



environmental defender's office new south wales

Legislative mechanisms for the protection of tropical forests in developing countries

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The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of fostering close links with the community*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services across NSW.*

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Legislative mechanisms for the protection of tropical forests in developing countries

The Environmental Defender's Office of NSW (EDO) is a community legal centre with over 20 years experience specialising in public interest environmental law. EDO has undertaken extensive policy and law reform work on issues of climate change and biodiversity conservation.¹

A key part of the current policy challenge is the protection of tropical forests in developing countries. It is widely recognised that deforestation of tropical forests is a key contributor to climate change. Indeed, it is estimated that deforestation contributes between 18-25% of total global greenhouse gas emissions. This paper outlines two legislative mechanisms that could be implemented in Australia to protect tropical forests for both their carbon and biodiversity value.

A large percentage of the world's tropical forests are found in the developing world. Clearing of these forests is progressing at an increasing rate for a variety of reasons. First, local communities rely on the forests for their livelihoods and sustenance. Furthermore, forests have to compete with a variety of other land uses such as agriculture, residential development and palm oil plantations. Lastly, many developing countries rely on deforestation as a key industry in developing their economies, as forests are often their best resource. In light of the increasing rate of deforestation in developing countries, it is clear that measures must be implemented to arrest this increase and promote sustainable development as a key means of addressing global climate change. Moreover, in addition to constituting important carbon sinks, tropical forests also provide significant safe haven for much of the world's biodiversity, which provides further impetus for protecting these areas.

Given this background, and the considerable co-benefits of conserving tropical forests in developing countries, the EDO has identified two legislative mechanisms that could be implemented by the Australian Government to assist in protecting areas of high biodiversity and reducing global greenhouse gas emissions from deforestation of tropical forests. These are:

1. The creation of a Federal 'debt for carbon' or 'debt for nature' scheme (a ***Tropical Forest Conservation Act***) that provides a mechanism for the foreign debt that a developing country owes to Australia to be reduced or cancelled if that country instead invests monies into the conservation of its tropical forests; and
2. The introduction of **amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)** that prohibit the importation of illegal and unsustainably sourced timber products and that regulate the importation of timber, palm oil and other tropical forest products from developing countries; and

These two mechanisms will be discussed in turn.

¹ See <http://www.edo.org.au/edonsw/site/policy.php> for all EDO policy submissions.

1. New Tropical Forest Conservation Act

1.1. Background

A ‘debt for nature’ scheme is not a new concept, having been introduced into the United States (US) in 1998. The United States *Tropical Forest Conservation Act 1998* provides a mechanism whereby eligible developing countries can relieve the debt they owe to the United States if they invest monies to support local tropical forest conservation activities. The US Act has been quite successful. Currently, ten countries have agreements with the US under the Act.² These include Bangladesh, Belize, El Salvador, Panama, Peru and the Philippines. These deals are likely to generate over \$60m for tropical forest conservation. Importantly, the US Act recognises not only the biodiversity benefits of protecting tropical forests in developing countries but also the carbon benefits. The Act states that one of the benefits to humankind of conserving tropical forests is the critical role they play as carbon sinks “in reducing greenhouse gases in the atmosphere, thus moderating potential global climate change.”³

The EDO believes that a similar Act should be introduced into Australia. Indeed, the protection of tropical forests in developing countries through a new Act would be consistent with Australia’s international obligations under the United Nations Framework Convention on Climate Change (UNFCCC), the United Nations Convention on Biological Diversity (CBD) and would implement the precautionary principle and the conservation of biodiversity principle of Ecologically Sustainable Development (ESD). Of note is that Australia is owed more than \$1.5 billion in debt by developing countries with significant reserves of tropical forests, including PNG, the Philippines and Sri Lanka which presents considerable opportunities for a ‘debt for nature’ scheme.⁴

The EDO has identified 9 key elements that should be included in an Australian Act:

- Title
- Objects clause
- Definitions
- Regulatory body
- Reduction of debt mechanism
- Debt reduction agreements
- Eligible conservation activities
- Tropical Forest Fund
- Monitoring and review

These are discussed in turn.

² <http://www.state.gov/g/oes/rls/fs/2003/22973.htm>

³ Section 802(a)(2)(B), *Tropical Forest Conservation Act of 1998 (US)*.

⁴ www.jubileeaustralia.org/index.html (22 September 2008).

1.2. Title

The new Act would need an appropriate title. The EDO submits that the title should take into account the need to protect not only tropical forests, but also peatland, wetlands and tundra.

The definition of ‘tropical forest’ is discussed in detail below.

1.3. Objects clause

A new Act would require an appropriate objects clause. Objects clauses are important, as they set out the aims and purpose of legislation and provide a contextual basis for interpretation.

