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The Parliament of the Commonwealth of Australia

# Advisory Report on the Illegal Logging Prohibition Bill 2011

Joint Standing Committee on Foreign Affairs, Defence and Trade

June 2012  
Canberra

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ISBN 978-0-642-79689-9 (Printed version)

ISBN 978-0-642-79690-5 (HTML version)

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## Membership of the Committee

Chair Mr Michael Danby MP

Deputy Chair Mrs Joanna Gash MP

Members	Senator Mark Bishop	Ms Gai Brodtmann MP
	Senator the Hon John Faulkner (from 30/09/10 to 14/02/11)	Hon Anthony Byrne MP (to 14/03/12)
	Senator David Fawcett (from 1/07/11)	Mr Nick Champion MP
	Senator the Hon Alan Ferguson (to 30/06/11)	Hon Laurie Ferguson, MP
	Senator Mark Furner	Hon Joel Fitzgibbon MP
	Senator Sarah Hanson-Young	Mr Steve Georganas MP (to 24/03/11)
	Senator the Hon David Johnston	Mr Steve Gibbons MP (to 7/02/12)
	Senator Scott Ludlam	Hon Alan Griffin MP
	Senator the Hon Ian Macdonald	Mr Harry Jenkins MP (from 7/02/12)
	Senator Anne McEwen (from 1/07/11)	Dr Dennis Jensen MP
	Senator Claire Moore	Hon Robert McClelland MP (from 14/03/12)
	Senator Kerry O'Brien (from 14/02/11 to 30/06/11)	Mrs Sophie Mirabella MP
	Senator Stephen Parry (from 1/07/11)	Hon John Murphy MP
	Senator Marise Payne	Mr Ken O'Dowd MP (from 25/10/10)
	Senator the Hon Ursula Stephens (from 1/07/11)	Ms Melissa Parke MP
	Senator Russell Trood (to 30/06/11)	Mr Stuart Robert MP
	Hon Dick Adams MP (from 24/03/11)	Hon Philip Ruddock MP
	Hon Julie Bishop MP	Ms Janelle Saffin MP
		Hon Bruce Scott MP
		Hon Dr Sharman Stone MP (from 25/10/10)
	Ms Maria Vamvakinou MP	





## Membership of the Trade Sub-Committee

**Chair** Ms Janelle Saffin MP

**Deputy Chair** Hon Bruce Scott MP

<b>Members</b>	Senator Scott Ludlam	Mrs Joanna Gash MP (ex officio)
	Senator the Hon Ian Macdonald	Mr Harry Jenkins MP
	Senator Stephen Parry	Mrs Sophie Mirabella MP
	Senator the Hon Ursula Stephens	Hon John Murphy MP
	Hon Dick Adams MP	Mr Ken O'Dowd MP
	Hon Julie Bishop MP	Ms Melissa Parke MP
	Mr Michael Danby MP (ex officio)	Hon Philip Ruddock MP
	Hon Joel Fitzgibbon MP	Hon Dr Sharman Stone MP







## Terms of reference

On 22 March 2012, the Illegal Logging Prohibition Bill 2011 was referred to the Committee by the Selection Committee of the House of Representatives.

The Selection Committee's report stated the following reason for referral:

Concern over the international implications of the bill which have been expressed by Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea in their submissions to the Senate Rural and Regional Affairs and Transport Legislation Committee inquiry.<sup>1</sup>

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1 House of Representatives Selection Committee, *Report No. 49, 22 March 2012*, p. 3.



## List of abbreviations

APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
DAFF	Department of Agriculture, Fisheries and Forestry
DFAT	Department of Foreign Affairs and Trade
EU	European Union
PNGFIA	Papua New Guinea Forest Industries Association
VPA	Voluntary Partnership Agreement
WTO	World Trade Organization



# List of recommendations

## 1 Illegal Logging Prohibition Bill 2011

### Recommendation 1

The Committee recommends that the Government continues to consult closely with the Governments of Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea and other relevant stakeholders on implementation of the bill and the development of subordinate legislation.

### Recommendation 2

The Committee recommends that the Government facilitate Malaysia and Papua New Guinea's representation on the Illegal Logging Working Group convened by the Department of Agriculture, Fisheries and Forestry.

### Recommendation 3

The Committee recommends that the *Illegal Logging Prohibition Bill 2011* be passed.



# Illegal Logging Prohibition Bill 2011

## Referral of the inquiry

- 1.1 The Illegal Logging Prohibition Bill 2011 (the bill) was referred to the Joint Standing Committee on Foreign Affairs, Defence and Trade for inquiry on 22 March 2012 by the House of Representatives Selection Committee.
- 1.2 The Selection Committee's report stated the following reason for referral:

Concern over the international implications of the bill which have been expressed by Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea in their submissions to the Senate Rural and Regional Affairs and Transport Legislation Committee inquiry.<sup>1</sup>
- 1.3 This inquiry is the third parliamentary committee inquiry into the proposed legislation.

## Previous inquiries

- 1.4 On 23 March 2011, the Minister for Agriculture, Fisheries and Forestry, Senator the Hon Joe Ludwig, referred an exposure draft of the bill to the Senate Rural Affairs and Transport Legislation Committee for inquiry. The Senate Committee received 31 submissions, conducted one public hearing and reported on 23 June 2011. The majority report made seven recommendations. The Government agreed with five recommendations and agreed in principle with two recommendations.

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1 House of Representatives Selection Committee, *Report No. 49*, 22 March 2012, p. 3.

- 1.5 A revised bill was introduced in the House of Representatives by the then Parliamentary Secretary for Agriculture, Fisheries and Forestry, the Hon Dr Mike Kelly AM, MP, on 23 November 2011. The Explanatory Memorandum notes that the bill was redrafted to address the recommendations of the Senate Committee and subsequent consultation with stakeholders.<sup>2</sup>
- 1.6 On 25 November 2011, the Senate referred the bill to the Senate Rural and Regional Affairs and Transport Legislation Committee. The Senate Committee received 22 submissions, conducted one public hearing and reported on 27 February 2012. The majority report recommended that the bill be passed. Additional comments were made by the Liberal Party, Australian Greens and Senator Nick Xenophon.
- 1.7 Background information about the development of the bill is outlined in the Explanatory Memorandum.<sup>3</sup>

## **Conduct of the inquiry**

- 1.8 This inquiry was conducted by the Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The Committee resolved, in light of previous inquiries, that it would focus specifically upon the reason for referral outlined in the Selection Committee's report (see paragraph 1.2).
- 1.9 Individuals and organisations were invited to prepare submissions. A media release was issued on 12 April 2012, and the inquiry was included in the fortnightly House of Representatives advertisement in the *Australian* on 18 April 2012. Details of the inquiry were made available on the Committee's website.
- 1.10 The Committee also wrote to all submitters to the Senate Rural and Regional Affairs and Transport Legislation Committee inquiry and to the Embassies and High Commissions named in the Selection Committee's report – Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea, inviting any additional comments.
- 1.11 The Committee received 22 submissions to the inquiry, which are listed at Appendix A.

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2 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 5.

3 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, pp. 1-5.

1.12 A public hearing was conducted on Wednesday, 9 May 2012 in Canberra. Representatives of the Governments of Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea participated in a roundtable style public hearing. The Committee also heard from Australian Government representatives. Appendix B lists the witnesses that appeared at the hearing.

## Overview of the bill

1.13 The objective of the Illegal Logging Prohibition Bill 2011 is to:

... reduce the harmful environmental, social and economic impacts of illegal logging by restricting the importation and sale of illegally logged timber products in Australia. The Bill represents a major step by Australia to prevent the trade of illegal timber products both nationally and internationally.<sup>4</sup>

1.14 The bill restricts importation and sale of illegally logged timber in three ways:

- by prohibiting importation of all timber products that contain illegally logged timber and processing of domestically grown raw logs that have been illegally harvested;<sup>5</sup>
- requiring importers of regulated timber products and processors of raw logs to undertake due diligence to mitigate the risks of products containing illegally logged timber;<sup>6</sup> and
- establishing a comprehensive monitoring, investigation and enforcement regime to ensure compliance with all elements of the bill, including the prohibition and due diligence requirements.<sup>7</sup>

1.15 In his second reading speech, the Parliamentary Secretary explained that the bill would regulate timber products at two key points of entry onto the Australian market. First, at the border for imported timber products and

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4 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 2.

