

Shoujaa Pty Ltd as Trustee for Shoujaa Trust v Aboriginal Areas Protection Authority and Bernard Abbott [2008] NTSC 11

PARTIES: SHOUJAA PTY LTD AS TRUSTEE
FOR SHOUJAA TRUST

v

ABORIGINAL AREAS PROTECTION
AUTHORITY

And

ABBOTT, Bernard

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 7 of 2008 (20801776)

DELIVERED: 11 February 2008

PUBLISHED: 10 March 2008

HEARING DATES: 30 and 31 January 2008

JUDGMENT OF: SOUTHWOOD J

CATCHWORDS:

NORTHERN TERRITORY ABORIGINAL SACRED SITES ACT –
Aboriginal Areas Protection Authority – Authority’s power to access sacred
sites across other land – whether reasonable notice was provided to owner of
other land under the Act – landowner’s right to refuse entry – injunction and
declaration sought – application refused.

Northern Territory Aboriginal Sacred Sites Act 1989 (NT) s 3, s 5, s 6(2), s 10, s 11, s 12, s 19, s 19B, s 27, s 28 and s 47
Pastoral Lands Act 1992 (NT)
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s 3.

Global Funds Management (NSW) Ltd v Rooney (1994) 36 NSWLR 122;
Australian Securities & Investments Commission v Adler (2002) 189 ALR 365, applied.

Aboriginal Sacred Sites Protection Authority v Maurice and Others (1986) 65 ALR 247, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	A H Silvester
Defendant:	W J Priestley

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Sou0802
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Shoujaa Pty Ltd as Trustee for Shoujaa Trust v Aboriginal Areas Protection
Authority and Bernard Abbott* [2008] NTSC 11
No 7 of 2008 (20801776)

BETWEEN:

**SHOUJAA PTY LTD AS TRUSTEE
FOR SHOUJAA TRUST**
Plaintiff

AND:

**ABORIGINAL AREAS PROTECTION
AUTHORITY**
First Defendant

AND:

ABBOTT, Bernard
Second Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Published 10 March 2008)

- [1] On 11 February 2007 I refused the plaintiff's claims for an injunction and a declaration and I gave judgment for the defendants. At the time I pronounced the judgment of the court I stated that I would publish my written reasons for decision at a later date. Following are my reasons for decision.

The plaintiff's claim

- [2] The plaintiff is the registered proprietor of Perpetual Pastoral Lease No. 1090 over NT portion 2958 known as Idracowra Station. The station is 4,628 square kilometres in area and is situated in Central Australia south of Alice Springs.
- [3] The Aboriginal Areas Protection Authority (the Authority) is a statutory body corporate that was established in 1989 under s 5 of the Northern Territory Aboriginal Sacred Sites Act to administer the registration and protection of Aboriginal sacred sites in the Northern Territory. The Authority is constituted by five male and five female Aboriginal custodians of sites nominated by the Northern Territory Aboriginal Land Councils together with two Government appointees. Members are appointed by the Administrator of the Northern Territory for three year terms and may be reappointed.
- [4] The second defendant, Mr Bernard Abbott, is a member of the Authority who by virtue of s 6(2) of the Northern Territory Aboriginal Sacred Sites Act is a custodian of sacred sites. He is a person who has responsibility for sacred sites. He is one of the four Aboriginal custodians of sacred sites nominated by the Central Land Council.
- [5] During December 2007, the Alice Springs Regional Manager of the Authority, Mr Andrew Allan, caused a letter dated 11 December 2007 to be faxed to the plaintiff. The letter stated, among other things, that Aboriginal

custodians had asked the Authority to document sacred sites in the vicinity of Idracowra Station homestead and that a field trip for this purpose was scheduled for 10 January 2008. Accordingly, access across Idracowra Station from a place of public access to the sacred sites was required by Mr Bernard Abbott, members of Mr Abbott's family and Mr Allan.

[6] The proposed date of the field trip was subsequently changed to 9 January 2008.

[7] The plaintiff is opposed to any such field trip. The plaintiff argued that the proposed field trip is unlawful and would constitute a trespass on Idracowra Station and the plaintiff claimed the following substantive relief:

1. A permanent injunction, permanently restraining the Authority, Mr Bernard Abbott and other unnamed persons from entering onto Idracowra Station or having access to any sacred sites on Idracowra Station to conduct a field trip.
2. A declaration that the Northern Territory Aboriginal Sacred Sites Act does not empower the Authority, Mr Abbott and persons unnamed to enter onto Idracowra Station to conduct the field trip.

[8] The particulars of the plaintiff's claim are set out in paragraphs four, five, six and seven of the statement of claim, which plead as follows:

[4.] The plaintiff purchased Idracowra [Station] from Judith Anne Murphy pursuant to a Contract of Sale entered into at auction on 27 April 2007 as a result of which a transfer of Idracowra [Station] was

lodged for registration on 20 June 2007 and registered on the register maintained under the Land Title Act on 21 June 2007.

[5.] The plaintiff has, subsequent to transfer of Idracowra [Station] to it, had various communications with the first defendant. Copies of relevant letters between the plaintiff and the first defendant are attached hereto as Attachment 1, being letters from the first defendant to the plaintiff dated 5 and 19 October 2007, 15 November 2007, 11 December 2007 and 3 January 2008; from the first defendant to the plaintiff's solicitor dated 4 and 7 January 2008; and letters by the plaintiff or the plaintiff's solicitors to the first defendant dated 6 and 31 October 2007, 23 November 2007, 10, 20, 21 and 23 December 2007 and 3 January 2008.

[6.] The correspondence from the first defendant to the plaintiff at Attachment 1 states that the first defendant, together with the second defendant and other persons unnamed intends to conduct a field trip (the field trip) to Idracowra [Station] for the purpose of documenting alleged sacred sites on Idracowra [Station].

[7.] The plaintiff contends that the proposed field trip is unlawful, not permitted by the Northern Territory Aboriginal Sacred Sites Act (NT) and that it would amount to a trespass over Idracowra [Station].

[9] In its defence, the Authority admits the allegations pleaded in paragraphs five and six of the statement of claim.

[10] The various letters, which have been written on behalf of the Authority and form part of Attachment 1 to the statement of claim, describe the access that the Authority intends to take across Idracowra Station in different and confusing terms. It is unclear whether the Authority intends to visit a site or sites on Idracowra Station, no site (or sites) is consistently identified in the correspondence, nor is the location of the site (or sites) that the Authority intends to visit on the field trip clearly specified.

