

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY GUNDITJ MIRRORING TRADITIONAL OWNERS ABORIGINAL CORPORATION

DATE OF DECISION: 7 February 2019

1. Decision

The Victorian Aboriginal Heritage Council declined the application from Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**) to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

GMTOAC's RAP application (**application**) was lodged on 23 April 2007. It was divided into Zones and was considered by Council in stages. The present decision to decline GMTOAC's application relates to an area that is the last part of GMTOAC's original application area to be decided upon by Council. This area commences at the South-Australian border, runs easterly across the Wimmera Highway, intersects with Apsley, then runs south-easterly, intersects with Edenhope and extends as far east as Harrow (**Decision Area**). The Decision Area is shown on the attached map (**Attachment 1**).

At the time Council considered the GMTOAC application in relation to the Decision Area, Council considered the Barengi Gadjin Land Council Aboriginal Corporation (**BGLC**) RAP application over the same area.

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)

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

Through two consent determinations GMTOAC is a native title holder within its appointed RAP area:

- In March 2007, GMOTAC became a registered native title holder for approximately 140,000 hectares in the area bound in the west by the Glenelg River and in the north by the Wannon River, and covering Lower Glenelg National Park, Mt Richmond National Park, Mt Eccles National Park, Lake Condah, Cobboboonee State Forest, Dunmore State Forest and Hotspur State forest.

- In July 2011, GMTOAC became a registered native title holder for an area between the Shaw and Eumeralla Rivers from Deen Maar (including Yambuk) to Lake Linlithgow, pursuant to the Federal Court consent determination of native title in the 'Part B' area by GMTOAC, for the Gunditjmarra People, and Eastern Maar Aboriginal Corporation, for the Eastern Maar peoples.

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

GMTOAC is not a traditional owner group entity which has entered into a Recognition and Settlement Agreement with the State under the *Traditional Owner Settlement Act 2010* (Vic) in relation to the Decision Area. Accordingly, Council is not required by s 151(2A) of the Act to register GMTOAC as a RAP for the Decision Area.

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

GMTOAC is not a native title party for the Decision Area.

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

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

Council noted GMTOAC has entered into an Indigenous Land Use Agreement (**ILUA**) with the State of Victoria in relation to areas within its appointed RAP area. The GMTOAC ILUA does not cover the Decision Area.

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

i) Recognition of Gunditjmarra People as Traditional Owners

GMTOAC is a Prescribed Body Corporate under the *Native Title Act 1993* (Cth) and holds native title rights and interests in trust for the Gunditjmarra People for areas within its appointed RAP area.

GMTOAC's current Rule Book defines 'Gunditjmarra' as the descendants of the following persons who identify as Gunditjmarra (GMTOAC Apical Ancestors): Jenny Green (Alberts line), Timothy James Arden, Barbara Winter, Mary (surname unknown, mother of James Egan), Billy Gorrie, Mary (wife of Billy Gorrie), William King, Hannah (wife of William King), James Lancaster, Susannah McDonald (Lovett line), Mary McKinnon, Eliza Mitchell (Saunders line), John Henry Rose, Lucy Sutton, James and Mary Sutton, Louisa Taylor, and Andrew and Ellen Winter. The Rule Book also states that "all adult Gunditjmarra Native Title Holders" are eligible for GMTOAC membership.

Whilst the Gunditjmarra People do not hold native title over the Decision Area, Council acknowledged its previous decisions in relation to the GMTOAC application and the Gunditjmarra People's traditional ownership of the area covered by their native title and areas for which they became a RAP.

ii) Traditional Ownership of the Decision Area

The GMTOAC application states that GMTOAC: 'represents Aboriginal people with traditional and familial links to the area under the application. Many [GMTOAC] members share their Gunditjmara heritage and identity with Baunditj country'.

Council requested that GMTOAC provide information as to the basis on which traditional and familial links of the Gunditjmara to the Decision Area were claimed. GMTOAC did not provide Council with any further information in this regard. On the basis of information available to it Council was unable to conclude that GMTOAC was an organisation that represents the Traditional Owners of the Decision Area.

Council considered GMTOAC's interest in seeking joint RAP status with BGLC as the other Traditional Owner corporation with a RAP application over the Decision Area. Council noted correspondence from both GMTOAC and BGLC that demonstrated their desire to seek joint RAP status over the Decision Area and finalise an agreement relating to cultural heritage management in the Decision Area. Council reviewed the draft agreement provided by GMTOAC and BGLC and requested both corporations provide more information in order for Council to consider a joint RAP appointment. Information requested included the basis of BGLC's and GMTOAC's Traditional Owner interests and shared interests in the Decision Area, and BGLC's and GMTOAC's plans to develop a joint operational plan. Neither GMTOAC nor BGLC provided Council with this information.

At the time of making its decision, Council had not been provided with information regarding the standing of the draft agreement, nor of any meetings held between GMTOAC and BGLC to progress agreement making. Council also considered it did not have enough information to conclude that GMTOAC and BGLC represent the Traditional Owners of the Decision Area.

