

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: 7 February 2019

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 original RAP application (**application**) from EMAC was made on 25 July 2011. EMAC submitted a second application on 15 August 2014 to extend its application area. The application area was divided into Zones and is being considered by Council in stages.

The present decision relates to EMAC's second application. The relevant area (**Decision Area**) encompasses the:

- Martang RAP area
- the Grampians National Park (**Gariwerd**)
- the area east of Gariwerd, bound to the north by the Wimmera River and to the east by the Ararat-St Arnaud Rd, and includes an area over which Barengi Gadjin Land Council Aboriginal Corporation (**BGLC**) has native title and an Indigenous Land Use Agreement (**ILUA**) and is a RAP.

The Decision Area is shown in the attached map (**Attachment 1**).

Formal claims by Traditional Owner corporations relevant to the Decision Area at the time the present decision was made included:

- the BGLC RAP application
- the native title application by the Gariwerd Native Title Group (VID 533/2016) (comprising members of Traditional Owner groups represented by BGLC, EMAC and Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**))
- the native title application by Eastern Maar Peoples (**Eastern Maar**)
- Eastern Maar's application for a Recognition and Settlement Agreement (**RSA**) under the *Traditional Owner Settlement Act 2010* (**TOS Act**).

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.

BGLC is a native title holder in relation to part of the Decision Area; the area bound to the west by the Western Highway and to the east by the by the Ararat-St Arnaud Rd. Where this part of the Decision Area is concerned, Council noted that pursuant to section 151(2) of the Act, no corporation other than BGLC can be registered as a RAP.

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

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

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 any part of 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 part of the Decision Area; most of the Martang RAP area and a minor part of the area referred to above in section 2 as the area over which BGLC has native title.

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 Gunditjmara, 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, Council requested details about the traditional or cultural connection of Eastern Maar People to the Decision Area, and the basis for EMAC's assertion that it includes and represents the Traditional Owners of the Decision Area. This information was not provided to Council.

As detailed above in section 2, the Decision Area completely overlaps the Martang RAP area and an area over which BGLC has native title and is a RAP. It also overlaps part of the BGLC RAP application area and the area pertaining to the Gariwerd native title application.

Council wrote to BGLC and Martang seeking their comments on the application. Early in Council's consideration of the application, BGLC advised Council it objected to EMAC's application over BGLC RAP application area and hoped to meet with EMAC. Martang also wrote to Council objecting to the application saying that traditional right to speak for Country existed at a more local level than the Eastern Maar grouping and EMAC was not representative.

Council noted correspondence from EMAC that demonstrated its intention and desire to negotiate boundaries and/or contact BGLC with a view to addressing overlapping interests in the Decision Area by agreement. However, EMAC did not provide evidence that formal discussions with BGLC had occurred in recent years. Council also noted correspondence from EMAC concerning Martang which stated EMAC's view that Martang members are Eastern Maar people and fit within the description of Eastern Maar people.

Council wrote to EMAC asking whether EMAC had met or planned to meet with BGLC to seek agreement about shared cultural heritage management responsibilities in the area of interest to BGLC. Council also asked whether EMAC had a plan with a timeframe for expanding the representation of Martang members in EMAC and ensuring their greater involvement in EMAC. Council noted EMAC did not provide any detailed response to these requests.

At 7 February 2019 Council found that traditional ownership of the Decision Area remained in dispute.

While Council acknowledged the information provided by EMAC to support its claim that it represents the Traditional Owners of the Decision Area, Council also had regard to the views of BGLC and Martang in relation to the EMAC application and concluded it was not satisfied EMAC is a body representing the Traditional Owners of that area.

While Council understands the complexities and challenges faced by Traditional Owner groups needing to address competing claims of traditional ownership, Council is unable to appoint either a single or joint RAP where such competing claims remain unresolved and where Traditional Owner groups have not reached agreement.

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 also provided undetailed information regarding its expertise in managing and protecting Aboriginal cultural heritage that was noted by Council.

While Council acknowledged that EMAC had been operating as a RAP since its appointment in December 2013, Council asked EMAC to provide evidence of its 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 capacity to manage and protect 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.

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 section 151 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 151(2A) of the Act. As such, Council was 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 established that EMAC was not a native title party in relation to the Decision Area. 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; EMAC's responses to Council's request for information about the traditional or cultural connections of the Eastern Maar to the Decision Area, EMAC's representativeness, and details about

EMAC's cultural heritage management operations; and the views of BGLC and Martang in relation to the EMAC application. While Council established that EMAC is a Traditional Owner Group Entity in relation to part of 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.

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 for that area. However, Council noted 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). Further, Council considered that the decision to decline does not prevent EMAC from reapplying for registration as a RAP in future.

In any event, taking into account the factors set out in section 151(3), particularly the s 151(3)(c) factor, 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 by the importance of Council ensuring that it is satisfied as to the Traditional Owners of the Decision Area when making RAP appointments. 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 may be 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 did not demonstrate it alone was representative of the Traditional Owners of the Decision Area.

Council's decision does not preclude future applications over the Decision Area from EMAC. If EMAC were to consider preparing a future application over the Decision Area, Council would expect EMAC, before applying, to form an agreement about boundaries and cultural heritage management responsibilities with other groups claiming traditional ownership of the area.



Rodney Carter
Chair
Victorian Aboriginal Heritage Council

Attachment 1

