

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

DATE OF DECISION: 07 August 2024

1. Decision

In these reasons, Council refers to the area which was the subject of the Application as the **Application Area**.

The Victorian Aboriginal Heritage Council (**Council**) has determined an application (the **Application**) made by the Wamba Wemba Aboriginal Corporation (**WWAC**) for registration as a Registered Aboriginal Party (**RAP**) under section 151 of the *Aboriginal Heritage Act 2006* (Vic) (**the Act**).

Council has determined to register WWAC as a RAP in respect of part of the area (**Decision Area**) for which WWAC sought to be registered as a RAP. A map depicting the Decision Area is set out at **Attachment 1**.

Council has determined not to register WWAC as a RAP in respect of part of the Application Area (the **Non-RAP Area**).

In making the decision, Council took into account all relevant information provided to it in respect of the Application.

2. Decision Area

The Decision Area extends from a point on the Murray River to the east of Murraydale, along the Murray River to a point north of Lake Boga, and then turns south to include Lake Boga (township and the waterbody). From Lake Boga it proceeds south along a series of roads and channels including the Swan Hill-Quambatook Road until it reaches a point on an unnamed channel to the south of Towaninny North Nature Conservation Reserve. From here the southern boundary is composed of straight line segments heading south-west through Dumosa to approach the eastern limits of Birchip. It then proceeds north towards Lake Tyrrell. From Lake Tyrrell the boundary heads east through Lake Wahpool, Chillingollah, Pira, Woorinen North, Tyntynder South and back to join the starting point on the Murray River. The Decision Area does not overlap with any other current RAP boundaries, nor are there any other current RAP applications over the area.

3. Findings and Determinations

In determining the application, Council made the following findings of fact, based on the evidence and other material detailed below in relation to the decision to register WWAC as a RAP in respect of the Decision Area and not to register WWAC as a RAP for the Non-RAP Area. Where Council has made a determination, this is set out below.

a) Whether WWAC is a Native Title Party or a Traditional Owner Group Entity (ss 151(2), (2A), (3)(a) and (3)(b) of the Act)

Findings of Fact

The Wamba Wemba People's Native Title Claim Group filed a determination application (the **NT Application**) under the *Native Title Act 1993* (Cth) (**NT Act**) on 23 December 2021. The Application Area includes part of the area subject to the NT Application (being the area which is within Victoria).

The NT Application was made by ten named individuals on behalf of the Wamba Wemba People's Native Title Claim Group.

In two separate decisions of 22 April 2022 and 28 October 2022, the National Native Title Tribunal found that the claim of the Wamba Wemba People's Claim Group did not satisfy all of the conditions set out in sections 190B and 190C of the NT Act. On this basis, the National Native Title Tribunal did not accept the NT Application for registration.

WWAC is not a registered native title holder, a registered native title claimant nor a native title party for the Decision Area. There is no registered native title holder, registered native title claimant nor a native title party for the Decision Area.

WWAC is not a Traditional Owner Group Entity and has not entered into a Recognition and Settlement Agreement (**RSA**) with the State of Victoria under the *Traditional Owner Settlement Act 2010* (Vic).

Council has not been made aware of any native title agreement entered into by WWAC, nor any other party, in respect of the Application Area.

Determinations

WWAC is not a registered native title holder for the Application Area within the meaning of s 151(2) of the Act, and has not entered into an RSA in relation to the Application Area within

the meaning of s 152(2A) of the Act. As such, Council is not obliged to approve WWAC's RAP application under ss 151(2) or 151(2A) of the Act.

In considering the matters set out in s 151(3)(a), Council determined that WWAC is not a native title party for the Application Area, given that:

- WWAC does not appear to be listed as an applicant in the NT Application; and
- in any case, the native title claim filed by the Wamba Wemba People's Native Title Claim Group has not been accepted for registration by the National Native Title Tribunal.