The history of the proceeding

- [11] The history of the proceeding is as follows.
- [12] The proceeding was commenced by writ filed on 16 January 2008. On that day the plaintiff also filed a summons seeking an interlocutory injunction restraining the Authority, Mr Abbott and other unnamed persons from entering onto Idracowra Station or having access to any sacred sites on Idracowra Station to conduct the field trip.
- [13] On 17 January 2008, by consent, Angel J made an order that there will be an interim injunction until 31 January 2008 or on until further order restraining the defendants, being the first defendant and the second defendant, whether by their servants, agents or otherwise from entering onto Idracowra Station whether to conduct the field trip referred to in paragraph 6 of the statement of claim or otherwise. His Honour granted the parties liberty to apply.
- [14] On 25 January 2008 the Authority filed a summons seeking orders that the interim injunction granted by Angel J is dissolved and the proceeding is dismissed. The Authority's summons came on for hearing before me on 30 January 2008. Mr Silvester appeared for the plaintiff and Mr Priestley appeared for the Authority. There was no appearance on behalf of Mr Abbott as he had not been served with any of the process.
- [15] During the course of the hearing of the Authority's summons, the parties, who appeared, consented to the court making a final determination in this proceeding and the matter proceeded as a substantive hearing.

[16] On 21 February 2008, the plaintiff filed further written submissions. The plaintiff submitted that the court had made a slip in delivering judgment in favour of the defendants and asked the court to make the following orders:

1. The order of the court, that the plaintiff's application for an injunction and a declaration is rejected, is set aside.
2. The Authority for itself and by its servants and agents and Mr Abbott are restrained and an injunction is hereby granted restraining them from entering onto Perpetual Pastoral Lease No. 1090 over NT portion 2958 known as Idracowra Station for the purpose of undertaking the field trip referred to in the following correspondence, namely letters from the Authority to the plaintiff dated 19 October 2007, 15 November 2007 and 11 December 2007, and the letter from the Authority to Ward Keller dated 3 January 2008.
3. The court declares that the field trip referred to in the preceding order is unlawful and beyond the power conferred on the Authority under the Northern Territory Aboriginal Sacred Sites Act.

The evidence

[17] In support of the Authority's case Mr Priestley read the affidavits of Ashley Thomas Heath sworn on 16 January 2008, Peter Colin Beattie sworn on 16 January 2008 and Christopher Joseph Capper sworn on 25 January 2008 and he tendered two file notes of telephone conversations dated respectively

25 September 2007 and 5 October 2007. The plaintiff tendered Pastoral Lease No. 952.

The facts

[18] The evidence before the court establishes the following facts.

[19] On or about 20 January 1986 the Minister under the Crown Lands Act granted Leo James Murphy Pastoral Lease No. 952 over Northern Territory Portion 2958 known as Idracowra Station for pastoral purposes until 30 June 2011. The pastoral lease was subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory.

[20] On or about 13 May 1993 under s 130 of the Pastoral Land Act, Pastoral Lease No. 952 was cancelled and Perpetual Pastoral Lease No. 1090 was issued in lieu thereof. Under s 38 and s 39 of the Pastoral Land Act, Perpetual Pastoral Lease No. 1090 was also subject to a reservation in favour of the Aboriginal inhabitants of the Territory. The reservation permits Aboriginal people who, by Aboriginal tradition, are entitled to use or occupy the leased land, to enter and be on the leased land; to take and use the water from the natural waters and springs on the leased land; and to take or kill for food or for ceremonial purposes animals *ferae naturae*; and to take for food or for ceremonial purposes vegetable matter growing naturally, on the leased land. The reservation does not apply to that part of the leased land that is within 2 kilometres of a homestead.

- [21] On 21 June 2007 the plaintiff became the registered holder of Idracowra Station. The plaintiff purchased Idracowra Station from Mrs Judith Murphy at auction on 27 April 2007. Since the plaintiff purchased the station, the management of the station has been under the direct control of Mr Peter Colin Beattie, who is a director of the plaintiff.
- [22] Prior to the completion of the purchase of Idracowra Station, Ward Keller, the solicitors for the plaintiff, wrote to the Authority and requested that a search be undertaken in order to determine so far as possible whether any sacred sites had been recorded against the property. The Acting Registrar of the Authority, Ms Katherine Goodwin, advised Ward Keller by letter that there was one sacred site within the area of Idracowra Station listed in the Register of Sacred Sites and she enclosed a map showing the location of that sacred site. The sacred site is located in the south western corner of Idracowra Station. It is some 93 kilometres from the homestead.
- [23] Ms Goodwin also advised Ward Keller that the Northern Territory Aboriginal Sacred Sites Act applied to all sacred sites on the station whether listed in the Register of Sacred Sites or not and that if any works were contemplated within the area of the station it was possible to apply for an Authority Certificate under the Northern Territory Aboriginal Sacred Sites Act which would set out the conditions under which any proposed work may be carried out.

[24] The plaintiff has not applied for an Authority Certificate under Part III of the Northern Territory Aboriginal Sacred Sites Act.

[25] After purchasing Idracowra Station the plaintiff undertook certain works on the station. The plaintiff has started works to upgrade the homestead, installed a new solar power generation facility in the homestead area, installed a new standby generator in the homestead area and replaced 5 kilometres of water pipes supplying water to the homestead area. The pipes are located under an old road which runs along the Finke River to the west of the homestead. The plaintiff also proposes to install a new four room staff accommodation building, kitchen and ablutions facilities in the area immediately surrounding the homestead. In addition the plaintiff intends to install a new tourist facility including a 16 bedroom accommodation facility, dining and living room facilities, kitchen and laundry facilities, a water tank and solar pumps, and sewerage system. None of the tourist facilities is to be constructed within an area of 16 square kilometres surrounding the homestead.

[26] On 25 September 2007, the Alice Springs Regional Manager of the Authority, Mr Andrew Allan, received a telephone call from Mr Abbott.

Mr Allan's file note of the telephone conversation states as follows:

On the morning of Tuesday 25 September 2007, AAPA Board Member Bernard Abbott rang me regarding concerns about a proposal for works on Idracowra Station. Bernard said that he had heard from a relative that there was a proposal to build a resort on a sandhill on Idracowra Station. Bernard said he could not name the

company that was contracted to do the works but he had a relative (possibly a nephew).

Bernard said that the sandhill is a sacred site connected to the Perentie Dreaming. He said that he wasn't sure whether the AAPA had this site recorded, although he said he thought we probably didn't. He said the sandhill was about half a mile north of the homestead and that it was a dancing site. He said other custodians knew more about the site than he did; these include his brother Barry Abbott and Casey and Don Kenny from Walkabout Bore.

Bernard said ideally a male researcher should visit the site to document it, but understood AAPA didn't currently have the resources to do this. However, he requested that in the short term we write to the owners of Idracowra Station and alert them to the existence of this and other sites on the property (Bernard suggested the letter could be similar to the one recently sent to the owner of Henbury Station).

He said that he did not know who owned the station or who the current manager was but the station had recently been purchased by an Asian company.

