

**STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL
IN RELATION TO AN APPLICATION BY BARAPA COUNTRY ABORIGINAL CORPORATION**

DATE OF DECISION: 15 June 2021

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has declined the application of the Barapa Country Aboriginal Corporation (**BCAC**), to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

The attached map (**Attachment 1**) depicts the area that BCAC sought to be a RAP over (**Decision Area**). The area extends from Fish Point (on the Murray river to the north), extending along the Murray River to Robertson's Bend to the east of Cohuna, across to Cohuna. The boundary follows the western side of Know Swamp to Kotta, heads west to Lake Marmal (excluding Boort), continues west to just beyond the Avoca River, then north towards Lake Boga (although excluding it) and Fish Point.

The Decision Area borders with two neighbouring RAPs – the Yorta Yorta to the East and Dja Dja Wurrung to the South.

3. Findings of Fact and Evidence

Part 10 of the Act requires that Council consider a number of matters in making a decision. Council considered the application in light of these matters. In relation to the Decision Area, Council made the following findings of fact, based on the evidence and other material detailed below.

a. Native Title (s 151(2) of the Act)

Council noted BCAC is not a registered native title holder for the Decision Area. Council also noted there is no other registered native title holder for the Decision Area.

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

BCAC 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 (Vic)*.

c. Native Title Party (s 151(3)(a) of the Act)

BCAC is not a native title party for the Decision Area (including for all or any part of the area under application).

While BCAC does not claim to be a native title party for the purposes of the Act, BCAC asserts that they represent Barapa Barapa People that are party to the Wamba Wemba Barapa Barapa (**WWBB**) Traditional Owner working group working toward a native title claim.

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

No terms of any native title agreement were made available to Council.

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

i) Membership and Representativeness

One of Council's key considerations when determining RAP status, is whether an applicant is inclusive and representative of all Traditional Owners of the area being claimed.

Council noted material submitted by BCAC relating to previously declined applications from organisations representing Barapa Barapa People. The material noted that previously Council had sought to clarify claims that those organisations were representative of Barapa Barapa Traditional Owners, and that the application was supported by Barapa Barapa Traditional Owners in general. Council found that those claims were not made out, taking into account comments received from the Wamba Wamba Barapa Barapa Wadi Wadi (**WWBBWW**) native title claim group in 2011. Council noted this information, however, it did not affect Council's current consideration of the application.

Council reviewed a range of information presented by BCAC, sourced from a number of historical references, which provided evidence of the identity, status, social organisation and territory of traditional Barapa Barapa Clans, and the relationship between traditional Barapa Barapa People and other Traditional Owner groups.

Council noted a list of Barapa Barapa Apical Ancestors and Clan groups that were included in the RAP application materials, namely:

"Barapa Barapa Ancestors

- *Albert Colger (1846-1917) born in 1846*
- *Alice Holmes (1862 Maudhope or Gunbower.) Mother and Father of Isabella Green Married Jasper Green who was born at Kow Swamp.*
- *Alick Campbell (1844 or 1853) Gannawarra Kerang or Loddon – Died 1932 in Melbourne.*
- *Benjamin Lanky Manton (1853) Swan Hill Died 1927 possibly at Lake Tyres*
- *David Taylor (1852 Pental Island) Died 1929 Deniliquin, buried Moonacullah.*
- *Ernest McGee (1876 Chowa Station Moulamein)*
- *George Allen (1882 Deniliquin)*
- *Hannah Boyd born (1860 and Rosie Butcher born 1864 at Conargo or Wanganella.*
- *Jasper Green born at Kow Swamp. He married Alice Holmes.*
- *Johanna Gardiner (1851 Kerang) Died 1921 Moonacullah*
- *John Galway (1866) Married Sissy Edgar at Moama*

- *Tro-Bullock and Wananee their son John Terrick (1835 or 1843 at Terrick Terrick) Died 1921 at Coranderrk.*
- *Koombra aka Alexander Campbell (1853- 1921)*
- *Louisa Frost (1858 Mathoua) Married Aaron Atkinson, died 1893.*
- *Peggy Kerr (related ncestors Leonard Kerr 1854 Mt Hope or Loddon) Leonard’s mother unknown on marriage certificate 1875)*
- *Phinniemore/Finemore Jackson (1869 Mt Hope) Lived at Cummergunja & Coranderrk died 1938.*
- *Sarah Ingram has siblings on Wamba Wamba Ancestor list (1851 at Nicause/Neimur near Moulamein) Died 1916 buried at Moonahcullah.*
- *William ‘Billy’ Murray (1872 or 1874 at Conargo or Deniliquin)*

