

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL (COUNCIL) IN RELATION TO AN APPLICATION BY GUNDITJ MIRRORING TRADITIONAL OWNERS ABORIGINAL CORPORATION

DATE OF DECISION: 11 October 2018

1. Decision

The Council declined, in part, the application from the Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**) to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

The GMTOAC RAP application was made on 23 April 2007. It was divided into Zones and is being considered by Council in stages. The present decision to decline GMTOAC's application relates to the area between the Shaw and Hopkins Rivers (**Decision Area**) as shown in the attached map (**Attachment 1**). This area overlapped a part of the Eastern Maar Aboriginal Corporation (**EMAC**) RAP application area, and a small part of the area Kuuyang Maar Aboriginal Corporation (**KMAC**) applied to be a RAP for in an application declined by Council in July 2015.

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)

GMTOAC is not a registered native title holder for the Decision Area. Although there is a registered native title claim in relation to the Decision Area,¹ there is no other RAP applicant for the Decision Area that is a registered native title holder for this area.

GMTOAC is a native title holder for areas within its appointed RAP area through two consent determinations;

- the first in March 2007 over almost 140,000 hectares, bound on the west by the Glenelg River and to the north by the Wannon River, and covering Lower Glenelg National Park, Mt Richmond National Park, Mt Eccles National Park, Lake Condah, Cobboboonee State Forest, Dunmore State Forest and Hotspur State Forest
- the second in July 2011 which gave native title to GMTOAC (for the Gunditjmarra People) and EMAC (for the Eastern Maar Peoples (**Eastern Maar**) for land between

¹ A native title determination application brought on behalf of the Eastern Maar Peoples was registered on 20 March 2013, covering the Decision Area apart from the area of coastal water included in the Decision Area.

the Shaw and Eumeralla Rivers from Deen Maar (including Yambuk) to Lake Linlithgow ('Part B' area).

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

GMTOAC is not a Traditional Owner Group Entity that has entered into a Recognition and Settlement Agreement (RSA) with the State under the *Traditional Owner Settlement Act 2010 (TOS Act)* in relation to the Decision Area. Accordingly, Council is not required by section 151(2A) of the Act to register GMTOAC as a RAP for the Decision Area.

EMAC is the Traditional Owner Group Entity for Eastern Maar in relation to the Decision Area. This is because EMAC represents the Eastern Maar who are seeking a RSA with the State, and part of the proposed RSA area, which includes the Decision Area, has met the State's threshold requirements under the TOS Act. However, as EMAC is not a Traditional Owner Group Entity that has entered into a RSA in relation to the Decision Area, EMAC has not been appointed as a RAP for this area.

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

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

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

Neither GMTOAC, nor any other party, brought any native title agreement to Council's attention in respect of the Decision Area.

GMTOAC has entered into an Indigenous Land Use Agreement (ILUA) with the State of Victoria in relation to areas within its appointed RAP area.

e) Representation - Traditional Owners of the Decision Area (s 151(3)(c) of the Act)

i) Recognition of Gunditjmarra People as Traditional Owners

GMTOAC is a prescribed body corporate under the Native Title Act 1993 (NTA) and holds the native title rights and interests in trust for the Gunditjmarra People for areas within its appointed RAP area.

GMTOAC's current Rule Book defines 'Gunditjmarra' as the descendants of the following persons who identify as Gunditjmarra (GMTOAC Apical Ancestors): Jenny Green (Alberts line), Timothy James Arden, Barbara Winter, Mary (surname unknown, mother of James Egan), Billy Gorrie, Mary (wife of Billy Gorrie), William King, Hannah (wife of William King), James Lancaster, Susannah McDonald (Lovett line), Mary McKinnon, Eliza Mitchell (Saunders line), John Henry Rose, Lucy Sutton, James and Mary Sutton, Louisa Taylor, and Andrew and Ellen Winter. It also states that "all adult Gunditjmarra Native Title Holders" are eligible for GMTOAC membership.

While the Gunditjmarra People do not hold native title over the Decision Area, Council acknowledged its previous decisions in relation to the GMTOAC RAP application, and the

traditional connections that members of GMTOAC could demonstrate with the area over which the Gunditjmara People were recognised as native title holders and areas for which they became a RAP. The previous decisions also recognised that GMTOAC represents the people who are the native title holders for the area covered by the native title determinations.

ii) Traditional Ownership of the Decision Area

In a number of letters to GMTOAC, Council requested information about the traditional or cultural connection of the Gunditjmara to the Decision Area.

GMTOAC did not provide Council with anthropological or historical evidence of the cultural links of the Gunditjmara people specific to the Decision Area, but stated that it has consistently maintained and asserted rights and interests of its members and of Gunditjmara native title holders beyond Part B, including in the Decision Area. In support of this statement, GMTOAC referred to details of its cultural heritage expertise and cultural heritage management activities conducted since 2009, in relation to the Decision Area, including reference to GMTOAC's:

- ongoing advocacy for the protection and management of cultural heritage demonstrated by its responsibility for a significant number of specified cultural heritage management activities regulated under the Act; involvement in the establishment of the Belfast Coastal Reserve and Moyjil Point Ritchie site; development of the Belfast Coastal Reserve Management Plan and Western Coastal Plan; and involvement in Victorian Water Plan consultations
- partnerships with other RAPs, local government authorities, state government, industry and broader community
- adherence to cultural protocols, statutory requirements, and archaeological practices (taken to mean 'practices in accordance with industry standards').

