

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY FIRST PEOPLE OF THE MILLEWA MALLEE ABORIGINAL CORPORATION

DATE OF DECISION: 5 December 2018

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has approved, in part, the application from First People of the Millewa Mallee Aboriginal Corporation (**FPMMAC**) to be a registered as a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006* (**Act**) (**application**). This is the second RAP application from FPMMAC.

In making this decision, Council took into account all relevant information provided to it in respect of this application.

2. Decision Area

The application was made on 27 April 2018. It was divided into two zones. FPMMAC's appointed area is the northern zone (**Decision Area**) of the area for which FPMMAC applied to be a RAP (**application area**). A map showing the Decision Area is set out below.

The Council has deferred consideration of FPMMAC's RAP application in relation to the application area outside of the Decision Area due to competing interests in relation to this area. This is consistent with Council's practice of encouraging all RAP applicants to discuss their RAP applications with neighbouring groups with a view to resolving competing interests and overlapping applications.

3. Previous decisions relating to FPMMAC

The first RAP application from FPMMAC was declined by Council on 6 December 2017.

Other RAP applications covering the application area (in whole, or in part) that have been declined by Council were made by Latji Latji Mumthelang Aboriginal Corporation, Tati Tati Aboriginal Corporation, Mallee District Aboriginal Services, Murray Valley Aboriginal Cooperative Limited, Gilbie Aboriginal Corporation and Barengi Gadjin Land Council Aboriginal Corporation (**BGLC**).

4. 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)

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

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

FPMMAC has been established as a proposed traditional owner group entity (**TOGE**) for the application area but is not currently a TOGE that has entered into a Recognition and Settlement Agreement with the State of Victoria under the *Traditional Owner Settlement Act 2010 (TOS Act)*.

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

The First Peoples of the Millewa Mallee Native Title Claim Group (**FPMM**) filed a native title determination application on 8 October 2015. The area covered by the application and the native title determination application is the same.

The native title determination application was made by four named people on their own behalf and on behalf of the native title claim group.

On 13 May 2016 the National Native Title Tribunal found that the claim of the FPMM satisfied all the conditions set out in sections 190B and 190C of the *Native Title Act 1993 (NTA)* and entered the claim on the Register of Native Title Claims. Federal Court proceedings (VID630 of 2015) remain ongoing under the NTA.

FPMMAC has been established as the proposed Prescribed Body Corporate for the FPMM Native Title Determination Application.

Given that FPMMAC is the proposed Prescribed Body Corporate for the FPMM Native Title Determination Application, and that the FPMM native title claim has been registered, Council finds that it is a native title party within the meaning of s 151(3)(a).

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

Neither FPMMAC, 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) Consideration of FPMMAC's claim of Traditional Ownership of the Decision Area

FPMMAC's application was made on the basis that FPMMAC represents the Traditional Owners of the Decision Area.

In support of its claim of Traditional Ownership of the application area, FPMMAC provided Council with the FPMMAC Rule Book (**Rules**), Register of FPMMAC members, the FPMM Native Title Determination Application, and the FPMM Threshold Statement (Part A) (for

purposes under the TOS Act) and Supplementary Information to Threshold Statement (Part A).

This information included:

- statements of the individual native title applicants who represent the FPMM native title claim group
- first-hand accounts of a number of early colonists that recorded their contacts with Traditional Owners of the Decision Area
- detailed evidence of the cultural and family history of the apical ancestors identified by FPMMAC
- research findings including anthropological discussion of the families of polity¹ of the application area, and the ways in which the descendants of FPMMAC identified apical ancestors have maintained their association with the application area and each other
- a list of FPMMAC members showing the relationship between members and FPMMAC identified apical ancestors.

ii) FPMMAC's inclusivity and representativeness

Council noted the FPMMAC membership criteria set out in section 5.1 of the Rules which states to be a full member of FPMMAC, a person must be:

- At least 18 years old; and
- A Traditional Owner of the Millewa-Mallee.