The objects clause could contain the following objects:

- *To recognise the benefits to Australia – including the carbon and biodiversity benefits - of conserving tropical forests and associated habitats in developing countries;*
- *To provide greater protection for tropical forests and associated habitats in developing countries through reducing debt in developing countries, thus relieving the economic pressures that can lead to greater deforestation;*
- *To provide incentives for generating additional resources for long-term conservation of tropical forests and other ecosystems in developing countries;*
- *To reduce the rate of deforestation in developing countries;*
- *To ensure that resources freed from debt in developing countries are directed to the conservation and management of tropical forests; and*
- *To ensure that this Act is implemented in accordance with principles of Ecologically Sustainable Development.*

1.4. Definitions

The new Act would need to include appropriate definitions for key concepts.

The Act must include an appropriate definition of **‘tropical forest’**.⁵ The characterisation of the vegetation types to be protected is crucial to the operation of the Act. The EDO believes that a ‘debt for nature’ scheme should apply widely to encompass tropical forests as well as other biodiverse and carbon-rich ecosystems such as peat lands, wetlands and tundra. Although some peat lands could be deemed ‘tropical forests’, wetlands and tundra fall outside the traditional definition of “tropical forest” Therefore, appropriate definitions for “peatland”, “wetland” and “tundra” are needed in addition to a definition of “tropical forest” in the new Act. We have provided an analysis of appropriate definitions for these habitat types in the **Appendix**.

The new Act must also provide a definition of **“eligible developing country”** to determine which countries are eligible to participate under the scheme. There is no single definition of “developing country” in international agreements.⁶ However, the Economic

⁵ We note that there are many definitions of “forest” and the definition often depends on regional and cultural factors.

⁶ http://unstats.un.org/unsd/cdb/cdb_dict_xrxx.asp?def_code=491

and Social Council of the United Nations has provided a definition of 'least developed countries' (LDCs). Three criteria are used to identify LDCs. These are:

- a low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita (under \$750 for inclusion, above \$900 for graduation);
- a human resource weakness criterion, involving a composite Human Assets Index (HAI) based on indicators of: (a) nutrition; (b) health; (c) education; and (d) adult literacy; and
- an economic vulnerability criterion, involving a composite Economic Vulnerability Index (EVI) based on indicators of: (a) the instability of agricultural production; (b) the instability of exports of goods and services; (c) the economic importance of non-traditional activities (share of manufacturing and modern services in GDP); (d) merchandise export concentration; and (e) the handicap of economic smallness (as measured through the population in logarithm); and the percentage of population displaced by natural disasters. [\(E/2004/33\)](#).⁷

Most definitions of “developing country” rely on similar criteria. For example, the *US Tropical Forest Conservation Act 1998* uses the following definition of “developing country with a tropical forest”:

(i) a country that has a per capita income of \$725 or less in 1994 United States dollars (commonly referred to as “low-income country”), as determined and adjusted on an annual basis by the International Bank for Reconstruction and Development in its World Development Report; or

(ii) a country that has a per capita income of more than \$725 but less than \$8,956 in 1994 United States dollars (commonly referred to as “middle-income country”), as determined and adjusted on an annual basis by the International Bank for Reconstruction and Development in its World Development; and

(B) a country that contains at least one tropical forest that is globally outstanding in terms of its biological diversity or represents one of the larger intact blocks of tropical forests left, on a regional, continental, or global scale.

The EDO submits that a similar definition should be included in an Australian Act.

In the US, a developing country is an ‘eligible developing country’ for the purposes of the scheme if certain conditions, which include the following, are satisfied:

- *Developing countries must have a tropical forest of global or regional significance.*
- *Developing countries must have democratically elected governments.*
- *Developing countries must not support international terrorism or violate human rights.*

Similar conditions should be introduced into an Australian Act to discharge Australia’s obligations under international human rights law. However we note that additional conditions and enforcement considerations arise where countries may not be democratically stable. These could be addressed by conditions to agreements made under the Act, specific to the local circumstances.

⁷ United Nations, Economic and Social Council (2003), <http://www.un.org/special-rep/ohrrls/ldc/ldc%20criteria.htm> (14 August 2008).

The Act should make clear whether it seeks protection of all tropical forests in the relevant developing countries or only forests of “global or regional significance” like in the US Act. This is a policy decision. In any event, a definition of ‘global or regional significance’ would need to be included if the Act is designed to prioritise globally or regionally significant tropical forests (there is no definition provided in the US Act). This definition may rely on world heritage lists, Alliance for Zero Extinction sites, Key Biodiversity Areas, Important Bird Areas, biodiversity hotspots and/or other scientific definitions. Alternatively, the Act could have a broad definition to potentially encompass a broader range of tropical forests and other ecosystems (see the **Appendix**).

