

CITATION: *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013]  
NTMC 019

PARTIES: ABORIGINAL AREAS PROTECTION  
AUTHORITY

v

OM (MANGANESE) LTD

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 21139652

DELIVERED ON: 2 August 2013

DELIVERED AT: Darwin

HEARING DATE(s): 4 March to 8 March 2013

JUDGMENT OF: Ms Sue Oliver SM

**CATCHWORDS:**

CRIMINAL LAW – Criminal Liability - Desecration of Sacred Site – Elements of Offence - Application of Section 31 of the Criminal Code.

**REPRESENTATION:**

*Counsel:*

Prosecution: Mr Collett  
Defendant: Mr Quinlan SC

*Solicitors:*

Prosecution: Aboriginal Areas Protection Authority  
Defendant: Ward Keller

Judgment category classification: A  
Judgment ID number: [2013] NTMC 019  
Number of paragraphs: 83

IN THE COURT OF SUMMARY JURISDICTION  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21139652

BETWEEN:

**ABORIGINAL AREAS PROTECTION  
AUTHORITY**

Complainant

AND:

**OM (MANGANESE) LTD**

Defendant

REASONS FOR JUDGMENT

(Delivered 2 August 2013)

MS OLIVER SM:

**The Charges**

1. The defendant company OM (Manganese) Ltd contests two charges of desecration of a Sacred Site contrary to section 35 of the *Northern Territory Sacred Sites Act*. Both offences are alleged to have occurred at the Bootu Creek Mine Site at the Masai Pit between the 19<sup>th</sup> and 20<sup>th</sup> of March 2011 and the 10<sup>th</sup> and 30<sup>th</sup> of September respectively and involve the same Sacred Site. The company has entered a guilty plea and has been found guilty of a further charge of contravening a condition of an authority certificate by damaging the same Sacred Site between the 1<sup>st</sup> of March and the 9<sup>th</sup> of September 2011.

**The Sacred Site**

2. There is no dispute that the geological feature the subject of all three charges is a Sacred Site.

3. The Sacred Site is known in the English language as “Two Women Sitting Down.” It has been a recorded Site since 2004. In the authority certificate granted with respect to the mining lease it is identified as 5760-21
4. In her statement, Gina Smith, a traditional owner of the area on which the site is located, described the history of the Site and the meaning attached to it. Ms Smith became involved in the negotiations around the Bootu Creek mining lease around 2001. Meetings held on the OM (Manganese) Ltd mining lease involved the old people and the song lines were sung again and they were told the stories about the song lines and dreaming on the mining lease. Ms Smith says that the best way to describe a song line for white people is that it is like a railway line and that the Sacred Sites are like stations on the railway line. The story of this Sacred Site is of two female dreaming figures whose skin names were *Namakili* and *Napanangka* who are represented by the rocky outcrops. One was a bandicoot and the other a type of marsupial rat. They had a fight over bush tucker fruits and their blood spilled onto the rocks in the area. This Sacred Site is one of a number along this song line.
5. The Expert Certificate of Jeff Stead, a consultant anthropologist who has had extensive experience in documenting Sacred Sites and in land claims and native title claims going back to 1981 in the Northern Territory, also provides an explanation of the Site. Mr Stead’s involvement with this dreaming began in 1982 when he was working for the Central Land Council.
6. In his report of 1982 he records two female dreamtime ancestors, a bandicoot and a rat. The bandicoot had only two children while the rat had many so the bandicoot tried to take one of the rat’s children which caused them to fight. The manganese outcrops in this area, of which this Sacred Site is one, represents the blood of these ancestors. Mr Stead noted that a senior man had said that they had given the dreaming away. Mining in the area in

the 1950's had destroyed nearly all of the areas where the ancestors had fought by extraction of the surface mineral.

7. In 2004 the dreaming had been reclaimed and there were identified Sacred Sites that could not be mined. Mr Stead says that this change of view is not surprising because the older informants had passed away and the political and cultural situation was different. He does not see this as a fabrication or recent invention because he has seen it in many places.

*“The dreaming story is consistent. What differs is the perception by aboriginal people of their power or ability to enforce protection of the Sites and dreamings.”*

8. This Site consisted of a number of outcrops of black rocks located on top of a small hill, although the most recent photos tendered show no evidence of what was once the hill evident in the photos taken in 2004. There were also other Sacred Sites on the mining lease.
9. A significant and strong identifying feature of the Sacred Site was a horizontal rock arm extending off a pillar that was part of the Site. Photos taken in 2004 show the horizontal arm. The feature also had strong recognition by mine workers at Bootu Creek indicated by the fact that they commonly referred to it as the “Horses Head”. I do not think this was intended to be disrespectful of the Site but it does underscore the prominence of the horizontal arm to any observing the Site. In other words it was a feature by which the Site was readily identifiable. Ms Smith refers to the significance of the arm as a feature of the Sacred Site and to the significance of its loss, which I will come to later.
10. Although the evidence of most witnesses referred to the horizontal arm falling off the pillar around 20 March 2011, the evidence of Paul Carrick, the then Mine Manager, was that it was not just a case of the piece snapping

off and falling. It was in many pieces. This destruction is relevant to the first count of desecration.

