

STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL (COUNCIL) IN RELATION TO AN APPLICATION BY YALUK-UT WEELAM ELDERS COUNCIL ABORIGINAL CORPORATION (YALUK)

DATE OF DECISION: 28 June 2018

1. Decision

The Council has declined the application of the Yaluk to be a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)*.

2. Decision Area

The area that Yaluk sought to be a RAP over (**Decision Area**) is shown in the attached map (**Attachment 1**). This area extends from the mouth of the Werribee River to and including Wilsons Promontory National Park excluding the area in respect of which Council appointed the Bunurong Land Council Aboriginal Corporation (**BLCAC**) as RAP in July 2017. It includes north western, western, eastern and south eastern Metropolitan Melbourne, most of Port Phillip Bay, Western Port Bay, and Cape Liptrap.

3. Background to the Decision

a) Relationship between Boon Wurrung Foundation Limited and Yaluk

The Boon wurrung Foundation Limited (**BWFL**) wrote to Council in June 2018 confirming it had formed Yaluk to undertake cultural heritage management services on behalf of BWFL.

b) 2007 RAP application from BWFL

On 1 June 2007, BWFL applied for registration as a RAP over the Decision Area. The 2007 application area was also the subject of a competing RAP application from the BLCAC submitted on 6 July 2007. On 27 August 2009, Council declined the RAP applications made by both the BLCAC and the BWFL.

In its written reasons relating to its decision not to register BWFL as a RAP, Council acknowledged that members of the BWFL were Traditional Owners of Boon Wurrung (Bunurong) Country¹. In making its decision Council also acknowledged that members of BLCAC were Traditional Owners of Boon Wurrung Country and noted that neither the BWFL nor BLCAC was prepared to accept the other group's claim to be Traditional Owners

¹ Council notes there are over 60 different spellings of this Aboriginal group found in the literature, including "Boon Wurrung", "Bunurong", "Boonerwurrung", "Bunwurrung" etc. The Council has used the spelling "Boon Wurrung" because it is the spelling used by BWFL. In using Boon Wurrung, Council also notes the alternative "Boonwurrung" which is the spelling used by the Victorian Aboriginal Corporation for Languages to assist users with correct pronunciation.

of Boon Wurrung Country. Given this situation, Council gave consideration to whether it could either appoint two RAPs over the 2007 application area, or whether BWFL should be appointed as the sole RAP in the area.

Council came to the view that it was not appropriate to register two RAPs to represent Boon Wurrung Country in the circumstances, and expressed concern about appointing two separate organisations from the same Traditional Owner group. Council was of the view that a single, inclusive organisation would be the most appropriate vehicle to be appointed as the RAP.

Council also considered that BWFL was not, at that time, the appropriate organisation to solely represent the Traditional Owners of Boon Wurrung Country. Council expressed the view that, in order to appoint BWFL as the sole RAP for Boon Wurrung Country, Council would need to be satisfied that BWFL would be able to accommodate within its membership members of BLCAC who have traditional or familial links to that Country.

At the time of making its decision in August 2009, Council was not satisfied that BWFL accepted the traditional or familial links of BLCAC members, and concluded that the BWFL was not the appropriate organisation to solely represent Aboriginal people with traditional or familial links to the application area.

c) 2013 RAP application from BWFL

On 30 December 2013, BWFL submitted a second RAP application. The 2013 RAP application area was the subject of competing RAP application from the Bunurong Land and Sea Association Incorporated (**BLSAI**) submitted on 4 April 2014. On 21 May 2015, Council declined the RAP applications made by both the BWFL and the BLSAI.

In its written reasons relating to its decision not to register BWFL as a RAP, Council noted it had taken into account all correspondence received from BWFL and available research reports. Council had also taken into account public comments.

In accordance with information made available to Council, Council formed a view that:

- the only known Boon Wurrung apical ancestors with living descendants are women abducted by sealers in the early 19th century
- other ancestors may be identified in future but knowledge (at the time of Council's decision) was limited to these women
- given the illegal and clandestine nature of the abductions, it is no surprise that the historical record is ambiguous where Boon Wurrung ancestry is concerned
- five women, collectively, had been identified as being the Boon Wurrung ancestors - they are Jane Foster, Margery Munro, Eliza Nowen, Elizabeth Maynard and Louisa Briggs
- different researchers use the words supported, asserted, unproven, possible and plausible to describe the likelihood of all of the named ancestors being Boon Wurrung ancestors
- each of the five women identified as being Boon Wurrung ancestors were accepted as Boon Wurrung ancestors and Council would be unlikely to change this position unless new information came to light disproving any or all of these claims.

In considering the 2013 RAP application from BWFL, Council was informed BWFL recognised four women as Boon Wurrung ancestors but did not recognise Jane Foster as a Boon Wurrung ancestor.