I agreed to write a letter and send a map to the landowners and the station manager alerting them of the existence of this particular site and other recorded and registered sites on the property. The letter would also alert the owners that is likely that there are other, as yet unrecorded, sites on the property and inform them of the Authority Certificate procedures available to them.

Bernard said that he would be satisfied with this.

[27] In his sworn evidence Mr Capper states that Mr Abbott has told him that the sandhill site is a “dreaming site” related to “Atywenpe” a word for Perentie, which is a type of Goanna and the part of the site which is a flood-out area is a men’s dancing site. The site is part of a series of sites that run all the way up the Finke River towards Hermannsburg. Mr Abbott is a Kwertengwerle for that part of the country in which the site is located and

his role is that of a custodian for the site. Mr Abbott has a cultural obligation to ensure that the site is not damaged. He has been aware of the site since the 1950s. He stayed at the site on numerous occasions as a child. He last visited the site in 1985.

[28] On 5 October 2007, Jacqui Brady, a servant or agent of the Authority, received an anonymous telephone call about works that were said to be going on at Idracowra Station. The caller told Miss Brady that the works were not far from the existing homestead and involved major earthmoving equipment. The caller said that anyone who enters the station is being asked to sign a confidentiality agreement that prevents anyone talking about any works going on at the station. The caller said that he or she was not prepared to be identified for fear of repercussions.

[29] On 5 October 2007 Mr Allan telephoned Mr Beattie. Mr Allan told Mr Beattie that the Authority had received information to the effect that the plaintiff was damaging or destroying a sacred site on a sand dune one kilometre north of Idracowra Station homestead. In response Mr Beattie told Mr Allan that he knew of no such sacred site and, in any event, the plaintiff had not done any work in that area of the station. Mr Beattie requested Mr Allan to put the allegations in writing. He said that if he was given specific details of the area he would look into the matter immediately.

[30] On 5 October 2007, Mr Allan sent a letter to Mr Beattie. The letter was received by Mr Beattie on or about 11 October 2007. The letter stated as follows:

I am writing to advise you that Aboriginal custodians have raised concerns about the protection of sacred sites within Idracowra Pastoral Lease in the Northern Territory. I believe you are, or represent, the owner of this lease.

In particular the custodians have asked that I alert you to the existence of *a sacred site in the vicinity of Idracowra homestead* [emphasis added]. They have also asked that I advise you that other sacred sites exist on the lease which have not been documented by the Aboriginal Areas Protection Authority (AAPA).

The APPA has not yet had the opportunity to document the precise location or extent of this site. However, I understand *the site comprises a sandhill and part of a nearby floodout area* [emphasis added]; it may include other features.

Although this site has not yet been evaluated or placed in the Register of Sacred Sites, there is information indicating it is nonetheless significant according to Aboriginal tradition and therefore 'a sacred site' within the meaning of the Northern Territory Aboriginal Sacred Sites Act.

This information is provided to you to assist in the avoidance of sacred sites during your pastoral operations and any future infrastructure works on your lease.

The AAPA does not purport to hold detailed information regarding all sacred sites and it is likely that there are other sites that have not been identified to the AAPA within your lease. I draw your attention that under the Sacred Sites Act it is an offence to enter or remain on a sacred site (s 33) or to carry out work on a sacred site (s34) anywhere in the Northern Territory.

The Sacred Sites Act provides a process whereby a person, wishing to make use or carry out works on land in the Northern Territory, can request that the AAPA consult with custodians and provide written

advice specifying the constraints (if any) to a particular activity imposed by the existence of sacred sites. Section 19G of the Act also provides the opportunity for an applicant to discuss the project with Aboriginal custodians at a meeting convened by the Authority.

The written advice provided by the Authority following the completion of the procedures established in ss 19A to 22 of the Act is termed an “Authority Certificate”. An Authority Certificate sets out the conditions (if any) on which, under the Act the proposed work may be carried out or use made of the land. As long as the holder of a Certificate complies with its conditions the holder is indemnified against prosecution under any of the offence provisions of the Act.

However, if work proceeds without an Authority Certificate, the works may lead to prosecution.

[31] On the available evidence, the first sentence in the above letter is not correct. The only person, who is said to be a custodian, to approach the Authority was Mr Abbott and he only expressed concern about one sacred site namely, the sandhill that is referred to in the letter. It is also unclear why Mr Allan did not state in the letter that the sacred site was located one kilometre north of the homestead, particularly as he told Mr Abbott that he would send a map to the landowners alerting them of the existence of the sandhill and he also told Mr Beattie about the location of the sandhill when he spoke to him on the telephone on 5 October 2007. No evidence was tendered by the Authority for the purpose of establishing that restrictions should be placed on access to any information about the location and extent of the sacred site or its physical features.

[32] On 6 October 2007 Mr Beattie responded to Mr Allan’s telephone call of 5 October 2007 by letter. In the letter Mr Beattie stated the following. He

had a lengthy conversation with the plaintiff's onsite manager at Idracowra Station and the onsite manager was not aware of any damage or of any sacred site in the area to the north of the homestead. The map originally provided by the Authority shows only one recorded sacred site and no alleged sandhill site. The plaintiff was extremely conscious of its obligations to the recorded sacred site on Idracowra Station and would not in any way damage it. He complained that the Authority had given him insufficient particulars of the allegations about the damage to the sandhill and he stated that no person from the Authority or custodian or agent from the Authority is allowed onto Idracowra Station without his express written permission having first been obtained.

[33] On 19 October 2007 the Chief Executive Officer of the Authority, Mr Jeffrey Stead, sent a letter to Mr Beattie. The letter was received by the plaintiff on 23 October 2007. The letter stated as follows:

Further to previous correspondence from Andrew Allen (Regional Manager, Alice Springs) dated 5 October 2007 regarding the above matter, I wish to provide additional information about the area of concern.

Attached is a map showing the approximate location of this area. Custodians have advised that within, and in the vicinity of, the area shown on the attached map, are sites of significance according to Aboriginal tradition, and therefore sacred sites under the Northern Territory Aboriginal Sacred Sites Act 1989.

I advise that in accordance with the Act, no works should occur on any sacred site other than in accordance with the conditions (if any) of an Authority Certificate. No works should take place which could risk damage to a sacred site.

It is strongly recommended that for any ground-disturbing works, an Authority Certificate be sought.

Custodians have requested that the Authority more fully document sacred sites in this area. Accordingly, an officer from the Authority will contact you shortly to arrange access to these sites.

For your information, the Act provides that custodians shall have access to sacred sites in accordance with Aboriginal tradition.

