HEAVIER PENALTIES NEEDED FOR FORESTRY OFFENCES

by Natasha Hammond-Deakin* and Evan B Brandes**

Introduction

In June 2011 in the 'Smoky Mouse case',[1] the Land and Environment Court of NSW ordered Forests NSW[2] to pay the NSW Office of Environment and Heritage $5 600 for project work, plus $19 000 legal costs, for unlawfully burning the habitat of the endangered Smoky Mouse (*Pseudomys fumeus*) in 2009 within an exclusion zone in the Nullica State Forest, near Eden. The burning constituted a breach of a condition of a threatened species licence under the *Threatened Species Conservation Act* 1995 (the TSCA) and an offence against the *National Parks and Wildlife Act* 1974 (the NPWA). The Smoky Mouse was listed as endangered under both the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) and the *Threatened Species Conservation Act 1995* (NSW) (TSC Act) at the time of the offence. In September 2010 the Smoky Mouse was listed as critically endangered under the TSC Act for reasons not related to the offence.[3]

Conservationists, who have lobbied for many years for an end to the logging of native forests, welcomed the prosecution, but many were disappointed by the penalty payable. Forests NSW had been prosecuted eight times for pollution-related offences but many hundreds of breaches of forestry regulations have been recorded by conservationists over the decade since NSW signed four Regional Forestry Agreements (RFAs) with the Commonwealth.[4]

This article examines the determination by the NSW Land and Environment Court in the Smoky Mouse case, and compares the penalties and fines for breaches of similar offences in Australia and the United States (US). It demonstrates that penalties under the *National Parks and Wildlife Act 1974* (NSW) (NPW Act) are insignificant when compared with those under other Australian environmental legislation. The same is true when compared with penalties for offences against a threatened species and its habitat in the US. It argues from a comparative standpoint that heavier fines for breaches of the NPW Act should be imposed on offenders, and that legislative change is required to increase the maximum penalties for breaches of the law.

NSW legislative regime

Forests NSW conducts forestry operations in the Eden region under a NSW Forest Agreement and Integrated Forest Operations Approval (IFOA) made under the *Forestry and National Parks Estate Act 1998* (NSW) (the FNPEA). That Act establishes the framework for forest policy and logging operations in New South Wales, for Ministerial agreements and a system of integrated approvals for future forestry operations (IFOAs), and for transfers of land to the national park estate or Aboriginal ownership. There are currently four NSW Forest Agreements covering New South Wales, for the Eden,

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1 *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* (2011) NSWLEC 102.

2 the Forestry Commission of New South Wales.

3 *Director-General, Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [16]

4 N Hammond-Deakin and S Higginson, *If a Tree Falls: Compliance Failures in the Public Forests of New South Wales*, (Environmental Defender's Office (NSW) Ltd, 2011).

Upper North East and Lower North East regions, each created in 1999, and the Southern Region NSW Forest Agreement created in 2002.[5]

Under the FNPEA, regional forest assessments are required to be carried out by or on behalf of the Natural Resources Commission unless the parties to the agreement accept other assessments as relevant.[6] Assessments profile an area's economic, social, environmental and heritage values.[7]

The FNPEA makes some provision for public participation in the making of forest agreements other than those for Eden, the Lower North East and the Upper North East regions,[8] and for participation when agreements are amended or revoked.[9] In practice however, New South Wales governments have signed numerous agreements with little prior consultation or negotiations taking place amongst relevant stakeholders. Additionally, commentators suggest that the timber industry has been favoured in the agreements.[10] In 2001 the then Federal Minister for Forestry and Conservation is said to have described the Upper North East Forest Agreement as a 'strong result for the NSW timber industry'.[11]

As noted above, the FNPEA provides for IFOAs. IFOAs describe forestry operations and detail the operating conditions for each of the NSW Forest Agreements. IFOAs integrate the regulatory regimes for environmental planning and assessment for the protection of the environment and threatened species conservation after forestry assessments and other environmental studies have been conducted.[12] IFOAs can contains the terms and conditions of licences that could otherwise have been issued under the *Protection of Environment Operations Act* 1997 (NSW), the *TSC Act* and the *Fisheries Management Act* 1994 (NSW).[13] Anyone conducting forestry operations under an IFOA is taken to hold a licence under these Acts. IFOA licences can also contain exemptions as if they had been issued under the relevant environmental statutes.

