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TOOLKIT 2: SACRED SITES



**ENVIRONMENTAL
DEFENDERS OFFICE NT**

ABOUT THE ENVIRONMENTAL DEFENDERS OFFICE (NT) INC

The Environmental Defenders Office NT (EDO) is an independent non-for-profit, community legal centre that specialises in environmental law. The EDO provides legal advice, representation and education through the Northern Territory. The EDO also advocates for stronger environmental protection laws by making submissions on law reform.

The EDO is the only community legal centre in the Northern Territory that provides legal advice on environmental matters in the public interest. The EDO is an incorporated association established under the *Associations Act* (NT).

In addition to NT based activities, the EDO is a member of a national network of EDO's working collectively to protect Australia's environment through public interest planning and environmental law.

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LEGAL ADVICE SHOULD BE SOUGHT IN SPECIFIC CASES

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specific questions you should seek legal advice.

ACKNOWLEDGEMENT

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What are Aboriginal sacred sites?

Aboriginal sacred sites are sites that are sacred to Aboriginal people or which have significance according to Aboriginal tradition¹. Aboriginal people have a right to access sacred sites in accordance with Aboriginal tradition². There are criminal offences under Commonwealth and Northern Territory laws that make it an offence for other people to enter or remain on land that is a sacred site³.

The Aboriginal Areas Protection Authority

The Aboriginal Areas Protection Authority (“AAPA”) is an independent statutory authority established under the *Northern Territory Aboriginal Sacred Sites Act* (“**Sacred Sites Act**”). AAPA is responsible for overseeing the protection of Aboriginal sacred sites on land and adjoining sea across the whole of Australia’s Northern Territory.

The broad purpose of the *Sacred Sites Act* is to:

‘...effect a practical balance between the recognised need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement...’

The Chief Executive Officer of AAPA is appointed by the Administrator of the Northern Territory and is employed by the Minister for Community Services, (currently The Hon. Bess Nungarrayi Price MLA). The staff of AAPA are employed by the AAPA Board (“**Board**”) and are not Northern Territory public servants.

The Board comprises five male and five female Aboriginal custodians nominated by Northern Territory Aboriginal Land Councils, together with two Government appointees. The Chair and Deputy Chair of the Board are nominated by the Board and appointed by the Administrator. They must be of opposite gender.

Custodians of Sacred Sites

A custodian of a sacred site is a person that has responsibility for that site. This person is responsible for its management, keeping it safe and to make sure it is used for its proper use. Under traditional Aboriginal laws there can be consequences if a custodian fails to protect a site. Additionally, there can be consequences for any person who has caused a site to be damaged.

Caption: EDO Lawyer discussing matters with traditional owners in the Gulf of Carpentaria.



What does AAPA do?

AAPA is created by the *Sacred Sites Act* and provides the means by which Aboriginal sacred sites are protected by law through:

1. Sacred site avoidance surveys and the issuing of Authority Certificates for any proposals of development;
2. The provision of information to the public about existing sacred sites data through abstracts of Authority records and access to the Registers maintained by AAPA; and
3. The registration of Aboriginal sacred sites.

1. Authority Certificates

An Authority Certificate protects a sacred site from damage by setting out the conditions for using land or carrying out works proposed by a proponent on an area of land and/or sea. These conditions relate to sacred sites in the area or in the vicinity of the proposed works, so that they are not damaged. Anyone proposing to use or work on land in the Northern Territory may apply to AAPA for an Authority Certificate to cover their proposed activities. Certificates are based on consultations with custodians and provide clear instructions on what can and cannot be done in and around sacred sites.

AAPA can only grant an Authority Certificate in the following two situations:⁴

- If it is satisfied that the work or use of the land could proceed without there being a real risk of damage or interference with a sacred site on or in vicinity of the land; or
- The custodians of the sacred site have made an agreement with the person (or company) that wants to use the land or carry out works and an Authority Certificate is in accordance with that agreement.