- [34] The area marked on the map attached to the letter dated 19 October 2007 is an area slightly in excess of 16 square kilometres. No sacred sites are identified within the area marked on the map and the homestead on Idracowra Station is incorrectly shown to be on the southern side of the Finke River. In fact, the area shown on the map includes the homestead and main infrastructure on the station. The homestead and outbuildings have always been in this location. The homestead area is an area of about 500 metres square. The only major infrastructure which is not within the homestead area are the long established station roads and tracks and an airstrip which is located 13 kilometres east of the main homestead.
- [35] The content of Mr Stead's letter of 19 October 2007 overstates what Mr Allan said in his letter dated 5 October 2005. Mr Allan did not make any statements about an "area of concern". Mr Stead's letter also overstates the position of Mr Abbott.
- [36] The contents of the letter of 19 October 2007 are inconsistent with Mr Capper's sworn evidence. In his affidavit Mr Capper states, among other things, that:

The Aboriginal Areas Protection Authority (the Authority) wishes to conduct the field trip referred to in paragraph 6 of the plaintiff's statement of claim so it can assess a site near the Idracowra homestead that is said to be sacred by a custodian, Mr Bernard Abbott, (the site). The Authority has two reasons for doing so.

The first reason is to conduct research, with the assistance of Mr Abbott and his family members, about the site. Such research is a function of the Authority pursuant to section 10(b) of the Northern Territory Aboriginal Sacred Sites Act (the Act). The research will assist the Authority to facilitate discussions between custodians of the site and the plaintiff with a view to their agreeing on ways to protect the site, which is a function of the Authority pursuant to section 10(a) of the Act. The research will also assist Mr Abbott make an application to have the site registered, and is reasonably necessary for or in connection with such an application.

The Authority has expressly approved Andrew Allan, and Bernard Abbott and members of his family, to access the site for the purposes set out in this affidavit. Mr Abbott, as custodian, has also expressly approved Mr Allan to visit the site.

The second reason the Authority wishes to access the site is to see if it has had works carried out on it, or has been desecrated or otherwise damaged. The Act prohibits the carrying out of work on all sacred sites, not just those on the Authority's Register.

I am advised by Mr Abbot that the site is a "Dreaming Site" related to Atywenpe (pronounced "Jorn ba"). Atywenpe is the Arrernte word for Perentie, a type of goanna. That part of the site which is a flood plain is also said by Mr Abbot to be a men's dancing site.

I am informed by Andrew Allen, the Regional Manager of the Authority's Alice Springs operations, that he received advice on about 25 September 2007 that the site may have been damaged, in that construction works were being performed upon it. The Authority needs to access the site to determine whether this is correct.

[37] Although I previously ruled that paragraph 5 of the affidavit of Mr Capper was inadmissible, I have varied my earlier ruling and admitted the evidence

for the sole purpose of establishing the full nature and extent of the information received by the Authority about possible damage to any sacred site on Idracowra Station. I have not received the evidence for any other purpose.

[38] On 31 October 2007, Mr Beattie wrote to Mr Allan seeking certain details regarding the alleged sacred sites on Idracowra Station including the name of the persons making the claim, their telephone numbers and addresses so that he could communicate with them about the sites.

[39] On 15 November 2007 Mr Stead, on behalf of the Authority, sent another letter to Mr Beattie. The letter was post marked 20 November 2007 and was received by the plaintiff on 23 November 2007. In the letter Mr Stead stated the following:

Thank you for your letter of 31 October 2007. The Aboriginal Areas Protection Authority is not deliberately failing to supply the answers requested. However, there is some material that is inappropriate to provide.

Section 38 of the Northern Territory Aboriginal Sacred Sites Act 1989 states: [The provisions of the section were then set out.]

As indicated in the Authority's letter dated 19 October 2007, custodians have indicated that within the vicinity of the area shown on the attached map, there are sites of significance according to Aboriginal tradition and therefore, sacred sites under the Act. All sacred sites in the Northern Territory are protected and the Act contains provisions for prosecution for desecration and illegal entry and carrying work out on a sacred site. The Authority has a duty to advise you that no works should occur on any sacred sites. The Authority strongly recommends that no ground-disturbing work occurs in this area.

As indicated in our previous letter, the Authority's Regional Manager, Alice Springs, together with custodians, intend to visit the area to ensure no damage to sites has occurred. You will be given notice in advance of their visit.

[40] The letter of 15 November 2007 also appears to be at odds with Mr Allan's letter dated 5 October 2007 and with the sworn evidence of Mr Capper.

Other than the evidence about the sandhill and nearby flood-out area, no evidence was tendered by the Authority about any other sacred sites within the 16 square kilometre area marked on the map that was attached to the letter dated 19 October 2007. Further, there is no reason why the Authority could not have given Mr Beattie more specific details about the location of the sandhill and the related flood-out area or provide him with the necessary information that would have enabled him to contact Mr Abbott.

[41] On 23 November 2007 Mr Beattie responded to Mr Stead's letter of 15 November 2007. He did so by letter. In the letter he stated the following. Mr Beattie was extremely disappointed by Mr Stead's letter dated 15 November 2007 as the plaintiff's letter of 31 October 2007 did not seek any secret information. It sought answers to factual actions and details of the persons who were asserting the existence of the sacred sites on Idracowra Station. The letter advised the Authority that the plaintiff must be given the name of the person, group or tribe who was making the claim. Mr Beattie stated that any person or custodian who comes onto Idracowra Station must be in his presence so that they can be conducted safely over the property and to ensure that the plaintiff's assets were not damaged. The

plaintiff was advised by the previous owners of Idracowra Station that Aboriginal people have had no association with the station since at least 1952 and possibly none since the early 1800s. The plaintiff was retaining expert anthropologists to advise the plaintiff about the allegations which the Authority had relayed to the plaintiff and the plaintiff would be seeking to recover all of these costs from the Authority.

[42] On 10 December 2007 Mr Beattie wrote a further letter to Mr Stead. In the letter he advised Mr Stead that the anthropologist who the plaintiff had approached was not able to act on the plaintiff's behalf and the plaintiff would have to retain another independent advisor. As a result any early visit to Idracowra Station by the Authority and any persons claiming to be the custodians of any sacred sites would not be possible.

[43] On 11 December 2007 Mr Allan sent another letter to Mr Beattie. The letter was headed, 'Advice of Entry onto Idracowra Station', and stated as follows:

I refer to previous correspondence from the (sic) Jeffery Stead, Chief Executive Officer of the Aboriginal Areas Protection Authority advising that Aboriginal custodians have requested the Authority to document sacred sites *in the vicinity of the Idracowra station homestead* (emphasis added).

This field trip is scheduled for Thursday, 10 January 2008. Accordingly, senior custodian Mr Bernard Abbott and I, together with other members of Mr Abbott's family, will require access to this area.

The party are required to take routes which do not obstruct the owner's normal activities and every effort will be made to avoid disturbance or interference to pastoral activities and facilities.