The FNPEA exempts forestry operations in IFOA regions from environmental impact assessment procedures under various parts of the *Environmental Planning and Assessment Act 1979* (NSW).[14]

Section 40 of the FNPEA excludes members of the public who are not relevant government officials from taking legal proceedings to enforce a forestry agreement or IFOA (including a breach of the terms of a licence issued under an IFOR), or for breach of a statutory provision affecting a forestry operation.[15] Only a relevant Minister involved in granting the approval of the IFOA or a licence, the Environment Protection Authority or a member of the staff of the Authority, or a government agency or any government official engaged in the execution or administration of a relevant Act, can bring civil proceedings in the Land and Environment Court to remedy or restrain a breach of a condition of an IFOA[16] or a licence set out in an IFOA.[17]

Under the FNPEA, Ministers and officers of the New South Wales Government are responsible for enforcing forestry rules and regulations. The exclusion of third party enforcement proceedings is a significant barrier to the proper enforcement of the conditions of IFOAs and environmental protection licences.

5 NSW Government Office of Environment and Heritage, *NSW Forest Agreements and IFOAs* (2011) <http://www.environment.nsw.gov.au/forestagreements/agreementsIFOAs.htm>.
6 *Forestry and National Parks Estate Act 1998* (NSW) s 15.
7 Jane Tribe, 'The Law of the Jungles: Regional Forest Agreements' (1998) 15(2) *Environmental and Planning Law Journal* 136, 137.
8 *Forestry and National Parks Estate Act 1998* (NSW) s 17.
9 *Forestry and National Parks Estate Act 1998* (NSW) s 19.
10 Tony Foley, 'Negotiation Resource Agreements: Lessons from ILUAs' (2002) 19(4) *Environmental and Planning Law Journal* 267, 273, quoting D Pugh, 'Establishing a *CARR* Reserve System: How Carr Sold out the North-East Forests'.
11 Ibid quoting Mr Wilson Tuckey, Press Release 24 April 2001.
12 *Forestry and National Parks Estate Act 1998* (NSW) s 25.
13 Ibid ss 33, 34.
14 Ibid s 36.
15 Ibid s 40(2)(3).
16 Ibid s 32(2).
17 Ibid ss 35, 40(3).

In the Smoky Mouse case, Forests NSW pleaded guilty to an offence under s 175(1)(a) of the NPWA. The offence was in contravention of a condition of the threatened species licence under Part 6 of the TSC Act, which is attached to the Eden IFOA.[18] Forests NSW admitted that it carried out bush fire hazard reduction burning in the Nullica State Forest, near Eden, within an exclusion zone established to protect the Smoky Mouse. The burning constituted a breach of condition 5.1(a) of the threatened species licence.[19]

The court observed that the Smoky Mouse was once widespread in southeastern NSW and in parts of Victoria, but since European settlement, this range has declined to a limited number of sites throughout western, southern and eastern Victoria, southeast New South Wales and the Australian Capital Territory.[20] Because the mouse's population and distribution has been reduced to a critical level, it is considered endangered nationally.[21] Additionally, in New South Wales, the Smoky Mouse is now listed as critically endangered under Schedule 1A of the TSC Act.[22]

The terms of the Eden IFOA commenced in January 2000. The Eden IFOA included conditions that excluded forestry activity within 100 hectares of the Smoky Mouse's habitat.[23] In 2006, the conditions in the Eden IFOA designed to protect the Smoky Mouse were amended to include a prohibition on specified forestry activities, including timber harvesting, road construction and hazard reduction burning (conditions 5.1 and 6.8A) in key Smoky Mouse habitats within the Nullica State Forest. These key Smoky Mouse habitats are 'Smoky Mouse exclusion zones'.[24] In June 2008, the Eden IFOA was amended again to indefinitely exclude identified forest activity from the Smoky Mouse exclusion zones and to give effect to the Smoky Mouse Species Management Plan ('Smoky Mouse SMP') which was intended to ensure the ongoing presence of the Smoky Mouse in the relevant areas.[25]

The Smoky Mouse SMP contained an action item to facilitate a small-scale hazard reduction burn in a Smoky Mouse exclusion zone and an action item to develop a Smoky Mouse fire management plan. Each action item required appropriate planning, comprehensive pre-burn monitoring and extensive long-term research on the impacts of fire on the Smoky Mouse. However, Forests NSW never developed the Smoky Mouse fire management plan, nor were the required approvals to undertake a burn ever granted to Forests NSW.