5 Hon Dr Mike Kelly AM MP, House of Representatives *Official Hansard*, 23 November 2011, p. 13569.

6 Hon Dr Mike Kelly AM MP, House of Representatives *Official Hansard*, 23 November 2011, p. 13570.

7 Hon Dr Mike Kelly AM MP, House of Representatives *Official Hansard*, 23 November 2011, p. 13571.

secondly, at timber processing plants where domestically sourced raw logs are processed for the first time.<sup>8</sup>

1.16 The Explanatory Memorandum noted that the bill:

... provides a high-level legislative framework to implement the government's policy to combat illegal logging. It provides the Commonwealth with the authority to develop subordinate legislative instruments, including regulations, to realise the government's policy objective...<sup>9</sup>

1.17 It also noted that by including the operational elements in subordinate legislation, the Commonwealth would have a level of flexibility to amend the regulations to ensure they remain up to date.<sup>10</sup>

1.18 Matters that will be covered by the regulations include:

- timber products to be regulated;
- due diligence requirements to mitigate the risk of importing or processing illegally logged timber; and
- circumstances under which a trade description relating to due diligence may be used.<sup>11</sup>

1.19 Importers will be required to complete a statement of compliance with the due diligence requirements of the bill before making a customs import declaration at the border.<sup>12</sup>

1.20 The Parliamentary Secretary indicated that the regulations would be developed in consultation with key stakeholders. The regulations would be based on a risk management approach and aligned as closely as possible with other legislative requirements, such as the United States *Lacey Act Amendment 2008* and the *EU Timber Regulation*, so as to minimise compliance costs for exporters.<sup>13</sup>

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8 Hon Dr Mike Kelly AM MP, House of Representatives *Official Hansard*, 23 November 2011, p. 13569.

9 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 5.

10 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 6.

11 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 6.

12 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 10.

13 Hon Dr Mike Kelly AM MP, House of Representatives *Official Hansard*, 23 November 2011, pp. 13570 and 13571.



## Key issues

### Background

- 1.21 In its joint submission, the Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade argued that the bill is important in order to:
- promote global trade in legally logged timber products;
  - contribute to an increase in legal timber production by a larger proportion of overseas timber producers;
  - help reduce deforestation, forest degradation and the harmful environmental, social and economic impacts of illegal logging; and
  - provide greater certainty for businesses and consumers that timber products sold in Australia are from legal sources.<sup>14</sup>
- 1.22 The Regulation Impact Statement incorporated into the Explanatory Memorandum states:
- It is generally acknowledged that, as the forestry laws in developing countries are sufficiently robust to stop illegal logging if they were adequately enforced, it is not the legal framework that is the problem. A lack of capacity of governments to enforce those laws or to monitor compliance with the regulatory regimes applying to forestry has subsequently led to consumer countries taking action to address the illegal logging problem.<sup>15</sup>
- 1.23 The Government has indicated that, with the exception of timber products protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora, its ability to verify timber legality, other than through voluntary measures, is limited.<sup>16</sup>
- 1.24 The World Bank estimates that illegal logging as a criminal activity generates approximately US\$10-15 billion annually worldwide.<sup>17</sup>

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14 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 1.

15 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 40.

16 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 39.

17 M Goncalves, M Panjer, T Greenberg and W Magrath, *Justice for Forests. Improving Criminal Justice Efforts to Combat Illegal Logging*, The World Bank, 2012, p. vii. Cited in United Church of Australia (Synod of Victoria and Tasmania), Submission 17, p. 7.

- 1.25 The majority of participants in the inquiry expressed support for the intent of the bill.<sup>18</sup> The Uniting Church in Australia, for example, considered the bill to be consistent with global efforts to combat illegal logging, moving Australia, in line with the United States and European Union, towards ‘ending, for what is for the most part, an organised criminal activity.’<sup>19</sup> The Papua New Guinea High Commission also acknowledged Australia’s efforts, noting that international trade in illegally logged timber:
- ... causes environmental damage, costs governments billions of dollars in lost revenue, promotes corruption, undermines the rule of law and good governance and funds armed conflicts. It also deprives local communities from direct benefits and retards sustainable development in some countries.<sup>20</sup>
- 1.26 Bunnings Group Limited and Kimberley-Clark Australia pointed out that they are signatories to the *Common Platform on Eliminating Illegal Forest Products in Australia*, which supports action to ban the importation and trade in illegally procured timber and wood products.<sup>21</sup>
- 1.27 While submitters were broadly supportive of the bill, a number of issues were raised, primarily relating to the international implications of the bill, the development of subordinate legislation, and possible impacts of the bill on timber exporting countries.

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18 Australian Hardwood Export Council, Submission 1, p. 1; Malaysian Ministry of Plantation Industries and Commodities, Submission 3, p. 3; Carter Holt Harvey, Submission 5, p. 1; Kimberly-Clark Australia Pty Limited, Submission 6, p. 1; New Zealand High Commission, Submission 8, p. 1; New Zealand Institute of Forestry, Submission 9, p. 2; Wood Processors Association of New Zealand, Submission 11, p. 1; Greenpeace Australia Pacific, Submission 12, p. 2; Canadian High Commission, Submission 15, p. 1; Bunnings Group Limited, Submission 16, p.1; United Church in Australia (Synod of Victoria and Tasmania), Submission 17, p. 1; Double Helix Tracking Technologies Pte Ltd, Submission 18, p. 3; Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 2.

19 United Church in Australia (Synod of Victoria and Tasmania), Submission 17, p. 1.

20 Papua New Guinea High Commission, Submission 21, p. 1.

21 Bunning Group Limited, Submission 16, p. 1; Kimberley-Clark Australia, Submission 6, pp. 1, 3.

## International implications

### Australia's international trade obligations

#### Consistency with international agreements

- 1.28 Australia has a number of obligations arising from the World Trade Organization Agreement and the free trade agreements it has concluded with countries that supply timber products to Australia.<sup>22</sup>
- 1.29 In its submission, the Department of Agriculture, Fisheries and Forestry and the Department of Foreign Affairs and Trade (the Departments) addressed the bill's compliance with Australia's international trade obligations, stating that the bill has been designed to be fully consistent with these obligations. The Departments went on to say:
- The Bill complies with principles and disciplines contained in Australia's international trade obligations, including those aimed at ensuring non-discriminatory treatment of products and those governing approaches to trade policies which have clear environmental objectives. The Bill meets these obligations by providing even-handed treatment of suppliers of timber irrespective of their nationality; incorporating clear environmental objectives; minimising the administrative burden that importers will face; and, importantly, having a clear and direct relationship between the environmental objective of the Bill and the detailed operational provisions.<sup>23</sup>
- 1.30 The question of consistency with Australia's obligations under various agreements was raised by several submitters. For example, Mr Alan Oxley, drawing on a legal opinion, argued that the bill is inconsistent with:
- Australia's World Trade Organization obligations;
  - the Australia New Zealand Closer Economic Relations Agreement;
  - the South Pacific Regional Trade and Economic Cooperation Agreement;
  - the proposed revised version of the Pacific Area Closer Economic Co-operation Agreement; and

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22 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 4.

23 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 4.