A Traditional Owner of the Millewa-Mallee is defined in the Rules as any person who has satisfied the following criteria to the satisfaction of the FPMM:

- A demonstrated descent from one of the identified apical ancestors, those ancestors being:
 - o John Perry and Nelly/ Emily Perry; or
 - o Elizabeth Johnson; or
 - o Archibald Pepper and Jessie Mayne/ Mein; and
- A connection to the Millewa-Mallee Traditional Owner community; and
- A connection to the lands and waters of the Millewa-Mallee in North West Victoria.

Council also noted section 5.1 of the Rules requires a person applying for membership to nominate the Identified Family Group(s) with which they identify.

In its reasons for declining the first RAP application from FPMMAC, Council noted concerns about FPMMAC's ability to sufficiently represent the people it says it represents particularly due to some Identified Family Groups being represented by only one or two members.

Measures taken by FPMMAC to address Council's concerns included:

¹ "Families of polity" is a basis for defining groups of Traditional Owners. The application states that FPMMAC members' claims of Traditional Ownership of the application area is based on a "families of polity" model rather than on language groups.

- amendments to FPMMAC's Rules to:
 - include the definition of FPMMAC Identified Family Groups
 - include a requirement that there must be at least two director positions on the FPMMAC board for each Identified Family Group
 - require the attendance of a majority of Identified Family Groups to achieve quorum at FPMMAC general meetings
 - include a requirement that a special resolution must be supported by a majority of Identified Family Groups, as well as 75% of the members entitled to vote on a full resolution.
- providing letters of support from FPMM families of polity (with relatively small numbers of representatives in FPMMAC) endorsing the FPMMAC members who are said to represent their interests
- providing evidence of efforts made by FPMMAC to increase its membership.

Two parties objected to the application, primarily in relation to the matter of FPMMAC's representativeness. Council provided the objections to FPMMAC giving FPMMAC the opportunity to respond to them. The objections included claims from the objectors that they have historical and traditional connections to the FPMMAC application area but lacked opportunity to be parties to FPMMAC RAP application. In responding to Council, FPMMAC provided copies of letters it had written to the objectors addressing their concerns. Council accepted FPMMAC's response in each case, which included an explanation of its membership rules and procedure for engaging with people seeking to be members of FPMMAC.

In discussing the matter of FPMMAC's representativeness, Council took into account that it has the ongoing function of managing, overseeing and supervising the operations of FPMMAC under s 132(ch) of the Act, and that it is empowered under s 154A of the Act to impose conditions on FPMMAC at any time, which could include a condition to ensure the ongoing inclusiveness and representativeness of FPMMAC.

In taking into account all information available to Council relevant to FPMMAC's claim of Traditional Ownership of the Decision Area, Council concluded FPMMAC was an appropriate organisation to represent 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)

FPMMAC's application states that FPMMAC relies on its traditional links to country as the basis for its historical and contemporary links.

In information FPMMAC provided to Council, Council noted accounts of the cultural heritage management experience of FPMMAC directors and other FPMMAC members and their engagement with government agencies and other stakeholders to manage cultural heritage in the Decision Area including vast areas of ancestral burials. Stakeholders referred to include Mallee Catchment Management Authority, Parks Victoria, the Murray Darling Basin Authority, Mildura Rural City Council, Aboriginal Victoria, Iluka Mines and La Trobe University.

Based on this information, Council concluded FPMMAC represents Aboriginal people with historical or contemporary interest in the Aboriginal cultural heritage relating to the Decision Area and demonstrates expertise in managing and protecting Aboriginal cultural heritage in that area.

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

A search of relevant registers, and information from FPMMAC, did not disclose any grants of land in fee simple made to FPMMAC 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)

FPMMAC had not advised Council that it had entered into any formal land and resource management agreements.

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

i) RAP capacity

Council noted FPMMAC is incorporated and fully compliant with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

FPMMAC developed a suite of operational materials detailing how the corporation will operate as a RAP. Copies of these documents were provided to Council and include the Initial Operational and Business Plan 2017-2020 and policies and procedures for managing cultural heritage.

