

DECISION OF THE ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY THE MOOGJI ABORIGINAL CORPORATION EAST GIPPSLAND INC TO BE REGISTERED AS A REGISTERED ABORIGINAL PARTY

Decision

The Aboriginal Heritage Council (“the Council”) has now considered your application and has decided that the Moogji Aboriginal Council East Gippsland Inc **not** be registered as a registered Aboriginal party (RAP).

Reasons for Decision

1. *Introduction*

On 5 June 2007, the Council received an application (dated 31 May 2007) by the Moogji Aboriginal Council East Gippsland Inc (“Moogji”) for registration as a registered Aboriginal party (RAP) pursuant to Part 10 of the *Aboriginal Heritage Act 2006* (“the Act”).

2. *The Aboriginal Heritage Act 2006*

The Act, which came into operation on 28 May 2007, replaced Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (“the Repealed Framework”) as providing the regulatory framework for protecting Aboriginal cultural heritage in Victoria.

The objectives of the Act are listed in s 3 of the Act and include:

- (a) to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices;
- (b) to recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage; and
- (c) to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage.

Part 9 of the Act creates the Council. Under s 132(2) of the Act, the Council is given the function of receiving and determining applications for registration of Aboriginal parties under Part 10 of the Act.

Part 10 of the Act provides for the creation of RAPs. RAPs play an important role under the Act for the protection of Aboriginal cultural heritage. The functions of RAPs are set out in s 148 of the Act as follows:

- (a) to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered;
- (b) to advise the Minister regarding, and to negotiate, the repatriation of Aboriginal cultural heritage that relates to the area for which the party is registered;
- (c) to consider and advise on applications for cultural heritage permits;
- (d) to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;
- (e) to enter into cultural heritage agreements;
- (f) to apply for interim and ongoing protection declarations;
- (g) to carry out any other functions conferred on registered Aboriginal parties by or under this Act.

Part 10 of the Act also sets out the procedure for the creation of RAPs. Under s 150 of the Act, an application for registration as a RAP must be made to the Council. The matters which need to be considered by the Council when deciding a RAP application are set out in s 151 of the Act.

Section 153 of the Act allows the Council to register more than one RAP for a particular area, but only if the Council is satisfied that this:

- (a) will not unduly hinder the ability of any of the RAPs for the area to exercise their powers and carry out their functions under this Act; and
- (b) will not otherwise hinder the effective operation of the Act.

Under s 151(1) of the Act, the Council is required to determine RAP applications within 120 days of receiving the application.

Taking all these provisions into account, Council sees its task in determining RAP applications to be to determine (having regard to all relevant considerations) whether a RAP applicant will be capable to carrying out the functions of a RAP for a particular area in a manner which best achieves the objects of the Act.

3. Background to the RAP Application

Under s 150 of the Act, a RAP application must be in the approved form and contain certain information. The Moogji RAP Application met these formal requirements.

Moogji an incorporated body

Moogji was incorporated under the *Associated Incorporations Act 1981* (Vic) on 6 February 1992. A search of the register of incorporated associations kept by Consumer Affairs Victoria showed that, as at 15 June 2007, Moogji was still registered.

The Application Area

A map was provided to the Council showing the area over which Moogji seeks to be a RAP (“the Application Area”). The RAP Application Area covers 16,000 km² over the far eastern part of Victoria.¹

Traditional and Family Links

The RAP Application states that Moogji’s board is elected from the community at its annual general meeting, and that five out of seven of the existing board members are of Gunai/Kurnai descent.

The RAP Application goes on to state that the bulk of the community which Moogji serves have traditional and family links to the Krowathunkooloong clan of the Gunai/Kurnai. In particular, the community of Orbost & District are direct descendants of George and Agnes Thomas.