### **The Authorisation Certificate**

11. The mining operation on Banka Banka station, which is called the Bootu Creek Mine, began in 2005. The mining plan for Bootu Creek involves a staged plan of opening up a series of open cut mines over time to ensure a constant supply of manganese ore.
12. Prior to commencing mining the defendant applied for an Authority Certificate from the Aboriginal Areas Protection Authority (AAPA) which would identify any Sacred Sites on the mining lease and identify any restrictions in relation to mining in the vicinity of the Sacred Sites.
13. Part III of the *Northern Territory Aboriginal Sacred Sites Act* provides for a procedure for the protection of Sites. A person who proposes to use or carry out work on land may apply to the Authority for an Authority Certificate for that use or work. On 23 December 2004 an authority certificate was issued to Bootu Creek Resources Pty Ltd<sup>1</sup> pursuant to section 22 of the Act. The proposed work was for “the development of a manganese mine, including open cut pits, small tailings dams, a haul road, camp accommodation and associated exploration activity”.
14. The Authority certificate attached a map of the subject land on which the Sacred Sites on the land are shown both diagrammatically and in photos. There are seven Sites on the land. The photo of Sacred Site 5760-21 shows the horizontal arm feature and the associated rocky outcrop. The authority certificate provided a condition that Sacred Site 5760-21 shall not be entered or damaged.
15. The effect of an authority certificate is that a person may, subject to the conditions of the certificate, enter or remain on the part of the land the

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<sup>1</sup> The name by which the defendant company was then known.

subject of the certificate and do such things as are reasonably necessary for carrying out that work or making use of the land.

16. The nature of the ongoing uses of land on which sacred sites are likely to be situated, primarily mining or pastoral activity, would make it impracticable for an authority certificate to direct or prohibit actual and specific activities around sacred sites. It necessitates the giving of a broad authority and conditions such as are set out in this authority certificate. In my view, the scheme of the Act relies on mutual trust and respect of the land over which the authority for use or work on the land is given. Sacred sites that exist on a parcel of land are identified and the recipient of the authority then undertakes to observe broad conditions related to the preservation and respect of the sacred sites. The recipient is left to determine the manner of use that will ensure that protection. This view is consistent with what is expressed in the Preamble to the Act:

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.

### **The Masai Pit**

17. As noted, the Bootu Creek Mine is a project that involved the progressive development of pits. The design plan for the Masai Pit was not finalised until January 2011. The mining plan<sup>2</sup> allowed for the development of the pit in close proximity to the Site by creating what was called a “bull-nose” of 140m width extending into the pit. Mining would occur both in front of and

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<sup>2</sup> A diagram as part of Exhibit P3

to the north and south of the rocky outcrop on which the Sacred Site was located. Much of the rocky outcrop of which the Sacred Site was a part would be removed and had been removed at the time when the horizontal arm fell off.

18. The design plan allowed for a steeper batter angle<sup>3</sup> of 55 degrees for the pit wall in front of the bull-nose whereas the rest of the western wall was to be mined at an angle of 36 degrees, as were the other footwall slopes at the Bootu Creek Mine. The purpose for choosing the steeper angle was to maximise the amount of ore extracted as the ore load continued up through the rocky outcrop with the Sacred Site being the extrusion of that load. The company had calculated that using the 36 degree angle would result in sterilising (losing) about 280,000 tons of ore whereas the steeper angle would result in a loss of approximately 103,000 tons of ore. In other words the company could extract about 177,000 tons of ore by the steeper approach to be taken at the edge of the Sacred Site.
19. It is an agreed fact that staff of the defendant met with two traditional custodians and a local employee of the Northern Land Counsel on site on 1 February 2011<sup>4</sup>. The purpose of the meeting was to present the two options with respect to the batter angles for the wall in front of the Site to those people.
20. While the agreed facts refer to a meeting with two traditional owners, the gentleman in question made statements that were tendered and only one, Mr Gordon Noonan, is a custodian of the Bootu Creek mining lease area with the Kunapa group of which he is part. The other gentleman, Mr Colin Freddy, says he is not a custodian but just went along with Gordon as a friend and witness and that the area is not his country. Mr Noonan confirms

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<sup>3</sup> The inclined section of the wall of an open pit mine is called the batter.

<sup>4</sup> Exhibit P1

that in his statement. They met with the Defendant's staff who explained the options. Neither Mr Noonan nor Mr Freddy have worked in mines or have mining experience. They are cattlemen. Mr Noonan left school at 14 and Mr Freddy has never been to school. Mr Noonan says in his statement:

*“they told me the good ore was under the Site and about mining angles and how they wanted to get the ore and not to damage the Site. I agreed with the mining angle even though I wasn't sure of what they were talking about.”*