- the ASEAN-Australia-New Zealand Free Trade Agreement.<sup>24</sup>
- 1.31 The Papua New Guinea Forest Industries Association also questioned the bill's consistency with negotiations for the revised Pacific Agreement on Closer Economic Relations and the South Pacific Regional Trade and Economic Cooperation Agreement.<sup>25</sup>
- 1.32 At the hearing, the Committee asked departmental representatives about the legal advice that has been obtained. The Committee was specifically interested to clarify opinion that the bill either contravenes, is inconsistent with or cannot be justified under:
- Articles I.1, III.2, XI.1, XX(b), XX(d) and XX(g) of the General Agreement on Tariffs and Trade 1994;
  - Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade; and
  - Article 4 of chapter 11 of the ASEAN-Australia-New Zealand Free Trade Agreement.
- 1.33 In response, departmental representatives advised that the Government has taken legal advice in relation to Australia's international trade obligations and was satisfied that the bill as drafted meets those requirements. Further, in relation to these agreements:
- ... those specific concerns have been examined and have been part of our consideration and discussions.<sup>26</sup>
- 1.34 Departmental representatives also observed that:
- Consistency with Australia's international trade obligations will continue to be a central issue as the regulations are formulated.<sup>27</sup>

### Equal treatment for importer and domestic products

- 1.35 As noted above, the Departments have stated that the bill provides even-handed treatment of suppliers of timber irrespective of their nationality. The Regulation Impact Statement notes that:
- Like measures for imported timber would also be applied to domestic products, in line with Australia's commitments under

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24 ITS Global, Submission 14, p. 4.

25 Papua New Guinea Forest Industries Association, Submission 10, pp. 5-6.

26 Mr Ravi Kewalram, DFAT, Committee Hansard, 9 May 2012, p. 17.

27 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 11

the World Trade Organization and obligations under its free trade agreements.<sup>28</sup>

1.36 In evidence to the Committee, however, both Canada and New Zealand were of the view that the bill provides more favourable treatment to domestic products because imported products face more onerous point-of-entry requirements.

1.37 Mr Robert Coleman of the Canadian High Commission outlined Canada's concern that imported products entering the market could be much more complex, and that:

... it would be much more difficult to go back from a complex product to find certification or chain of custody, whereas on the Australian market you are only looking at the original logs when they are harvested. So it is very easy to find chain of custody for a log that has just been harvested in the same country compared with looking at a very complex product and trying to go to all of the inputs and find out where they came from.<sup>29</sup>

1.38 In its submission, the New Zealand High Commission argued there is a risk that:

... importers of and exporters from countries of low-risk status will bear the significant and unnecessary compliance costs of 'proving' legality. These costs will escalate with the length of the chain of custody, which in the case of processed forestry exports from New Zealand, is long. This is in contrast to the compliance costs Australia's own domestic timber processing sector will face, with processors only needing to verify the legality of raw logs for their due diligence which may create a competitive advantage.<sup>30</sup>

1.39 At the hearing, Ms Alison Mann of the New Zealand High Commission clarified that:

Essentially it is a question of the extent to which we need to certify or in some way verify the legality at each stage of the process. If it only applies to the raw log phase in Australia but for imported product it applies at each stage of the processing there is an undue burden placed on those particular imports.<sup>31</sup>

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28 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 54.

29 Mr Robert Coleman, Canadian High Commission, Committee Hansard, 9 May 2012, p. 4.

30 New Zealand High Commission, Submission 8, p. 2.

31 Ms Alison Mann, New Zealand High Commission, Committee Hansard, 9 May 2012, p. 4.

- 1.40 The Royal Institute of International Affairs (Chatham House) argued that the differential treatment of imported and domestic timber is a key argument that the Government needs to address in relation to the bill as:

[t]he real challenge in WTO terms, for any measure designed to exclude illegal timber is to ensure that imports are treated, as far as possible, in the same way as domestic products.<sup>32</sup>

- 1.41 In response, departmental representatives told the Committee that the framework for the operation of the bill is designed around the first point of entry onto the Australian market. For imported materials, the first point of entry is the Australian border, and for domestic material, the point of processing. In terms of Australia's WTO obligations, representatives informed the Committee that the Departments consider this to be a reasonable approach, and that by focussing on first point of entry, the system would operate effectively and allow good trade.<sup>33</sup>

### Complementarity with United States and European Union regimes

- 1.42 The Government has stated that it intends this legislation to be as complementary as possible to regimes being implemented in two of Australia's biggest timber importing markets – the United States and European Union, so as to minimise the impact of the legislation on businesses.<sup>34</sup>

- 1.43 Under the United States *Lacey Act Amendment 2008*, it is unlawful to:

...trade in any plant that is 'taken, possessed, transported or sold in violation of any US law or regulation, or any foreign law', that protects plants or regulates: the theft or taking of plants; the payment of royalties, taxes of stumpage fees required for the harvest; the governance of export or transshipment of plants.<sup>35</sup>

- 1.44 The Act also requires importers to exercise 'due care' in ensuring shipments of timber are obtained legally.<sup>36</sup>

- 1.45 Under the *EU Timber Regulation*, to be implemented from March 2013, 'the placing on the market of illegally harvested timber or timber products
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32 Royal Institute of International Affairs, Submission 19, p. 8.

33 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 15.

34 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 7.

35 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 5.

36 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 5.

derived from such timber' is prohibited. Illegally harvested is defined to mean timber that is harvested in contravention to 'applicable legislation in the country of harvest.'<sup>37</sup>

1.46 Due diligence must be exercised when timber or timber products are first placed on the European Union market.<sup>38</sup>

1.47 The *EU Regulation* is supported by a Voluntary Partnership Agreement (VPA) between the European Union and some developing countries.<sup>39</sup> Chatham House noted that these agreements incorporate a licensing scheme designed to ensure only legal products are exported to the European Union.<sup>40</sup> The timber-exporting country will establish, with European Union assistance, a timber legality verification scheme for its own products. Only products licensed as being legally produced under the scheme will be able to be exported to the European Union and such products will automatically satisfy the requirements of the *EU Timber Regulation*.<sup>41</sup>

1.48 The Committee notes that Indonesia's timber legality assurance system, the Sistem Verifikasi Legalitas Kayu or SVLK, has been developed under its VPA.<sup>42</sup> The Malaysian Government is also currently negotiating a VPA with the European Union, which will include a timber legality assurance system.<sup>43</sup>

1.49 The Departments noted:

Timber legality verification is increasingly part of the global business environment for trading partners and commercial interests, who are already participating in markets with similar legislation.<sup>44</sup>

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37 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 5.

38 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 6.

39 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 5.

40 The Royal Institute of International Affairs, Submission 19, p. 2.

41 The Royal Institute of International Affairs, Submission 19, p. 9.

42 Minister of Trade of the Republic of Indonesia, Submission to the Senate Rural and Regional Affairs and Transport Legislation Committee inquiry into the Illegal Logging Prohibition Bill 2011, p. 2.

43 Malaysian Ministry of Plantation Industries and Commodities, Submission 3, pp. 2-3.

44 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 10.

- 1.50 This view was echoed by Greenpeace, which, noting that the bill reflects these initiatives in the United States and European Union, argued:

These are two massive timber markets, with restrictions on the import of illegal timber and timber products already in place. These rules have already affected practices and processes in most timber producing countries.<sup>45</sup>

- 1.51 Chatham House also emphasised that national and international legality verification and forest certification schemes are increasingly common in international trade in timber and timber products.<sup>46</sup> Kimberly-Clark Australia observed that compliance with the bill 'should be no more difficult or onerous than that existing now for US imports.'<sup>47</sup>

- 1.52 Indeed, the Committee noted during the public hearing that Canada and Malaysia are already exporting within the framework of the Lacey Act.<sup>48</sup>

- 1.53 The Canadian Government provided the Committee with additional information about its experience with the *Lacey Act Amendment 2008*. In 2011, Canada exported 61.5 per cent of its total forest exports, with a value of approximately \$16 billion, to the United States. As the United States' largest trading partner, Canada has more experience than any other country in dealing with the import declaration requirements imposed under the *Lacey Act Amendment 2008*.<sup>49</sup>

- 1.54 The Canadian Government argued that despite its world leading forestry practices and effective regulatory regime (and therefore negligible risk that its products are illegal), Canadian exporters are disproportionately affected by the legislation's requirements. In its view, this has resulted in unnecessary restrictions on legal trade as well as significant new compliance costs for exporters. These concerns centre around information requirements under the 'due care' process and the import declaration rules.<sup>50</sup>

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45 Greenpeace Australia Pacific, Submission 12, p. 2.