Given BWFL's position about Boon Wurrung ancestry and that BWFL membership rules prevented descendants of Jane Foster from applying for BWFL membership, Council considered that BWFL was not, at that time, the appropriate organisation to solely represent Aboriginal people with traditional or familial links to the 2013 RAP application area.

d) Other RAP applications from BLCAC

BLCAC applied to be a RAP on two occasions following the decline of its 2007 RAP application. The second application made on 4 November 2010 was refused on 1 July 2011. BLCAC's third application was made on 24 February 2017 in relation to an area consistent with areas claimed in previous BLCAC RAP applications.

BLCAC's third RAP application resulted in the appointment of BLCAC as a RAP for part of the area it applied for in this application. This area is referred to as '**Area A1**'. The northern boundary of Area A1 is a line that extends from around Carrum Downs to Koo wee rup, Drouin and Warrigal. The area includes the Mornington Peninsula, Western Port Bay and Gippsland to the western boundary of the Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**) RAP area and the Tarwin River.

In registering BLCAC as a RAP over Area A1, Council was satisfied that BLCAC was an organisation representing people who identify as being Bunurong or Boon Wurrung, and that such people are the Traditional Owners of Area A1. In this regard, Council took into account all available information including BLCAC's rulebook and membership and was satisfied that BLCAC could accommodate within its membership members of BWFL and other people who identify as being Boon Wurrung.

e) Other competing claims

GLaWAC applied for registration as a RAP over the South Gippsland part of the Decision Area on four occasions, each of which was declined: 18 November 2008 (declined 21 March 2013); 19 July 2013 (declined 5 December 2013); 30 June 2014 (declined 17 July 2015) and 5 May 2017 (declined 26 October 2017).

Wurundjeri Land and Compensation Cultural Heritage Council Aboriginal Corporation (**WLCCHCAC**) applied to be a RAP on 24 August 2007. WLCCHCAC was appointed as a RAP for core Country on 22 August 2008. The remaining application area, which lay to the south of the WLCCHCAC appointed area and overlapped claims by BLCAC and BWFL, was declined by Council on 4 April 2014. On 2 December 2014 WLCCHCAC applied to be a RAP for the second time for an area that extended south from the WLCCHCAC appointed area to Port Phillip Bay, Frankston, Cranbourne and Western Port Bay; eastward from Werribee River to the surrounds of Bunyip River and Bunyip State Park; and included two

discrete areas – one around Drouin, and the other north east of Drouin. This second application was declined by Council on 4 September 2015.

In addition, Council noted WLCCHCAC's objection which states that part of the Decision Area overlaps country claimed in WLCCHCAC's Threshold Statement under the *Traditional Owner Settlement Act 2010* and is subject to boundary agreement making processes by the Right People for Country program.

4. 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 (s 151(2) of the Act)

Council noted Yaluk 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 but that Gunaikurnai people are a registered native title claimant in respect of the South Gippsland part of the Decision Area that includes Wilsons Promontory.

b) Recognition and settlement agreement (s 151(2A) of the Act)

Yaluk 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*.

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

Yaluk is not a native title party for the Decision Area.

Council noted that, in August 2014, a Native Title Determination Application was filed on behalf of the Gunaikurnai people over the South Gippsland part of the Decision Area. This was subsequently registered by the National Native Title Tribunal on 20 April 2015. Accordingly, GLaWAC is a registered native title claimant, and a native title party for the Decision Area.

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

The RAP application from Yaluk refers to an Indigenous Land Use Agreement for the Blairgowrie Safe Boat Harbour (**Blairgowrie ILUA**), registered on 21 December 2001. Council noted this agreement relates to a small part of the application area and was signed on behalf of the 'Boonerwung' people by Carolyn Briggs.

Council noted the Blairgowrie ILUA was not made with the Minister on behalf of the State and is therefore not a 'native title agreement' for the purposes of the Act. No terms of any native title agreement were otherwise made available to Council.

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

i) Membership and representativeness

As mentioned above in section 3. c), in previous decisions made by Council in relation to RAP applications from organisations representing Boon Wurrung/Bunurong people, Council recognised five women as Boon Wurrung/Bunurong ancestors (Elizabeth Maynard, Eliza Nowan, Jane Foster, Marjorie Munro and Louisa Briggs). In making those decisions Council also stated it would be unlikely to change this view unless new information came to light that disproved this understanding of Boon Wurrung ancestry.

Section 3.1 of the Yaluk rule book states that a Yaluk member must be over the age of 18 years old and an Australian Aboriginal or Torres Strait Islander person who is born of at least one parent with a Yaluk-ut Weelam or Boon Wurrung ancestor listed in the Register of Ancestors as set out in Schedule 4 of the rule book. Schedule 4 lists Louisa Briggs as a primary ancestor, and the children of Louisa Briggs as secondary ancestors. The Yaluk rule book also states that the Yaluk directors may initiate research in relation to other primary or secondary ancestors to be included in the Register of Ancestors.