21. It is also an agreed fact that although the Defendant's staff stated a commitment to conserve and respect the Site it expressed concern about one of the rocks that looked cracked and very fragile. The second option of the steeper mining angle was identified as giving rise to the possibility of damage to the Site. The “two traditional owner/custodians” are said to have agreed to the second option on an undertaking of the defendant to immediately advise the NLC of any damage to the Site.
22. In my view arranging a meeting with the three gentlemen to essentially obtain approval for the steeper batter angle approach was either a cynical or a naïve exercise on the part of the Defendant. The custodians had no individual authority to approve a mining plan that posed a risk to the integrity of the Sacred Site. The local NLC officer had no authority to authorise those works. According to the evidence of Ms Shanti Rama, a solicitor with the NLC, the agreement between the native title holders and the defendant company provided for a liaison committee as the means of communication between the parties. Ms Rama commenced with the NLC in 2009 and could not remember any meeting of the committee until September 2011. She was clear that there was no meeting in early 2011 when the opening of the Masai Pit was to commence.
23. In any event the liaison committee could not approve an action that gave rise to a potential for damage to a Site. The only mechanism for undertaking



works that risk damage or interference with a Sacred Site is under the *Northern Territory Aboriginal Sacred Sites Act*. Section 22 provides:

## **22 Authority Certificate**

(1) The Authority shall, where it is satisfied that, in relation to an application under section 19B:

(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,

issue an Authority Certificate to the applicant (which, in the case where an agreement referred to in paragraph (b) has been reached, is in accordance with the agreement):

(c) describing the part or parts of the land on which the work proposed in the application may be carried out or use made (or on which the work may not be carried out or use made, as the case may be) with sufficient particularity to enable the land and part or parts to be identified; and

(d) setting out the conditions, if any, on which under this Act the work may be carried out or use made as the Authority thinks accords with the custodians' wishes or, if an agreement has been reached between the custodians and the applicant, accords with that agreement.

24. In my view section 22 is clear in its terms. Authority Certificates can be issued in one of two circumstances. First, where 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 or secondly, where there is such a risk there has been agreement reached between the custodians and the applicant. Where an agreement has been reached the conditions set out in the authority are to accord with the agreement<sup>5</sup>. The authority certificate to Bootu Creek Resources Pty Ltd contained no reference to an agreement with the custodians. The approval for works was subject to an absolute prohibition on

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<sup>5</sup> S22(1)(d)

damage to any of the Sacred Sites situated on the mining lease. The authorisation for the use of the land was therefore given on the basis that it “could proceed or be made without there being a substantive risk of damage to or interference with a Sacred Site”.

25. If the company wished to undertake works that posed a real or actual risk of damage to the Sacred Site with the agreement of the custodians then it was incumbent on it to apply for a variation of the certificate pursuant to section 23.
26. The agreed facts state that the NLC advised the Authority of the meeting and these arrangements on 1 February 2011 following the meeting. No concern appears to have been expressed by either body that the defendant was about to embark on works that acknowledged a risk of damage to the Sacred Site. However without knowing the nature or content of that communication it is not possible to determine whether either body was apprised of the nature and degree of the risk. In any event the communication by the NLC could not change the responsibility and liability of the defendant. It had authority only to carry out works which were conditioned on not damaging the Site.
27. The steeper batter angle is relevant to the charge of damage to the Sacred Site to which the defendant has been found guilty on its plea. The defendant acknowledges that this was a cause of the damage (the slippage of the Site) in July 2011. The batter angle is not relevant to the first count of desecration because I accept that the bull nose had not been fully created at that time. However the fact of the meeting about the mine plan with the bullnose and steeper batter angle, the knowledge of the fragility of the rock formation and the potential foreseen for damage and the failure to obtain a variation to the authority certificate if the company believed that it had agreement with the custodians for that plan, are relevant because they go to the defendant’s knowledge in relation to potential harm to the Site.

## What does “desecrate” mean?

28. “Desecrate” is not defined in the *Northern Territory Aboriginal Sacred Sites Act*. There does not appear to be any binding authority on the meaning of desecration. The only authority to which I have been referred is that of *Chapman and Chapman v Australian Broadcasting Commission* [2000] SASC 146 which briefly considered the meaning in the context of defamatory imputations. The South Australian Full Court went no further than to refer to the dictionary meaning of the word given by the 1993 Edition of the Shorter Oxford English Dictionary which gives the meaning “to remove or violate the sacred nature of, profane; spoil or treat with contempt (something venerated or admired).”
29. Two further definitions were tendered by the prosecution. The Oxford English Dictionary<sup>6</sup> “to take away its consecrated or sacred character from (anything), to treat as not sacred or hallowed; to profane”. In a similar vein the Macquarie Dictionary provides “to divest of sacred or hallowed character or office; divert from a sacred to a profane purpose; treat with sacrilege; profane.”
30. The word must of course be interpreted in the context of the Act as a whole. The Act establishes a regime for the identification, registration and protection of Sacred Sites<sup>7</sup>. It establishes the Aboriginal Areas Protection Authority amongst which functions it has is 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;”<sup>8</sup>
31. In my view the object of the legislation is to protect sacred sites within a context of permitting use of land on which sites may be situated. Four

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<sup>6</sup> Second edition, Clarendon Press, Oxford

<sup>7</sup> It is not necessary for a sacred site to be registered for the Act to apply.

