

*Sacred Sites Processes
and Outcomes Review*
PwC's Indigenous
Consulting

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*Department of the Chief
Minister*

26 April 2016

Letter of transmittal

Mr Che Walsh
Department of the Chief Minister
GPO Box 4396
Darwin NT 0801

Dear Mr Walsh

Report on the Review into Sacred Sites Processes and Outcomes

I am pleased to present you with PricewaterhouseCoopers Indigenous Consulting's (PIC) report on the review into Sacred Sites Processes and Outcomes.

The Northern Territory *Aboriginal Sacred Sites Act* (the NTASSA) was passed in the NT Legislative Assembly in 1989. The NTASSA sought to create a framework legislation for balancing the protection of sacred sites with the economic, social and cultural development aspirations of all Territorians.

PIC was appointed to undertake a review of the Sacred Sites Processes and Outcomes and were asked to provide advice on:

- 1 areas in which the Act might be strengthened to improve protections for sacred sites;
- 2 areas in which the Act might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory; and
- 3 ways in which the Aboriginal Areas Protection Authority (the Authority) can:
 - a become more efficient; and
 - b balance the need for development with the need for protection of sacred sites.

The review undertook extensive face to face consultation with stakeholders. Stakeholders were also invited to make written submissions in addition to consultations. In total, 40 consultations were held and 9 submissions were received, from a wide range of stakeholders including the four Land Councils, the Aboriginal Areas Protection Authority, a select group of proponents, key NT Government agencies and other stakeholders. Their input has been key to the formulation of PIC's recommendations.

PIC has benefitted greatly from consulting with the stakeholders over the course of the review. We are particularly appreciative of the contributions received from all individuals and groups and for them taking the time to meet with the team.

PIC is confident that the recommendations in this report will assist the Authority's operations in regards to the NTASSA and enable the Authority to operate as an independent party to applicants and custodians to balance the protection of sacred sites whilst supporting economic development in the Northern Territory.

Yours sincerely,



Jason Eades
CEO



Glossary of Terms and Acronyms

Administrator means the Administrator of the Northern Territory as defined in the Northern Territory (Self-Government) Act 1978.

ALRA means the *Aboriginal Land Rights Act 1976*.

APPA means the Aboriginal Areas Protection Authority.

ARMS means the Administrative Research Management System which is an Oracle database developed for the Authority.

Authority means the Aboriginal Areas Protection Authority.

Authority Certificate means a certificate to undertake works on or near a Sacred Site issued by the Aboriginal Areas Protection Authority.

Board means the 12 member Authority Board as defined in the *Aboriginal Sacred Sites Act*.

CEO means the Chief Executive Officer of the Aboriginal Areas Protection Authority as appointed by the Administrator in accordance with the Aboriginal Sacred Sites Act.

EIA means an Environmental Impact Assessment as defined by the Northern Territory Environmental Protection Agency.

Land Council means Aboriginal Land Council established by or under the *Aboriginal Land Rights Act 1976*.

Ministers Certificate means a certificate to undertake works on or near a Sacred Site issued by the Minister.

NTASSA means the Northern Territory *Aboriginal Sacred Sites Act*.

NTCAT means the Northern Territory Civil and Administrative Tribunal.

NTEPA means the Northern Territory Environmental Protection Authority.

PSEMA means the Public Sector Employment and Management Act.

Register of Authority Certificates means the list of all Authority and Minister Certificates including all issued certificates, agreements and refusals.

Register of Authority Certificate Applications means a list of all applicants for an Authority Certificate.

Register of Sacred Sites means the list of all sacred sites registered by the Aboriginal Areas Protection Authority.



Sacred Site as defined by the *Aboriginal Sacred Sites Act* “means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.”

Executive summary

Introduction

Laws to protect sites that are important to living Aboriginal people in Australia were enacted in the Northern Territory decades before any other jurisdiction. The *Aboriginal Land Rights (NT) Act* (ALRA) sets the parameters of sacred site laws in the Northern Territory. On all land tenures, any site that is 'significant according to Aboriginal tradition' is defined in the ALRA as a 'sacred site' and is protected automatically.

The ALRA requires the Northern Territory Parliament to only make laws with respect to sacred sites that protect those sites but not in a way that gives any priority for protection based on the degree of significance of the site or on consideration of any other interests that may be affected. The ALRA also empowers the Legislative Assembly of the Northern Territory to the making of:

laws providing for the protection of, and the prevention of desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorising the entry of persons on those sites, but so that such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

These words define the limits of the powers of the Northern Territory Legislative Assembly with respect to Aboriginal sacred sites; and it is with respect to these powers, and to the offence provisions of the ALRA that all subsequent Northern Territory laws protecting sacred sites must be read.


The Northern Territory *Aboriginal Sacred Sites Act 1989* (the NTASSA) was established to provide a system a system that protects sacred sites whilst providing for the development of land. The long title of this Act provides an insight to the purpose:

An Act to effect a practical balance between the recognized 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, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

Whilst the long title uses the word balance, the Northern Territory Legislative Assembly through Section 73(1) of the ALRA establishes that the protection of sacred sites is the first priority and as such any mechanism that is seeking to allow for development cannot over-ride the protection of a sacred site.

The NTASSA contains a number of elements that collectively seek to protect sacred sites. The main features of the NTASSA include:

- The establishment of a 12 member **Authority** whose functions are predominantly to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site, to issue clearance certificates and to enforce the NTASSA.

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- A **Register of Sacred Sites** that establishes the process and establishes that only a custodian of a sacred site is able to apply for the registration of a sacred site. Section 27 places the onus on the Authority to gather the required information to process the application and the matters it must take into consideration.
 - A **Certificate** process that allows applicants to apply to undertake work near or on sacred sites. It is important to note that the Certificate does not establish a process by which a sacred site can be desecrated.
 - Establishes the rights of custodians to **Access Sacred Sites** including access on private property.
 - The NTASSA establishes a range of **Offenses** and associated **Penalties** that are aimed at protecting sacred sites.

The Review

The Sacred Sites Processes and Outcomes Review was established to investigate the extent to which the NTASSA supports economic development in the Northern Territory by examining the scope and operation of the NTASSA as well as the strategic and day-to-day operations of the Aboriginal Areas Protection Authority (AAPA), the statutory authority set up by the NTASSA to carry out the functions set out within it. Specifically the review sought to provide advice on:

- 1) Areas in which the Act might be strengthened to improve protections for sacred sites
- 2) Areas in which the Act might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory
- 3) Ways in which the Authority can:
 - a) Become more efficient
 - b) Balance the need for development with the need for protection of sacred sites

The NTASSA has been in operation for 27 years and during that time there has been no substantive changes made to the NTASSA. It appears to have served its purpose of providing protection of sacred sites whilst allowing development on land to occur. There has only been three occasions in which applicants have requested the Minister to review the decision of the Authority with only one of these resulting in the Minister issuing Certificate.

Whilst the legislation does provide automatic protection to all sacred sites in the Northern Territory, desecration of sacred sites has occurred and in some circumstances sites have been completely destroyed. However by comparison to the number of sacred sites protected by clearance certificates in the same period, it could be argued that protection has outweighed harm.

Moving forward the Northern Territory and Australian Governments have both expressed interest in developing Northern Australia, and this will necessarily involve consideration of developments on land where sacred sites are present. The need to have a protection system which is functioning efficiently and effectively is critical to this development agenda.

Trust and Transparency

A high level review of the literature relating to successful systems and practices quickly reveals the importance of two specific elements – trust and transparency.

In the context of the NTASSA it is critical that key stakeholders trust that the NTASSA will operate as it designed to and that the Authority will undertake its work

independently. Stakeholders also want to know that the processes themselves are transparent and consistent.

From the perspective of custodians who are highly concerned about the protection of their sacred sites, it is vital that they believe that their sites will be protected above all else and that the information they provide will be treated appropriately. For custodians this means that:

- Sacred sites are respected as places of significance for Aboriginal people.
- Information provided for the purposes of determining the existence of a sacred site will be kept confidential.
- Custodians are consulted on proposed activities on or near sacred sites. The right to be consulted is considered to be a fundamental element in the effective operations of the NTASSA from the perspective of custodians.
- Custodians are provided with the right amount of detail for them to determine the likely impact (if any) of the proposed activity on the sacred site. This requires applicants to be specific in the nature of current works and any proposed future activity.
- Certificates issued under the NTASSA will take into account the wishes of custodians including any measures to ensure that sacred sites remain protected.
- The NTASSA will provide sufficient deterrents and penalties to minimise desecration of sites.
- In case of where desecration occurs the Authority will prosecute offenders.

Without these elements existing it is likely that custodians will withdraw from the processes of the NTASSA and seek alternative measures to protect their sacred sites.

For applicants there is equally the need for trust and transparency but perhaps from a slightly different point of view. For applicants or proponents of development these elements include:

- Confidence that the system will operate as it is designed and that applications will be treated within the framework of the NTASSA. This includes no ethical judgement about the type of work proposed but rather a focus on the potential impact of the proposed activity on sacred sites.
- Transparency in the process that will be undertaken for assessing their application for the purposes of issuing a certificate. This includes communications at the key stages of the process and providing details of when delays occur and the reasons for such delays.
- Transparency in the cost recovery model utilised by the Authority.
- Confidence conditions that are placed on certificates are consistent, fair and reasonable to ensure for the protection of a sacred site.
- Reassurance that if they follow the certificate conditions that they will be indemnified from prosecution under the NTASSA.

- Knowledge that should they damage a site as a consequence of either not seeking a certificate or by not following the certificate conditions that they will be prosecuted and potentially receive penalties.

Without these elements existing for applicants it could lead to them disengaging from the process and proceeding with the development in any event. The consequence is that they utilise alternative measures (or not) to determine the risks associated with potential damage to sites.

Ultimately the breakdown of trust and transparency in the NTASSA and its operations will increase the threat to sacred sites which the NTASSA is seeking to protect. On the basis of this, the NTASSA as it currently operates and any proposed changes need to take into consideration these elements.

Consistency and Certainty

The consultations with stakeholders during this review confirmed that consistency and certainty were the most critical issues in relation to the operation of the NTASSA and the processes that underpin its performance.

The Oxford dictionary defines consistency as “the quality of achieving a level of performance which does not vary greatly in quality over time”. The term certainty is used extensively in relation to providing proponents of development a level of comfort in relation to the environment in which they operate. It is sometimes interpreted as meaning a level of guarantee that a project will be able to go ahead.

But in the context of the operations of the NTASSA, certainty is about ensuring that the NTASSA does what it is designed to do in the manner in which it was expected. In short does the NTASSA protect sacred sites and does it provide the correct processes that allow applicants or proponents the ability to undertake works on or near sacred sites whilst continuing to protect them.

Strengthening Protection

All stakeholders during the consultations recognised the need for the protection of sacred sites. In fact, it is fair to say that many acknowledge that the NTASSA as it is written contains significant measures that protect sacred sites however there were areas identified where protection could be strengthened. The major mechanisms considered during the Review were to:

- Amend the penalties in the NTASSA to better align with community expectations about the importance of the protection of sacred sites. During stakeholder consultations and in submissions made to the Review the question of the appropriateness of the level of the penalties was raised. Specifically proponents were concerned the penalties may not be a sufficient deterrent, and custodians were concerned that penalties may not sufficiently recognise the cultural importance of sacred sites. There was concern of the possibility a proponent may weigh up the cost of paying the maximum penalty against the potential loss of earnings to the business if they proceeded with the works.
- Introduce provisions for the compulsory reporting of damage or desecration of Sacred Sites including when holding an Authority Certificate. The process is reliant on the voluntary reporting of damage or through the discovery of damage at a later date. The Review found that it is reasonable to expect that if a person or body corporate is aware that they have damaged a sacred site then they should be required to report the damage to the Authority.
- Introduce provisions in the NTASSA that requires a proponent, whether they hold an authority certificate or not to stop work immediately should they damage or desecrate a site in the course of undertaking work on or near a

sacred site. Similarly the Review found that it would be beneficial for there to be provisions for the Authority to issue an emergency stop work order if they believe that the works being undertaken are placing a sacred site at risk of damage or desecration, and for there to be penalties if works continued after a stop work order had been issued. An appeals mechanism could be built into these provisions to allow an aggrieved party the opportunity to state their case if they feel the stop order is unjust. This process should be managed through the Northern Territory Civil and Administrative Tribunal (NTCAT).

- The introduction of compensation measures into the NTASSA recognising the complexities involved in these discussions and a need for these matters to be managed in a manner that ensures that customary matters are also taken into consideration. The NTCAT could be utilised as the means of addressing compensation under the NTASSA as this system has been established for the purposes of reviewing a wide range of administrative decisions and resolving certain civil disputes and would provide a separation of compensation from penalties which should continue to be managed through the courts.
- Greater clarity about the circumstances in which it would be appropriate for an Authority certificate to be revoked e.g. if the Authority believes there is a substantial risk of damage and repeat offenders.
- Introduce capacity for custodians to issue the Authority standing instructions in relation to a geographic location or particular site. The purpose of these provisions is to ultimately provide some flexibility for custodians and not take away any rights they currently hold in the NTASSA.
- Increase the rate of payment to custodians to be in line with other agencies would ultimately impact on the cost to the Authority. The review found that the rate has not changed in many years and in comparison to fees paid by other organisations, is considered as tokenistic by many custodians.
- Require that any proponents of projects be compelled to make the appropriate level of enquiries to establish if there are sacred sites in the area of their proposed works. In effect this would remove the ignorance defence and require the proponent body corporate to undertake a certain level of due diligence and risk assessment to determine if they should apply for an Authority Certificate.

Whilst there is a mechanism in the NTASSA for the registration and protection of sacred sites, it is not a requirement of the NTASSA that a sacred site be registered for the purposes of it being protected. The consultations raised the issue as to whether Authority Certificates should be made mandatory. In carefully considering the pros and cons, the Review believes that the current provisions in the NTASSA are sufficient and mandatory requirements should not be introduced subject to the penalties in the NTASSA being increased as outlined above.

Improving processes for economic development

The review found that all stakeholders, custodians and proponents, recognised the need for economic development now and into the future. The custodians the primary concern was for development not to occur at the cost of damaging or destroying sites. The key issues required to achieve this balance of interests were identified as:

- The introduction of a practicable way for the Land Councils to be more directly involved in the work of the Authority to carry out work required under the NTASSA. This could include documenting sacred sites for registration by the Authority and negotiating agreements between custodians and developers that form the basis for the issue of an Authority Certificate. Consultations



indicated that there have been times when proponents have not fully understood the separate and different roles of the Land Councils and the Authority, and hence have assumed processes were being duplicated. However examples were highlighted where communication and exchange of information between the Land Councils and the Authority occurs and the two concurrent processes proceed smoothly and effectively.

- Improving communication by the Authority of the process, of the information required in applications, and about the progress of applications being considered. On balance, the Review believes it would not be beneficial to impose any additional timeframes or requirements on the Authority or proponents.
- Amendment of the NTASSA to specifically allow for timeframes for the validity of certificates to be set. Further an appropriate set of standards that applicants can rely on to determine if they have met the requirement to commence work within the specified timeframes could be introduced.
- Introduction of a mechanism to transfer certificates to other parties in certain circumstances where:
 - The application relates to the same area of land;
 - Works or use of the land is the same as already permitted under a previously issued Authority Certificate;
 - Conditions are the same as already set out in a previously issued Authority Certificate.

It would be important for custodians to be notified by the Authority of any Authority Certificate transfers including being provided with the name of the holder.

- Introduction of the ability to issue one Authority Certificate was issued to an overarching proponent. All proponents would be required to be subject to the conditions of the certificate, but the overarching proponent would still be subject to prosecution should conditions be breached.
- Amend the NTASSA to provide greater clarity that proprietary rights do not allow for the damage or destruction of a sacred site. Some stakeholders consulted during the Review said that a landowner might be discouraged from applying for an Authority Certificate to confirm the continued use of the site as it might diminish rights that might otherwise exist under Section 44.
- Improve information and communication between the Authority and other regulatory bodies to ensure proponents are aware of the various requirements before they commence each application process, and do not miss the opportunity to align or manage matters concurrently

The Review was asked to look at the issue of site clearance for broader areas. There is a desire to create a clear process or framework for sacred site clearance over large geographical areas. However it is worth noting that the NTASSA already permits this type of process and that the Authority has already managed assessment of a number of broad area clearances. On balance, the Review believes that the creation of a system to deal with broader area clearances in a different manner to how other sacred site clearances are undertaken does not provide the level of red tape reduction or certainty required by major projects but rather is likely to create more uncertainty, risk custodians disengagement and lead to greater time delays and costs on projects.



Operations of the Authority

In reviewing the functions and powers of the NTASSA it is the view of this Review that the functions and powers are appropriate and adequate for the role of the Authority. The consultations with stakeholders did not raise any issues relating to either the functions or powers. The review did however identify a number of areas where the Authority's resources, structures and operations could be improved or streamlined to become more efficient and balance the need for development with the need for protection of sacred sites.

The review found that the Northern Territory Government appropriation has decreased, income from fees has fluctuated. When compared with the activity of the Authority, it would appear that demand (requests for information, applications received) had been declining marginally over this same time period, and output (registrations, certificates issued) has also been declining.

The review also found that the Authority collects a large amount of information from custodians about sacred sites. This information includes the location of a site, the detailed story and any other material that supports the registration of the site. The Authority currently holds information on 2031 registered sites and the keeping of this material has become an important function of the Authority. It provides a valuable resource base to draw from when applications are lodged for certificates and it also provides a valuable resource for custodians who have an expectation that if information is supplied then it will be available to them when they require access to it.

The Review did receive a range of views about the processes of appointment to the Board. This included Land Councils who want to provide direct nominations, some stakeholders who expressed a desire to see other interests represented on the board, the skills of board members including the Minister appointments be specified to include skills that are required for the Authority to discharge its responsibilities and some stakeholders expressed a desire for general good governance principles to be applied including staggering the terms of Authority board members.

The Review believes there is value in maintaining an independent Board with decision making authority, rather than moving to a model where the Board is predominantly advising government. However to improve the performance of the Board, the Review considers that collectively the Board needs its members to have a range of skills to ensure good governance.

During the consultations the role of the CEO of the Authority was discussed in the context that the role is not appointed by the Authority but by the Administrator on the terms and conditions as determined by the Minister. The review found that for effective governance purposes it is more desirable to have the CEO position appointed and responsible to the Board.

A consistent theme from the majority of stakeholders consulted was that the Authority was not resourced to the level required to effectively and efficiently discharge the full extent of its duties. The examples of responsibilities that the Review found were not being carried out to a level of efficiency that might be expected are:

- the number of sites being registered annually is minimal and a backlog exists.
- the ability for the Authority to bring forward prosecutions is dependent on special advances from Treasury.

The review found the implementation of the following changes would benefit the Authority:

- Implementation of a revised fee for service model as already identified in the current regulations, in the NTASSA.



- Develop an operational model to allow the Authority to scale its resources in line with the level of demand that it receives. This would require the building of a model that would allow the Authority to make educated estimates on future workload, revenue especially cost recoveries from clients so that it is able to resource appropriately.
- Undertake a comprehensive review of the structure of the Authority supported by a change management process and require a one off injection of funding to undertake the review and to implement the findings across the Authority. A key consideration in this review would be how investigations and prosecutions were managed and resourced.
- Require proponents applying for Authority certificates to provide a greater level of detail in their original applications. This would provide greater clarity of the work and provide custodians a fuller picture of what is requested to be undertaken and hence streamline the authority certificate process.
- Implement pre-contact with land owners about the intention to register a site on their land before the Authority sends the official notification required by the NTASSA. The 28 days notification period is often not long enough for the land owner to obtain sufficient information to understand their rights and to make informed representations. Additionally it can also result in negative relationships between land owners and custodians which can present as later problems when custodians are seeking access to a sacred site.
- Establish either a sub-committee of the Authority Board or regional committees that are provided with the powers to consider the registration of sacred sites. This would provide some efficiency in relation to the timeframes to register a sacred site.
- Establish an electronic register that is accessible online and that has a mechanism in place to ensure the Register does not contain any restricted information and on payment of the prescribed fee applicants are provided with access. The consequences of managing applications to inspect the register manually are that it takes up the resources of the Authority.
- Implement a cost modelling tool for preparation of cost estimates for certificates to make efficiency gains whilst providing transparency for applicants. One substantive issue that emerged during the review was that the cost for applying for an Authority Certificate is not related in any way to the cost of the works that are being proposed by the applicant. Another was that the estimates of the costs were not consistent from application to application or sufficiently transparent on the drivers of the cost of preparing an application.
- Modernise and develop a new interface for the Authority's database. This will also enable the sharing of data in relation to the location of sacred sites, and involve strict licencing agreements that maintain the confidentiality of information. Risks such as managing any commercial in confidence matters and inadvertent disclosure of sensitive cultural information, would need to be built into any new mechanism.
- Establish a system for 'heat mapping' to provide information to users on areas that are safe to undertake work, areas that would require caution and areas that are no entry zones.
- Recommence proactive and engaged communication strategies and information sharing with industry, government agencies and other proponents.

The review found that there is a mixture of misinformation and a general lack of awareness of the NTASSA and the role and function of the Authority.

- Develop an ISO Standard for the protection of sacred sites to set out Standard Operating Procedures that provide any person involved in ground disturbance works on near sacred sites with guidance on best practice.

During the consultations for the Review there was questions raised about the independence of the Authority. Specific concerns related to a perception that some staff may allow their personal ethics or views to influence their work and this in turn may be leading to the delay to the issuing of certificates or influence the extent of restricted areas. The Review was not presented with any evidence to support this view. The Authority has in place a range of checks and balances to ensure individuals views do not overly influence the process.



Summary of Recommendations

A total of 39 recommendations are made in this Review. They are summarised below.