Barapa Barapa Clans

- *Gunbower gundidj – Gunbower Station*
- *Kurrowertukhe – Torrumberry Station*
- *Mially Water Clan – Mially Water adjoining Koondrook*
- *Moyberrer Balug – Mt Hope*
- *Perregoo - Unknown Tanne Balug – Duck Swamp, adjoining Durham Ox*
- *Teerap Balug – Near Kerang*
- *Yulowil Balug – Mt Pyramid”*

Council noted that many of the individuals listed by BCAC as Barapa Barapa Apical Ancestors are also listed by Wemba Wamba Traditional Owners as their Apical Ancestors. This information was documented in the ‘Record of Meeting’ of the WWBB Traditional Owner Full Group dated 3 November 2019 provided to Council by BCAC.

Council reviewed the BCAC rule book which provides at section 3.1, that a BCAC member must be over 18 years old and an Aboriginal person who is of the Barapa Barapa People. Council noted no documented reference to the asserted Barapa Barapa Apical Ancestors within the corporation’s Rule Book.

Council sought to confirm with BCAC whether the list of Apical Ancestors included in its RAP application represented a complete list of Apical Ancestors directly relevant to the Decision area. The evidence presented to Council did not support this conclusion.

Council also sought evidence of consultation regarding the BCAC RAP application between BCAC and other descendants of Barapa Barapa Apical Ancestors that were not BCAC members. The evidence presented to Council did not assist Council’s consideration of BCAC’s representativeness.

In addition, Council sought specific information from BCAC relating to material BCAC had submitted within its RAP application which stated that there were concerns of ‘the Wamba Wamba Barapa Barapa Wadi Wadi Native Title Claim’ regarding Land Based agreements, geological information and contested borders, and all such concerns (which for Council’s purposes were undisclosed) had been resolved. The evidence requested of BCAC, and received by Council in response, did not satisfy Council that concerns regarding Land Based agreements, genealogical information and contested borders had been resolved by Traditional Owners of the Decision Area.

Council received and noted comments from the WWBB working group regarding the BCAC RAP application. Council noted that the WWBB Traditional Owner group had appointed 14 members to comprise of a working group to provide guidance to First Nations Legal and Research Services (FNRLS) on matters related to its native title matter. The WWBB working group had instructed FNRLS to write to Council regarding the BCAC RAP application. The letter stated that the BCAC RAP application has not been endorsed by WWBB Traditional Owner group at a native title meeting, it is the view of the working group that there are unresolved boundary issues with neighbouring Traditional Owner groups and that the working group is concerned that BCAC is not representative of Barapa Barapa and its family groups. BCAC was provided with these comments and the opportunity to respond to them. BCAC stated that the WWBB full group made a resolution to support the BCAC RAP application and that the Barapa Barapa Traditional Owners had given support to the BCAC RAP application. However, Council did not receive evidence from BCAC supporting these statements.

Council, however, did receive a letter from WWBB working group through FNRLS addressed to “Barapa Land and Water” supporting “Barapa Land and Water” to continue to work on Country with regard to Natural Resource Management and cultural values. Council noted that this letter did not provide support for the BCAC RAP application.

Council accepted that there are members of BCAC who are Barapa Barapa Traditional Owners, and also noted its membership rules could potentially allow it to represent the Traditional Owner group in an inclusive manner. However, the evidence made available to Council did not support BCAC’s claims that it currently sufficiently represented Barapa Barapa People and its associated family groups.

ii) Traditional Ownership

In accordance with the Act, Council accords priority to groups with traditional or familial links to a particular application area to give appropriate status and rights to Traditional Owner groups in cultural heritage management and protection. To best achieve the goals of the Act, and pursuant to s 151 (3)(g) Council prefers to appoint RAPs which are single, inclusive groups and (pursuant to s 151 (3)(d)) representative of Traditional Owners in the respective application area.

Council had requested detailed supporting evidence from BCAC that it had resolved group composition and boundary disputes with neighbouring Traditional Owners. This was for Council to allow other affected Traditional Owner Groups to the Decision Area the opportunity to comment on the material submitted by an applicant. Council carefully considered the information provided by BCAC supporting the relationship and links of the Barapa Barapa Peoples to the Decision Area.

Council sought to clarify the basis of BCAC’s claims that it represented Barapa Brapa Traditional Owners, and that its application was supported by Barapa Barapa Traditional Owners in general. Council found that these claims were not made out, taking into account the comments received from the FNRLS, as instructed by WWBB Traditional Owner working group. Council also took all evidence provided by BCAC into account.

