

Environmental crime results in bat research funding

Tim Moore (Judge of the NSW Land and Environment Court
and ACKMA Life Member)

On 21 April 2021, the New South Wales Environment Protection Authority (the EPA) commenced proceedings in the NSW Land and Environment Court to prosecute the Forestry Corporation of NSW for three charges alleging that, during the course of timber harvesting activities in April/May 2019 in the Dampier State Forest on the NSW South Coast, the Corporation committed three breaches of the *Forestry Act 2012* (NSW). The three breaches arose from the failure of logging contractors operating on behalf of the Corporation to mark out accurately and protect an exclusion zone in the vicinity of a disused mine shaft. The mine shaft was a potential roost for the Eastern Horseshoe Bats and the Corporation's operating license required it to ensure that logging machinery was not to operate within a mandated exclusion area around such potential bat habitat locations and that no tree felling was to take place within such exclusion areas.

The EPA and the Corporation reached agreement on a statement of facts setting out, in detail, the facts concerning the Corporation's offending conduct. They also, subsequently, agreed on the terms of a supplementary statement of facts addressing the question of environmental harm caused by the Corporation's offending conduct. These two documents are reproduced in full as part of my judgement. For the purposes of this short summary, it is sufficient to note that I was required to assess, in general descriptive terms, where in the range of seriousness of potential offending conduct that a breach of the relevant statutory provision might fall, I concluded that the three offences should be regarded as being toward the low end of the low range of such offences.

As an annexure to my judgement, I reproduced one of the photographs forming part of the evidence in the proceedings. It is a photograph of the entry to the disused mine shaft at the centre of the proceedings. A copy of that image is reproduced below.



On insert, the Corporation pleaded guilty to the three offences with which it had been charged. In December 2021, a sentencing hearing was held to determine what would be the appropriate penalties to impose on the Corporation for its offending conduct. I was assigned by the Court's Chief Judge to conduct that hearing and determine the penalties to be imposed.

On 23 June 2022, I published my decision. A copy of the full text of my judgement, [Environment Protection Authority v Forestry Corporation of NSW](#) [2022] NSWLEC 75, can be read on the New South Wales Caselaw website. The full text of the judgement explains the statutory reasoning process I was obliged to follow and the various factors I was required to consider as part of what is known as the "instinctive synthesis" process for sentencing for criminal offences.

The legislation requiring consideration in the sentencing process was the *Biosecurity Conservation Act 2016*. This legislation established the maximum penalties which the Corporation potentially faced (\$2 million for each offence) depending on the assessment of the seriousness of the Corporation's breaches. This Act also contained provisions for the making of orders of a remedial nature reflecting responses to such offending conduct. In this instance, three aspects of the additional order making power were engaged.

First, the EPA proposed that portion of the fine otherwise appropriate to be imposed should be diverted to fund a research project to be undertaken by the Australasian Bat Society Inc. This research project is directed to understanding the impact that the 2019/20 major bushfires in this region of NSW had had on bat populations. The project funding proposed was \$15,000 (but this amount was scalable to be able to support a wider project scope if I considered that this was appropriate). Funding the proposed research project was not opposed by the Corporation.

As noted above, the research project proposed by the Australasian Bat Society was scalable. Given the size of the financial penalty I proposed, in total, to impose on the Corporation across all three offences, I determined that it was appropriate to increase the amount to be allocated to the bat research project to \$45,000.

Because of the Corporation had pleaded guilty at the earliest opportunity, it was entitled to be given a 25% discount on the penalties that would otherwise have been appropriate to be imposed. Similarly, because all three offences all formed part of a single course of offending conduct, the final overall penalty is required to take that into account by applying what lawyers call “totality and accumulation of sentences” to reflect this fact. The consequence of these factors meant that the appropriate overall starting penalty of \$360,000 was reduced to \$230,000. Of this total, \$45,000 was to be applied to the bat research project leaving the balance of \$185,000 to be imposed as fines.

The second aspect of the power to make additional orders was raised by me during the course of the sentencing hearing, this being the power to mandate that relevant employees and contractors to the Corporation should be required to undertake mandatory training in the use of the iPad based mapping application (known as MapApp) used by the Corporation to provide GPS sourced information to operators in the forest as to where and what exclusion zones were required to be marked for environmental protection. In response to my proposal for such training, the EPA and the Corporation reached agreement, after the sentencing hearing, on orders to be made to mandate such training. Those orders have been made.

The third aspect of the additional order making power that was engaged was that which enables the Court to order that the publication of media notices drawing attention to the convictions and the outcomes of the prosecutions. This publication power is regularly invoked by the Court when a defendant is convicted of environmental crimes. In this instance, the Corporation was ordered to place and pay for such publication notices in the *Australian Financial Review*, two newspapers circulating in the region where the Dampier State Forest is located and two timber industry trade publications. The primary purpose of such publication requirements is to act as a warning to others of the potential consequences of committing such offending conduct in the future.

The EPA also requested that I order that half of the fine be paid to the EPA to support ongoing environmental law enforcement activities. I made such an order so that \$92,500 of the fine was to be paid to the EPA for those activities.



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