

**STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL
IN RELATION TO AN APPLICATION BY BOONWURRUNG LAND AND SEA COUNCIL (ABORIGINAL
CORPORATION) FORMERLY KNOWN AS YALUK-UT WEELAM ELDERS COUNCIL ABORIGINAL
CORPORATION**

DATE OF DECISION: 4 April 2019

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has declined the application of the Boonwurrung Land and Sea Council (Aboriginal Corporation) (**BLSC**), formerly known as Yaluk-Ut Weelam Elders Council (Aboriginal Corporation) (**YWEC**), to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

The area that BLSC sought to be a RAP over (**Decision Area**) is shown in the attached map (**Attachment 1**). This area extends from the mouth of the Werribee River to and including Wilsons Promontory National Park. It includes north western, western, eastern and south eastern Metropolitan Melbourne, Port Phillip Bay, Western Port Bay, and Cape Liptrap, and includes the area in respect of which Council appointed the Bunurong Land Council Aboriginal Corporation (**BLCAC**) as RAP in July 2017.

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)

Council noted BLSC is not a registered native title holder for the Decision Area. Council also noted there is no other registered native title holder for the Decision Area, and that Gunaikurnai people are a registered native title claimant in respect of the South Gippsland part of the Decision Area that includes Wilsons Promontory.

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

BLSC is not a traditional owner group entity for the Decision Area and has not entered into a recognition and settlement agreement with the State of Victoria under the *Traditional Owner Settlement Act 2010*.

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

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

Council noted that in August 2014 a Native Title Determination Application was filed on behalf of the Gunaikurnai people over the South Gippsland part of the Decision Area. This was subsequently registered by the National Native Title Tribunal on 20 April 2015. Accordingly, Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**) is a registered native title claimant, and a native title party for part of the Decision Area.

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

The RAP application from BLSC refers to an Indigenous Land Use Agreement for the Blairgowrie Safe Boat Harbour (**Blairgowrie ILUA**), registered on 21 December 2001. Council noted this agreement relates to a small part of the application area and was signed on behalf of the 'Boonerwung' people by Carolyn Briggs.

Council noted the Blairgowrie ILUA was not made with the Minister on behalf of the State and is therefore not a 'native title agreement' for the purposes of the Act.

No terms of any native title agreement were otherwise made available to Council.

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

i) Membership and representativeness

In previous decisions made by Council in relation to RAP applications from organisations representing Boon Wurrung/Bunurong people, Council recognised five women as Boon Wurrung/Bunurong ancestors (Elizabeth Maynard, Eliza Nowan, Jane Foster, Marjorie Munro and Louisa Briggs).

In its decision in July 2017 to appoint BLCAC as a RAP for part of the area it applied to be a RAP over, Council indicated it accepted BLCAC was representative of Traditional Owners in that area. Council also expressed the view that it was satisfied BLCAC could accommodate within its membership members of Boon Wurrung Foundation Limited (**BWFL**) with traditional and familial links to the area. Council considered that BLCAC had taken steps to engage with BWFL to create a single, inclusive and representative organisation, and that BLCAC was genuinely committed to accommodating members of BWFL in its membership. Council's decision to appoint BLCAC as RAP was upheld by the Supreme Court in 2018, following a challenge to the decision by Carolyn Briggs.

Section 3.1 of the BLSC rule book states that a BLSC member must be over the age of 18 years old and an Australian Aboriginal or Torres Strait Islander person who is born of at least one parent with a Boon Wurrung ancestor who had an association with Boonwurrung country or community, or with one of the five Estates of the Boon Wurrung Language Group, during the period from immediately prior to European settlement of Melbourne in 1835 until 1886 (the year of the expulsion of families from Corranderrk). The Boon Wurrung ancestors are listed in the Register of Ancestors set out in Schedule 4 of the rule book.

Schedule 4 of the rule book lists the following persons as primary ancestors: the BLSC descendants of Marjory Munro, Marjory Munro's daughter Mary, and Mary's daughter Louisa Briggs. Various children of Louisa Briggs are listed as secondary ancestors.

The BLSC rule book at section 3.2 also states that the BLSC Directors may initiate research in relation to other primary or secondary ancestors to be included in the Register of Ancestors.

Council noted the eligibility criteria set out at section 3.1 of the BLSC rule book and that the list of Ancestors entered onto the Register of Ancestors only includes two of the five women Council has accepted as Boon Wurrung ancestors.

Council received information from BLSC regarding the apical ancestors recognised by BLSC and BLCAC. While Council noted that section 3.2(a) of the rule book provides that the Register of Ancestors can be amended, Council has not received any indication from BLSC that it will amend its Registry of Ancestors to include the other women recognised by Council as Boon Wurrung/Bunurong apical ancestors. From the information provided to Council from BLSC, it appears that BLSC disputes that three of the five women recognised by Council are in fact Bunurong/Boon Wurrung ancestors.

Council received and noted comments from BLCAC regarding the Boon Wurrung/Bunurong people's representation. BLCAC stated it is 'an inclusive body representing around 200 people from all five known Boon Wurrung/Bunurong apical ancestors, including Louisa Briggs, and that it has made every effort to respectfully include Yaluk [BLSC] members in the inclusive model it has achieved'. BLSC was provided with these comments and the opportunity to respond to them. BLSC did not respond to BLCAC's comments.