Council noted the eligibility criteria set out at section 3.1 of the Yaluk rule book and that the list of Ancestors entered onto the Register of Ancestors only includes one of the five women Council has accepted as Boon Wurrung ancestors. While Council noted that section 3.2(a) of the rule book provides that the Register of Ancestors can be amended, Yaluk did not provide any indication as to whether it would be amending the Register to be more inclusive and representative and, if so, the nature of any such amendment.

Council received and noted comments from BLCAC regarding Boon Wurrung people's representation. BLCAC stated it is 'an inclusive body representing around 200 people from all five known Boon Wurrung/Bunurong apical ancestors, including Louisa Briggs, and that it has made every effort to respectfully include Yaluk members in the inclusive model it has achieved'. Yaluk was provided with these comments and the opportunity to respond to them. Yaluk did not respond to BLCAC's comments.

Council accepted that there are members of Yaluk who are Yaluk-ut Weelam or Boon Wurrung Traditional Owners. However, Council was not satisfied that Yaluk is the appropriate organisation to represent Boon Wurrung Traditional Owners.

ii) Whether the Yaluk-Ut Weelam and Boon Wurrung peoples are Traditional Owners

Council carefully considered the information provided by Yaluk supporting the relationship and links of the Yaluk-ut Weelam and Boon Wurrung peoples to the Decision Area.

However, Council noted the Decision Area overlaps areas relevant to current and declined RAP applications by BLCAC, GLaWAC and WLCCHCAC. Council also noted comments received from two of these corporations objecting to Yaluk's claims due to their interests in the Decision Area.

Council referred to its reasons for declining previous RAP applications from organisations representing Boon Wurrung/Bunurong people, GLaWAC and WLCCHCAC.

Having regard to the competing claims to traditional ownership of the Decision Area, Council was not able to be satisfied that Yaluk-ut Weelam /Boon Wurrung people are the Traditional Owners of the Decision Area.

f) Representation - historical or contemporary interest (s 151(3)(d) of the Act)

Yaluk does not claim to be a body representing Aboriginal people that has a historical or contemporary interest in the Aboriginal cultural heritage relating to the Decision Area.

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

A title search did not show any relevant grant of land. Council had not otherwise been notified of any relevant grant of land by Yaluk, or by any other party.

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

Yaluk did not draw Council's attention to any land and natural resource management agreement to which it is a party.

To the extent it could be relevant to this consideration, Council had regard to matters at 4(d) above. However, Council noted that the ILUA was not an agreement entered into with the State and is therefore not a 'land and natural resource management agreement' for the purposes of the Act.

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

Council acknowledged Boon Wurrung people's long history of involvement in cultural heritage management and noted the account given by Yaluk in its RAP application of the experience and accomplishments of its directors and members in this regard.

5. Reasons for decision

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

a) Legislation

In deciding Yaluk's RAP 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.

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

Council considered, in accordance with ss 151(3)(c) and 151(3)(d), the question of whether Yaluk 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 Yaluk rule book and competing claims to traditional ownership of the Decision Area, Council was not able to be satisfied that Yaluk is an appropriate organisation to represent Boon Wurrung Traditional Owners.

Having regard to the material in support of Yaluk's claim that the Yaluk-ut Weelam/Boon Wurrung are the Traditional Owners of the Decision Area, as well as the competing claims to traditional ownership of the Decision Area by groups representing the Gunaikurnai people and Wurundjeri people, Council was not able to be satisfied that Yaluk-ut Weelam/Boon Wurrung people are the Traditional Owners of the Decision Area.

Council noted that Yaluk does not claim to represent people who have a historical or contemporary interest in the Aboriginal cultural heritage relating to the Decision Area.

Council acknowledged Yaluk-ut Weelam/Boon Wurrung people's involvement in cultural heritage management and noted Yaluk'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'.

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 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 s 19(2)(d) of the Charter.

Council formed the view that the decision to decline to register Yaluk over this Decision Area is compatible with the Charter.

Council took account of the fact that, in declining the application over the Decision Area, Yaluk 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 obligations on 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 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 Yaluk-ut Weelam/Boon Wurrung 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 Yaluk's RAP application over the Decision Area.

Conclusion

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

While Council recognises there are members of Yaluk who are Yaluk-ut Weelam or Boon Wurrung Traditional Owners and that Yaluk members have had a long history of involvement in cultural heritage management, these factors are outweighed by the factors that do not support the Yaluk RAP application (primarily, that Yaluk has not established that it represents the Traditional Owners of the Decision Area).



Rodney Carter
Chairperson
Victorian Aboriginal Heritage Council

Attachment 1

