

REASONS FOR THE DECISION OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL IN APPLICATION BY BUNURONG LAND COUNCIL ABORIGINAL CORPORATION

DATE OF DECISION: 19 July 2017

1. Decision

The Victorian Aboriginal Heritage Council (**Council**) has approved, in part, an application from the Bunurong Land Council Aboriginal Corporation (**BLCAC**) to be registered as a Registered Aboriginal Party (**RAP**) under the *Aboriginal Heritage Act 2006 (Act)* (**2017 Application**). This was the third application received by Council from BLCAC.

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

2. Decision Area

Council made a decision to appoint BLCAC for part of Area A1 of BLCAC's RAP application area (**Decision Area**). A map showing the Decision Area is set out below.

3. Background to Decision

a) **2007 RAP Application**

On 27 June 2007, BLCAC submitted a RAP Application to Council (**2007 Application**). The 2007 Application area was also the subject of a competing RAP Application from the Boon Wurrung Foundation Limited (**BWFL**) submitted on 1 June 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 the BLCAC as a RAP, Council acknowledged that members of the BLCAC are Traditional Owners of Bunurong (Boon Wurrung) Country.¹ Council also acknowledged that members of BWFL are Traditional Owners of Bunurong Country and noted that neither the BWFL nor BLCAC was prepared to accept the other group's claim to be Traditional Owners of Bunurong Country. Given this situation, Council gave consideration to whether it could either appoint two RAPs over the 2007 Application area, or whether the BLCAC 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 Bunurong 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.

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

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

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

b) 2010 RAP Application

On 4 December 2010, the BLCAC submitted a second RAP Application to the Council, which relied largely on identical materials to those submitted by the BLCAC in relation to its 2007 Application (**2010 Application**). A number of minor amendments and additions had been made to these materials. A new application form had been completed and the application also contained a number of letters and enclosures addressed to Council that had not previously been provided.

The 2010 Application sought to address the concerns raised by the Council in relation to BLCAC's ability to accommodate members of BWFL with traditional and familial links to Bunurong Country. However, while the 2010 Application made reference to steps taken by the BLCAC to extend an offer of membership to limited members of the BWFL, these steps did not involve any change to the formal membership rules for the BLCAC. On 1 July 2011, Council declined the 2010 Application.

Council also considered that BLCAC was not, at that time, the appropriate organisation to solely represent Aboriginal people with traditional or familial links to the 2010 Application area.

4. Findings of Fact and Evidence

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

a) Native Title (s 151(2), s151(3)(a) and s 151(3)(b) of the Act)

BLCAC is neither a registered native title holder nor a native title party for the Decision Area, and did not rely on either basis in support of its application.

There is no registered native title holder for the Decision Area.

In its public comments relating to BLCAC's 2017 Application, BWFL brought Council's attention to the Blairgowrie Indigenous Land Use Agreement between Blairgowrie Safe Boat Harbour Pty Ltd and Carolyn Briggs (on behalf of the Boonerwung People). However, Council notes that 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.

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

BLCAC's application was not made on the basis that it has a recognition and settlement agreement within the meaning of s 151(2A) of the Act. As such, Council finds that BLCAC is not a traditional owner group entity that has entered into a recognition and settlement agreement in relation to the Decision Area.

c) Representation - Traditional Owners (s 151(3)(c) of the Act)

BLCAC's application was made on the basis that it represents Bunurong Traditional Owners, and that Bunurong Country includes the Decision Area.

i) Extent of Bunurong Country

Taking into account the information provided to the Council to date, including historical records, Council is of the view that BLCAC is a body representing the Traditional Owners of the Decision Area.

ii) Bunurong Ancestry

In its reasons for decision in declining an application from BWFL on 21 May 2015, Council expressed the view that, based on ethno-historic research and other information available to it, Council accepts five women as Bunurong ancestors (Elizabeth Maynard, Eliza Nowan, Jane Foster, Marjorie Munro and Louisa Briggs).² At that time, Council also stated that it would be unlikely to change its position on this issue unless new information came to light that disproved any or all of these claims.

