

**STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL (COUNCIL) IN RELATION TO AN APPLICATION BY EASTERN MAAR ABORIGINAL CORPORATION**

**DATE OF DECISION: 11 October 2018**

**1. Decision**

The Council declined, in part, the application from Eastern Maar Aboriginal Corporation (EMAC) to be a Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Act).

**2. Decision Area**

The EMAC RAP application was made on 25 July 2011. It was divided into Zones and is being considered by Council in stages. The present decision to decline EMAC's application relates to the area between the Shaw and Hopkins Rivers (**Decision Area**) as shown in the attached map (**Attachment 1**). This area overlapped the eastern component of the Gunditj Mirring Traditional Owners Aboriginal Corporation (GMTOAC) RAP application area, and a small part of the area Kuuyang Maar Aboriginal Corporation (KMAC) applied to be a RAP for in an application declined by Council in July 2015.

**3. Findings of Fact and Evidence**

In relation to the Decision Area, Council made the following findings of fact, based on the evidence and other material detailed.

***a) Native title (s 151(2) of the Act)***

EMAC is not a registered native title holder for the Decision Area. There is no registered native title holder for the Decision Area.

EMAC is a registered native title holder for areas south-west of the Decision Area, pursuant to the Federal Court consent determination of native title in the 'Part B' area by GMTOAC, for the Gunditjmarra People, and EMAC, for the Eastern Maar Peoples (**Eastern Maar**). Part B is an area between the Shaw and Eumeralla Rivers from Deen Maar (including Yambuk) to Lake Linlithgow and is outside the Decision Area.

***b) Recognition and settlement agreement (s 151(2A) of the Act)***

Council noted EMAC is the Traditional Owner Group Entity for Eastern Maar in relation to the Decision Area. This is because EMAC represents the Eastern Maar who are seeking a Recognition and Settlement Agreement (RSA) with the State under the *Traditional Owner Settlement Act 2010* (TOS Act), and part of the proposed RSA area, which includes the Decision Area, has met the State's threshold requirements under the TOS Act.

However, EMAC is not a Traditional Owner Group Entity that has entered into a RSA with the State under the TOS Act in relation to the Decision Area. Accordingly, Council is not required by section 151(2A) of the Act to register EMAC as a RAP for the Decision Area.

***c) Native title party (s 151(3)(a) of the Act)***

A native title determination application brought on behalf of the Eastern Maar Peoples was registered on 20 March 2013 (**NT Claim**). The NT Claim covers the Decision Area apart from the area of coastal water included in the Decision Area.

The registered native title claimant for this Claim as authorised by the native title claim group, the Eastern Maar Peoples, would be considered a 'native title party' under the Act. However, Council noted that the Eastern Maar Peoples as described for the purposes of the NT Claim differs to the description of the Eastern Maar Traditional Owner Group in the EMAC Rule Book, which includes ancestors Jim Crowe and Richard Sharp.

***d) Terms of any native title agreement (s 151(3)(b) of the Act)***

Neither EMAC, nor any other party, brought any native title agreement to Council's attention in respect of the Decision Area.

***e) Representation - Traditional Owners of the Decision Area (s 151(3)(c) of the Act)***

i) Recognition of Eastern Maar People as Traditional Owners and EMAC membership

EMAC is a Prescribed Body Corporate under the *Native Title Act 1993* (Cth) and holds native title on behalf of the Eastern Maar People with respect to the Part B area. Following this native title determination, Council recognised EMAC as an organisation representing Traditional Owners with respect to the Part B area.

A person is eligible for EMAC membership if the person is an Aboriginal person who is an Eastern Maar Person, defined as a member of the Eastern Maar Traditional Owner Group, and is at least 18 years of age.

The EMAC Rule Book provides that 'The Eastern Maar Traditional Owner Group' is a name adopted by the people who identify as Maar, Eastern Gunditjmarra, Tjap Wurrung, Peek Whurrong, Kirrae Whurrung, Kuurn Kopan Noot, Yarro waetch (Tooram Tribe), Gulidjan and/or Gadubanud amongst other names, who are Aboriginal people and who are:

- descendants, including by adoption, of the ancestors identified in the Rule Book;
- members of families who have an association with the former Framlingham Aboriginal Mission Station, with the exception of the descendants of Richard Sharp who do not need to meet this requirement of having an association with the former Framlingham Aboriginal Mission Station; and
- recognised by other members of the Eastern Maar Traditional Owner Group as members of the group.

The identified ancestors in the EMAC Rule Book are: King of Port Fairy and Eliza, Old Jack (father of John Dawson), Charlie and Alice (parents of Albert Austin), Samuel Robinson and Mary Caramut, Lizzie (mother of Frank Clarke), Robert and Lucy (parents of Alice Dixon), Barney Minimalk and Nellie Whitburboin, Louisa (mother of William Rawlings), Jim Crow (son of Beeac) and Richard Sharp.