An Authority Certificate provides a statutory indemnity against prosecution in relation to the works or uses covered by the Certificate, provided the applicant complies with any conditions imposed to protect sacred sites. Authority Certificates are voluntary and provide an effective risk management tool for developers and act as site protection measures for custodians. It is not compulsory for a company or person to obtain an Authority Certificate before doing work on the land.

How do I get an Authority Certificate?

Persons or organisations wanting an Authority Certificate can apply to AAPA using an AAPA Certificate online application form (see form **attached**). All applications are charged a lodgement fee. AAPA will issue an Authority Certificate when it is satisfied that the use of or work on the area in question can proceed without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the area. To reach this level of satisfaction, AAPA will have first consulted with custodians of the area for which a certificate is sought to 'clear' the area for the proposed action.

A Certificate may also be issued if an agreement has been reached between the Aboriginal custodians of any affected sites and the applicant for the Certificate.

Application forms are available at: www.aapant.org.au/images/aapaDocs/forms/authCertificateForm/authority_certificate_application_form.pdf

The *Northern Territory Aboriginal Sacred Sites Regulations* set out guidelines for classifying Authority Certificate applications as either 'standard' or 'non-standard' applications and the charges which may apply for non-standard applications. The Regulations also set out fees which apply to the various services provided by AAPA:

- Standard applications costs can be found at www.aapant.org.au/feesandcharges.html⁵
- Non-standard applications are made for large projects or those incorporating factors that may complicate consultations with Aboriginal custodians, and AAPA will determine this cost on an individual basis⁶

2. Requests for information

AAPA maintains a record of all sacred sites that it has identified in the Northern Territory. Members of the public may seek advice on registered sacred sites by requesting access to the Register of Sacred Sites. AAPA provides **abstracts of information** to advise the public where sacred sites are known to exist so that they are not inadvertently damaged, and provide advice where sacred sites are likely to be at risk if works were to be carried out without more detailed information being sought first. AAPA may inform them that they should not carry out works on these sacred sites without an Authority Certificate and that any development proposals take into account their existence.

An Abstract of Records is a written abstract and a map of all the known sites including both Recorded and or Registered Sites. The abstract may also contain any Restricted Works Areas (RWAs) that have been created as part of AAPA Certificate process. A project area is required (normally a lot number, but it can also include a Mining Title or Pastoral Lease or other area of interest).

It is important to emphasise that requesting information from records is not a definitive way of determining the location of all sacred sites in a given area, particularly where use of land or sea may result in disturbance of features. There is a risk that a sacred site previously unknown to the AAPA may be identified after the commencement of works, leaving no option but to cease works under the provisions of the *Sacred Sites Act*. This is because the Act applies to all sacred sites in the NT, not just sites registered or recorded by the AAPA. Requesting information does not protect from prosecution under the *Sacred Sites Act*.

IMPORTANT NOTE:

The EDO is aware that some companies proceed with exploration for mining without having first obtained an Authority Certificate, instead relying on the information contained in the Abstract of Records. Obviously, the abstract of records cannot protect unregistered sacred sites from damage. The EDO can assist people to find out if a company has obtained a Authority Certificate to undertake works on a particular piece of land.

How do I request information?

Persons or organisations wanting an abstract of records can apply to AAPA using AAPA Certificate online application form (**attached**)

Application forms are available at www.aapant.org.au

3. Site registration

Custodians of sacred sites may apply to have their sites registered under Part III Division 2 of the *Sacred Sites Act*. AAPA will then conduct research into the site to determine the location, extent and significance of the site. In accordance with the *Sacred Sites Act*, AAPA ensures that sufficiently detailed documentation about specific sacred sites is recorded to warrant their inclusion by the Board and landowners are given an opportunity to comment.

Site registration enhances the protection of sacred sites. Registering a sacred site establishes its status with comprehensive information that is required by law and makes it easier to prosecute any offences committed in relation to that site. It establishes clear boundaries, details the features and traditions that make the site sacred and identifies the Aboriginal custodians of the site. Secret and sensitive material about the site is protected and not made available to the public.