In its public comments relating to BLCAC's 2017 Application, BWFL stated that it continues to recognise only four women as Bunurong ancestors. In its deliberations, Council reviewed all relevant information and correspondence received on this issue, including available research reports, and determined that Council had not been provided with any new information that disproved its acceptance of all five Bunurong ancestors.

iii) Membership and Representativeness

In its reasons for decision in relation to both the 2007 and 2010 Applications, Council indicated that it would be unable to accept BLCAC as the sole RAP for Bunurong Country unless it was satisfied that BLCAC could accommodate within its membership members of BWFL who have traditional links to Bunurong Country. The 2017 Application submitted by BLCAC sought to satisfy the Council as to this matter.

BLCAC's current rulebook provides that BLCAC membership is open to Bunurong people who are at least 18 years old, and who descend from one of five identified Bunurong apical ancestors (being those ancestors also accepted by Council). The BLCAC rulebook also provides that each of the five identified apical ancestor groups is to be equally represented by two directors on the BLCAC board (with two additional non-voting advisory directors). Council welcomes these changes to BLCAC's rulebook, which now expressly provides a framework for the equal representation of each of the five Bunurong apical ancestors. Council also noted other steps taken by the BLCAC to ensure that it is an inclusive and representative Traditional Owner body. At present, BLCAC has 147 full members and 15 associate members, including a spread of members descended from each of the five identified apical ancestors.

In its public comments, BWFL raised concerns with Council about the interstate residency of some members of BLCAC, and expressed its view that BLCAC represents the Tasmanian and Western Australian Bunurong communities, while BWFL represents descendants who have maintained connection to Victorian culture and heritage. BWFL also expressed its concern that the BLCAC board structure is designed, in its view, to give power and authority to the three "Tasmanian" apical ancestor groups on the basis that these groups are "interrelated" and collectively hold 6 of 12 board positions. BWFL submitted

² See Written Statement of Reasons for Decision of the Victorian Aboriginal Heritage Council in Relation to an Application by Boon Wurrung Foundation Limited to be a Registered Aboriginal Party, dated 21 May 2015, which includes a detailed examination of Bunurong ancestry and information relied upon by Council.

that a decision to appoint BLCAC as a RAP in these circumstances could result in the destruction of “surviving Victorian Boon Wurrung heritage”.

In its deliberations, Council took into account all relevant information provided by BWFL. It noted that one of the objectives of the Act is “to accord appropriate status to traditional owners, including a preference to appoint traditional owner bodies corporate as registered Aboriginal parties”. In this regard, Council wishes to emphasise that it acknowledges and accepts that BWFL represents some of the Traditional Owners of Bunurong Country, and respects the significance of their role in protecting Aboriginal cultural heritage in Victoria. Council also wishes to particularly recognise with respect the outstanding contribution made by Carolyn Briggs and her family to revive and sustain Bunurong cultural heritage, including the promotion of Bunurong identity, language and history.

However, in line with the Act, Council places importance on the ability of groups to broadly represent the Traditional Owners of the area to which the application relates. The importance Council places upon inclusive Traditional Owner groups is located in its understanding of traditional laws and customs and an appreciation of the need for shared involvement in Country by all Traditional Owners.

Council notes that the Act does not impose a requirement that Traditional Owners must live on country, nor in Victoria generally, to be considered the Traditional Owners of an area. Accordingly, Council is of the view that the most appropriate vehicle to protect and promote Aboriginal cultural heritage in the Decision Area is an organisation that is evenly representative of all five accepted Bunurong apical ancestor groups. This accords with the purposes of the Act.

Council notes that under BLCAC’s current rules, all Bunurong Traditional Owners, including those who are members of BWFL, are eligible to become members of BLCAC and are able to be involved in the protection and management of cultural heritage in the Decision Area as BLCAC members. Council took into account information provided by BWFL disputing the biological connection and cultural authority of certain BLCAC directors. However, having regard to all of the information available to it, Council is satisfied that BLCAC has implemented reasonable processes to ensure the cultural authority of directors and the biological connection of its members.

