

**STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL  
IN RELATION TO AN APPLICATION BY THE GUNAIKURNAI LAND AND WATERS ABORIGINAL  
CORPORATION**

**DATE OF DECISION: 26 October 2017**

The Victorian Aboriginal Heritage Council (**Council**) has previously approved Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**) as a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006* (Act).

**1. Decision**

The Council has declined, in part, (Zone C ) the application of GLaWAC to be registered as a RAP under the Act.

**2. Decision Area**

The RAP application was made on 5 May 2017, and related to large areas of Eastern Victoria. It was divided into separate zones (Area A, Area B, and Area C), and determined by Council in stages, at the request of GLaWAC. The present decision relates to Area C (Decision Area).

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

**3. Background to Decision**

GLaWAC was first registered as a RAP in 2008. The area over which GLaWAC was registered as a RAP in 2008 was extended by various subsequent decisions of Council. By May 2012, GLaWAC was registered as a RAP over Area A and Area B.

On 7 November 2016, GLaWAC's registration as a RAP was revoked by the Secretary to the Department of Premier and Cabinet when GLaWAC was placed into special administration.

GLaWAC came out of special administration in April 2017, and made a new application for registration as a RAP on 5 May 2017. In its 5 May 2017 application, GLaWAC asked Council to consider its application in three parts: Area A, Area B, and the Decision Area.

Council appointed GLaWAC as a RAP over Area A and Area B in a decision dated 24 May 2017.

GLaWAC has previously applied for registration as a RAP over the Decision Area on three occasions, each of which have been declined: 18 November 2008 (declined 21 March 2013); 19 July 2013 (declined 5 December 2013); and 26 June 2014 (declined 17 July 2015).

Other organisations have also applied for registration as a RAP over the Decision Area, claiming that the Bunurong/Boon Wurrung people are the traditional owners of the Decision Area. Those applications were made by the Boon Wurrung Foundation Limited (BWFL) on 1 June 2007, and 30 December 2013, Bunurong Land and Sea Association Incorporated (BLSAI) on 4 April 2014, and Bunurong Land Council Aboriginal Corporation (BLCAC) on 27 June 2007, 4 December 2010 and 24

February 2017. Each of those applications has been declined, other than the 2017 application of Bunurong Land Council Aboriginal Corporation, in respect of which no decision has yet been made on this Decision Area.

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

#### **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***

GLaWAC is not a registered native title holder for the Decision Area. There is no registered native title holder for the Decision Area. GLaWAC is not a party to any Indigenous Land Use Agreement that has been registered under the Native Title Act. Accordingly, Council is not obliged under s 151(2) of the Act to register GLaWAC as a RAP for this area.

##### ***b) Recognition and settlement agreement (s 151(2A) of the Aboriginal Heritage Act 2006)***

GLaWAC has entered into a recognition and settlement agreement with the State (within the meaning of s 151(2A)) for Area A of its application area.

GLaWAC has not entered into a Recognition and Settlement agreement with the State of Victoria in relation to the Decision Area. Accordingly, Council is not obliged under s 151(2A) to appoint GLaWAC as a RAP for this area.

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

In August 2014, a Native Title Determination Application was filed on behalf of the Gunaikurnai people over Area C. 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 GLaWAC, nor any other party, brought any native title agreement to Council's attention in respect of the Decision Area.

##### ***e) Representation - Traditional owners (s 151(3)(c) of the Act)***

GLaWAC's application was made on the basis that it represented the Gunaikurnai Peoples, and that the Gunaikurnai Peoples are the traditional owners of the Decision Area.

##### ***i) Whether GLaWAC represents Gunaikurnai Peoples***

In registering GLaWAC as a RAP over Area A and Area B in May 2017, Council was satisfied that GLaWAC was an organisation representing the Gunaikurnai Peoples, and that the Gunaikurnai Peoples are the traditional owners of Area A and Area B. In this regard, Council took account of its

previous decisions to register GLaWAC as a RAP, and noted that this position was further supported by a Federal Court native title consent determination and a recognition and settlement agreement which recognised the Gunaikurnai People as the traditional owners for Area A.

Council also has regard to information about GLaWAC's membership including that, under GLaWAC's current rules, membership is only open to Gunaikurnai people who are at least 18 years old who can demonstrate descent from one of the Identified Apical Ancestors. GLaWAC currently has approximately 600 members. These individuals are the same as those identified as the 'native title claim group' in its Native Title Determination Application.

Accordingly, Council is satisfied that GLaWAC represents the Gunaikurnai Peoples.

Council also repeats its previous findings that Gunaikurnai Peoples are the traditional owners of Area A and Area B.

*ii) Whether the Gunaikurnai Peoples are the traditional owners of the Decision Area*

GLaWAC included its August 2014 Native Title Determination Application in its RAP application, in order to outline the evidence which supports its claim that the Gunaikurnai Peoples are the traditional owners of the Decision Area.