<sup>8</sup> Section 10(a)

offences are created under the Act with respect to sacred sites. These appear to envisage the ways in which a sacred site might be affected by use of the land on which it is situated. Section 33 deals with entry onto a sacred site, section 34 prohibits work on a sacred site and section 35 creates the offence of desecration of a sacred site. In the case of each of these offences it is a defence if it is proved that the defendant had no reasonable grounds for suspecting that the sacred site was a sacred site. Section 37 deals with contravention of sites avoidance conditions and it is apparent from what is required for the obtaining of an authority certificate (section 22(1)(a)) that a contravention will by necessity be one involving damage to a sacred site.

32. The question then is what work does section 35 have to do in relation to site protection? Entry, work upon and damage to a site will be covered by the other offences, so the question is what else can it be that requires protection? In my view the offence created by section 35 of desecration of a sacred site was intended to go to the heart of what was recognised by the legislation, that is, the sacred or spiritual nature of a site. If that character should be insulted, diminished or removed, it may interfere with or cause to be lost, the belief systems associated with a site including damaging the sacredness of the site. It is this, in my view that distinguishes the offence in section 35 from the others. The offence of desecration is aimed not so much at the physical integrity of the site but as to whether what has occurred in relation to it has violated the sacred symbols or beliefs that it represents. Consequently it seems to me, that various acts might amount to a desecration, ranging from an act of defilement or profanity in relation to a site to an act which diminishes or removes the sacred or spiritual nature of a site.

33. I disagree with what was put by Counsel for the defendant that the provision is to be interpreted as being to act in a way which treats the sacred nature of the site with contempt. Mr Quinlan submits that treating a sacred thing with contempt carries with it an attitude or disposition. That is, that a defendant

is contemptuous of the site or has an attitude or disposition meeting that description. That being the case it was submitted that section 31 of the Criminal Code had no application. To support that view, Mr Quinlan said that acts the same in character may be desecration or not desecration, entirely dependent on the attitude or disposition of the person doing the act. He gave flag burning as an example, saying that when a person burns a flag in protest they are desecrating the flag but that the protocol for disposing of a soiled flag is to burn it and that is not a desecration. There is the same act but with a different attitude or disposition, one desecration and one not. With respect, in my view, this does not illustrate that desecration should be interpreted as dependent on an attitude. In the latter case it might be said that the respect or “sacredness” of the flag has already been lost because it is despoiled and the proper respect is being given by following an accepted protocol for destruction.

34. An act or omission done or made by a person is generally the essential foundation of criminal responsibility<sup>9</sup>. In my view the act that is required for the offence of desecration of a sacred site is not an act of treating a sacred site with contempt. A physical act that might fall within that definition could potentially include such things as publishing material contemptuous of a sacred site. I do not think that this broad approach would be intended given the penalties that attach to the offence and the context in which the offence is created.
35. In my view then the offence requires a physical act that defiles or treats in a profane manner the sacredness of a site, or diminishes or destroys the sacredness of a site. An act of this nature is consistent with the broad definition of “act” in the Criminal Code which provides “*act*, in relation to an accused person, means the deed alleged to have been done by him, it is not limited to bodily movement and it includes the deed of another caused,

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<sup>9</sup> Barwick CJ in *Ryan v The Queen* 1967) 121 CLR 205 at 213

induced or adopted by him or done pursuant to a common intention”.<sup>10</sup> In my view, a physical act that removes or diminishes the sacred nature and/or spiritual significance of a sacred site is a deed within the definition of “act”.

36. The question then is whether criminal liability attaches to the act which is answered by section 31.

### **31 Unwilled act etc. and accident**

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

37. Consequently, if a person intends to diminish or destroy the sacred nature or spiritual significance of a site (commit an act of desecration) and the site is desecrated, that person will be criminally responsible for the offence of desecration. So much is in part consistent with the submission of the defendant that desecration requires in essence some attitude of contempt for a site. However, criminal liability for an act of desecration is not limited to an intentional act but extends to a circumstance where diminishment or destruction of the sacred nature or spiritual significance of a site is foreseen as a possible consequence of his conduct unless in the particular circumstances including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

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<sup>10</sup> Criminal Code section 1

### **Did the destruction of the horizontal arm desecrate the site?**

38. The statement of Gina Smith goes to this issue. Ms Smith says that when she went to Bootu Creek in August 2011 she could see that the horizontal arm which protruded from one of the large rocky outcrops which represents the two women was gone. The disappearance of the horizontal arm is regarded as very serious. “First, it greatly offends our law which says that sacred sites must not be disturbed or damaged. Second, the appearance and shape of the sacred site has been significantly changed. This makes it much harder for me and other aboriginal people with traditional interests in the sacred site to recognise it and the dreaming that it represents and to teach our young people about this. This is likely to stop us visiting the sacred site any longer. This damage has greatly offended the sacredness of this site and *has made it much less sacred (my emphasis)*”.
39. Ms Smith goes on to say the Kunapa people feel powerless to help the site, that they have let this happen and nothing can repair the site. “It will always remain a sacred site to us but it has been ruined and we don’t know what to do because this has never happened to the old people. It had been there for thousands of years as part of our culture and our story”.
40. The expert certificate of Jeffrey Stead also goes to the issue. He says “Generally a sacred site displays a number of elements. Having seen the photographs of the damage to the rocky outcrop which forms part of site 5760-21 occasioned by the collapse of the horizontal arm of the main vertical pillar of the rocky outcrop, it is my view that this constitutes desecration. This is because, as a result of the damage, **some of the sacredness of the site has been removed from the Sacred Site** and the Sacred Site has been insulted and treated with contempt (*my emphasis*)”.

