

**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)**

DATE OF DECISION: 12 December 2019

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has declined the application of the Boonwurrung Land and Sea Council (Aboriginal Corporation) (**BLSC**) 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)

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.

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 the details of the *Gunaikurnai People Native Title Claim Group & Ors v State of Victoria* Ors provided by BLSC as to the Boonwurrung's Peoples potential claim under the Native Title Act over the land and waters previously the subject of the Gunaikurnai People Native Title Claim.

Council noted that First Nations Legal & Research Services is presently undertaking research under section 203BJ(b) of the Native Title Act to identify those people who hold or may hold native title in Bunurong/Boonwurrung Country. Council was advised that the first stage of the research will be likely completed in early 2020 and following receipt of the research, First Nations Legal & Research Services intends to engage Counsel to review the research findings under the Native Title and/or Settlement Act.

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). Council noted that BLSC only recognises two, of the already recognised, five women as ancestors, namely Louisa Briggs and Marjorie Munro.

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 2019, following a challenge to the decision by Carolyn Briggs.

Council accepted that there are members of BLSC who are Boon Wurrung Traditional Owners. However Council found that BLCAC was the appropriate group to represent Traditional Owners of Boon Wurrung/Bunurong Country. Additionally, Council also found that all remaining areas of the Decision Area not classified as core Boon Wurrung/Bunurong Country had other Traditional Owners with vested interests.

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, Gunaikurnai Land and Waters Aboriginal Corporation (**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 also took into consideration BLSC's response to each of these objections.

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 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 or expertise in managing and protecting, the Aboriginal cultural heritage of 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.

a) 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 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 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, or expertise in managing and protecting, the Aboriginal cultural heritage of the Decision Area.

However, 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.

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'.

Councils' 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.

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 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)(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 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.

A handwritten signature in black ink, appearing to read 'R. Carter', with a stylized flourish at the end.

Rodney Carter
Chairperson
Victorian Aboriginal Heritage Council

Attachment 1

Boonwurrung Land and Sea Council (Aboriginal Corporation)