In considering the matters set out in s 151(3)(b), the 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.

b) Whether WWAC is a body representing Traditional Owners of the Application Area (s 151(3)(c) of the Act)

WWAC's Application was made on the basis that WWAC represents the Wamba Wemba Traditional Owners, and that Wamba Wemba Country includes the Application Area.

Council had regard to a range of detailed anthropological and historical information provided by WWAC in support of its claim that Wamba Wemba peoples are the Traditional Owners of the Application Area, including:

- A list of Wamba Wemba Apical ancestors.
- Research findings undertaken by anthropologists, geographers, historians, and genealogists over a period of 20 years upon which the Wamba Wemba Apical ancestor list is based.
- Information on WWAC members demonstrating the relationship between members and identified Wamba Wemba Apical ancestors, Wamba Wemba language, and the Country referred to in the Application.
- Evidence in support of Wamba Wemba peoples' Traditional Ownership of the area referred to in the Application, including the research of 19th century European ethnographers and 20th century ethnographers, anthropologists and linguists.
- Evidence of the existence and use of Wamba Wemba language and its relationship to Wamba Wemba Country.

Council also had regard to WWAC's inclusivity and representation of all the Traditional Owners of the Application Area. In particular, Council considered statements made by WWAC

in its Application in respect of Wamba Wemba Apical ancestors, WWAC's membership criteria as set out in the WWAC Rule Book and ten submissions made in response to the Application.

Apical ancestors

Council noted the list of Wamba Wemba Apical ancestors that was included in the Application, namely:

- **Edward Firebrace** – born circa 1855 and died in Swan Hill 1921
- **Edward Joachim** – born at Nemi near Edwards River
- **Eliza Edwards** – born circa 1840 near Moulamein
- **Ernest McGee** – born circa 1867 on Chowra Station at Neimer Creek, near Moulamein
- **George Allen** – born circa 1858 near Deniliquin
- **Henry Edwards** – born circa 1866 at Moulamein and died at Moonahcullah
- **Jemima Burns** – born circa 1854 at Gannawarra or Swan Hill
- **John Moore** – born 1800s and lived near Moulamein
- **Koombra Campbell (aka Alick)** – born circa 1848, died 1923
- **Mary/Margaret Smith** – born circa 1830
- **Mary Tattambo** – born early 1800s on Gonn Station
- **Richard and Sarah Wilson-Crow** – born early 1800s
- **Robert and David Taylor** – born circa 1850 Barham and 1852 Pental Island
- **Sarah Moore/Mayne** – born near Moulamein
- **Sarah Smith** – born circa 1858 at Long Lake, near Swan Hill
- **Wallin and Kathleen/Kitty**
- **William Day** – born circa 1840 and died near Moulamein 1900
- **William Sampson** – born 1851 at Denilquin and died 1926 at Moonahcullah

WWAC Rule Book

WWAC's Rule Book states that a member must be at least 16 years of age, a WambaWemba Person, and must demonstrate descent from at least one of the Apical ancestors listed in the Wamba Wemba NT Application.

Council requested clarification from WWAC as to why the Rule Book does not include a list of Wamba Wemba Apical ancestors. In response, WWAC noted that this exclusion was intentional, on the basis that the membership of the group will ultimately be determined by the Federal Court through the current Wamba Wemba native title claim. WWAC further assured Council that its list of Apical ancestors is non-exhaustive.

Wamba Wemba First Peoples' Assembly of Victoria Reserved Seat

WWAC informed Council that it had been appointed to a reserved seat in the First Peoples' Assembly of Victoria and that this was evidence of WWAC's representation of Traditional Owners.