No	Recommendation	Page Reference
1	That Section 42 of the NTASSA be enhanced by a requirement that it is the wishes of Aboriginal people who have a culture relationship with the sacred site be taken into account and that clarity be provided that no decision can give rise to the desecration of a site.	28
2	That the NTASSA be amended to align the penalties for breaching certificates with the NT Environmental Offences and Penalties Act, Environmental Offence level 1.	30
3	That the NTASSA be amended to the definition of a body corporate to include its Directors and senior officers.	30
4	That subject to recommendations 2 and 3 being introduced, the NTASSA not be amended to require mandatory Authority Certificates.	31
5	That the NTASSA be amended to ensure Section 36(1) relates only to a natural person and that a defence should only exist for a proponent body corporate if it can establish that it exercised all due diligence to ensure it complies with the NTASSA.	31
6	That the NTASSA be amended to include compulsory reporting in relation to the damage and/or desecration of a sacred site.	32
7	That the NTASSA be amended to allow for stop work orders to be implemented if a site has been damaged and/or desecrated or is seen to be under threat of being damaged and/or desecrated. Further the NTASSA should allow for appeals mechanism to NTCAT.	33
8	That the NTASSA be amended to incorporate compensation measures and that discussions and resolution of compensation be managed through NTCAT.	36
9	That the regulations to the NTASSA be amended to include guidance about when the Authority will revoke a certificate.	37
10	That the NTASSA be amended to provide custodians with the ability to issue standing orders on terms that the custodians set. Further any amendments must not take away any rights of custodians to be consulted.	38
11	That the remuneration for custodians be determined on an annual basis by the Northern Territory Remuneration tribunal.	38

No	Recommendation	Page Reference
12	That the Section 22 of the NTASSA set out the minimum standards for any agreement reached under Section 22 (1)(b) and that the Authority explore the options for sub-contracting the Land Councils to undertake work on its behalf for preparation of documentation for the registration of sacred sites and consultations with custodians for the purpose of an Authority Certificate.	41
13	That the NTASSA be amended to include the ability to require works to commence within a statutory timeframe and that the statutory timeframe including guidance on what constitutes commencement of a project be outline in the Regulations of the NTASSA.	44
14	That a mechanism be introduced in the NTASSA that allows for the transfer of Authority Certificates to other proponents subject to being bound to the original purpose and conditions of the Authority Certificate. Further amendments be introduced that allow for multiple Applicants to a single Authority certificate.	45
15	That Section 44 of the NTASSA be amended to provide greater clarity that the exercise of priority rights must not contravene the protections for sacred sites elsewhere in the NTASSA or in other words does not give rise to a right that would result in a site being damaged or destroyed.	47
16	That the Authority work with the NTEPA, the Department of Mines and Energy and the Department of Lands, Planning and the Environment to review and redevelop respective communication material for proponents, to clarify respective roles and responsibilities and streamline regulatory processes.	50
17	That the functions and powers of the Authority as described in Sections 10 and 11 of the NTASSA are appropriate.	53
18	That in the exercising of the powers in Section 5 (5) consideration be given to the resource impact on the Authority by any directions provided to them.	54
19	That the Authority be resourced to undertake an assessment of the collection and to undertake work with the collection that preserves and protects the material whilst making it accessible for the work of the authority and custodians.	55
20	That the NTASSA be amended to: <ol style="list-style-type: none"> 1) Specify that the ratio of Board positions that must be filled by the four Land Councils. 2) Require the Land Councils to nominate a pool of nominees for their specified Board positions only. The number of nominees must be twice that of the number of vacancies and must be of equal gender. 3) Retain the requirement that the 10 appointments made 	57

No	Recommendation	Page Reference
	from the pool of Land Council panel be custodians.	
	4) Require the Administrator to have regard to a range of other secondary skills required by the Board when making appointments.	
	5) Provide details on the two Minister nominees including the skills and knowledge that the Minister must have regard to in making the nominees.	
	6) Introduce staggered Board terms so that 4 members are appointed annually.	
	7) Any amendments made to the appointment process should not occur without further consultations with the Land Councils	
21	That the NTASSA be amended to allow for the appointment of the Chief Executive Officer to be made by and be responsible to the Authority Board.	57
22	That the Authorities operational structure be reviewed with an emphasis on structuring a cost recovery model that allows the Authority to scale it resources based on demand. Further the outcomes of the review be supported by a change management process across the Authority.	59
23	That the employment status of Authority Staff be clarified and if required amendments be made to the NTASSA to reflect their employment status.	59
24	That APPA work with applicants to ensure that their full scope of proposed works including any future work is included in the original application for an Authority Certificate.	61
25	That the Authority work with custodians to ensure that they are provided as soon as practical, full details of an applicants proposed scope of works including any future works.	61
26	That the NTASSA be changed to increase the time frame from 28 days to 60 days for the notification to land owners that a sacred site is to be registered on their property and that the Authority adopted a policy of contacting land owners where practical prior to the issuing of notices to advise verbally that a site is to be registered.	62
27	That the Authority Board examine the use of committees including sub-committees of the Authority Board to consider the registration of sacred sites.	62
28	That the Authority implement an electronic Register online that ensures that confidential information is restricted in which access is provided only on receipt of the prescribed fee.	63
29	That the Authority implement an electronic system to handle information requests including the inspection of the Register of	64

No	Recommendation	Page Reference
	Sites and Certificates. This system should include the ability to lodge a fee online and ensure that any restricted material as defined by the NTASSA not be made available.	
30	That the Authority investigates and adopts a price estimation tool for the preparation of fees associated with the preparation of an Authority Certificate.	65
31	That the use of standard and non-standard fees in the NTASSA and Regulation be replaced with a single fee process that includes the ability for the Authority to waiver the fee.	66
32	That at the time of an applicant being provided a cost estimate that the Authority provide applicants with an estimation of the timeframes to process their application.	66
33	That the Authority be provided with sufficient resources to discharge its prosecution responsibilities under the NTASSA.	67
34	That the Authority be resourced to urgently undertake work on the database and to develop a new interface that will enhance the usability and accessibility of information contained in the database.	68
35	That the Authority continue to enhance its data sharing capabilities by ensuring that any future redesign of the database include enhanced data sharing capabilities.	69
36	That the Authority implement heat-mapping capabilities into its data mapping systems.	69
37	That the Authority allocate sufficient resources to undertake an annual program of marketing and communications aimed at increasing the level of awareness of the NTASSA and the Authority with key stakeholders.	70
38	That the Authority develop an ISO Standard in relation to working on or near sacred sites. The Standard should be voluntary with proponents seeking to implement the System charged on a fee for service basis.	70
39	That the Authority: <ol style="list-style-type: none"> <li data-bbox="432 1630 1139 1686">1) Continue to provide all staff and the Board with training about independence and ethical practices; <li data-bbox="432 1686 1139 1720">2) Ensure policy and procedures embed this principle; and <li data-bbox="432 1720 1139 1776">3) Develop a feedback pathway for proponents and custodians. 	71



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1 **Introductory Matters**

1.1 **History of legal protection of Aboriginal sites in the NT**

Laws to protect sites that are important to living Aboriginal people in Australia were enacted in the Northern Territory decades before any other jurisdiction. Elsewhere in Australia, the first laws to protect Aboriginal sites were designed to protect prehistoric sites particularly rock art and sites of archaeological importance. The purpose of these laws was to preserve sites that were identified as significant because of the ‘cultural relics’ they contained. Contemporary Aboriginal interests in such sites were not acknowledged. In some jurisdictions protection for such sites was achieved within the regime of laws protecting natural and built heritage¹.

In the Northern Territory the need to protect sites was recognised for different reasons. The purpose of the first legislation concerned with the protection of Aboriginal sites in the Northern Territory was to keep non-Aboriginal people away from sacred ceremony grounds and burial places so that the Aboriginal custodians of those places would not be provoked into retaliating under “tribal law”.

The *Police and Police Offences Ordinance (NT) 1954* operated in the wider policy context of the *Welfare Ordinance 1953* under which, Aboriginal people were classified as “wards” of the state and thereby excluded from the rights, obligations and responsibilities of citizens. An Aboriginal remained a ward as long as they adhered to traditional cultural practices; in particular speaking distinct languages and living with kinsmen in proximity to totemic sites and country. The provisions protecting sites in the *Police Offences Ordinance*, designed to operate in remote Aboriginal communities, made it an offence to:

“wilfully or negligently deface, damage and cover, expose, excavate or otherwise interfere with a place which is, or has been at any time, used by Australian Aboriginal natives as a ceremonial, burial or initiation ground”.

No prosecution was ever authorised under this section of the Ordinance.

In 1960 the Native and Historical Objects Ordinance (NT) 1955 was amended to include 'areas' and became known as the Native and Historical Objects and Areas preservation Ordinance (NT) 1960. This law extended the prohibitions of the Police and Police Offences Ordinance by making it an offence to wilfully or negligently interfere with a place in which "ancient remains, human or otherwise are situated", and enabled such areas to be “prescribed” on un-alienated crown land by the Administrator². Some of the first sites considered for protection under this Ordinance were those threatened by bauxite mining on the Gove Peninsula.

¹ Ritchie D (1994) *Principles and Practice of Site Protection Laws in Australia. Sacred Sites Sacred Places*. D L Carmichael, J Hubert, B Reeves and A Schanche Eds. London, Routledge

² Jack-Hinton, C. and Milikin, E.P. in Edwards ed. "The Preservation of Australia's Aboriginal Heritage", A.I.A.S., Canberra 1975

1.1.1 Gove Land Rights

The Gove Land Rights Case³ was the seminal event in the development of Aboriginal land rights policy in the Northern Territory and hence the protection of Aboriginal sacred sites. The Rirratjingu and Gumatj plaintiffs in this case argued that the basis of their traditional entitlements to land lay in their relationship to sacred sites on their land. Mr Justice Blackburn acknowledged the importance of this spiritual relationship but also found that this did not amount to communal native title.

In the aftermath of the Gove case, the Commonwealth issued a Commission to Justice Woodward⁴ to inquire into Aboriginal Land Rights. The findings and recommendations of that inquiry were the basis of the *Aboriginal Land Rights (NT) Act 1976* (ALRA). Among other things, this Act empowered the Northern Territory Legislative Assembly to pass laws to protect sacred sites and set the parameters governing any such laws.

1.1.2 Woodward Report

In 1974, the Commonwealth Aboriginal Land Rights Commission (Woodward Commission) made recommendations for the protection of Aboriginal sites.

The Second Report of the Woodward Commission⁵ contains a section on Aboriginal sacred sites that includes six recommendations that greatly influenced policy and subsequent legislation (bracketed numbers refer to paragraphs from the Woodward Report):

- **Definition of sacred sites/sites of significance:** These are places of “contemporary religious importance” (535). There is “no clear dividing line” (517) between “sacred” sites and those otherwise of significance. Therefore “sacred sites” is used to include, with sites that are clearly sacred in the ordinary sense, sites which may not be clearly sacred but which have spiritual or religious significance in addition to any other significance they may have. Sacred sites in this sense include places of significance to living Aborigines. “In case of sites which have been sacred to Aborigines in the past, but where there are no present custodians of the place, a general policy will have to be devised in consultation with regional and national Aboriginal organisations.” (532)
- **Sites need protection:** Because of Aborigines’ personal identification with land focused on sacred sites they are vulnerable to “grave offence and deep hurt” (521) if sites are damaged.
- **Register of Aboriginal sacred sites:** A Register of Aboriginal Sacred Sites should be established to identify sacred sites. Entries upon the register should be at the discretion of site custodians who “will need to be convinced of the benefits...” (524). The register should be conclusive evidence in all courts that the sites it names are sacred sites.
- **Offence to damage or desecrate a site:** Legislation should establish such offences in law. Defendants should need to prove that site damage is accidental or that they “had no reasonable grounds for suspecting that the site was of significance to Aboriginal custom or belief” (Appendix D: s44(4)(b)). On Aboriginal land, the onus lies with persons carrying out works to determine whether their works will affect sacred sites.

³ *Milirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141

⁴ A. E. Woodward had gained experience in this area as Counsel for the Rirratjingu and Gumatj plaintiffs in the Gove Case.

⁵ Woodward J. (1974) *Aboriginal Land Rights Commission 2nd Report*, April 1974 Australian Government Printing Service, Canberra.

- **Public information about sites:** Subject to the wishes of custodians, the location of sacred sites should be made known to land owners and members of the public. Options for doing so may vary with different land titles and for other reasons.
- **Permits:** There should be a permit system to allow access to sites, subject to the wishes of custodians⁶.

Woodward based these recommendations on his finding that places of current spiritual or religious significance to Aboriginal people need to be protected to avoid the harm to Aboriginal community members (custodians) identified with such places that would arise if they are damaged.

The Woodward Commission considered legislation concerning sites within the broader context of land rights legislation but did not make specific recommendations on the administration of proposed legislation. However, there appears to be an assumption that the Land Councils and the office of the Land Commissioner would have carriage of these provisions.

When the *Aboriginal Land Right (NT) Bill 1975* was drafted, it contained many of Woodward's recommendations. The Bill made it an offence to "desecrate land in the Northern Territory that is a site of significance according to Aboriginal tradition" (Clause 72(1)). However, Clause 72(3) of the Bill allowed three defences to a charge under Sub-section 1:-

- That the desecration was accidental.
- That the person charged had not reasonable grounds for suspecting the site was of significance according to Aboriginal tradition.
- Where the site was on Aboriginal land, that the person charged had obtained the appropriate permits from the Land Council and sought the services of a guide for the area in which the site was situated and either a guide was not provided in reasonable time or the guide failed to identify the site of significance.

Clause 72(4) provided that an area of land might be 'declared' a site of significance by regulation and that such a declaration should be accepted by persons acting judicially as proof that the area to which it relates is a site of significance according to Aboriginal tradition.

Both the Minister and the Land Councils were given powers to authorise activities on any Aboriginal site of significance. In fact Section 72(7) gave the Land Councils power to accept payment in exchange for consent to carry out activities on a site of significance.

1.1.3 Aboriginal Land Rights

The ALRA sets the parameters of sacred site laws in the Northern Territory. As a consequence, sacred sites are more broadly defined and more explicitly protected than in any other jurisdiction.

On all land tenures, any site that is 'significant according to Aboriginal tradition' is defined in the ALRA as a 'sacred site' and is protected automatically.

⁶ Woodward J. (1974) *Aboriginal Land Rights Commission 2nd Report*, April 1974 Australian Government Printing Service, Canberra.

The ALRA requires the Territory Parliament to only make laws with respect to sacred sites that protect sacred sites. Section 73 of the ALRA allows no scope for either an administrative or political process to determine the priority for protection based on the degree of significance of the site or on consideration of any other interests that may be affected.

The ALRA contained some significant departures from the 1975 Bill including a definition of 'sacred site'⁷.

The other significant departure from the 1975 Bill was the provision for 'reciprocal legislation', giving the Legislative Assembly of the Northern Territory power to make laws providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land.

Section 73(1) extends the power of the Legislative Assembly of the Northern Territory under the Northern Territory (Self-Government) Act 1978 to the making of:

laws providing for the protection of, and the prevention of desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorising the entry of persons on those sites, but so that such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

These words define the limits of the powers of the Northern Territory Legislative Assembly with respect to Aboriginal sacred sites; and it is with respect to these powers, and to the offence provisions of the ALRA that all subsequent Northern Territory laws protecting sacred sites must be read.

The scheme of site protection recommended by Woodward is very closely followed and the legally recognised concept of “sacred sites” is central to the scheme of the ALRA, evident in the definition of “traditional Aboriginal owners”⁸.

The ALRA establishes principles that applied to subsequent Northern Territory site protection laws including the Northern Territory *Aboriginal Sacred Sites Act 1989* (NTASSA):

- Presumptive protection for sites of traditional significance
- The creation of a legally recognised register of sites.
- Protective measures such as signs and fences should be at the discretion of Aboriginal custodians.
- Specific attention should be given to protecting sites from capital works.
- Access to some sites should be completely prohibited to non-Aboriginals.
- The wilful damage or desecration of a site should be an offence⁹.

⁷ This definition was later adopted in the Northern Territory *Aboriginal Sacred Sites Act (NT) 1978*.

⁸ The *Land Rights Act* defines: *Traditional Aboriginal owners, in relation to land, means a local descent group of Aboriginals who:*

- a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- b) are entitled to forage as of right over that land.

Specifically, the definitions and offences relating to sacred sites in the ALRA are adopted in the NTASSA.

“Aboriginal tradition” means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

This definition focuses on current beliefs and practices of Aboriginal groups and communities and therefore allows for cultural change. However, reference to “traditions” and “custom” within the definition support the interpretation that current Aboriginal traditions will have continuity with past beliefs and practices.

“Sacred site” means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any 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 makes it clear that sacred sites are places of significance under currently held traditions of Aboriginals, that is to living individuals.

Offence of Entry to Sacred Sites

The ALRA, makes it an offence for any person to enter or remain upon any site of traditional significance to Aboriginal people in the Northern Territory regardless of whether or not that site had been declared and in fact, even if its existence was unknown to the authorities¹⁰. Section 69 of the ALRA prohibits a person other than an Aboriginal person acting in accordance with Aboriginal tradition from entering land that is a sacred site. The only defence is for the defendant to prove that he had no reasonable grounds for suspecting that the land concerned was a sacred site. In respect of charges in relation to Aboriginal land, the a defendant also needs to establish that he was otherwise lawfully on the land and that he had taken all reasonable steps to ascertain the location and extent of sites on those parts of the land likely to be visited by him.

The importance of sites of current spiritual importance extends further to the protection of sites on land, regardless of whether it may be claimed, regardless, in fact, of the form of title under which land is held. It is assumed in the ALRA and subsequent complimentary legislation that the protection of sites normally will have no effect on land title and the protection of Aboriginal sacred sites amounts to an administrative interest in the land¹¹.

Land Council Functions in Relation to Sacred Sites

In contrast to the 1975 Bill, the ALRA contained no reference to Land Council functions relating to the protection of sacred sites when it was passed in 1976.

In response to recommendations made in Toohey J’s, review of the ALRA in 1983¹² such a function was added. The functions of the Land Council s23(ba) now reads:

⁹ Woodward Report 1974: Para.536

¹⁰ Although, for prosecution to be successful, it was necessary to demonstrate conclusively to a Court that the site was indeed of significance to Aboriginal people in accordance with Aboriginal tradition (and that the person charged had reason to so suspect that the place was a site of traditional significance).

¹¹ Blackburn J’s conclusion in the Gove Case was that relationships to sites are religious and spiritual and do not constitute proprietary interests in land.

¹² Toohey, J. (1984) Seven years on, Report to Minister for Aboriginal Affairs, AGPS, Canberra.

to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal Land) in the area of the Land Council.

This wording does not suggest that the Land Councils have a primary role in the administration of sacred sites but one of assisting custodians of sites to make use, *inter alia*, of legislation such as the NTASSA and *Aboriginal and Torres Strait Heritage Protection Act 1984*. On Aboriginal Land, Land Councils have a larger administrative role to the extent that they control, in consultation with relevant Aboriginal people, access to and use of the land.

1.1.4 Northern Territory Sacred Sites Policy

Territory Government draft Legislation, 1977

The *Aboriginal Lands and Sacred Sites Bill (NT) 1977* was the first legislation to be drafted under the terms of Section 73(1) of the ALRA. This Bill created two categories of sacred sites - those on Aboriginal land and those not on Aboriginal land. For sites on Aboriginal land, an authorised Aboriginal, defined as a person who in accordance with Aboriginal tradition might control the entry of persons upon that area of land (Section 3), might take action to protect a sacred site by either erecting signs and/or requesting that the Administrator make regulations prescribing the area a sacred site.

In cases of sites not on Aboriginal land, the authorised Aboriginal could only request that the Administrator in Council initiate steps to protect the site. Such requests were to be referred by the Administrator to the Aboriginal Land Commission.

Offences under the Bill were:

- Entering or remaining upon land that is a prescribed area with lawful authority - Penalty \$2,000.
- Knowingly desecrating an Aboriginal sacred site - Penalty \$10,000.

However it was a defence if the person charged could demonstrate that the boundaries of the area were not adequately and clearly defined or that signs were not erected according to the provisions.

Bonner Report, 1977

The Joint Select Committee on Aboriginal Land Rights in the Northern Territory examined the *Aboriginal Lands and Sacred Sites Bill (NT) 1977* and the *Native and Historic Objects and Areas Preservation (NT) Act 1960*. The Committee was critical of both pieces of legislation and made recommendations concerning protection of Aboriginal sites in the Northern Territory including:

- The creation of a Statutory Authority with Land Council representation to co-ordinate requests for protection, initiate prosecutions and establish appropriate methods of protection.
- Mandatory consultation with the Land Councils to determine the existence of sacred sites before major capital works involving earth works or clearing were initiated.
- That initiatives for the protection of sacred sites should rest with the Aborigines themselves and that mandatory sign posting and fencing should be avoided.
- That penalties should be sufficient to act as a real deterrent against breaches of the Act.

Refinement of NT Government Legislation, 1978

In the light of the recommendations of the Bonner Committee and following further consultation with the Land Councils and various other stakeholders, the Northern Territory Government decided to split the *Aboriginal Lands and Sacred Sites Bill* into two separate Acts - the ALRA covering entry onto Aboriginal land and closure of seas and the NTASSA covering the protection of sacred sites.

The subsequent *Aboriginal Sacred Sites (NT) Bill 1978* picked up the Committee's suggestion to establish a statutory authority to administer the task of documenting, recording and protecting Aboriginal sites. The *Sacred Sites Bill* was introduced into the Legislative Assembly on 2nd March 1978. It was subsequently amended to include clauses providing clear authority for Aboriginals to enter sites and excise direction over measures for the protection of sites. It was assented to on 19th November 1978. Board members to the Sacred Sites Authority were appointed in 1979 and subsequently, a Director and staff. The new organisation commenced operation in 1980.

Review and Proposed amendments 1982 - 1984

The first years of the operation of the NTASSA and the new Sacred Sites Authority highlighted critical issues for the administration of the legislation that prompted the first review of the legislation.

The Government's 1981 capital works program in Alice Springs was discontinued because issues arising from the existence of sacred sites could not be resolved, in particular:

- the breadth of the definition of sacred site; and
- the presumptive protection for all places meeting the definition.

The Government determined the problem lay in the NTASSA and drafted amendments in the form of new legislation: the *Aboriginal Heritage Bill 1982*.

In his Second Reading Speech to that Bill the then Chief Minister, Paul Everingham, MLA, explained what he saw as the problems created by the broad definition of "sacred site":

The definition of a sacred site in its present form is extremely broad in application and very narrow in effect. It is very broad in that it applies not only to sites which may be sacred to Aboriginals or important to Aboriginals but also to sites which are otherwise of significance according to Aboriginal tradition.

In the well known case Marika -v- Nabalco before Mr. Justice Blackburn which heralded the emergence of the Land Rights movement, an opinion was given by one of Australia's anthropologists of the old school that "there was probably not a square inch of Australia that is not of significance by tradition to Aboriginals"¹³

The *Aboriginal Heritage Bill* contemplated a tiered classification and protection of sacred sites under two broad categories - those within town boundaries and those outside towns (Section 11). A site outside town boundaries could, upon application, be declared an area of significance, however it was up to the Administrator to determine the degree of significance to be attached to the site. For sites within town boundaries, the Bill set out a three-tier classification being 'sacred sites', 'important sites' and 'sites of interest' than on 'sacred sites'.

¹³ Northern Territory Legislative Assembly Hansard (1983).

The proposed changes were strongly criticised by Aboriginal custodians and Land Councils, and were not supported by the Commonwealth Government¹⁴. In the end the Territory Government did not proceed with the *Aboriginal Heritage Bill*.

In September 1983 the Territory Government submission to the “Seven Years On” review of the ALRA argued the need to amend the provisions in the ALRA relating to sacred sites. In his findings following the Review, Justice Toohey stated that:

“There is in force in the Territory submission but the answer must lie not in amending the definition but in establishing workable administrative provisions”¹⁵.

The Commonwealth accepted this recommendation.

Justice Toohey accepted the Territory’s submission that the role of administering the site protection measures established under the ALRA should not be carried out by the Land Councils and that there was no imperative for the Commonwealth to pass additional legislation in this area “unless the Territory legislation is demonstrably inadequate or is not working effectively”¹⁶.