41. In a paper<sup>11</sup> attached to his certificate Mr Stead explains the spiritual links between individuals, groups and ancestral beings. He says “Ritual and ceremony is perceived as a means of continuing the link with the ancestral beings, thus maintaining the spiritual and environmental health of country. Much ceremony involves the process of singing the travels of the ancestral beings through the sites they gave meaning to and reproducing their actions through dance .... Whilst such ceremonies do not have to be held at those sites, there is a general belief that damage to, or isolation from them, makes the ceremony less effective and relevant.” I understand from this and from Ms Smith’s statement that the spiritual meaning or significance of the site has been damaged by the loss of the horizontal arm.
42. I am satisfied beyond a reasonable doubt on the evidence of Ms Smith and Mr Stead that the loss of the horizontal arm of the sacred site was a desecration of the site because it seriously diminished the sacredness of the site and interfered with the spiritual connections attached to the site.

**Was the desecration caused by the defendant?**

43. The particulars of Count 1 allege that the damage to the horizontal arm was caused by mining between 1 March and 19 March 2011 in close proximity to the Site including by detonating explosives to the boundary of the site on 19 March. The particulars of a charge are not elements for which each and every fact requires proof. Particulars are given to provide reasonable information as to the nature of the charge<sup>12</sup>.
44. Mr Peter Anderson was a mobile plant operator working at Bootu Creek. He started work at what was to become the Masai Pit in early March 2011. His evidence provides a picture of the mine site and works at the Masai Pit leading up to the horizontal arm of the Sacred Site falling off. There was no pit when he started work there, just a rocky bluff and a “big gnarly old hill”

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<sup>11</sup> Issues paper – Spiritual Connections, Aboriginal Areas Protection Authority 2010

<sup>12</sup> Section 22A(1) *Justices Act*



and the Sacred Site. There was a “no go” tape around 100 meters from the Sacred Site. When he returned around 18 or 19 March the “no go” tape had been removed and the area, including most of the rocky bluff had been cleared back to the Sacred Site. The area had been cleared to about 30 metres of the Site.

45. There was a wire fence delineating the Site but *“it was never really coming out that far from the site, it was right up against the rock formation”*. All the vegetation had been cleared off the rock formation. The bluff to the North had been cleared flat. Drilling was occurring up to about 30 meters off the rock formation on the northern edge of it. The drilling was in a grid pattern for the blasting crew. Mr Anderson was grading the haul road when observing the drilling about which he gave evidence. He estimated that the closest drill hole to the horizontal arm feature would have been about 30 to 40 meters. He said he could give an accurate measure because of his work over decades in the pipe line industry working with lengths of pipe so that he could estimate the distance as either two 18 meter lengths or three 12 meter lengths. I take the view that his evidence in terms of estimating distance arising out of his experience would be extremely reliable. The blasting crew were working around the holes that had been dug and the bomb truck nearby. Although Mr Anderson didn't see the explosives being put in the holes as he said in cross examination *“I'm not guessing this is what blasting crews do. They load the drill holes with explosives. So when they're working with the bomb truck, which is the truck that carries the explosives, they're not just walking along poking their fingers down their holes mate”*. It was dusty on the day he observed the drilling and the bomb truck.

46. He did not see blasting on the day because, as he observed, the site is cleared of personnel during blasting which is usually done either around 1pm or 6.30 pm. He knocked off around 6pm. He believed that it was either the 18<sup>th</sup> or 19<sup>th</sup> that he saw the drilling because 20 March was a day with

some significant events, including the loss of the horizontal arm and he had made a diary entry on the 20<sup>th</sup> recording some of the events.

47. Mr Anderson said he returned to the site about a week after he had seen the drilling crew and that the ground had been blasted when he went back and that *“it wouldn’t have been dug out unless it had been blasted because it was too tight”*.
48. This evidence is consistent with the observations of Michelle Goodwin, who visited the Site on the 24<sup>th</sup> of March with some custodians, of the proximity of mining to the Site. She said *“we could see mining activities taking place with large earth moving machinery at the north western end of the hill associated with sacred site 5760-21. The custodians expressed concern that the mining activities were too close to the sacred site.”* She marked this position on a Google earth map attached to her statement.<sup>13</sup>
49. Mr Paul Carrick was the mining manager at the Bootu Creek Mine. He arrived on site in early January 2011. His first observation was that there was no ground control management plan to identify and manage ground control issues. The Masai pit had not been opened. They began the access to it by developing an access road into the centre pit and a road to the west of the Sacred Site. The haul road and the road to the west of the sacred site are clear from later photos. Mining then started in the top North end and they worked their way south over a period of a few weeks until they “established a pit crest<sup>14</sup> along that red and yellow line.” The red and yellow line to which Mr Carrick referred is the line commencing the northern edge of the bull nose shown in the mining plan in Exhibit P2. The yellow line is the edge of the pit.

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<sup>13</sup> I note that the Google Map would not appear to be contemporaneous with her visit but appears to give a close approximation of her observations for positional purposes.