Submissions in response to the Application

Council considered a total of ten submissions that were received in response to the Application via the public notification period. The majority of submissions received were from Traditional Owners or their appointed representatives. Council noted the following submissions in particular:

- Submissions by representatives of the Nicholls family which assert that the Application Area overlaps with Wadi Wadi Country over which the Nicholls family has traditional ties.
- Submission by the Davis Family which asserts that the Application Area overlaps with Wadi Wadi Country over which the Davis family has traditional ties.
- Submission by the Wadi Wadi Traditional Owners of Swan Hill (Ricky Kirby, Elsa Kirby, Josephine Kirby, Trevor Kirby and Robyn Charles) which assert that the Application Area overlaps with Wadi Wadi Country over which the group has traditional ties.
- Submission by Raymond Kennedy which objects to the Application on the basis that the Application Area overlaps with the traditional lands of the Wadi Wadi people.
- Submission by the 'Mid North West Working Group' comprised of members nominated by Custodians of Country in Mid North West Victoria, which asserts that the WWAC Rap Application Area overlaps with the Mid North West Custodian's Traditional lands and waters.
- Submission by First Nations Legal & Research Services (**FNLRS**) which asserts the Application Area is subject to the interests of both Wadi Wadi and Barapa Barapa Traditional Owners.
- Submission by Wayne Webster which objects to the Application on the basis that the Application Area overlaps with Barapa Barapa Country.

Findings of fact

Apical Ancestors

Council was satisfied that in relation to WWAC's statements in its Application:

- the list of Wamba Wemba Apical Ancestors is non-exhaustive, and that the Rule Book allows for additional Wamba Wemba Apical ancestors to be included if identified.
- the listed Apical ancestors are based on the continuing knowledge of the Wamba Wemba people, historical records, and extensive research undertaken over a period of two decades.
- that the identified Wamba Wemba Apical ancestors were advertised nationally in the Koori Mail and Herald Sun and extensively through social media, and that an additional two Apical ancestors were identified through this process.
- the above process provided the opportunity for wide consultation with Wamba Wemba peoples to ensure that potential Wamba Wemba Apical ancestors were identified.

WWAC Rule Book

Council noted that it is standard practice among existing RAPs to include a list of Apical ancestors within their Rule Book (as part of its membership criteria). Council further noted that ten of the eleven current RAPs include a list of Apical ancestors within their Rule Books.

Wamba Wemba First Peoples' Assembly of Victoria Reserved Seat

Council was satisfied that WWAC has been appointed to a reserved seat in the First Peoples' Assembly of Victoria. Council noted that to be appointed to a reserved seat, it is necessary for a party to demonstrate a connection to Country but that a seat is not specifically tied to a map of Country and nor does it afford legislative rights in Country. Council had regard to WWAC's appointment to a reserved seat in its consideration of s 151(3)(c) of the Act.

Submissions in response to the Application

- Barapa Barapa Traditional Owner Interests
 - Council noted submissions from the representatives of Barapa Barapa Traditional Owners and had regard to whether the Application Area appears to be subject to competing Barapa Barapa interests.
 - In a public submission received by Council from Wayne Webster, Mr Webster objected to the Application on the basis that the WWAC Rule Book includes Barapa Barapa Apical ancestors. In making this objection, Mr Webster referenced the 2020 Barapa Country Aboriginal Corporation (**BCAC**) RAP application, which included Apical ancestors who are also listed in WWAC's Application. In response, WWAC asserted that in Council's Reasons for

Decision to decline BCAC's RAP Application, Council did not state that it accepted the Barapa Barapa Apical ancestors listed in the BCAC application. Further, Council noted in its decision that *'many of the individuals listed by BCAC as Barapa Barapa Apical Ancestors are also listed by Wamba Wemba Traditional Owners as their Apical Ancestors'* (p 3).