In 1984 the Territory Government proposed another amendment to proscribe the application of the blanket protection offered to all sacred sites. The amending Bill contained a clause making it illegal for the Sacred Sites Authority to erect signs identifying the location of sacred sites unless the Government gave approval¹⁷. The intention was to diminish the practical application of the blanket protection given to all sacred sites under the ALRA by creating a situation in which a defence of “having no reasonable grounds for suspecting that an area was a sacred site” would be likely to succeed in the case of all sites except those officially declared under the new law. Again these proposed amendments did not attract wide support and were discontinued.

The Martin Committee Review 1987

In 1986 a Committee of Review chaired by Brian Martin QC was established to:

“enquire into, report and make recommendations in respect of the philosophy and policies regarding the law to appropriately protect areas which are sacred or otherwise of significance to Aboriginals, including the operation and effect of existing laws, and the practices and procedures adopted by the Aboriginal Sacred Sites Act of the Northern Territory”¹⁸.

The Committee's findings were made available to the Government in June of the following year (1987). In October 1988 new legislation, informed by the findings of the Martin Committee was introduced to the Assembly.

In its original form the *Aboriginal Areas Protection (NT) Bill*, would have created two broad categories of sites. One category would be protected under the new legislation and the other category would not. For a site to be included in the protected category, the Minister had to agree. This approach was based almost word for word from the Commonwealth *Aboriginal & Torres Strait Islanders Heritage Protection Act 1984*

¹⁴ Robinson M.V (1982) “Review of Sites Legislation in the Northern Territory, April 1982” Unpublished Manuscript, NTASA Library.

¹⁵ Toohey, J. (1984) Seven years on, Report to Minister for Aboriginal Affairs, AGPS, Canberra.

¹⁶ Toohey, J. (1983), “Seven Years On”, AGPS, Canberra.

¹⁷ *Aboriginal Sacred Sites Amendment Bill 1984*

¹⁸ Report of the Sacred Sites Review Committee June 1987. Unpublished Manuscript AAPA Library.

(Section 10(2)(4), legislation that is designed as an emergency procedure applying throughout Australia to be triggered as a last resort if state legislation was demonstrated not to be working.

Aboriginal Areas Protection Bill proposed to grant the Minister extensive powers over the operations of a proposed new Areas Protection Authority. The Minister would have "absolute discretion" whether to declare the area or refuse to make the declaration and had the power to veto any site that was nominated for protection under the legislation.

This version of the Bill was discarded after legal opinion was obtained that Northern Territory Parliament did not have the constitutional power to remove the protection extended to sacred sites under the ALRA.

The text of the original *Aboriginal Areas Protection Bill* was set aside and following extensive consultations with all stakeholders, substantial amendments to the 1978 legislation eventually enacted as the "*Northern Territory Aboriginal Sacred Sites Act 1989*".

1.1.5 Native Title

The kind of common law native title rights, first asserted in the Gove Case, were recognised in 1993 by the High Court in the *Mabo* case¹⁹. Subsequently a system for identifying these rights and who holds them was established through the provisions of the *Native Title Act 1993*. Native title, like the tenure supported by the ALRA, is a form of communal title where ownership rights are closely linked to traditional affiliations (e.g. laws and customs) the landowning group hold in relation to the land.

Native title to particular land is ascertained according to the laws and customs of the Aboriginal people who, by those laws and customs, have a connection with the land.

In the Northern Territory the courts have determined specific rights that together comprise native title on pastoral leases and other tenures where native title has not been extinguished. Several native title rights relate to traditionally significant sites. These rights co-exist with the Crown's and lessee's rights and include:

- (g) *the right to access and to maintain and protect sites and places on or in the land and waters that are important under traditional laws and customs;*
- (h) *the right to conduct and participate in the following activities on the land and waters:*
 - (i) *cultural activities;*
 - (ii) *ceremonies;*
 - (iii) *meetings;*
 - (iv) *cultural practices relating to birth and death including burial rites;*
 - (v) *teaching the physical and spiritual attributes of sites and places on the land and waters that are important under traditional laws and customs, including the power to regulate the presence of others at any of these activities on the land and waters*²⁰.

¹⁹ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

²⁰ Extract from the National Native Title Register – Determination of *Nelson v Northern Territory of Australia* "Newhaven PL" 2012

The effect of a determination of native title rights such as this is that the recognised native titleholders are the people who unequivocally have authority to access the provisions of the sacred sites laws in relation to sites on their country. For many stakeholders, this conflicts with the NTASSA that references “Aboriginal custodians” as the relevant Aboriginal people to access the provisions of the NTASSA not native titleholders. Many stakeholders do not understand the differences in roles and responsibilities between custodians and native titleholders.

1.2 Announcement of this Review

The Minister for Local Government and Community Services formally announced a review of the NTASSA in July 2015 with the Department of the Chief Minister calling for expressions of interest for suitable consultants to undertake the review.

The three areas of focus of the review were:

- Areas in which the NTASSA might be strengthened to improve protections for sacred sites
- Areas in which the NTASSA might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory
- Ways in which the Aboriginal Areas Protection Authority (the Authority) can:
 - become more efficient
 - balance the need for development with the need for protection of sacred sites

The drafting of the terms of reference including some limited stakeholder engagement prior to the terms of reference being finalised by the Department of the Chief Minister.

All stakeholders participating in the Review were provided with a copy of the full terms of reference. A copy of the full Terms of Reference can be found at Appendix A.

1.3 Review methodology

1.3.1 Consultations

The work of this review is substantially informed by stakeholder consultations.

The review team in discussions with the Department of the Chief Minister agreed to undertake consultations with over forty stakeholders from across the Northern Territory including:

- Aboriginal Land Councils
- Custodians
- Aboriginal Protected Areas Authority board and management
- Developers/proponents/applicants
- Peak industry and representative bodies
- Government departments and agencies
- Other key stakeholders

A full list of the stakeholders consulted is provided in appendix B.

Consultations for the review commenced in October 2015 and concluded in February 2016. The format of the consultations included one-on-one interviews, focus groups, presentations and where requested phone interviews.

1.3.2 Submissions

There was no formal call for public submissions to the review. However stakeholders were given the opportunity to make a written submission, the purpose of which was to clarify key points made during the consultations and where appropriate, provide the review team with key points for consideration.

All stakeholders providing a written submission were informed that their submission would remain confidential and would not be published or included in the report.

The review team received a total of 9 written submissions representing a core cross section of the stakeholder group. The submissions have been considered in the development of this report including recommendations.

1.3.3 Research

To complement the information obtained during the consultations the review team undertook some key research and gathered data to ensure that issues were fully explored.

This research included:

- an examination of key documents and reports that informed the development of the NTASSA.
- a desktop analysis of the various heritage protection regimes operating throughout Australia. The purpose of this was to fully understand the development of heritage protection and to identify key lessons and examples of measures that are designed to enhance the level of protection of sites whilst providing certainty and clarity in process. This analysis also extended to international jurisdictions.
- Analysis of data, reports and other information provided by the Authority to inform a deeper understanding of the role of the authority, its structure and approach to discharging its responsibilities under the NTASSA. The information included a mixture of previous consultant reports, data extracted from the Authority systems, working papers and other documents.

1.3.4 Case Studies

During the consultations, stakeholders were asked to identify potential case studies that demonstrated how the NTASSA was operating in practice including cases that highlighted deficiencies and strengths. The review team has where necessary gathered information about each of the case studies.

2 Northern Territory Aboriginal Sacred Sites Act 1989

2.1 Background/Context

The approach adopted by the Government in framing the 1989 NTASSA was informed by the experience of the previous decade. This experience had shown that in the Territory and elsewhere, controversies centring around sacred sites where the authenticity and integrity of Aboriginal beliefs were at stake were divisive and had harmed relations between Aboriginal custodians and the wider population. These controversies had added significant costs to land development projects.

The policy underpinning the 1989 NTASSA was to:

- Separate the recognition of sacred sites from questions relating to the use to be made of land.
- Ensure independent assessment of the bona fides of sacred sites.
- Enable risks generated by the uncertainty surrounding the open-ended protection of sacred sites to be transferred to an NTG agency.
- Ensure that the rights of Aboriginal custodians to protect sacred sites are exercised for the intended outcome, which is to protect the continuity of religious traditions linking people with their country.
- Minimise opportunity for these rights to be used to extract rents or as a bargaining chip to advance other objectives.
- Establish a body (i.e. the Aboriginal Areas Protection Authority) having credibility with and the trust of, both Aboriginal custodians and the Government.

These policy objectives underpin the 1989 NTASSA that strengthened weaknesses in the 1978 Act (i.e. no process for identifying sacred sites prior to development, weak enforcement provisions, no female representation on Board) and changed the focus of the new Aboriginal Areas Protection Authority. Instead of simply recording information about sacred sites in a “Register”, the purpose of the Authority was broadened:

- Consult with the Aboriginal custodians of sacred sites “on or in the vicinity of land where use or works was proposed” to ensure that sacred sites are protected.
- Determine the nature of the constraints (if any) created by the fact that an area is a sacred site may have on particular land use proposals.
- Issue approvals for works or use of land on or in the vicinity of a sacred site, in accordance with the wishes of Aboriginal custodians that grant indemnity against the operations of the Offence provisions of the NTASSA.

This process was designed to ensure that while land that falls within the definition of “sacred site” may be identified, mapped and officially recognised, the implications of the existence of a sacred site on a particular land use proposal will be determined on a case by case basis.

The 1989 NTASSA, particularly the roles responsibilities and functions of the statutory board responsible for the NTASSA’s implementation are based on respect for the distinct roles and responsibilities board members carry under European and Aboriginal law.

2.2 Purpose of the NTASSA

The long title of the NTASSA provides an insight to the purpose of the NTASSA. The long title states:

An Act to effect a practical balance between the recognized 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, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.

In short the NTASSA is seeking to establish a system that protects sacred sites whilst providing for the development of land. Whilst the long title uses the word balance, as outlined in section 1.1.3 above, the Northern Territory Legislative Assembly through Section 73(1) of the ALRA 1976 sets the parameters as the making of:

laws providing for the protection of, and the prevention of desecration of, sacred sites in the Northern Territory, including sacred sites on Aboriginal land, and, in particular, laws regulating or authorizing the entry of persons on those sites, but so that such laws shall provide for the right of Aboriginals to have access to those sites in accordance with Aboriginal tradition and shall take into account the wishes of Aboriginals relating to the extent to which those sites should be protected.

On this basis the NTASSA is firmly directed towards the protection of sacred sites and provides for a system for development to occur in which the sites remain protected.

2.3 Sacred Sites Definition

The definition relating to sacred sites in the ALRA is adopted in the NTASSA.

“Sacred site” means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any 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 makes it clear that sacred sites are places of significance under currently held traditions of Aboriginals, that is to living individuals.

“Aboriginal tradition” means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

This definition focuses on current beliefs and practices of Aboriginal groups and communities and therefore allows for cultural change. However, reference to “traditions” and “custom” within the definition support the interpretation that current Aboriginal traditions will have continuity with past beliefs and practices.

2.4 Features of the NTASSA

The NTASSA contains a number of elements that collectively seek to protect sacred sites. This section sets out the main features of the NTASSA.

2.4.1 Establishment of Aboriginal Areas Protection Authority

Section 5 of the NTASSA establishes the Authority consisting of 12 members with its functions detailed in Section 10. The full role and function of the Authority is outlined in Section 6 of this Report.

There are a number of specific roles and functions that are outlined in various sections of the NTASSA that relate specifically to the Minister. These include:

- Section 6 (5) outlines the process for the seeking of nominations for the Authority Board.
- Section 9 which provides for Acting Appointments in relation to Authority Board members in certain circumstances.
- Section 14 (2) which requires the tabling by the Minister of the Authorities annual report before the Legislative Assembly and the time frames for this.
- Section 19F allows for the extension of period in which consultations with custodians must commence.
- Section 19H which provides the ability for applicants to request matters in limited circumstances be reviewed by the Minister.
- Section 19 J allows the Minister to seek a security from applicants in specific circumstances.
- Section 19L (2) provides for the extension of the period in which a conference with custodians must occur.
- Section 24 allows for the Minister to provide permission for applicants to submit for an application for a certificate over an area the applicant has been previously refused.
- Section 26 requires the Minister to approve the form of a register of applications made and certificates issued under the NTASSA.
- Section 30 allows a person who is aggrieved to seek a review of the decision, action or failure, by the Minister.
- Section 31 requires the Minister to consider reports provided under Section 30 (4).
- Section 32 requires the Minister to either uphold the decision of the Authority or issue a certificate including any conditions. It further provides a range of actions that must be undertaken in relation to this issuing of the certificate.

- Section 42 requires the Minister to take into consideration the wishes of Aboriginals relating to the extent to which the sacred site should be protected.

2.4.2 Register of sites

Division 2 of the NTASSA provides for the documentation, evaluating and registering of sacred sites.

Only a custodian of a sacred site is able to apply for the registration of a sacred site. Section 27 places the onus on the Authority to gather the required information to process the application and the matters it must take into consideration.

2.4.3 Certificates

The NTASSA establishes a process by which ‘Applicants’ can apply to undertake works on land and avoid sacred sites. Subject to the Authority being satisfied that:

- a) the work or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land; or
- b) an agreement has been reached between the custodians and the applicant.

Then it can issue an authority certificate which details the area in which work can and cannot be conducted and any conditions attached to this approval.

The Certificate, providing the applicant adheres to the conditions, provides the applicant with indemnity.

2.4.4 Access to sacred sites

The NTASSA creates a right for Aboriginal people to access sacred sites located on all land tenures, including freehold in Section 46. It further establishes in Section 47(1) the right for Aboriginal people to cross any land to access a sacred site “by the most direct practical route”.

A landholder has the ability to specify an access route as outlined in Section 47 (2) but cannot refuse access. Section 47 (4) of the NTASSA makes it an offense to block access.

The purpose for which access may be granted is broad in that it specifies for anything relating to Aboriginal tradition and also for purposes related to the NTASSA, ALRA and the Aboriginal & Torres Strait Islander Heritage Protection Act 1984.

It should be noted that Section 47 (3) of the NTASSA states that this right specifically does not include the right to “camp or otherwise reside” on the land.

2.4.5 Protection / Offences

The NTASSA establishes a range of offenses and associated penalties that are aimed at protecting sacred sites.

Part IV, sections 33-35 and 37-8 of the NTASSA makes it an offense to:

- a) enter or remain on a sacred site unless performing a function under or in accordance with the NTASSA or the ALRA.
- b) carry out work on or use a sacred site unless they hold a certificate issued under the NTASSA.
- c) desecrate a sacred site.

- d) failure to comply with Certificate conditions which causes damage to a sacred site or distress to a custodian of a sacred site.
- e) make a record of, or communicate to a person information of a secret nature according to Aboriginal tradition.
- f) produce to a person, or permit a person to have access to documents produced for the purposes of the NTASSA.

Part IV, section 36 of the NTASSA sets out Defence from prosecution:

- a) It can be established that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site (ignorance).

The NTASSA does limit this as a defence specifically in relation to Aboriginal lands with the meaning of the ALRA by making it only available where it can be proved as per section 36(2) of the NTASSA that:

- a) the defendant's presence on the land comprised in the sacred site would not have been unlawful if the land had not been a sacred site; and
- b) the defendant had taken reasonable steps to ascertain the location and extent of sacred sites on any part of that Aboriginal land likely to be visited by the defendant.

The NTASSA establishes by Section 39 that the Authority is the only responsible body authorised to bring prosecutions for offences against the NTASSA or the Regulations.

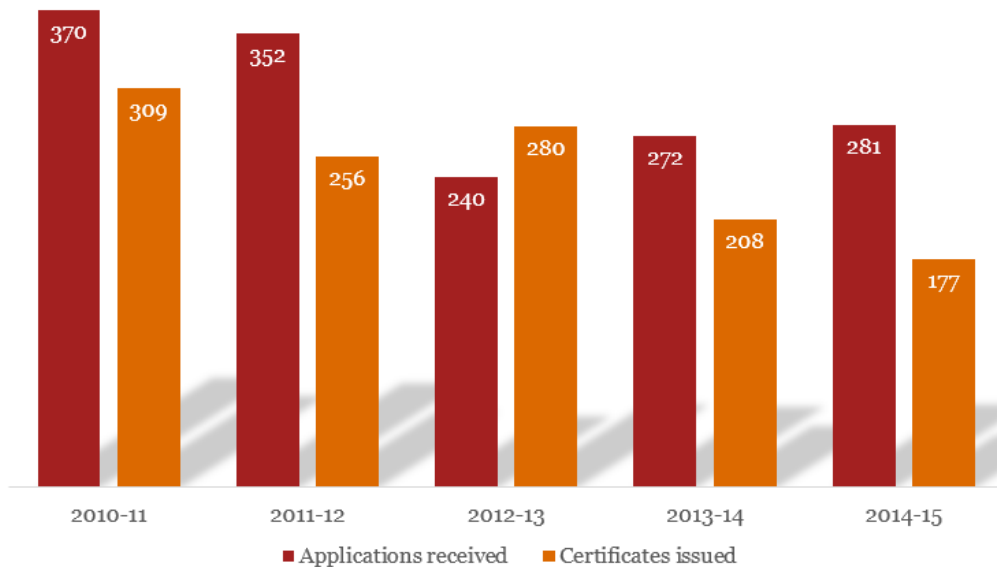
The Authority has two years (or any further time allowed by the courts) from the day in which it comes aware of an alleged offense to commence prosecution.

3 Case for Reform

3.1 Introduction

2016 marks the 27th year of operation of the NTASSA. During that time there has been no substantive changes made to the NTASSA and it has served its purpose of providing protection of sacred sites whilst allowing development on land to occur. As the graph below demonstrates over the past 5 years there have been 1,515 applications made to the Authority with 1,230 certificates issued.

Applications received and certificates issued



During the history of the NTASSA there has only been three occasions in which applicants have requested the Minister to review the decision of the Authority with only one of these resulting in the Minister issuing Certificate. This is a positive sign that the processes that underpin the workings of the NTASSA have been effective.

Notwithstanding this record, in the last decade there have been considerable advancements in legislation that protects heritage including sacred sites across other jurisdictions.

Whilst the legislation does provide automatic protection to all sacred sites in the Northern Territory, as the evidence shows sacred sites have been desecrated and in some circumstances completely destroyed. However by comparison to the number of sacred sites protected by clearance certificates in the same period, it could be argued that protection has outweighed harm. Notwithstanding the record of protection and limited number of desecrations it is necessary to ensure that the legislation provides the best possible mechanisms to ensure the highest level of protection of sacred sites.

Additionally there is likely to be an increase in development within the Northern Territory, as both the Northern Territory and Australian Governments pursue economic development across Northern Australia.

3.2 Trust and Transparency

A high level review of the literature relating to successful systems and practices quickly reveals the importance of two specific elements – trust and transparency.

In the context of the NTASSA it is critical that key stakeholders trust that the NTASSA will operate as it designed to and that the Authority will undertake its work independently. Stakeholders also want to know that the processes themselves are transparent and consistent.

From the perspective of custodians who are highly concerned about the protection of their sacred sites, it is vital that they believe that their sites will be protected above all else and that the information they provide will be treated appropriately. For custodians this means that:

- Sacred sites are respected as places of significance for Aboriginal people.
- Information provided for the purposes of determining the existence of a sacred site will be kept confidential.
- Custodians are consulted on proposed activities on or near sacred sites. The right to be consulted is considered to be a fundamental element in the effective operations of the NTASSA from the perspective of custodians.
- Custodians are provided with the right amount of detail for them to determine the likely impact (if any) of the proposed activity on the sacred site. This requires applicants to be specific in the nature of current works and any proposed future activity.
- Certificates issued under the NTASSA will take into account the wishes of custodians including any measures to ensure that sacred sites remain protected.
- The NTASSA will provide sufficient deterrents and penalties to minimise desecration of sites.
- In case of where desecration occurs the Authority will prosecute offenders.

Without these elements existing it is likely that custodians will withdraw from the processes of the NTASSA and seek alternative measures to protect their sacred sites. Given the crucial role that the NTASSA outlines for custodians it is unlikely that the system could operate without them.

For applicants there is equally the need for trust and transparency but perhaps from a slightly different point of view. For applicants or proponents of development these elements include:

- Confidence that the system will operate as it is designed and that applications will be treated within the framework of the NTASSA. This includes no ethical judgement about the type of work proposed but rather a focus on the potential impact of the proposed activity on sacred sites.
- Transparency in the process that will be undertaken for assessing their application for the purposes of issuing a certificate. This includes communications at the key stages of the process and providing details of when delays occur and the reasons for such delays.
- Transparency in the cost recovery model utilised by the Authority.

- Confidence conditions that are placed on certificates are consistent, fair and reasonable to ensure for the protection of a sacred site.
- Reassurance that if they follow the certificate conditions that they will be indemnified from prosecution under the NTASSA.
- Knowledge that should they damage a site as a consequence of either not seeking a certificate or by not following the certificate conditions that they will be prosecuted and potentially receive penalties.

Without these elements existing for applicants it could lead to them disengaging from the process and proceeding with the development in any event. The consequence is that they utilise alternative measures (or not) to determine the risks associated with potential damage to sites.

Ultimately the breakdown of trust and transparency in the NTASSA and its operations will increase the threat to sacred sites which the NTASSA is seeking to protect. On the basis of this, the NTASSA as it currently operates and any proposed changes need to take into consideration these elements.

3.3 Site Damage and Compliance

As discussed in section 2.3.5 above, Part IV of the NTASSA establishes specific penalties and measures to protect sacred sites.

However since it is not mandatory for proponents to apply for a certificate, proponents can use their discretion as to whether they apply for a certificate. Most proponents who apply for a certificate see that it is in their interest to do so. Should a certificate be issued to a proponent, the NTASSA provides indemnity for applicants from damage and/or desecration of a site if they act within the conditions set out in the certificate.

Since the establishment of the NTASSA in 1989, there has been 33 (completed) prosecutions brought before the courts for breaches of the NTASSA. Of the 33, 30 were successful prosecutions. Over the past five years there has been seven instances of non-compliance against a certificate, of these instances, two have been prosecuted. Of these two prosecution, one resulted in a not guilty verdict and one of guilty. This is out of a total of five prosecutions for the past five year period, four of which resulted in a guilty pleas or a guilty verdict. Some of these incidents of breaches have been by the same proponent on more than one occasion.

Whilst in relative terms the number of instances of damage to sacred sites may seem low, it nonetheless raises an issue about the effectiveness of the NTASSA in providing the level of protection it was designed to provide.

In considering this issue it is also important to consider the elements that may be required to provide effective site protection and ensure compliance with the conditions set out in certificates issued under the NTASSA.

3.4 Consistency

The Oxford dictionary defines consistency as “the quality of achieving a level of performance which does not vary greatly in quality over time”.

The Department of the Chief Minister, through the scope outlined in the terms of reference, identified specific areas of the NTASSA and processes of the Authority that indicate areas of inconsistency. These areas include:

- Timeframes in which applications are processed and certificates issued.

- Requirements outlined in other administrative and regulatory frameworks that operate in the Northern Territory.
- The conditions attached to a certificate.

The consultations with stakeholders confirmed that these were the most critical issues in relation to the operation of the NTASSA and the processes that underpin its performance. Additionally issues of transparency of cost were highlighted. These are discussed in more detail in section 6.6.5.

The issues raised regarding timeframes are also discussed in more detail in sections 5.2 and 6.5.5 but are interlinked with a range of other issues related to the operation of the Authority that are also discussed throughout this report.