Historical and Contemporary Links

The RAP Application states that Moogji has been responsible for the Cultural Heritage Management of the area under the previous cultural heritage scheme since 1987. The Council has referred to Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* as it was before its repeal in May 2007 and noted that the Repealed Framework listed Moogji as a Local Aboriginal Community.²

¹ The area of the Moogji RAP application runs clockwise from the East Gippsland coast at Lake Tyers generally north-westerly for about 15kms along Boggy Creek, and then westerly along the Princes Highway to Nowa Nowa. It follows the major roads northerly from Nowa Nowa to Bruthen and the Omeo Highway from Bruthen through Omeo to the Razorback Spur near Mt Wills. It then follows the municipal boundary between the Shires of East Gippsland and Towong to Mt Gibbo, and from there in straight lines to Mt Pinnibar and then for about 11kms to the Victoria/New South Wales border on the Murray River. It then follows that border along the Murray River to its source and continues following the border to the coast at Cape Howe. It then follows the coastline westerly back to Lake Tyers and includes Gabo and Tullaberga Islands.

² We note in passing that Moogji state they have been delivering this service since 1987, but that the certificate of incorporation is only dated 1992. We have accepted Moogji’s statement that they

The RAP Application also states that the geographical boundary for Moogji included three Tribal Nations, those being Gunai/Kunai, Monero-Ngarigo and Bidawell and that Moogji has developed a positive working relationship with these tribal nations concerning Cultural Heritage Management. The Council notes that, in general, the issue of the identity of the Traditional Owners for the Application Area did not appear to be in dispute.³

The RAP Application provides a number of examples of important projects in which Moogji has been involved for the purposes of cultural heritage protection.

The RAP Application also provided a letter of support for Moogji from Rachel Mullett, Co-Chairperson of the Ninde Ngdjarn Monero Aboriginal Corporation, and stated that representatives of Moogji had met with the Gunai/Kurnai Cultural Heritage Sub-committee of the Gunai/Kurnai Council, and that efforts had been made to also liaise with the Bidawell group.

Expertise in Cultural Heritage Management

The RAP Application provides details of Moogji's experience and expertise in Cultural Heritage Management over the past 20 years.

Other relevant details

Moogji is not a registered native title holder, therefore the Council is not bound to register it as a RAP, but has a discretion to do so.⁴

Moogji is not a native title party for the Application Area.⁵ The Council has not been provided with the terms of any relevant native title agreement involving Moogji.⁶

The RAP Application states that there are no grants of land made by the State or Commonwealth to an Aboriginal body under a specific power in a State or Commonwealth Act in relation to the Application Area.⁷ Nor are there any relevant agreements in relation to land and natural resource management in the application area.⁸

References were provided to the Council from government agencies such as Parks Victoria, the East Gippsland Catchment Management Authority, VicRoads and the

operated under the Old Act from 1987, and have assumed that there was some change in corporate structure in 1992, but that any different entities would have had common memberships.

³ Apart from a portion of the Application Area which is claimed by the Dudhuroa Native Title Group to overlap the north-east portion of their Country (see below).

⁴ Section 151(2) of the Act.

⁵ Section 151(3)(a) of the Act.

⁶ Section 151(3)(b) of the Act.

⁷ Section 151(3)(e) of the Act.

⁸ Section 151(3)(f) of the Act.

Department of Sustainability and Environment advising of the professional manner in which Moogji has carried out these services. The Council did not receive any contrary evidence as to the professional manner of Moogji.

Public Comments

The Council arranged for a notice to be published in the Koori Mail in June 2007 inviting written comments on the application to be sent to it.

Four objections were received by the Council in relation to the application.

Objection 1 - Ninde Ngujarn - Monero Aboriginal Corporation

On 15 July 2007, Rachel Mullet of the Ninde Ngujarn - Monero Aboriginal Corporation (“NNMAC”) wrote to the Council. This letter advised that NNMAC had recently been incorporated and that it was in the process of preparing a RAP application, which would overlap with the Moogji RAP application. This letter also advised that no consultation or discussions in relation to possible overlapping boundaries between the NNMAC RAP Application and the Moogji Rap Application had taken place at this stage.