- In a public submission received by Council from FNLRS, FNLRS made several assertions regarding WWAC's Apical ancestors. These assertions are based on FNLRS's experiences in several formal recognition processes involving Wamba Wemba, Barapa Barapa and Wadi Wadi Traditional Owners, its own research, and from multiple Traditional Owners who have contacted FNLRS to assert rights and interests over the Decision area. FNLRS asserted that its research suggests that the Wamba Wemba, Barapa Barapa, and Wadi Wadi peoples are closely related and that many people identify as members of more than one of these groups. FNLRS further asserted that WWAC's Apical ancestors and membership do not accurately represent all Traditional Owners of the Application Area.
 - FNLRS submitted that WWAC's listed Apical ancestors do not include all ancestors previously identified as having connections to the Application Area under the *Wamba Wemba, Barapa Barapa, Wadi Wadi Native Title Claim 2013 (WWBBWW Claim)*.¹ Additionally, FNLRS asserted that WWAC's listed Apical ancestors include ancestors who have been previously identified within the WWBBWW Claim as being either both Barapa Barapa and Wamba Wemba Apical ancestors, or Barapa Barapa Apical ancestors solely. Specifically, FNLRS asserted that WWAC's listed Apical ancestors Koombra Campbell, Ernest McGee, George Allen and David Taylor have been previously identified as Barapa Barapa Apical ancestors.
 - FNLRS also submitted that several Barapa Barapa Traditional Owners, who are descendants of Apical ancestors listed on the WWBBWW Claim, object to the inclusion of some of the Apical ancestors listed in the Application. Specifically, FNLRS identified Koombra Campbell, Ernest McGee, William Sampson and Robert and David Taylor as Barapa Barapa Apical ancestors, and asserted that the descendants of these ancestors did not consent to their inclusion in the Application.

¹ Federal Court File Number VID6005/2000

- FNLRS further submitted that several Traditional Owners have asserted that their Apical ancestors are ancestors in respect of the Application Area but are not included in WWAC's Rule Book. These include Barapa Barapa Apical ancestors Joanna Gardiner, John Terrick, Savina Wise, John Galway and Albert Colger. FNLRS concluded that WWAC's Rule Book does not allow for the inclusive representation of all Traditional Owners for the Decision Area.
- Council noted that WWAC rejects FNLRS' claims. In particular, WWAC rejected the assertion that Koombra Campbell, Ernest McGee, William Sampson and Robert and David Taylor are Barapa Barapa Apical ancestors. WWAC asserted that FNLRS's own research indicates that these ancestors are Wamba Wemba Apical ancestors. WWAC further rejected the assertion that there are Apical ancestors for the Application Area which are not included in WWAC's listed Apical ancestors and submitted that FNLRS has not provided any evidence supporting its claims.
- Noting the interests of Barapa Barapa Traditional Owners within the Application Area, as raised in public submissions, Council engaged in conversations with Barapa Barapa representatives to further its understanding of these interests. In speaking with these representatives, Council noted that Barapa Barapa peoples strongly assert historic and ongoing cultural links to parts of the Application Area, as follows:
 - the importance of parts of the Country of the Application Area to Barapa Barapa peoples, and in particular, the significance and cultural value held by the Lake System (including Lake Tutchewop, Reedy Lake, Third Lake, Middle Lake, Lake Bael Bael, Kerang Lake, Kangaroo Lake) within the Application Area.
 - the Lake System forms an integral part the Barapa Barapa creation story and as such is highly significant to the Barapa Barapa peoples' spiritual beliefs and connection.
 - Kerang and the surrounding Lake System is very culturally important to the Barapa Barapa peoples, including its associated animal and plant species, and the Barapa peoples have cultural ties to these areas through cultural heritage practices including reed weaving.