The links between the sacred sites clearance process and clearances and approvals under other regulatory frameworks were largely related to proponent's lack of knowledge about the different processes and hence the impact on the timing of a whole project and the way applications may need to be managed. This is discussed in more details in sections 3.6 and 5.7.

The major concern regarding the conditions attached to certificates was that conditions need to be specific and concrete, so there can be no doubt over time about what was intended. In order to attach conditions that support proponents managing works in ways that will protect sacred sites, and to avoid any dispute about what can and cannot occur, it is important that the assessment process has canvassed a range of possible scenarios and options.

3.5 Certainty

The term certainty is used extensively in relation to providing proponents of development a level of comfort in relation to the environment in which they operate. It is sometimes interpreted as meaning a level of guarantee that a project will be able to go ahead.

But in the context of the operations of the NTASSA, certainty is about ensuring that the NTASSA does what it is designed to do in the manner in which it was expected. In short does the NTASSA protect sacred sites and does it provide the correct processes that allow applicants or proponents the ability to undertake works on or near sacred sites whilst continuing to protect them.

In general custodians are seeking certainty of protection of their sacred sites, whereas proponents are seeking certainty for development. There are a range of elements that need to work together to balance these interests as illustrated in the figure below.



3.6 Other regulatory frameworks

A regulatory framework is the term used to describe the authorising environment together with the mechanisms that are used to achieve key policy objectives. For example the finance regulatory framework governs the sound operation of our banking system to ensure that our financial institutions operate fairly and responsibly.

The Northern Territory has in operation numerous regulatory frameworks but the most relevant of these in relation to the operations of the NTASSA and the general protection of sacred sites are those that are related to planning, environment and land usage. These are described further in section 5.7.

Overtime some of these frameworks or the authorities that operate within the framework have introduced measures that relate to sacred sites.

A good example of this is the environmental regulatory framework that seeks to protect the environment. A key agency or authority of government that ensures that the impact on the environment as a result of development is considered and minimised in the Northern Territory Environment Protection Authority (NTEPA). Major projects that are undertaken are usually required to undertake an Environment Impact Assessment and submitted as part of the process for a projects approval.

The NTEPA has a part of its checklist for proponents, a requirement that proponents show evidence that an Authority certificate has been sought. However given that seeking an Authority certificate is not mandatory, proponents may not have known about the sacred sites clearance and not factored the dual approval processes into their project timeframes and costs.

Most stakeholders were not disputing the need for both processes, and most recognised that different issues were being considered. However they did suggest that more public information was needed about the sacred sites clearance process to enable proponents to carefully plan their projects from the outset.

4 Strengthening Protection

4.1 Overview

The Terms of Reference ask that the Review provide advice on:

- Areas in which the NTASSA might be strengthened to improved protections for sacred sites.

The NTASSA establishes in Part IV that it is an offence to enter or remain in a sacred site. Whilst there is a mechanism in the NTASSA for the registration and protection of sacred sites, it is not a requirement of the NTASSA that a sacred site be registered for the purposes of it being protected.

This section of the report will initially examine the history of heritage protection and a summary of current heritage protection mechanisms across jurisdictions domestically as a means of learning and informing any suggested enhancements to the NTASSA for the purposes of enhancing protection of sacred sites.

4.2 The history of heritage protection in Australia

Aboriginal heritage protection and management in Australia is typically the responsibility of States and Territories. Legislative protections for cultural heritage emerged during the 1960s and 70s, with South Australia being the first jurisdiction to create Aboriginal heritage protection legislation, coming in the form of the *Aboriginal and Historic Relics Preservation Act 1965*. Conceptions of heritage in this initial era were largely confined to the conservation of 'relics'. Consequences of this narrow conceptualisation meant that the purpose and perceived value of heritage protection was merely for archaeological interests. This subsequently restricted, if not entirely diminished allowances for current Aboriginal culture, values and input into heritage protection processes.

The archaeological basis for heritage value remained into the early 1980s. However, during this period methods and appreciation for Aboriginal consultation in heritage matters and conservation initiatives began to emerge. The incorporation of Aboriginal consultation encouraged an important shift in the social and political attitudes towards heritage protection: The heritage industry began to understand the unique and complex nature of Aboriginal culture. Additionally, Aboriginal cultural heritage was conceived as a means of advancing the political and social status of Aboriginal people.²¹

By the mid to late 80's, shifts in attitudes and understanding of Aboriginal culture and heritage inspired some jurisdictions to increase the scope of their legislation to provide some (limited) protections for non-archaeological sites of significance.²² Additionally, in 1984 the federal government endorsed the shift by instating the *Aboriginal and*

²¹ National Native Title Tribunal, *Indigenous Cultural Heritage Schemes in Victoria, Queensland and the Northern Territory: an overview* (May 2009), p4.

²² The Hon Justice Rachel Pepper, *Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia* (March 2014), p3.

Torres Strait Islander Heritage Protection Act, which provided a last resort safety net for heritage protection in circumstances where sites were inadequately protected by State or Territory frameworks.

Evidencing the positive trend in attitudes towards Aboriginal cultural heritage protection since the 1960s, the *Commonwealth Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* supported that the defining and determination of cultural heritage and value ought to be undertaken by Aboriginal people themselves. The instatement of the 2002 Australian Heritage Commission's 'Ask First' policy provided a guide that allowed Aboriginal people with the requisite knowledge of an area to determine what places were of high cultural significance.²³ This hallmark policy, which further supported the empowerment of Aboriginal people to determine their own cultural heritage, represented the push for greater heritage protections that manifested throughout the 1990s.

Nascent accounts of Aboriginal culture encourage the recognition of holistic conceptualisations of heritage, including intangible value, and the importance of Aboriginal self-determination in identification matters.²⁴ This perspective was echoed in the Australian government's 2015 Australian Heritage Strategy, which defines Indigenous heritage places as: landscapes, sites and areas that are particularly important to Indigenous people as part of their customary law, developing traditions, history and/or current practices.²⁵ However, despite the increase in public awareness of the holistic dimensions of Aboriginal culture, Aboriginal communities across the country continue to express a great concern over the inability for this to translate into the provisions of heritage protection legislation. This is especially in regards to intangible heritage bonds.²⁶ The Australian Government's 2015 Australian Heritage Strategy identified that Aboriginal cultural heritage remains inadequately documented and protected, and clear government leadership is required to address this issue.²⁷

Damaging a registered Aboriginal heritage place or object is a criminal offence under all respective State, Territory and Commonwealth legislation. However, the definitions of objects and places, and the approaches to heritage management remain significantly varied across States and Territories. Laws in Victoria and Queensland are regarded as the most advanced for their recognition that Aboriginal and Torres Strait Islander people are the primary authority on their cultural heritage, and structures subsequently exist at varying degrees to promote Aboriginal decision making in the States.

4.3 Enhancing protection

All stakeholders during the consultations recognised the need for the protection of sacred sites. In fact, it is fair to say that many acknowledge that the NTASSA as it is written contains significant measures that protect sacred sites including:

- The automatic protection of all sacred sites.

²³ Ibid, 3.

²⁴ The Hon Justice Rachel Pepper, *Not Plants or Animals: the Protection of Indigenous Cultural Heritage in Australia* (March 2014), p4.

²⁵ Australian Government, *Australian Heritage Strategy* (December 2015). P11.

²⁶ New South Wales Aboriginal Land Council, *Caring for Culture* (August 2010), p10.

²⁷ Australian Government, *Australian Heritage Strategy* (December 2015). P12.

- Sacred sites being defined based on Aboriginal “tradition” and “customs” and that current Aboriginal traditions will have continuity with past beliefs and practices of Aboriginal people.
- That the wishes of Aboriginals must be taken into account when exercising powers under the NTASSA in relation to the protection of sacred sites.

The Review recognises these strengths and seeks to offer mechanisms that further enhance the protection of sacred sites.

4.3.1 Review Procedures

The NTASSA establishes through Division 3 mechanisms by which a person who is aggrieved by a decision of the Authority may appeal. It is important to note that any decisions made under the NTASSA are subject to two main principles.

Firstly that sacred sites are automatically protected and that the Northern Territory government by the enabling legislation (ALRA) that allowed it to enact the NTASSA is not able to make laws that allow for the desecration of sacred sites. The implication being that any decision made under the NTASSA must apply this principle.

Secondly the NTASSA through Section 42 requires that in exercising any powers under the NTASSA that the wishes of Aboriginals must be taken into account when deciding the extent to which the sacred site should be protected. It is interesting to note that this section references Aboriginals and not custodians, which is different to other parts of the NTASSA.

During the consultations, several stakeholders did raise some issues with the review procedures specifically the mechanism that allows the Minister to review a decision.

Three applications for review have been made to the Minister. However only one application was accepted for review and a Minister Certificate was issued. It would appear that on this basis given the 27 year history of the NTASSA that it has operated as an effective mechanism.

Notwithstanding this, Section 42 could be enhanced by being clearer that it is Aboriginal people who have a direct relationship with the sacred site as being the appropriate people whose wishes be taken into account when deciding on the extent to which the sacred site should be protected. It should also be made clear that this section does not give rise for a decision in which a sacred site could be desecrated.

Recommendation 1

That Section 42 of the NTASSA be enhanced by a requirement that it is the wishes of Aboriginal people who have a culture relationship with the sacred site be taken into account and that clarity be provided that no decision can give rise to the desecration of a site.

4.3.2 Penalties

Part IV, Sections 33-35 of the NTASSA sets out the offences, penalties and procedures of entering onto, working on or desecrating a sacred site.

During stakeholder consultations and in submissions made to the Review the question of the appropriateness of the level of the penalties was raised. Specifically a range of stakeholders including proponents were concerned the penalties may not be a sufficient deterrent, and custodians were concerned that penalties may not sufficiently recognise the cultural importance of sacred sites. There was concern of the possibility a proponent may weigh up the cost of paying the maximum penalty against the potential loss of earnings to the business if they proceeded with the works.

It was proposed that consideration be given to strengthening Part IV of the NTASSA to increase penalties for offences to bring them in line with the *NT Environmental Offences and Penalties Act*, Environmental Offence level 1.

The maximum penalties applicable in the NTASSA are:

- Entry onto sacred sites (s33)– 200 penalty units for a natural person or 12 months imprisonment and 1,000 penalty units for a body corporate.
- Work on a sacred site or desecration (s34) - 400 penalty units for a natural person or 2 years imprisonment and 2,000 penalty units for a body corporate.
- Desecration (s35) – 400 penalty units for a natural person or 2 years imprisonment and 2,000 penalty units for a body corporate.

The penalties for breaching the *NT Environmental Offences and Penalties Act* are:

- Environmental Offence level 1 (s4) – maximum of 3,850 penalty units for an individual or up to 5 years imprisonment and a maximum of 19,240 penalty units for a body corporate.

The alignment with the *NT Environmental Offences and Penalties Act*, is seen as providing an incentive to ensure that businesses understand the importance of the protection of sacred sites whilst acting as a sufficient deterrent.

In order for a system to operate in a manner that is effective, it is important that penalties are aligned with community expectations about the importance of the protection of sacred sites. Looking to other sectors in which natural assets are seeking to be protected provides a good indicator as to where that expectation sits.

Whilst it is acknowledged that amendments to the *NT Penalties Act* have increased the level of penalties from \$137 in 2011 to \$153 in 2015, the penalty points outlined in the *NTASSA* is still not commensurate with other protection regimes in operation in the Northern Territory.

By way of comparison, the table below shows the penalties in the NT and other jurisdictions for matters such as sacred site, heritage and environmental desecration.

Jurisdiction	Act	Penalty 2011 (max)	\$	Penalty 2015 (max)	\$
NT	Sacred Sites – entry onto sacred on a site				
	Natural person	27,400		30,600	
	Body Corporate	137,000		153,000	
	Sacred Sites – works on or desecration				
	Natural person	54,800		61,200	
	Body Corporate	274,000		306,000	
	Environmental protection– Environmental offence level 1				
	Individual	527,450		589,050	
	Body Corporate	2,635,880		2,943,720	
	WA	Aboriginal Heritage Act			
Individual – first offence		20,000		20,000	
Individual – second offence		40,000		40,000	
Body Corporate – first offence		50,000		50,000	
Body Corporate – second offence		100,000		100,000	

Jurisdiction	Act	Penalty \$ 2011 (max)	Penalty \$ 2015 (max)
QLD	Aboriginal Cultural Heritage Act		
	Individual	22,000	23,560
	Body Corporate	220,000	235,600

Note: The way the environmental protection penalties in the relevant QLD and WA legislation are listed are not immediately comparable with the NT.

Recommendation 2

That the NTASSA be amended to align the penalties for breaching certificates with the NT Environmental Offences and Penalties Act, Environmental Offence level 1.

In Australia there is an increased expectation that body corporates must also be held account in the same manner. This expectation has resulted in a number of laws being changed, like occupational health and safety laws, which also hold Directors and Officers of the body corporate accountable for the actions of the body corporate.

One of the stakeholders proposed that penalties in the NTASSA also extended to Directors and management of body corporates.

An example of how this has been applied in other legislation is Part 8, Division 2, section 134(1) of the *NT Livestock Act* which sets out criminal liability of executive officer of body corporate and details that:

- An executive officer of a body corporate commits an offence if the body corporate commits an offence by contravening a declared provision.
- Maximum penalty: The maximum penalty that may be imposed on an individual for the relevant offence.

Recommendation 3

That the NTASSA be amended to the definition of a body corporate to include its Directors and senior officers.

4.3.3 Mandatory requirements

Proponents of projects are not required by the NTASSA to apply for an Authority Certificate. It is an optional system in which proponents are able to weigh up the risks of undertaking work where there may be a sacred site, with managing the other opportunities and risks for their project.

There were mixed views expressed about this during the consultations. Some saw it as being appropriate whilst others expressed that the system should be mandatory.

Another suggestion was to introduce conditions into the government regulatory approval processes mandating the need for an Authority Certificate, with certain exempt categories of minor or low risk matters.

Previous reviews have considered the issue of a mandatory requirement for an Authority Certificate and have concluded that the work load that would be generated from minor works that in the ordinary course of work would not require an Authority Certificate would slow down the whole system and lead to an overall decline in the

protection of sacred sites. Expressed in another way, the unintended consequence is that delays in processing would lead to proponent's weighing up penalties against the cost of projects.

In carefully considering the pros and cons of mandating the Authority Certificates, the Review believes that the current provisions in the NTASSA are sufficient and mandatory requirements should not be introduced subject to the penalties in the NTASSA being increased as outlined above. Further the proposed changes to Section 36 as outlined below, if implemented, would also negate the need for mandatory Authority Certificates.

Recommendation 4

That subject to recommendations 2 and 3 being introduced, the NTASSA not be amended to require mandatory Authority Certificates.

4.3.4 Defences under the NTASSA

Section 36 of the NTASSA outlines prosecution defences for an offence against entry onto sacred sites, working on sacred sites and desecration of sacred sites.

Section 36(1) states that:

“subject to subsection (2), it is a defence to a prosecution for an offence against section 33, 34(1) or 35 if it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site”.

In short this section might provide a mechanism by which inaction could be a defence under the NTASSA. It could be argued that if a proponent decides not to undertake any risk assessment, seek any advice or make enquiries than they could have a defence under the NTASSA.

Whilst it might be reasonable for an ordinary member of the public to be afforded such a defence in that they may accidentally enter a sacred site, it would not be reasonable for a proponent business or body corporate seeking to engage in an activity or undertaking to be afforded the same level of protection. For example, in the context of work health and safety legislation, a defence might only be available if it can be established that the duty holder exercised all due diligence, or in the case of officers of a company, that they were not in position to influence the conduct of the corporation.

Any proponents of projects should be required or compelled to make the appropriate level of enquiries to establish if there are sacred sites in the area of their proposed works.

In effect this would remove the ignorance defence and require the proponent body corporate to undertake a certain level of due diligence and risk assessment to determine if they should apply for an Authority Certificate.

Recommendation 5

That the NTASSA be amended to ensure Section 36(1) relates only to a natural person and that a defence should only exist for a proponent body corporate if it can establish that it exercised all due diligence to ensure it complies with the NTASSA.

4.3.5 Compulsory reporting of damage

The NTASSA does not contain any provisions for the compulsory reporting of damage or desecration of sacred sites including when holding an Authority Certificate. The process is reliant on the voluntary reporting of damage or through the discovery of damage at a later date.

It is reasonable to expect that if a person or body corporate is aware that they have damaged a sacred site then they should be required to report the damage to the Authority.

It is common at law to have requirements to report damage ie the requirement to report an accident involving a vehicle to the police.

The changes outlined in the section on Defences under the NTASSA, will provide sufficient level of defence to prosecution for accidental damage by a member of the public who did not know they were in a sacred site.

Recommendation 6

That the NTASSA be amended to include compulsory reporting in relation to the damage and/or desecration of a sacred site.

4.3.6 Provisions to stop work

There is no provision in the NTASSA that requires a proponent, whether they hold an authority certificate or not to stop work immediately should they damage or desecrate a site in the course of undertaking work on or near a sacred site.

In a similar way there are no provisions in the NTASSA for the Authority to issue an emergency stop work order if they believe that the works being undertaken are placing a sacred site at risk of damage or desecration.

In both scenarios outlined above, the issue is not related to whether a proponent holds an authority certificate, but rather focuses on the need for a sacred site to be protected, which is the primary reason for the existence of the NTASSA.

Other jurisdictions have introduced such measures as preventative measures that ensure that heritage including sacred sites is protected.

In the case of where damage has occurred, there should be provisions introduced that allow for an assessment to be undertaken and in the case of where an Authority Certificate has been issued either changes made to the certificate conditions or the certificate cancelled.

Where a sacred site is under threat of damage or desecration then provisions should be introduced that allow the Authority to make an assessment of the likelihood of damaging occurring.

Stop work provisions for the Authority could be in line with the *NT Heritage Act* Part 3.4, Section 79 where stop work orders are applicable if the heritage officer is satisfied that:

- a a person is carrying out, or is about to carry out, work; and
- b the work constitutes a serious and imminent threat to the heritage significance of a heritage place or object; and
- c an order under this Part is necessary for the conservation of the place or object.

The *NT Heritage Act* further outlines the process of repair orders on a heritage place or object (Part 3.5, sections 88-85). This includes the issuing of an order, offence to contravene order and Territory may carry out work if owner contravenes order.

Penalties would also need to be considered for those proponents who choose to continue to work after a stop work order has been issued, such as those outlined in the *NT Heritage Act* (section 84):

- (1) A person commits an offence if:
 - (a) the person knows a stop work order has been issued for a place or object; and
 - (b) the person engages in conduct that results in a contravention of the order.
Maximum penalty: 200 penalty units or imprisonment for 12 months.
- (2) If a court finds a person guilty of an offence against subsection (1), the court may, in addition to a penalty imposed for the offence, impose a penalty not exceeding 10 penalty units for each day during which the offence continues after the day the offence is committed.

The *Victorian Aboriginal Heritage Act 2006* provides provisions for stop orders to be issued by the Minister or an inspector engaged in the conducting of a cultural heritage audit.²⁸ Stop orders require the person undertaking the specified activity to immediately cease operations, or the commencement of the activity specified in the order may be prohibited entirely. In the event of a cultural heritage audit being ordered, a stop order is subsequently imposed on the person/s carrying out the activity to which the audit relates.

Stop orders are issued in circumstances where the Minister or inspector is satisfied that an activity, proposed or underway, is harming or likely to harm Aboriginal cultural heritage and a stop order is necessary for protection to occur. A stop order can operate for a period of up to 30 days. The Minister has the ability to extend, but only once, a stop order for up to an additionally 14 days. Failing to comply with a stop order is an offence that carries penalties.

An appeals mechanism should also be built into these provisions to allow an aggrieved party the opportunity to state their case if they feel the stop orders are unjust. This process should be managed through the Northern Territory Civil and Administrative Tribunal (NTCAT).

Recommendation 7

That the NTASSA be amended to allow for stop work orders to be implemented if a site has been damaged and/or desecrated or is seen to be under threat of being damaged and/or desecrated. Further the NTASSA should allow for appeals mechanism to NTCAT.

²⁸ A cultural heritage audit is an assessment of the impact of an activity on Aboriginal cultural heritage. Audits can be ordered by the Minister if, on the advice of the Secretary, the Council or an inspector, it is believed that: the sponsor of an approved cultural heritage management plan or the holder of a cultural heritage permit has contravened, or is likely to contravene, the recommendations or conditions in the plan/permit. Alternatively, an audit can be ordered if it is believed that the impact on Aboriginal cultural heritage of an activity to which an approved cultural heritage management plan or a cultural heritage permit applies will be greater than initially determined. An audit report may make a number of recommendations, including amendment to the original conditions of the management plan or permit, or any other necessary actions.

Case study: OM Manganese Ltd Bootu Creek mine site

In August 2013, the Authority undertook a precedent setting prosecution of mining company OM Manganese Ltd. OM Manganese Ltd were prosecuted for desecration and damage to a sacred site between March-October 2011 at their Bootu Creek Manganese mining site located on Banka Banka station, 179kms north of Tennant Creek.

The sacred site, which has been a recorded site since 2004 and is known to Aboriginal people as 'two women sitting down' was damaged after an open cut pit was constructed approximately five meters from the boundary of the sacred site, causing the pit wall to collapse. The collapse of the pit wall in turn caused half the sacred site to collapse into the pit.

OM Manganese Ltd were fined \$150,000 for one count of desecration and one count of damage.

This case study illustrates that had a stop work order been able to be issued at the initial point of damage (the wall collapse), further damage could have been prevented.

4.3.7 Compensation

Under traditional law some transgressions involving sacred sites were punishable by death. T.G.H. Strehlow, cites Central Australian several cases where the offender was killed²⁹ including the execution of the Aboriginal man known as 'Racehorse' for assisting two white men to steal objects from sacred cave in the Haast's Bluff area in 1894³⁰.

The absence of provisions under the NTASSA or any other official avenue to compensate the custodians of sacred sites in the event that sites are desecrated or destroyed has meant that where arrangements for restitution have occurred, it has followed direct negotiation between the perpetrator of the damage and the custodians responsible for the sacred site. In the majority of such cases the relevant land council has assisted the custodians.

Compensation or restitution for damage to sacred sites has been made from time to time on an ad hoc basis. The creation of statutory avenues for obtaining compensation, by creating compensation provisions in the NTASSA, have been rejected in the past, due to the difficulties in establishing the nature and extent of compensation and who is entitled to receive it.

Since the 1980s both Government and private sectors in the Northern Territory have, from time to time, made payment to compensate Aboriginal custodians for damage to their sacred sites. Compensation has usually been either cash or goods and the

²⁹ Strehlow T G H (1971) Songs of Central Australia pg 114, 137.

³⁰ Strehlow T G H (1971) Songs of Central Australia pg 120.

relevant land council or the Authority has usually verified the appropriate beneficiaries.