46 Royal Institute of International Affairs, Submission 19, p. 9.

47 Kimberly-Clark Australia Pty Limited, Submission 6, p. 1; See also Double Helix Tracking Technologies Pte Ltd, Submission 18, p. 3.

48 Mr Robert Coleman, Canadian High Commission, Committee Hansard, 9 May 2012, p. 6; Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, p. 6; Dr Yew Eng Low, Malaysian Ministry of Plantation Industries and Commodities, Committee Hansard, 9 May 2012, p. 7.

49 High Commission of Canada, Submission 22, p. 2.

50 High Commission of Canada, Submission 22, pp. 2-4.



- 1.55 Canada has advocated to the United States that it adopt a risk-based approach that focuses its regulatory or enforcement efforts upon imports from regions with a high risk of illegal logging.<sup>51</sup>

## Regulations

- 1.56 Clause 2 of the bill provides for different parts of the bill to commence at different times. The prohibition on all illegally logged imported timber products and domestic processing of illegally logged raw logs will commence the day after Royal Assent, as will the related enforcement, seizure and forfeiture provisions of the bill.<sup>52</sup>
- 1.57 The regulations will then come into force two years after the bill receives Royal Assent.<sup>53</sup> The Committee notes the Government's intention that regulations will be tabled in Parliament within six months of Royal Assent so as to give timber importers and domestic processors sufficient time to establish their due diligence systems in the following 18 month period.<sup>54</sup>
- 1.58 The Departments explained how the Government envisaged importers and processors would meet the due diligence requirements:
- ... it is anticipated that importers and processors will carry out a number of steps including: (a) risk identification; (b) risk assessment; and (c) risk mitigation. The level of risk will determine what action importers and processors will be required to carry out to mitigate that risk. The legislation provides that the due diligence requirements for importing regulated timber products will be satisfied, wholly or partly, by compliance with specified laws, rules or processes, including the following:
- laws, or processes under laws, in force in a State or Territory or another country;
  - rules or processes established or accredited by an industry or certifying body;
  - established operational processes.<sup>55</sup>
- 1.59 Further:

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51 High Commission of Canada, Submission 22, p. 2.

52 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 3.

53 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 16.

54 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 3.

55 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 3.

Importers required to comply with due diligence arrangements will be able to implement due diligence that responds to the risks associated with a given product.<sup>56</sup>

1.60 The Explanatory Memorandum explains the two-step process that must be undertaken by persons importing regulated timber products into Australia:

- First, importers are required to undertake due diligence in compliance with clause 14 of the bill before regulated timber products are imported. On completion of due diligence, importers are required to sign a legally binding statement of compliance with the bill.
- Secondly, importers or their agents will be required to answer a community protection question on a customs import declaration.<sup>57</sup>

1.61 Several countries raised concerns about the implications of the regulations and the due diligence process for timber exporters. These concerns are based on uncertainty about:

- the due diligence requirements that are to be outlined in the regulations, particularly those products that will be prescribed as 'regulated timber products';
- the imposition of additional compliance costs that may act as a deterrent to exporters; and
- the extent to which national laws and certification schemes will be recognised.

## Due diligence requirements

### *Uncertainty for exporters*

1.62 At the hearing, Malaysian representatives highlighted the uncertainty currently facing timber exporters about the level of due diligence that will be required.<sup>58</sup> Mrs Ernawati Soedjono of the Indonesian Ministry of Trade also told the Committee:

The bill does not yet clearly define how it will be implemented in the regulations, so it is difficult for us to guess how it will be

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56 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 11.

57 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 14.

58 Datuk Heng Hau Yeo, Malaysian Timber Council, Committee Hansard, 9 May 2012, p. 9; Mr Yew Eng Low, Malaysian Ministry of Plantation Industries and Commodities, Committee Hansard, 9 May 2012, p. 9.

implemented and how difficult it will be for our country to adjust.<sup>59</sup>

1.63 Datuk Yeo of the Malaysian Timber Council stated:

The point is, only after this two-year period would you be sure ...  
If ... the regulations can be put in place, at the same time as the bill,  
all this concern that we have will not be there.<sup>60</sup>

1.64 Other submitters also raised this issue. Mr Thorry Gunnensen contended that:

... the bill creates a crime without adequately defining that crime.  
There is no list of products to be regulated, the definition of 'illegal  
logging' is broad, and the regulations do not yet exist.<sup>61</sup>

1.65 Greenpeace considered that 'too much information and detail is being left to the regulations resulting in uncertainty for business (and countries).'<sup>62</sup> The Papua New Guinea Forest Industries Association was similarly concerned about the extended period of uncertainty for exporters.<sup>63</sup> Chatham House also argued that the due diligence process needs to be clarified to address the concerns expressed by a number of countries.<sup>64</sup>

#### *Regulated timber products*

1.66 An additional source of uncertainty for exporters is a lack of clarity as to those products that will be 'regulated timber products.'<sup>65</sup> Clause 9(3) of the bill states that a regulated timber product is a timber product prescribed by the regulations.

1.67 The Explanatory Memorandum explains that:

The selection of timber products for regulation will be undertaken in consultation with key stakeholders based on an economic analysis of the coverage, value and volume of timber products imported in Australia and an analysis of their risk profile using appropriate criteria and indicators.<sup>66</sup>

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59 Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 9.

60 Datuk Heng Hau Yeo, Malaysian Timber Council, Committee Hansard, 9 May 2012, p. 5.

61 Gunnensen Pty Ltd, Submission 4, Addendum, p. 2.

62 Greenpeace Australia Pacific, Submission 12, p. 5.

63 Papua New Guinea Forest Industries Association, Submission 10, p. 2.

64 Royal Institute of International Affairs, Submission 19, pp. 8-9.

65 See, for example, New Zealand Institute of Forestry, Submission 9, pp. 4-5; Wood Processors Association of New Zealand, Submission 11, p. 1.

66 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 11.

1.68 Both the Indonesian and Malaysian Governments raised this issue in evidence. The Ministry of Trade Indonesia argued in its submission:

... it is crucial that the scope of this bill be set out and that loose terminology such as 'regulated timber products' be addressed. ... This is essential in that the trade chilling effect of the introduction of the bill, which would also lead to criminal prosecution for a trade that remains undefined, is obvious and very damaging.<sup>67</sup>

1.69 Malaysian representatives also expressed particular concern about need for clarity, explaining that most of Malaysia's exports to Australia are furniture, made from wood originating from small estates and with components other than rubber wood being used.<sup>68</sup> Mr Yew Eng Low of the Ministry of Plantation Industries and Commodities emphasised that the regulations must be clear, 'otherwise we are afraid that the exporter may face a lot of difficulty.'<sup>69</sup>

#### Compliance costs

1.70 For a number of submitters, the possibility of increased compliance costs as a result of the due diligence process, was a matter of concern. Wood and paper products manufacturer, Carter Holt Harvey, argued that:

There is the potential for a significant increase in regulatory and compliance cost on importers and their suppliers in seeking to meet the full requirements of the proposed Bill.<sup>70</sup>

1.71 Others considered that the real cost of compliance would be higher than modelled with a negative effect on a range of industries.<sup>71</sup> Both Canada and Malaysia highlighted the possible flow-on effect on trade. According to Mr Robert Coleman of the Canadian High Commission:

... subordinate legislation may impose unnecessary burdens and costs on the trade enforced products from countries with effective legislative supervision and therefore may discourage imports of forest products into Australia.<sup>72</sup>

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67 Ministry of Trade Indonesia, Submission 13, p. 2.