[44] Although the letter dated 11 December 2007 refers to previous correspondence from Mr Stead, the letter appears to be largely consistent with the file note that Mr Allan made of his telephone conversation with Mr Abbott on 25 September 2007, his letter dated 5 October 2007 and the sworn evidence of Mr Capper. The letter seeks access to sites in the vicinity of the station homestead. According to the file note of the telephone conversation on 25 September 2007, the only site which Mr Abbot requested the Authority to document was the sandhill which was located about half a mile north of the homestead on Idracowra Station. It was this site which Mr Allan described in his letter to Mr Beattie dated 5 October 2007 as being in the vicinity of Idracowra Station homestead. The letter dated 11 December 2007 does not refer to the area depicted on the map attached to Mr Stead's letter dated 19 October 2007. However, because of the reference in the letter to sites as opposed a site and because of Mr Allan's failure to specifically refer to the sandhill and the associated flood-out area the letter is ambiguous. The ambiguity is heightened because the letter is sent to Mr Beattie in the context of the other letters which had been sent to Mr Beattie by Mr Stead.

[45] On 20 December 2007 Mr Beattie sent a letter to Mr Stead complaining about the Authority's failure to adequately respond to the plaintiff's letters dated 6 October 2007, 31 October 2007, 23 November 2007 and 10 December 2007. On 21 December 2007 the plaintiff sent a letter to the Administrator of the Authority asking for the plaintiff to be supplied with a

detailed map and a schedule of all details of registered sacred sites on Idracowra Station as at 20 June 2007, 1 October 2007 and 21 December 2007. On 23 December 2007 Mr Beattie sent a letter to Mr Stead asking him to discover to the plaintiff all copies of any written applications made under s 27 of the Northern Territory Aboriginal Sacred Sites Act.

[46] During January 2008 Mr Stead responded to a number of Mr Beattie's letters. He did so by letter dated 3 January 2008. In that letter Mr Stead stated as follows:

You have had replies to your letters. These are attached.

The Aboriginal Areas Protection Authority will not be meeting your costs.

Neither the Authority, nor the custodians, is making a claim under the Native Title Act.

The Authority is a statutory authority set up under the Northern Territory Aboriginal Sacred Sites Act 1989. Its main function is the protection of Aboriginal sacred sites.

As indicated to you on 19 October 2007, custodians have advised that within the area marked on the map attached to that letter are sacred sites.

Custodians have requested the Authority to more fully document the sites.

You have been advised that the Regional Manager, Andrew Allan, and custodians will be inspecting the sites on 10 January 2008 (see attached notification dated 11 December 2007).

Your letter of 20 December 2007 requested advice on any application under section 27 of the Northern Territory Aboriginal Sacred Sites Act.

A search of the records has not revealed any such application. Please note that this advice cannot be taken to imply that there are no sacred sites located in this area. It indicates that custodians have not previously sought registration of sacred sites under the Northern Territory Aboriginal Sacred Sites Act.

As indicated above, Aboriginal custodians have raised concerns about the protection of sacred sites and have requested that the authority document the sites. This is not in response to an application under section 27.

[47] On the evidence before the court, the above letter once again overstates the position of Mr Abbott. The content of paragraph five of the letter is inconsistent with the file note of the telephone conversation between Mr Allan and Mr Abbott on 25 September 2007, the contents of the letter dated 5 October 2007 and the sworn evidence of Mr Capper. The only site that Mr Abbott requested the Authority to document is the sandhill and arguably the associated flood-out area. These sites are said to be located about one kilometre north of the homestead.

[48] During January 2008 Ward Keller sent a letter dated 3 January 2008 to Mr Stead. The letter notes that the Authority has not received any application under s 27 of the Northern Territory Aboriginal Sacred Sites Act in relation to Idracowra Station; states that there is some doubt whether the powers under s 47 of the Act are available in circumstances where the existence or otherwise of any sacred site in the area remains uncertain; requests the Authority to specify the function that the Authority is intending

to fulfil by conducting the field trip referred to in its letter to the plaintiff dated 11 December 2007; in the absence of satisfactory confirmation of the power or function to be exercised by the Authority when conducting the field trip, declines permission for the Authority to access Idracowra Station on 10 January 2008; and states that the plaintiff would welcome an opportunity to meet with representatives of the Authority and Aboriginal custodians at a mutually convenient time.

[49] Mr Stead responded to Ward Keller's letter dated 3 January 2008 by letter dated 4 January 2008. The letter states as following:

As indicated in the Aboriginal Areas Protection Authority's (AAPA) letter dated 5 October 2007, custodians have raised concerns about the protection of sacred sites located on Idracowra Pastoral Lease (attached). The custodians have a traditional responsibility to protect sacred sites; this includes visiting sites they believe may be under threat. Sections 46 and 47 of the *Northern Territory Aboriginal Sacred Sites Act 1989* (NTASSA) provide for such access by custodians.

Further, in the letter from AAPA of 11 December 2007, it is indicated that "Aboriginal custodians have requested the AAPA to document sacred sites in the vicinity of Idracowra Station homestead." To clarify, the AAPA has been requested by the custodians to assist in the protection of sacred sites by (a) carrying out (field) research to record the *site(s)* [emphasis added] (s10b) and (b) investigating whether any works have taken place on a sacred site (s34).

Access to the *site(s)* [emphasis added] across Idracowra Pastoral Lease is for a purpose reasonably necessary for, or in connection with, the above performance of a function or the exercising of a power under the NTASSA (s47(1)).

The advice received by your client on 19 December 2007 regarding the proposed site visit on 10 January 2008 was provided as reasonable notice for the purposes of s 47(1).

Access across the Lease to the sites will be by four wheel drive vehicle via the most direct route on existing roads wherever possible within the areas shown on the map attached to my letter dated 19 October 2007. The current intention is to use the main access road from the Stuart Highway, to the station homestead.

Given custodians' availability, AAPA intends to visit the sites on the date indicated (10 January 2008) in the letter of 11 December 2007. In terms of this visit to access *site(s)* [emphasis added], I also draw to your attention section 47(4) of the NTASSA:

A person who prevents a person from or obstructs a person exercising a right under subsection (1) is guilty of an offence.

AAPA also does not want to take an unreasonable approach to this issue. The purposes of the visit are as stated in paragraph 2 above. There is no intention to discuss any of these issues in detail with Shoujaa Pty Ltd during the visit. The data collected will require the AAPA assessment. Thus, Mr Beattie's presence is not essential. Mr Allan and custodians will attempt to contact locally-based staff once they arrive at the homestead.

Once this research has occurred and the AAPA's assessment completed, a meeting can be held between Shoujaa Pty Ltd, the AAPA and custodians, if necessary, to discuss any arising issues or actions.

If you arrange for Shoujaa Pty Ltd to provide the AAPA possible suitable dates for such a meeting, I will arrange the meeting and discussion agenda.