The Decision Area overlapped the south west portion of the EMAC RAP application area between the Shaw and Hopkins Rivers. Council noted GMTOAC's interest in seeking joint RAP status with EMAC, and that the basis for this was that GMTOAC believed it did not alone represent all Traditional Owners of the Decision Area, but represented Gunditjmara People in this area not represented by any other RAP applicant. EMAC indicated in correspondence to Council that it believed the Part B area formed the boundary between the Gunditjmara and the Eastern Maar and did not wish to pursue joint RAP appointment with GMTOAC.

Council noted that the area KMAC had applied for in a RAP application declined by Council in 2015 narrowly overlapped the Decision Area along the eastern boundary of the area. Council also noted that in the most recent correspondence received from KMAC in relation to the Decision Area, received in November 2014, KMAC stated it believed further discussions were required with other groups, including EMAC, in the areas of overlapping interest. In response GMTOAC proposed a meeting with EMAC and KMAC facilitated by the Council. Council declined the proposal on the basis that it cannot compel groups to meet.

At the time of making its decision Council was not aware of any meetings held between the Gunditjmara, Eastern Maar and Kuuyang Maar groups to discuss overlapping boundaries.

In carefully considering the information provided by GMTOAC about the relationship of Gunditjmara People to the Decision Area, as well as comments made in relation to the GMTOAC RAP application from other relevant Traditional Owner organisations, particularly EMAC, Council considered that it did not have enough information to conclude that GMTOAC alone represents the Traditional Owners of the Decision Area.

Acknowledging GMTOAC's proposition that both GMTOAC and EMAC represented Traditional Owners of the Decision Area and should be joint RAPs for this area, Council considered the GMTOAC RAP application in relation to section 153 of the Act. This consideration is referred to below in section 3 i) i).

f) Representation - historical or contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage (s 151(3)(d) of the Act)

GMTOAC also claimed historical and contemporary links for its RAP application and provided details of expertise in cultural heritage management as noted above in section 3 e) ii).

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

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

No land and resource management agreements in relation to the Decision Area were referred to by GMTOAC in its RAP application.

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

i) 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 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 noted above, GMTOAC sought joint RAP status with EMAC over the Decision Area. However, EMAC did not accept that the Gunditjmara represent Traditional Owners of the Decision Area or wish to pursue joint RAP appointment.

4. Reasons for decision

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

a) Legislation

In deciding GMTOAC's RAP application over the Decision Area, Council took into account all of the matters it is required to consider under sections 151 and 153 of the Act.

GMTOAC is not a registered native title holder for the Decision Area within the meaning of section 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 section 152(2A) of the Act. As such, Council is not obliged to approve GMTOAC's RAP application over the Decision Area under sections 151(2) or 151(2A) of the Act.

Council considered the matters set out in section 151(3) of the Act and concluded that GMTOAC did not establish the factors set out in sections 151(3)(a), 151(3)(b), 151(3)(e) and 151(3)(f). In considering the matters set out in section 151(3)(a), Council established that GMTOAC is not a native title party for the Decision Area. In considering the matters set out in section 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 at section 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 section 151(3)(f), Council established that there had been no relevant land and natural resource management agreements entered into by GMTOAC with the State.

Council considered sections 151(3)(c) and 151(3)(d). In doing so Council considered a number of factors, including: GMTOAC's membership and Rule Book; information provided by GMTOAC in relation to the Decision Area, including about the traditional or cultural connections of the Gunditjmara People, GMTOAC's representativeness, and the cultural heritage management experience of GMTOAC members; and other claims of traditional connections to the Decision Area, particularly by EMAC. While Council established that GMTOAC comprises Traditional Owners in its membership and has substantial cultural heritage management experience and accomplishment within the Decision Area, Council considered it did not have enough information to conclude that GMTOAC alone was representative of the Traditional Owners of the Decision Area.

Council considered the matters set out at section 153. Council acknowledged that while GMTOAC sought joint RAP status with EMAC over the Decision Area, EMAC did not wish to pursue joint RAP appointment. This factor prevented Council from considering the appointment of both EMAC and GMTOAC as RAPs for the Decision 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 body corporates 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 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 section 19(2)(d) of the Charter.

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

Council took account of the fact that, in declining the GMTOAC's RAP application over the Decision Area, GMTOAC 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 Aboriginal cultural heritage, and which enable relevant Aboriginal people to participate in the protection of Aboriginal 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).

In any event, taking into account the factors set out in section 151(3) 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 formed the view that any limitation to the Gunditjmara Peoples' rights is justified, particularly having regard to section 151(3)(c) and that it did not have enough information to conclude that GMTOAC alone was representative of the Traditional Owners of the Decision Area. Council was also unable to appoint GMTOAC and EMAC as joint RAPs for this area under section 153, as EMAC did not agree to a joint appointment. In this regard, Council did not identify any less restrictive means available to achieve this purpose, other than declining GMTOAC's RAP application over the Decision Area.

Conclusion

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

While Council recognises there are members of GMTOAC who are Traditional Owners of the Decision Area, and experienced in the management of cultural heritage in this area, Council formed the view that these factors were outweighed by the factors that did not support the GMTOAC RAP application. These were primarily that GMTOAC had not provided Council with enough information to demonstrate that GMTOAC alone was representative of the Traditional Owners of the Decision Area, and Council could not appoint GMTOAC and EMAC as joint RAPs for this area.



Rodney Carter
Chair
Victorian Aboriginal Heritage Council

Attachment 1