68 Mr Yew Eng Low, Malaysian Ministry of Plantation Industries and Commodities, Committee Hansard, 9 May 2012, p. 4.

69 Mr Yew Eng Low, Malaysian Ministry of Plantation Industries and Commodities, Committee Hansard, 9 May 2012, p. 4.

70 Carter Holt Harvey, Submission 5, p. 2. See also Wood Processors Association of New Zealand, Submission 11, p. 1; Ministry of Trade Indonesia, Submission 13, p. 2; Papua New Guinea High Commission, Submission 21, p. 3.

71 Gunnensen Pty Ltd, Submission 4, p. 2.

72 Mr Robert Coleman, Canadian High Commission, Committee Hansard, 9 May 2012, p. 2.

1.72 The Malaysian Government took a similar view:

The vague due diligence process imposed on importers coupled with the heavy penalty for non-compliance will make it onerous on importers of timber products in terms of time, effort and cost. The need to obtain additional information will incur additional costs which when passed to consumers will mean higher price and less competitive timber products, thereby deterring them from using imported timber products.<sup>73</sup>

1.73 The New Zealand Government considered the regulations should not impose unnecessary costs on forestry exports from low risk countries, such as New Zealand. New Zealand advocated an outcome based approach to the regulations that provides flexibility as to how importers meet the bill's objectives.<sup>74</sup> New Zealand also indicated that to avoid unnecessary compliance costs and streamline the due diligence process, it supported a special trade description being established in regulations.<sup>75</sup>

1.74 For Double Helix Tracking Technologies:

The assertion that costs will be prohibitive and discourage trade is not backed up by any evidence. Cost is frequently raised as an objection, but is generally not calculated.<sup>76</sup>

1.75 Double Helix went on to point out that due diligence and due care requirements under the *EU Timber Regulation* and *Lacey Act Amendment 2008* are similar to the requirements in this bill.<sup>77</sup>

#### Recognition of national laws and certification schemes

1.76 The Government's stated position is that it will not accredit, certify or mandate the use of third party schemes or country initiatives under the legislation.<sup>78</sup> It has indicated, however, that importers and domestic processors will be able to use these schemes as 'a component of their due diligence toolbox.'<sup>79</sup>

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73 Malaysian Ministry of Plantation Industries and Commodities, Submission 3, p. 2.

74 Ms Alison Mann, New Zealand High Commission, Committee Hansard, 9 May 2012, p. 3.

75 New Zealand High Commission, Submission 8, p. 2.

76 Double Helix Tracking Technologies Pte Ltd, Submission 18, p. 3.

77 Double Helix Tracking Technologies Pte Ltd, Submission 18, p. 3.

78 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 3.

79 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 3.

... the system that we are putting in place is in fact a risk based system. We are not mandating a specific certification scheme or certification level to other countries. We are imposing a requirement on Australian based companies and people to undertake a risk assessment of the chance of illegally logged timber coming in.<sup>80</sup>

- 1.77 The Malaysian and Indonesian Governments both considered that recognition should be given to their national certification schemes.<sup>81</sup> Malaysian representatives told the Committee about the timber legality assurance system it is developing as part of its Voluntary Partnership Agreement with the European Union.<sup>82</sup> Dr Harun of the Malaysian Timber Industry Board indicated that recognition of these schemes would provide greater certainty as to the definition of legal timber.<sup>83</sup>
- 1.78 Indonesia noted that its timber legality assurance system is already recognised by the European Union, and argued 'it deserves the full support of Australia as one of our closest trading partners.'<sup>84</sup>
- 1.79 Other submitters noted that the bill does not provide for recognition of other countries' processes to recognise timber legality.<sup>85</sup> Chatham House considered that the more due diligence systems can rely on existing system for verifying legality, the easier they will be to operate and the lower the burden placed on exporters to Australia.<sup>86</sup>
- 1.80 The Papua New Guinea Forest Industries Association (PNGFIA) supported recognition of third party certification schemes, noting that 'third-party legality verification schemes (whether endorsed by governments or the private sector) are the most straightforward means to verify legality'. The PNGFIA considered that without such recognition, there will be a lack of certainty for exporters in the two year period between the Act and regulations coming into force.<sup>87</sup>
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80 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 15.

81 Malaysian Ministry of Plantation Industries and Commodities, Submission 3, p. 3; Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, p. 5; Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 2; Ministry of Trade Indonesia, Submission 13, p. 2.

82 Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, pp. 7-8.

83 Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, p. 5.

84 Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 3.

85 Gunnensen Pty Ltd, Submission 4, p. 2.

86 Royal Institute of International Affairs, Submission 19, p. 9.

87 Papua New Guinea Forest Industries Association, Submission 10, p. 3.

1.81 In contrast, Greenpeace argued that the bill should avoid bias towards any certification scheme and that:

... its primary goal should be to seek verification of legality rather than reliance on specific mechanisms that may or may not evidence legality.<sup>88</sup>

1.82 A number of submitters, including the Governments of Canada, New Zealand and Malaysia, the American Hardwood Export Council and Carter Holt Harvey argued that countries with effective legislative supervision and therefore a low risk of exporting illegal timber, should be given national recognition and not be subject to the same level of scrutiny as higher risk countries or regions.<sup>89</sup>

1.83 Mr Coleman of the Canadian High Commission argued that the risk of illegal logging in Canada is negligible due to its comprehensive legislative and regulatory regime. Consequently:

We feel that the legislation and resources allocated to its implementation should be focussed on jurisdictions where the risk of illegal logging would be the greatest.<sup>90</sup>

1.84 Countries took the view that a risk based approach would be consistent with Australia's obligations to provide non-discriminatory treatment to importing countries. Ms Alison Mann of the New Zealand High Commission told the Committee:

From our perspective it is consistent with Australia's international legal obligations to put in place a risk-based system which ascribes different requirements for different levels of risk, and under such a system you would then be able to impose a lesser array of requirements for low-risk countries as opposed to those where there is a high risk.<sup>91</sup>

## Potential prosecution in initial two year period

1.85 Dr Jalaluddin Harun of the Malaysian Timber Industry Board expressed an expectation that prosecution would not occur within the initial two year period, stating amongst other things:

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88 Greenpeace Australia Pacific, Submission 12, p. 4.

89 American Hardwood Export Council, Submission 1, p. 1;

90 Mr Robert Coleman, Canadian High Commission, Committee Hansard, 9 May 2012, p. 2.

91 Ms Alison Mann, New Zealand High Commission, Committee Hansard, 9 May 2012, p. 5.

... once the procedures have been finalised in six months time, we expect a two-year breathing space ...<sup>92</sup>

- 1.86 Departmental representatives clarified however that the penalties in the bill would take effect from the date of Royal Assent.<sup>93</sup> The legal standard that would apply at this time is defined by the Criminal Code:

A person is reckless with respect to this circumstance if the person is aware of a substantial risk that the thing is, is made from, or includes, illegally logged timber and, having regard to the circumstances known to him, it is unjustifiable to take that risk.<sup>94</sup>

- 1.87 The Australian Government would be required to prove that timber was 'harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested'. This was further explained as follows:

The fault element associated with that is material 'intentionally, knowingly, recklessly' imported. That relates to the definition in clause 8 of the bill. The regulations will apply a due diligence approach to a subset of timber and timber products. So there will be a lower level of evidence required, if you like, in terms of fault once the regulations come into place in regard to that subset after two years.<sup>95</sup>

- 1.88 With regard to products such as furniture, a person would be committing an offence from the date of Royal Assent 'if they imported a thing made from or including illegally logged timber'. Drawing on an example of a chair made from another material but with wooden feet, this would be the case, even though '[s]ubsequently, when a lower fault element is implemented, there will be a subset that may exclude those sorts of products.'<sup>96</sup>

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92 Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, p. 10.

93 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 12.

94 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 9.

95 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 13.

96 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 15.