In the last 25 years there have been at least a dozen compensation arrangements mostly negotiated by the Land Councils. The form and monetary value of compensation payments has changed over this period. Initially, compensation involved payments to hold ceremonies or to physically restore sites. The majority of payments made now are direct payments to custodians ranging from cash payments of \$50,000 and \$40,000 paid by the ADF for damage to a ceremony ground at Borrooloola and to a sacred site near Emu Springs in Arnhem Land to provision of two Toyota Land cruisers, paid for by the Commonwealth for damage to a sacred site at Numbulwar. In recent years compensation settlements have usually been in the form of vehicles - Mount Isa Mines settlement for damage to sites on their project area at McArthur River involved the provision of two motor vehicles.

It is important to note that these payments have not been considered as financial compensation for a loss of a right in the land held by custodians that can be reduced to a cash value. The scheme of ALRA/NTASSA does not create a right in a sacred site in favour of custodians. These laws create an obligation on the Crown to protect sacred sites and prevent them from being desecrated, which is achieved by making damage and desecration (and in some circumstances entry) a criminal offence.

If an offence under the NTASSA is proved in the courts, custodians are entitled to seek compensation for loss or injury under the provisions of the *Sentencing Act 1995* and the *Crimes (Victims Assistance) Act*.

Why is compensation necessary?

The reasons compelling compensation payments for site damage are the need to:

- repair damaged relationship with Aboriginal custodians,
- to tangibly demonstrate respect for their traditions; and
- to re-establish the goodwill necessary for a cooperative relationship in the future.

Given that the purpose of compensation is to show respect and re-establish goodwill, the social process by which compensation is negotiated is as important as the actual payment. The most important thing is that it is a social process between the custodians and those responsible for the site damage.

Compensation payments are a component of a wider public act of contrition in the form of an apology.

Ritual of public apology

Apology in these circumstances is a highly ritualised social interaction. This is partly because, from the point of view of the indigenous recipient, it is impossible to distinguishing genuine remorse (that arises from a moral response to harm done) from the amoral regret that arises from the discomfort caused to the government official by being obliged to apologise.

This creates an anxiety in the person being apologised to that they are being duped into having to accept an apology they “know” is insincere.

In the Western tradition the church proscribed three stages in the sacrament of penance: contrition, confession and satisfaction. Significantly no absolution could be granted until satisfaction had been made. St Thomas Aquinas defined satisfaction as compensation for injury inflicted.

In Aboriginal tradition a deliberate transgression involving ceremony may be punished by death. An inadvertent or careless transgressor can only hope to prove that it was an accident by paying a price. There is an inherent tension in such

circumstances because the person accepting the apology and payment is at pains not to settle too low - hereby revealing himself or herself impotent to avenge the transgression.

In contemporary Aboriginal communities there is little incentive to accept even an apparently sincere apology for damage to a sacred site and every incentive to demand payment so that the custodians of the site can be seen by the wider Aboriginal community to have extracted satisfactory restitution for what has been damaged.

Risks

There are some risks in moving away from the current emphasis on prevention. An unintended consequence may be a greater emphasis (and incentive) to pursue prosecution in order to secure compensation as a form of rent seeking. There is a long history of problems with how compensation is determined for different impacts let alone how those monies are subsequently applied.

Another risk is that a formal process (particularly one where the compensation payment was determined by a disinterested body like a court of tribunal) would remove the incentive for a social process between the custodians and those responsible for the site damage and that the resulting compensation payment would not satisfy the custodians and the purpose of the exercise would be lost.

Timeliness is a major factor in successful resolution of damages issues. Where it has been possible to deal with the issues quickly – on site and with custodians and those responsible for the site damage – the situation has generally been resolved to the satisfaction of all parties.

Process

The introduction of compensation measures into the NTASSA will require the consideration of how these measures will be managed.

Considering the complexities involved in these discussions and the matters that will need to be managed in a manner that ensures that customary matters are also taken into consideration, requires the adoption of a system to underpin this.

The NTCAT could be utilised as the means of addressing compensation under the NTASSA as this system has been established for the purposes of reviewing a wide range of administrative decisions and resolving certain civil disputes. NTCAT has two broad types of jurisdiction:

1. In its *original* jurisdiction NTCAT considers and determines disputes and issues that have not been the subject of an earlier adjudication; and
2. In its *review* jurisdiction NTCAT considers and determines applications for review of the merits of decisions made by government officers and form its own view as to what is the correct or preferable decision.

Examples of NT legislation that currently utilise NTCAT to address compensation is the *NT Pastoral Act*, *Petroleum Act*, *Fences Act*, and the *Control of Roads Act*.

This will provide a separation of compensation from penalties which should continue to be managed through the courts.

Recommendation 8

That the NTASSA be amended to incorporate compensation measures and that discussions and resolution of compensation be managed through NTCAT.

4.3.8 *Criteria to revoke certificates*

There is no reference in the NTASSA to the Authority having the ability to revoke certificates, yet the Authority believes that the *Northern Territory Acts Interpretation Act* does provide it with this power. In short the position is that if the NTASSA gives Authority the power to issue something, like an Authority Certificate, then the Authority has the power to revoke.

In order to make it clearer to proponents that there are instances when the Authority might consider revoking a certificate, guidelines could be developed that outline the criteria and circumstances when the Authority will revoke a certificate, including by way of example if the Authority believes there is a substantial risk of damage. During consultations, most of the stakeholders supported that repeat offenders should also be dealt with in this manner.

Recommendation 9

That the regulations to the NTASSA be amended to include guidance about when the Authority will revoke a certificate.

4.3.9 *Consultation with Custodians*

As discussed earlier in this section the consultation clauses in the NTASSA are considered an important part of the protection provided to sacred sites. For the purposes of clarity nothing in this section suggests that the right to consultation should be removed, however after discussions with a number of stakeholders there are suggestions on how the workability of this could be enhanced via an amendment to the NTASSA.

Currently there is no capacity within the NTASSA for custodians to issue the Authority standing instructions in relation to a geographic location or particular site. The consequence is that every application for an Authority Certificate received by the Authority must go to the custodians for consultations.

Custodians indicated that they get frustrated at repetitive consultation for the same areas where they have already indicated that there are no sacred sites or where they have indicated how a specific site should be managed.

The Authority believes that consultation for certificates is enshrined in legislation and consultation needs to occur. With the NTASSA excluding the capacity to issue standing instructions, the Authority is required to consult with custodians, whether it is for a new application or a variation to a certificate.

To address this specific issue where there is knowledge and good information available from custodians, the issuing of standing orders should be considered. The ability to issue standing orders should be solely at the discretion of custodians who should also have the ability to revoke the standing order. The issuing of standing orders should also include provision to issue for specific purpose i.e. limited to projects that have a certain type of impact.

Further, if there was an application that was outside the limits of the standing instructions, consultations would need to be undertaken with custodians. Custodians would also need to be notified of any works occurring in their area of interest at all times, including any new proponents, new projects and variations to certificates. This notification should include a period for the custodians to respond and request that a consultation take place should they so desire.

The purpose of these provisions is to ultimately provide some flexibility for custodians and not take away any rights they currently hold in the NTASSA.

Recommendation 10

That the NTASSA be amended to provide custodians with the ability to issue standing orders on terms that the custodians set. Further any amendments must not take away any rights of custodians to be consulted.

4.3.10 Custodian fees

Section 19F of the NTASSA requires the Authority to consult with custodians:

As soon as practicable (but not later than 60 days or such longer as the Minister approves) after:

(a) A standard application is received; or

(b) Written confirmation in accordance with section 19E(2) is received in relation to a non-standard application.

The consultations must take place on or in the vicinity of the land to which the application for a certificate relates that are likely to be affected by the proposed use or work.

Payment to custodians for the consultations is set at \$135 per day or \$70 per half day. The rate has not changed in many years and in comparison to fees paid by other organisations, is considered as tokenistic by many custodians. Increasing the fees to be in line with other agencies would ultimately impact on the cost to the Authority. It is unclear as to how the fee structure has been determined, as it is not mentioned in the NTASSA or in the Regulations.

It is reasonable for the custodians to receive an appropriate fee for their time.

To ensure independence in setting rates for the payments to custodians, the rate could be set by the NT Remuneration Tribunal. One of the responsibilities of the Remuneration Tribunal is to:

conduct reviews and make recommendations about the entitlement of members of Northern Territory statutory bodies and statutory officers, including Judges, as requested by the Administrator from time to time.

Increasing rates will have an impact on the Authorities budget, however recovery for the payments could be from:

- Cost recovery through the certificate process;
- Additional appropriation from the Northern Territory Government.

Recommendation 11

That the remuneration for custodians be determined on an annual basis by the Northern Territory Remuneration tribunal.

5 *Improving processes and certainty*

This section of the report is focused on responding to the second point in the Terms of Reference that is to provide advice on:

Areas in which the Act might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory.

The Northern Territory Government has a focus on the reduction of red tape across the whole of government activity. Red tape can appear in many shapes and sizes – forms and queues, administrative processing times, or legislative burdens. This section contains measures that require amendments to the NTASSA.

In the context red tape reduction, strengthening the NTASSA to provide certainty and improving the processes for economic development does not imply that the red tape reductions in anyway compromise the protection of sacred sites. For the purposes of clarity none of the measures proposed seek to reduce the level of protection rather they seek to provide a clearer system.

5.1 *Duplication – Role of the Land Councils*

The ALRA establishes that sacred sites are protected and sets the parameters for complimentary Territory legislation. The Frazer Government’s approach when drafting the ALRA to give the new Territory Legislative Assembly powers to make laws to protect sacred sites was informed by the constitutional precedent that the making of laws for the administration and development of land is a state not a Commonwealth responsibility.

The NTASSA and hence the Authority are a part of the Territory’s land administration system. The Authority is given the independence necessary to carry out its functions but is accountable to the Territory Government.

The Land Councils are independent statutory authorities established by the Commonwealth to assist traditional Aboriginal owners, Native Title holders and affected Aboriginal communities to secure and manage their land, most of which is held under forms of communal title. The land council’s primary function is to carry out their clients wishes regarding the management and use of their land. This regularly involves entering the political domain to advocate on behalf of their clients.

Land Councils invoke the Whitlam Government’s ALRA as the authority for a major role in the carriage of functions under the Territory’s sacred sites legislation but the case for a separate Territory entity, responsible to the Territory Parliament, is compelling.

The Land Councils’ purpose is focussed on enacting the wishes of their clients, traditional Aboriginal owners, in relation to their clients land interests - they are not part of the Territory Government public administration and not required to work to achieve the broader outcomes required by government.

From the perspective of the Land Councils, their role is to maximise the statutory rights arising from the ALRA/NTASSA according to their client’s wishes.

Their clients have a special interest in sacred sites, recognised under common law, under the Constitution and in statute. This interest transcends other land interests. Importantly, this interest is activated by the assertion of the Land Council with limited possibility for external validation or review.

The Land Councils understand that the combination of the broad definition of sacred site, subjective assessment and strict requirements for protection, creates an opportunity in negotiations to advance the interests of their clients. The bargaining potential of this interest is maximised by the uncertainty of not knowing precisely where land conforming to the definition of 'sacred site' is located.

The role of the Authority is more complex. The Authority must administer the NTASSA in a way that affords their clients (Aboriginal custodians) site protection and also engenders community acceptance of the cultural value and authenticity of sacred sites.

The approach that the Authority is required to take under the NTASSA is to facilitate the identification of all issues relating to sacred sites at the planning stage of a project and then issue an approval, underwritten by the Territory Government specifying the conditions under which a project may proceed.

5.1.1 Practices of the Land Councils and AAPA

The wider community accepts that sacred sites should not be damaged however continuing community acceptance is underpinned by an assurance from government that the bona fides of sacred sites will be determined by an independent assessment: this is the Authority's core business.

There is always the potential for a community backlash against the site protection laws. The risk of this increases when there is a public perception that Aboriginal groups are using their right to protect sacred sites to gain economic advantage or block legitimate development by withholding clearances. In the past, this issue has created deep divisions within the Territory community. It is the Authority's role to operate in a way that minimises this risk.

Land Councils usually take the approach that, for major projects, issues relating to sacred sites are negotiated simultaneously with compensation and royalties. Consultations indicated that there have been times when proponents have not fully understood the separate and different roles of the Land Councils and the Authority, and hence have assumed processes were being duplicated. However examples were highlighted where communication and exchange of information between the Land Councils and the Authority occurs and the two concurrent processes proceed smoothly and effectively.

If Land Councils were to be given a determinative role under the NTASSA (i.e. other than as a sub-contractor see below) then the ALRA may need to be amended to give them accountability to the Territory Government similar to the Authority. This Review is not suggesting that any such amendments be to the ALRA.

A practicable way for the Land Councils to be more directly involved in the work of the Authority would be to carry out work required under the NTASSA for documenting sacred sites for registration by the Authority and also to negotiate agreements between custodians and developers within the meaning of section 22(1)(b) that form the basis for the issue of an Authority Certificate. Such work would need to be carried out in accordance with the requirements of the NTASSA and the requirements of the Authority.

Stakeholders have raised concerns about Section 22 (1)(b) as it does not provide any guidance about the nature or principles of an agreement between custodians and the applicant for an Authority Certificate. There is merit in being clear about the standard that such an agreement must take and in effect it would make sense that the

agreement should reflect the requirements that would be required if the Authority was undertaking the work direct.

The Review has been asked to consider recommending a requirement that Section 22 (1)(b) require the Land Councils or a limited number of agents as being the appropriate parties to an agreement with the applicant to ensure that the agreement represents the desire of custodians. The NTASSA already requires the Authority to be satisfied that an agreement has been reached with the custodians. The Review has taken this to mean that it is the correct custodians for that area and as such no alteration to address this issue is required.

Recommendation 12

That the Section 22 of the NTASSA set out the minimum standards for any agreement reached under Section 22 (1)(b) and that the Authority explore the options for sub-contracting the Land Councils to undertake work on its behalf for preparation of documentation for the registration of sacred sites and consultations with custodians for the purpose of an Authority Certificate.

Case study: Darwin to Alice Springs railway

In 2003-2004 the Adelaide to Alice Springs railway was extended from Alice Springs to Darwin by the Australasia Rail Corporation.

Site identification and clearance work for this project commenced in 1993 and the project was completed in 2004. In 2001-2002, the Authority protected over 250 sacred sites by way of conditions on reports contained in 122 certificates and 11 Consultation Notification processes under the Darwin to Alice Springs Authority Certificate.³¹ Consultation, site marking and fencing continued into 2002-2003 and 131 avoidance procedures (certificates and consultation notifications) were completed.

The Authority worked closely with both the Central Land Council and the Northern Land Council on this project. This included contracting the Land councils to undertake consultation work with custodians and the preparation of documentation for the Authority to issue certificates.

This case study illustrates that when the Land Councils and the Authority clarify their respective roles and outcomes, and work together within these parameters, the clearance process can be managed positively for all stakeholders.

5.2 Timeframes

Section 19F of the NTASSA details that the Authority must consult as soon as practicable (but no later than 60 days) for a standard application, or as soon as written confirmation is received from the applicant in relation to a non-standard application.

³¹ Aboriginal Areas Protection Authority, *Annual Report 2001-02*, pp 11

No other timeframes are specified in the NTASSA, these are managed by the Authority's internal procedure, including the total amount of time to issue a certificate from the time of application.

In 2014-15, the average time for issuing certificates was 126 days to complete. Government (NT Government, Commonwealth and Other Government and Local Government) were the largest clients for certificates comprising 62%. In 2013-14, the average days to complete a certificate was 138 days and in 2012-13 the average was 148 days. However these figures can be misleading, as the averages can be skewed by those applications that take a very long time to complete, and mask those that progress quite quickly.

Typically, Authority Certificates relating to road works and exploration and mining project take the most amount of time, due to complexity, remoteness and large areas of land involved for the proposed works.³²

Consultations identified that timeframe for issuing certificates is not a significant issue for larger sized proponents. Most stakeholders identified the time taken to issue Authority certificates was in line with other processes, such as an Environmental Impact Statement (EIS) issued by the NT Environmental Protection Authority (EPA). Noting there is a vast difference between the two processes, with the NTASSA requiring consultation to be undertaken by the Authority once a submission is received, however with the EIS process, the proponent undertakes the pre-work required for obtaining an EIS. Hence when submitting an application to the NT EPA the timeframe taken to approve the certificate is often less than the time taken for an Authority certificate.

As stated in section 3.6 of this report, some agencies mandate that proponents hold an Authority Certificate (e.g. EPA and the NT Heritage Act). However, if proponents are not aware of the NTASSA and the Authority until late in their planning process, the commencement of their work may be delayed whilst the Authority process is being undertaken. Consequently if an application for an Authority Certificate is not made concurrently with other approval processes, sacred site clearances are likely to add to the total time required to meet regulatory obligations.

Seasonal factors need to be considered in the process for issuing of Authority Certificates, particularly in the top end of the NT. During consultations, many proponents identified they undertake the majority of their work (e.g. surveying, construction, civil works, repairs and maintenance) during the dry season, therefore require Authority Certificates to be approved towards the end of the wet season. The Authority however also undertake the majority of their consultations and work during the dry season, due to a number of reasons, including:

- The availability of custodians due to family, cultural and personal obligations;
- The location of the land – there needs to be consideration of travel to remote areas;
- The size of the proposed area – there may be a number of custodians that need to be consulted with for the certificate;

³² Aboriginal Areas Protection Authority, *Annual Report 2014-15*, pp 27

- The complexity of works proposed as custodians may take longer to work through issues to ensure they are comfortable to approve the development in close proximity to sacred sites; and
- The availability of resources within the Authority (research staff).

Delays for the issuing of certificates can also be proponent driven. Where applicants fail to provide sufficient information on their application, the Authority is unable to proceed with the application until all the information is received. The amount of time taken to respond to requests for additional information will influence the timeframe for the approval process.

During consultations, some stakeholders identified that enforcing arbitrary timeframes for the issuing of certificates would impose additional stress not only to the Authority but to custodians and could put the quality of work at risk and compromise certainty for custodians and proponents.

Stakeholders also indicated that any delay in receiving Authority Certificates could cause the proponent to run the risk of penalties being imposed by an agency if they are not meeting industry standards should work be required to be undertaken.

To reduce over-consultation with custodians, the Authority may occasionally combine the consultation process for several certificates from different proponents, particularly where the same custodians are required to be consulted. By undertaking this process, it may also result in cost effectiveness for proponents and resource availability at the Authority, thus ultimately have an impact on timelines for issuing certificates.

On balance, the Review believes it would not be beneficial to impose any additional timeframes or requirements on the Authority or proponents. Rather the Review believes that improved communication by the Authority of the process, of the information required in applications, and about the progress of applications being considered, would enhance the process for all concerned.

5.3 Certificate validity period

The NTASSA is silent on the validity term of an Authority Certificate. It is appropriate that once an Authority Certificate is issued and works have commenced or been completed that the Authority Certificates exist in perpetuity.

However the substantive issue relates to a condition that the Authority inserts on Authority Certificates that requires works to commence within a 24 month period once an Authority Certificate is issued, although in some limited circumstances the commencement period has been longer. There is no guidance as to what level of activity constitutes commencement of a project and the Authority has at time taken a broad definition of this. The issue that emerges is that there are no formal guidelines to provide guidance to allow Authority Certificate holders to understand their obligations.

Additionally there are no sections of the NTASSA, other than the ability to insert conditions on Authority Certificates that enable the Authority to place such a restriction.

Questions have also arisen from stakeholders about the length of time being set at 24 months. For large complex projects proponents may be seeking an Authority Certificate to provide long term certainty that a project can go ahead but not seeking to commence works for a period over 2 years.

In discussions with the Authority it is understood that the two year time frame has arisen to ensure that works commence within reasonable timeframes. In planning laws it is not uncommon to find such restrictions.

To create a high level of transparency, the NTASSA should be amended to specifically allow for the timeframes to be set. Further the NTASSA, via Regulations, should determine an appropriate set of standards that applicants can rely on to determine if they have met the requirement to commence work within the specified timeframes.

Recommendation 13

That the NTASSA be amended to include the ability to require works to commence within a statutory timeframe and that the statutory timeframe including guidance on what constitutes commencement of a project be outline in the Regulations of the NTASSA.

5.4 Transferability and multiple applicants

The approval process sees Authority Certificates issued to the applicant and may set out conditions for using or carrying out works proposed by the applicant on an area of land and/or sea. However there is no provision in the NTASSA to allow for the transferring of certificates from one proponent to another.

The Authority Certificates can only be used by the original applicant and for the proposed works identified in the Authority Certificate. For example, if a proponent applies for a certificate in the initial stages of development, the application will be under their entity name. However once the Authority Certificate is issued, other parties cannot use the certificate should the development to which the certificate applies be on-sold to another developer. The 'new' proponent is required to apply for an Authority Certificate for the same area, even if the same proposed works are intended. Section 19F of the NTASSA requires consultation with custodians, regardless of the nature of the application, therefore the Authority is bound to undertake the Authority Certificate approval process again for the new proponent, including negotiating with the custodians.

The lack of transferability creates a number of issues in that it requires repeat consultations for projects that have already received Authority Certificates. From both a custodians point of view and applicants.

During the consultation, suggestions were made to give consideration to waiving the requirement to consult with custodians in regards to an Authority Certificate where:

- The application relates to the same area of land;
- Works or use of the land is the same as already permitted under a previously issued Authority Certificate;
- Conditions are the same as already set out in a previously issued Authority Certificate.

There should however be a clear requirement that a subsequent holder of the Authority Certificate is also bound by the conditions and purpose for which the Authority Certificate was issued. It was also suggested that it would be important for custodians to be notified by the Authority of any Authority Certificate transfers including being provided with the name of the holder.

Both proponents and the Authority identified that there have been occasions where Authority Certificates have been applied for by different proponents in the same area (and on occasion for the same proposed works). For example in a large residential building development area, if there are a number of proponents undertaking work, all would be required to apply for Authority Certificates. It would be more effective and efficient, as well as reduce the work for the Authority if one Authority Certificate was issued to an overarching proponent. However the issue lies with the responsibility for adhering to the Authority Certificate and any conditions. All proponents would be

required to be subject to the conditions of the certificate, but the overarching proponent would still be subject to prosecution should conditions be breached.

Case study:

During the Northern Territory Emergency Response (NTER), the Authority was receiving uncoordinated applications for Authority certificates from multiple Australian and Northern Territory Government agencies for the same project.

The Authority managed to negotiate an agreement with a number of agencies to allow the Authority to resource itself appropriately to meet the demand for clearances. This was also cost effective as it allowed the Authority to use staff resources rather than engaging consultants. It also allowed the Authority to work collaboratively with the agencies to prioritise works.

This resulted in comprehensive clearances being completed for all 72 major remote communities within the first three years of the NTER.

Recommendation 14

That a mechanism be introduced in the NTASSA that allows for the transfer of Authority Certificates to other proponents subject to being bound to the original purpose and conditions of the Authority Certificate. Further amendments be introduced that allow for multiple Applicants to a single Authority Certificate.

5.5 Broad area clearances

The Review was asked to look at the issue of site clearance for broader areas. There is a desire to create a clear process or framework for sacred site clearance over large geographical areas. However it is worth noting that the NTASSA already permits this type of process and that the Authority has already managed assessment of a number of broad area clearances.

The desirability for clearer or stronger provisions stems from interest to have areas pre cleared for the purposes of major projects. The primary concern seems to be that since there has been no comprehensive mapping of sacred sites in the Northern Territory, proponents cannot access a locational map that gives them surety about potential sacred site issues in their prospective development areas.