A definition of ecologically sustainable development should be adopted in the Act consistent with the definition of the principles of ESD under s3A of the *EPBC Act*. This definition reads:

- The following principles are **principles of ecologically sustainable development**:*
- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;*
 - (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
 - (c) the principle of inter-generational equity - that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
 - (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;*
 - (e) improved valuation, pricing and incentive mechanisms should be promoted.*

1.5. Reduction of debt mechanism

The central aspect of the new Act will be the debt reduction mechanism. Power must be given to an appropriate Minister to reduce or cancel the debt owed by a developing country. For example, the US *Tropical Forest Conservation Act 1998* grants the President the power to reduce any amount owed to the US, including any concessional loans and credit extended, by an eligible developing country. Therefore, the new Act must include a provision authorising an appropriate Minister to reduce the debt owed by an eligible developed country, upon receiving advice from an expert regulatory body (discussed below) that the ‘debt for nature’ swap should proceed.

Specifically, the Act should incorporate a ‘debt buyback’ mechanism allowing a debtor country to “buy back” its debt (i.e. discharge it) on the payment of a reduced amount, on the condition that the debtor country will use the monies it would have paid (had it paid back the full amount of the debt) to instead undertake ‘eligible conservation activities’ in its tropical forests.⁸ Of course, this is dependent on the country actually having the funds to invest in such activities, which may be unlikely in some cases. However, this

⁸ In the US TFC Act, the provision facilitating debt buyback states that the President may cancel a country’s loan after receiving less than full payment of the loan from the country “*only for the purpose of facilitating a debt buyback by an eligible country of its own qualified debt, only if the eligible country uses an additional amount of the local currency of the eligible country, equal to not less than the lesser of 40 percent of the price paid for such debt by an eligible country, or the difference between the price paid for such debt and the face value of such debt, to support eligible activities...*”.

mechanism will provide an opportunity for developing countries to participate where they do have some capacity to discharge their debt obligations to Australia. How a ‘debt for nature’ scheme may still work where a country does not have any funds available to invest in conservation activities is discussed below.

1.6. Debt reduction agreements

The most crucial element of the new Act is the debt reduction agreement itself. To facilitate the ‘debt for nature’ swap, an agreement must be drawn up that contractually replaces the existing obligation of the developing country (to pay back the debt owed to Australia), with new obligations. These new obligations must require the developing country to conduct activities that conserve and protect its tropical forests. In the US *TFC Act*, this provision reads:

At the direction of the Facility,⁹ the old obligations that are the subject of the agreement shall be cancelled and a new debt obligation for the country shall be established relating to the agreement.

The new Act must include provisions relating to the making of Tropical Forest Agreements (or some other appropriate name), which will facilitate the exchange of obligations. The drafting of the agreements will be important to ensure that the new obligations are robust and quantifiable (for example they could set targets for a percentage reduction in deforestation and degradation, the protection of a certain number of hectares of tropical forest in National Parks, etc). The Act should set out mandatory clauses/criteria to be included in agreements, and provide for additional conditions to be agreed where appropriate. The regulatory authority (discussed below) should play a central role in administering the agreements. Once the body is satisfied that a proposed agreement is acceptable, then it can recommend to the Minister that the relevant foreign debt be reduced or cancelled.

Debt reduction agreements may still be negotiated in circumstances where the debtor country has only limited funds available to invest in conservation activities. This might be achieved through provisions in the agreement that provide incentives for raising additional resources for ongoing management. This could involve the creation of carbon credits for avoided deforestation or some other mechanism that ensures that financial resources for developing countries are generated where the country has limited financial resources. For example, the agreement may provide that potential carbon credits will vest in the host country at the time the debt is retired. The agreement could allocate any carbon credits to the host country on the condition that monies gained from the sale of these credits on future international markets go towards ‘eligible conservation activities’ (discussed below). This will allow for revenue to be generated for management where the developing country has limited financial resources to invest in the protection of its tropical forests.

A debt reduction agreement’s central focus will of course be the requirement for developing countries to conduct ‘eligible conservation activities’ to ensure that positive outcomes in terms of biodiversity and climate change are achieved by the scheme.

⁹ The ‘Tropical Forest Facility’ is established under the US *TFC Act* to administer the ‘debt for nature’ scheme.

