

## STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN RELATION TO AN APPLICATION BY BANGERANG ABORIGINAL CORPORATION

DATE OF DECISION: 3 February 2022

### 1. Decision

Pursuant to section 151 of the *Aboriginal Heritage Act 2006* (**the Act**), the Victorian Aboriginal Heritage Council (**Council**) determined to decline the application from Bangerang Aboriginal Corporation (**BAC**) for registration as a registered Aboriginal party (**RAP**) in relation to the area described as the 'Application Area' in **Attachment 1 (Decision Area)**.

The Decision Area in respect of which BAC sought to be a RAP includes Application Area A, and Application Area B. Application Area A, which includes Beechworth, Yackandandah and Myrtleford. Application Area B, which stretches from Shepparton to Wangaratta, overlaps with Yorta Yorta Nation Aboriginal Corporation's (**YYNAC**) current RAP area.

### 2. Decision Area

The attached maps (Attachment 1) depict the Decision Area (which includes Application Area A and Application Area B).

### 3. Findings

In relation to the Decision Area, Council made the following findings of fact, based on the evidence and other material detailed below.

#### *Native Title & Traditional Owner Group Entity*

BAC is neither a Native Title holder, nor a Traditional Owner Group Entity (**TOGE**) that has entered into an RSA under the *Traditional Owner Settlement Act 2010*. There are no other native title agreement or terms that have been agreed between BAC and either the Commonwealth or State governments. There is no registered Native title holder for the application area. BAC has no native title claim over the application area and as such Council is not obliged to register BAC as a RAP under sections 151(2) and (2A) of the Act.

Council notes that in 2004 the State entered into a Cooperative Management Agreement with YYNAC to facilitate greater cooperation between the Yorta Yorta People and the State in management of designated areas of Crown land in Yorta Yorta country. In October 2010, YYNAC became a party to a Traditional Owner Land Management Agreement with the State entered into under the *Conservation, Forests and Lands Act 1987*. This agreement

establishes the Yorta Yorta Traditional Owner Land Management Board to jointly manage Barmah National Park (located within Application Area B).

*A body representing Traditional Owners to the Decision Area*

BAC has 170 adult members and 52 child members. BAC's Rule Book states that a member must be at least 16 years old; and an Aboriginal or Torres Strait Islander person who is a descendant of one of the following (Apical Ancestor) family groups: i) Jenny McCulloch and George Charles; ii) Kitty Atkinson/Cooper iii) Edward Walker; iv) Thowmunga – grandfather of Luana (Lily) Milawa; v) Mulwella – mother of Alfred Morgan and Bagot Morgan.

As set out in the reasons for decision relating to the YYNAC dated 14 September 2007, Council indicated that it accepted BAC, which was then known as the Bangerang Cultural Centre Co-operative Ltd (**BCCC**), were representative of Traditional Owners in that application area, but took the view that YYNAC represents a wider group of traditional owners than BCCC, and that the membership of YYNAC was intended to include all traditional owners of the area that was the subject of the Yorta Yorta native title claim. Accordingly, Council believes that, as traditional owners of the area, members of BAC are entitled to participate in YYNAC, along with other traditional owners of that area.

BAC disputes the YYNAC assertion, that the organisation is representative of all clan groups within their structure, including Bangerang Clan Group. The Thowmunga family is not included in YYNAC's membership and therefore only represented by BAC. Council notes that BAC is a Traditional Owner organisation but, as set out below, BAC has not provided Council with evidence to satisfy it that the organisation is collectively representative of Traditional Owners of the Decision Area.

*Historical & contemporary links & cultural heritage management experience*

The BAC RAP Application was made based on traditional links and on its historical and contemporary links to Country. Included in support of their claim of historical and contemporary links BAC provide reference to documentation asserting Bangerang people's involvement in spheres including cultural heritage, land care, education, arts, sporting and the church, lists of published works and references detailing historical contact with Bangerang people throughout the Decision Area, letters of support from contemporary organisations and local government recognition through the establishment of the Bangerang ark in Corowa and the Bullawah Cultural Trail in Wangaratta.