For custodians, the site registration process offers greater protection for sacred sites. Any member of the public viewing the Register of Sacred Sites will see the location and boundary of registered sacred sites. The comprehensive level of information held by AAPA on registered sacred sites result in more effective conditions within Authority Certificates.

How do I register a sacred site?

1. Custodians can request that their sites be registered by downloading the Site Registration application form (**attached**) from AAPA's website. AAPA recommends that you use the application form, because it has lots of information about the site that will help the registration process. However, it is not necessary to use the form.

Application forms are available at www.aapant.org.au

Certain information is required for the registration form. This includes:

- The name of the sacred site
- Features of the sacred site
- The location, described by a map or GPS reference⁷
- Whether the site is under threat
- Whether site access is available for men, women or both
- The custodians and custodial relationship to the site

2. AAPA will send a Research Officer/Anthropologist to record:⁸
 - who the custodians are and their relationship to the site
 - what the site looks like
 - the story of the site and why the site is important to custodians
 - where the site is located
 - whether there are any restrictions, e.g. access for only men or only women

3. The Research Officer/Anthropologist will use the information collected from custodians to write a registration report and to make a map of the sacred site area so that it can be registered under the *Sacred Sites Act*.
4. Where required, AAPA will tell the relevant landowner that custodians want to register the sacred site.
5. The registration report and map of the sacred site will then go to the AAPA Board for approval.
6. If the AAPA Board approves the registration of the site, there are rules about who can read and use the custodian's information about the sacred site:
 - The registration report about the sacred site is kept at AAPA. Custodians can access any information they have shared with AAPA and maps of their sacred sites by visiting the AAPA's offices, either in Alice Springs or Darwin.
 - AAPA will not tell outside people about secret parts of the sacred site story without consulting with custodians.
 - A short story about the sacred site, which is called a Register Extract, and a map of the site are put on the AAPA's Public Register. The names of custodians of the site are also listed on this short story.
 - People from the public can read the short story (Register Extract) and look at the map. It is important that people working near the sacred site know where it is located so they don't damage the site.
 - People from the public and AAPA workers may contact custodians whose names are on the short story. It is therefore important to have the right address and phone number for each custodian.

IMPORTANT NOTE:

The EDO can assist custodians to apply to have a sacred site registered.

Caption: Wet season, Litchfield National Park.



Northern Territory sacred sites legislation

AAPA has a number of very specific functions under the *Sacred Sites Act* that include:

- Responding to requests for sacred site protection from Aboriginal custodians, including the recording and documenting of sacred site information, registration of sacred sites, the provision of related protection measures and the keeping of confidential sacred site records;
- Maintaining the Register of Sacred Sites, AAPA Certificate Register and other records and carrying out the necessary research for its functions;
- Responding to applications for Authority Certificates, carrying out research and surveys, and consulting with Aboriginal custodians to determine the constraints, if any, imposed on proposed works on or use of land by the protection of sacred sites, and where necessary, facilitating discussions between proponents and custodians; and issue or refuse to issue an Authority Certificate accordingly;
- Making available for public inspection the Register of Sacred Sites and AAPA Certificate register and providing sacred site records information to assist with the avoidance of sacred sites;
- Enforcing the *Sacred Sites Act*, including prosecuting for offences against the *Sacred Sites Act*. This is an exclusive power provided under Section 39 of the *Sacred Sites Act*;
- Approving entry on to a sacred site, and approve access across other land to a sacred site, under Section 47 of the *Sacred Sites Act*; and
- Conducting a review as requested by the Minister, reviewing representations towards resolving concerns by an applicant and reporting to the Minister.

