

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO A REGISTRATION VARIATION APPLICATION BY EASTERN MAAR ABORIGINAL CORPORATION

DATE OF DECISION: 6 February 2020

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) approved the 22 October 2019 request from Eastern Maar Aboriginal Corporation (**EMAC**) for a variation of Registered Aboriginal Party (**RAP**) registration under section 155 of the *Aboriginal Heritage Act 2006* (**Act**).

In making this decision, Council considered all relevant information provided to it in respect of this application.

2. Decision Area

The application from EMAC was made on 22 October 2019. The original application was submitted in the form of a section 150 application for registration as a RAP. However, EMAC was first appointed as a RAP in December 2013. Therefore, as an existing RAP at the time of application, EMAC's request was considered as a registration boundary variation application pursuant to section 155 of the Act.

The decision relates to EMAC's request for boundary variation. The relevant area (**Decision Area**) is shown in the attached map (**Attachment 1**) and is described as:

- Extending easterly from EMAC's shared RAP area, the townships of Warrnambool, Terang, Mortlake, Camperdown, Colac, Apollo Bay, Lorne and Cressy are included within the application area as well as the Great Otway National Park. The Decision Area is bounded to the north west by the Grampians National Park and extends through Ararat north easterly. Its northernmost point is just across the Wimmera River. The area does not include zones within the registration area of any existing RAP.

The Decision Area overlaps:

- the area between the Shaw and Hopkins rivers which Gunditj Mirring Traditional Owners Aboriginal Corporation (**GMTOAC**) asserted interests over in an application declined by Council October 2018 and in a request for boundary extension lodged 6 January 2020.
- the area Kuuyang Maar Aboriginal Corporation's (**KMAC**) applied to be a RAP over in applications declined by Council in November 2012 and July 2015
- an area encompassing Colac, Cressy and the Otways that some people identifying as Gulidjan/Gadabanud claim Traditional Ownership over.

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.

i) Whether EMAC represents Eastern Maar People

EMAC is a Prescribed Body Corporate under the *Native Title Act 1993* (Cth).

Pursuant to the Federal Court consent determination of native title in the 'Part B' area by GMTOAC, for the Gunditjmara People, and EMAC, for the Eastern Maar Peoples (**Eastern Maar**); EMAC holds native title on behalf of the Eastern Maar People with respect to the Part B area. Following this native title determination, Council recognised EMAC as an organisation representing Traditional Owners with respect to the Part B area. There are no other native title holders within the boundary variation application area.

A person is eligible for EMAC membership if the person is an Aboriginal person who is an Eastern Maar Person, defined as a member of the Eastern Maar Traditional Owner Group, and is at least 18 years of age.

The EMAC Rule Book provides that 'The Eastern Maar Traditional Owner Group' is a name adopted by the people who identify as Maar, Eastern Gunditjmara, Tjap Wurrung, Peek Whurrong, Kirrae Whurrung, Kuurn Kopan Noot, Yarro Waetch (Tooram Tribe), Gulidjan and/or Gadabanud amongst other names, who are Aboriginal people and who are:

- descendants, including by adoption, of the ancestors identified in the Rule Book;
- members of families who have an association with the former Framlingham Aboriginal Mission Station, with the exception of the descendants of Richard Sharp who do not need to meet this requirement of having an association with the former Framlingham Aboriginal Mission Station; and
- recognised by other members of the Eastern Maar Traditional Owner Group as members of the group.

The identified ancestors in the EMAC Rule Book are: King of Port Fairy and Eliza, Old Jack (father of John Dawson), Charlie and Alice (parents of Albert Austin), Samuel Robinson and Mary Caramut, Lizzie (mother of Frank Clarke), Robert and Lucy (parents of Alice Dixon), Barney Minimalk and Nellie Whitburboin, Louisa (mother of William Rawlings), Jim Crow (son of Beeac) and Richard Sharp.

Council noted that this description has been accepted by the State of Victoria for the purpose of the negotiations under the *Traditional Owner Settlement Act 2010 (Vic)* as being inclusive of all people who are Traditional Owners for the Decision Area.