Council also notes BAC's cultural heritage management experience through items such as the establishment of the "The Bangerang Keeping Place" also referred to as the Bangerang Cultural Centre Co-operative and the first Aboriginal museum in 1982, work with the Cumeragunja Local Aboriginal Land Council (CLALC) - custodian of the area along the Murray known as Cumeragunja, recognition of the life work of Bangerang Elder (Mr John 'Sandy' Atkinson) who was awarded an Order of Australia Medal (1983) in recognition of

his contribution to the collection Barapa National Indigenous Landcare Awards 2009, the Possum Skin Cloak (Brigana) made by Mr Kevin Atkinson and worn by Irene Thomas during the opening of the 2006 Commonwealth Games, the story published by Irene Thomas telling of the creation of the Murray River, BAC Board members' formal qualifications and experience in Cultural Heritage Management, and members' engagement in cultural heritage management in NSW via referral from Land Councils and NSW Parks.

BAC has provided evidence of participation in cultural heritage management to Council's satisfaction.

*Corporate governance, capacity, Cultural heritage decision making and CHM expertise*

The BAC was established and registered with ORIC in 2014. BAC's Board has exclusively Aboriginal Directors. The gender mix is 3 female members, 4 male members and 1 vacancy and the Board includes membership across generations. BAC has not provided information about its operating systems and infrastructure. There is no detail of the systems in place for cultural heritage management or operating with other Traditional Owner Group organisations with either established or claimed interests in the Decision Area. BAC has stated its intent to develop memorandums of understanding (MoU) with these interest groups and has held discussions with Taungurung Land and Water Aboriginal Council and Duduroa Dhargal Aboriginal Corporation. However, to date, no MoU had been reached.

*Views of neighbouring and interested parties*

Council considered a total of 15 submissions that were received in response to the BAC RAP application via the public comment period. The majority of submissions were received from Traditional Owner organisations or their appointed representatives.

Council notes the following submissions in particular:

1. Dhulanyagan Ulupna Family Clan provided an objection on the basis of representation and overlapping interests;
2. Holding Redlich (on behalf of the Ngurai Illum Wurrung and Waywurru People) provided commentary that the Decision Area encroaches on Country that has connections with Ngurai Illum Wurrung and Waywurru People;
3. Waywurru Women's Collective objects to the application on the basis of Apical Ancestors, language and overlapping interests of the Waywurru People including assertions BAC claims to represent Mary Jane Milawa of the Thowmunga line are absent of genealogical and cultural connection to the Dowling family or Bangerang community;
4. Ngurai Illum Wurrung First Nations Clans Aboriginal Corporation provided an objection based on overlapping interests;
5. Duduroa Dhargal Aboriginal Corporations Submission submitted mixed support on the basis of overlapping interests in Area A and advising that discussions between BAC and DDAC are on-going;

- 6.- Dhudhuroa Waywuru Nations Aboriginal Corporation objected on the basis of s 153, representation and overlapping interests and asserts BAC have not consulted with Dhuduroa or Waywuru Nations and have failed to provide professional responses to matters raised in 2014 asserting these indicate issues of BAC's organisational capacity;
7. Wollithiga Aboriginal Corporation objected to the application on the basis of overlapping interests;
- 8: Yorta Yorta Nation Aboriginal Corporation stated that BAC's RAP application is invalid as BAC applied over an area (Barmah National Park) for which YYNAC is a TOGE and had failed to seek their consent; YYNAC further state that BAC did not address all of the reasons for Council's refusal of its 2014 application (namely, that BAC had not provided any materials, agreements, operational plans or policies explaining how the two groups could carry out functions as dual RAP in the areas). YYNAC submitted examples of offers to BAC and BAC members to participate in decision making and cultural heritage management.