## Possible impacts on timber exporting countries

- 1.89 Countries put forward their views that the bill could possibly have an adverse impact on their trade.<sup>97</sup>
- 1.90 The Papua New Guinea High Commission considered there could be possible effects on trade if the due diligence requirements are too costly for Papua New Guinea's exports to be competitive in the Australian market.<sup>98</sup> This point was reinforced by the PNGFIA, which highlighted concerns about the impact of the bill on around 10,000 low income forest producers in Papua New Guinea, who harvest up to 500 cubic metres of timber per year on the basis of customary tenure laws and are not required to substantiate legality. PNGFIA considered that compliance costs would deter these smallholder foresters from exporting to Australia.<sup>99</sup>
- 1.91 Other submitters also addressed this issue. An alliance of Australia's major timber importers<sup>100</sup> considered the bill to be:
- ... a substantial over-reaction to the issue and will have a range of unfortunate consequences, such as potentially impacting on the cost effectiveness and willingness of importers to continue to import timber products where legality assurance has never been raised as an issue in the past.<sup>101</sup>
- 1.92 The alliance observed that without the regulations and a definition of regulated timber products there has been 'an escalating lack of confidence by the industry and supplier countries in the development of the Bill.'<sup>102</sup>

## Consultation on regulations

- 1.93 The Committee notes that the Government has been consulting on the proposed legislation since 2008.<sup>103</sup> With respect to the regulations, departmental representatives told the Committee:

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97 Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 2; Malaysian Ministry of Plantation Industries and Commodities, Submission 3, pp. 1-2.

98 Papua New Guinea High Commission, Submission 21, p. 3.

99 Papua New Guinea Forest Industries Association, Submission 10, p. 4.

100 Australian Timber Importers Federation Inc, Timber and Building Materials Association (Aust) Ltd, Timber Merchants Association; Timber Veneer Association of Australia and Windows and Doors Industry Council.

101 Australian Timber Importers Federation Inc, Submission 7, p. 3.

102 Australian Timber Importers Federation Inc. Submission 7, p. 6.

103 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, pp. 6-8, 11-14.

As the more detailed process of developing the regulations is now underway, more in-depth consultation with stakeholders is being and will be undertaken to assist their development and to ensure they operate as intended. This consultation will include the continuation of productive discussions with domestic producers, importers, trading partners, international suppliers and other interested stakeholders through an illegal logging working group convened by the Department...<sup>104</sup>

1.94 New Zealand, Canada and Indonesia are represented on the DAFF-convened Illegal Logging Working Group.<sup>105</sup>

1.95 The Committee notes that the countries that participated in the public hearing have called for further consultation.<sup>106</sup> For example, Dr Harun of the Malaysian Timber Industry Board told the Committee:

Our No. 1 concern about the bill is that we would like to have proper consultation on the implementation of the bill later on, especially during the creation of procedures.<sup>107</sup>

1.96 His Excellency Mr Salman Ahmad, High Commissioner to Malaysia, also stated:

Once the consultation has been done, I think it will satisfy our concerns.<sup>108</sup>

1.97 During the hearing, the Committee questioned whether there is scope to expand the membership of the Illegal Logging Working Group,<sup>109</sup> noting that the Malaysian Government would welcome Malaysia's inclusion.<sup>110</sup>

1.98 The Committee notes the Government's stated intention that:

Due diligence requirements will be developed in consultation with industry and key stakeholders in relation to information

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104 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 11.

105 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 6; Ms Alison Mann, New Zealand High Commission, Committee Hansard, 9 May 2012, p. 7.

106 Mrs Jacinta Manua, Papua New Guinea High Commission, 9 May 2012, p. 3; Mrs Ernawati Soedjono, Ministry of Trade Indonesia, Committee Hansard, 9 May 2012, p. 2; Ms Alison Mann, New Zealand High Commission, Committee Hansard, 9 May 2012, p. 4.

107 Dr Jalaluddin Harun, Malaysian Timber Industry Board, Committee Hansard, 9 May 2012, p. 1.

108 HE Mr Salman Ahmad, High Commissioner for Malaysia, Committee Hansard, 9 May 2012, p. 8.

109 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 12.

110 HE Mr Salman Ahmad, High Commissioner for Malaysia, Committee Hansard, 9 May 2012, p. 7.

gathering, risk assessment and identification and risk mitigation to assist importers to meet the due diligence requirements in a cost effective, efficient and adaptable manner. This may include addressing due diligence requirements for different timber product categories (e.g. solid, composite, manufactured, processed), supply chains of differing complexity (e.g. single, multiple, short, long) and applicable laws of different countries of harvest, to be prescribed by regulations.<sup>111</sup>

## Illegally logged definition

1.99 The Committee notes that the definition of illegally logged timber received considerable attention during the Senate Rural and Regional Affairs and Transport Legislation Committee inquiry. It was again raised in a number of submissions to this inquiry.

1.100 The bill defines illegally logged as follows:

*illegally logged*, in relation to timber, means harvested in contravention of laws in force in the place (whether or not in Australia) when the timber was harvested.<sup>112</sup>

1.101 The Explanatory Memorandum explains the basis for this definition:

*Illegally logged* is a high level definition that provides scope and flexibility for importers and processors of raw logs to undertake due diligence in relation to the applicable laws in place where the timber is harvested, which may be prescribed by regulations, without the limitations of a prescriptive set of legislative requirements. The challenge of prescribing individual requirements in a definition is complicated by the range of legislation given the number of countries – 85 in total – from which Australia imports timber products. An unintended consequence of a prescriptive definition of illegally logged may result in some elements of applicable legislation being overlooked or excluded through omission.<sup>113</sup>

1.102 In its submission, the Malaysian Government argued that illegal logging should be defined in terms of compliance with respective national forest laws.<sup>114</sup> Similarly, the New Zealand Institute of Forestry argued that the

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111 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 16.

112 Section 2, Clause 7.

113 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 11.

114 Malaysian Ministry of Plantation Industries and Commodities, Submission 3, p. 2.

definition 'illegally logged' was difficult to interpret and unnecessarily broad.<sup>115</sup>

1.103 Concern was raised too about the scope of the definition – that is, whether it is intended to apply to forestry laws or other legislation more broadly, such as health and safety, transport or tax laws.<sup>116</sup> The Papua New Guinea Government questioned whether it would extend to labour laws or land tenure laws.<sup>117</sup>

1.104 Departmental representatives advised the Committee that in contrast to the European Union definition of illegal logging:

In our definition we have tried to be as broad as possible so we do not exclude any of those categories or issues that may come into play.<sup>118</sup>

1.105 Representatives also indicated that there would be scope within subordinate legislation and regulations 'to further categorise the issues and laws we may be considering here.'<sup>119</sup>

## Concluding comments

1.106 As indicated earlier, the Committee's focus for this inquiry was the reasons for referral outlined in the House of Representatives Selection Committee's report – that is, 'concern over the international implications of the bill expressed by Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea...'<sup>120</sup> The Committee has endeavoured to address these issues while avoiding unnecessary duplication with previous parliamentary committee inquiries into the bill.

1.107 The Committee notes that the bill is essentially harmonious with legislation in the United States and European Union, and that timber exporting countries are adjusting to these new regimes.<sup>121</sup> The Committee shares the view expressed by Double Helix Tracking Technologies in its submission, that:

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115 New Zealand Institute of Forestry, Submission 9, p. 2.

116 Wood Processors Association of New Zealand, Submission 11, p. 2.

117 Papua New Guinea High Commission, Submission 21, p. 3.

118 Mr Ben Mitchell, DAFF, Committee Hansard, 9 May 2012, p. 13.

119 Mr Ben Mitchell, DAFF, Committee Hansard, 9 May 2012, p. 13.

120 House of Representatives Selection Committee, *Report No. 49*, 22 March 2012, p. 3.

121 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, p. 10.

The Australian Bill is not adding to a problem; it represents Australia joining a growing international movement to prevent the trade in illegal timber products.<sup>122</sup>

- 1.108 Indeed, the Committee notes that at the 2011 APEC Summit, the Prime Minister, the Hon Julia Gillard MP, and other leaders from Canada, Indonesia, Malaysia, New Zealand, Papua New Guinea, the United States and China declared they would address illegal logging.<sup>123</sup> The APEC 2011 Leaders' Declaration states, *inter alia*:

We will also take the following steps to promote our green growth goals: ...