1.7. Eligible conservation activities

The new obligations must require the developing country to invest resources into protecting its tropical forests and associated ecosystems. Requiring the developing country to conduct conservation activities in return for a reduction or cancellation of its debt would be the central pillar of the new Act. A ‘debt for nature’ swap program ensures that areas high in biodiversity value, that also act as carbon sinks, are protected. The new obligations must accordingly require the developing country to conduct certain activities that conserve, maintain and protect its tropical forests. These are termed ‘eligible conservation activities’ in the US *TFC Act* and comprise the following:

- *Establishment, restoration, protection, and maintenance of parks, protected areas, and reserves;*
- *Development and implementation of scientifically sound systems of natural resource management, including land and ecosystem management practices;*
- *Training programs to increase the scientific, technical, and managerial capacities of individuals and organisations involved in conservation efforts;*
- *Restoration, protection or sustainable use of diverse animal and plant species;*
- *Research and identification of medicinal uses of tropical forest plant life to treat human diseases, illnesses, and health related concerns; and*
- *Development and support of livelihoods of individuals living in or near a tropical forest in a manner consistent with protecting such tropical forest.*

The agreements in the US require the countries to conduct such activities as contractual conditions. An Australian Act will need to contain a similar list of ‘eligible conservation activities’ to ensure that conservation action is undertaken in participating countries to protect/enhance their tropical forests and attract ongoing management funding. Central actions will include the establishment of national parks and conservation zones in areas of high biodiversity value, the restoration of degraded areas, the implementation of sustainable land and agriculture practices in sensitive areas, the introduction of comprehensive environmental assessment regimes and the provision of education and training to local groups and individuals on natural resource management.

The Act should also clearly stipulate any prohibited activities that would breach agreements, such as clearing, logging or otherwise degrading areas designated under agreements.

1.8. Tropical Forest Fund

Provisions relating to the establishment of a Fund are needed in the new Act. The US legislation requires the debtor country to establish a Tropical Forest Fund from which to direct financial resources for implementing ‘eligible conservation activities’. These funds could be reallocated by the country itself, or, where the country has limited resources, from other sources such as through the sale of carbon credits from avoided deforestation. The US legislation favours non-government organisations as the preferred option for implementing these activities. Governments of the developing country can grant the funds to themselves only in exceptional circumstances. This provision reads:

Grants from the fund should be made to:

- (A) non governmental environmental, forestry, conservation, and indigenous peoples organisations of, or active in, the beneficiary country;*
- (B) other appropriate local or regional entities of, or active in, the beneficiary country; or*
- (C) in exceptional circumstances, the government of the beneficiary country.*

The EDO recommends that environmental, indigenous and conservation groups should be the primary means of implementing eligible conservation activities. These groups are committed to the protection of the environment and their activities are less likely to be subjected to pressure from outside sources with vested interests. However, the Fund itself should be administered by a government body in that country in a transparent manner, so there is governmental accountability for the allocation of funds and grants from the Fund can be easily tracked by Australia.

1.9. Regulatory body

The EDO recommends that a new government body should be established to administer the scheme. In the United States, an entity has been established within the Department of Treasury entitled the “Tropical Forest Facility” to administer the Act. Similarly, an Australian regulatory body should be established under the new Act.

A full list of the body’s functions must be provided in the Act. Functions would include negotiating Tropical Forest Agreements with developing countries, providing advice to the relevant Minister, consulting with the governments and NGOs of developing countries on eligible conservation activities, and reporting to parliament on Tropical Forest Agreements. The body could operate under the auspices of the Department of Foreign Affairs or Treasury. However, it would be appropriate for a concurrent role for the Department of Environment, Heritage, Water and the Arts to advise on the ‘eligible conservation activities’ conducted by developing countries.

The Act must also contain provisions relating to the establishment of a board for the new body and its membership. Furthermore, there must be a requirement for the body to report to the Commonwealth Minister for Environment.

1.10. Monitoring and review mechanism

The monitoring of obligations created under Tropical Forest Agreements will be crucial to the success of scheme. Indeed, unfulfilled Tropical Forest Agreements will not lead to positive biodiversity or carbon sequestration outcomes. Therefore, the Act should include a provision requiring a developing country that has a Tropical Forest Agreement with Australia to report annually to the regulatory body on its grants from the Tropical Forest Fund and on the progress of ‘eligible conservation activities’ to ensure that the country is complying with its contractual obligations.

The regulatory body should also be required to report annually to parliament. In the US Act, the Tropical Forest Facility is required to make annual reports to Congress. The report is required to include a description of the activities undertaken by the Facility during the previous year, descriptions of Tropical Forest Agreements entered into and a report on the Tropical Forest funds and a description of grants made. A similar provision should be introduced in the new Australian Act. This is important to maintain

transparency and accountability, and to encourage compliance (and address any early indications of non-compliance). In this vein, the EDO also advises that a publicly accessible register, both online and hard copy, of Tropical Forest Agreements should be established. Moreover, a formal parliamentary review of the legislation should occur 5 years from the date of commencement of the Act. This review should be independently done and should be ongoing every 5 years.

Compliance and enforcement provisions may be included in the Act or alternatively, be dealt with by agreeing conditions to agreements under the Act.

