

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY BARENGI GADJIN LAND COUNCIL ABORIGINAL CORPORATION

DATE OF DECISION: 7 February 2019

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) declined the application from Barengi Gadjin Land Council Aboriginal Corporation (**BGLC**) to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

BGLC's RAP application (**application**) was received on 3 August 2007. It was divided into Zones and was being considered by Council in stages. The present decision to decline BGLC's application relates to an area which commences at the South-Australian border, runs easterly across the Wimmera Highway, intersects with Apsley, then runs south-easterly, intersects with Edenhope and extends as far east as Harrow (**Decision Area**). The Decision Area is shown on the attached map (**Attachment 1**).

At the time Council considered the BGLC application in relation to the Decision Area, Council considered the Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**) RAP application over the same area.

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 (sections 151(2), 151(3)(a) and 151 (3)(b) of the Act)

BGLC is not a registered native title holder or a native title party for the Decision Area.

Whilst BGLC holds native title over parts of north west Victoria through the 2005 Wotjobaluk Federal Court Native Title Determination, no native title agreement in relation to the Decision Area had been brought to Council's attention.

Council noted BGLC's Indigenous Land Use Agreement (**ILUA**) which was entered into in 2005 between BGLC, the State of Victoria and the Commonwealth of Australia as part of the Wotjobaluk native title settlement. However, BGLC's ILUA does not cover the Decision Area.

b) Recognition and Settlement Agreement (s 151(2A) of the Act)

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

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

Council acknowledge that BGLC is a Prescribed Body Corporate under the *Native Title Act 1993* (Cth) holding native title rights and interests on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupgalk People.

BGLC's application was made on the basis that it represents Traditional Owners of the Decision Area. BGLC asserted that it represents the Traditional Owners of the Decision Area in its application. In correspondence BGLC provided material in support of this assertion as outlined below.

Material included BGLC's Rule Book and membership criteria. BGLC's current Rule Book states that a member must be *"at least 18 years of age; and a) a native title holder; or b) an Aboriginal person who has been accepted as a Traditional Owner of Wotjobaluk Country according to the criteria and process set out in Schedule E"*.

Schedule E states that, *"a Traditional Owner who is not a native title holder will be eligible for membership of the corporation if they can demonstrate descent from an apical ancestor who has been accepted by the native title group as an apical ancestor of Wotjobaluk Country"*, and defines a process for how the native title group make this finding. The Rule Book does not define Wotjobaluk Country, nor was this information provided to Council.

BGLC also provided a Cultural Heritage Report which draws on documents based on the nineteenth century Ebenezer Mission community's accounts of BGLC's ancestors, as well as pastoral station papers, the writings of early ethnographers and accounts of linguists. The report uses various creation and cultural stories, as well as accounts of linguists and ethnographers, to illustrate the links between BGLC identified ancestors and the application area generally. The stories and accounts relate to areas in and around the Decision Area and are used in the Report to demonstrate the links between BGLC identified ancestors and the contemporary families represented by BGLC. Council considered all this material.

On the basis of information available to it Council was unable to conclude that BGLC was an organisation that represents the Traditional Owners of the Decision Area.

Council considered BGLC's interest in seeking joint RAP status with GMTOAC as the other Traditional Owner corporation with a RAP application over the Decision Area. Council noted correspondence from both BGLC and GMTOAC that demonstrated their desire to seek joint RAP status over the Decision Area and finalise an agreement relating to cultural heritage management in the Decision Area. Council reviewed the draft agreement provided by BGLC and GMTOAC and requested both corporations provide more information in order for

Council to consider a joint RAP appointment. Information requested included the basis of BGLC's and GMTOAC's Traditional Owner interests and shared interests in the Decision Area, and BGLC's and GMTOAC's plans to develop a joint operational plan. Neither BGLC nor GMTOAC provided Council with this information.

At the time of making its decision, Council or had not been provided with any information regarding the standing of the draft agreement nor of any meetings held between BGLC and GMTOAC to progress agreement making. Council also considered it did not have enough information to conclude that BGLC and GMTOAC represent the Traditional Owners of the Decision Area.

Given BGLC's interest in seeking joint RAP status with GMTOAC over the Decision Area, Council considered the BGLC RAP application in relation to section 153 of the Act. This consideration is referred to below in section 3(g)(i).

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

Council found BGLC demonstrated experience in managing and protecting Aboriginal cultural heritage in the application area generally, including work with representatives of other Traditional Owner groups to pursue their Aboriginal cultural heritage management responsibilities. Council acknowledged BGLC has operated as a RAP since 2007 and has effectively established and operated a Cultural Heritage Program, a Site Monitoring Program and other cultural heritage management activities. However, BGLC did not present evidence about management and protection of Aboriginal cultural heritage in the Decision Area specifically.