Work to implement appropriate measures to prohibit trade in illegally harvested forest products and undertake additional activities in APEC to combat illegal logging and associated trade.<sup>124</sup>

- 1.109 The Committee supports Australia's efforts to address the negative impacts of illegal logging and promote legal international trade. In doing so, however, it is essential that this legislation is consistent with Australia's international trade obligations. The Committee is satisfied that the Government is taking these obligations seriously in the development of the bill and subordinate legislation, including the need to provide equal treatment for imported and domestic products.
- 1.110 The Committee acknowledges the broad approach taken by the Government to the definition of illegally logged timber so as to limit unintended consequences that may arise from a more prescriptive approach.
- 1.111 The Committee also notes that there will be flexibility as to how the due diligence requirements are implemented, based on a risk management approach. As noted earlier, the level of risk will determine what actions importers and processors must take to mitigate that risk. The lack of clarity, however, about the process, likely compliance costs, and the extent to which certification schemes and national laws will be recognised, is a significant source of concern.

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122 Double Helix Tracking Technologies Pte Ltd, Submission 18, p. 3.

123 Department of Agriculture, Fisheries and Forestry and Department of Foreign Affairs and Trade, Submission 20, pp. 1-2.

124 Asia-Pacific Economic Cooperation, *2011 Leaders' Declaration: The Honolulu Declaration – Towards a Seamless Regional Economy*, November 2011, accessed 17 April 2012, <[http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011\\_aelm.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm.aspx)>.

- 1.112 The Committee notes the Government's stated intention that industry, including importers, will be extensively consulted in the development of the regulations.<sup>125</sup> It is apparent, however, that timber exporting countries also have considerable concerns about the details of the new regime that are to be outlined in the regulations, which will not be available for about six months.
- 1.113 The Committee commends the consultation that has been undertaken to date on the bill. The Committee considers it is essential however that there be continued bilateral and multilateral engagement on the development of the regulations.
- 1.114 The Committee also encourages the Government to make the regulations available as quickly as possible.
- 1.115 The Departments advised the Committee that the two year period between the bill and regulations coming into effect was 'something that we have not been picking up as a concern from our timber importer members of our industry'<sup>126</sup> and that it expected that the two year period between entry into force of the Act and the regulations would have negligible unintended consequences upon trade.<sup>127</sup>
- 1.116 Evidence to the Committee suggested however that the lag between the bill and regulations is a matter of some concern. It was also clear that there are differing expectations among other nations as to whether prosecution would occur in this period. The Committee considers further outreach is required by the Government on this issue.
- 1.117 The Committee notes that this is the third parliamentary committee inquiry into the proposed legislation and acknowledges the ongoing participation of stakeholders. Broad support for the intent of this legislation has been expressed throughout the inquiry. The Committee considers that with continued engagement, many of the outstanding issues can be resolved.

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125 Illegal Logging Prohibition Bill 2011, *Explanatory Memorandum*, p. 12.

126 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 17.

127 Mr Tom Aldred, DAFF, Committee Hansard, 9 May 2012, p. 16.

**Recommendation 1**

The Committee recommends that the Government continues to consult closely with the Governments of Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea and other relevant stakeholders on implementation of the bill and the development of subordinate legislation.

**Recommendation 2**

The Committee recommends that the Government facilitate Malaysia and Papua New Guinea's representation on the Illegal Logging Working Group convened by the Department of Agriculture, Fisheries and Forestry.

**Recommendation 3**

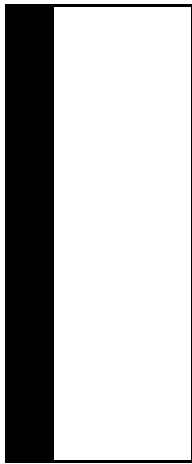
The Committee recommends that the *Illegal Logging Prohibition Bill 2011* be passed.

**Ms Janelle Saffin MP**  
Chair, Trade Sub-Committee

**Mr Michael Danby MP**  
Chair







## Minority Report—Coalition Senators and Members

The evidence presented to the Trade Sub-Committee shows that there is considerable unease amongst our key regional trading partners at the lack of consultation on the proposed Illegal Logging Prohibition Bill and subordinate legislation. In particular there is a real concern with the gap between the Bill being passed and its regulations coming into force, over the time allocated for consultation on the regulations, and on what form the consultations on the regulations will take.

The evidence presented to the Trade Sub-Committee also clearly shows that important regional trading partners believe this Bill will harm their trading relationship with Australia and that there is legal uncertainty as to whether the Bill is World Trade Organisation (WTO) compliant.

It is indisputable that as soon as it enters into law, the Illegal Logging Prohibition Bill will cause uncertainty in Australia's timber trade because importers will not know what the precise impact of the legislation will be until the regulations are enacted.

The Government has indicated that the regulations would be developed in consultation with key stakeholders yet has done nothing to clearly demonstrate how this will be done.

The Department of Agriculture, Forestry and Fisheries estimate that they can produce the regulations within six months. Yet evidence submitted to the inquiry indicated that little progress has been made on the content of the regulations and that fundamental issues remain unresolved.

The Government has also indicated that the regulations will come into force two years after the Bill receives Royal Assent and also indicated that the regulations will be tabled in the Parliament within six months of Royal Assent to give exporters and importers time to establish due diligence. However, the

Government also made it clear that parties could be open to prosecution during this two year stand-off. This lag between the Bill and the regulations is of genuine concern.

In giving evidence the Gillard Government highlighted how its consultative process has been found wanting. While noting that it has been consulting on the proposed legislation since 2008 it admitted that:

As the more detailed process of developing the regulations is now underway, more in-depth consultation with stakeholders is being and will be undertaken to assist their development and to ensure they operate as intended.<sup>1</sup>

The Government needs to clearly set out how the consultations on the regulations will take place with the Australian timber industry and our international trading partners and the timeline for these consultations.

In its submission Papua New Guinea recommended that:

More organised consultations be held with trading partners particularly the developing countries on the proposed legislation.<sup>2</sup>

It should not introduce the legislation until the enabling subordinate legislation is finalised and is released for public comment and a satisfactory consultation period has taken place on both the legislation and the regulations. Based on evidence submitted to the sub-committee that may take at least 18 months to 2 years.

As well as concerns over the consultation process, there are also real concerns being raised over the cost of compliance with the Bill and its yet to be drafted regulations.

As the submission from the Canadian Government states:

Canada is concerned that third party certification schemes may be too heavily relied upon as the means to addressing the due diligence requirements set forth in the Bill, to the exclusion of other approaches for meeting the due diligence requirements...  
...Relying upon chain-of-custody certification as proof of legality could present a barrier to trade for many smaller producers or those exporting complex products.<sup>3</sup>

The content of the Bill and the way in which it has been handled to date has already arguably caused harm to our trading relationships and if passed will very possibly lead to more harm occurring. The Indonesian Government, already

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1 Mr Mark Tucker, DAFF, Committee Hansard, 9 May 2012, p. 11.

2 Papua New Guinea High Commission, Submission 21, p. 4.

3 High Commission of Canada, Submission 22, p. 1.

irritated by the way in which Australia placed a hasty and ill-conceived temporary ban on live cattle exports, made clear in its submission that:

The implementation of the Bill is also likely to undermine the development of trade between Indonesia and Australia based on our respective mutual interests. In this respect, reference is made to the recent efforts of the Government of Indonesia to accommodate and resolve the problem faced by Australia during the self-imposed ban on beef exports to Indonesia.<sup>4</sup>

It is self evident that this is a relationship which we need to repair, not worsen. Indonesia is Australia's largest neighbour and a key member of ASEAN. It is already Australia's most important beef and wheat market. If we do not respect the relationship, it will not only be Australia's trade interests that suffer.

