

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

DATE OF DECISION: 4 April 2019

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) declined 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 from EMAC was made on 25 July 2011. EMAC submitted a second application on 15 August 2014 to extend its application area. The application was divided into separate Zones and considered by Council in stages.

The present decision to decline EMAC's application relates to EMAC's second application (**application**). The relevant areas (**Decision Area**) are shown in the attached map (**Attachment 1**) and are described as:

- i) the area east of Gariwerd which includes Navarre in the north, is bound by Dja Dja Wurrung Aboriginal Corporation's RAP area in the east and Barengi Gadjin Land Council Aboriginal Corporation's and Martang's RAP areas in the west, and extends southerly to the boundary of Wathaurung Aboriginal Corporation's RAP area (northern bloc); and
- ii) the area located east of Warrnambool in the Western District of Victoria that has Camperdown and Colac at its center and which extends easterly to Winchelsea, northerly to Cressy, and southerly to the Victorian coast incorporating the great Otway National Park, Apollo Bay, Lorne and surrounding areas (southern bloc).

The Decision Area overlaps:

- the area Kuuyang Maar Aboriginal Corporation's (**KMAC**) applied to be a RAP over in an application declined by Council in July 2015
- an area encompassing Colac, Cressy and the Otways that people identifying as Gulidjan Gadabanud claim traditional ownership over.

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. Accordingly, Council is not obliged under s 151(2) of the Act to register EMAC (or any other applicant) for this area.

Council notes that 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 Guditjmarra 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 that the Victorian Government and Eastern Maar Traditional Owner Group (**EMTOG**) is negotiating a Recognition and Settlement Agreement (**RSA**) under the *Traditional Owner Settlement Act 2010* (Vic) (**TOS Act**) with respect to part of the Country that the Eastern Maar Traditional Owner Group is seeking to become a RAP over. The proposed RSA area includes the Decision Area. However, the eastern part of the southern bloc (the Colac and Otway areas) does not fall within the threshold area accepted by the State.

As EMAC is not a Traditional Owner Group Entity that has entered into an RSA with the State under the TOS Act in relation to the Decision Area, Council is not required by s 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 with the Federal Court of Australia on 20 March 2013 (**NT Claim**). The NT Claim covers part of the southern bloc of the Decision Area (excluding the Colac and Cressy areas in the east) but not the northern bloc.

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) Whether EMAC represents Eastern Maar People

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) Whether the Eastern Maar people are Traditional Owners of the Decision Area

Council noted the EMAC application states that the consent determination in relation to the Part B area is based on research accepted by the State which shows the traditional, familial, historical and contemporary links of the Eastern Maar people to the Part B area, and demonstrates such links extend much further to the east, to the borders of the current application. Council also noted EMAC's view that other Aboriginal groups recognise the traditional connections of its members to the Decision Area, and that EMAC did not elaborate as to the manner in which these links are recognised.

While acknowledging EMAC's claim to the Decision Area, Council had regard to a petition by community members identifying as Eastern Maar people who claimed a lack of consultation and effective representation by EMAC. Council also had regard to competing interests in the Decision Area by KMAC and people identifying as Gulidjan Gadabanud.

In late 2017 Council was informed by EMAC of its intentions to meet with a representative of the Gulidjan Gadabanud to discuss changes to the EMAC group description and decision-making structures to accommodate people who identify as Gulidjan or Gadabanud. In the same correspondence 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.

In correspondence to EMAC, Council asked for detailed information supporting EMAC's traditional connection to the Decision Area, EMAC's inclusiveness and representativeness of all the Traditional Owners of the Decision Area, and details about the experience of EMAC members in caring for Aboriginal Places in the Decision Area. EMAC did not provide Council with information Council requested to support its claim of traditional ownership of the Decision Area.

At 4 April 2017 Council found that competing claims of traditional ownership regarding the Decision Area remained unresolved 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 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 capacity to manage and protect Aboriginal cultural heritage 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 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 were considered 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 RSA in relation to the Decision Area within the meaning of section 151(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 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: EMAC's membership and Rule Book; EMAC's responses to Council's request for details about the traditional or cultural connections of the Eastern Maar to the Decision Area, EMAC's representativeness, and EMAC's cultural heritage management operations and experience; and other claims of traditional connections to the Decision Area by KMAC and Gulidjan Gadabanud people. While Council acknowledged information provided by EMAC to support its claim that it represents the Traditional Owners of the Decision Area, and there may be members of EMAC who are Traditional Owners of the Decision Area, Council concluded it did not have enough evidence that EMAC alone was representative of the Traditional Owners of the Decision Area.

b) Policy

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 the 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). Council also took into account that the decision to decline does not prevent EMAC from reapplying for registration as a RAP over the Decision Area in future.

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 rights of those Traditional Owners represented by EMAC is justified by the importance of Council needing to be satisfied as to the Traditional Owners of an 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 acknowledges there may be members of EMAC who are Traditional Owners of the Decision Area, Council came to the conclusion it was not satisfied EMAC 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 RAP application over the Decision Area, Council would expect detailed information from EMAC to support its claim of traditional ownership of the Decision Area and evidence of its effective representation of the Traditional Owners of that area.



Rodney Carter

Chair

Victorian Aboriginal Heritage Council

Attachment 1