Condition 5.1 of the threatened species licence attached to the Eden IFOA provides that specified forestry activities, like bush fire hazard reduction work, are prohibited in the exclusion zones.[26] On 8 July 2008 Forests NSW approved a Hazard Reduction Burn Plan ('the burn plan') for a logged coupe in compartment 717 of the Nullica State Forest.[27] The burn plan included a map, and a reference to the Smoky Mouse exclusion zone in the legend. However, no other references to the Smoky Mouse exclusion zone were included in the burn plan. The area of the Smoky Mouse exclusion zone was not clearly delineated because the zone was the same colour as the background colour of the map.[28]

Due to a wildfire and associated burning activities in late January and early February 2009 within a section adjacent to coupe 717 of Nullica State Forest, the presence of logging slash in the logged coupe of compartment 717 was a concern. As a result, Forests NSW prioritised the area for hazard reduction burning.[29] On 19 March 2009 officers of the Department of Environment, Climate Change and Water of NSW (DECCW) and Forests NSW met to discuss the progress of the Smoky Mouse SMP. Both parties agreed that no prescribed burning would occur within the Smoky Mouse exclusion zones until fire management plans had been developed jointly.[30]

18 *Director-General, Department of Environment, Climate Change and Water* (2011) NSWLEC 102
19 Ibid [4].
20 Foundation for Australia's Most Endangered Species Inc., '*Endangered Wildlife Support by Fame…*' (2011) <http://www.fame.org.au/endangered_wildlife.html>
21 *Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [15].
22 Ibid. See also *Threatened Species Conservation Act 1995* (NSW) Sch 1A.
23 *Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [18].
24 Ibid [20].
25 Ibid [22]–[23].
26 Ibid [25].
27 Ibid [29].
28 Ibid [30]
29 Ibid [27].
30 Ibid [28].

On 29 April 2009 a hazard reduction burn occurred. Its lead operator was unaware of the presence of the Smoky Mouse exclusion zone[31] and measures were not taken to prevent the spread of the burn into that zone. Forests NSW failed to provide information about the exclusion zone to the burn employees. As a result, the low intensity hazard reduction burn continued for two weeks largely unsupervised.[32]

On 14 May 2009, DECCW officers observed an active fire within the Smoky Mouse exclusion zone in compartment 717 of the Nullica State Forest and advised Forests NSW, after which inspections occurred.[33] By 21 May 2009 the fire had burned over 90% of the exclusion zone before extinguishing itself.[34]

Forests NSW conducted and completed a full investigation and review of its procedures.[35] This report concluded that the burn spread into the Smoky Mouse exclusion zone primarily because the burn supervisor failed to identify the existence of the exclusion zone from the burn plan map.[36] As a result, Forests NSW employees did not take steps to enforce the boundary of the burn.[37] Additionally, the report found that:

- the burn planning process did not involve consultation with key harvesting and ecology staff
- the handover of the burn plan from the planner to the burn supervisor did not involve a formal briefing that would highlight potential issues, such as the proximity of an exclusion area
- at the time the harvest plan for compartment 717 was written, the harvest planners did not routinely include a direction for logging crews to construct a bare earth break along the edge of their operations to ensure that the fire not leave the logged area
- generally post-logging burns extinguish themselves as they reach the edge of the logged areas due to significant moisture differentials between logged and unlogged areas. However, in the present instance, the differential was not sufficient to achieve this outcome, with the fire taking several days to reach the boundary of coupes 1 and 2.[38]

The penalties imposed

The offences of allowing the hazard reduction burn to spread into the Smoky Mouse Exclusion zone fall under ss 175, 175A and 175B of the NPWA. The maximum penalty under under s 175 is 200 penalty units in the case of a corporation (or $22 000 in 2011).[39]

Pepper J stated:

> …the penalty for an offence against s 175 of the NPWA is exceedingly low compared to penalties for other environmental offences, particularly given the seriousness with which the community has come to view environmental offences. However, any increase in the penalty is a matter for Parliament and cannot affect the outcome of these proceedings…[40]

Pepper J reviewed applicable sentencing principles and noted that in environmental matters the court must consider the extent of the harm caused or likely to be caused and the significance of the endangered species that was harmed