The Government of Malaysia also raised its bilateral relationship with Australia in its submission:

While Malaysia fully understands that the objective of the Bill is laudable, Malaysia would like to see that the implementation of the Bill will not in any way hamper the good bilateral trade relationship particularly in timber products.<sup>5</sup>

Countries that gave evidence referred to the actions and measures they have taken to reduce illegal logging and to demonstrate to purchasers of their timber products are legally procured. All requested that these systems be recognized in Australia as demonstrating legality. They also noted that the Bill will require Australian authorities to demonstrate to their own satisfaction the validity of their schemes; in effect it has been argued that this amounts to a vote of no-confidence by the Australian Government in the capability of some of our key trading partners. This is one of the key reasons why it is in Australia's national interest to avoid using unilateral trade measures wherever possible. The use of unilateral trade restrictions has a long history of causing disputes between trading partners. Australia has consistently opposed the unilateral imposition of trade measures by the EU and the US. Due to the damage they can cause to trade relations between countries, it is against our self interest to use such measures unless there are no other alternatives.

Evidence presented to the inquiry suggests the Illegal Logging Prohibition Bill may be unsound in international law. Although legal opinion is divided, there are indications the Bill is highly likely to face legal challenge in the WTO.

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4 Ministry of Trade Indonesia, Submission 13, p. 2.

5 Malaysian Ministry of Plantation Industries and Commodities, Submission 3, p. 5

In its submission the Government of Canada put Australia on notice when it noted:

While Canada has concerns related to some of the potential trade implications of the Bill, Canada is pleased that the Government of Australia is committed to ensuring that the Bill and associated regulations are consistent with international trade obligations, that they treat importers and domestic processors of timber equally, and that they are not trade distortive.<sup>6</sup>

This was a point reiterated by the Papua New Guinea Forest Industries Association:

The Government of Indonesia has already foreshadowed the possibility that the Bill will not meet WTO requirements and remain challengeable under the WTO. An expert legal opinion by Professor Andrew Mitchell of Melbourne University indicated that the agreement would pose problems with WTO compliance, as well as compliance with the ASEAN-Australia-New Zealand Free Trade Agreement.<sup>7</sup>

In summary Coalition members believe that the Bill and any accompanying draft subordinate legislation need to be subject to the most rigorous consultation process.

### **Recommendation 1**

**The Coalition members support recommendations 1 and 2 of the majority sub-committee report.**

### **Recommendation 2**

**While the Coalition agrees that the Bill, the penalties and the regulations need to be aligned, the Coalition members do not support the timing in recommendation 3 of the majority sub-committee report. The Coalition members recommend that the Bill not be passed until the draft subordinate legislation has been finalised and has been the subject of extensive community and international consultation. In that respect the Bill should not be brought on for second reading debate until the first Parliamentary session of calendar year 2014 at the earliest.**

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6 High Commission of Canada, Submission 15, p. 2.

7 Papua New Guinea Forest Industries Association, Submission 10, p. 5.

**Mrs Joanna Gash MP**  
**Deputy Chair**

**Senator David Fawcett**

**Senator the Hon David Johnston**

**Senator the Hon Ian Macdonald**

**Senator Stephen Parry**

**Senator Marise Payne**

**Hon Julie Bishop MP**

**Dr Dennis Jensen MP**

**Mrs Sophie Mirabella MP**

**Mr Ken O'Dowd MP**

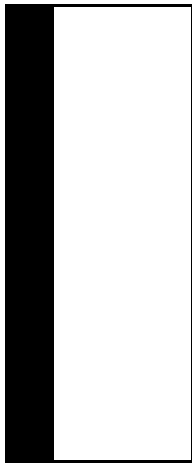
**Mr Stuart Robert MP**

**Hon Philip Ruddock MP**

**Hon Bruce Scott MP**

**Hon Dr Sharman Stone MP**





## Additional comments—Australian Greens

The Greens support passage of the Illegal Timber Prohibition Bill 2011 (recommendation 3).

We support broader consultation with importer countries in order to ensure that countries are given adequate time to respond to the new laws and to provide input that will make those laws and regulations more effective (recommendation 1). However, we are not convinced that recommending just two countries be permitted representation on a working group (recommendation 2) is the best way to accomplish this. If countries in addition to Malaysia and Papua New Guinea decide they want to participate in the development of regulations, an already large working group will become unworkable. The Greens recommend that a more considered approach to consultation and input on the regulations from importing countries is developed.

In the context of this inquiry the Greens recommend that the legal advice received by the Department regarding our WTO obligations be tabled.

One of the persistent complaints from a variety of submitters to this and previous inquiries has been the lack of clarity and certainty in the current bill. In particular, the lack of clarity regarding the definition of illegal timber and the lack of clarity regarding due diligence requirements remains unresolved. While the Greens are now confident that in the near future there will be clarity regarding what will constitute regulated timber, we remain convinced that a precise (although not necessarily exclusive) definition of illegal timber should be in the primary legislation. While many of the due diligence requirements will necessarily be left to the regulations, a clearer statement of the structure of the due diligence requirements, the basic information that must be ascertained and the oversight, monitoring and enforcement provisions that will attach to due diligence could be significantly strengthened in the primary legislation.

We note and incorporate by reference our comments to the February 2012 Rural and Regional Affairs and Transport Committee report relating to these two issues.

Finally, the Committee notes the Government's intent to have regulations tabled within 6 months of Royal Assent. The Committee does not explicitly support this intent. The Greens support an additional recommendation that the Regulations be tabled within 6 months of Royal Assent.

**Senator Scott Ludlam**

**Senator Sarah Hanson-Young**





## Appendix A – List of Submissions

1. American Hardwood Export Council
2. Mr Colin Ely
3. Ministry of Plantation Industries and Commodities, Malaysia  
(Timber, Tobacco and Kenaf Industries Development Division)
4. Gunnensen Pty Ltd
5. Carter Holt Harvey
6. Kimberly-Clark Australia Pty Ltd
7. Australian Timbers Importers Federation
8. New Zealand High Commission
9. New Zealand Institute of Forestry
10. Papua New Guinea Forest Industries Association
11. New Zealand Wood Processors' Association
12. Greenpeace Australia Pacific
13. Ministry of Trade of the Republic of Indonesia
14. ITS Global
15. High Commissioner of Canada
16. Bunnings Group Limited
17. Uniting Church in Australia (Synod of Victoria and Tasmania)
18. Double Helix Tracking Technologies Pte Ltd
19. The Royal Institute of International Affairs

20. Department of Agriculture, Fisheries and Forestry  
Department of Foreign Affairs and Trade

21. Papua New Guinea High Commission

22. High Commissioner of Canada (Supplementary Submission)



## Appendix B – List of Hearings and Witnesses

**Canberra, Wednesday, 9 May 2012**

**Department of Agriculture, Forestry and Fisheries**

Mr Tom Aldred, First Assistant Secretary

Mr Ben Mitchell, Director

Mr Mark Tucker, Deputy Secretary

**Department of Foreign Affairs and Trade**

Mr Ravi Kewalram, Assistant Secretary

Mr George Mina, Assistant Secretary

**Embassy of the Republic of Indonesia**

Miss Dewi Anggraeni Wahjudati, Minister Counsellor

Mr Denny Lesmana, First Secretary

**High Commission of Canada**

Mr Robert Coleman, Counsellor (Commercial) and Senior Trade Commissioner

**High Commission of Malaysia**

HE Mr Salman Ahmad, High Commissioner of Malaysia

**High Commission of Papua New Guinea**

Mrs Jacinta Manua, Minister/Deputy Head of Mission

**Malaysian Timber Council**

Datuk Heng Hau Yeo, Senior Director

**Malaysian Timber Industry Board**

Dr Jalaluddin Harun, Director General

**Ministry of Plantation Industries and Commodities, Malaysia**

Mr Yew Eng Low, Under Secretary of Timber, Tobacco and Kenaf Industries  
Development Division

**Ministry of Trade, Indonesia**

Mrs Ernawati Soedjono, Director

Mr Donny Tamtama, Head of Section

**New Zealand High Commission**

Mr Matthew Aileone, First Secretary

Ms Alison Mann, Deputy High Commissioner