NNMAC also forwarded a copy of a letter it had sent to Moogji informing it that NNMAC objected to the Moogji RAP Application because the territory boundary claim extended well beyond familial or traditional links to the area. This letter appears to suggest that Ms Mullet’s earlier letter of support (referred to above) had been on the basis that Moogji would act as an auspicing agency for the region, not as a RAP. The letter continued:

We would not seek to withdraw our support if you decide to proceed in your original intention however, your intentions as a RAP Body disregards the cultural processes required in respecting the rights of rightful people to manage their cultural heritage.

Objection 2 - Gunaikurnai Land and Waters Corporation

The Council also received a letter dated 29 June 2007 from the Gunaikurnai Land and Waters Corporation (“GLWC”). This letter advised that (amongst other things):

- the Gunai/Kurnai people have a right based on their traditional law and custom to (among other things) protect and manage the cultural heritage of the Gunai/Kurnai people on, and relating to, their traditional lands;
- the Gunai/Kurnai people have a registered native title claim over the Gippsland region in the area which is their traditional lands;
- GLWC is about to apply for registration as a RAP over the area of the Gunai/Kurnai Native Title Claim, this area encompasses part of the area encompassed by the application by Moogji;

- although Moogji contains many members who are Gunai/Kurnai people, not all members of Moogji are members of this Group, and therefore Moogji does not have a right to be making decisions about the protection and management of the cultural heritage of the Gunai/Kurnai people on their traditional lands;
- it is inappropriate for these people who are not Gunai/Kurnai to be making decisions about the protection and management of the cultural heritage of the Gunai/Kurnai people;
- GLWC is the most appropriate organisation to be registered as a RAP for the area of the Gunai/Kurnai Native Title Claim;
- GLWC objects to the Moogji RAP Application, but only in so far as it overlapped the RAP application of the GLWC.

Objection 3 - Ninde Ngujarn Ngarigo Monero Aboriginal Corporation

The Council also received an email on 4 July 2007 from Doris Paton of the Ninde Ngujarn Ngarigo Monero Aboriginal Corporation (“NNNMAC”) objecting to the Moogji RAP Application on the following basis:

- Moogji is not a native title party, and does not have this recognition on behalf of either the Kurnai/Gunai people, or the Ngarigo Monero peoples.
- Moogji has claimed a territorial boundary which extends well beyond familial or traditional links to the area;
- Moogji’s contemporary and historical interest and expertise does not extend to the management of the Aboriginal cultural heritage in all the areas claimed. The Aboriginal families of the Cann River have undertaken this responsibility with the recognition from other Aboriginal people throughout Victoria and NSW;
- Ngarigo Monero peoples have participated as Native Title claimants in the Far East Gippsland and NSW border regions.
- NNNMAC intends to apply as a RAP over this traditional Country.

Objection 4 - Dhudhuroa Native Title Group

In an email dated 21 June 2007, Gary Murray, co-chair of the Dhudhuroa Native Title Group lodged an objection to the Moogji RAP Application on the basis that the north-east boundary of the Dhudhuroa Native Title Group overlapped with the Moogji RAP Application, and that Moogji were not the traditional owners of that overlap area.

This email also noted that Moogji was not properly authorised with respect to the Manero⁹ and Gunai Native Title Groups, and therefore advised that the Dhudhuroa Native Title Group objected to the entire Moogji RAP Application.

Request for further information from Moogji

Following the receipt of these comments, on 26 July 2007, the Council wrote to Moogji informing it of the objections received and providing an opportunity to respond to the issues raised. Council advised that any further information should be provided by 10 August 2007. No further information was provided by Moogji.

4. Assessment of Application

Council has considered all the above information and has decided to refuse Moogji's RAP Application.