Council noted correspondence from EMAC which states that its Board comprises directors elected as representatives of their individual family groups, ensuring a fair representation of the Eastern Maar community, and that each of the 12 family groups is entitled to elect a director to the Board.

ii) Traditional Ownership of the Decision Area

In registering the NT Claim over most of the Decision Area, the Native Title Registrar accepted that Eastern Maar (as the native title claim group) prima facie established the existence of native title rights, which is the right of possession, occupation, use and enjoyment of land and waters as against all others. Given the overlap between existence of native title and the meaning of 'traditional ownership' under the Act, the registration of the NT Claim over the Decision Area was taken into account in Council's consideration of whether the Eastern Maar Peoples are Traditional Owners of the Decision Area.

In correspondence to EMAC, at different times, Council requested information about the traditional or cultural connection of Eastern Maar to the Decision Area, EMAC's representativeness of the Traditional Owners of the Decision Area and details about the work experience of EMAC members in caring for Aboriginal places in the Decision Area. EMAC did not provide Council with information about the traditional connections of its members to the Decision Area and made undetailed reference to undertaking RAP operations with GMTOAC in the 'Part B' area and engaging with government organisations in undertaking cultural heritage management in the Decision Area.

Council formed the view that EMAC relies on the 2011 native title determination, and comments made in the determination about Eastern Maar interests extending to the east of the Part B area, to demonstrate that it represents the Traditional Owners of the application area. Council noted that EMAC's RAP application states that other Aboriginal groups recognise its traditional connections to the Decision Area, including the Gunditjmarra who recognised the rights of the Eastern Maar in their negotiations. However, EMAC did not otherwise elaborate as to the manner in which these links are recognised.

The Decision Area completely overlapped the GMTOAC RAP application area to the east of the GMTOAC appointed area. GMTOAC stated that it has consistently maintained and asserted rights and interests of its members and of Gunditjmarra native title holders beyond Part B, including in the Decision Area, and referred to its experience in cultural heritage management and the State's reliance on its knowledge in natural resource management in relation to this area. While asserting it represents Traditional Owners of the Decision Area, GMTOAC confirmed it did not believe it alone represents all Traditional Owners of the Decision Area and sought joint RAP status with EMAC over this area. EMAC indicated in correspondence to Council that it believed the Part B area formed the boundary between

the Gunditjmarra and the Eastern Maar and did not wish to pursue joint RAP appointment with GMTOAC.

Council noted that the area KMAC had applied for in a RAP application declined by Council in 2015 narrowly overlapped the Decision Area along the eastern boundary of the area. Council also noted that in the most recent correspondence received from KMAC in relation to the Decision Area, received in November 2014, KMAC stated it believed further discussions were required with other groups, including EMAC, in the areas of overlapping interest. EMAC informed Council it did not recognise it had overlapping interests with KMAC as it believed KMAC members are Eastern Maar People and Kuuyang Maar Traditional Owners are part of the Eastern Maar community and may become EMAC members.

At the time of making its decision Council was not aware of any meetings held between the Gunditjmarra, Eastern Maar and Kuuyang Maar groups to discuss overlapping boundaries.

In carefully considering the information provided by EMAC supporting the relationship of Eastern Maar People to the Decision Area, as well as comments made in relation to the EMAC RAP application from other relevant Traditional Owner organisations, particularly GMTOAC, Council considered that it did not have enough information to conclude that EMAC alone represents the Traditional Owners of the Decision Area.

***f) Representation - historical or contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage (s 151(3)(d) of the Act)***

EMAC stated in information provided to Council that it represents Aboriginal people who have a historical or contemporary interest in the Aboriginal cultural heritage of the Decision Area. However, EMAC did not elaborate on these interests in the information provided.

EMAC provided information to demonstrate its expertise in managing and protecting Aboriginal cultural heritage, stating that:

- its directors and members are experienced in cultural heritage management and running cultural heritage businesses
- it undertakes RAP functions with local government authorities and other organisations on Country shared with GMTOAC and in the Decision Area
- its organisational structure includes a CEO, a Cultural and Natural Resource Manager and a cultural heritage subcommittee
- it has established processes for managing cultural heritage work.

While Council acknowledged that EMAC has been operating as a RAP since its appointment in December 2013, Council sought further detail from EMAC about the experience of its members in caring for Aboriginal places in the Decision Area and evidence of EMAC's cultural heritage management procedures, such as policies or an operational plan. Such information was not provided by EMAC. Council concluded that further information was required for it to have sufficient understanding of EMAC's expertise in managing and protecting Aboriginal cultural heritage.

***g) Grant of land in fee simple (s 151(3)(e) of the Act)***

A search of relevant registers, and information from EMAC, did not disclose any grants of land in fee simple made to EMAC under a specific power in a State or Commonwealth Act in relation to the Decision Area.

***h) Land and natural resource management agreements (s 151(3)(f) of the Act)***

No land and resource management agreements were referred to by EMAC in its RAP application.

***i) Other relevant matters (s 151(3)(g) of the Act)***

i) Section 153 joint RAP appointment

Section 153(1) of the Act provides that more than one body may be a RAP for a particular area if the Council is satisfied that having more than one RAP will not unduly hinder the ability of any of the RAPs for the area to exercise their powers and carry out their functions under the Act, and will not otherwise hinder the effective operation of the Act.