- Barapa Barapa peoples have a long history of caring for Country within the Application Area, having been actively involved in extensive cultural heritage management activities and the repatriation of Ancestral Remains to Country within the area.
 - The Barapa Barapa peoples have always had an understanding that their Country extends into the Application Area, and as such assert that the appointment of WWAC as a RAP over these areas would have a significant impact on their connection to Country and culture. In particular, the Barapa representatives spoke of their connections to the Kerang area and its surrounds, and that the appointment of WWAC as a RAP over this area would effectively result in the displacement of Barapa Barapa peoples.
 - The Barapa Barapa representatives also noted that they had attempted to engage in conversations with WWAC on multiple occasions, but that WWAC had not been responsive and had otherwise conveyed resistance to any such discussion or negotiation regarding boundaries between Barapa Barapa and Wamba Wemba Country.
- Wadi Wadi Traditional Owner Interests
 - Council also noted submissions from the representatives of four family groups identifying as Wadi Wadi Traditional Owners (members of the Nicholls, Davis, Kirby and Kennedy families) and had regard to whether the Decision Area is subject to competing Wadi Wadi interests.
 - The representatives of these families asserted historical and ongoing connections to the Decision Area and raised issues regarding WWAC's inclusivity and representativeness of Wadi Wadi Traditional Owners.
 - Council also noted that the members of the Nicholls and Davis families asserted ties to the Decision Area through their Apical ancestors whom they identify as Wadi Wadi based on genealogical knowledge and oral history that was mostly verbally transmitted and held by the women in their families.
 - Council provided the above submissions to WWAC and sought its response. In responding to these submissions, WWAC asserted that Council has no evidence before it to support a conclusion that these families have Wadi Wadi connections to the Decision Area. WWAC further submitted that the Nicholls and Davis families have ties to the area as Wamba Wemba Traditional Owners.
 - In relation to whether the WWAC is a body which represents the Traditional

Owners of the area to which the Application relates, WWAC noted that members of both the Nicholls and Davis families are eligible for WWAC membership through their descendancy from identified Wamba Wemba Apical ancestors.

In its consideration of the Application, Council has taken significant measures to understand and resolve the competing interests of Wadi Wadi and Wamba Wemba Traditional Owners within the Decision Area. Council made considerable efforts to meet with the representatives of each of the four families (Nicholls, Davis, Kirby and Kennedy families). Council notes that it was not able to meet with the representatives of the Kirby and Kennedy families who asserted interests in the Decision Area through the public submission process.

Council did however meet with the representatives of two Wadi Wadi Traditional Owner families from whom Council received public submissions, the Nicholls and Davis families. In meeting with representatives from the Nicholls and Davis families, Council gained additional information and understanding of the interests and position of these families in relation to the Decision Area.

Council also noted that the above families' primary concerns with WWAC related to their ability to meaningfully participate in cultural heritage management and protection as members of WWAC.

Council also met with representatives of WWAC to further discuss the concerns raised by the Nicholls and Davis families. In meeting with Council, WWAC representatives confirmed the eligibility of the Nicholls and Davis families for membership of WWAC and noted that they are welcome to join the organisation. The WWAC representatives also spoke to WWAC's inclusivity and representation of all Wamba Wemba peoples, and in particular, spoke of WWAC's increasing membership numbers, high attendance rate at recent full group meetings, and the strong representation of different family groups in WWAC.

Determination

In consideration of all of the material before it relating to WWAC's identified Apical ancestors and connections to the Decision Area, Council is satisfied that Wamba Wemba peoples are Traditional Owners of the Decision Area. Council could not be satisfied that Wamba Wemba peoples are Traditional Owners of the Non-RAP Area.

Through the information provided by WWAC and the Wadi Wadi families, Council was informed that the Nicholls and Davies families identify as dual Wamba Wemba and Wadi Wadi Traditional Owners, and that they recognise both their eligibility to join WWAC and the Traditional Ownership of Wamba Wemba peoples over the Decision Area.

In considering the sum of the evidence before it, Council determined that it cannot be sufficiently certain that Wamba Wemba peoples are the sole Traditional Owners for the Country that extends into areas with competing Barapa Barapa interests. Because of this, and

absent an agreement on boundaries or shared Country with Barapa Barapa Traditional Owners, Council has determined not to register WWAC as a RAP in the Non-RAP Area, which does not appear to be solely Wamba Wemba Country.