In reaching this decision, Council has had regard to s 151(3) of the Act which requires Council to take certain matters into account. In this regard we note that:

- (a) Moogji is not a native title party for the Application Area;
- (b) there are no native title agreements that have been made available to the Council;
- (c) Moogji is a body whose membership includes the Aboriginal people with traditional or familial links to the Application Area, but is not exclusively made up of these people and Aboriginal people not having traditional links to the Application Area are also members of Moogji;
- (d) to the extent that Moogji is a body representing Aboriginal people that have historical or contemporary interests in the Aboriginal cultural heritage relating to the Application Area, Moogji has demonstrated expertise in managing and protecting Aboriginal cultural heritage. Moogji has been involved in Cultural Heritage Management for the past twenty years and the references provided indicate that it has carried out these functions in a professional manner;
- (e) there are no land grants made to an Aboriginal body under a specific power in a State or Commonwealth Act in relation to the Application Area; and
- (f) there are no agreements between Moogji and the State in relation to land and natural resource management for the Application Area.

Section 151(3)(g) of the Act provides that the Council can take into account any other matter that the Council considers relevant. As provided by s 151(3)(g) of the

⁹ *Sic.*

Act, Council considers that in addition to the above matters it is also an important consideration for the Council to take into account the views of the Traditional Owners of the Application Area before deciding a RAP Application.

In order to properly carry out most, if not all of the functions of a RAP set out in s 148 of the Act, it will be necessary for Moogji to have the support of the relevant Traditional Owners for the particular Country. In particular, Council takes the view that Traditional Owners would ordinarily need to play an important role as the 'primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area'.

Representatives of the Gunai/Kurnai people, the Ngarigo Monero people and the Dhudhuroa have all objected to the Moogji RAP Application.

Moogji has not responded to any of objections raised by these Traditional Owner Groups.

Consequently, the Council has not been satisfied that Moogji is a suitable body to perform the functions of a RAP over those areas belonging to these Traditional Owner Groups.

Another RAP application could be made in the future once discussions have occurred between Moogji and Traditional Owners. However any future RAP Applicant would need to satisfy the Council that it is able to carry out the statutory functions of a RAP. When the Council considers this issue, the views of the Traditional Owner Groups of all these areas will be a significant consideration.

The Council acknowledges that it is not precluded from registering a corporation to be a RAP over an area even though it does not have the support of the Traditional Owners for that area. In fact, the Act specifically provides for corporations representing historical or contemporary interests to be registered provided that they have demonstrated expertise in managing and protecting Aboriginal cultural heritage in that area. However Council believes it is important to have regard to the objections raised by Traditional Owners of the Application Area.

This view is reinforced by the fact that the Council is constrained from registering more than one RAP for a particular area if this would unduly hinder the ability of the RAP to exercise its powers and carry out its functions under the Act and would not otherwise hinder the effective operation of the Act.¹⁰ Taking this provision into account, Council is not prepared to register Moogji as it does not have the support of Traditional Owners, and Traditional Owners are indicating an intention to make a RAP Application themselves.

¹⁰ S 153(1) of the Act.

If Council did not adopt this position, Traditional Owners could subsequently be denied a role in cultural heritage management if a prior registered RAP was able to establish that registering the corporation which represented the Traditional Owners as a RAP would unduly hinder the ability of that RAP in exercising its powers, or it would hinder the effective operation of the Act.

It should be emphasised that Council might, in certain circumstances, be prepared to register a body that does not have the support of Traditional Owners, but clear justification for doing this in the absence of Traditional Owner support would be necessary. Council would also need to be satisfied that it is unlikely that a more suitable organisation would be prevented from becoming a RAP at a later date. Council is not satisfied of these things at this time.

5. Conclusion

Accordingly, Council has decided not to register Moogji as a RAP.

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Tim Chatfield
Deputy-Chair
Aboriginal Heritage Council