Council reviewed all information available to it to determine whether there were potential impediments (such as safety and inclusiveness) that could prevent eligible BWFL members from seeking BLCAC membership and actively participating in the corporation. Council also took into account BWFL’s concern that BLCAC was not representative because it did not legitimately consult with BWFL or Elders representing the descendants of Louisa Briggs. However, having regard to the information provided to Council, Council is of the view that BLCAC took reasonable steps to engage with BWFL to create a single, inclusive and representative organisation, and that BLCAC is genuinely committed to accommodating within its membership members of BWFL who are Bunurong people.

Based on all of the available information, Council finds that BLCAC is a body representing the Traditional Owners of the Decision Area.

d) Representation - Historical or contemporary interest and demonstrated expertise in managing and protecting Aboriginal cultural heritage (s 151(3)(d) of the Act)

BLCAC relied on its traditional ownership of the Decision Area as the basis for its historical and contemporary interest in cultural heritage in that area. In considering this part of BLCAC’s application, Council had regard to the same information and evidence considered in relation to BLCAC’s traditional ownership of the Decision Area.

Council took into account information provided by BLCAC in relation to its cultural heritage expertise, including case studies and letters of support evidencing its cultural heritage management experience.

To the extent that they apply to the issue of historical or contemporary interest and demonstrate expertise in managing and protecting Aboriginal cultural heritage, Council also took into account those matters detailed in Sections 4(c), 4(g)(ii) and 4 (g)(iii) of this statement.

Based on the available information, Council finds that BLCAC:

- is a body representing the 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 in the Decision Area.

e) *Grant of fee simple (s 151(3)(e) of the Act)*

Neither BLCAC, nor any other person, has drawn Council's attention to any grant of land in fee simple within the Decision Area, by the State or Commonwealth, to any Aboriginal body. Council also conducted reasonable searches and did not otherwise find that any such grant of land had been made.

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

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

g) *Other considerations (s 151(3)(g) of the Act)*

i) Traditional Owner Priority

On the basis of Council finding that BLCAC is a body representing the Traditional Owners of the Decision Area, and that the Decision Area is Bunurong Country, Council took into account its general principle to prioritise the appointment of Traditional Owner representative bodies.

ii) Single, sustainable RAP

Council has previously declined RAP applications from three organisations seeking to represent the Bunurong People; BLCAC, BWFL and Bunurong Land and Sea Association Inc (**BLASAI**), and has previously expressed its preference for all Bunurong people to work together to develop a single, inclusive and representative organisation.³ Council appreciates that efforts have been made by all three organisations towards this end. In particular, Council welcomes BLASAI's merger with BLCAC to create a single entity.⁴ Council notes that BLCAC has 147 full members and 15 associate members, including a spread of members connected to each of the five identified apical ancestors, indicating a sustainable RAP structure.

Council is aware that BWFL and BLCAC have been unable to agree to a single, inclusive and representative organisational structure. Council took into account concerns raised by BWFL, including that BLCAC did not make good faith efforts to engage with BWFL, with particular reference to BLCAC's withdrawal from mediation processes and other agreements with BWFL. Council also had regard to those objections raised by BWFL relating to BLCAC's suitability as a body representing Traditional Owners, insofar as those objections relate to the appropriateness

³ See Written Statement of Reasons for Decision of the Victorian Aboriginal Heritage Council in Relation to an Application by Boon Wurrung Foundation Limited to be a Registered Aboriginal Party, dated 21 May 2015.

⁴ Council notes that BLASAI is still a registered entity for interim administrative purposes only.

and sustainability of BLCAC as a single RAP (see Council's consideration of these matters in Section 4(c) above).

Having regard to all of the information before it, Council is of the view that BLCAC took reasonable steps to engage with BWFL in order to establish a single, inclusive and representative organisation. Council also took into account that BWFL members who are Traditional Owners of Bunurong Country are eligible to become members of BLCAC, and that, on the information available to Council, BLCAC has demonstrated a genuine commitment to accommodating within its membership members of BWFL who are Traditional Owners of Bunurong Country.