[50] The letter of 4 January 2008 is confusing and it also overstates the position of Mr Abbott. Because of the reference to "site(s)" in the letter it is unclear whether a site or sites is to be inspected and researched and it is unclear whether the site or sites are in the vicinity of the Idracowra homestead or

within the area shown on the map attached to the letter dated 19 October 2007. The whole of the area of 16 square kilometres shown on the map annexed to the letter dated 19 October 2007 cannot be said to be in the vicinity of the Idracowra homestead.

[51] By letter dated 7 January 2008 the Authority advised the plaintiff that the field trip would be conducted on 9 January 2008 instead of 10 January 2008.

[52] By letter dated 7 January 2008, Ward Keller replied to Mr Stead's letter dated 4 January 2008. In the letter dated 7 January 2008, Mr Heath stated that the plaintiff had obtained advice from counsel that the Authority did not have any demonstrated power or any other legal right to enter onto Idracowra Station for the purpose of the proposed field visit on 9 January 2008. He asked the Authority to cancel the field trip and he advised the Authority that if Ward Keller did not receive confirmation that the field trip had been cancelled the plaintiff would be making an urgent application for an ex parte interim injunction restraining the Authority from trespassing on Idracowra Station. A letter containing similar advice was also sent to Mr Abbott care of the Aboriginal Areas Protection Authority.

[53] During January 2008 the Solicitor for the Northern Territory sent a letter dated 9 January 2008 to Ward Keller. The letter appears as annexure 7 to the affidavit of Mr Heath sworn on 16 January 2008. The letter states as follows:

I refer to correspondence between yourself and the Aboriginal Areas Protection Authority ('the Authority '). I am instructed by the Authority in this matter.

The Authority has expressly approved its Officers *to access the sacred site near your client's Homestead* [emphasis added]. The site is shown on the map previously provided to your client under cover of a letter dated 19 October 2007. I infer from the correspondence you also have a copy of this map. The Authority will also expressly approve Aboriginal people connected with the site to access it. The purpose of the approvals is twofold.

The first purpose is to carry out research to document sacred sites in the area.

The second purpose is to inspect the sacred site to determine whether information received that work has been carried out (sic) [on] sacred sites, or whether they have been desecrated, is correct. Section 11 of the Northern Territory Aboriginal Sacred Sites Act (the Act) provides the Authority with the necessary powers to perform its functions and exercise its powers. Section 10 of the Act provides, amongst other things, the functions of the Authority are to enforce the Act and to carry out research necessary to enable it to carry out its functions.

I have considered the contents of your letters carefully and cannot see how the proposed actions of the Authority could be unlawful. I have advised my client accordingly and I am instructed to let you know that it intends to proceed to access the site. I note the Authority has advised your client that its proposed route is from the Stuart Highway, along the main road directly to the site behind the Homestead. Your client has advised that this would obstruct its normal activities on the land (and as this is the main route to the Homestead it is hard to see how this could be the case). Nor has your client proposed an alternative route. Accordingly, the Authority will use the route it has nominated to access the site.

Although we can see nothing unlawful about the Authority's actions, as advised to you by telephone on 8 January 2008, we are prepared to allow you a reasonable time to make application to the Supreme Court to obtain orders to prevent the Authority from proceeding as advised above.

In that regard the Authority is prepared to delay its visit to the site until 18 January 2008, if your client is prepared to undertake through you not to carry out work on, or desecrate, the site.

Should your client decide to apply for the injunctive relief foreshadowed in your correspondence, the Authority would consent to any interim injunction restraining it from accessing the site while the Court determined the matter. This would be dependent upon your client providing an undertaking to the court that it would not carry out work on, or desecrate the site, while the matter is being determined. Your client would also be required to give the usual undertaking as to damages.

[54] The letter from the Solicitor for the Northern Territory to Ward Keller is also confusing. Contrary to what is stated in the letter, the map attached to the letter dated 19 October 2007 does not show a sacred site near the Idracowra Station homestead. The second paragraph of the letter states that the Authority has expressly approved its Officers to access the sacred site (*singular*) near the Idracowra homestead and will also expressly approve access by Aboriginal people connected with the site, yet the third paragraph of the letter states that research is to be carried out to document sacred sites (*plural*) in the area. Somewhat oddly, the fourth paragraph of the letter states that the second purpose of the approvals for access is to inspect the sacred site (*singular*) in order to determine whether information received that work has been carried out on sacred sites (*plural*), or whether they (*plural*) have been desecrated, is correct. These statements are made in circumstances where no information has been received by the Authority that more than one sacred site may have been damaged or desecrated. Consistent with the fact that concern has only been expressed about one site, the fifth

paragraph of the letter states that the Authority intends to proceed to access the site (*singular*) and further notes that the Authority has advised the plaintiff that the Authority's proposed route is from the Stuart Highway, along the main road directly to the site (*singular*) behind the homestead and further states, accordingly, the Authority will use the route it has nominated to access the site (*singular*).

[55] On the evidence before the court, I find that the only information of substance which has been received by the Authority is as follows. First, there may be an Aboriginal sacred site which is comprised of a sandhill and flood-out area located about one kilometre north of the Idracowra Station homestead. The sandhill site may be a "dreaming site" related to "Atywenpe" a word for Perentie, which is a type of Goanna and the part of the site which is a flood-out area maybe a men's dancing site. The site is said to be part of a series of sites that run all the way up the Finke River towards Hermannsburg. Secondly, earthworks may have been carried out on or near this sandhill. Thirdly, Mr Abbott who is a member of the Authority claims to be an Aboriginal custodian of the sandhill and associated flood-out area and he would like the Authority to research and properly document and delineate the sandhill and associated flood-out area so that this area may be protected. Mr Abbott claims to be a Kwertengwerle for that part of the country in which the site is located and his role is that of a custodian for the site. Mr Abbott maintains that he has a cultural obligation to ensure that the site is not damaged. He has been aware of the site since the 1950s. He

stayed at the site on numerous occasions as a child. He last visited the site in 1985. Fourthly, Mr Abbott will consider making an application under s 27 of the Northern Territory Aboriginal Scared Sites Act once he has accessed the site and the research and preparatory work has been done.

[56] I also find as a matter of fact that the Authority has not given reasonable notice to the plaintiff in accordance with s 47(1) of the Northern Territory Aboriginal Scared Sites Act. The various letters that have been written to the plaintiff are utterly confusing.

[57] I accept Mr Capper's evidence that the Authority has expressly approved Mr Allan, Mr Abbott and members of Mr Abbott's family to access the sandhill and associated flood-out area for the reasons set out in Mr Capper's affidavit. I take this to mean that either there has been a meeting of members of the Authority in accordance with s 12 of the Northern Territory Aboriginal Scared Sites Act at which it was resolved that the Authority approves of Mr Allan, Mr Abbott and the members of Mr Abbott's family having access to the sandhill and associated flood-out area on Idracowra Station and presumably, if there was such a meeting, the minutes of the meeting recording the resolution will be available; or, alternatively, that someone, who has been delegated with the Authority's power under s 47 of the Act in accordance with s 19 of the Act has expressly approved that Mr Allan, Mr Abbott and the members of Mr Abbott's family are to have access to the sandhill and associated flood-out area on Idracowra Station.