The Minister for Community Services also has a number of very specific functions under the *Sacred Sites Act* that include:⁹

- Deciding whether to accept an application for a review of a decision, a failure or action of AAPA in connection with the issuing or processing of a request for an Authority Certificate, and request AAPA to review the matter;
- Deciding to either uphold the outcomes of AAPA's review, or to issue a Minister's Certificate, and table the reasons for such in parliament;
- Tabling AAPA's Annual Report in parliament;
- Seeking nominations from the Land Councils for membership of AAPA Board when positions become vacant;
- Approving an extension of 60 days in which to commence consultations or conduct a conference with custodians;
- Deciding on referred matters regarding charges for an Authority Certificate;
- Requesting security from an Authority Certificate applicant; and
- Granting permission for a new Authority Certificate application after a previous refusal to issue.

Sacred sites, heritage and burials

Archaeological places and objects are protected under the *Heritage Act* (2011) NT. Archaeological places may include artefact scatters, shell middens, earth mounds, quarries, stone arrangements, petroglyphs, rock shelters and rock art. When these sites have an Aboriginal tradition associated with them as defined under the *Aboriginal Land Rights Act* (1979) (NT), they are considered sacred sites for the purposes of the *Sacred Sites Act*.

Aboriginal skeletal remains are considered Aboriginal archaeological places and objects under the *Heritage Act*¹⁰. When skeletal remains are found in the Northern Territory, it is the police who should be contacted in the first instance. If they determine that the remains are not of a suspicious nature and may be of traditional Aboriginal origin, they will contact the Heritage Branch responsible for administering the *Heritage Act*. The Heritage Branch routinely works with AAPA in order to consult the relevant custodians, and be advised of the location of sacred sites in the vicinity of the burial area.

Under the *Heritage Act*¹¹ it is an offence to interfere with archaeological places and objects without authorisation under that Act.

If you do encounter skeletal remains, it is your responsibility by law to stop any work that is occurring and report such disturbance to the police immediately. If you have reason to believe the remains are those of an Aboriginal burial, this should be reported to the Heritage Branch. For further information you can contact the Heritage Branch at the Department of Lands, Planning and the Environment on (08) 8999 5039 or email heritage@nt.gov.au.

Offence provisions under the *Sacred Sites Act*

Under the *Sacred Sites Act* it is an offence to:¹²

- Enter a sacred site unauthorised;
- Work on sacred sites;
- Desecrate sacred sites;
- Contravene site avoidance conditions set out in an Authority Certificate or a Minister's Certificate;
- Communicate secret information unauthorised;
- Fail to comply with landowner specifications; or
- Refuse to allow authorised persons access to sacred sites.

The Aboriginal Protection Authority is the only body that can prosecute offences.¹³

The two most serious offences are desecrating a sacred site and using or carrying out work at a sacred site. These offences have a penalty of 2000 penalty units (\$298,000) for a body corporate or 400 penalty units (\$59,600) or two years imprisonment for a person. For more information about penalty units, read our Fact Sheet on penalties a www.edont.org.au/factsheets/penalties/.

The offences of entering a sacred site or failing to comply with a condition of a Certificate have a lower penalty of 12 months imprisonment or 200 penalty units (\$29,800) for a person or 1000 penalty units (\$149,000) for a body corporate.

Example: “Profit before protection” Aboriginal Areas Protection Authority v OM (Manganese) Ltd [2013] NTMC 19

In *Aboriginal Areas Protection Authority v OM (Manganese) Ltd (OM)* AAPA prosecuted OM (Manganese) Ltd (“**Defendant**”) for the desecration of a sacred site listed under the *Sacred Sites Act*. OM was fined \$150,000 in the Darwin Magistrates Court for offences, which occurred at the company’s Bootu Creek Mine site about 170km north of Tennant Creek.

This was the first successful prosecution by APAA for the offence of ‘desecration of a sacred site’ under the *Sacred Sites Act*.

The Sacred Site

The prosecution related to the damage of a site known in English as ‘Two Women Sitting Down’. The story of the site relates to two female dreaming figures, represented by rocky outcrops prominent in the area itself. The damage that occurred saw the collapse of a horizontal rock arm, which extended off a pillar that was a significant and strong identifying feature of the sacred site. This was of importance because OM employees were readily able to identify it.

