

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL (COUNCIL) IN RELATION TO AN APPLICATION BY BUNURONG LAND COUNCIL ABORIGINAL CORPORATION (BLCAC)

DATE OF DECISION: 10 May 2018

1. Decision

The Council has declined, in part (Zone D), the application of the BLCAC to be a Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

The RAP application was made on 24 February 2017. It was divided into separate zones (Zone A, Zone B, Zone C, Zone D and Zone E), and determined by Council in stages, at the request of BLCAC. The present decision relates to Zone D (**Decision Area**).

The Decision Area is shown in the attached map (**Attachment 1**). The area includes Wilsons Promontory in the south, Tarwin Lower in the west, Mirboo North in the north, and Foster and Port Franklin in the south east.

3. Background to the Decision

BLCAC has applied to be a RAP on three occasions. Its first application was made on 6 July 2007, and was refused by the Council on 27 August 2009. A second application made on 4 November 2010 was refused on 1 July 2011. BLCAC's third application was made on 24 February 2017 in relation to an area which included the Decision Area.

On 19 July 2017, BLCAC was appointed as a RAP for an area up to the western border of the Decision Area ('**Area A1**').

Other organisations, claiming that the Bunurong/Boon Wurrung¹ people are the Traditional Owners of the Decision Area, have also applied for registration as a RAP over the Decision Area in the past. These include the Boon Wurrung Foundation Limited (**BWFL**) on 1 June 2007 and 30 December 2013, the Bunurong Land and Sea Association Incorporated (**BLSAI**) on 4 April 2014; and the Yaluk-ut Weelam Elders Council Aboriginal Corporation (**YWECAC**) on 6 December 2017.

The Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**) has also applied for registration as a RAP over the Decision Area on four occasions, each of which has been

¹ The Council notes that there are over 60 different spellings of this Aboriginal group found in the literature, including "Boon Wurrung", "Bunurong", "Boonerwung", "Bunwurrung" etc. The Council has used the spelling "Bunurong" because it is the spelling used by BLCAC. In using Bunurong, the Council also notes the alternative "Boonwurrung" which is the spelling used by the Victorian Aboriginal Corporation for Languages to assist users with correct pronunciation.

declined: 18 November 2008 (declined 21 March 2013); 19 July 2013 (declined 5 December 2013); 30 June 2014 (declined 17 July 2015) and 5 May 2017 (declined 26 October 2017).

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)

BLCAC is not a registered native title holder for the Decision Area. There is no other registered native title holder for the Decision Area, however the Gunaikurnai people are a registered native title claimant in respect of the Decision Area.

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

BLCAC 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)

BLCAC is not a native title party for the Decision Area.

Council notes that, in August 2014, a Native Title Determination Application was filed on behalf of the Gunaikurnai people over Zone D. This was subsequently registered by the National Native Title Tribunal on 20 April 2015. The native title determination application envisages that GLaWAC will be the prescribed body corporate for any native title rights and interests determined. Accordingly, Council considers that GLaWAC is a native title party for the Decision Area.

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

Neither BLCAC, 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)

In registering BLCAC as a RAP over Area A1 in July 2017, Council was satisfied that BLCAC was an organisation representing the Bunurong peoples, and that the Bunurong peoples are the Traditional Owners of Area A1. In this regard, Council took into account all available information including BLCAC's rulebook and membership, and Council was satisfied that BLCAC could accommodate within its membership members of BWFL who have traditional links to Bunurong Country².

² See Council's Statement of Reasons for Decision in Application by Bunurong Land Council Aboriginal Corporation dated 19 July 2017.

Accordingly, Council is satisfied that BLCAC represents the Bunurong peoples.

Council also repeats its previous findings that Area A1 is Bunurong Country.

However, having regard to a number of competing claims from other Traditional Owner groups, including that the Gunaikurnai people are a registered native title claimant in respect of the Decision Area, Council is not able to be satisfied that the Bunurong people are the Traditional Owners of the Decision Area. Council is therefore not able to be satisfied that BLCAC is a body representing Traditional Owners of the Decision Area.

In July 2012, GLaWAC, BWFL and BLCAC entered into a non-binding MOU with Parks Victoria in relation to Wilsons Promontory. The MOU recognises that each of these organisations 'assert to have connection to, and to being Traditional Owners of the area' and that Bunurong and Gunaikurnai assert to have intergenerational obligations and responsibilities and cultural obligations to care for Country, their cultural well-being and that of future generations.

On 13 September 2017, Council noted BLCAC's proposal to enter into Right People for Country negotiations with GLaWAC in relation to Zone D, and requested that BLCAC provide evidence that formal discussions with GLaWAC had commenced, including details about the outcome of those discussions (such as any agreement as to the means through which the parties intend to pursue boundary negotiations, and a timeline and proposed steps for that purpose). Council requested BLCAC provide that information to Council no later than 31 October 2017.

On 25 September 2017, BLCAC advised Council that it was progressing with an expression of interest to engage in Right People for Country negotiations with GLaWAC in relation to Zone D.

On 28 December 2017, Council wrote to BLCAC acknowledging that the information provided by BLCAC and GLaWAC indicates that both groups intend to engage in discussions to try and resolve different views on boundary areas, and Traditional Owner representation for the area. However, Council stated it remained of the view that the current information did not fully respond to its request. Accordingly, Council requested that, by 28 February 2018, BLCAC provide evidence of:

- The boundary negotiations between BLCAC and GLaWAC that have occurred;
- Details of an agreed time frame and proposed steps for negotiations;
- Details of any agreement for the management of Aboriginal cultural heritage in Zone D; and
- Details of any outcomes or agreements reached between BLCAC and GLaWAC.

