



VICTORIAN ABORIGINAL  
HERITAGE COUNCIL

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## STATEMENT OF REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL TO IMPOSE A CONDITION ON THE REGISTRATION OF THE FIRST PEOPLE OF THE MILLEWA-MALLEE ABORIGINAL CORPORATION

**DATE OF DECISION: 12 January 2024**

**DATE OF STATEMENT OF REASONS: 15 February 2024**

### 1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has decided to impose the following condition on the registration of the First People of the Millewa-Mallee Aboriginal Corporation (**FPMMAC**) under section 154A(1) of the *Aboriginal Heritage Act 2006* (**Act**):

- (1) By 12 April 2024, FPMMAC is required to amend its rule book so that descendants of Archibald Pepper and Jessie Mayne are eligible for full membership of FPMMAC.
- (2) The condition must be reviewed by the Council in the event that a native title determination or recognition and settlement agreement is made in respect of the Registered Aboriginal Party (**RAP**) area, or any part of the RAP area, affected by the condition.

(the **Condition**)

### 2. Background

#### ***a) RAP applications and decisions***

FPMMAC was incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* on 23 July 2015. It was established to represent the Traditional Owners of the Millewa-Mallee, including for the purposes of a native title determination application and to seek appointment as a RAP. On 8 October 2015, the First People of the Millewa-Mallee Claim Group (**FPMM**) filed a native title determination application in the Federal Court.

FPMMAC initially applied to be registered as a RAP on 28 January 2016. On 6 December 2016, Council rejected that application, not being satisfied that FPMMAC had sufficiently established that it was a body representing all of the Traditional Owner family groups of the application area or that FPMMAC was sufficiently inclusive or representative of those Traditional Owners.

On 27 April 2018, FPMMAC submitted a second application for registration as a RAP in respect of the application area, which was divided into northern and southern zones. On 5 December 2018, Council approved FPMMAC's application to be a RAP in respect of the northern zone.

### ***b) Amendment of eligibility rules***

In October 2020, FPMMAC members decided to remove Archibald Pepper and Jessie Mayne as apical ancestors for formal recognition purposes, and to remove the Pepper and Mayne families as an identified family for the purposes of membership eligibility in the FPMMAC Rule Book. These families had been eligible for membership of FPMMAC since a decision to this effect was made by FPMMAC's members on 25 March 2017, which was reflected in an amendment to the FPMMAC Rule Book on 4 November 2017.

### ***c) Complaint by Nyeri Nyeri Working Group***

The Nyeri Nyeri Working Group, comprising descendants of Archibald Pepper and Jessie Mayne (the **Complainants**), identify themselves as the Traditional Owners of Nyeri Nyeri Country in north west Victoria.

On 4 March 2022, the Complainants made a complaint to Council (the **Complaint**), alleging that FPMMAC was no longer capable of having RAP status because it was engaging in conduct that justifies Council cancelling or suspending its RAP status in accordance with s 156 of the Act, or alternatively under a purported implied power to revoke FPMMAC's RAP status under s 151 of the Act, read with s 41A of the *Interpretation of Legislation Act 1984*. The basis for the Complaint was that FPMMAC had changed its rules to exclude the Nyeri Nyeri Working Group from eligibility for membership of FPMMAC, notwithstanding that FPMMAC's RAP status was approved on the basis that it represented all the Traditional Owners in the RAP area.

The Complainants alleged that their exclusion from membership of the FPMMAC had resulted in the FPMMAC being unable to perform various functions in respect of Nyeri Nyeri Country.

### ***d) Steps taken by Council to resolve the complaint***

One of Council's functions under the Act is to 'manage, oversee and supervise the operations of registered Aboriginal parties' (s 132(2)(ch)). Council has the power to impose conditions on a RAP's registration under s 154A(1) of the Act and to suspend or revoke its registration in certain circumstances under s 156 of the Act. Council considers complaints against RAPs in accordance with Council's Complaints Against RAPs Policy (the Policy).

#### ***i) Preliminary assessment***

The Office of the Victorian Aboriginal Heritage Council (**OVAHC**) conducted a preliminary assessment of the Complaint. As part of the preliminary assessment process, on 23 June 2022, FPMMAC provided a written response to the Complaint, disputing the Complainants' allegations on various grounds. OVAHC provided FPMMAC's response to the Complainants on 26 July 2022.

On 26 July 2022, the Complainants provided a reply to FPMMAC's response. On 13 September 2022, OVAHC wrote to the parties to advise that the matter was within scope of the Policy and that pursuant to the Policy, OVAHC would conduct an investigation into the Complaint.

#### ***ii) Informal dispute resolution***

On 14 September 2022, Council proposed that the parties attempt to resolve the Complaint through informal dispute resolution and advised the parties that Council would defer considering the matter further until that process had concluded.

On 7 February 2023, the Complainants advised Council that informal dispute resolution had not resolved the Complaint.

iii) Investigation

On 22 February 2023, as part of its investigation of the Complaint, OVAHC provided the parties with an opportunity to provide any further information and evidence. On 10 March 2023, the Complainants and FPMMAC provided their responses. OVAHC provided both responses to the other party for further comment.