As noted above, GMTOAC sought joint RAP status with EMAC over the Decision Area. However, EMAC did not accept that the Gunditjmarra represent Traditional Owners of the Decision Area or wish to pursue joint RAP appointment.

**4. Reasons for decision**

The following steps have been taken into account in Council's decision-making process.

***a) Legislation***

In deciding EMAC's RAP application over the Decision Area, Council took into account all of the matters it is required to consider under sections 151 and 153 of the Act.

EMAC is not a registered native title holder for the Decision Area within the meaning of section 151(2) of the Act, and has not entered into a recognition and settlement agreement in relation to the Decision Area within the meaning of section 152(2A) of the Act. As such, Council is not obliged to approve EMAC's RAP application over the Decision Area under sections 151(2) or 151(2A) of the Act.

Council considered the matters set out in section 151(3) of the Act and concluded that those factors were not established.

In considering the matters set out in section 151(3)(a), Council noted that while the registered native title claimant for the NT Claim as authorised by the Eastern Maar peoples would be considered a 'native title party' under the Act, the Eastern Maar peoples as described for the purposes of the NT Claim differs to the description of the Eastern Maar Traditional Owner Group in the EMAC Rule Book.

In considering the matters set out in section 151(3)(b), Council established that no terms of any native title agreement (as that term is defined in the Act) had been brought to Council's attention. In considering matters set out at section 151(3)(e), Council established that there had been no relevant grants of land in fee simple to an Aboriginal body by the State or Commonwealth in relation to the Decision Area. In considering section 151(3)(f), Council established that there had been no relevant land and natural resource management agreements entered into by EMAC with the State.

Council considered sections 151(3)(c) and 151(3)(d). In doing so Council considered a number of factors, including: the relevance of EMAC's status as a Traditional Owner Group Entity in relation to the Decision Area; EMAC's membership and Rule Book; information provided by EMAC in response to Council's request for information about the traditional or cultural connections of the Eastern Maar, EMAC's representativeness, and details about the cultural heritage management experience of EMAC members; and other claims of traditional connections to the Decision Area, particularly by GMTOAC. While Council established that EMAC is a Traditional Owner Group Entity in relation to the Decision Area, and comprises Traditional Owners in its membership, Council considered it did not have enough information to conclude that EMAC alone was representative of the Traditional Owners of the Decision Area.

Council considered the matters set out at section 153. Council acknowledged that while GMTOAC sought joint RAP status with EMAC over the Decision Area, EMAC did not wish to pursue joint RAP appointment. This factor prevented Council from considering the appointment of both EMAC and GMTOAC as RAPs for the Decision Area.

### ***b) Policy***

Council applied its policies as contained in its 'Fact Sheet for RAP applicants on registration of multiple RAPs for a single area' and 'General Principles - RAP Decision Making'.

Council's policy is to accord appropriate status to Traditional Owners with a preference to appoint Traditional Owner body corporates as RAPs. Council's policy is also to appoint RAPs that are single, inclusive groups and representative of Traditional Owners in the relevant Decision Area.

### ***c) Charter of Human Rights and Responsibilities***

Prior to making the relevant decision, Council gave careful consideration to the *Charter of Human Rights and Responsibilities Act 2006 (Charter)*, having particular regard to the distinct cultural rights of Aboriginal persons recognised in section 19(2)(d) of the Charter.

Council formed the view that the decision to decline to register EMAC over this Decision Area is compatible with the Charter.

Council took account of the fact that, in declining the application over the Decision Area, EMAC will not be able to protect Aboriginal cultural heritage in the Decision Area as a RAP. However, Council notes there are other mechanisms in the Act which ensure the protection of Aboriginal cultural heritage, and which enable relevant Aboriginal people to participate in

the protection of Aboriginal cultural heritage in the Decision Area (including obligations on various entities to consult with relevant Aboriginal persons in relation to Aboriginal cultural heritage in the Decision Area).

In any event, taking into account the factors set out in section 151(3) when read with the purposes of the Act (including one of the 'main purposes' being 'to empower Traditional Owners as protectors of their cultural heritage....'), Council formed the view that any limitation to the Eastern Maar peoples' rights is justified, particularly having regard to section 151(3)(c) and that it did not have enough information to conclude that EMAC alone was representative of the Traditional Owners of the Decision Area. In this regard, Council did not identify any less restrictive means available to achieve this purpose, other than declining EMAC's RAP application over the Decision Area.

### **Conclusion**

Having taken all matters detailed above into account, Council declined EMAC's application to be registered as a RAP over the Decision Area.

While Council recognises there are members of EMAC who are Traditional Owners of the Decision Area, and experienced in the management of cultural heritage in this area, Council formed the view that these factors were outweighed by the factors that did not support the EMAC RAP application (primarily, that EMAC had not provided Council with enough information to demonstrate that EMAC alone was representative of the Traditional Owners of the Decision Area).



Rodney Carter  
**Chair**  
**Victorian Aboriginal Heritage Council**

Attachment 1