5. Reasons for decision

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

a) Legislation

In deciding FPMMAC'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.

FPMMAC 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 FPMMAC's 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, and concluded FPMMAC had established that it is a native title party, within the meaning of s 151(3)(a) of the Act.

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 relation to s 151(3)(e), no relevant grants of land in fee simple to an Aboriginal body by the State or Commonwealth in relation to the Decision Area were brought to Council's attention.

In considering matters set out s 151(3)(f), Council established that FPMMAC had not entered into any formal land and natural resource management agreements with the State.

In relation to s 151(3)(g), Council considered FPMMAC's corporate plan and capacity to operate as a RAP and found FPMMAC had sufficiently demonstrated capacity to operate as a RAP.

Council considered, in accordance with sections 151(3)(c) and 151(3)(d), the question of whether FPMMAC 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 and expertise managing and protecting such heritage.

Council was satisfied that FPMMAC is a body representing the Traditional Owners of the Decision Area for the purpose of s 151(3)(c), on the basis of information provided by FPMMAC, including the FPMM Native Title Determination Application and Threshold information for purposes under the TOS Act, details of FPMMAC members including their association with FPMMAC identified apical ancestors, amendments to the FPMMAC Rule Book to establish greater measures for assuring FPMMAC representativeness, and FPMMAC's membership rules and procedure for engaging with Aboriginal people seeking to become FPMMAC members.

In relation to s 151(3)(d) Council was satisfied that FPMMAC is a body representing Aboriginal people with historical and contemporary interest in Aboriginal cultural heritage relating to the Decision Area with demonstrated expertise in managing and protecting Aboriginal cultural heritage in that 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 corporations 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 present 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.

In its deliberations, the Council acknowledged that not all people who identify as Traditional Owners of the Decision Area are members of FPMMAC or wish to be represented through FPMMAC. Council acknowledged that the decision to appoint FPMMAC may, in certain circumstances, impact on the ability of those Traditional Owners of the Decision Area to enjoy their identity and culture and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources in the Decision Area. For example, people who identify as Traditional Owners of the Decision Area, other than FPMMAC members, may be limited in their ability to participate in the protection and management of Aboriginal cultural heritage in the Decision Area.

However, Council noted that the appointment of FPMMAC as a RAP provides a formal mechanism through which Traditional Owners of the Decision Area will be able to exercise their distinct cultural rights protected under the Charter. Further, under FPMMAC's current Rules, and in accordance with FPMMAC procedure for engaging with people seeking to be members of FPMMAC, Council formed the view that Traditional Owners of the Decision Area are eligible to become members of FPMMAC and able to continue to exercise their distinct cultural rights and be involved in the protection and management of cultural heritage in the Decision Area as FPMMAC members.

Council also took into account that it has the ongoing function of managing, overseeing and supervising the operations of FPMMAC under s 132(ch) of the Act, and that it is empowered under s 154A of the Act to impose conditions on FPMMAC at any time, including a condition to ensure the ongoing inclusiveness and representativeness of FPMMAC to ensure that Traditional Owners of Decision Area are able to exercise their cultural rights as members of FPMMAC.

Council considered that these factors lessen the extent of any limitation to rights contained in s 19 of the Charter caused by the decision to appoint FPMMAC. Additionally, and having regard to the factors discussed above, in particular the desirability of appointing a single, sustainable and representative RAP, Council further determined that there was no less restrictive means reasonably available to achieve the purpose of the decision. As set out above, the purpose of the decision is to appoint an inclusive and representative Traditional Owner body as a RAP to protect and manage Aboriginal cultural heritage within the Decision Area. Council found that the appointment of FPMMAC is a reasonable imposition on the cultural rights of those Traditional Owners of the Decision Area who are not currently FPMMAC members.

Accordingly, Council formed the view that the decision to register FPMMAC as a RAP is compatible with the Charter.

Conclusion

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

Rodney Carter

Chair

Victorian Aboriginal Heritage Council