On 15 March 2023, FPMMAC advised Council that it did not intend to provide a substantive reply to the additional materials submitted by the Complainants. On 23 March 2015, the Complainants provided Council with material in reply to FPMMAC's response of 10 March 2023.

On 4 May 2023, at the request of the Complainants, Council provided the Complainants with a redacted copy of FPMMAC's 2018 RAP application. Both parties were given a further opportunity to respond in light of Council's decision to provide that document. On 19 May 2023, FPMMAC advised that it would not be providing any further response. On the same day, the Complainants provided a further response to Council.

iv) Proposed outcome

On 5 September 2023, having considered all of the material provided by the parties in the course of the preliminary assessment and investigation, Council notified the parties that it was proposing to impose the Condition. Council requested the parties provide a written response to the proposed outcome, following which Council would decide whether it would impose the Condition. The parties provided written responses to the proposed imposition of the Condition.

v) Notice and decision

On 13 December 2023, after carefully considering the issues raised by the Complaint, the written responses and the material provided by the parties throughout the investigation of the Complaint and in response to Council's proposal to impose the Condition, Council decided to issue a notice to FPMMAC under s 154A(2) of the Act that it intended to impose, on 12 January 2024, the Condition. FPMMAC did not respond to this notice.

On 12 January 2024, Council notified the parties that it had imposed the Condition on FPMMAC's RAP registration.

### **3. Reasons for decision**

#### **a) Imposition of Condition**

The Council has discretion under s 154A(1) of the Act to impose conditions on the registration of a RAP at any time.

In deciding to impose the Condition, Council reflected on its earlier decision to appoint FPMMAC as a RAP. That decision was based on, among other things, FPMMAC being representative and inclusive of the Traditional Owners of the RAP area. Council considered that a condition requiring the Complainants to be eligible for membership of FPMMAC is consistent with its earlier decision to appoint FPMMAC as a RAP, in particular to ensure that FPMMAC is representative and inclusive of the Traditional Owners of the RAP area.

Council noted that, in its decision to approve FPMMAC's application for registration in 2018, Council took into account that it has the ongoing function of managing, overseeing and supervising the operations of FPMMAC under s 132(2)(ch) of the Act, and that it is empowered under s 154A(1) of the Act to impose conditions on FPMMAC at any time, which could include a condition to ensure the ongoing inclusiveness and representativeness of FPMMAC.

Council further noted that whether an applicant is a 'body representing the Traditional Owners of the area' is a mandatory relevant consideration in deciding whether to approve a RAP's application for registration under s 151(3)(c) of the Act.

Council's overarching response to the matters raised by both FPMMAC and the complainants in their written material was that Council's decision to impose the Condition was intended to ensure that FPMMAC is in the same position as it was in when it was registered as a RAP, at which time the complainants were eligible for membership.

i) Matters raised by FPMMAC relating to the Condition

In its written material, FPMMAC asserted that the evidence did not support a conclusion that descendants of Archibald Pepper and Jessie Mayne were Traditional Owners of the RAP area. The Complainants rejected that contention and asserted that they were Traditional Owners of part of the RAP area.

Having considered the material provided by both parties, Council was satisfied that imposing the Condition is consistent with its decision to appoint FPMMAC as a RAP and the objective of ensuring that FPMMAC is representative and inclusive of the Traditional Owners of the RAP area. Council noted in particular the material provided by FPMMAC in support of its second RAP application, including the FPMMAC Rule Book, Register of FPMMAC members, and the FPMM Threshold Statement (Part A) and Supplementary Information to Threshold Statement (Part A), which Council relied on in deciding to approve FPMMAC's application for registration. The material provided by FPMMAC in its second RAP application and relied on by Council in its decision to appoint FPMMAC as a RAP included statements that the descendants of Archibald Pepper and Jessie Mayne were eligible for membership. Council is not satisfied that there has been a change in circumstances since Council made its decision to register FPMMAC as a RAP that would justify an amendment in the Rule Book to exclude the Complainants from eligibility for membership.

FPMMAC asserted that the imposition of the Condition would impact matters beyond FPMMAC's role as a RAP and issues that relate to Aboriginal cultural heritage. However, Council was satisfied that imposing the Condition is consistent with the broad scope of its power to impose conditions on a RAP's registration under the Act.

FPMMAC further asserted that risks to Aboriginal cultural heritage in the RAP area would be more appropriately managed through an agreed heritage process, which would involve, among other things, the Complainants being given notice of and an opportunity to comment on matters that are likely to adversely impact Aboriginal cultural heritage in the RAP area. The Complainants opposed this proposal. Council considered that this alternative proposal was unsatisfactory because it would not provide the Complainants with the express right to participate in FPMMAC's decision-making in relation to Aboriginal cultural heritage, as they were entitled to do at the time FPMMAC was registered as a RAP.