Council accepted that there are members of BLSC who are Boon Wurrung Traditional Owners. However, Council was not satisfied that BLSC is the appropriate organisation to represent Traditional Owners of the Decision Area.

ii) Whether BLSC are Traditional Owners

Council carefully considered the information provided by BLSC supporting the relationship and links of the Boon Wurrung peoples to the Decision Area.

However, Council noted the Decision Area overlaps areas relevant to current and declined RAP applications of BLCAC, GLaWAC and Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation (**WWWCHAC**). Council also noted comments received from two of these corporations objecting to BLSC's claims due to their interests in the Decision Area.

Council referred to its reasons for declining previous RAP applications from organisations representing Boon Wurrung/Bunurong people, GLaWAC and WWWCHAC.

Having regard to the competing claims to traditional ownership of the Decision Area, Council was not able to be satisfied that the Boon Wurrung/Bunurong people are the sole Traditional Owners of the Decision Area.

f) Representation - historical or contemporary interest (s 151(3)(d) of the Act)

BLSC does not claim to be a body representing Aboriginal people that has a historical or contemporary interest in the Aboriginal cultural heritage relating to the Decision Area.

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

A title search did not show any relevant grant of land. Neither BLSC nor any other party notified Council of any relevant grant of land.

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

BLSC did not draw Council's attention to any land and natural resource management agreement to which it is a party.

To the extent it could be relevant to this consideration, Council had regard to matters at 3(d) above. However, Council noted that the Blairgowrie ILUA was not an agreement entered into with the State and is therefore not a 'land and natural resource management agreement' for the purposes of the Act.

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

Council acknowledged Boon Wurrung people's long history of involvement in cultural heritage management and noted the account given by BLSC in its RAP application of the experience and accomplishments of its directors and members in this regard.

j) 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 for the area 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 BLCAC is an existing RAP within the Decision area, Council considered BLSC's RAP Application pursuant to section 153. Council was not satisfied that having more than one RAP within the Decision Area would not unduly hinder the ability of the current RAP to exercise their powers and carry out their functions under the Act.

5. Reasons for decision

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

b) Legislation

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

BLSC is not a registered native title holder for the Decision Area within the meaning of s 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 s 151(2A) of the Act. As such, Council was not obliged to approve BLSC's RAP application over the Decision Area under ss 151(2) or 151(2A) of the Act.

Council considered the matters set out in s 151(3) of the Act. Council concluded that BLSC had not established the factors set out in ss 151(3)(a), 151(3)(b), s 151(3)(c) and s 151(3)(f). In considering the matters set out in s 151(3)(a), Council established that BLSC is not a native title party for the Decision Area. In considering the matters set out in s 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 s 151(3)(c), 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 s 151(3)(f), Council established that there had been no relevant land and natural resource management agreements entered into by BLSC with the State.

Council considered, in accordance with ss 151(3)(c) and 151(3)(d), the question of whether BLSC is a body representing the Traditional Owners of the Decision Area, and/or a body representing Aboriginal people with a historical or contemporary interest in Aboriginal cultural heritage relating to the Decision Area.

Having regard to the BLSC rule book, material in support of BLSC's claim that the Boon Wurrung are the Traditional Owners of the Decision Area, as well as the competing claims to traditional ownership of the Decision Area, Council was not able to be satisfied that BLSC is representative of the Traditional Owners of the Decision Area.

Council noted that BLSC does not claim to represent people who have a historical or contemporary interest in the Aboriginal cultural heritage of the Decision Area.

Council acknowledged Boon Wurrung people's involvement in cultural heritage management and noted BLSC's account of the experience and accomplishments of its directors and members in this regard.

c) 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 including a preference to appoint Traditional Owner bodies corporate as RAPs.

Council's policy is to appoint RAPs that are single, inclusive groups and which are representative of Traditional Owners in the relevant Decision Area.

d) 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 s 19(2)(d) of the Charter.

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

Council took account of the fact that, in declining the application over the Decision Area, BLSC 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 cultural heritage, and which enable relevant Aboriginal people to participate in the protection of cultural heritage in parts of the Decision Area (including obligations on various entities to consult with relevant Aboriginal persons in relation to Aboriginal cultural heritage in the Decision Area). Additionally, as noted above, members of BLSC are eligible to become members of BLCAC, and accordingly could exercise their cultural rights by way of BLCAC membership in relation to the part of the Decision Area over which BLCAC has been appointed as a RAP.

In any event, taking into account the factors set out in s 151(3), particularly the s 151(3)© 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 was of the view that any limitation to the Boon Wurrung peoples' rights is justified by the importance of Council ensuring that it is satisfied as to the Traditional Owners of the Decision Area prior to appointing a RAP. In this regard, Council could not identify any less restrictive means available to achieve this purpose, other than declining BLSC's RAP application over the Decision Area.

Conclusion

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

While Council recognised there are members of BLSC who are Boon Wurrung Traditional Owners and that BLSC members have had a long history of involvement in cultural heritage management, these factors were outweighed by the other factors that did not support the BLSC RAP application (primarily, that BLSC had not established that it represents the Traditional Owners of the Decision Area).



Rodney Carter

Chairperson

Victorian Aboriginal Heritage Council

Attachment 1

Boonwurrung Land and Sea Council (Aboriginal Corporation)