The Authority Certificate

In this case, AAPA issued an authority certificate on the basis that mining could occur without there being a substantive risk or damage to, or interference with any of the sacred sites on the mining lease area (there were 7 sacred sites). The Authority Certificate included a condition that the Sacred Site “shall not be entered or damaged”.

Actions of OM

The court concluded that blasting of the open pit caused the horizontal arm to fall from the pillar that was part of the sacred site.

It was clear that OM had foreseen the possibility that the site might be desecrated. A number of their employees had expressed concerns about the fragility and stability of the horizontal rock arm. Indeed, OM employees had specifically noted the potential for damage to the horizontal rock arm.

OM failed to consult the traditional owners in a meaningful way. OM obtained consent from TOs with no mining experience, and TOs who later stated they failed to understand the discussion relating to the steeper (and more risky) angle of the open pit. OM ignored the concerns of TOs that mining was occurring too close to the sacred site.

Desecration or not?

A central issue in the case was whether the conduct of the Defendant amounted to the most serious offence under the *Sacred Sites Act*, being the desecration of a sacred site, or the less serious offence of breaching a condition of an approval that caused damage to a sacred site.

Desecrate is not defined in the sacred sites act. It was held that the offence requires a physical act that defiles or treats in a profane manner the sacredness of a site, or diminishes or destroys the sacredness of a site.

Criminal responsibility for the offence of desecration is not limited to an intentional act but extends to a circumstance where desecration of a site is foreseen as a possible consequence of the conduct. Here, it was foreseeable that the Defendant’s action would have caused the desecration of the sacred site. In OM, the court held that an ordinary mining company knowing its obligation under the authority certificate, the risk to the sacred site from proposed blasting, the fragility of the site and appreciating that damage might interfere with or damage the spiritual significance of the site, would not have proceeded with the Defendant’s conduct.

The full judgement can be read here:

<http://www.nt.gov.au/justice/ntmc/judgements/2013NTMC019.htm>

Site damage

How to prevent site damage

Site damage can be prevented by obtaining an Authority Certificate prior to commencing works in an area and by registering sacred sites.

When someone wants to undertake any kind of work on land or sea anywhere in the Territory, they should seek an Authority Certificate. Once an application is made and costs are accepted by the applicant, AAPA begins consultations with the Aboriginal people responsible for that area. Through these consultations, AAPA is able to advise about any sacred sites that need to be protected when the work takes place. The applicant receives an Authority Certificate with a map that clearly shows the location and extent of sacred sites in the area. The Certificate advises of any restrictions which may apply in order to avoid damaging the sites.

Custodians who are Aboriginal people responsible for a sacred site can request that the site is registered and placed on the Register of Sacred Sites. Registration of a sacred site means that it will be accepted by a court as prima facie evidence that a place is a sacred site. Other protective measures like fencing or erecting signage at the sacred site telling people to keep out of the site area can also be used when necessary.

Reporting damage to a sacred site

If at any time you have concerns that a sacred site has been damaged, or is under threat of being damaged, you should notify AAPA as soon as possible.

The following kinds of information that will help AAPA to investigate the site damage include:

- The location of the site;
- What kind of damage has occurred;
- Who discovered the damage;
- Who or what caused the damage;
- Using a camera or mobile phone to take a photo of the damage.

AAPA will send a staff member to investigate the damage as soon as possible, and will act quickly to prevent further damage from occurring.

AAPA can be contacted at:

Darwin

4th Floor,
R.C.G Centre,
47 Mitchell Street,
DARWIN NT.

Postal:

GPO Box 1890,
DARWIN NT 0801.