GLaWAC's Native Title Determination Application relies on reports by Dr John Morton (2006, 2008, 2008b, 2009, 2010), and on statements by Beryl Booth and Broderick Mullet, to demonstrate the Gunaikurnai people are the Traditional Owners of the Decision Area. The Application contains the following claims:

- Effective assertion of sovereignty in the claim area through sustained European settlement occurred in the 1840s. At this time, the predecessors of the native title claim group wholly occupied their traditional territory, including the Decision Area. While it is uncertain whether any Gunaikurnai lived permanently on Wilsons Promontory, people visited there and stayed for periods of time.
- There exist traditional laws acknowledged by and traditional customs observed by the native title claim group, and the group has continued to hold native title in accordance with those traditional laws and customs. At sovereignty, the native title group's predecessors as a whole held common or underlying title to the whole of the Gunaikurnai traditional lands, through multiple patrilineal clan estates set within and across five dialect groups and held proximate title to their lands. In response to colonisation, there was a realignment of Gunaikurnai kinship politics, and, as a result, clan estates no longer held proximate title to certain land within the Gunaikurnai traditional lands. The group as a whole still maintained underlying title to the Gunaikurnai lands generally.
- The native title claim group members and their predecessors have maintained continuity of their occupation and connection and association with the Decision Area from the time of sustained European contact until today. Many members of the native title claim group live and their predecessors were also born, lived for much of their lives and have been employed, in and around Area C. The native title claim group has continuously carried on activities in the Decision Area, including travelling to significant places, camping, recreating (including story telling), cultural heritage work (including site clearance, cultural heritage reports and surveys), cultural heritage education for claim group members and other interest holders in the Decision Area, protection and management of the Decision Area (in particular, cultural

sites), visitation and maintenance of cultural sites, hunting and fishing, and taking of resources for medicinal purposes.

- Contemporary Gunaikurnai people refer to a historical feud between the Boonwurrung and the Gunaikurnai, and name the Tarwin River as the boundary between the two groups. They say that this information was passed to them by their elders who were told by their elders.

As set out above, BLCAC, BWFL and BLSAI have previously made RAP applications over the Decision Area, claiming that Boon Wurrung/Bunurong people are the traditional owners of the Decision Area (B/B applications). Each of the Boon Wurrung/Bunurong applications has been refused by Council, other than the current BLCAC RAP application, which remains undecided.

Council refers to its reasons for declining the Boon Wurrung /Bunurong applications, as well as to its reasons for declining GLaWAC's previous applications over the Decision Area.

Council also notes that BLCAC (in its current RAP application), and BWFL (in correspondence to Council dated 6 July 2017, a copy of which was provided by Council to GLaWAC on 12 July 2017) maintain their position that the traditional owners of the Decision Area are the Bunurong/Boon wurrung people.

GLaWAC, BLCAC and the BWFL have entered a joint Memorandum of Understanding with Parks Victoria in relation to how the groups will work collaboratively over the Wilsons Promontory area. Council finds that the MOU does not resolve the issue of traditional ownership for Wilsons Promontory.

Council also acknowledges steps taken by GLaWAC and BLCAC 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:

- On one hand, the competing claims to traditional ownership of the Decision Area from the Bunurong/Boon wurrung people; and
- On the other hand, the detailed evidence put forward in the RAP application, including the matters set out in the Native Title Determination Application,

Council is not able to be satisfied that the Gunaikurnai people are the traditional owners of the Decision Area. Council is therefore not satisfied that GLaWAC represents the 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)**

GLaWAC's application states that it 'relies on its traditional links to country as the basis of its historical and cultural interest in cultural heritage relating to' the Decision Area.

The Native Title Determination Application states that the native title claim group undertakes cultural heritage work (including site clearance, cultural heritage reports and surveys), undertakes cultural heritage education for claim group members and other interest holders, protects and manages areas including cultural sites, and visits and maintains cultural sites in the Decision Area.

The MOU in relation to Wilsons Promontory, referred to above, also envisages that GLaWAC (along with BWFL and BLCAC) will have input into a wide variety of cultural heritage matters.

Based on these matters, Council finds that GLaWAC has demonstrated that Gunaikurnai people have historical or contemporary interest in the Decision Area, and expertise in managing and protecting Aboriginal cultural heritage in that area.

**g) Grant of 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 GLaWAC, or by any other party.

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

As previously mentioned, GLaWAC entered into a Memorandum of Understanding with Parks Victoria, BLCAC, and BWFL in 2012 relating to cultural heritage management in Wilsons Promontory National Park. GLaWAC 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 (s 151(3)(g) of the Act)**

GLaWAC has operated as a RAP over a significant area of land, both prior to 7 November 2016, and after 24 May 2017. In doing so, GLaWAC has demonstrated its experience and expertise in managing and protecting Aboriginal cultural heritage. Having come out of special administration, Council also finds (consistent with its decision to appoint GLaWAC as a RAP over Area A and Area B) that GLaWAC 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 GLaWAC'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.

GLaWAC 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 GLaWAC'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, and concludes that GLaWAC has established that it is a native title party, within the meaning of s 151(3)(a) of the Act. Council concludes that GLaWAC has not established the factors set out in ss 151(3)(b) and 151(3)(e). 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 GLaWAC's experience as a RAP, and capacity to operate as a RAP.

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

Council is not satisfied that GLaWAC is a body representing the traditional owners of the Decision Area for the purpose of s 151(3)(c), because it is not satisfied, in the face of competing claims to traditional ownership of the Decision Area, that the Gunaikurnai Peoples are the traditional owners of the Decision Area.

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

Council is satisfied that GLaWAC 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 GLaWAC's efforts towards starting a dialogue with BLCAC 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 application 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 GLaWAC over this application area is compatible with the Charter.

Council took account of the fact that, in declining the application over the Decision Area, the Gunaikurnai peoples 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 GLaWAC 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 Gunaikurnai 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 GLaWAC's application over the Decision Area.

### **Conclusion**

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

While a number of factors support GLaWAC's position that it should be appointed as a RAP over the Decision Area (particularly that it is a native title party, 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 GLaWAC has not established that it represents the traditional owners of the Decision Area).



Eleanor A. Bourke

**Chairperson**

**Victorian Aboriginal Heritage Council**

# Attachment 1