<sup>14</sup> The transcript records “peak press” – my notes indicate Mr Carrick saying a “pit crest”.

50. Mr Carrick went on to say “So we basically went from the northwest side and there was a couple of substantial hills, hills, which stood eight to ten meters apart, natural ground level. Which we took out, working from the north, back towards the south. And they extended a good 100 meters into the middle of the pit. So we took those down and general mining direction was to the south. **Until such times we got to within the vicinity of the Sacred Site and within probably 50 meters (my emphasis)**”.
51. The Sacred Site was delineated on three sides by star pickets strung with wire, which is consistent with Mr Anderson’s evidence as to the delineation of the Sacred Site at that time.
52. Mr Carrick said that it was quite apparent that the horizontal arm was fragile. It was quite brittle and quite cracked. He commonly walked up there outside the fence line (which was just a few metres from the Site itself) to keep an idea of what was happening to it. As they got closer to where they were to establish the bull nose on the western pit wall he consulted with others as to how far south they could come with the existing drill blast before using methods to minimise the impact on the Sacred Site. It is apparent that he was concerned about its stability in view of the works that were underway and that the paddock blasting method which he described in his evidence could impact the Site. Indeed he said that if they had not employed specific techniques of blasting (which he described) when they created the bull nose, the Site would have been destroyed by the vibration from the blasting.
53. Mr Carrick was asked whether there was any discussion about other means of protecting the Site, for example by starting the pit wall 40 or 50 metres further to the east. He said that in mid to late January there had been discussion about protecting the horizontal arm. This was when “*a couple of the traditional owners came to the site. From then we were told, just progress with the mine, the mine design we’ve got.*”

54. Mr Carrick's evidence made it clear that the reason why the Pit wall did not commence further to the east is because that would have prevented the company from accessing substantially more ore.
55. There is some ambiguity in Mr Carrick's recollection of when they created the bull nose by the careful firing techniques. Mr Carrick's evidence suggests that the bull nose was being created at this time, he says around mid March, although he said he could not quite remember. Mr Anderson's description was that there was still paddock blasting occurring to west of the site. I do not think that the evidence if each is irreconcilable. Mr Carrick's evidence of the proximity of the ordinary blasting was somewhat inconsistent. At one point he said that they had moved within 50 metres of the Sacred Site with the ordinary blasting techniques and another time that they had stopped using ordinary blasting about 20 metres from the site. Later he said "...about 25 odd meters from the horizontal arm"<sup>15</sup>. I note that there may be some differences as to distance being expressed by the witnesses as to whether they were estimating it from the crest in front of the Sacred Site at the time or from the horizontal arm itself.
56. Mr Carrick's evidence around when the western wall of the bull nose was actually commenced was not certain. In my view Mr Carrick must be mistaken that they had advanced to the full creation of the bull nose at that time other than perhaps the northern end. He was also unclear about the date on which he was informed and then saw the loss of the horizontal arm. The statement of Michelle Goodwin who visited the site with custodians shortly after the horizontal arm was destroyed is clear evidence that there was still sufficient land on the Pit side of the Sacred Site, *albeit* substantially cleared, for a vehicle to go to the western side. She confirmed their path in the

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<sup>15</sup>The Transcript records this answer as "Twenty five, about 45 odd meters (inaudible). My own notes reflect the words I have indicated and I note that a description of either 20 or 25 meters is more consistent with the diagram that Mr Carrick drew [P42].

vehicle using co-ordinates taken from her GPS. Mr Carrick was with them and conceded in cross examination that if they got around that side in a car that the bull nose could not have been built at that time.

57. Ms Goodwin says she observed “mining activities taking place with large earth moving machinery at the north western end of a hill associated with Sacred Site 5760-21. Custodians who were with her expressed concern that the mining activities were too close to the Sacred Site.
58. As to blasting, Mr Carrick’s evidence is that there was blasting in the Massai Pit every few days, so that the last blasting before the loss of the horizontal arm would be 1 to 3 days before. He said that mining progresses very quickly and that the general landscape changes on a day to day basis. This is consistent with Mr Anderson’s recollection of timing and with the work practices he described.
59. There is an inconsistency between Mr Carrick and Mr Anderson as to how far from the Sacred Site the last blasting would have been. Mr Anderson put it at between 30 to 40 metres (36m according to his pipe length comparison) whereas Mr Carrick said it would have been 80-100 metres although noting that in an earlier part of his evidence he said that they got within 50 metres of the Site. Given that Mr Carrick had an imprecise recollection of where the blasting had advanced to around 20 March, I much prefer Mr Anderson’s direct visual recollection of where he saw paddock drilling occurring on this point. I thought he was an accurate historian of the state of the pit around the relevant time and was able to mark on a photo the approximate position of the blasting.
60. Finally, even if the gentler blasting had commenced to create the bull nose that does not, in my view, on the evidence exclude the possibility of paddock blasting occurring to move the pit creation south and to increase the depth of the pit. As Mr Carrick said things were moving quickly and the landscape changing on a day to day basis. His evidence does not suggest that

there was no blasting in the Pit other than the gentler techniques around the site at a time proximate to the destruction of the horizontal arm. The photos of the Pit taken on the 19<sup>th</sup> of April<sup>16</sup> well indicate both the depth and extent of the Pit to the South in proximation to the Sacred Site only one month later.