Council noted correspondence from EMAC which states that its Board comprises directors elected as representatives of their individual family groups, ensuring a fair representation of the Eastern Maar community and a strong connection for family members to stay informed and included in EMAC's decision making processes, and that each of the 12 family groups is entitled to elect a director to the Board.

Council also noted correspondence from some individuals identifying as Gulidjan and Gadabanud which raised issues of inclusivity and representativeness of EMAC for Gulidjan and Gadabanud people. Council also noted correspondence from a collective of descendants of Richard Sharp stating that they do not support the Guli-Gad Aboriginal Corporation's claims that it is the representative body for them in principle or otherwise, and asserting their support for EMAC's inclusivity and application over the Decision Area.

Towards inclusive representation EMAC stated in their application that Members of the former Kuuyang Maar Aboriginal Corporation and the former Martang RAP have now joined EMAC; that inclusion of persons descended from Richard Sharp in the Rule Book, Constitution and formal decision making structure is the final and formal step in ensuring membership of EMAC is open to all people who assert Traditional Ownership in the Application Area.

Further to inclusive representation, EMAC stated in their application that: EMAC annual general meetings and EMAC full group meetings (convened by FNLRS) are open to all Eastern Maar Traditional Owners even if they have not applied for EMAC membership; and that all people who identify as Eastern Maar are able to undertake cultural heritage work on behalf of EMAC even if they have not applied for EMAC membership.

On the basis of the information before it, Council were satisfied that EMAC is a body sufficiently representative of the Eastern Maar People.

ii) Whether the Eastern Maar people are Traditional Owners of the Decision Area

Council noted that the EMAC application states that the consent determination in relation to the Part B area settled the boundary between Gunditjmarra and the Eastern Maar; and the Part B shared area constitutes the boundary between Gunditjmarra and the Eastern Maar.

Council noted the EMAC application states that the consent determination in relation to the Part B area is based on research accepted by the State which shows the traditional, familial, historical and contemporary links of the Eastern Maar people to the Part B area, and demonstrates that such links extend much further to the east. Council also noted EMAC's view that nowhere in the Part B consent determination judgement did the judge refer to Gunditjmarra's native title rights and interests stretching to the East of Part B.

Council noted detailed research findings prepared with the support of Native Title Services Victoria (**NTSV**) now known as First Nations Legal Research Services (**FNLRS**) which EMAC provided in support of establishing its traditional and cultural links to the Decision Area and extent of Eastern Maar Country.

EMAC's application states that these research findings supported its native title claim which was registered in 2012 by the National Native Title Tribunal, and that registration of the claim is prima facie evidence of a factual basis that the claim group and their predecessors have, amongst other things, a traditional association with the area. Council noted the reasons EMAC included areas in the Decision area which were excluded from its native title claim, in its boundary variation application.

Council noted the information EMAC provided relating to its identified apical ancestors and the places within the Decision Area with which they were connected within the historical record at the British assertion of sovereignty. Set against the objectives of the Act and its overall purpose and direction, the Council gives significant weight to traditional or familial links and considers it an important factor.

Council noted that the Decision Area does not overlap with areas of country that have been the subject of an application (under the Act or other legislation) by the Barengi Gadgin Land Council (**BGLC**) or Wathaurung Aboriginal Corporation (**WAC**). Council noted that the assertions contained in the BGLC and WAC submissions of traditional interests within the Decision Area were non-specific and not supported by evidence. Council also had regard to other asserted competing interests within the Decision Area. In particular, the interest asserted by the GMTOAC in the area between Part B and the Hopkins River bounded by Mustons Creek. Council noted that on 6 January 2020 GMTOAC had also made a request pursuant to s 155 for a variation of its registration area so as to include this area. In relation to their area of interest, Council had requested, in recent and historical correspondence to GMTOAC, information supporting GMTOAC's traditional or familial relationship to the area. Such information was not provided. Whilst Council recognises GMTOAC's membership comprises Traditional Owners; acknowledges GMTOAC's experience and management of cultural heritage in the Part B area; and noted GMTOAC's interest in caring for Country East of the Part B area to the Hopkins River and Up to Mustons Creek, as Council was not

provided with the requested further information Council could not make a conclusion as to GMTOAC's traditional or familial relationship to the area

Council noted that in the GMTOAC submissions there was no denial that Eastern Maar peoples were Traditional Owners for the Decision Area; rather, there was an assertion that Gunditj Mirring peoples were *also* Traditional Owners with respect to the area the subject of the GMTOAC s 155 variation request.