Having regard to the above, Council was not able to be satisfied that the Barapa Barapa are the sole Traditional Owners of the Decision Area or that BCAC was sufficiently representative of Barapa Barapa Peoples.

f. Representation - Historical or Contemporary Interest (s 151(3)(d) of the Act)

The BCAC RAP application was made also based on its historical and contemporary links to Country.

BCAC states that research by Clark and Hercus, and documentation by Robinson describe the social organisation of the Barapa Barapa, including their laws, customs, language, connection with land and waters, and social and cultural relations with other groups including Wiradjuri and Dja Dja Wurrung.

Council noted that this material and subsequent submissions provided by BCAC did not advance considerations of BCAC's historical or contemporary interests within the Decision Area.

g. Grant of Land in Fee Simple (s 151(3)(e) of the Act)

A title search showed that no grants of land have been made under State or Commonwealth legislation to BCAC or to another Aboriginal group within the Decision Area.

h. Land and Natural Resource Management Agreements (s 151(3)(f) of the Act)

BCAC did not draw Council's attention to any land and natural resource management agreement to which it is a party. Council noted material submitted from BCAC from the Department of Environment, Land and Water & Planning dated 8 January 2018 & 17 August 2018 respectively addressed to Barapa Land and Water Landcare, and Barapa Land and Water regarding "Healthy Country Plan biodiversity on ground project and community project" and "Reedy Lakes, Mobilising Barapa Land and Water".

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

Council acknowledged Barapa Barapa People's long history of involvement in cultural heritage management and noted the evidence provided by BCAC in its RAP application of the experience and accomplishments of its directors and members in this regard.

However, Council noted that the evidence submitted did not alter the conclusions reached above.

4. Reasons for Decision

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

a) Legislation

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

BCAC 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 BCAC'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. Council concluded that BCAC had not established the factors set out in sections 151(3)(a), 151(3)(b), section 151(3)(e) and section 151(3)(f). In considering the matters set out in section 151(3)(a), Council established that BCAC 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 under 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 BCAC with the State.

Council considered, in accordance with sections 151(3)(c) and 151(3)(d), the question of whether BCAC 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.

Having regard to the BCAC rule book, as well as the competing claims to Traditional Ownership of the Decision Area, Council was not satisfied that BCAC is an organisation which sufficiently represents all parties who have an interest in the Decision Area. Further, the objection received from the WWBB Traditional Owner working group to BCAC being registered (and the lack of provision of required evidence of an endorsement by WWBB Traditional Owner working group) was a relevant consideration for Council in forming its view.

Council noted that BCAC claims to represent people who have a historical or contemporary interest in the Aboriginal cultural heritage of the Decision Area, however considering all factors before Council, Council was not satisfied BCAC represented all Traditional Owners of the Decision Area.

Council acknowledged Barapa Barapa People's involvement in cultural heritage management and noted BCAC's account of the experience and accomplishments of its directors and members in this regard.

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'.

Councils' policy is to accord appropriate status to Traditional Owners including a requirement a preference to appoint Traditional Owner bodies corporate as RAPs, pursuant to the Act

Council's policy is to appoint RAPs that are single, inclusive groups and which are representative of Traditional Owners in the relevant Decision Area. This policy is supported by s 151(3)(g).

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 (the 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 BCAC over this Decision Area is compatible with the Charter.

Council took account of the fact that, in declining the application over the Decision Area, BCAC 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 cultural heritage, and which enable relevant Aboriginal people to participate in the protection of cultural heritage in parts of the Decision Area (including obligations on various entities to consult with relevant Aboriginal persons in relation to Aboriginal cultural heritage in the Decision Area).

Taking into account the factors set out in section 151(3), particularly the section 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 was of the view that any limitation to the Barapa Barapa People's rights is justified by the importance of Council ensuring that it is satisfied as to the identity of Traditional Owners of the Decision Area prior to appointing a RAP. In this regard, Council could not identify any less restrictive means available to achieve this purpose, other than declining BCAC's RAP application over the Decision Area.

Conclusion

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

While Council recognised that there are members of BCAC who are Barapa Barapa Traditional Owners and that BCAC members have had a long history of involvement in cultural heritage management, these factors were outweighed by the other factors that did not support the BCAC RAP application as set out above. Primarily amongst these reasons, was that BCAC had not established that it represents the Traditional Owners of the Decision Area.



Bonnie Chew

Quorum Acting Chair

Victorian Aboriginal Heritage Council