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

BGLC had not drawn Council's attention to any grant of land in fee simple within the decision Area, by the State or Commonwealth. Council also conducted reasonable searches and did not otherwise find that nay such grant of land had been made.

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

BGLC had not entered into a land and natural resource management agreement with the State in relation to the Decision Area.

g) Other relevant matters (s 153 (3)(f) of the Act)

i) Section 153 joint RAP appointment

Section 153(1) of the Act provides that Council may appoint more than one body as a RAP for a particular area if 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, or carry out their functions under the Act, and will not otherwise hinder the effective operation of the Act.

As noted above, BGLC sought joint RAP status with GMTOAC over the Decision Area. Noting that neither corporation informed Council as to the basis of their Traditional Owner interests and shared interests in the Decision Area, or how they would conduct joint RAP operations in this area, Council concluded it could not be satisfied that BGLC and GMTOAC met the requirements of section 153 of the Act.

ii) RAP Capacity

BGLC's significant experience and expertise in operating as a RAP since 2007 was taken into account by Council.

4. Reasons for decision

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

a) Legislation

In deciding BGLC'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.

BGLC 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 151(2A) of the Act. As such, Council was not obliged to approve BGLC'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 the factors set out in sections 151(3)(a), 151(3)(b), 151(3)(e) and 151(3)(f) were not established.

In considering the matters set out in section 151(3)(a), Council established that BGLC is not a native title party for the Decision Area. In considering 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 in 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 BGLC with the State.

Council also considered sections 151(3)(c) and 151(3)(d). In doing so Council considered a number of factors, including: BGLC's membership and Rule Book; BGLC's claims in relation to the Decision Area, including about the traditional or cultural connections of BGLC members, BGLC's representativeness, and the cultural heritage management experience of BGLC members; and information provided by GMTOAC in relation to its RAP application. Although Council established that BGLC comprises Traditional Owners in its membership and has substantial cultural heritage management experience generally, Council was not satisfied that that BGLC was an organisation representative of Traditional Owners of the Decision Area.

Council considered matters set out at section 153 and acknowledged that whilst BGLC sought joint RAP status with GMTOAC over the Decision Area, Council did not have sufficient information as to the basis for BGLC's and GMTOAC's Traditional Owner interests and shared interests in the Decision Area, the status of an agreement between BGLC and GMTOAC, or how BGLC and GMTOAC would work together to ensure effective operation of the Act.

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. Council will give priority consideration to uncontested applications groups that meet the Act's requirements and that are supported by Traditional Owners of the Country under application. Council made a number of requests, to BGLC and GMTOAC for updates on progress made to finalise their proposed agreement in relation to the Decision Area. However, such information was not provided.

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 BGLC over this Decision Area is compatible with the Charter.

Council took account of the fact that, in declining BGLC application over the Decision Area, BGLC 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). Further, Council considered that the present decision does not prevent BGLC from reapplying for registration as a RAP in future.

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 BGLC members' rights is justified, particularly having regard to sections 151(3)(c) and 153 and that it could not be satisfied that BGLC was representative of the Traditional Owners of the Decision Area, or that BGLC should be appointed jointly with GMTOAC as a RAP over the Decision Area. In this regard, Council did not identify any less

restrictive means available to achieve the purposes of the Act, other than declining BGLC's RAP application over the Decision Area.

Conclusion

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

While Council recognises there may be members of BGLC who are Traditional Owners of the Decision Area and have experience in the management of cultural heritage, Council formed the view that these factors were outweighed by the factors that did not support the BGLC application. These were primarily that BGLC had not provided Council with enough information as to the basis of its Traditional Owner interests in the Decision Area, BGLC's and GMTOAC's shared interests in the Decision Area, or how BGLC and GMTOAC would work together to ensure effective operation of the Act.

Council's present decision does not preclude future applications over the Decision Area from BGLC. If BGLC were to lodge a future application over the same area, Council would expect the application to include information that substantiates BGLC's claims to the Decision Area, and details the agreement reached with GMTOAC concerning responsibilities for cultural heritage management in the Decision Area. If in any future RAP application BGLC were to seek joint RAP status with GMTOAC over the Decision Area, Council would also expect a RAP application to explain the basis of BGLC's and GMTOAC's shared interests in the area, and how BGLC and GMTOAC planned to work together to ensure the effective operation of the Act.



Rodney Carter
Chair
Victorian Aboriginal Heritage Council

Attachment 1