Yet for the reasons outlined in other sections of this Review, there is a reluctance on the part of custodians to register sites unless they are under threat from immediate works. For custodians to have the level of comfort required to disclose sites, would require a high level of detail about future use or activity on the land to understand what the likely impact on specific sacred sites. There is a real risk that custodians will lose trust in the system if they are not provided with the information they need to inform their decision making. Further any system that was seen as forcing custodians into revealing information would also lead to a higher risk of custodians disengaging from the process.

A further consideration is that the cost associated with broad area clearances would be significant and are likely to require lengthy periods of time depending on the location and size of areas.

On balance, the Review believes that the creation of a system to deal with broader area clearances in a different manner to how other sacred site clearances are undertaken does not provide the level of red tape reduction or certainty required by major projects but rather is likely to create more uncertainty, risk custodians disengagement and lead to greater time delays and costs on projects.

5.6 Section 44 Proprietary rights

The purpose of Section 44 is to ensure that the application of the NTASSA does not affect the owners' enjoyment of their proprietary interests in the land to the extent of creating an entitlement for compensation to be paid (i.e. an acquisition).

In practice this section has been held to mean that landowners may continue their normal use of land, even if it is a sacred site, but may not use the land in ways that would further affect the site adversely.

The 1986 Sacred Sites Review Committee, chaired by Brian Martin QC, canvassed the policy and legal issues that underpin Section 44 of the NTASSA. A critical issue for the Committee was: what if recognition of sacred sites on freehold land amounts to an acquisition of property? The following extract from the Committee's report covers both their findings and recommendations on this point:

“14. Compensation

It is pointed out that the effect of the Commonwealth and Territory sites legislation is to effectively de-bar private property “owners” from access to those parts of the land upon which there is a sacred site and to provide for a statutory right of access by Aboriginals to such land. This may cause loss or hardship to the landowner without a permit to enter and/or carry out works on a sacred site from the Authority.

It would appear to be an arguable legal proposition that the effect of the legislation is to deprive the “owner” of an interest in his property and to that extent the legislation may be invalid since it does not provide for compensation on just terms (section 50(1) Northern Territory (Self Government) Act).

In any event private land “owners”, including pastoralists and miners, may incur costs in adjusting their practices and/or in relation to the making of improvements so as to avoid sites.

The two questions then arise as to whether compensation should be made available and if so who should assess and pay it.

The operations of the Territory Act have so far not given rise to these legal questions. The Commonwealth recognises the problem in the Aboriginal and Torres Strait Islander Heritage Protection Act. Section 28 of that Act (discussed more fully elsewhere) provides –

“28. (1) Where, but for this section the operation of a provision of this Act or of a declaration made under Part II would result in the acquisition of property from a person otherwise than on just terms, there is payable to the person by the Commonwealth such reasonable amount of compensation as is agreed upon between the person and the Commonwealth or, failing agreement, as is determined by the Federal Court.

(2) In sub-section (1), “acquisition of property” and “just terms” have the same respective meanings as in paragraph 51 (xxxi) of the Constitution.”

We suggest that a similar provision be incorporated into Territory legislation dealing with the protection of sacred sites if its validity is to be ensured in all cases. Since it is a Territory law which may have the undesirable effect then the Territory would have to be primarily liable for the payment but it may be possible to negotiate an agreement with the Commonwealth for reimbursement since it is the Commonwealth policy which dictates the Territory law.

Recommend that the Territory Act be amended to overcome the possibility of invalidity because it may amount to an acquisition of property on other than just terms³³.

However, when the *Sacred Sites Act (1978)* was amended in 1989, the Government did not follow the recommendation of the Martin Committee but instead inserted a clause that preserved the right of landowners to enter and remain on their property.

Section 44 was devised following advice from the Commonwealth Solicitor General that without such a clause the NTASSA would constitute an acquisition other than on just terms and that this had been a serious weakness in the 1978 Act³⁴.

This section has to be read within the context of Section 73 of the ALRA, which gives powers to the Northern Territory Legislative Assembly to make laws for the protection of sacred sites in specific ways. The Northern Territory is not granted the power to permit landowners generally, and persons acting with their permission, to damage or desecrate sacred sites on their land, as this would be contrary to s.73.

It has been accepted by the courts, in *Authority v Tapp* and subsequent cases where this section has been invoked as a defence, that Section 44 does not mean that landowners are not liable to prosecution for offences under the NTASSA. A reading along those lines would suggest that only trespassers would be liable to prosecution under the NTASSA. Again, a successful prosecution resulted for causing damage to a registered sacred site at Bullita Homestead in Gregory National Park³⁵.

Some stakeholders consulted during the Review said that a landowner might be discouraged from applying for an Authority Certificate to confirm the continued use of the site as it might diminish rights that might otherwise exist under Section 44. Specifically, that there is a perception that an Authority Certificate might impose conditions that would not otherwise have been said to apply under the preservation of proprietary rights in Section 44.

While the practice may be that while landowners may continue their normal use of land on which a sacred site is found, the landowners must not use the land in ways that would further affect the site adversely, this principle should be enshrined in the NTASSA.

Recommendation 15

³³ Martin, BF, Lovegrove, TC, and Darbin, DF. (1987) Report of committee established to review legislation relating to sites of significance to Aboriginals. June, Report to Chief Minister. Northern Territory Government, Darwin pg. 130-132.

³⁴ Griffith, G. 1989. Advice to Northern Territory Government. 21 April, letter. Commonwealth Solicitor General, Canberra.

³⁵ Aboriginal Areas Protection Authority Annual Report 2013 -2014

That Section 44 of the NTASSA be amended to provide greater clarity that the exercise of priority rights must not contravene the protections for sacred sites elsewhere in the NTASSA or in other words does not give rise to a right that would result in a site being damaged or destroyed.

5.7 *Aligning with other regulatory frameworks*

Throughout the course of the Review, there were only three regulatory frameworks that arose which directly incorporated or referred to the NTASSA.

Setting aside the impact on timeframes, which are discussed earlier in section 5.2, there are broader issues that are required to be considered, especially where the other regulatory frameworks introduce requirements that are not requirements of the NTASSA. The issue for proponents is often that they are unaware of the various requirements until they commence each application process, and by then they may have missed the opportunity to align or manage matters concurrently. The need for the Authority to work with other regulatory bodies to improve information and communication is discussed in more detail in section 6.5.8.

5.7.1 *Northern Territory Environment Protection Authority*

The *NT Environmental Assessment Act* requires the Northern Territory Environment Protection Authority (NTEPA) to assess and provide advice to the Minister for the Environment on development proposals.³⁶

Assessment Guidelines are issued by the NTEPA to assist proponents, consultants and the general public to understand and where appropriate comply with the NTEPA's information requirements for the environmental impact assessment process (EIA). The documents provide a basis from which the NTEPA is able to assess proposals and provide recommendations to the Minister, and enable proponents to develop environmentally acceptable development proposals. The information requirements are intended to provide best practice approaches to environmental assessment and management.³⁷

The guidelines contain a checklist which includes the following requirement:

An Authority Certificate application has been submitted to the Aboriginal Areas Protection Authority and once issued, the Certificate conditions will be complied with. Authority Certificate Requests can be made from the form on the AAPA website: www.aapant.org.au.

Confusion arises for proponents as to whether they are required to apply for an Authority Certificate as a result of the guidelines even though the NTASSA does not have the ability to mandate that a proponent apply for an Authority Certificate. This is further complicated by the NTEPA's website indicating that the guidelines provide best practice approaches and not necessarily mandated requirements.

It would be in the interests of proponents if the two were better aligned. This could be achieved by altering the NTEPA guidelines to include a requirement that proponents investigate and determine if they require an Authority Certificate.

³⁶ <http://www.ntepa.nt.gov.au/environmental-assessments/>

³⁷ <http://www.ntepa.nt.gov.au/environmental-assessments/>

5.7.2 Mines and Energy

The Department of Mines and Energy is responsible for issuing authorisations for mining and energy operations in the Northern Territory.

In this role the Department of Mines and Energy ensures compliance with the specific legislation within its portfolio and the associated regulations. For example *The Mining Management Act* requires a company to produce a Mining Management Plan. To assist companies with the preparation of the Mining Management Plan the Department of Mines and Energy has issued a template for the preparation of the Plan.

Included in the template is a specific reference to sacred sites:

Results of an inspection of the Register of Sacred Sites maintained by the AAPA or surveys undertaken by land councils must be summarised and discussed. Results may be provided as an Appendix. Copies of applications, Authority Certificates from the Aboriginal Areas Protection Authority (AAPA) may be attached.

It is expected that Authority Certificates would be required for mining activities.

This should be supported by map(s) at appropriate scales (aerial photograph or topographical).

The guidelines issued by the Department of Mines and Energy are consistent with the requirements of the NTASSA in that whilst it states that it is expected that Authority Certificates would be required it does not mandate the requirement. It also demonstrates good practice by requiring the Register to be inspected and appropriate evidence provided to support this, which whilst not being a mandatory requirement of the NTASSA is consistent with the recommendations of this Review in relation to changes to Section 36 (1) of the NTASSA (no reasonable grounds for suspecting that the sacred site was a sacred site).

5.7.3 Heritage

All Aboriginal or Macassan archaeological places and objects are automatically protected under the *NT Heritage Act 2011*, whether they have been recorded or not. The Heritage Act establishes requirements and procedures that must be undertaken for any proposed activity that will significantly affect an Aboriginal or Macassan archaeological place or object.

If a proposed activity will unavoidably impact or disturb an Aboriginal or Macassan archaeological place (including for research purposes), the Heritage Branch will require the proponent to submit an application form describing what is proposed.³⁸ An assessment of the application is then made as to whether or not the activity may commence. The grantor may attach reasonable conditions for the undertaking of the activity, including the removal of an archaeological object from the heritage place, with further set determinations for what happens to the removed object. The Heritage Branch will also negotiate the best possible outcome of an activity in terms of the fate of artefacts, with an emphasis on handing them over to Traditional Owners.³⁹

³⁸ Northern Territory Government: Department of Lands, Planning and the Environment, *Indigenous Heritage* (2012): <http://www.dlp.nt.gov.au/heritage/indigenous-heritage>

³⁹ Ibid

If it is believed that the proposed activity will not detrimentally affect the heritage significance of a place or object, the Heritage Branch may exercise its discretion to exempt the proponent from the activity application process. However, in all cases, heritage places and objects must be recorded prior to any form of disturbance.

In circumstances where insufficient information is available to assess the impact of a proposed activity on a heritage site or object, an archaeological survey must be undertaken in accordance with a Scope of Works provided by the Heritage Branch.⁴⁰ When conducting an archaeological survey or research, Traditional Owners must be notified and consulted about the intent to carry out the work and, if possible, involved in fieldwork.

A stop work order for up to 30 days (or more, depending on the time required for the Tribunal to hear the stop order application) may be issued by a heritage officer if a proponent is carrying out, or is about to undertake work that constitutes a serious and imminent threat to the heritage place or object, and an order is necessary for the conservation of the place or object. Stop work orders can require the person to stop the work stated in the notice, or prohibit the commencement of the activity altogether.

During the consultations some stakeholders expressed an interest in having the Heritage requirements combined with the requirements of the sacred site clearance.

The recommendations made in the report will create a greater level of consistency between the two pieces of legislation especially in relation to the introduction of stop work orders. However there is a significant difference between the nature of heritage being protected through the Heritage Act to that is seeking to be protected in the NTASSA. This definition is really drawn out when you examine what is defined as heritage and a sacred site.

Aboriginal heritage that is protected under the Heritage Act is defined as archaeological places, which are evidence of the occupation of the Northern Territory. Such places include skeletal remains, artefact scatters, shell middens, earth mounds, quarries, stone arrangements, rock shelters, rock art, and places that provide evidence of early contact between Aboriginal people and Europeans.⁴¹

Whereas a sacred site is defined as “a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.”⁴²

Recommendation 16

That the Authority work with the NTEPA, the Department of Mines and Energy and the Department of Lands, Planning and the Environment to review and redevelop respective communication material for proponents, to clarify respective roles and responsibilities and streamline regulatory processes.

⁴⁰ Ibid

⁴¹ <http://www.dlp.nt.gov.au/heritage/indigenous-heritage>

⁴² Aboriginal Land Rights (Northern Territory) Act 1976

5.8 Sacred sites in water

The NTASSA includes a definition of “land” that for the purposes of the NTASSA removes any doubt that the NTASSA applies to sites in the seas under the Territory’s jurisdiction:

“land includes land covered by water (including such land in the Territorial sea) and the water covering land”.

The main reason custodians have requested protection for their sites in the sea under NT sites laws is to keep out fishermen (both commercial and recreational). Sacred sites in the sea have accordingly been a major issue since the drafting of the first Sacred Sites Act in 1978⁴³.

Historically this was an area managed by the Authority and its predecessor ASSA. Until the 2008 decision in the Blue Mud Bay Case Land Councils had no jurisdiction over the Territorial seas.

During the consultations one interest group raised specific matters that related to the costs and complexities of seeking Authority Certificates on water. Specifically the costs were seen as being significantly higher and prohibitive to small operators.

Costs for Authority Certificates in relation to proportion of project costs have been addressed in other sections of the Review.

One way in which this matter could be addressed is through the provisions, if adopted, for multiple applicants for a single area. In effect this would allow several operators to apply for a single Authority Certificate which would proportionally reduce the cost.

⁴³ Site protection issues were raised by the traditional owners of sacred sites in the seas off the Blyth and Glyde River mouths in NE Arnhemland, and also reefs and low islands off Bynoe Harbour.

6 *The Aboriginal Areas Protection Authority*

The Terms of Reference require that the Review provide advice on ways in which the Authority can:

- Become more efficient; and
- Balance the need for development with the need for protection of sacred sites.

This section of the report examines the Authority and addresses these specific points from the Terms of Reference.

6.1 *Key Functions described in the NTASSA*

The Authority is established under section 5 of the NTASSA. The Authority is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the Northern Territory and has such powers as are necessary to enable it to perform its functions and exercise its powers (section 11).

Section 10 of the NTASSA establishes that the functions of the Authority are:

- a to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site;
- b to carry out research and keep records necessary to enable it to efficiently carry out its functions;
- c to establish such committees, consisting of such members and other persons to efficiently carry out its functions;
- d to establish and maintain the Register of Sacred Sites and such other registers and records as required by or under the Act;
- e to examine and evaluate applications made under sections 19B and 27 of the Act;
- f after considering applications under 19B, and in accordance with Division I of Part III, issue or refuse to issue an Authority Certificate;
- g to make available for public inspection the Register and records of all agreements, certificates and refusals except where it would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret;
- h to make such recommendations to the Minister on the administration of the Act as it thinks fit;
- i to perform such other functions imposed on it by or under the Sacred Sites or any other Act, or as directed by the Minister; and
- j to enforce the Act.

As outlined in section 5(5) the Authority, in the performance of its functions and the exercise of its powers, other than a function or power under section 17, 43 or 51 or Part III or IV, is subject to the direction of the Minister.

In reviewing the functions and powers of the NTASSA it is the view of this Review that the functions and powers are appropriate and adequate for the role of the Authority. The consultations with stakeholders did not raise any issues relating to either the functions or powers.

Recommendation 17

That the functions and powers of the Authority as described in Sections 10 and 11 of the NTASSA are appropriate.

6.2 Resources of the Authority

The Authority has two primary sources of revenue to fund operations:

- An appropriation from the Northern Territory Government (including services provided free of charge), providing facilities, staff and IT services for the conduct of statutory functions.
- Fees for service from the production of Authority certificates. This is based on a cost recovery method to recover direct costs associated with producing certificates.

In the past the Authority has also successfully negotiated funds from clients who have generated a high level of work for the Authority to allow it to increase its staffing to respond to the level of demand from that client. This occurred during the period of the Northern Territory Intervention when the Australian Government provided a fixed annual fee for an initial three year period which was extended for a subsequent three years. This expired in 2015.

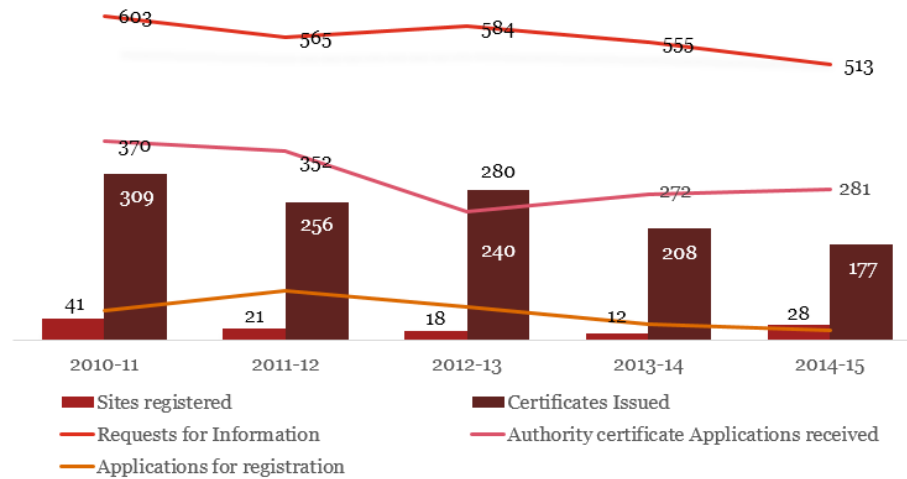
Below is a comparison of the income and expenditure of the Authority for the past five years. It shows that while income from the NTG appropriation has decreased, income from fees has fluctuated.

	2010-11 \$	2011-12 \$	2012-13 \$	2013-14 \$	2014-15 \$
Appropriation - output	3,116,000	3,616,000	2,798,000	2,831,000	2,681,000
Sale of goods and services	1,967,000	1,736,000	2,100,000	2,266,000	1,844,000
Other Income	1,000	3,000	5,000	36,000	87,000
Total Income	5,084,000	5,355,000	4,903,000	5,133,000	4,612,000
Total Expenditure	4,895,000	5,396,000	5,350,000	4,795,000	4,321,000

When compared with the activity of the Authority, it would appear that demand (requests for information, applications received) had been declining marginally over this same time period, and output (registrations, certificates issued) has also been declining. The factors impacting this trend are discussed in more detail in section 6.4.



Applications for registration, Sites registered, requests for information, Authority certificate applications received and certificates issued



6.3 Other Functions

6.3.1 Direction of the Minister

The Authority as outlined in section 5(5) is subject to direction of the Minister. This clause has been exercised by the Minister previously to request that the Authority undertake specific activities. The Authority was asked to undertake a research into the secret and ceremonial nature of the Papunya Boards, a collection held by the Museum and Art Gallery of the Northern Territory. In this instance the Authority was required to undertake the work from their existing resources. The skills required to undertake this were not contained within the Authority and a specialist was required to undertake the work.

Recommendation 18

That in the exercising of the powers in Section 5 (5) consideration be given to the resource impact on the Authority by any directions provided to them.

6.3.2 Maintaining information provided by custodians

In the ordinary course of its work, the Authority collects a large amount of information from custodians about sacred sites. This information includes the location of a site, the detailed story and any other material that supports the registration of the site. The information has been captured in a variety of formats from written documents, photographs, audio and video material. This material can be likened to a collection that might be found in any collecting institution such as a museum or archive.

The Authority currently holds information on 2019 registered sites. The keeping of this material has become an important function of the Authority in that it provides a valuable resource base to draw from when applications are lodged for certificates. But it also provides a valuable resource for custodians. In fact, as generations of community pass on, the material has become a source of information in which custodians seek to access to ensure that the details about a site are correct.

There is also an expectation as expressed by custodians in the consultations, and understood by the Authority, that if custodians supply information then it will be available to them when the custodians require access to it. These increasing cultural and social expectations were not envisaged when the Authority was first established and do not appear to have been adequately recognised in recent years, when decisions have been made about the resource requirements of the Authority now and into the future.

Recommendation 19

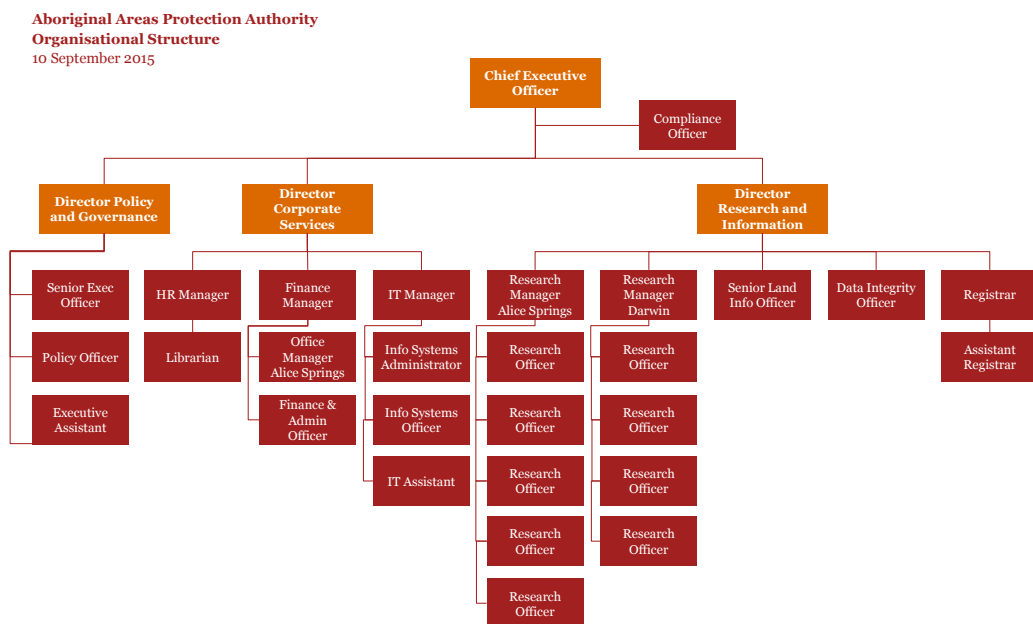
That the Authority be resourced to undertake an assessment of the collection and to undertake work with the collection that preserves and protects the material whilst making it accessible for the work of the authority and custodians.

6.4 Organisation Structure and Governance

The Board of the Authority consists of 12 members appointed by the Administrator by notice in the Government Gazette.

The Administrator is also required to appoint a Chief Executive Officer of the Authority who is charged with the responsibility of carrying out the decisions of the Authority.

The Authority may also employ such staff as are necessary to enable it to perform its functions and exercise its powers. The structure and resources of the Authority at the time of commencing this Review are shown in the figure below.



Note the organisational structure reflects the totality of the Authority staff, it does not provide a breakdown of how the Darwin and Alice Springs offices are structured. Decisions about the location of staff in the Darwin and Alice Springs offices has varied over time and is a matter that is managed internally by the Authority.

6.4.1 Board

As outlined above the Board of the Authority consist of 12 members, the composition of which is outlined in Section 6 of the NTASSA as follows:

- Ten members of the Authority shall be custodians of sacred sites appointed in equal number from a panel of 10 male custodians and 10 female custodians nominated by the Land Councils, or as provided in Section 6 (5) or (6).