FPMMAC further asserted that it could not amend its own rule book of its own accord, and that the imposition of the Condition would therefore be contrary to its obligations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Council considered that this point did not preclude the imposition of the Condition. This is because FPMMAC may introduce the Condition in compliance with applicable rules and legislation, including the requirements of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. Council further considered that the effect of non-compliance by FPMMAC with the Condition would be limited to a consequence pursuant to the Act, which is that it would empower the Council to revoke FPMMAC's registration under s 156(1A).

FPMMAC also argued that the imposition of the Condition would complicate issues that may be mediated as part of the FPMM native title claim. Council was satisfied that the Condition would not preclude FPMM from continuing to progress its native title claim. Council further noted that the membership condition must be reviewed by Council in the event that a native title determination is made in respect of the RAP area, or any part of the RAP area, affected by the condition.

FPMMAC proposed that Council consider whether to impose the Condition after the resolution of the FPMM native title proceeding. Council was not satisfied that this is an appropriate option given the uncertainty as to when that proceeding might resolve and the effect on and consequences for the Complainants in the meantime.

ii) Matters raised by the Complainants relating to the Condition

The Complainants proposed that the Condition be amended to the effect that:

- the Complainants must be eligible to become members of the FPMMAC Committee of Management without having to wait for the next election cycle;
- various groups should be represented in accordance with the number of members of the organisation within each group;
- descendants of Archibald Pepper and Jessie Mayne must have autonomy in respect of matters which impact on Nyeri Nyeri Country; and
- FPMMAC must provide the Complainants with an opportunity to assess the financial position of FPMMAC.

Council did not consider that the amendments to the Condition proposed by the Complainants were necessary or appropriate. Council determined that the Condition in its original form addresses its concerns relating to the inclusivity and representation of FPMMAC by restoring the Complainants' eligibility for membership of FPMMAC. Council further determined that it is appropriate that the governance of FPMMAC is otherwise a matter for its members, as was the case at the time of FPMMAC's registration as a RAP.

iii) Charter of Human Rights and Responsibilities

Prior to making the decision to impose the Condition, Council gave careful consideration to the distinct cultural rights of Aboriginal persons recognised in section 19(2)(d) of the Charter.

Council took account of the fact that a failure to resolve the matters raised by the Complaint could result in the exclusion of the Complainants from exercising their cultural rights in relation to the RAP area.

Accordingly, Council formed the view that the decision to impose the Condition is consistent with its obligations under the Charter.

#### **b) Revocation of registration**

Under s 156(1)(d) of the Act, Council has a discretion to revoke or suspend a RAP's status if it believes on reasonable grounds that a RAP has failed to act in good faith in the discharge of any of its functions or the exercise of any of its powers under the Act.

The Complainants sought the revocation of FPMMAC's RAP status. Council considered the various allegations by the Complainants that FPMMAC had failed to act in good faith, including:

- FPMMAC had failed to act in good faith by amending its eligibility rules to exclude descendants of Archibald Pepper and Jessie Mayne from membership of FPMMAC; and
- FPMMAC achieved RAP status on the basis that it is representative and inclusive of all Traditional Owners within the RAP area, so that it cannot continue, in good faith, to claim that it is inclusive and representative of all Traditional Owners within the RAP area when it exercises its powers and discharges its responsibilities under the Act in respect of Nyeri Nyeri Country.

FPMMAC stated that the decision of FPMM to remove Archibald Pepper and Jessie Mayne as apical ancestors was made following mediation with the respondent parties in the FPMM native title proceeding. FPMMAC asserted that Archibald Pepper and Jessie Mayne were excluded as apical ancestors on the basis that, among other reasons, FPMM does not recognise them, and they are recognised by other Traditional Owners in areas outside the RAP area as apical ancestors for Wotjobaluk and Barengi Gadjin (for Archibald Pepper), and Wadi Wadi and/or Wemba Wemba (for Jessie Mayne).

Council was not satisfied that there was sufficient evidence for it to form a reasonable belief that FPMMAC has not acted in good faith based on the information available to Council.

The Complainants alternatively sought the revocation of FPMMAC's registration in reliance on a purported implied power to revoke a RAP's registration under s 151 of the Act, read with s 41A of the *Interpretation of Legislation Act 1984*.

Council was not satisfied that it has such a power. Section 41A provides, relevantly, that if an Act confers power to make, issue or grant an instrument, that power shall, unless the contrary intention appears, be construed as including a power, exercisable in the same manner and subject to the same conditions or limitations (if any), to repeal, revoke, rescind, amend, alter or vary an instrument made in the exercise of that power. Council considered that s 156 of the Act evidences a contrary intention by exhaustively stating the circumstances in which, and the procedure by which, a RAP's registration may be revoked.

On this basis, Council was not satisfied that it was empowered to make a decision to revoke the registration of the FPMMAC as a RAP on these grounds. Council therefore did not consider whether there exists a factual basis for making a decision as to the revocation of the FPMMAC's registration as a RAP on these grounds.

#### **4. Conclusion**

For the above reasons, Council decided to impose the Condition on FPMMAC's registration as a RAP pursuant to s 154A(2) of the Act.



DENISE LOVETT

**CHAIRPERSON**

VICTORIAN ABORIGINAL HERITAGE COUNCIL