Having regard to the material in support of EMAC's claim that Eastern Maar people are the Traditional Owners of the Decision area, and on the balance of the information before it, Council was satisfied that Eastern Maar people are Traditional Owners of the Decision Area.

Council noted that in making a decision regarding the EMAC request for variation pursuant to s 155 it was not declining the GMTOAC request for registration boundary variation also pursuant to s 155. Council recognised that its decision would though have the consequence that GMTOAC would need to gain the consent of EMAC for the GMTOAC s 155 variation request to be subsequently approved by Council. Council determined that given its conclusion regarding the Traditional Ownership of the Eastern Maar people this outcome was appropriate.

ii) What is EMAC's organisational capacity to discharge its statutory functions as a RAP regarding the proposed registration variation area?

EMAC also provided detailed information regarding its expertise and capacity in managing and protecting Aboriginal cultural heritage in its current RAP area and within the Decision Area that was noted by Council. EMAC also provided information as to cultural heritage management procedures operationally employed by EMAC.

EMAC stated in information provided to Council that it represents Aboriginal people who have a historical or contemporary interest in the Aboriginal cultural heritage of the Decision Area. EMAC's application stated that EMAC will consider the interests of Aboriginal people who are not Traditional Owners but have cultural heritage interests in the area by consulting with them at board level and through EMAC's General Manager of Cultural Heritage and Natural Resource Management. EMAC stated these views will be taken into account when making any decision relating to Country.

While Council acknowledged that EMAC had been effectively operating as a RAP since its appointment in December 2013, and noted detailed information EMAC provided as to its organisational structure and capacity; Council sought further detail from EMAC about its readiness to undertake and discharge RAP functions over an increased registration area as proposed by the boundary variation application. In response, EMAC provided Council with a "*Readiness Report*" providing detailed further information including an aspired staffing profile aimed to enable timely servicing of RAP responsibilities with a projected increase work.

Council were satisfied as to EMAC's organisational capacity, sustainability and ability to undertake cultural heritage management and protection responsibilities as a RAP over the Decision Area.

iii) What are the views of other parties whose interests may be affected by a registration variation in the form of a boundary variation?

In considering the views of other parties whose interests may be affected by the registration variation over the Decision Area, Council considered all submissions and relevant referenced materials provided in response to the open public comment period as well as EMAC's response to these submissions.

Council also noted that previous RAP applications have been made within the Decision Area from the former Martang RAP, GMTOAC, Kuuyang Maar Aboriginal Corporation and the Guli-Gad Aboriginal Corporation. Council also considered that GMTOAC had made a request on 6 January 2020 for a boundary variation under s 155 over the land between the Shaw and Hopkins Rivers and up to Mustons Creek. At the time of making its decision Council had not been provided with information regarding GMTOAC's traditional or familial connection to the Decision Area, nor representativeness for Traditional Owners in the application area.

EMAC had stated in their application that the Decision Area does not include any areas contested by either WAC or BGLC. EMAC's included statements regarding their attempts to commence boundary negotiations with neighbouring groups BGLC and WAC. Council had questions regarding these statements and sought further information from both BGLC and WAC as their historical boundary negotiations with EMAC; EMAC's attempts of engagement; and any outcomes reached. Council noted BGLC's and WAC's responses to these questions within their submissions to Council's advertised public comment period and considered that boundary negotiations could continue irrespective of any determination over the Decision Area.

Some of the submissions requested that Council delay determination of the boundary variation until resolution of the native title matter before the Federal Court. Council noted that EMAC has pursued various routes to formal recognition over parts of the Decision Area which are yet to be resolved, including EMAC's native title claim before the Federal Court. With respect to these processes, Council noted that it had broad power under s 155 to further vary relevant RAP's registrations to make any necessary aligning adjustments.

4. Reasons for decision

The following steps were considered in Council's decision-making process.

a) Legislation

As EMAC is an existing RAP, Council considered EMAC's application for boundary variation pursuant to section 155 of the Act. In deciding EMAC's RAP application over the Decision Area, Council took into account all of the matters it is required to consider under section 155 of the Act.