Council encourages all interested parties to come together with an intention to agree on a boundary or to form a consolidated and fully representative group which can focus on protecting Aboriginal cultural heritage in the Non-RAP Area.

In reviewing WWAC's Rule Book structure and governance, Council is satisfied that WWAC's current membership rules allow it to inclusively represent the Wadi Wadi families that Council met with. Council also reviewed all of the information available to determine whether there were potential barriers that could prevent these dual Wadi Wadi and Wamba Wemba Traditional Owners from seeking WWAC membership and actively participating in WWAC (including cultural safety and inclusiveness practices). In reviewing this information, and in meeting with WWAC, Council is satisfied that WWAC has taken reasonable steps to ensure that it is an inclusive and representative organisation, and that WWAC is genuinely committed to accommodating the descendants of all Wamba Wemba peoples within its membership.

Council determined that the appointment of WWAC to a reserved seat in the First Peoples' Assembly of Victoria adds weight to the view that the WWAC is a body representing Traditional Owners within the Decision Area.

As such, Council finds that under WWAC's current rules and governance practices, the appointment of WWAC as a RAP over the Decision Area will not negatively affect the interests of these Wadi Wadi families or prevent them from participating in WWAC as members. While Council does note these considerations relate to two of the four Wadi Wadi families who made public submissions, Council finds that on the balance of the information before it, WWAC is an inclusive organisation and is a body representing the Traditional Owners of the Decision Area for the purposes of s 151(3)(c) of the Act.

Council was unable to conclude that WWAC is a body representing all of the Traditional Owners of the Non-RAP Area for the purposes of s 151(3)(c) of the Act. Council reached this view in consideration of the asserted interests of Barapa Barapa Traditional Owners within the Non-RAP Area. Council could not sufficiently determine that WWAC inclusively represents all Traditional Owners with ongoing cultural ties to the Non-RAP Area, and in particular, Barapa Barapa peoples with asserted interests in the Country of the Non-RAP Area.

c) Whether WWAC is a body representing Aboriginal people that has a historical and contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage in the Application Area (s 151(3)(d) of the Act)

Council noted that WWAC asserted a strong historical and contemporary connection to the Country of the Application Area. In support, the Application included a range of materials

including:

- Victorian Languages: A Late Survey, by L.A. Hercus.
 - Survey between 1962-1965 which recorded Victorian languages with the assistance of the Australian Institute of Aboriginal Studies in Canberra. Extensive material was collected from people of Aboriginal descent across Victoria.
- The Aborigines of Lake Boga, Victoria, by A.C. Stone.
 - Contains a detailed list of the designation of tribes and personalities in Lake Boga.
 - Outlines a range of traditional manners, customs, practices, and languages carried out by the Aboriginal peoples of Lake Boga.
- Lake Boga Mission Historical Study, by Graham Atkinson and Rod Hagen.
 - Contains a broad history of the Wamba Wemba people of Lake Boga.
 - Asserts that the Wamba Wemba people of the Murray River are responsible under traditional Indigenous law and custom for the Lake Boga area around Swan Hill.
 - Contains extensive recounting from European settlers of encounters with the Wamba Wemba people of Lake Boga, concluding that '*Lake Boga Remains a prominent focal point for the Wamba Wemba community. The old mission site itself, the many heritage sites in the area, including burial grounds of both spiritual and cultural significance, as well as the areas on which people have lived and camped, are places of great importance to many people living today.*' (68)

WWAC asserted strong historical and contemporary interests and demonstrated expertise in managing and protecting Aboriginal cultural heritage in the Application Area. In particular, WWAC included the following matters in support of its claim in managing and protecting Aboriginal cultural heritage in the Application Area:

- Welcomes to Country
- Murray Black repatriations 1980s Cumberagunga and Ghow Swamp
- Cabool Creek repatriations 1980s Cabool NSW
- Murray Downs Golf Club repatriations 1988-1993
- Ngatuk Possum Skin Cloak and Etched Barks Exhibition, Museum Victoria 2003
- Djarra Baby repatriation to Charlton from Museum Victoria 2004
- Menera Station Burials 2007
- Castledonnington Burial 2007
- Boomberdill Lake Baker Burials 2008
- Yung Balug repatriations from Menera to Boort 2011

- Swan Hill Burials 2021
- Digby Quarry burials 2021
- Museum Victoria Repatriations 2021
- Buronga NSW repatriations 2021

WWAC asserted that from 2007 the Wamba Wemba Peoples have been, and continue to be, active participants in Cultural Heritage Management Plans and related land and water activities. WWAC cited Direl, aka Lake Tyrrell, as another major site for cultural heritage protection, stating that the Wamba Wemba peoples have led the charge on protecting the tangible and intangible cultural heritage of Direl. It was noted that applications have been lodged with the Commonwealth Government to prevent ongoing desecration and toxic environments arising from salt mining and development at Direl.

Findings of fact

Council took into account information provided by WWAC in relation to its cultural heritage expertise, including evidence of WWAC's involvement in cultural heritage management over a period of decades and experience with the repatriation of Ancestral Remains.

Determination

Based on the information available, Council concluded that for the purposes of s 151(3)(d) of the Act, in respect of the Decision Area, WWAC:

- Is a body representing Aboriginal people that has historical and contemporary interest in Aboriginal cultural heritage relating to the Decision Area; and
- Has demonstrated expertise in managing and protecting Aboriginal cultural heritage.

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

Findings of fact

A search of relevant registers, and information from WWAC, did not disclose any grants of land in fee simple made to WWAC under a specific power in a State or Commonwealth Act in relation to the Application Area.

Determination

Council determined that for the purposes of section 151(3)(e) of the Act, there has been no relevant grants of land in fee simple to an Aboriginal body by the State or Commonwealth in relation to the Application Area.

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

Findings of fact

WWAC has not entered into an agreement with the State in relation to land and resource management within the Application Area, and WWAC did not rely on any such agreement in support of its Application.

Determination

Council determined that for the purposes of s 151(3)(f) of the Act, there has been no relevant land and natural resource management agreements entered into by WWAC with the State.

f) Other Relevant Matters (s 151(3)(g) of the Act)

i) Corporate Governance, Organisational Capacity, Cultural Heritage Decision Making

In determining WWAC's RAP Application, Council took into account whether WWAC is organisationally sustainable and capable of carrying out the obligations of a RAP.

Findings of fact

Council reviewed all of the information provided by WWAC in relation to its governance and capacity.

In particular, Council notes that WWAC's Board has exclusively Aboriginal Directors, six of whom are Wamba Wemba Elders. WWAC meets regularly to oversee responsibilities for advancing cultural heritage, native title, and representation of the Wamba Wemba people.

WWAC also provided Council with a draft operational plan in which it states it intends to ensure cultural legitimacy through the establishment of compliant and responsive structures to meet all regulatory responsibilities and accountabilities.

WWAC further provided Council with information as to the cultural heritage management policies and procedures operationally employed by WWAC, as well as information regarding WWAC's physical infrastructure and employee arrangements.

Determination

Based on the available information, Council determined that WWAC has demonstrated that it has sufficient operational and governance arrangements in place to effectively carry out all the functions of a RAP as prescribed in the Act in relation to the Decision Area.

4. Additional matters

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

a) 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.

b) 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 (Vic) (Charter)*, having particular regard to the distinct cultural rights of Aboriginal persons recognised by s 19(2)(d) of the Charter.