31 Ibid [31]–[33]
32 Ibid.
33 Ibid [34].
34 Ibid [38].
35 Ibid [42].
36 Ibid [43].
37 Ibid
38 Ibid [44].
39 *National Parks and Wildlife Act 1974* (NSW) *s 175B*
40 *Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [64]

or was likely to be harmed by the offence.[41] Her honour assessed the environmental harm perpetrated by the Forestry Commission, the foreseeability of the risk of harm, the practical measures taken by Forests NSW to prevent the harm, Forests NSW's control over the cause of the harm and whether there was any specific intent of Forests NSW to destroy the habitat of the Smoky Mouse. In relation to these matters, Pepper J concluded that:

> [h]aving regard to the nature of the offence; the low maximum penalty; the extent of likely harm to the environment; the practical measures able to have been taken to prevent the harm; the failure of the Forestry Commission to control, abate or mitigate the harm; the reasonable foreseeability of harm likely to be caused by the commission of the offence; the extent to which the Forestry Commission, had control over the causes giving rise to the offence, and the absence of any deliberate or commercial motive in committing the offence, I find that the offence committed is of low to moderate objective gravity.[42]

In considering the appropriate penalty to impose, the court considered the mitigating or aggravating factors specific to Forests NSW.[43] In assessing the aggregating factors, the court reviewed the eight prior offences of Forests NSW under environmental legislation which included:

- the polluting of waters in 1992 resulting from logging operations and road construction in Oakes State Forest near Dorrigo, contrary to s 16 of the *Clean Waters Act 1970* (NSW). The offence was proven but no conviction was entered against Forests NSW[44]
- its 1995 conviction for three breaches of conditions of pollution control licence in Nullum State Forest, contrary to s 17D of the *Pollution Control Act 1970* (NSW). These offences included the failure to construct a road drainage structure properly; the felling of a tree into a filter strip; and the failure to install sediment traps. Forests NSW was fined $25 000 for these offences[45]
- its 1996 conviction of three breaches of conditions of Forests NSW's pollution control licence in Colymea State Forest, contrary to s 17D of the *Pollution Control Act 1970* (NSW). These offences included two counts of failing to properly construct gutters of a logging road and placing soil into a filter strip. Forests NSW was fined $30 000[46]
- its 2003 conviction of another offence of polluting waters. This offence occurred in Chichester State Forest and involved soil and sediment from a collapsed portion of a dirt road being washed into a watercourse, contrary to s 120 of the *Protection of the Environment Operations Act 1997* (NSW). Forests NSW was fined $30 000.[47]

The DECCW argued that Forests NSW's prior criminality should be considered an aggravating factor.[48] Forests NSW countered that very little weight should be attributed to its prior offences because they were all pollution related, had little similarity to the current offences and the passage of time had rendered the prior convictions stale.[49] Pepper J however stated that the number of convictions suggested either a pattern of continuing disobedience towards environmental laws or, at the very least, a cavalier attitude toward compliance with such laws.[50] Pepper J concluded Forests NSW had displayed a 'reckless attitude' and considered its prior criminality to be an aggravating factor to be taken into account in assessing the penalty.[51]

Pepper J proposed that the penalty should serve as both general and specific deterrents to others who might commit similar offences against the NPWA and should serve to encourage a corporation such as Forests NSW to adopt preventative

41 Ibid [65] citing *Bentley v BGP Properties* (2006) NSWLEC 34 [179]; *Plath v Hunter Valley Property Management Limit* (2010) NSWLEC 264 [14]; *Director General, National Parks and Wildlife Service v Wilkinson* (2002) NSWLWEC 171[91] and *National Parks and Wildlife Act 1974* (NSW) s 194(1)(a) and (b).
42 *Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [90] (Pepper J).
43 Ibid [91] citing *Crimes Sentencing Procedure Act 1999* (Cth) s 21A(2), (3).
44 Ibid [93].
45 Ibid [94].
46 Ibid [95].
47 Ibid [96].
48 Ibid [97].
49 Ibid [98].
50 Ibid [100].
51 Ibid [103].

procedures to avoid causing harm to the environment in the future.[52] Her honour found that the deterrent effect of a fine should ensure that companies doing business near a threatened species habitat do not damage those species, and to ensure that the cost of not protecting threatened species is not absorbed as an ordinary cost of doing business.[53] Specifically, given the prior history of the Forest Commission, the court found that there should be a specific deterrence component of the penalty.[54]

Pepper J concluded that an appropriate fine would be $8 000 discounted by 30% taking into consideration all the mitigating factors and the aggravating factor of Forests NSW, resulting in a total penalty of $5 600.[55] At the request of the prosecutor Justice Pepper did not levy the fine but ordered Forests NSW to pay an equivalent amount to the Office of Environment and Heritage, Department of Premier and Cabinet, for the purpose of a specified environmental project, namely, to engage a consultant or contractor to undertake monitoring and analysis of the Smoky Mouse habitat at various sites in the South East Forests National Park, as set out in the Smoky Mouse SMP in the Eden Region starting September 2011 for three years.[56] She awarded a separate $19 000 for DECCW's legal fees.

