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**KURUMA MARTHUDUNERA ABORIGINAL  
CORPORATION RNTBC's ('KMAC')  
SUBMISSION TO THE REVIEW OF THE  
*ABORIGINAL HERITAGE ACT 1972*  
CONSULTATION PAPER**

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## Introduction

Kuruma Marthudunera Aboriginal Corporation RNTBC ('**KMAC**') is the appointed Registered Native Title Body Corporate ('**RNTBC**') for the partial determination of the Robe River Kuruma (**RRK**) People's native title claim application, known as 'Part A', following the Federal Court's determination on 1 November 2016 in *Finlay on behalf of the Kuruma Marthudunera People v State of Western Australia (No 2)* [2016] FCA 1260, and for 'Part B' on 26 April 2018, following the Federal Court's determination in *Finlay on behalf of the Kuruma Marthudunera People v State of Western Australia (No 3)* [2018] FCA 548.

KMAC is holding on trust the RRK People's determined native title rights and interests of the determined claims. This includes a combination of exclusive and non-exclusive native title rights and interests.

The RRK people have traditional rights and interests in an area covering about 15,759 square kilometres in the Pilbara region of Western Australia. The RRK traditional lands lie within the Shire of Ashburton and comprise part of the Fortescue River and the complete river system of the Robe River, in the most westerly part of the Hamersley Range. KMAC has a pivotal role in progressing the broader interests of approximately 300 RRK people and in representing the RRK people in their dealings with government and the private sector.

KMAC respectfully provides the following submission in response to the Minister for Indigenous Affairs consultation paper on the proposed 'Review of the *Aboriginal Heritage Act 1972*'. This submission is provided in the context of a fast paced environment, where KMAC, through a small core team, is dealing with small, medium and large scale exploration and mining projects and various proponents, whilst maintaining our ongoing cultural roles and responsibilities for the preservation, protection and maintenance (enhancement) of sensitive and significant Aboriginal heritage sites in RRK country. Accordingly, we operate within a series of different but parallel heritage agreements, approvals and processes.

## Purpose of the Act

The long title of the Act is outdated and reflects the role of the Western Australia (WA) Museum at the time in 1972 to preserve Aboriginal cultural heritage. It considers Aboriginal people, places, heritage, sacred sites and culture as past relics to be preserved, not contributing to a living and contemporary society. The passing of the *Native Title Act* (1993) has since seen traditional rights and interests that Aboriginal people hold in connection to their country and land formally recognised.

To keep pace with the times, the purpose of the Act should be to make provision for the *preservation, protection* and *enhancement* '.... on behalf of the community of places and objects customarily used by ... the original inhabitants of Australia...' The addition of the word *protection* is at the heart of what the Act sets out to do; to protect Aboriginal places and objects, while *enhancement* recognises that Aboriginal society, law and custom is a continuing, vibrant and active way of life for Aboriginal people.

## Consultation with Aboriginal People

There is no explicit requirement for Aboriginal people to be consulted under the Act. Even though it may be the intention of Minister, the legislation does not oblige the Minister, the Registrar or the Aboriginal Cultural Materials Committee (**ACMC**) to consult with Aboriginal people.

Whilst there is the need for timeliness in regard to approvals, quality of advice and information should not be compromised. A procedural process which promotes efficiency over proper enquiry undermines the very process in which it operates and discourages meaningful consultation and good faith discussions. Enshrining in the legislation the need to consult with Aboriginal people will give the Act strength in being an authoritative source of site, place and object information and will give Aboriginal people confidence in the ability of the Department of Planning, Lands and Heritage (**DLPH**) to effectively protect Aboriginal sites, places and objects.



## The Role of the Aboriginal Cultural Materials Committee (ACMC)

A clear shortcoming of the Act is that it is not a requirement that the membership of the ACMC is comprised of Aboriginal people, which must be addressed. Further, the ACMC does not consult directly with Aboriginal informants, groups or custodians for the site in which they are making a decision, whether this is for the site to be registered, or granting permission for cultural material to be removed, the site to be excavated, or destroyed under sections 16 and/or 18.

It is the view of the RRK people that appropriate elders and traditional owners should be directly consulted by the ACMC when making decisions about a site for which they have responsibility and custodianship.

## Protection and Enforcement

The RRK People call for far greater protection and enforcement through a strengthening of and expansion on penalties currently prescribed in the Act. Appropriate measures submitted for consideration include significant penalty increases, an extension of time to prosecute from the current 12 months to up to 5 years, additional deterrent methods (and in particular for Corporate Bodies), and an extension of powers to consider other remedial orders.