Accordingly, based on the available information, Council is of the view that BLCAC has developed a sustainable RAP structure inclusive of the Traditional Owners of Bunurong Country and has taken reasonable steps to include BWFL in the development of that structure, consistent with Council's general principles.

iii) Organisational capacity

Another matter that the Council took into account when determining BLCAC's RAP application is whether the BLCAC is organisationally sustainable and capable of carrying out its obligations as a RAP.

In its deliberations, Council reviewed all of the information provided by BLCAC, including its operational and governance-related policies and procedures, financial management arrangements, case studies evidencing cultural heritage management capacity, letters of support (including from the Office of the Registrar of Indigenous Corporations), employee arrangements and details as to the volume of cultural heritage work undertaken by BLCAC.

Council also took into account concerns raised by BWFL relating to BLCAC's capability to carry out its functions as a RAP.

Based on the available information, Council finds that BLCAC demonstrates that it has sufficient operational and governance arrangements in place to effectively carry out all the functions of a RAP prescribed in the Act.

5. Reasons for the decision

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

a) Legislation

In deciding BLCAC's 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.

BLCAC is not a registered native title holder 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 BLCAC's 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, and concludes that BLCAC has not established the factors set out in ss 151(3)(a) and 151(3)(f). 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.

Council has considered, in accordance with ss 151(3)(c) and 151(3)(d), the question of whether BLCAC 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 and expertise managing and protecting such heritage. In regard to these sections of the Act, Council is satisfied that BLCAC is a body representing:

- the Traditional Owners of the Decision Area; and
- Aboriginal people with historical and contemporary interest in Aboriginal cultural heritage relating to the Decision Area (being the Traditional Owners of that area) with demonstrated expertise in managing and protecting Aboriginal cultural heritage in that area.

Council has considered other matters under s 151(3)(g), including BLCAC's organisational capacity and relevant principles set out in Council's policy entitled 'General Principles - RAP Decision Making'.

b) Policy set out in Council's 'General Principles - RAP Decision Making'

Particular aspects of Council policy that were relevant to matters Council took into account in making a decision about the BLCAC application were as follows:

- To accord appropriate status to Traditional Owners including a preference to appoint Traditional Owner bodies corporate as RAPs.
- To encourage smaller groups to develop single, sustainable RAP structures.
- To appoint applicants as RAPs who have sufficient capacity to become RAPs.

With regard to these factors, Council concluded that:

- BLCAC is represents the Traditional Owners of the Decision Area.
- BLCAC has demonstrated sufficient organisational capacity to effectively perform the functions of a RAP.
- BLCAC has a sustainable RAP structure capable of representing all of the Traditional Owners of the 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 s19(2)(d) of the Charter.

In its deliberations, the Council acknowledged that not all Traditional Owners of Bunurong Country are members of BLCAC and that some Traditional Owners of Bunurong Country wish to be represented through BWFL. Council acknowledged that the decision to appoint BLCAC may, in certain circumstances, impact on the ability of those Traditional Owners of Bunurong Country to enjoy their identity and culture and to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources in the Decision Area. For example, Bunurong people may be limited in their ability to participate in the protection and management of Aboriginal cultural heritage in the Decision Area otherwise than as members of BLCAC.

However, Council notes that the appointment of BLCAC as a RAP provides a formal mechanism through which Traditional Owners of Bunurong Country will be able to exercise their distinct cultural rights protected under the Charter. Further, under BLCAC's current rules, all of the Traditional Owners of Bunurong Country, including those who are members of BWFL, are eligible to become members of BLCAC

and are able to continue to exercise their distinct cultural rights and be involved in the protection and management of cultural heritage in the Decision Area as BLCAC members. On this point, Council had particular regard to those matters set out in paragraphs 4(c) and 4(g)(iii) of this statement of reasons.

Council also took into account that it has the ongoing function of managing, overseeing and supervising the operations of BLCAC under s 132(cg) of the Act, and that it is empowered under s 154A of the Act to impose conditions on BLCAC at any time, including a condition to ensure the ongoing inclusiveness and representativeness of BLCAC to ensure that all Traditional Owners of Bunurong Country are able to exercise their cultural rights as members of BLCAC.

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

Accordingly, Council formed the view that the decision to register BLCAC is compatible with the Charter.

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