Comparative penalties for similar offences in NSW

Comparatively, whilst the maximum penalty for breaching a condition of a licence contained in the IFOA is $22 000,[57] the maximum penalty for clearing native vegetation or authorising the clearing of native vegetation under the *Native Vegetation Act 2003* (NSW), not in accordance with a development consent or a property vegetation plan, is to up to $1 100 000, in addition to a daily penalty of up to $110 000.[58] As a result, the maximum penalty for breaching a condition contained in an IFOA is one-fifth the daily amount for clearing native vegetation.

Comparative penalties for similar offences under the EPBC Act

The EPBC Act provides a regime for the protection of eight matters of national environmental significance, including world heritage properties, wetlands of international importance, listed threatened species and ecological communities and migratory species. Actions that have, or are likely to have, a significant impact on a matter of national environmental significance require approval from the Australian Government Minister for Sustainability, Environment, Water, Population and Communities.[59]A person who takes an action that is likely to have a significant impact on a matter of national environmental significance, without first obtaining approval, can be liable for a civil penalty of up to $550 000 for an individual and $5.5m for a body corporate,[60] or for a criminal penalty of seven years imprisonment and/or a penalty of $46 200.[61] Therefore, an action such as clearing or otherwise damaging a forest that comprises an ecological community listed under the EPBC Act or provides habitat for a listed threatened or migratory species without the requisite consent is potentially subject to very high penalties.[62] In *Minister for Environment Heritage and the Arts v Lamattina* [2009] FCA 753 the first respondent, a family owned primary producer operating on a property known as Acacia Downs, was found to have caused the clearance of at least 170 trees comprising native vegetation and, thereby, took an action likely to have a significant impact on a listed threatened species included in the endangered category, namely the South-eastern

52 Ibid [121] citing *Plath v Hunter Valley Property Management Pty Limited* (2010) NSWLEC 309 [34]; *Bentley v BGP Properties Pty Ltd* (2006) NSWLEC 34; *Axer Pty Ltd v Environment Protection Authority* (1993) 113 LGERA 357.
53 Ibid [124] citing *Bentley* [141], [211].
54 Ibid [125].
55 Ibid [128].
56 Ibid [130].
57 *National Parks and Wildlife Act 1974* (NSW) s. 175, 175A and 175B delineates the penalties for an individual, directors or managers of a corporation, or a corporation
58 *Native Vegetation Act 2003* (NSW) s 12(b). Maximum Penalties are provided under the *Environmental Planning and Assessment Act 1979* (NSW) s 126.
59 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) Part 3, and Chapter 4, Parts 7 and 9.
60 *Ibid*, for example, s 18 in respect of threatened species.
61 *Ibid*, for example, s 18A(3) in respect of threatened species.
62 Note that forestry activities that are carried out in accordance with a regional forestry agreement are exempt from Commonwealth oversight under the EPBC Act. See EPBC Act s 38.

Red-tailed Black Cockatoo (*Cayptorhynchus banksii graptogyne*), in contravention of s 18(3) of the EPBC Act. The Court ordered the first respondent to pay the Commonwealth a pecuniary penalty of $220 000 and the Minister's costs of the application were fixed at $22 500.

Comparative penalties in United States

In the United States the purpose of the *Endangered Species Act 1973*[63] is to protect species and the ecosystems upon which they depend.[64] In addition to the ability to seek injunctions,[65] the Endangered Species Act imposes criminal penalties and civil damages. Criminal penalties are up a maximum of $100 000 per violation for an individual and $200 000 for a corporation.[66] Civil suits may impose up to $25 000 per violation and the Act allows legal costs to be awarded at the court's discretion.[67]

In addition, any person who knowingly violates the Fish and Wildlife Service regulations[68] prohibiting the taking of a threatened species of fish or wildlife, is subject to a civil penalty of up to $12 000 per violation[69] and criminal penalties of a fine or imprisonment.[70] An offender can escape civil or criminal penalties by demonstrating 'a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species'.[71]