The appointments are made by the Administrator and include the appointment of two additional members to those appointed from the Land Council nominees. The NTASSA is silent on these two roles, and on any requirements for any specific skills or knowledge by Board members.

The consultations with stakeholders raised a number of issues for consideration by the Review:

- The Land Councils expressed a strong desire to provide direct nominees to the Board rather than the process of providing a pool of applicants for consideration.
- A small number of stakeholders advocated that the Board should also comprise of members who represent other stakeholder interests i.e. pastoral, mining, etc. However it is not clear as to how such stakeholders would enhance the protection of sacred sites.
- A suggestion was made that the NTASSA be amended to include specific details about the two government appointed members including any details of skills or special requirements. Stakeholders generally felt that the operations of the Board would be enhanced by the addition of a second order level of skills, that whilst not applying to all members, could be required by the Board in order for it to effectively discharge its duties. This is not intended to take away the primary need for the 10 members drawn from the pool nominated by the Land Councils but rather matters for the Administrator to consider when deciding upon appointments to the Board.
- The final matter raised was that of the terms of Board members. The NTASSA in Section 6(4) specifies that members can be appointed for a period up to 3 years and that they are eligible for reappointment. In practice this has resulted in all members coming up for renomination at the same time, a process which could lead to all members of the Board being replaced at the same time. This is generally considered not to be good governance as there is a high potential to lose corporate knowledge and destabilise the Board. Stakeholders believe that the terms should be staggered so that 4 members are appointed (including the ability for reappointment) annually.

The Review believes there is value in maintaining an independent Board with decision making authority, rather than moving to a model where the Board is predominantly advising government. Independence is important as it allows the board to monitor and review the performance and management of the Authority, without having any other competing responsibilities, relationships or business that could hamper or interfere with decision making.

However to improve the performance of the Board, the Review considers that collectively the Board needs its members to have a range of skills to ensure good governance. Skills such as recognising and managing conflicts of interest, analysing and monitoring risks and opportunities, financial management and resource allocation, subject matter and strategic capability are all generally regarded as fundamental skills for Boards.

With some changes to the way the Authority Board members are appointed and the Board is supported, the Review believes the current model can be strengthened. These changes are specified in recommendation 20 below.



Recommendation 20

That the NTASSA be amended to:

- 1) Specify that the ratio of Board positions that must be filled by the four Land Councils.
- 2) Require the Land Councils to nominate a pool of nominees for their specified Board positions only. The number of nominees must be twice that of the number of vacancies and must be of equal gender.
- 3) Retain the requirement that the 10 appointments made from the pool of Land Council panel be custodians.
- 4) Require the Administrator to have regard to a range of other secondary skills required by the Board when making appointments.
- 5) Provide details on the two Minister nominees including the skills and knowledge that the Minister must have regard to in making the nominees.
- 6) Introduce staggered Board terms so that 4 members are appointed annually.
- 7) Any amendments made to the appointment process should not occur without further consultations with the Land Councils.

6.4.2 Management

The Chief Executive Officer (CEO) of the Authority is appointed by the Administrator and is responsible for managing the day to day operations of the Authority and for carrying out decisions of the Authority as per Section 15 of the NTASSA.

If the CEO is expected to be absent from duty or from the Northern Territory, or if the position becomes vacant, the Authority can appoint a person employed by the Authority, to act as the CEO during the absence or until the position is filled.

During the consultations the role of the CEO was discussed in the context that the role is not appointed by the Authority but by the Administrator on the terms and conditions as determined by the Minister. Yet in practice the CEO has the responsibility under the NTASSA to implement the decisions of the Authority, and the Authority via its ability to delegate its powers under Section 19 provides the CEO with the powers to undertake their duties.

This appointment process could conceivably result in a situation in which the Board does not agree on the appointment or one in which the Minister and the Board are in disagreement about the terms of the appointment. In essence it results in the CEO having two managers in which they are required to report.

For effective governance purposes it is more desirable to have the CEO position appointed and responsible to the Board. The Authority is subject to direction from the Minister subject to the limitations set out in Section 5(5) which is the appropriate.

Recommendation 21

That the NTASSA be amended to allow for the appointment of the Chief Executive Officer to be made by and be responsible to the Authority Board.



6.5 Operational Matters

Historically the Authority has organised its resources around key functional areas of Research, Technical, Corporate Services and Policy and Governance. The Authority undertook a major review in 2008 and there have been some structural changes implemented since then. The organisation also undertook a Corporate Services review in 2015 where it was recommended that due to the independent statutory nature of the organisation there is a necessity to retain certain levels of corporate functionality within the organisation rather than outsourcing or purchasing these functions from central government agencies.

6.5.1 Capacity

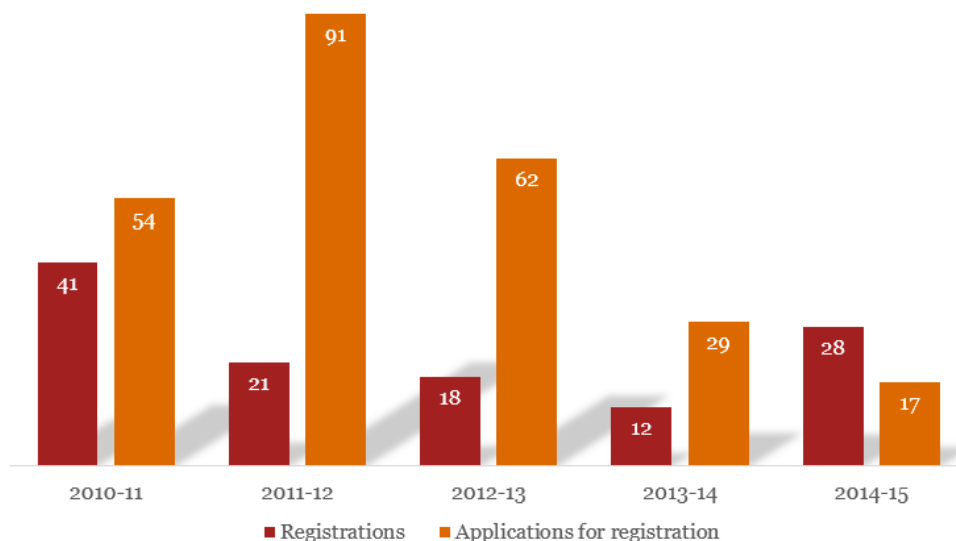
Based on current appropriations and its fee recovery model the Authority has directed the majority of its resources into the processing of applications for certificates. A consistent theme from the majority of stakeholders consulted was that the Authority was not resourced to the level required to effectively and efficiently discharge the full extent of its duties.

The examples of responsibilities that the Review found were not being carried out to a level of efficiency that might be expected are:

- The number of sites being registered annually is minimal and a backlog exists. The Authority have advised that there is now a significant backlog of registration requests awaiting action.

The number of applications received from custodians to register a site over the past 5 years has outweighed the actual number of sites registered. As the graph below depicts, over the 5 year period there were 253 new applications for registrations compared to only 120 registrations. Applications for registrations can be carried forward into the next year if they have not been finalised and registered in the previous year. The Authority advised that to maximise their current resources and streamline consultations, generally the registration work is addressed on an ad hoc basis when work is being undertaken to process a certificate or field work is being carried out near a site being requested for registration.

Registration of Sacred Sites



- The ability for the Authority to bring forward prosecutions is dependent on special advances from Treasury. The Authority is not sufficiently proactive in regards to monitoring projects that may be on the horizon, or talk early with proponents and custodians before an application is received. This impedes its ability to build relationships and ensure that proponents and custodians are given the time they require to consider matters. The flow on effect is that this work has to be undertaken once an application has been lodged which can lead to delays. Further discussion about the processes regarding investigations and prosecutions is contained in section 6.5.6.

Whilst the Authority has received independent advice on the structuring of its fee for service model based on the current regulations, it has not been able to fully implement this advice which has impeded its ability to respond to the level of demand it receives for its services in a timely and efficient manner. The Review believes that given the regulations in the NTASSA already provide for the Authority to recover costs, implementation of a revised fee for service model is paramount.

Furthermore, the Review believes consideration is needed to develop an operational model that would allow the Authority to scale its resources in line with the level of demand that it receives. This would require the building of a model that would allow the Authority to make educated estimates on future workload, revenue especially cost recoveries from clients so that it is able to resource appropriately.

Based on the information provided by the Authority to previous reviews it is clear that there is need for a comprehensive review that is supported by a change management process. Given the resourcing issues to date it would also require a one off injection of funding to undertake the review and to implement the finding across the Authority.

Recommendation 22

That the Authority's operational structure be reviewed with an emphasis on structuring a cost recovery model that allows the Authority to scale its resources based on demand. Further the outcomes of the review be supported by a change management process across the Authority.

6.5.2 *Employment status of Authority staff*

Authority staff are employed by the Authority (Section 17) as necessary to enable the Authority to perform its functions and exercise its powers on terms and conditions as defined in the *Public Service Sector Employment and Management Act (PSEMA)* approved by the Commissioner.

However the Administrative Arrangement Order date 1 July 2015 states that the Authority is not an agency which falls under the PSEMA.

On the face of it this Administrative Arrangement Order conflicts with the provisions of the NTASSA.

The Authority has advised that they have an instrument from the Commissioner for Public Employment which gives the Authority permission to utilise the terms and conditions of the PSEMA. The Authority applies PSEMA to its day to day operations in regards to staff, including utilising the Northern Territory Government's policies and processes (including ones that stem from PSEMA). For example the Authority staff use the Northern Territory Government's MYHR system to manage staff's pay/conditions and the Authority applies the Northern Territory Government's salary and grade scheme etc.

Recommendation 23

That the employment status of Authority Staff be clarified and if required amendments be made to the NTASSA to reflect their employment status.

6.6 *Review of Authority Processes*

To determine how efficient and effective the Authority is at discharging its responsibilities under the NTASSA it is necessary to examine the processes in detail.

6.6.1 *Site registration*

Division 2 of the NTASSA sets out the procedures that are required to be followed for the registration of a sacred site. The registration may be triggered when custodians request a site to be registered at any time or can be the result of custodians requesting a site to be registered because of an applicant seeking to undertake work near or in a sacred site. In either event it is the custodians who make the request for a sacred site to be registered.

Once an application is received, the Authority as soon as practicable after receiving the application must consult with the applicant and other custodians (if any) to determine:

- a) The basis on and the extent to which the applicant and the 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 matters referred to in paragraph (c) or (f) divulged by the custodian or custodians.

Section 28 of the NTASSA requires the Authority to notify each owner of land comprised in the site or on which the land is situated notice which details the area concerned and provide the land owner with the opportunity to make written representations concerning the registrations with at least 28 day's notice.

Section 28 (2) requires the Authority to take into considerations the representations of the land owner including the making and recording of findings in relation to these representations where they have an immediate or possible detrimental effect on the land owner's proprietary rights.

Where the land owner advises the Authority that the owner's intended work on or use of the land may be constrained by the existence of the sacred site, the Authority is required to notify the land owner in writing about their right to apply for an Authority Certificate.

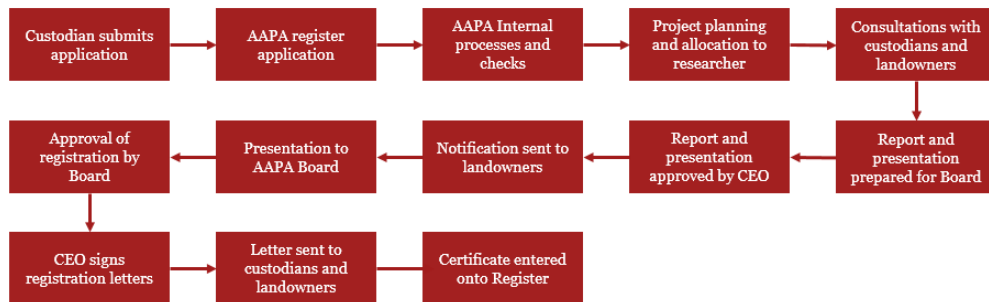
It is also worth noting that Section 44 which will be explored further in a later part of this Review also provides further details on owner's proprietary rights.

Once the Authority after considering the information from the consultations with the custodian or custodians, any representations from land owners (including the report produced by the Authority) and any other relevant information is satisfied that the site is a sacred site, it shall record the site as sacred site in the manner set out in Section 29.

Section 10 (d) requires the Authority to establish and maintain the register which is to be known as the Register of Sacred Sites.

A detailed process map of the procedures undertaken by the Authority is provided below.

Site Registration Process



The consultations with stakeholders revealed a number of issues that are worth discussing in the context of how the Authority undertakes this process.

The trigger for the registration of a sacred site is a request from custodians. Custodian’s decisions to register sacred sites are usually based on the perceived threat to the sacred site and hence whether it needs to be registered. Issues emerge when applicants seek to vary the type of works within an area they currently hold an Authority certificate and this subsequently triggers the registration of further sites. There is a perception that a sacred site may have been ‘invented’ for the purposes of delaying or blocking a proposed development.

This could be avoided if an applicant is able to provide a greater level of detail in their original applications.

As shown earlier, there is a declining number of requests for registration of sites which might be an indication that custodians are not seeking to register unless there is a perceived threat to the sacred site. This is not surprising as it is common practice in the registration of heritage sites that specific locations are not divulged out of fear that once the location is known curious individuals may decide to visit the site or even remove part or all of the site depending on its nature.

Recommendation 24

That APPA work with applicants to ensure that their full scope of proposed works including any future work is included in the original application for an Authority Certificate.

Recommendation 25

That the Authority work with custodians to ensure that they are provided as soon as practical, full details of an applicants proposed scope of works including any future works.

The consultations also identified that the Authority generally does not make any pre-contact with land owners about the intention to register a site on their land before sending the official notification required by the NTASSA.

This can present land owners with a number of issues, especially if they live in a remote area in which there is not regular mail delivery. The 28 days notification period is

often not long enough for the land owner to obtain sufficient information to understand their rights and to make informed representations. Additionally it can also result in negative relationships between land owners and custodians which can present as later problems when custodians are seeking access to sacred site.

The added complexity is situations in which the land owners primary place of operations are located within the sacred site which has been the situation in at least one instance.

Recommendation 26

That the NTASSA be changed to increase the time frame from 28 days to 60 days for the notification to land owners that a sacred site is to be registered on their property and that the Authority adopted a policy of contacting land owners where practical prior to the issuing of notices to advise verbally that a site is to be registered.

6.6.2 Register of sites

The Authority, and in this instance the Authority Board is responsible for the registration of sacred sites. The Authority Board currently meets four times a year at which it considers the registration of sacred sites. If at this meeting the Authority Board wishes to seek clarification prior to the registration of a sacred site, the matter would have to be carried over to the next meeting of the Authority Board.

Section 10(c) provides the Authority with the ability to establish committees (including executive and regional committees), consisting of such members and other persons, as are necessary to enable it to carry out its functions.

The establishment of either a sub-committee of the Authority Board or regional committees that are provided with the powers to consider the registration of sacred sites may be one approach in which some efficiency could be obtained in relation to the timeframes to register a sacred site.

Recommendation 27

That the Authority Board examine the use of committees including sub-committees of the Authority Board to consider the registration of sacred sites.

6.6.3 Inspection of the register

Section 29 of the NTASSA requires that where a sacred site is registered it shall place the information reentered in pursuance of Section 27 (3) and a record of its findings referred to in Section 28 (2), if any, in the Register.

Under Section 48, a person may at any reasonable time, on payment of the prescribed fee, inspect so much of the Register or other records of the Authority as the Authority, in pursuance of Section 10 (g), is required to make available for public inspection. Approval for inspection needs to take into account the sensitivity of the information being requested and the commercial information or matters required by Aboriginal tradition to be kept secret.

In practice, the Authority maintains three registers:

- 1) a register of Sacred Sites
- 2) a register of Authority Certificates, agreements and refusals

3) a register of Authority Certificate Applications

Any applicant wishing to inspect the information in the Register once they have paid their fee, is required to physically inspect the Register at the offices of the Authority. The NTASSA makes no provision for a person to receive a copy of the information but there is no restriction on a person taking notes or photographs of the information they are provided.

The consequences of managing applications to inspect the register in this manner is that it can take up the resources of the Authority when there are alternative ways that would deliver greater efficiencies for the Authority and a person seeking to inspect the register.

One alternative is for the Register to be managed as an electronic register that is accessible online and that has a mechanism in place to fulfil the obligations of Section 10 (g) and Section 48. That is the Register does not contain any restricted information as defined in Section 10 (g) and on payment of the prescribed fee applicants are provided with access.

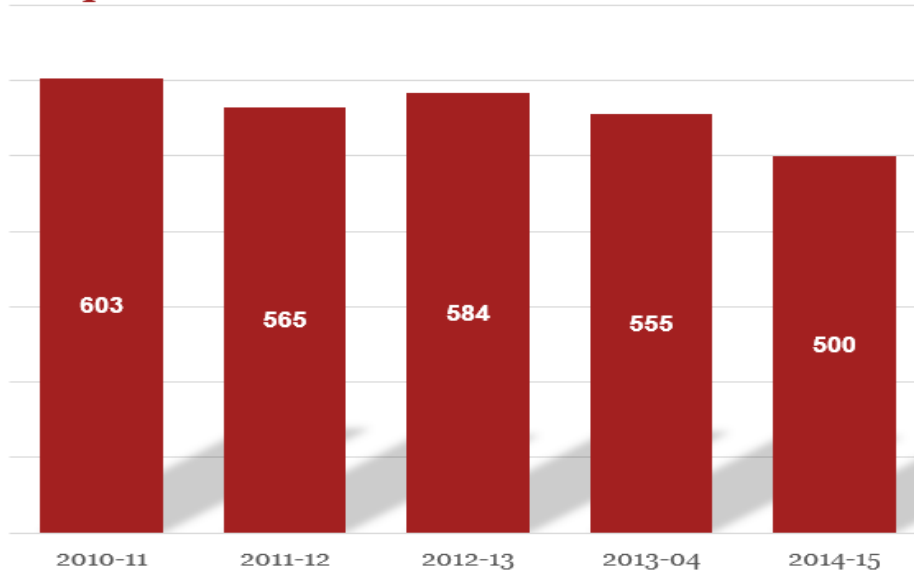
Recommendation 28

That the Authority implement an electronic Register online that ensures that confidential information is restricted in which access is provided only on receipt of the prescribed fee.

6.6.4 Requests for information

The Authority receives requests for a variety of information on an ongoing daily basis. As demonstrated from the data contained in the Authority's annual reports for the last five years (see graph below) there are a significant number of requests. The majority of requests are for the abstract of the Authority's records. Other requests relate to the inspection of the Sacred Sites Register and Authority Certificates Register, inspection of Authority records and digital data requests whilst other enquires may relate to the progress of an application for a certificate. During this review there was no real concern raised about the timeliness or transparency processes for stakeholders wishing to inspect the registers.

Requests for Information



Another form of request being made to the Authority is for information about the status and process of a current application. Stakeholders consulted during the review expressed some frustration with what they saw as lack of transparency and the requirement to continually contact the Authority to obtain information on the progress of their application.

At the time of the Review the Authority was in the process of implementing an online application process for certificates and other requests. This system will allow applicants to track the progress of their applications and should reduce the amount of requests for information.

This initiative should be extended to include the publishing of an online Register of Sacred Sites and Certificates.

Recommendation 29

That the Authority implement an electronic system to handle information requests including the inspection of the Register of Sites and Certificates. This system should include the ability to lodge a fee online and ensure that any restricted material as defined by the NTASSA not be made available.

6.6.5 Certificates

Division 1A sets out the procedures for an applicant to apply for an Authority Certificate.

The process for obtaining an Authority certificate is initiated by proponents as per section 19B of the NTASSA. Once an application has been received Section 19 F states that the Authority must as soon as practicable (but no later than 60 days or such longer period as the Minister approves) consult with the custodians of sacred sites on or in the vicinity of the land to which the application relates that are likely to be affected by the proposed use or work.

Section 19G provides applicants with the opportunity to meet with custodians to discuss either their application or if an Authority Certificate has been issued the conditions attached to the Authority Certificate.

An Authority Certificate can only be issued under Section 22 (1) of the NTASSA if the Authority is satisfied that either the works or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site or as allowed in Section 22 (1)(b) where an agreement has been reached between the custodians and the applicant.

The Authority in issuing a certificate must provide details of where work can and cannot occur with a sufficient level of detail to enable the land and part or parts to be identified. The Authority Certificate must also set out any conditions under which the works can be undertaken.

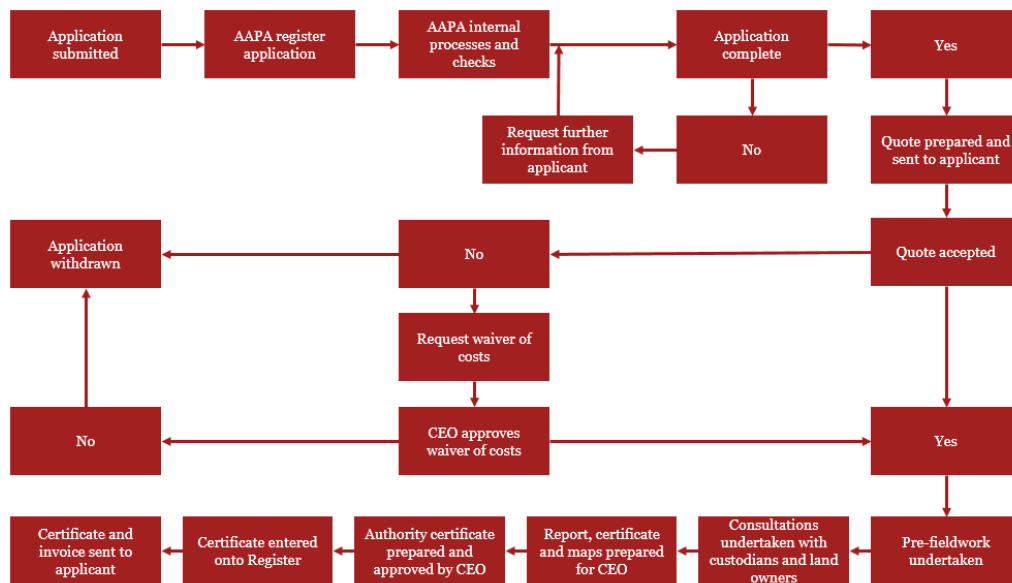
Variations to an Authority Certificate are possible and the process for this is as if an application for a certificate was lodged.

Applications for Authority certificates are voluntary, and are issued to provide a statutory indemnity against prosecution, this is provided the applicant complies with the certificate and any conditions imposed to protect sacred sites. The purpose of the certificates is twofold, one is to provide a risk management tool for proponents and the second is to provide a protection measure of sacred sites for custodians.

To initiate the application process, proponents can download an application form online from the Authority website or contact the Authority for a copy of the form. Once

the application has been submitted, the steps that the Authority undertakes issue an Authority certificate are outlined in the flow chart below.

Authority Certification Process



The Act at section 19, provides for standard and non-standard applications with the Regulations detailing the types of applications that fall into each category. The majority of applications to the Authority are treated as non-standard applications, which require the applicant to pay all of the costs, associated with the processing and issuing of the certificate. On receipt of an application the Authority prepares a cost estimate. The applicant prior to the application being accepted must accept this estimate.