In its deliberations, Council noted that the ethno-historical record of Traditional Ownership in the north west of Victoria is particularly complex and that there is no clear and easily distinguishable division of Traditional Owner groups, Apical ancestors, and Country boundaries. Council also noted the public submissions by Wadi Wadi Traditional Owners asserting interests in the Country of the Decision Area. Council acknowledges its decision to register WWAC as a RAP over the Decision Area may, in certain circumstances, impact on the ability of those Wadi Wadi Traditional Owners to enjoy their identity and culture and to maintain their distinctive spiritual, material, and economic relationship with the land and waters and other resources of the Decision Area.

However, Council notes that the registration of WWAC as a RAP provides a formal mechanism through which Traditional Owners of Wamba Wemba Country will be able to exercise their distinct cultural rights protected under the Charter. Further, through its discussions with Wadi Wadi Traditional Owners and WWAC, Council is satisfied that WWAC is able to inclusively represent Traditional Owners of the Decision Area. In addition, under WWAC's current rules, Traditional Owners of the Decision Area, including the Wadi Wadi Traditional Owners whom Council spoke with, are eligible to become members of WWAC. As such, Council is satisfied that all Traditional Owners affected by the decision to register WWAC as a RAP are able to continue to exercise their distinct cultural rights and be involved in the protection of Aboriginal cultural heritage in the Decision Area as WWAC members.

Council also had regard to the impact of native title determinations upon RAP status as prescribed by s 156(3) of the Act. In particular, Council noted that, should a native title

determination be made that recognises Wadi Wadi Traditional Owners as the native title holders for any part of the Decision Area, the Act operates to ensure that those native title holders can access and exercise their rights over that Country. Council recognises that this mechanism safeguards the interests of Wadi Wadi Traditional Owners who may achieve native title in the future, by ensuring that any decision to appoint WWAC as a RAP now, may be revised in the event of a subsequent native title determination.

Council considers that these factors lessen the extent of any limitation on the rights contained in s 19 of the Charter caused by the decision to register WWAC as a RAP in respect of the Decision Area. Having particular regard to the factors discussed above, Council determined that there were no less restrictive means reasonably available to achieve the purpose of the decision. As set out above, the purpose of the decision is to register an inclusive and representative Traditional Owner body as a RAP to protect and manage Aboriginal cultural heritage within the Decision Area. The appointment of WWAC is a reasonable imposition on the cultural rights of those Traditional Owners of Wamba Wemba Country who are not currently WWAC members.

Council formed the view that the decision to appoint WWAC as the RAP in relation to the Decision Area is compatible with its obligations under the Charter.

In relation to the Non-RAP Area, Council formed the view that the decision to decline to register WWAC over this area is compatible with the Charter.

Council took into account the fact that, in declining the Application over the Non-RAP Area, WWAC will not be able to protect the Aboriginal cultural heritage of that area as a RAP. However, Council also noted that there are other mechanisms in the Act which ensure the protection of cultural heritage, including obligations on various stakeholders to consult with relevant Aboriginal persons in relation to the Aboriginal cultural heritage of the Non-RAP Area. Accordingly, Council noted that the Act enables relevant Aboriginal people to participate in the protection of cultural heritage in the Non-RAP Area.

Council also took into account all factors set out in section 151(3) of the Act, and in particular, section 151(3)(c) regarding whether WWAC is a body representing the Traditional Owners of the Non-RAP Area. When read with the purposes of the Act, including that of empowering Traditional Owners as protectors of their cultural heritage, Council reached the view that any limitation to the Wamba Wemba People's rights is justified by the importance of ensuring that Council is satisfied as to the identity of Traditional Owners of the Non-RAP Area prior to appointing a RAP over that area. To this end, Council was unable to identify a less restrictive means to achieve this purpose, other than to decline WWAC's Application over the Non-RAP Area.

Conclusion

Council approves WWAC's application to be registered as a RAP over the Decision Area.
Council does not approve WWAC's application to be registered as a RAP over the Non-RAP Area.



Russell Mullett
Chairperson
Victorian Aboriginal Heritage Council

Attachment 1 – Decision Area