The Endangered Species Act prohibits the 'taking' of any endangered species of fish or wildlife by any person or agency.[72] The Endangered Species Act defines 'take' to mean 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct'.[73] This broad definition does not necessitate that an animal be killed. The Endangered Species Act's definition of 'take' also does not, on its face, require that a person know, or have reason to know, that their conduct will 'take' a listed endangered or threatened species or wildlife. Moreover, the US Supreme Court ruled in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* that the harming of a species that constitutes a 'taking' under the Endangered Species Act also includes 'significant habitat modification or degradation that actually kills or injures wildlife'.[74]

In *Babbitt*, the Secretary of Interior, Bruce Babbitt, redefined the word 'harm' in the Endangered Species Act regulations to include 'not only direct physical injury, but also injury caused by impairment of essential behavioral patterns via habitat modifications that can have significant and permanent effects on a listed species'.[75] Plaintiffs challenged the Secretary's

63 16 USC §§ 1531-44 (2002).
64 16 USC § 1531(b) (2002). See also *California State Grange v. National Marine Fisheries Service*, F Supp 2d 111 (ED Cal, 2008), corrected, affirmed in part, 619 F 3d 1024 (9th Cir, 2010); *Pacific Rivers Council v. Thomas*, 936 F Supp 738 (D Idaho, 1996).
65 16 USC §1536(a)(2). Federal agencies must ''insure' that [agency] actions are 'not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species'.' *Defenders of Wildlife v. Martin*, 454 F Supp 2d 1085, 1095 (ED Wash, 2006) quoting *Defenders of Wildlife v. EPA*, 420 F 3d 946, 950-91 (9th Cir, 2005).
66 16 USC §1540(b)(1). The 1984 Sentencing Reform Act and the 1987 Criminal Fines Improvement Act, 18 USC §§3359(a)(6), 3571(b), (e) (2006 & Supp. 1993), increased the maximum criminal penalties for each violation under the Endangered Species Act, to a $100,000 fine, one year imprisonment, or both, for an individual, and to a $200,000 fine for a corporation.
67 Ibid §1540(a)(1), (g)(4).
68 Wildlife and Fisheries, 50 CFR §17.31 (2005).
69 16 U.S.C. §1540(a)(1) (2002).
70 Ibid § 1540(b)(1) (2002).
71 Ibid § 1540(a)(3), (b)(3).
72 Ibid § 1538(a)(1)(B)-(C); 50 CFR §17.12; *Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F Supp 985 (D. Hawai'I, 1979), affirmed 639 F 2d 495 (9th Cir, 1981) (*Palila I)*; *Palila v. Hawaii Dept. of Land and Natural Resources*, 649 F Supp 1070 (D Hawai'i, 1986), affirmed 852 F 2d 1106 (9th Cir, 1988) (state action in maintaining feral sheep which significantly impaired essential behavioural patterns constituted 'harm' resulting in 'take' of the Palila, an endangered finch);
73 Ibid § 1532(19) (2002). Fish and Wildlife Service regulations also define 'take' in this manner.
74 *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* 515 US 687 (1995) (Stevens J).
75 *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108 (9th Cir, 1988), see also *Sweet Home Chapter of Communities v. Lujan*, 806 F Supp 279 (D DC, 1992); *Sweet Home Chapter of Communities v. Babbitt*, 1 F 3d 1 (DC Cir, 1993); *Sweet Home Chapter of Communities v. Babbitt*, 17 F 3d 1463 (DC Cir, 1994); *Sweet Home Chapter of Communities v. Babbitt*, 30 F.3d 190 (DC Cir, 1994).

harm regulation as 'contrary to the Endangered Species Act and void for vagueness.'[76] However, the Supreme Court affirmed the lower court's decisions and supported the Secretary of Interior's broad interpretation of the word 'take' and 'harm'. The Court ruled that the broad purpose of the Act was to protect endangered and threatened wildlife, and provisions authorizing the issuance of permits for otherwise prohibited takings incidental to otherwise lawful activities, established Congress's intent that 'take' applied broadly to cover indirect as well as purposeful actions.[77] Moreover, the Court found the Endangered Species Act places upon landowners a duty to avoid habitat alteration that would cause the effects Congress enacted the statute to avoid.