Council advised that, in the absence of further evidence requested by Council, it would be unable to ascertain whether BLCAC or GLaWAC, or any combination of these bodies, represents the Traditional Owners of the Decision Area; and that without such evidence it is likely that Council will move to decline BLCAC's RAP application over Zone D.

Council did not receive a response to its letter of 28 December 2017.

Having regard to the above, Council finds that the joint Memorandum of Understanding entered into by GLaWAC, BLCAC, BWFL and Parks Victoria does not resolve the issue of traditional ownership for Wilsons Promontory.

Council also acknowledges steps taken by BLCAC and GLaWAC to attempt to resolve the competing claims to traditional ownership over the Decision Area, by agreeing to commence discussions through Right People for Country. Council acknowledges this important step to resolving disagreements over traditional ownership of the Decision Area, but finds that these disputes remain unresolved at this stage, and that there is no agreement between the Bunurong and Gunaikurnai peoples as to the traditional ownership of the Decision Area.

Having regard to the competing claims to traditional ownership of the Decision Area, Council is not able to be satisfied that the Bunurong people are the Traditional Owners of the Decision Area. Council is therefore not able to be satisfied that BLCAC is a body representing 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)

The BLCAC relies on its traditional links to country as the basis for its historical and contemporary interest in the Aboriginal cultural heritage relating to the Decision Area.

In its RAP application, BLCAC detailed substantial cultural heritage management expertise, including completing over 880 cultural heritage related jobs in the 2015/16 financial year, completing 1000 cultural heritage-related works since 2016, and case studies exemplifying cultural heritage management capacity (RMIT, Point Nepean National Park and La Trobe).

BLCAC has also stated that it employs a full-time General Manager and CH Manager, two Senior Heritage Advisors employed on a casual basis, and a team of casual Cultural Heritage Field Officers (18 who are Bunurong people and 7 who are Indigenous) who work with consultant Archaeologists to complete complex surveys and review recommendations of CHMPs.

Further, BLCAC provided references from 15 organisations (including archaeological consultants, local government organisations, Department of Environment, Land, Water and Planning and Melbourne Water) attesting to BLCAC's cultural heritage management capacity.

Based on these matters, Council finds that BLCAC has demonstrated that it is a body representing the Bunurong people, who have a historical or contemporary interest in the Decision Area, and 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 title search has not shown any relevant grant of land. Council has not otherwise been notified of any relevant grant of land by BLCAC, or by any other party.

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

As previously mentioned, BLCAC entered into a Memorandum of Understanding with Parks Victoria, GLaWAC, and BWFL in 2012 relating to cultural heritage management in Wilsons Promontory. BLCAC has not drawn Council's attention to any other agreement with the State in relation to land and natural resource management in the Decision Area.

i) Other considerations

When determining BLCAC's RAP application Council took into account whether BLCAC is organisationally sustainable and capable of carrying out its obligations as a RAP.

In its deliberations, Council reviewed all of the information provided by BLCAC, including its operational and governance-related policies and procedures, financial management arrangements, case studies evidencing cultural heritage management capacity, letters of support (including from the Office of the Registrar of Indigenous Corporations), employee arrangements and details as to the volume of cultural heritage work undertaken by BLCAC. Council also took into account concerns raised by BWFL relating to BLCAC's capability to carry out its functions as a RAP. Council finds that BLCAC has capacity to act as a RAP.

5. Reasons for decision

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

a) Legislation

In deciding BLCAC'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.

BLCAC 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 BLCAC'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. Council concludes that BLCAC has not established the factors set out in ss 151(3)(a), 151(3)(b) and s 151(3)(e). In considering the matters set out in s 151(3)(a), Council established that that BLCAC 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)(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 s 151(3)(f), Council has taken account of the MOU detailed above. In relation to s 151(3)(g), Council has considered BLCAC's capacity to operate as a RAP.

Council has considered, in accordance with ss 151(3)(c) and 151(3)(d), the question of whether BLCAC 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.

Having regard to the competing claims to traditional ownership of the Decision Area, Council is not able to be satisfied that the Bunurong people are the Traditional Owners of the Decision Area. Council is therefore not able to be satisfied that BLCAC is a body representing Traditional Owners of the Decision Area.

In reaching this view, Council had regard to the material in support of BLCAC's claim that the Bunurong 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 Gunaikurnai people.

Council is satisfied that BLCAC 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 BLCAC's efforts towards starting a dialogue with GLaWAC over 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 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 BLCAC 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 Bunurong 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 BLCAC 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) 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 is of the view that any limitation to the Bunurong 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 has not identified any less restrictive means available to achieve this purpose, other than declining BLCAC's application over the Decision Area.

Conclusion

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

While a number of factors support BLCAC's position that it should be appointed as a RAP over the Decision Area (particularly that it 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 has experience and capacity to act as a RAP), these factors are outweighed by the factors that do not support the application (primarily, that BLCAC has not established that it represents the Traditional Owners of the Decision Area).



Eleanor A. Bourke
Chairperson
Victorian Aboriginal Heritage Council

Attachment 1