61. Mr Dave Clark is a geotechnical engineer. He provided a report in September 2011 to the AAPA subsequent to the damage to the Site in July. His report was made after a site visit on 9 September 2011. His report was attached to his expert certificate and he gave oral evidence. Mr Clark's opinion as to the loss of the horizontal arm was that "blasting within close proximity to the north [of the site] where you've got a fabric of the structure continuing in that direction. There's a – I'd consider there's a high likelihood that the blasting has impacted on and resulted in that movement that's occurred".
62. Mr Clark was asked to consider whether that opinion would alter if the blasting had been on the 18<sup>th</sup> rather than the 19<sup>th</sup>. He responded that within the mining industry there are safe work practices put into place involving a period of standoff anywhere from 12 to 48 hours immediately adjacent to slopes where there has been a blast within close proximity because of the potential for small to medium scale movement to occur. I take his answer to mean that there can be delayed structural movement following a blast so that if the horizontal arm fell on or about the 20<sup>th</sup> that damage might be associated with a blast not at the immediate time but in a period around the days immediately preceding it. I note that there is no precise evidence as to when the arm fell off only that it was noticed and that Mr Carrick received a report of it on the 20<sup>th</sup>.
63. Evidence in relation to blast records at Bootu Creek was given by a witness called by the defendant, Mr Paul McHugh. Mr McHugh had been asked to

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<sup>16</sup> Contained in P2

inspect the records as to any blasting on the 18<sup>th</sup> or 19<sup>th</sup> of March. He said he could only find records in relation to the 19<sup>th</sup> (which were produced) but these related to the Chugga North mine. There were none for those dates for the Masai Pit. However Mr McHugh did not check whether any of the sequentially numbered reports were missing and, as he was not the person responsible for filing of the reports at the time, could not say whether all blast records were filed.

64. No one has given evidence that they saw the instant when the horizontal arm fell off. It appears to have been noticed by someone, though not Mr Carrick who was simply informed of it, sometime on the afternoon of the 20<sup>th</sup>.
65. There is in my view only two possibilities as to how the arm was destroyed. First, that as the charge alleges it fell off as a result of the mining activity, including blasting. Alternatively, it fell off as a natural result of its age and fragility and would have done so on or about 20 March absent any mining activity. In other words the loss of the horizontal arm at a time when mining activity was occurring in close proximity was merely coincidental.
66. In my view there is a multiplicity of factors that point to the former. The evidence is that the rock formation was observed to be fragile and cracked but there was no evidence to suggest that it was in imminent danger of falling off from natural deterioration. The concern about the fragility expressed by those involved in the mining was directed at the impact that the mining activity might have on that fragility. It appears to have stood many hundreds of thousands of years.<sup>17</sup> Although there was evidence of heavy rains that season there is also evidence<sup>18</sup> of other seasons dating back to 1946 of substantial rainfall across the wet season months, in some cases higher than in the 2010/2011 wet season rains. In any event there is no evidence that heavy rains might have had an effect that would cause the

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<sup>17</sup> The Coffey Mining report [4.1.1] notes that the rocks of the Bootu formation are paleoproterozoic age Ex P15

<sup>18</sup> [P26]

horizontal arm to fall off. By contrast, the evidence acknowledges that ground soaking was something that might enhance the shock wave effects of the blasting.

67. The concerns expressed by the Defendant that the horizontal arm might be damaged were directly related to the impact of vibrations from blasting activities. Blasting commenced in early March and although the precise date is not clear, it is at the most less than 3 weeks before the arm fell off. There was large scale paddock blasting in the Massai Pit every few days so that the mining progressed very quickly from the North to the South to a point where the crest was to be established around the bull-nose. Even if it were accepted that the blasting had moved from paddock blasting to the more controlled methods described by Mr Carrick there is no evidence to suggest that these methods were foolproof in terms of protecting the Site. In any event the evidence favours the continuation of paddock blasting in the Pit even if it were not right up to the crest for establishment of the bull nose. There may be some uncertainty around the date of the last blast before the arm was seen to have fallen off in pieces but the evidence of Mr Clark is that the effects of a blast can continue over a period of around 2 days.
68. In my view the irresistible inference to be drawn from all the evidence is that the horizontal arm fell from the pillar that was part of the Sacred Site as a result of the blasting of the Massai Pit from 1 March to 19 March. The alternative hypothesis is that it fell off as a result of weathering over time. In my view there is nothing in the evidence that would support that as a reasonable hypothesis.
69. I am satisfied beyond a reasonable doubt the defendant caused the Sacred Site to be desecrated by causing the loss of the horizontal arm by blasting in the Pit.