Tel: +61 (08) 8999 5511

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Email: enquiries.aapa@nt.gov.au

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References

- 1 Note that a sacred site under the *Sacred Sites Act* is defined in s 3 as a 'sacred site within the meaning of the Land Rights Act'. *The Aboriginal Land Rights (Northern Territory) Act (1979)* (ALRA) defines a sacred site as 'a site that is sacred to Aboriginals or is otherwise of significant according to Aboriginal tradition, and includes land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition'. This definition does not require sites to be declared before they are considered to be sacred sites, but implies that whether a site is a sacred site is a question of fact.
- 2 s 46 *Sacred Sites Act*
- 3 See s 69 ALRA and s 33 *Sacred Sites Act*
- 4 s 22(1) *Sacred Sites Act*
- 5 Standard applications are those not mentioned in cl 2, sch 1 of the NTSS Sacred Sites Regulations
- 6 Additional charges that may apply in relation to determining a Non-Standard application are as follows:
 - Consultants' fees (including payments to custodians and translators), which range from \$180 per day to \$800 per day.
 - Travel and accommodation expenses (including vehicle costs, airfares, etc).
 - Communication costs (satellite phones etc).
 - Equipment hire charges (Digital GPS, helicopter, fixed wing aircraft, boat charter, etc).
 - Photography.
 - Mapping and production of documents (printing, binding, etc).
 - Transcription costs.
 - Incidental costs.
 - Cost of staff time spent on research.
 - Cost of staff time spent supervising and liaising with other agencies/bodies.
 - Administration costs (staff and/or consultant arrangements).
 - Any other costs reasonably incurred.
- 7 EDONT can assist with providing GPS coordinates and maps.
- 8 Under s 27(2) *Sacred Sites Act*, AAPA must determine:
 - a) the basis on and extent to which the applicant and other custodians, if any, are entrusted with responsibility for the site according to Aboriginal tradition;
 - b) the name or names and addresses of the custodian or custodians;
 - c) the story of the site according to Aboriginal tradition;
 - d) the location and extent of the site;
 - e) the restrictions, if any, according to Aboriginal tradition, on activities that may be carried out on or in the vicinity of the site;
 - f) the physical features that constitute the site;
 - g) whether, and if so to what extent, the period of the registration should be limited; and
 - h) the restrictions, if any, that should be applied to information about the story of the site or the physical features of the site divulged by the custodian or custodians.
- 9 Under Section 5(5) of the *Sacred Sites Act* there are a number of AAPA functions that are specifically excluded from Ministerial direction as outlined below. They reflect the intention to provide an arms-length and independent role for AAPA, particularly with regard to sacred sites matters. In brief, AAPA cannot be directed on:
 - Processing and issuing of Authority Certificates.
 - Registration of sacred sites.
 - Role of AAPA in a review process.
 - Prosecutions under the Act.
 - Permission to enter a sacred site.
 - Appointment of staff, with the exception of the Chief Executive Officer.
- 10 See section 5-9 *Heritage Act* (NT).
- 11 See section 111 *Heritage Act* (NT).
- 12 Mitigating factors and functions which are included in the *Sacred Sites Act* clarify the capacity of AAPA to carry out its functions and the accountabilities that apply:
 - A holder of an Authority Certificate is indemnified against prosecution if, at any time in the future, they act in accordance with the conditions of the Certificate
 - Before a sacred site is registered AAPA must provide the owner of land on which a site is situated with notice of the proposed registration and invite written representations. AAPA considers representations and makes findings on the detriment that the site registration may have on the owner's proprietary interest in the land. The owner may apply for an Authority Certificate in relation to the registration of the site.
 - A sacred site, once registered by AAPA, shall be accepted as prima facie evidence by all courts, judges and persons acting judicially.
 - Aboriginal people have a right of access to sacred sites.
 - There is a defence to prosecution if the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site. This defence is limited on Aboriginal land, where there is a requirement to take steps to find out about sacred sites in the area to be visited.
 - An applicant for an Authority Certificate may apply for a conference with the custodians, about their application, or about the conditions of an Authority Certificate. A conference can occur before or after the issuing of a Certificate by AAPA.
- 13 s 39 *Sacred Sites Act*

Caption: Rockpools in afternoon glow, Butterfly Gorge Nature Park





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