Concluding comment

Arresting the greenhouse gas emissions and loss of biodiversity resulting from the clearing of tropical forests in developing countries is an urgent global challenge. The EDO recommends that a 'debt for nature' scheme should be implemented in Australia as a means of meeting this challenge. Furthermore, in addition to positive climate change and biodiversity benefits, a well designed 'debt for nature' scheme will also help alleviate the economic pressures on developing countries and benefit local communities.

As noted, in order to ensure that the desired environmental outcomes are achieved, the new Act must not just provide for the cancellation of debt, but establish mechanisms to generate funding for ongoing management of tropical forests. For example, this could include the provision of increased funding and grants from developed countries as incentives for ongoing management. Such mechanisms are essential if tropical forests and other ecosystems are to be managed effectively in the long term for carbon and biodiversity benefits. A new Act should therefore be designed to complement any future means of ensuring the protection of tropical forests that may be developed, such as a robust international scheme that recognises carbon credits from avoided deforestation.

2. Amendments to EPBC Act – regulation of tropical forest product imports

2.1. Background

The Australian Labor Party committed to the banning of illegally logged timber imports in the lead up to the 2007 federal election. Such a ban would be consistent with the *National Strategy on Ecologically Sustainable Development 1992*¹⁰ and Australia's obligations under the United Nations Convention on Biological Diversity. Furthermore, Australia will soon ratify the International Tropical Timber Agreement 2006 (ITTA) which is an extension of the 1994 agreement that is still in force. Under these agreements, Australia has obligations to use its 'best endeavours and cooperate to promote the attainment of ITTA's objectives and avoid any action contrary thereto'. One of the ITTA's stated objectives is to:

*Promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests.*¹¹

¹⁰ Australian Government (1994), <http://www.environment.gov.au/esd/national/nsesd/index.html> (14 August 2008).

¹¹ *International Tropical Timber Agreement 2006*, http://www.aph.gov.au/house/committee/jsct/14may2008/treaties/timber_text.pdf

Therefore, there are clear obligations on Australia to ensure that tropical forest products are only sourced from legal and sustainable sources. However, there is currently a lack of government regulation in this area. As a result, the EDO recommends that legislation be drafted to implement laws that regulate tropical timber product imports.

We propose that the *EPBC Act* is the appropriate place for the regulation of tropical forest imports. The *EPBC Act* already regulates the importation and trade of threatened flora and fauna consistently with the Convention on the International Trade of Endangered Species (CITES). The regulation of timber imports is consistent with this treaty as well as the CBD and the ITTA 1994. The current *EPBC Act* review process therefore offers a good opportunity for the Government to introduce amendments to the Act that ban illegal imports and that regulate the importation of tropical forest products into Australia. A new Part could be introduced to deal with international movement of tropical forest products' similar in form to the Part 13A which relates to the international movement of wildlife specimens in accordance with CITES.

Recently, the United States became the first jurisdiction in the world to prohibit the import, sale or trade of illegally harvested wood and wood products through the *Legal Timber Protection Act* that amends the Lacey Act Amendments of 1981.¹² The United Kingdom is proposing a similar law with the *Illegally Logged Timber (Prohibition of Sale and Distribution) Bill* ('UK Bill') being tabled in the UK parliament in April 2008.¹³

The EDO has identified 8 key elements that should be included in the new Part:

- Objects
- Definitions
- Prohibitions and offences
- Penalties
- Chain of custody scheme
- Sustainability certification
- Monitoring
- Public participation

These are discussed in turn.

2.2. *Objects of Part*

The new Part must contain an appropriate objects clause. The EDO recommends the following objects:

- (a) to ensure that Australia complies with its obligations under the International Tropical Timber Agreement 2006 and the United Nations Convention on Biological Diversity;
- (b) to prohibit the importation into Australia of tropical forest products that are from an illegal source;
- (c) to prohibit the importation into Australia of tropical forest products that are from unsustainable harvesting operations;

¹² US Congress, <http://www.govtrack.us/congress/bill.xpd?bill=h110-1497> (14 August 2008).

¹³ UK parliament, <http://services.parliament.uk/bills/2007-8/illegallyloggedtimberprohibitionofsaleanddistribution.html> (14 August 2008).

- (d) to promote the conservation of biodiversity in Australia and other countries;*
- (e) to introduce a chain of custody scheme requiring importers of tropical forest products to provide proof of the legality of their products; and*
- (f) to introduce a sustainability certification scheme to ensure that tropical forest products imported into Australia are from sustainable operations.*

2.3. Definitions

The new Part must contain appropriate definitions to assist in the interpretation of the provisions. In the UK Bill the following definitions are provided:

“distributor” means any person who, for professional and commercial purposes, irrespective of the selling technique used—

- (a) manufactures and sells wood,*
- (b) sells wood manufactured by another person, or*
- (c) imports or exports wood into the United Kingdom;*

“importer” means any person established within the United Kingdom who is responsible for the physical introduction for commercial purposes of wood or wood products into the United Kingdom;

“person” includes any individual or organisation of any kind subject to any jurisdiction in the United Kingdom;

“wood” means any timber, bamboo or rattan and products thereof.

