

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

DATE OF DECISION: 6 December 2017

1. Decision

The Council has declined the application of the First Peoples of Millewa Mallee Aboriginal Corporation (FPMMAC) to be a Registered Aboriginal Party under the *Aboriginal Heritage Act 2006*.

2. Decision Area

The RAP application was made on 28 January 2016, and related to the North-West corner of the state of Victoria. It was divided into two zones, Zone 1 and Zone 2. At that time, Zone 2 overlapped with an existing RAP application of Barenji Gadjin Land Council (BGLC).

Prior to finalising its assessment of the FPMMAC application, Council declined the portion of the BGLC application that overlapped with the FPMMAC application (Zone 2). Council determined Zones 1 and 2 of FPMMAC's application together, so this decision relates to the full FPMMAC application area (Decision Area).

The Decision Area is shown in the attached map (Attachment 1). Commencing at the South Australian and Victorian border at the Mallee Highway, the application boundary extends northward to the Murray River, then eastward along the River to a point just north of Iraak. From there it extends inland and then runs along the Calder Highway until Ouyen, and then in a westerly direction back to the commencement point.

3. Background to Decision

The FPMMAC was incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* on the 23 July 2015.

A number of previous RAP applications have been made over parts of the Decision Area. Those applications over the Decision Area were all declined. Previous RAP applicants that had an interest in at least part of the Decision Area include:

- Latji Latji Mumthelang Aboriginal Corporation
- Tati Tati Aboriginal Corporation
- Mallee District Aboriginal Services
- Murray Valley Aboriginal Cooperative Limited
- Gilbie Aboriginal Corporation
- Barenji Gadjin Land Council (is also an approved RAP over areas south of the decision area)

4. Findings of Fact and Evidence

In relation to the Decision Area, Council has 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. FPMMAC is not a party to any Indigenous Land Use Agreement that has been registered under the Native Title Act. Accordingly, Council is not obliged under s 151(2) of the Act to register FPMMAC as a RAP for this area.

b) Recognition and settlement agreement (s 151(2A) of the Aboriginal Heritage Act 2006)

FPMMAC lodged a Threshold Statement – Part A (10 May 2015) to settle its native title claim by way of a recognition and settlement agreement under the Traditional Owner Settlement Act.

However, FPMMAC has not entered into a Recognition and Settlement agreement with the State of Victoria in relation to the Decision Area. Accordingly, Council is not obliged under s 151(2A) to appoint FPMMAC as a RAP for this area.

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

The First Peoples of the Millewa Mallee Native Title Claim Group filed a native title determination application on 8 October 2015. The area covered by the RAP 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. The members of the native title claim group comprise the descendants of the apical ancestors John and Nelly Perry.

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 and entered the claim on the Register of Native Title Claims. Federal Court proceedings (VID630 of 2015) remain ongoing under the Native Title Act.

FPMMAC has been established as the proposed Prescribed Body Corporate for the FPMM Native Title Determination Application and/or as a proposed Traditional Owner Group Entity (TOGE).

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 (s 151(3)(c) of the Act)

FPMMAC's application was made on the basis that it represented the traditional owners of the Decision Area.

In support of its application FPMMAC provided Council with its Rule Book, Register of Members, Native Title Determination Application, Threshold Statement (Part A) under the TOS Act, Supplementary Information to Threshold Statement (Part A), References in regard to work undertaken by FPMMAC members on cultural heritage management, Initial Operational and Business Plan 2017-2020, Cultural Heritage Committee Terms of Reference, position description for a Cultural Heritage Manager, RAP Policies and Procedures, Work Health and Safety Management Plan, Risk Management Plan, and a bookkeeping services agreement with Federation Enterprises Pty Ltd.

FPMMAC provided details of contacts made with individuals at full group meetings, and emails to individuals that it was aware of to invite them to apply for membership of FPMMAC.