The substantive issue that emerges here is that the cost for applying for an Authority Certificate is not related in any way to the cost of the works that are being proposed by the applicant. As the NTASSA requires certain procedures to be undertaken when processing an application there is a minimum level of work and hence costs triggered by the request which includes the cost of conducting the consultations with custodians. For some types of applications this cost can be in high in relation to the cost of the proposed works. A case example provided was an application to build a fence in which the cost of the fence was going to be the same cost as the application to the Authority. In another example provided an application was put in for a 100 square metre area to put in a septic tank with the estimate being \$11,000, however on another application for an additional 20-25m (to add additional trenches) the estimate was \$10,500.

Applicant stakeholders also expressed that whilst they are provided with an estimate of the costs there does not appear to be consistency on how fees are arrived at from application to application or sufficient transparency on what drives the cost of preparing an application.

The process behind the preparation of cost estimates could be improved by the Authority through the adoption of a modelling tool that would allow it to make efficiency gains whilst providing transparency for applicants.

Recommendation 30

That the Authority investigates and adopts a price estimation tool for the preparation of fees associated with the preparation of an Authority Certificate.

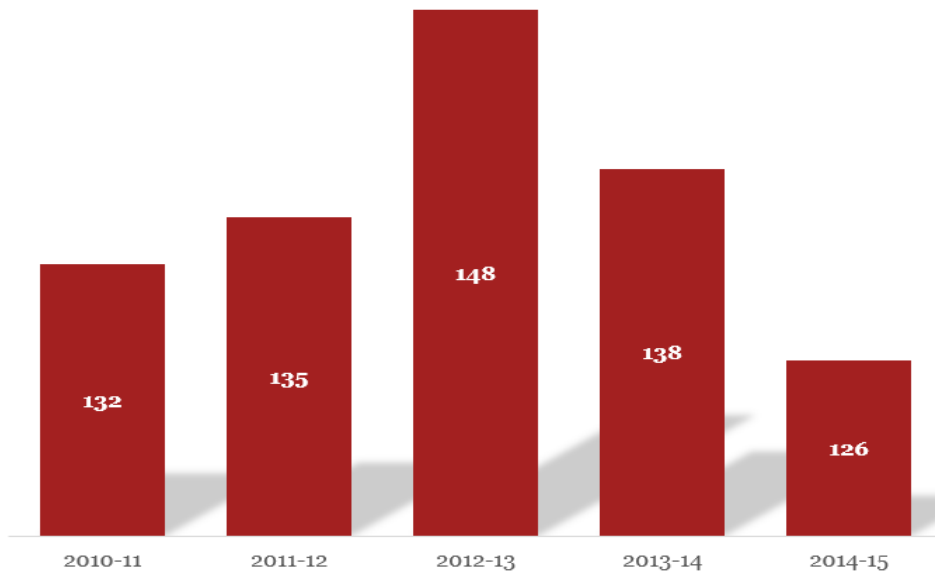
The usage of standard and non-standard application fees in the NTASSA and Regulations further complicates the messaging to applicants. The Authority currently has the ability to waive the fees for any application and if in practice there is almost no applications that fit the category of standard then the NTASSA and application fee structure should be simplified.

Recommendation 31

That the use of standard and non-standard fees in the NTASSA and Regulation be replaced with a single fee process that includes the ability for the Authority to waiver the fee.

As demonstrated by the graph below the average length of time to obtain an authority certificate has largely remained stable with some efficiency gains in recent years.

Average length of time (days)



However while this graph shows averages, it does not show that there are wide variations in the length of time an application can take to assess and finalise. Some applications take substantively longer (at least a year and in at least one case 3 years) to process. There are many factors that can impact on the time it takes to process an application including the complexity and area size of a project, the number of custodians that are required to be consulted, seasonal weather conditions etc. (see more information in section 5.2).

Whilst the majority of stakeholders understood these factors there was a level of frustration in that they are unable to effectively factor the timeframes into their project planning. For some major projects the delay cost to a project is higher than the cost of a certificate so for them understanding timeframes is critical.

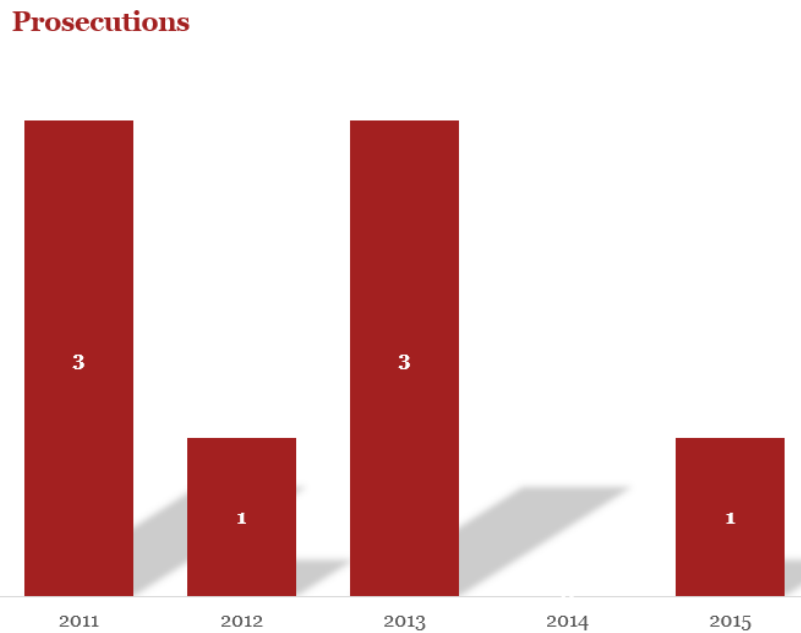
Recommendation 32

That at the time of an applicant being provided a cost estimate that the Authority provide applicants with an estimation of the timeframes to process their application.

6.6.6 Enforcement of the NTASSA

It is the responsibility of the Authority as set out in Section 39 of the NTASSA to prosecute for any offense against the NTASSA or Regulations.

Currently the Authority employs one person to assist it with the investigation into offences. Funding for the prosecution of offences is dealt with by way of seeking a special appropriation from Treasury. As demonstrated in the table below there has only been a small number of prosecutions over the last 5 years.



The Authority does however undertake a larger number of investigations each year (reportedly an average around 20 per annum). These matters have required the Authority to divert other resources towards the investigation of the alleged offences and preparation of the prosecution brief, and this appears to have impacted on the overall functioning of the Authority to discharge all of its responsibilities under the NTASSA.

The decision to proceed with a prosecution is made after consideration of setting bench marks and establishing points of law, and with a view to whether or not a Treasurers Advance will be approved. The Review believes that if the Authority had sufficient resources to attribute to the process, then matters that meet the prosecution threshold would proceed and there is a likelihood that the number of prosecutions would increase.

Recommendation 33

That the Authority be provided with sufficient resources to discharge its prosecution responsibilities under the NTASSA.

6.6.7 Database

The Authority uses a database management system (Administrative Research Management System (ARMS)). The system is an Oracle database which at the time was the first to be developed in the Northern Territory Government environment. This

system however has not had any substantive updates since its development and is no longer supported by the developer.

ARMS provides a number of important functions for the Authority including:

- Recording all information collected for the purposes of the registration of a sacred site.
- The Register of Sacred Sites.
- Location and extent of registered and recorded sacred sites.
- Management of the application process for Authority Certificates.
- Management of fee estimation for applications.
- The Register of Sacred Sites.
- Management of all information inquiries.

The database is the core system utilised to underpin and support all of the functions of the Authority. However over time as the database interface in particular has fallen behind in terms of the functionality required to support the efficient functioning of the Authority. This raises a substantive risk for the agency.

There is an urgent need for the database to be modernised including the building of a new interface.

Other efficiencies outlined earlier in this section of the report, namely the ability for information to be made available online, will not be possible unless the database is modernised.

Recommendation 34

That the Authority be resourced to urgently undertake work on the database and to develop a new interface that will enhance the usability and accessibility of information contained in the database.

Data sharing

The Authority currently shares information about the location of sacred sites as recorded in the register with a limited number of stakeholders. The Authority has managed the sensitivities associated with sharing of the data through licencing agreements.

As discussed earlier in this Review making data available online will improve the transparency and lead to efficiencies for the Authority.

In a similar manner the sharing of data in relation to the location of sacred sites, under strict licencing agreements that maintain the confidentiality of information as provided for in the NTASSA, will drive further efficiencies.

The sharing of data will increase the level of risk for the Authority and the Authority will need to carefully manage the risks by ensuring that the terms and conditions in licensing agreements are adhered to and monitored. Risks such as managing any commercial in confidence matters and inadvertent disclose of sensitive cultural information, would need to be built into any new mechanism.

To enhance the level of accurate information provided with Authority Certificates, electronic data should be provided to applicants so they can accurately map the location of restricted areas within their systems. It is expected that sharing data of this nature will lead to a greater level of protection of sacred sites.

Recommendation 35

That the Authority continue to enhance its data sharing capabilities by ensuring that any future redesign of the database include enhanced data sharing capabilities.

Mapping

During the consultations with stakeholders it was suggested that one way in which the mapping information provided by the Authority could be enhanced is through the provision of 'heat maps'. Heat maps provide information to users on areas that are safe to undertake work, areas that would require caution and areas that are no entry zones.

At least one industry group suggested that this approach was now being used in their sector and that it provide them with a level of clarity and certainty about where they could undertake work and where they could not. In suggesting this system the stakeholders suggested that they did not need to know the details of sacred sites but rather be in a position to accurately plot known locations and exclusion zones into their respective systems.

Austrade have created a 'heat map' for land tenure in Northern Australia which provides a good example of how this type of mapping can work⁴⁴. The website gives the user options to recognise the different types of land tenure within the search area to identify who has the rights to use and occupy the land.

The Authority would need to ensure that any changes to the database and software changes would support the requirements of the certificates whilst ensuring that the requirements of Section 10(g) are met.

Recommendation 36

That the Authority implement heat-mapping capabilities into its data mapping systems.

6.6.8 Marketing and communications

The Authority has been in operation for 27 years but it was clear from the stakeholder consultations that there is a mixture of misinformation and a general lack of awareness of NTASSA and the role and function of the Authority.

In recent years there has been a growing number of developments in the Northern Territory and a substantive push generally to increase development across Northern Australia. The current Northern Territory Government has a clear policy position to increase development.

⁴⁴ <http://northernaustralia.nationalmap.nicta.com.au/>

This level of development has resulted in new operators / proponents entering into the Northern Territory. Generally speaking they are not aware of the NTASSA and the Authority let alone the processes and timeframes attached to them.

In the past the Authority has been proactive with marketing and communications in the market place. However in recent years with increased demand for Authority Certificates and the decrease in its annual appropriation it has reduced its activities in this area. Stakeholders commented that since the Authority has been less proactive and engaged, industry, government agencies and other proponents have had to initiate contact with the Authority and this has weakened the relationship between the parties. As mentioned earlier, the sacred sites protection system relies on trust and transparency to operate effectively.

Recommendation 37

That the Authority allocate sufficient resources to undertake an annual program of marketing and communications aimed at increasing the level of awareness of the NTASSA and the Authority with key stakeholders.

6.6.9 ISO standard

An industry group consulted in the Review suggested that the development of an ISO Standard by the Authority could be one way in which the protection of sacred sites could be enhanced whilst providing efficiencies and consistency for industry.

A standard is a document that provides requirements, specifications, guidelines or characteristics that can be used consistently to ensure that materials, products, processes and services are fit for their purpose. ISO International Standards ensure that products and services are safe, reliable and of good quality. For business, they are strategic tools that reduce costs by minimizing waste and errors, and increasing productivity.⁴⁵

The management system would not diminish the obligation for compliance with the Authority Certificate conditions or provide immunity from prosecution should damage to occur to a sacred site. The Standard would set out Standard Operating Procedures that provide any person involved in ground disturbance works on near sacred sites with guidance on best practice.

Recommendation 38

That the Authority develop an ISO Standard in relation to working on or near sacred sites. The Standard should be voluntary with proponents seeking to implement the System charged on a fee for service basis.

6.7 Balance

The Terms of Reference for this Review seek advice on ways in which the Authority can balance the need for development with the need for protection of sacred sites.

Words to similar effect are also found in the long title of the NTASSA itself:

⁴⁵ <http://www.iso.org/iso/home/standards.htm>

An Act to effect a practical balance between the recognized need 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, by establishing a procedure for the protection and registration of sacred sites, providing entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land...

The Authority, established by the NTASSA is charged with the responsibility to implement the NTASSA. The Authority in undertaking its role must pay attention to the requirements of the NTASSA and act as an independent body. That is it is not the role of the Authority to determine what the balance between development and protection of sacred sites.

The NTASSA is clear that its primary concern is to protect sacred sites. What the NTASSA provides is a mechanism, a risk management tool, for proponents to utilise to minimise the risks associated with undertaking development in the Northern Territory.

The NTASSA long title also provides an insight to this in the following words “by establishing a procedure for the avoidance of sacred sites in the development and use of land...”

During the consultations for the Review there was questions raised about the independence of the Authority. Specific concerns related to a perception that some staff may allow their personal ethics or views to influence their work and this in turn may be leading to the delay to the issuing of certificates or influence the extent of restricted areas. The Review was not presented with any evidence to support this view.

The Authority undertakes induction training with staff on commencement of employment, with research staff undertaking further additional training associated with the Anthropology Induction and fieldwork training *in situ*. Further, the Anthropologists undertake Research independence and avoidance of bias and research ethics as part of their university degree. The Authority has in place a range of checks and balances to ensure individual views do not overly influence the process.

The Authority could promote a more open process whereby proponents and custodians have a pathway to provide feedback on the assessment and decision making activities.

Recommendation 39

That the Authority:

- 1) Continue to provide all staff and the Board with training about independence and ethical practices;
- 2) Ensure policy and procedures embed this principle; and
- 3) Develop a feedback pathway for proponents and custodians.

Appendix A

Terms of Reference

SACRED SITES PROCESSES AND OUTCOMES REVIEW

TERMS OF REFERENCE

Purpose

The purpose of the Sacred Sites Processes and Outcomes Review (the review) is to investigate the extent to which the Northern Territory *Aboriginal Sacred Sites Act 1989* (the Act) supports economic development in the Northern Territory. The review will examine the scope and operation of the Act as well as the strategic and day-to-day operations of the Aboriginal Areas Protection Authority (AAPA), the statutory authority set up by the Act to carry out the functions set out within it. The review should provide advice on:

1. Areas in which the Act might be strengthened to improve protections for sacred sites
2. Areas in which the Act might be strengthened to reduce red tape and provide certainty and improved processes for economic development in the Northern Territory
3. Ways in which the Authority can:
 - a. Become more efficient
 - b. Balance the need for development with the need for protection of sacred sites

Specific areas of the Act and business of the Authority that have been identified as key starting points for the review are set out below. Other areas may be identified and considered in the course of the review.

Background

A review of the Act has not been undertaken in 25 years. The Act predates recognition of native title under Australian law. There have also been considerable economic, political and social developments in the Northern Territory since the last review of the Act.

To ensure the Act remains effective in achieving its purpose, it is necessary to undertake a full review of the scope and operations of the Act as well as the strategic and day-to-day operations of the Authority.

The first iteration of the Act (1978) was brought in during the 1970s and was one of the first pieces of legislation to be passed following the granting of self-government to the Northern Territory in 1978. The Act is reciprocal legislation to section 73(1)(a) of the Aboriginal Land Rights (Northern Territory) Act 1976 (the Land Rights Act which permits the Northern Territory Legislative Assembly to make laws 'for the protection of, and the prevention of desecration of, sacred sites.... Including sacred sites on Aboriginal land'.

The original Act was the subject of a significant review in the mid-1980s. Since its inception in 1989, the Act has been amended, other than inconsequentially, on three occasions:

- 2002 ensuring that any acquisition of property is on just terms

- 2003 creating an improved sites avoidance procedure
- 2005 clarifying the liability of the Territory Crown, improving secrecy and providing a reasonable time frame in which to bring charges.

Scope of the Review

The Department of the Chief Minister proposes that a comprehensive review of the sacred sites processes and outcomes should include, among other things, consideration of the following eight key areas:

1. Reducing red tape and improvement of timeframes

It would be beneficial to increase certainty to developers about the timeframes that will be needed in connection with Authority Certificates. The Act does not set out specific timeframes for the various types of work that will be undertaken. Concerns have been expressed about the amount of time it is currently taking to get Authority Certificates issues, with the latest figures showing an average of 136 days in the current financial year. Analysis of AAPA's procedures should be undertaken and consideration should be given to the imposition of timeframes.

2. Investigation of a system of site clearance for broader area

Consideration could be given to including provisions on how AAPA can improve processes for site surveys of large areas including extending the validity of Authority Certificates to facilitate development of large scale projects with long lead in times.

3. Aligning the Sacred Sites Act with other NT regulatory frameworks

Consideration should be given to including the Act in legislative frameworks associated with land use development in certain instances. This could enable shorter overall processing times for major projects and ensure a high level of risk management for proponents. Protection of sacred sites should be a regular consideration for developers in the Northern Territory and a regular part of the development process. If an applicant goes through all the other land access and approval processes for a project, only to be told at the end they need to comply with the Act, it is an inefficient use of time and money.

4. Compensation where site damage has occurred

Land councils negotiate compensation where damage to or desecration of sacred sites has occurred and been proven/ accepted. There is, however, no compensation regime or schedule currently set out in statute. Consideration may be given to setting out a statutory damages payment scheme or the possibility of giving powers with the Act to courts to set compensation payments as well as determining fines/ penalties under the Act.

5. Roles and relations with land councils: avoiding duplication; increasing certainty, cooperation and efficiencies

The Act sets a number of ways in which interaction is to occur with land councils. There are continuing complications in the protection of sacred sites in the Northern Territory as a result of the parallel functions held by the land councils under the *Aboriginal Land Rights (Northern Territory) Act*. There have been a number of attempts at establishing protocols with the land councils, but no formal agreements have been reached. Consideration may be given to how AAPA and the land councils' roles can be more clearly delineated, including increasing certainty and removing duplication for development, and how cooperation may lead to better efficiencies and reduced transactions costs for all involved.

6. Reviewing the offence provisions in the Act



AAPA has very little in terms of powers to prevent interference with sacred sites, beyond prosecution which requires a high burden of proof. Once a developer has an Authority Certificate, they can act freely and AAPA has to wait to determine whether site damage has occurred and then decide on prosecution. It would be useful to consider the appropriateness of current offence provisions, including any additional provisions which are required to streamline enforcement for both developers and AAPA. Alternatively, interim powers may allow for AAPA to prevent damage occurring thus reducing the burden of the cost of legal action on developers and AAPA.

7. The AAPA Board appointment process and terms of membership

AAPA Board members are appointed by the Northern Territory Administrator for a period of three years on the nomination of land councils and with the approval of Cabinet. The Act requires that, for the 10 non-government Board positions, land councils provide two recommendations for each position, allowing the Minister to choose between candidates, as well as ensuring a balance of male and female members. Consideration may be given to increasing flexibility in how Board members are nominated. Currently, 10 out of the 12 Board members' terms on the Board expire on the same day and the remaining two within a few months of that date. Consideration may also be given to amending the appointment process to allow for the staggering of Board appointments.

8. Determining the use and protection of sacred site information – creating certainty

AAPA is developing a new web-based portal to allow for applications for Authority Certificates to be made online. Work is being done to integrate this system with the NT Government's Integrated Land Information System (ILIS). There is a scope for providing information to applicants about sacred sites within a given area at the point of application, which could have a significant impact on reducing processing times and helping drive development across the Northern Territory,. The Act lacks clarity in defining responsibilities and liabilities of persons who use, reinterpret or transmit AAPA's sacred site information to third parties. Consideration of this matter and how it may be resolved would help protect the integrity of AAPA's information and ensure custodians and developers receive authorised data. Subsection 10(g) of the Act sets out that AAPA is to make available for public inspection the Register and records of all agreements, certificates and refusals, except to the extent that such availability would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret. Clarity in this area has particular relevance given the above-mentioned developments in technology.

Consultation

It is anticipated that the review would include consultation with the land councils, a select group of proponents, AAPA, representative bodies, key Northern Territory Government agencies and any other stakeholders considered necessary.

Production of a Report

The review will explore the issues above and culminate in a report with findings and recommendations for Governments consideration.

Appendix B

Consultations

Stakeholder	Who	When
Aboriginal Areas Protection Authority	Aboriginal Areas Protection Authority	16-Sep-15
		5-Oct-15
		27-Oct-15
		30-Oct-15
		9-Dec-15
		27-Jan-16
Aboriginal Land Councils	Northern Land Council	5-Oct-15
		17-Nov-15
	Central Land Council	6-Oct-15
		30-Oct-15
	Anindilyakwa Land Council Tiwi Land Council	13-Oct-15 29-Oct-15
Northern Territory Government	Minister for Local Government and Community Services	16-Sep-15
	Department of the Chief Minister	16-Sep-15
	Northern Australia Development Office	17-Sep-15
	Parks and Wildlife Commission of the NT	6-Oct-15
	Department of Business	7-Oct-15
	Department of Housing	7-Oct-15
	Department of Infrastructure	7-Oct-15
	Central Australia Development Office	7-Oct-15
	Department of Lands, Planning and the Environment	8-Oct-15
	Department of Local Government and Community Services	9-Oct-15
	Department of Land Resource Management	23-Oct-15
	Department of Primary Industry and Fisheries	26-Oct-15
	Department of Transport	26-Oct-15
	Department of Mines and Energy	27-Oct-15
	Tourism NT	28-Oct-15
	Power and Water Authority	28-Oct-15
CEO Aboriginal Land working group	29-Oct-15	
NT Chief Minister	11-Nov-15	
Department of Attorney-General and Justice	30-Nov-15	
Australian Government	Indigenous Business Australia	22-Sep-15
	Indigenous Land Corporation	29-Sep-15
	Office of township leasing	27-Oct-15
	Department of Prime Minister and cabinet	9-Jan-16
	Department of the Environment	11-Jan-16



Industry	Mining	
	Minerals Council of Australia (NT)	13-Oct-15
	Australian Petroleum Production and Exploration Association (APPEA)	29-Oct-15
	Association of mining and exploration companies (AMEC)	18-Nov-15
	Agriculture	
	NT Cattleman's Association	11-Nov-15
	NT Seafood Council of the NT	11-Dec-15
	Environment	
	NT Environmental Protection Authority	11-Nov-15
	Private sector	
Ward Keller	8-Oct-15	
ERA (Rio Tinto)	29-Oct-15	
Glencore	12-Nov-15	
BESPOKE	16-Nov-15	

Appendix C

Written submissions

Stakeholder	Who	When
Land Councils	Anindilyakwa Land Council	02-Nov-15
	Central Land Council	10-Dec-15
	Northern Land Council	19-Jan-15
AAPA	AAPA	21-Dec-15
NT Government	Power and Water	11-Dec-15
	Parks and Wildlife Commission of the NT	04-Nov-15
Industry	Minerals Council NT	06-Nov-15
	APPEA	13-Nov-15
	AMEC	04-Dec-15