Council received BAC's reply to submissions and noted that BAC's reply failed to address most objections raised, particularly regarding matters of inclusivity and representation.

#### *Core Country and Competing Applications*

BAC's RAP Application Area B overlaps with the YYNAC's appointed RAP Area. Application Area B also overlaps with areas which Taungurung Land and Waters Aboriginal Council, Ngurai Illum Wurrung First Nations Aboriginal Corporation, Wollithiga Aboriginal Corporation and Dhulanyagan (Ulupna) Family Clan (also represented by the YYNAC) claim interest in. Application Area A has known overlapping areas of interest to the following parties: Dalka Warra Mittung Aboriginal Corporation, Duduroa Dhargal Aboriginal Corporation, Dhudhuroa Waywuru Nations Aboriginal Corporation and the Yaitmathang Indigenous Lands Incorporated (YILI).

The Decision Area, including Area A which BAC asserts is core country, is contested by other Traditional owner groups. Evidence available to Council does not support BAC's claims of representing all Traditional Owners as BAC's membership rules do not allow it to represent the other Traditional Owner groups asserting interest in the Decision Area.

#### **4. Applications and Findings**

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

##### ***a) Legislation***

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

BAC 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 BAC's RAP 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. Council concludes that BAC has not established that any of the factors set out in ss 151(3)(a), 151(3)(b), s 151(3)(e) and s 151(3)(f) applied. In considering the matters set out in s 151(3)(a), Council determined that BAC is not a native title party for the Decision Area. In considering the matters set out in s 151(3)(b), Council determined 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 s 151(3)(e), Council determined 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 determined that there had been no relevant land and natural resource management agreements entered into by BAC with the State.

Council considered, in accordance with ss 151(3)(c) and 151(3)(d), the question of whether BAC 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 membership rules and Register of Ancestors included in the BAC rule book and competing claims to traditional ownership of the Decision Area, Council was not able to be satisfied that BAC is an appropriate organisation to represent Traditional Owners within the Decision area.

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

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

Council also considered the current registration of YYNAC as RAP. Because YYNAC is a current RAP, it was necessary to consider the application of s 153 of the Act.

Pursuant to s 153 of the Act, more than one body may be appointed RAP for a particular area if Council is satisfied that having more than one RAP for the area will not unduly hinder the ability of any of the RAPs for the area to exercise their powers and carry out functions under the Act; and will not otherwise hinder the effective operation of the Act.

Submissions from YYNAC, DWNAC and Holding Redlich (on behalf of the Ngurai Illum Wurrung and Waywurru People) raise issues in relation to s 153, asserting that it would not be possible to carry out functions and powers as dual RAP for various reasons, including that BAC had not provided any materials to explain how functions and powers would be carried out as dual RAPs. Council notes that, while BAC has indicated that it would intend

to work with shared interest holders if it was appointed as RAP, BAC has not provided any materials, agreements, processes or policies as to how a dual RAP will carry out functions and processes.

As such, at this time, Council cannot be satisfied that the requirements of s 153 are satisfied to permit more than one body to be registered as the RAP for any part of 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'.

It is Council's policy to accord appropriate status to Traditional Owners including a preference to appoint Traditional Owner bodies corporate as RAPs.

It is also Council's policy 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 its 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 by s 19(2)(d) of the Charter.

Council formed the view that the decision to decline to register BAC as the RAP in relation to the Decision Area is consistent with its obligations under the Charter.

In deciding not to grant the application in relation to the Decision Area, Council took account of the fact that, BAC will not be able to protect Aboriginal cultural heritage in the Decision Area as a RAP. However, Council notes 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 the obligations of 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 s 151(3), particularly the factor contained in s 151(3)(c), 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 Bangerang 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 rejecting BAC's RAP application in relation to the Decision Area.

**Conclusion**

Council declines BAC's application to be registered as a RAP over the Decision Area.

Denise Lovett

Denise Lovett

**Chair**

**Victorian Aboriginal Heritage Council**

# Attachment 1