In addition to its application documents, FPMMAC also provided Council with information about its agreement with BGLC to progress working together in the area where their interests overlapped. FPMMAC's Native Title Determination Application relies on statements of Norm 'Tinawin' Wilson, Kingsley Abdulla, and Janine Wilson. It also relied on the first-hand accounts of a number of early colonists that recorded their contacts with Traditional Owners of the Decision Area.

FPMMAC's explained that its members' claims to traditional ownership of the Decision Area was based on a 'families of polity' model, rather than on language groups. FPMMAC identified traditional owners of the Decision Area as coming from three family groups, that is, the descendants of Apical Ancestors:

- John Perry and Nelly/ Emily Perry; or
- Elizabeth Johnson; or
- Archibald Pepper and Jessie Mayne/ Mein.

In its application the FPMMAC referred to key research findings including anthropological discussion of the families of polity, and the ways in which the descendants of ancestors from the area have maintained their association to the country, and to each other. The FPMM claim group recognition of the other families of polity associated with the area is a core component of how the group is described.

FPMMAC stated that all members had an opportunity to present their oral tradition to the other members of the FPMM claim group in order to be included in the group. One of the key principles of membership of the group is recognition and acceptance by other FPMM people. It highlighted that each of the families of polity are engaged with (and within) the FPMM group, have expressed their association to country within the application area to the Full Group, and have been recognised and accepted by the FPMM Full Group.

FPMMAC stated that its research found that the FPMM families of polity have a strong association with the country within the application area, and that no other families of polity have been supported as Traditional Owner families. It explained that each of the families of polity associate with different 'country' within the application as people of that country while still belonging to the broader cultural bloc.

The key features of the society at sovereignty were, among other things, that:

- It comprised large numbers of interacting landholding groups which held native title at sovereignty,
- These landholding groups were members of a single society, bound by normative laws and customs which governed their systems of kinship, ritual, trade and environment,
- There were further internal boundaries within the society where the landholding groups were distinguished by small differences such as dialect,
- There was a cross-linked mosaic of associations (through marriage, trade, ceremony) and amity between the landholding groups, across the territory associated with the society which coalesced through the custom of holding meetings of associated groups at resource rich sites within the territory.

FPMMAC noted that assessment of language group identity and language group area on the ethno-historic record and secondary contemporary records, are in many instances misleading and overstated. It is the unreliable nature of those records and opinions that has led FPMMAC to focus on association to country.

FPMMAC noted that despite the devastating impacts of European settlement, the First Peoples of the Millewa- Mallee have maintained continuous connection to the Decision area. European settlement disrupted traditional culture but it didn't sever the ties that the First Peoples of the Millewa-Mallee people and their descendants maintain with country.

FPMMAC provided detailed evidence of the cultural and family history of the apical ancestors.

FPMMAC noted that currently each family of polity is represented on the Board of the FPMMAC. Documents submitted to Council by FPMMAC provide that, 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 by FMPPAC as any person who has satisfied the following criteria to the satisfaction of the First People of the Millewa-Mallee Traditional Owner group:

- A demonstrated descent from one of the identified Apical Ancestors, those ancestors being:
 - John Perry and Nelly/ Emily Perry; or
 - Elizabeth Johnson; or
 - 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.

FPMMAC also includes a category for Associate Membership. To be an Associate Member, a person must be:

- At least 18 years old; and
- A descendant of the apical ancestor Thomas Pearce.

As of 4 September FPMMAC had 57 full members and no listed associate members. FPMMAC's information provided to Council indicates that:

- 53 are descendants of John and Nelly Perry;
- 2 members are descendants of Archibald Pepper and Jessi Mayne;
- 1 member is a descendant of Elizabeth Johnson
- There are no associate members of FPMMAC.

Zone 2

As previously noted, a number of organisations have previously lodged RAP applications over the whole or parts of the Decision Area. BGLC is an approved RAP to the area south of the Decision Area. The BGLC application area overlapped with the southern half of the FPMMAC Application Area (Zone 2). Council declined that area of BGLC's RAP application on 26 October 2017.