As a result of the *Babbitt* case, the harming or taking of species, in the US, can be realised through the modification or degradation of a listed species' habitat where it is shown that such habitat modification or degradation, indirectly or prospectively, will either kill or injure wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.[78] Thus, any action affecting a designated critical habitat is an offence if it might be expected to result in reduction in number or distribution of the species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable expansion or recovery of that species. [79]

Moreover, the US District Court for the Northern District of California In *Marbled Murrelet v. Pacific Lumber Co.*[80] enjoined logging activities pursuant to a timber harvest plan when the logging activities resulted in the destruction and degradation of habitat such that behavioural, breeding or nesting patterns would be disrupted. These types of disruptions constituted 'harm' under the Endangered Species Act.

Conclusions

In the *Smoky Mouse* case Forests NSW extensively harmed the critical habitat of the Smoky Mouse and the Land and Environment Court recognised this. Forests NSW had inspected the burn within the Smoky Mouse exclusion zone and confirmed the destruction of in excess of 90% of the zone.[81] If such an incident occurred in the US in breach of comparable legislation, the offender would likely face much greater penalties than provided for in the NPWA. A similar offence of harming habitat for a threatened species or an ecological community listed under the EPBC Act would also likely attract a much greater penalty, provided the offence did not fall within the Act's exemption of forestry activities that are carried out in accordance with a regional forestry agreement.[82]

Pepper J in the Smoky Mouse case noted that Forests NSW has repeatedly breached various environmental laws, and noted the 'exceedingly low' maximum penalties available to be imposed. In view of this case it would be timely for stricter fines for violators and offenders for breaches of the NPWA to be imposed. Stricter fines should be in line with, at the very least, the *Native Vegetation Act 2003* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW).

Higher fines would serve as a deterrent against forestry activities that may impact on an endangered species and their habitat. It would ensure that Forests NSW and other relevant parties have a stronger incentive to be much more accurate in delineating the boundaries for forestry activities and complying with the IFOA requirements designed to protect threatened flora and fauna species. Requiring Forests NSW to be more meticulous with its procedures will also

76 *Sweet Home*, 806 F Supp 279, 282. The district court found that the regulation 'is not impermissibly vague.' Ibid. It noted that the terms of the regulation 'clearly provide more than 'minimal guidelines' and are sufficiently clear to put a party on notice of prohibited conduct'. Ibid. The court substantiated this finding by noting that, 'the definition of 'harm' found at [50 CFR] §17.3 clearly limits prohibited conduct to that which 'actually kills or injures wildlife' … Furthermore, the regulations prohibit only '*significant* habitat modification or degradation', expressly defined as modification or degradation which 'actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering' …. Moreover, the regulations itself requires a finding that actual death or injury to a species has occurred. Ibid at 286.

77 Babbitt, 515 US 687*,* 703.

78 *San Carlos Apache Tribe v. U.S.*, 272 F Supp 2d 860 (D Ariz, 2003), affirmed 417 F 3d 1091 (9th Cir, 2005).

79 *Hill v. Tennessee Valley Authority*, 549 F 2d 1064 (6th Cir, 1977), certiorari granted 434 US 954, affirmed 437 US 153 (1978).

80 880 F Supp 1343 (ND Cal, 1995)

81 *Department of Environment, Climate Change and Water* (2011) NSWLEC 102 [18], [38].

82 *Ibid* s 38. There is a similar provision in the *Regional Forest Agreements Act 2002* (Cth), s 6(4).

encourage it to conform to its stated mission to, among other things, 'take all practical steps to ensure the preservation and enhancement of the quality of the environment'.[83]

The history of law breaking by Forests NSW suggests that it does not have a sufficient culture of compliance with environmental protection laws or, at worst, that it is reckless in its attitude towards environmental regulation. It is evident from the hundreds of breaches that have been reported in recent years that the current practice of using 'soft' enforcement tools, such as warnings and remediation orders, are an insufficient deterrent. An increase in penalties under the NPW Act to increase the maximum penalties, would create a stronger message of non-tolerance of Forests NSW's behaviour and culture, and perhaps drive it to take real steps to avoid future damage to the environment and endangered species.

83 Forests NSW (NSW), 'Annual Report 2009-10: Social, Environmental and Economic Performance' (Corporate Publications, October 2010) <http://www.dpi.nsw.gov.au/__data/assets/pdf_file/0009/366750/forests-nsw-annual-report-200910-complete.pdf>.