Council has broad discretionary power to make a variation to the registration of a RAP; including geographic boundary variations under s 155(2). As an existing RAP, EMAC has provided consent to varying their registration boundary in line with the Decision Area via lodgement of their 22 October 2019 application. No other RAPs are within the Decision Area, therefore no other consent is required.

EMAC 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 RSA in relation to the Decision Area within the meaning of section 151(2A) of the Act. As such, Council is not obliged to approve EMAC's application over the Decision Area to align with sections 151(2) or 151(2A) of the Act.

b) Policy

Council applied its policies as contained in "*Section 155 Requests for Variations of Registration Policy and Procedures*".

In doing so Council considered a number of factors, including: EMAC's membership and Rule Book; detailed historical and anthropological information EMAC provided regarding the

traditional or cultural connections of the Eastern Maar to the Decision Area, EMAC's representativeness, and EMAC's cultural heritage management operations and experience as well as EMAC's responses to Council's request for details about readiness to undertake an increased level of statutory responsibilities in an increased area; Council also took into account submissions to the public notice period and the views of parties whose interests may be affected by registration variation.

Council's policy is to accord appropriate status to Traditional Owners.

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 sections 19 (2)(a) and 19(2)(d) of the Charter.

Council formed the view that the decision to alter EMAC's registration in line with their application over the Decision Area is compatible with the Charter. In its deliberations, Council acknowledged that not all Traditional Owners of the Decision Area are members of EMAC and that some Traditional Owners do not wish to be represented by EMAC. Council acknowledged that the decision to appoint EMAC may, in some circumstances, impact on the ability of those Traditional Owners to enjoy their identity and culture and maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources in the Decision Area.

However, Council noted that the extension of EMAC's RAP boundary provides a formal mechanism through which Traditional Owners can exercise their distinct cultural rights protected under the Charter. Under EMAC's current Constitution all of the descendants of Richard Sharp who identify as Gulidjan and Gadabanud peoples are eligible to become members of EMAC and are able to continue to exercise their distinct cultural rights and be involved in the protection and management of cultural heritage in the Decision Area. Towards this, Council had particular regard to the work EMAC had taken to be representative and inclusive in decisions involving cultural heritage and their movement towards inclusion at a governance level.

Council also took into account that it has the ongoing function of managing, overseeing and supervising the operations of EMAC under s 132(cg) of the Act, and that it is empowered under s 154A of the Act to impose conditions on EMAC at any time, including a condition to ensure inclusiveness and representativeness of EMAC so as that all Traditional Owners of Maar Country are able to exercise their cultural rights as members of EMAC.

Further to this, Council's decision does not preclude future applications for registration variation over the Decision Area from GMTOAC, WAC and BGLC. If any of these groups were to consider preparing a future registration variation application over the Decision Area, Council would expect to be provided with evidentiary information towards traditional and familial connections, representativeness and inclusivity.

Council considers that these factors lessen the extent of any limitation to the rights contained in s 19 of the Charter caused by the decision to appoint EMAC. Additionally, and having regards to the factors discussed above, Council further determined that there were no less restrictive means reasonably available to achieve the purpose of the decision. The purpose of the decision being to appoint registration of an inclusive and representative Traditional Owner body as a RAP to protect and manage cultural heritage within the Decision Area.

EMAC provided detailed information to support its claim of traditional ownership of the Decision Area and evidence of its effective representation of the Traditional Owners of that area. Taking into account 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 rights of those Traditional Owners not represented by EMAC, is justified by the importance of Council being satisfied as to the Traditional Owners of an area when making RAP appointments. In this regard, Council were satisfied that EMAC inclusively represents Traditional Owners of the Decision Area and Council did not identify any less restrictive means available to achieve this purpose, other than appoint EMAC's RAP application over the Decision Area.

Conclusion

Having taken all matters detailed above into account, Council considered EMAC an inclusive group representative of Traditional Owners in the relevant Decision area and approved EMAC's boundary variation application to extend their registration as a RAP over the Decision Area.



Rodney Carter
Chair
Victorian Aboriginal Heritage Council

Attachment 1