In response to the FPMMAC application BGLC stated it considered Zone 2 to be Wergaia Country. BGLC represents the Native Title interests and cultural heritage obligations of the Wergaia peoples, who are one of the five groups named under the Native Title positive determination (VI2004/008, Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk). BGLC are the Prescribed Body Corporate for this determination.

Council notes that BGLC and FPMMAC have reached an agreement that *"Both BGLC and FPMMAC are committed to working together to reach agreement on how cultural heritage is protected and managed in the area where both RAP applications overlap."*

The agreement is a general statement of working together but does not provide for a specific process of how BGLC and FPMMAC will work together over the overlap area to protect cultural heritage. The agreement does not indicate any process or timeframe for BGLC and FPMMAC to negotiate in regard to the disputed area, to resolve the long term issue of how cultural heritage is protected and managed in the overlapping area.

Council acknowledges the efforts of BGLC and FPMMAC towards developing a dialogue over the southern area of the Decision Area. Council understands that these issues are complex. Council is of the view it is important for Traditional Owners to have these discussions, especially where there are overlapping claims or interests. At this stage however, Council is not satisfied that the overlapping interests and competing claims have been resolved, and Council is aware that resolving these issues could take some time.

Council is unable to be satisfied whether BGLC, or the FPMMAC represent the Traditional Owners of Zone 2. As such Council finds that at this stage, traditional ownership over the southern half of the Decision Area remains in dispute. Council is therefore not able to be satisfied that the First Peoples of Millewa-Mallee are the traditional owners of Zone 2 of the Decision Area.

Zone 1

Council has raised concerns with FPMMAC since it lodged its application about FPMMAC's representativeness of Traditional Owners in Zone 1. Those concerns related to the small number of members of the organisation, and that some families of polity were only represented by one or two members. The FPMMAC Rule Book states that each Full Member has one vote. Therefore the individuals who represent their family group have a single vote. The current individuals who state they represent their family group are currently Directors, however there is no requirement in the Rule Book of the Directors having to be from particular family groups.

FPMMAC advised Council that those individual members were chosen to represent the interests of their relevant family groups. The FPMMAC has not provided specific information about how each of those members was selected, or determined to represent those family groups. FPMMAC's rule book does not indicate if there is a process that is followed for individual members to be selected to represent their family groups.

Council requested information about how those members came to represent the broader family of polity interests, however FPMMAC did not agree to provide that information. Council therefore was unable to ameliorate its concerns that FPMMAC did not represent (in the sense of having the authority to speak or act for) those Traditional Owner families.

Therefore, while Council finds that members of FPMMAC are traditional owners of Zone 1, it is not satisfied that FPMMAC is sufficiently representative of the Traditional Owners of Zone 1 - that is, Council is not satisfied that FPMMAC represents (or has the authority to speak and act on behalf of) the Traditional Owners of Zone 1.

Council notes that FPMMAC acknowledges it is aware of assertions of the Pearce family of polity of its interest and connection to land on the eastern fringe of the eastern boundary area. FPMMAC states it has accommodated the Pearce family of polity by providing the Pearce family are able to become associate members of the FPMMAC. Council notes that to date no member of the Pearce family has joined as an associate member. The FPMMAC stated that each of the families of polity within the FPMM claim group associate with different 'country' within the proposed area as people of that country while belonging to the broader cultural bloc.

It remains unclear to Council the reasons why the FPMMAC acknowledges the interests of the Pearce family to areas in the eastern part of its Application Area, but does not only allow for descendants of apical ancestor Thomas Pearce to be Full Members of FPMMAC.