[58] I also accept Mr Capper's evidence that Mr Abbott has expressly approved Mr Allan to visit the sandhill and the flood-out area on Idracowra Station. However, it has not been established on the evidence before the court that Mr Abbott is a custodian for the site who is personally capable of granting access to the site according to Aboriginal tradition. There is no evidence before the court about what are the traditional decision making mechanisms for such a decision.

[59] Neither the Authority nor Mr Abbott has approved anyone crossing Idracowra Station from a place of public access to any site other than the sandhill and flood-out area. The approval of the Authority is confined to access to the sandhill and associated flood-out area.

The argument of the Authority

[60] The Authority argues that under s 47 of the Northern Territory Aboriginal Sacred Sites Act, the Authority has given approval to Mr Allan, Mr Abbott and the members of Mr Abbott's family to cross Idracowra Station from a place of public access to the sandhill and the associated flood-out area and that accordingly they may lawfully cross Idracowra Station to that site. The approval was reasonably necessary for or in connection with the performance of a function or the exercising of a power under the Act namely to carry out research to enable the Authority to efficiently carry out its functions and to enforce the Act.

[61] In my opinion, in the circumstances of this case as I have found them to be, given the information which has been received by the Authority and the work which has been undertaken within the 500 hundred metres square of the Idracowra Station homestead and is still to be undertaken within the 500 meters square of the Idracowra Station homestead, it is appropriate for Mr Allan, Mr Abbott and the members of Mr Abbott's family to be granted approval by the Authority to cross Idracowra Station from a place of public access to the sandhill and the associated flood-out area so that Mr Allan can conduct research about the basis on which Mr Abbott is entrusted with responsibility for the site, the story of the site, the physical features that constitute the site, the extent of the site, the restrictions, if any, according to Aboriginal tradition, on activities that may be carried out on or in the vicinity of the site for the following purposes. First, for the purpose of enabling the Authority to determine whether the site has been damaged or desecrated by the activities of the plaintiff. Secondly, for enabling the Authority to determine if steps need to be taken to enforce the provisions of the Act. Thirdly, for the purpose of enabling the Authority to determine whether the Authority should facilitate discussions between Mr Abbott and his family and Mr Beattie about appropriate means of protection of the site. Fourthly, for any purpose reasonably necessary for the preparation by Mr Abbott and the members of his family of an application to have the site registered. Such assistance to Aboriginal custodians is incidental to the Authority's functions of establishing a register of sacred sites, maintaining

records under the Act, protecting sacred sites and enforcing the provisions of the Act. Such activities will also assist the plaintiff in ensuring that the plaintiff does not breach the provisions of the Act.

[62] However, a precondition to Mr Allan, Mr Abbott and the members of Mr Abbott's family crossing Idracowra Station from a place of public access to the sandhill and the associated flood-out area is that reasonable notice must be given to the plaintiff. As yet no such notice has been given to the plaintiff and until such notice is given to the plaintiff, neither Mr Allan, Mr Abbott or the members of Mr Abbott's family have the authority to cross Idracowra Station in accordance with s 47 of the Act.

The substantive argument of the plaintiff

[63] The plaintiff argues that on all of the evidence before the court there is no basis for the servants or agents of the Authority, Mr Abbott and the members of Mr Abbott's family to obtain access to Idracowra Station. The Authority seeks to obtain access over a 16 square kilometre area of Idracowra Station on the basis that Mr Abbott merely asserts himself to be a custodian and he thinks there may be a sandhill one kilometre north of the station homestead which he claims to be a sacred site that according to unidentified and unsourced allegations may have been damaged or have been the subject of building works. The Northern Territory Aboriginal Sacred Sites Act provides no authority for such action.

[64] The plaintiff contends that ordinarily the Authority may only obtain access to an area that is claimed to be a sacred site if it has received an application for an Authority Certificate or an application for the registration of a sacred site. A pre-requisite to the performance of the Authority's functions as set out in s 10 of the Northern Territory Aboriginal Sacred Sites Act and the exercise of the powers of access granted to it under s 47 of the Northern Territory Aboriginal Sacred Sites Act is that there is a person who is in fact a custodian and there is in fact a sacred site and these pre-requisites have not been established in this case. Further, the Authority has not given the plaintiff reasonable notice in accordance with s 47(1) of the Northern Territory Aboriginal Sacred Sites Act.

[65] In accordance with my findings of fact and for the reasons set out below, I accept the plaintiff's submission that the Authority has not given the plaintiff reasonable notice of the intended access across Idracowra Station in accordance with s 47(1) of the Northern Territory Aboriginal Sacred Sites Act. I hold that Mr Allan, Mr Abbott and the members of Mr Abbott's family cannot cross Idracowra Station from a place of public access to the sandhill and associated flood-out area in accordance with the approval of the Authority until the Authority its servants or agents gives the plaintiff reasonable notice of the intended crossing.

[66] However, this is not an appropriate case to grant the injunction and make the declaration sought by the plaintiff. I do not accept the plaintiff's argument that the Authority may only enter upon Idracowra Station if an application is

made for an Authority Certificate or if an Aboriginal custodian makes an application for the registration of a sacred site on Idracowra Station. Section 47 of the Northern Territory Aboriginal Sacred Sites Act gives the Authority the power to approve access across land from a place of public access to a site in accordance with the provisions s 47 of the Act. Nor do I accept the plaintiff's argument that access under s 47 is contingent upon prior proof on the balance of probabilities that there is both a sacred site on Idracowra Station and surviving Aboriginal custodians of the sacred site.

[67] The legal status of a sacred site is not dependant upon any action taken by the Authority. Indeed, the offences created by s 33 to s 35 inclusive of the Act do not require the site to be registered or even under consideration by the Authority: *Aboriginal Sacred Sites Protection Authority v Maurice and Others* (1986) 65 ALR 247 per Toohey J at 262.

The functions and powers of the Authority

[68] The preamble to the Northern Territory Aboriginal Sacred Sites Act states that the Act was enacted 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.

[69] Under s 10 of the Northern Territory Aboriginal Sacred Sites Act, the functions of the Authority are 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, with a view to their agreeing on an appropriate means of sites avoidance and protection of sacred sites; to carry out research and keep records necessary to enable it to efficiently carry out its functions; to establish such committees (including executive and regional committees), consisting of such members and other persons, as are necessary to enable it to carry out its functions; to establish and maintain a register to be known as the Register of Sacred Sites and such other registers and records as required by or under this Act; to examine and evaluate applications made under s 19B and s 27 of the Act; after considering an application under s 19B of the Act, and in accordance with Division 1 of Part III of the Act, to issue or refuse to issue an Authority Certificate; 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; to make such recommendations to the Minister on the administration of the Act as it thinks fit; to perform such other functions as are imposed on it by or under

the Act or any other Act, or as directed by the Minister; and to enforce the Act.