We note that the US Act has used ‘plant’ rather than ‘wood’ in order to capture most tropical forest products. The US Act contains a definition of ‘plant’ as follows:

The term ‘plant’ means any wild member of the plant kingdom, including roots, seeds, parts, and products thereof (but excluding common food crops and cultivars).’

While the focus of the UK Act is on timber, a broader definition (such as included in the US Act) should be introduced into the new Part of the *EPBC Act* as this will ensure that palm oil and similar products are covered.

We note that the Part 13A of the *EPBC Act* already contains a definition for ‘import’ which should be incorporated into a new Part.

There is no universally agreed definition of illegal logging. The US *Legal Timber Protection Act* contains 5 categorisations of ‘illegal’ foreign timber. These are:

- Timber that is taken, transported, or sold in violation of any law that applies in the country where the harvest, taking, transport or sale occurs;
- Timber taken without the payment of required royalties, taxes or stumpage fee;
- Timber exported or transhipped in violation of any legal limitation;
- Timber taken, exported or transhipped in violation of any international law, treaty or international agreement; and
- Timber that is imported without any official documentation of compliance with applicable legal requirements.

The Australian Government has also defined illegal logging as including obtaining access to forests by corrupt means, extracting timber without permission from protected areas and timber that has been transported by smuggling or by using false documentation.¹⁴ It is important that the new Part defines ‘illegal’ broadly to encompass all of these situations and to avoid disputes over what constitutes ‘illegally sourced’ timber.

2.4. Prohibitions and offences

The new Part will need to contain clear prohibitions and offences. The most important provision will be the one prohibiting the importation into Australia of illegally sourced timber and timber products from foreign countries.

The UK Bill prohibits not only the *importation* of illegally harvested wood but also the *sale* and *possession* of such timber. The prohibition should be similarly expressed in a new Part as follows:

Any person, including importers and distributors, who import into Australia, or who possesses, sells or attempts to sell, illegally sourced timber from a foreign country will commit an offence.

The list of offences in the new Part should also include the following:

- any person who imports timber into Australia without appropriate documentation that outlines the chain of custody of the timber commits an offence; and
- any person who imports timber into Australia that has not been certified as originating from a sustainable harvesting operation commits an offence.

Chain of custody and sustainability certification will be discussed below.

2.5. Penalties

Appropriate penalties are needed in the new Part in relation to the prohibition discussed above. These penalties must be sufficiently high in order to act as an effective deterrent to importers of illegal tropical forest products. The EDO stresses that the level of the penalty must be high enough to ensure that unconscionable importers do not simply ‘write off’ penalties as simply a cost of doing business.

The US *Legal Timber Protection Act* has introduced strong penalties for breaches of the prohibitions. The most stringent penalties include the possibility of gaol sentences and fines in excess of US\$500,000. Similarly, the UK Bill proposes terms of imprisonment of up to 5 years and/or fines of up to 100,000 pounds for importers who knowingly breach the law, and monetary penalties and summary convictions for those who recklessly break the law. The EDO submits that the US and UK legislation should be used to guide the formulation of a penalty regime under the new Part.

¹⁴ Australian Government, *Bringing Down the axe on illegal logging*, October 2007. http://www.daff.gov.au/data/assets/pdf_file/0018/408501/DAFF-Illegal-Logging-Policy.pdf (6 August 2008).

In Australia we have an established three-tier structure of offences as provided by the High Court in the case of *He Kaw Teh*.¹⁵ These are:

- *Tier 1 offences* - the most serious offences as they involve wilful or negligent breaches of the law. In such cases an appropriate state of mind must be proven in addition to the prohibited act. Such breaches may lead to imprisonment in addition to a monetary penalty.
- *Tier 2 offences* - these are 'strict liability offences'. This means that to prove the offence, the prosecutor does not need to show that the defendant intended to breach the law. The prosecutor only has to prove that the defendant committed the prohibited act. The appropriate penalty is a monetary fine.
- *Tier 3 offences* - these are 'absolute liability' offences and are the least serious of the three categories of offences. A Tier 3 offence is a Tier 2 offence for which a simply penalty notice can be issued. These may be appropriate for breaches of ancillary provisions of the Act.

A penalty regime should be introduced consistently with this established structure.