The lack of information about the reason that descendants of apical ancestor Thomas Pearce are only eligible for Associate Membership, in circumstances where the Pearce family asserts traditional ownership over the Decision Area, provides a further and alternative basis that Council is not satisfied that FPMMAC represents the 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 relies on its traditional links to country as the basis for its historical and contemporary links, noting that the ethno-historical record evidences the existence and continuity prior and since sovereignty of a single aboriginal society in north-west Victoria around the Murray River region, and the continuation of that society in that area to the present day.

In its RAP application, FPMMAC noted that its members (including directors) continue to exercise their rights to manage and protect cultural heritage and:

- have significant experience in cultural heritage management in the south, west, north eastern, northern and western parts of the application area;
- are regularly called on by local and state government departments, agencies and proponents to protect and manage Aboriginal cultural heritage;
- live on or in the vicinity of the application area; and
- train young members of the group to manage cultural heritage and encourage individuals to undertake a Certificate IV training in Cultural Heritage Management.

FPMMAC provided broad details of the expertise and experience of its current Directors in cultural heritage management. FPMMAC provided an extensive list of cultural heritage projects they have worked on with various stakeholders including Mallee Catchment Management Authority, Parks Victoria, the Murray Darling Basin Authority, Mildura Rural City Council, Aboriginal Victoria, Iluka Mines, and La Trobe University. Darren Perry has also undertaken work protecting large cemeteries of the Ngintait People and with the Kurna elders in Adelaide, and Janine Wilson has undertaken work with (and as a member of) the Latji Latji. In addition, members of the Ngintait language group share and consult about cultural heritage responsibilities and matters with members of the Latji Latji language group, and vice versa.

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

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

A title search has not shown any relevant grant of land. Council has not otherwise been notified of any relevant grant of land by FPMMAC, or by any other party.

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

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

FPMMAC notes in its application that its members have an extensive and comprehensive history of engagement with the community in matters associated with land management. The FPMMAC application states that its members have long-standing productive and pro-active relationships in relation to cultural heritage management.

i) Other considerations (s 151(3)(g) of the Act)

RAP capacity

FPMMAC is incorporated and fully compliant with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. FPMMAC provided its required general report to the Office of Registered Indigenous Corporations for 2017 in a timely manner.

FPMMAC registered its updated Rule Book with ORIC on 4 September 2017. FPMMAC has developed, with the assistance of the First Nations Legal and Research Service, a suite of operational materials detailing how the corporation will operate as a RAP. The documents included:

- Initial Operational and Business Plan 2017-2020,
- Draft position description for a cultural heritage manager,
- Policies and Procedures (for managing cultural heritage, including procedures for evaluating Cultural Heritage Management Plans, advising on Cultural Heritage Permits, decision on Cultural Heritage Agreements, and on Protection Declarations);
- Work Health and Safety Management Plan;
- Risk Management Plan;
- Client Agreement with Federation Enterprises Pty Ltd for administrative support

Single RAP or co-operative arrangements

In accordance with s151(3)(g) of the Act, Council has developed general principles for consideration of RAP applications. Two of those principles are:

“The Council will also give priority consideration to uncontested applications by other groups that meet the Acts requirements that are supported by the Traditional Owners of the Country affected by the application,” and

“The Council encourages smaller groups to create sustainable RAP structures by working together to create a single RAP or to develop co-operative arrangements with other Aboriginal organisations”

Zone 1

As discussed in 4(e) above, while Council finds that members of FPMMAC are traditional owners of Zone 1, Council is not satisfied that FPMMAC is sufficiently representative of the traditional owners of Zone 1 to enable Council to appoint FPMMAC as a RAP.

Zone 2

Council acknowledges the progress being taken by BGLC and FPMMAC to work co-operatively to manage and protect Aboriginal cultural heritage in Zone 2 of the Decision Area. However, there is no current agreement that establishes the policies and procedures how BGLC and FPMMAC would manage the process. Responsibility for Zone 2 of the Decision Area is unresolved.