Given GMTOAC's proposition that both GMTOAC and BGLC represent Traditional Owners of the Decision Area and should be joint RAPs for the area, Council considered the GMTOAC RAP application in relation to section 153 of the Act. This consideration is referred to below in section 3(i)(i).

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

GMTOAC states in its application that it does not represent Aboriginal people with an historical or contemporary interest in the Aboriginal cultural heritage of the application area.

Council understood this to mean that GMTOAC does not represent Aboriginal people other than the Traditional Owners with interest in the Aboriginal cultural heritage of the application area. GMTOAC's application also states: "*Gunditj Mirring members are confident that the corporation's constitution and operations will engage all traditional owners and native title holders in the application area*".

Council acknowledged GMTOAC had been operating as a RAP since its appointment in April 2007. Council also noted that within its application GMTOAC provided details about its

members' experience and expertise in managing and protecting cultural heritage and that this information did not indicate the extent to which GMTOAC had been engaged in cultural heritage work in the Decision Area.

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

A search of relevant registers, and information from GMTOAC, did not disclose any grants of land in fee simple made to GMTOAC 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 GMTOAC in its application.

i) Other relevant matters (s 153 (3)(f) 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 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 or 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 BGLC over the Decision Area. Noting that neither corporation informed Council as to the basis of their Traditional Owner interests and shared interests in the Decision Area, or how they would conduct joint RAP operations in this area, Council concluded it could not be satisfied that GMTOAC and BGLC had met the requirements of section 153 of the Act.

ii) RAP Capacity

GMTOAC's significant experience and expertise in operating as a RAP since 2007 was taken into account by Council.

4. Reasons for decision

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

a) Legislation

In deciding GMTOAC'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.

GMTOAC 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 GMTOAC'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 the factors set out in sections 151(3)(a), 151(3)(b), 151(3)(e) and 151(3)(f) were not established.

In considering the matters set out in section 151(3)(a), Council established that GMTOAC is not a native title party for the Decision Area. In considering 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 in 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 GMTOAC with the State.

Council considered sections 151(3)(c) and 151(3)(d). In doing so Council considered a number of factors, including: GMTOAC's membership and Rule Book; GMTOAC's claims in relation to the Decision Area, including about the traditional or cultural connections of the Gunditjmara People, GMTOAC's representativeness, and the cultural heritage management experience of GMTOAC members; and information provided by BGLC in relation to its RAP application. Although Council established that GMTOAC comprises Traditional Owners in its membership and has substantial cultural heritage management experience generally, Council was not satisfied that GMTOAC was an organisation representative of Traditional Owners of the Decision Area.

Council considered matters set out at section 153 and acknowledged that whilst GMTOAC sought joint RAP status with BGLC over the Decision Area, Council did not have sufficient information as to the basis of GMTOAC's and BGLC's Traditional Owner interests and shared interests in the Decision Area, the status of an agreement between GMTOAC and BGLC, or how GMTOAC and BGLC would work together to ensure the effective operation of the Act.

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. Council will give priority consideration to uncontested applications groups that meet the Acts requirements and that are supported by Traditional Owners of the Country under application. Council made a number of requests to GMTOAC and BGLC for updates on progress made to finalise their proposed agreement in relation to the Decision Area. However, such information was not provided.

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 GMTOAC over this Decision Area is compatible with the Charter.

Council took account of the fact that, in declining GMTOAC's application over the Decision Area, GMTOAC will not be able to protect Aboriginal cultural heritage in the Decision Area as a RAP. 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 present decision does not prevent GMTOAC from reapplying for registration as a RAP in future.

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 Gunditjmarra Peoples' rights is justified, particularly having regard to sections 151(3)(c) and 153 and that it could not be satisfied that GMTOAC was representative of the Traditional Owners of the Decision Area, or that GMTOAC should be appointed jointly with BGLC as a RAP over the Decision Area. In this regard, Council did not identify any less restrictive means available to achieve the purposes of the Act, other than declining GMTOAC's RAP application over the Decision Area.

Conclusion

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

While Council recognises there may members of GMTOAC who are Traditional Owners of the Decision Area and have experience in the management of cultural heritage, Council formed the view that these factors were outweighed by the factors that did not support the GMTOAC application. These were primarily that GMTOAC had not provided Council with enough information as to the basis of its Traditional Owner interests in the Decision Area, GMTOAC's and BGLC's shared interests in the Decision Area, or how GMTOAC and BGLC would work together to ensure effective operation of the Act.

Council's present decision does not preclude future applications over the Decision Area from GMTOAC. If GMTOAC were to lodge a future application over the same area, Council would expect the application to include information that substantiates GMTOAC claims to the Decision Area, and details the agreement reached with BGLC concerning responsibilities for cultural heritage management in the Decision Area. If in any future RAP application GMTOAC were to seek joint RAP status with BGLC over the Decision Area, Council would

also expect a RAP application to explain the basis of GMTOAC's and BGLC's shared interests in the area, and how GMTOAC and BGLC planned to work together to ensure the effective operation of the Act.

A handwritten signature in black ink, appearing to read "R. Carter", with a stylized flourish at the end.

Rodney Carter

Chair

Victorian Aboriginal Heritage Council

Attachment 1