**Did the Defendant foresee that the Site might be desecrated by the mining activity?**

70. The complainant does not assert that the defendant intended to desecrate the Sacred Site. The issue is whether desecration was foreseeable by the defendant as a possible consequence of its conduct.
71. In my view the evidence is clear that the defendant did not regard damage to the Site as a vague and remote possibility arising out of the design of the pit which would take the pit crest to close proximity of the Sacred Site.<sup>19</sup> Mr Ludeke, the general manager of the defendant, had met with “two” traditional owners and an officer of the NLC to discuss the pit design options and at that meeting identified that one of the rocks looked cracked and very fragile. Mr Carrick appreciated that the pit design and blasting did present the possibility of damage as a whole to the Site. He said “Yes, it was a brilliant feature [*the horizontal arm*] and there got to a point, where if you got too close, you were just going to destroy it, if you kept basically using sledge hammer tactics”. Damage to the Site particularly the horizontal arm feature was therefore recognised by the mine manager and the general manager as a possible consequence of the mining activities, including pit design and blasting to open the Pit.
72. In my view having identified the possibility of damage to the Site this should and would have carried with it, by the very nature of the object they were dealing with, recognition of the possibility that the damage caused might diminish or destroy the sacredness of the Site or interfere with the spiritual significance of the Site. This was not just a geological feature of the landscape but a registered **Sacred** Site. Damage to it would carry a risk with respect to its sacred nature. This is particularly so with respect to the horizontal arm because it was the significant identifying feature of the Site.

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<sup>19</sup> The Photos taken by Gareth Lewis on 9 September 2011[P2] particularly the aerial view [P16] and Peter Waggitt on 11 October [P38] provide a graphic illustration of the isolation of the Site by the Pit and road created behind it.

Any assertion that the idea that damage to the Site was not recognised as carrying the possibility of interfering with its sacredness would in my view amount to wilful blindness. The defendant was well aware and had gained authority for works under a legislative system for the protection of Sacred Sites. It would simply be illogical to therefore not appreciate that preservation of the sacredness and spiritual significance of Sites was central to the system of protection.

**Would an ordinary mining company having such foresight proceeded with that conduct.**

73. The defendant company had been granted an authority certificate in 2004 to, *inter alia*, develop a manganese mine including open cut pits on a mineral lease that included Sacred Sites identified in the certificate. The authority was given under conditions. One of those conditions, not to enter or damage Sacred Site 5760-21, has been mentioned already. The authority also was given on condition that “the applicant shall ensure any agent, contractor or employee is aware of the conditions of this Certificate and the obligations of all persons (who enter on or carry out works or use land on which there is a Sacred Site) under Part IV of the *Northern Territory Aboriginal Sacred Sites Act 1989*.” Part IV of the Act provides for the offences, penalties and procedures under the Act including the offence of desecration. The defendant was obligated to ensure that all those involved in the mining activity were aware that the Site could not be desecrated.
74. With that knowledge and obligation in mind the defendant proceeded to develop a plan for the Masai Pit that they knew presented a risk of damage to the Sacred Site, including the potential for destruction in that creation by blasting of the bull-nose around it that involved not just the steeper batter angle that is not relevant to this charge, but taking the pit crest to close proximity at the north and south ends of the Site which by necessity would involve blasting in some form or another. The evidence discloses that the

defendant company made decisions that involved the Sacred Site that favoured business and profit over the obligations they had under the authority certificate.

75. In my view, an ordinary mining company, knowing its obligation under the authority certificate and knowing that a risk to the Sacred Site arose from the plan proposed, knowing of the fragility of the horizontal arm, and appreciating that damage might interfere with or damage the spiritual significance of the Site, would not have proceeded with the conduct.
76. I am satisfied beyond a reasonable doubt that the defendant company is guilty of count 1.

### **Count 3**

77. Count 3 is a further charge of desecration of the same Sacred Site between 10 September 2011 and 30 September 2011.
78. The allegation is that there was further dislodgement and slippage of part of the soil, rock and vegetation comprising the Site into the mine pit.
79. This count is put differently from Count 1 in that the desecration is said to be an insult to the sacred nature of the Site and a treating of the sacred nature of the Site with contempt by continuing to conduct mining operations and failing to buttress the Site after the major slippage of the Site into the Pit in July.
80. There are a number of evidentiary issues with respect to this count. First, there does not seem to be direct evidence of further slippage into the Mine Pit after 10 September 2011. Evidence of further widening of cracks through the rocky outcrop was given but it was not clear whether these went back into the Sacred Site itself or were occurring in the parts of the outcrop not part of the Site. Even if I were satisfied that there was further damage through the Site the evidence does not point as to whether this arose as a

result of ongoing mining activities or as a result of the stability of the Site being undermined by the July slippage.

81. Secondly, given my finding as to what is required for proof of desecration (intention or foresight of diminishment or destruction of the sacredness or spiritual nature of a Site), insult or contempt of a Sacred Site is not sufficient for proof of the offence of desecration, unless it were to involve some act of defilement or profanity.
82. Finally, even if I had taken a view that desecration could be made out by insult or contempt, in my view that would not be made out on the facts in relation to this period of time. The evidence of communications between the company and the NLC and the AAPA show that the company was anxious to take remedial works to buttress but were being told not to do so until they had approval and there seems to me to have been considerable delay in giving that approval.
83. I am not satisfied that the defendant company is guilty of count 3.

Dated this 2<sup>nd</sup> day of August 2013



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**Sue Oliver**  
STIPENDIARY MAGISTRATE