5. Reasons for Decision

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

a) Legislation

In deciding FPMMAC's application over the Decision Area, Council has taken into account all of the matters it is required to consider under s 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 152(2A) of the Act. As such, Council is not obliged to approve FPMMAC's application over the Decision Area under ss 151(2) or 151(2A) of the Act.

Council has considered the matters set out in s 151(3) of the Act, and concludes that FPMMAC has established that it is a native title party, within the meaning of s 151(3)(a) of the Act. Council concludes that FPMMAC has not established the factors set out in ss 151(3)(b) and 151(3)(e). 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 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 have been brought to Council's attention.

In relation to s 151(3)(g), Council has considered FPMMAC's corporate plan and capacity to operate as a RAP, and its stated intention to work with BGLC in the overlapping area of the Decision Area.

Council has 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 is not satisfied that FPMMAC is a body representing the traditional owners of the Decision Area for the purpose of s 151(3)(c), because:

- In relation to Zone 1, Council is not satisfied that FPMMAC represents all of the Traditional Owner family groups of the Decision Area; and
- In relation to Zone 2, in the face of competing claims to traditional ownership of the Decision Area, that the First Peoples of Millewa-Mallee are the traditional owners of the Zone 2.

Further, and in any event, in relation to Zone 1, even if Council were satisfied that FPMMAC represented the traditional owners of Zone 1 within the meaning of s 151(3)(c), it would decline the application based on its consideration of s 151(3)(g). Namely, it would decline the application based on Council's finding that it could not be satisfied that appointing FPMMAC would be consistent with its policy of appointing RAPs that are single, inclusive groups and representative of Traditional Owners in the relevant application area.

In reaching this view, Council had regard to the material in support of FPMMAC's claim that the First Peoples of the Millewa-Mallee are the traditional owners of the Decision Area, as well as the fact of there being competing claims to traditional ownership of the Decision Area, made by groups representing the Wergaia, and Wotjabaluk people.

Council is 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.

Council acknowledges FPMMAC's efforts towards starting a dialogue with BGLC over Zone 2 of the Decision Area. Council understands that these issues are complex. Council also sees it as important for Traditional Owners to have these discussions, especially where there are overlapping claims or interests. This is Council's vision for all Traditional Owners.

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'.

Policy is to accord appropriate status to Traditional Owners including a preference to appoint Traditional Owner bodies corporate as RAPs.

Policy is to appoint RAPs that are single, inclusive groups and representative of Traditional Owners in the relevant application 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 s 19(2)(d) of the Charter.

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

Council took account of the fact that, in declining the application over the Decision Area, the First Peoples of Millewa-Mallee will not be able to protect Aboriginal cultural heritage in the Decision Area as a RAP. However, Council notes that 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 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, the decision to decline does not prevent FPMMAC from reapplying for registration as a RAP in future.

In any event, taking into account the factors set out in s 151(3), particularly the s 151(3)(c)/151(3)(g) factors, 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 is of the view that any limitation to the rights of the First Peoples of Millewa-Mallee is justified by the importance of Council ensuring that it is satisfied as to the traditional owners of the Decision Area, and that the applicant represents those traditional owners, prior to appointing a RAP. In this regard, Council has not identified any less restrictive means available to achieve this purpose, other than declining FPMMAC's application over the Decision Area.

Conclusion

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

While a number of factors support FPMMAC's position that it should be appointed as a RAP over the Decision Area (particularly that it is a native title party, represents 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, and represents some of the traditional owners of Zone 1 of the Decision Area), these factors are outweighed by the factors that do not support the application (primarily, that FPMMAC has not established that it represents the traditional owners of the Decision Area, and/or is not sufficiently inclusive or representative of those traditional owners).

A handwritten signature in black ink that reads "Tim Chatfield". The signature is written in a cursive style with a large, sweeping initial 'T'.

Tim Chatfield
Deputy Chairperson
Victorian Aboriginal Heritage Council

Attachment 1