[70] Under s 11 of the Northern Territory Aboriginal Sacred Sites Act, the Authority has such powers as are necessary to enable the Authority to perform its functions and exercise its powers.

[71] Section 47 of the Northern Territory Aboriginal Sacred Sites Act, so far as is relevant for the purposes of this case, provides that a person may, with the express approval of the Authority, for a purpose reasonably necessary for or in connection with the performance of a function or the exercising of a power under this Act or for a purpose reasonably necessary for the preparation of an application under the Act, by reasonable means and by the most direct practical route between a place of public access and the sacred site (or between sacred sites) cross any land to that sacred site or between sacred sites.

[72] However, s 47(1) of the Northern Territory Aboriginal Sacred Sites Act provides that before a person may cross land in accordance with the approval of the Authority from a place of public access to a sacred site, it is necessary for the person to give reasonable notice to the owners of the land that he or she proposes to cross. The purpose of the notice is to ensure that the activity of crossing the land to the sacred site or sites does not interfere with the landowners normal activities on the land and the landowner may request that an alternative route across the land be taken.

- [73] Under s 3 of the Northern Territory Aboriginal Sacred Sites Act, “sacred site” means a sacred site within the meaning of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). According to s 3 of the latter Act a sacred site is a site that is sacred to Aboriginal peoples or is otherwise of significance according to Aboriginal tradition. "Custodian", in relation to a sacred site, means an Aboriginal who, by Aboriginal tradition, has responsibility for that site.
- [74] Before a sacred site can be registered the Authority must be satisfied after examining and evaluating the information obtained by consulting the applicant and other custodians about the matters set out in s 27(2) of the Northern Territory Aboriginal Sacred Sites Act, any representations made by the landowner under s 28(1) of the Act and such other information concerning the site as is available that the site the subject of the application is a sacred site.
- [75] In my opinion it is not necessary for the Authority to be satisfied that a site is a sacred site before it can grant approval to a person to cross land from a place of public access to a sacred site under s 47 of the Northern Territory Aboriginal Sacred Sites Act. It is apparent from s 47(1) (c) of the Act that approval may be given before the Authority is satisfied that a site is a sacred site. Section 47 (1) (c) of the Act provides as follows: “... a person with the express approval of ... the Authority ... may, for a purpose – reasonably necessary for or in connection with the preparation of an application under this Act ... cross any land to that sacred site or between sacred sites.”

Clearly any such application is normally made at a time before the Authority is satisfied that a site is a sacred site. The legislation is beneficial legislation which should be construed beneficially in favour of a person seeking access to a site which is said to be a sacred site provided that the access is for the purposes contemplated by s 47. The relevant purpose of s 47 of the Act is to give a person with the approval of the Authority a right to cross land from a place of public access to a site or between sites so that the Authority may carry out its functions and exercise its powers under the Act which include conducting research for the purpose of investigating whether the provisions of the Act have been breached or whether steps need to be taken to enforce the Act or protect a sacred site.

[76] While it falls upon Mr Allan, Mr Abbott and the members of Mr Abbott's family to prove that they have a right to cross Idracowra Station to the site in question, the answer to any allegation of trespass is not to prove on the balance of probabilities that the site is a sacred site and that Mr Abbott is in fact the custodian of the site but to prove that they have the approval of the Authority to cross the land from a place of public access to the site in question and that reasonable notice has been given to the landowner. The purpose of s 47 is to overcome the necessity of such proof in the circumstances contemplated by the section. It has been proven in this case that Mr Allan, Mr Abbott and the members of Mr Abbott's family have the approval of the Authority to cross Idracowra Station from a place of public access to the sandhill and associated flood-out area. Further, the plaintiff

has not sought an order quashing the decision of the Authority approving Mr Allan, Mr Abbott and the members of Mr Abbott's family crossing Idracowra Station from a place of public access to the sandhill and the associated flood-out area.

[77] What constitutes reasonable notice to a landowner in accordance with s 47 of the Northern Territory Aboriginal Sacred Sites Act is a question of fact to be determined in the circumstances of each case. However, it must be noted that the access which may be approved under s 47 of the Act is access by the most direct practical route from a place of public access to the sacred site or between sacred sites; it is not access to an area containing a sacred site or sacred sites. Further the notice must be such as to enable the landowner to request that an alternative route be taken so as not to obstruct the landowner's normal activities on the land which may include ensuring that any legitimately confidential activities being carried out on the land remain confidential. A greater level of particularity in the notice may be required if the purpose of accessing the site is to investigate if the site has been damaged or desecrated and if enforcement proceedings may follow upon the investigation of the site.

[78] As the access approved by the Authority in this case is access from a place of public access to the sandhill and associated flood-out area, reasonable notice requires that the notice be limited to access across Idracowra Station to the sandhill and associated flood-out area by the most direct practical route, that the features of the sandhill and associated flood-out area be

described in as much detail as is reasonably possible and that the location of the sandhill and flood-out area be specified as accurately as is reasonably possible. Should the location of the site that is specified turn out to be inaccurate then further notice can be given to the plaintiff and the correct location of the sandhill and the flood-out area specified. For obvious reasons the map annexed to the letter dated 19 October 2007 does not constitute reasonable notice to the plaintiff.

The relief claimed by the plaintiff

[79] It is not appropriate to grant either the injunction or the declaration sought by the plaintiff in this case as the relief claimed by the plaintiff is so wide that it would restrain Mr Allan, Mr Abbott and the members of Mr Abbott's family from crossing Idracowra Station from a place of public access to the sandhill and associated flood-out area even after reasonable notice was given to the plaintiff. Once reasonable notice is given to the plaintiff, Mr Allan, Mr Abbott and the members of Mr Abbott's family may make such a crossing in accordance with the approval of the Authority and the provisions of s 47 of the Northern Territory Aboriginal Sacred Sites Act.

[80] Further, the inclusion of the reference to the correspondence between the parties in the orders sought by the plaintiff means that the terms of the orders are unclear and ambiguous. Neither a declaration nor an injunction should be granted unless there is considerable precision in the terms of the order: *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR

122 at 136; *ASIC v Adler* (2002) 189 ALR 365. There is no utility in an unclear declaration or injunction.

[81] As the Authority is subject to the direction of the Minister in the performance of its functions and the exercise of its powers, I would not expect the Authority its servants and agents to conduct itself in a manner inconsistent with the findings that I have made in this case or inconsistently with the extent of the approval granted by the Authority under s 47 of the Act.

The slip rule

[82] As to the plaintiff's application based on the submission that the court has made a slip, I hold that there was no slip. The judgment that I pronounced is consistent with my reasons for decision set out above.