2.6. Chain of custody scheme

As discussed above, the *US Legal Timber Protection Act* makes it is an offence to import timber from a foreign country without "any official documentation of compliance" that confirms that the timber has complied with legal requirements. Furthermore, the Act also requires importers of tropical forest products to make a declaration containing details of the species and country of origin of any plant or plant product. The Act aims to increase transparency in global wood supply chains through the introduction of a 'chain of custody' scheme. It is submitted that a chain of custody scheme such as the one in the US, is the most effective way of ensuring that timber is legally sourced because it traces the timber back to the point of harvesting. Chain of custody, according to the Forest Stewardship Council, is the path taken by raw materials from the forest to the consumer, including all successive stages of processing, transformation, manufacturing and distribution.¹⁶

A chain of custody scheme should therefore form a key element of the *EPBC Act* amendments. A legal requirement should be introduced requiring all importers of tropical forest products to provide legal documentation that traces the origin and movement of the wood products that they have imported and that demonstrates compliance with all legal obligations. Any importer who does not hold such documentation will be guilty of an offence.

2.7. Sustainability certification

A chain of custody scheme will ensure that wood products that enter Australia are sourced from *legal* harvesting operations. It does not necessarily ensure that the wood is sourced from *sustainable* harvesting operations. Indeed, it is clear that much of the wood sourced from developing countries comes from ecologically unsustainable operations (although legal). An obvious example is the widespread clearing of tropical forests that are high in biodiversity value, to replace them with palm oil plantations.

¹⁵ (1985) 157 CLR 523.

¹⁶ Forest Stewardship Council Australia, <http://www.fscaustralia.org/certification/> (4 August 2008).

Therefore, in addition to a chain of custody scheme, we advise that mandatory sustainability certification requirements be introduced into the new Part. The certification of timber products would go a long way to ensuring that not only *legal* but *sustainable* timber products enter Australia. Products that are not certified by an accepted certification source will be prohibited and importers who sell timber that has not been certified will commit an offence.

Forest certification identifies wood products as coming from forests which are managed sustainably and under specific environmental, economic and social standards.¹⁷ There are various voluntary certification schemes operating around the world, some of which could inform a compulsory sustainability certification regime for Australia. Two certification schemes that are accepted internationally are: the Programme for the Endorsement of Forest Certification (PEFC) which has 30 international members, and the Forest Stewardship Council which certifies up to 65.5 million hectares of forests worldwide. The Forest Stewardship Council is more commonly used in Australia. It is an independent non-profit network of organisations that assess harvesting operations according to the Principles of Responsible Forest Management. Certification is only granted to operations that, *inter alia*, involve robust environmental assessment, that protect high conservation areas and that include adequate monitoring and assessment regimes.¹⁸ Any mandatory certification scheme for Australia will need to ensure that certification is subject to stringent assessment regimes such as the Forest Stewardship Council. Only certification schemes that involve rigorous, independent assessment by third parties of the sustainability of harvesting operations should be eligible under the new Part.

2.9. Reporting and review

The new Part should include a reporting and review mechanism. The Department of Environment, Heritage, Water and the Arts must report annually on the scheme based on environmental, social and economic indicators. Reports under the new Part should be included in the Department's mandatory annual ESD reporting under s516A of the *EPBC Act*. This should include information on the number of prosecutions under the new Part and the volume of certified timber imported into Australia, etc.

2.10. Public participation

Public participation and community enforcement rights are key elements of best practice environmental legislation. We note that the *EPBC Act* already incorporates third party enforcement rights for "interested parties" under s475 of the Act. Although this will presumably extend to the new Part, it must be made clear that third party enforcement rights apply to breaches of timber importation laws.

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¹⁷ Forest Stewardship Council, www.fscus.org (6 August 2008).

¹⁸ Forest Stewardship Council, *Principles and criteria for forest stewardship*, http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf

APPENDIX- Definitions of vegetation types

1. Definition of Tropical Forest

- 1.1 The term tropical forest is generally understood to mean rainforests within the tropics (23.5° N and S). There are a number of possible definitions of tropical forests and any definition adopted should clearly indicate if the scheme is to include secondary/regrowth tropical forests, forest plantations, or rehabilitated forest areas that have a history of disturbance.
- 1.2 The definition of forest under the Kyoto Protocol is:
 - (a) “Forest” is a minimum area of land of 0.05-1.0 hectares with tree crown cover (or equivalent stocking level) of more than 10-30 per cent with trees with the potential to reach a minimum height of 2-5 metres at maturity *in situ*. A forest may consist either of closed forest formations where trees of various storeys and undergrowth cover a high proportion of the ground or open forest. Young natural stands and all plantations which have yet to reach a crown density of 10-30 per cent or tree height of 2-5 metres are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest.
 - (b) Parties nominate the minimum area, tree crown cover and tree minimum height to be classified as forest in their countries. In Australia a minimum area of 0.2ha, a minimum tree crown cover of 20% and a minimum tree height of 2m is used to define forests.
- 1.3 Some more scientific definitions of rainforest, based on life forms, canopy measures and climatological factors include:
 - (a) Rainforests are defined ecologically as closed, broadleaved forest vegetation with a continuous tree canopy of variable height, and with a characteristic diversity of species and life forms. The ecological definition of rainforest includes transitional and seral communities with sclerophyll emergents that are of similar botanical composition to mature rainforests in which sclerophylls are absent.¹⁹
 - (b) Typically, rainforests are closed forests (canopy cover of >70%) and composed of trees less than 30m tall.²⁰
 - (c) Evergreen, hygrophilous in character, at least 30m high, but usually taller, rich in thick-stemmed lianas and in woody as well as herbaceous epiphytes.²¹
- 1.4 The Kyoto definition is not considered suitable because a canopy cover of 30% is not considered representative of tropical forests and highly degraded forests in tropical areas would meet this definition. A definition that combines some of these definitions and also defines the proposed scope of the scheme would be the most useful, for example:
 - (a) Tropical forests are those with a canopy cover of >70%, comprised of broadleaved vegetation and have a diversity of species and life forms. They contain lianas and epiphytes. Tropical forests do not include forest

¹⁹ Dale et al (1980). Resolution by the Ecological Society of Australia on Australian rainforest conservation. *Bulletin of the Ecological Society of Australia* 10:6-7

²⁰ Lindenmayer and Burgman (2005) Practical Conservation Biology. *CSIRO Publishing*

²¹ Schimper, A. (1903) Plan Geography upon a Physiological basis. *Clarendon Press*

plantations containing only a single species planted for primarily commercial purposes, however they do include naturally, or artificially assisted regenerated forests that fit the above definition.

2. Definition of Wetlands

- 2.1 Wetlands may be defined in a number of ways, depending on whether only permanently inundated wetlands are to be included in the scheme, or if seasonally inundated wetlands are also proposed to be included.
- 2.2 If only permanently inundated areas are to be included in the scheme then the following is a reasonable definition of a wetland:
 - (a) A wetland is defined as an area with the following characteristics
 - i) Water table is near the ground surface.
 - ii) As a consequence the substrate is poorly aerated.
 - iii) Inundation lasts for such a large part of the year that the dominant plants and other organisms are those that can exist in wet and reducing conditions.²²
- 2.3 For a broader definition of freshwater wetlands, to include areas such as floodplains, and ephemeral lakes the following definition could be used
 - (a) Areas of land where the ecological processes are affected by permanent or temporary inundation either by standing or running water.²³
- 2.4 The definition from the Ramsar Convention is the broadest and also includes marine and estuarine ecosystems. This definition is as follows
 - (a) Wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including area of marine water the depth of which at low tide does not exceed 6 metres.

3. Definition of Peatlands

- 3.1 Peat is the remains of plant and animal constituents accumulating under more or less water-saturated conditions owing to incomplete decomposition. It is the result of anoxic conditions, low decomposability of the plant material, and other complex causes. Peat is organic material that has formed in situ i.e. as sedentary material, in contrast to aquatic sedimentary deposits.
- 3.2 Peatland is a term used to encompass peat-covered terrain and usually a minimum depth of peat is required for a site to be classified as peatland. In Canada this limit is 40cm but in many countries and in the peatland statistics of the International Mire Conservation Group it is 30cm.²⁴
- 3.3 It is suggested that a peatland may be defined as

²² Rydin (2006) Biology of Peatlands

²³ Keith, D. (2004) Ocean Shores to Desert Dunes: The native vegetation of NSW and the ACT. Department of Environment and Conservation

²⁴ Joosten and Clarke (2002) Wise use of mires and peatlands: Background and principles including a framework for decision making. *International Mire Conservation Group and International Peat Society*.

- (a) an area with or without vegetation with a naturally accumulated peat layer at the surface with a minimum depth of 30cm.

4. Definition of Tundra²⁵

- 4.1 Tundra describes the vegetation growing above the tree line in alpine or arctic areas. Tree growth at high latitudes or altitudes is hindered by low temperatures and short growing seasons. The vegetation is composed of dwarf shrubs, sedges and grasses, mosses and lichens. Generally subsoil in tundra areas is permanently frozen i.e. permafrost.
- 4.2 A possible definition for tundra for this scheme may be:
 - (a) Alpine vegetation comprised of shrubs, sedges, grasses, mosses and lichens, located in areas above the tree line of mountains.

²⁵ We note that it may be unlikely that the scope of an Australian debt for nature scheme would include arctic tundra, because of the lack of developing debtor countries in the Arctic and therefore the lack of opportunity for debt for nature swaps.