KMAC supports any proposals to significantly increase penalties for those who commit offences under section 17 and 43 of the Act. KMAC also proposes extending the penalty of imprisonment currently only available to individuals who commit an offence, to the Directors of offending Body Corporates in a similar vein to the criminal sanctions imposed under the *Corporations Act 2001*. Further, in recognition of any impact and/or loss of Aboriginal cultural heritage, pecuniary compensation should be awarded to the traditional owners whose country has been impacted.

Additional deterrent measures should also be considered in the context of reputational damage and Body Corporate efforts in the Corporate Social Responsibility space. The impact on a corporate brand has the potential to be far greater than any pecuniary penalty imposed, particularly with larger scale mining companies.

In the pursuit of the purpose of the Act, KMAC submits that regard should be had to a prescribed tiered approach to offences to capture various breach levels, from minor through to very serious, attracting different penalties and processes, and the ability to rely on a section 62 defence (including if it is carried out by an individual or Body Corporate). If a section 62 defence is relied upon, the burden of proof should shift to the offender with mandatory penalties applying to the most serious offences. The *Occupational Safety and Health Act 1984 (WA)* exemplifies such an approach including risk management, investigation of breaches and applying penalties.

The above proposed measures will enable Government, Aboriginal people and groups to more effectively prosecute for breaches under the Act.

## Interconnected Places and Sites

Pilbara traditional owner groups including RRK people, do not view their sacred sites, places and objects in isolation from one another or confined to the cultural boundaries of the country of individual groups. Sacred sites are part of a series of interconnecting song lines, dreaming tracks, narratives and stories that are present throughout the country side. It is essential to provide scope within the Act to recognise Aboriginal sacred sites and heritage places in this way that are culturally significant, such as landscapes, mountain ranges and rivers with provision for linking these sites together, recognising continued use and values.

## Section 18 Applications

The RRK people have the great misfortune of having their country sit in the heart of the Iron-rich Pilbara and are significantly impacted by the shortcomings of the current section 18 process in that regard,



witnessing constant destruction of country and culture. The current process for Aboriginal Site destruction is unquestionably balanced in favour of proponents. Unfortunately, KMAC and RRK people regularly witness this first hand through their frequent dealings with Section 18 applications from proponents to destroy their heritage sites, resulting in devastating destruction on country and significant distress to the community given their inability to protect RRK country and culture for now and future generations. The current legislation states that any final decisions regarding Section 18 applications rest with the Minister. RRK people call for a change in process to reflect the critical significance of such applications, including that the Minister or a delegated senior official be compelled to meet and consult the appropriate Aboriginal people whose site is being proposed to be, and ultimately, destroyed.

Further, if a proponent is denied by the APMC in their Section 18 application, they have an avenue for this decision to be reviewed and overturned. However, if Aboriginal people seek to have a decision reviewed, they cannot and do not have an equal right of appeal which is clearly a disparity in process and fails to afford Aboriginal people procedural fairness, a conflicting theme with the purpose of the Act. When a Section 18 application is approved by the Minister, a 30 day cooling off period between the time the decision is made and when works can commence to destroy the site should be included as an additional procedural step. This will give Aboriginal people time to consider the decision, to undertake further consultation with the proponent (including salvage) and/or appeal as required.

## Conclusion

KMAC recognises that the review of the *Aboriginal Heritage Act 1972* is a positive step to modernise the Act and recognise the many changes that have occurred in acknowledging Aboriginal people's ongoing values, rights, interests, heritage and knowledge, and the powerful and significant contribution Aboriginal Heritage makes to Australian life. It is an important opportunity to reflect on the operation of the Act in practice and address the shortcomings that come with an Act 45 years in operation which has seen little change during that time.

KMAC submits that the Act can be made stronger by including in its purpose the need to protect and enhance Aboriginal heritage. An expansion and strengthening of penalties and procedural rights, including a longer time to prosecute offences, time to consider section 18 applications, and mandatory appropriate consultation with Aboriginal people as outlined in this submission, would contribute to more balanced rights and interests of all stakeholders. The preservation, protection and enhancement of Aboriginal society, law and custom is undoubtedly in the public interest of all Western Australians, and supports the State's responsibility to promote and protect its cultural assets.

Finally, RRK people identify that the Act needs to include scope to account for the nature and value of their cultural heritage and sacred sites as an interconnected landscape, not separate sites in isolation from one another.

KMAC has a clear vested interest in this process on behalf of the RRK People, and formally requests that we be recorded as a party for ongoing consultation, and to be kept informed, throughout this process.

Please do not hesitate to contact us should you require any further information.

Yours sincerely



Sara Slattery  
**KMAC Chairperson &  
Robe River Kuruma Traditional Owner**

31 May 2018

