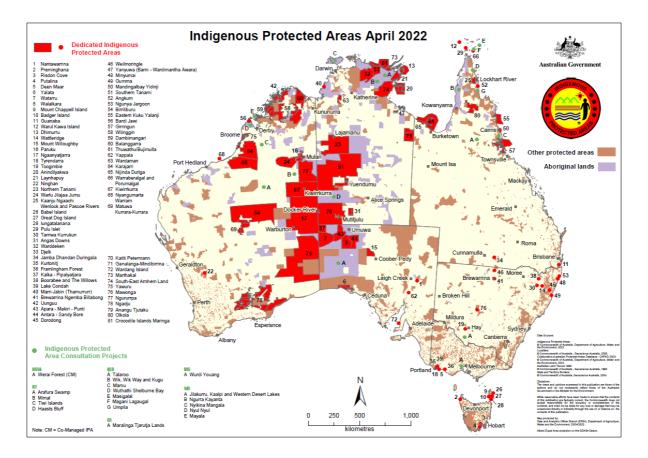
<sup>&</sup>lt;sup>15</sup> See submission on CLC <u>website</u>, p.4.

# Appendix A. Land tenure in the NT

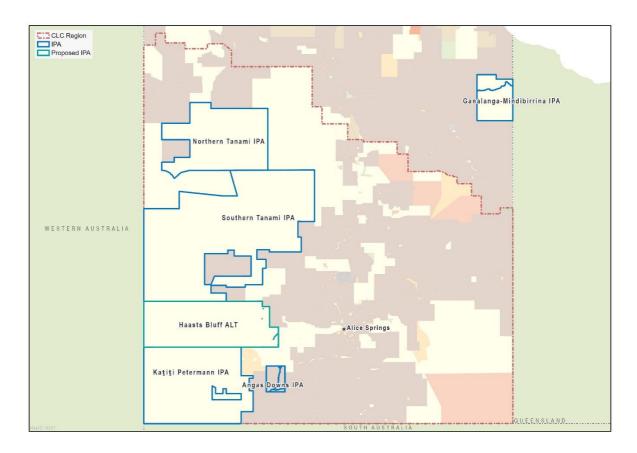
Note Native Title determinations not shown on this map. See next map on page 12.







# Appendix B. Indigenous protected areas national map



# Appendix C. Indigenous Protected Areas in the CLC region