

SUBMISSION TO THE SENATE INQUIRY ON THE ILLEGAL LOGGING PROHIBITION BILL 2011

WADIC

Window and Door Industry Council

 **Timber Veneer**
Association of Australia

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A joint submission from the following Associations:

- Window and Door Industry Council www.wadic.org.au
- Timber Veneer Association of Australia
www.woodveneer.asn.au
- Timber and Building Materials Association
www.tabma.com.au
- Australian Furniture Association South West
www.australianfurniture.org.au
- Timber Merchants Association www.timber.asn.au
- Cabinet Makers Association (Vic) www.cmavic.com.au
- Cabinet Makers Association (WA) www.cmawa.com.au
- Qld Timber Importers, Exporters and Wholesalers
Association
- Australian Shop and Office Fitting Industry Association
www.asofia.com.au
- Furnishing Industry Association of Australia Ltd
www.fiaa.com.au

Representing approximately 140 Australian timber and wood-based products importers and around 2,500 businesses in total, from the timber merchant, secondary wood-processing/manufacturing and domestic log processing sectors.

Submitted - 8 /12/11

EXECUTIVE SUMMARY

Our Alliance of Associations represents more than 140 timber, panel, veneer and wood based products importers, domestic log processors and approximately 2,500 timber merchant and secondary wood processing businesses. Members create more than 25,000 direct jobs, largely in the outer suburban and light-industrial areas of Australian cities and regional towns. We support the intent of the Bill and believe it should substantially stand as it is, especially noting that the bill *matches or exceeds* the requirements of the Lacey Act and the EU Illegal Logging Act (EUTR) in nearly every case (Attachment 3). However, we have serious concerns with regards to business compliance burdens, cost impacts, impossible time restraints for compliance and lack of certainty. To correct these problems we propose five amendments, which we do not think would decrease regulatory effectiveness, and may increase it.

1. REVIEW - BUSINESS AFFORDABILITY & ACHIEVABILITY OF THE REGULATIONS

- Amendment to be added to Sections 14 and 18:

“The Regulations may provide for a review of the businesses affordability and achievability of the regulations, one year after the Regulations come into force.”

Illegal logging Due Diligence requirements are untested, not having come into force anywhere in the world. They will likely prove to be unaffordable and unachievable for many businesses: a recent report³ on the European Timber Regulation’s Due Diligence system states that *“SME’s (Small and Medium Enterprises) do not have the technical, financial and human resources to carry out complex (Illegal Logging) Due Diligence”*

2. NON-REGULATED IMPORTED PRODUCTS AND DOMESTIC LOGS – FAULT ELEMENT

- Amendment to Section 8 – Importing illegally logged timber:

“A person commits an offense if: (a) the person knowingly or intentionally imports a thing; and”

- Amendment to Section 15 - Processing Illegally Logged raw logs

(1) “A person commits and offense if :..... (c) the person has processed the raw log knowing or intending that it is illegally logged”

It is unreasonable to make a person liable (and, especially, *criminally* liable) for illegal acts committed by (an unknown number of) third parties, of whom they have no knowledge or control, often far removed in the supply chain and for which there is no definitive test of legality. It is especially unreasonable to hold someone liable for others’ compliance to an *unknown number of unidentified foreign laws*. By making the fault elements those of *deliberately* or *knowingly* importing or processing illegal timber or logs, the prohibition (for non-regulated products) becomes fair, holding a person accountable for matters that they *do* have control over, or knowledge of.

3. NON-REGULATED IMPORTED PRODUCTS AND DOMESTIC LOGS - “NOTICE FOR COMPLIANCE”

- Amendment to be added to Section 8 and Section 15:

“That there is a 12 month period from the time the bill receives Royal Assent until the time this offense comes into force.”

As it stands, the compliance requirement for non-regulated products will come into force the day after Royal Assent. This would be an impossible and unreasonable timeframe for most businesses to meet, especially if the fault element in the bill remains as including that of *recklessly* (not just *knowingly* or *intentionally*) importing or processing illegal timber/logs. One year at the very minimum is a reasonable time frame, especially noting that European importers and domestic log processors have been given at least a two year period to comply with their prohibition requirement.

4. DEFINITION OF “ILLEGALLY LOGGED”

- We propose that this be amended to:

“harvested in contravention of National and Sub-national forest laws in force in the place (whether or not in Australia) where the timber was harvested”

In criminal law, definitions need to be specific and unambiguous, so that people understand what, precisely, is expected of them. Additionally, this definition needs to be more specific because business needs certainty, and by providing such certainty the Government will enable improved business compliance and so increase the effectiveness of the law.

5. AMMENDMENT – Delete major part of Section 14 (5), as per

14 (5) The regulations may provide for due diligence requirements for importing regulated timber products ~~to be satisfied, wholly or partly, by compliance with specific laws, rules or processes, including the following:~~

- ~~(a) laws, or processes under laws, in force in a State or Territory or another country~~
- ~~(b) rules or processes established or accredited by an industry or certifying body~~
- ~~(c) established operational processes~~

The crossed out section is unnecessary and too prescriptive, giving detail that is more properly dealt with comprehensively in the Regulations, not in the enabling Act. It could be interpreted as limiting or favouring only the legality mechanisms mentioned. The Bill should not introduce such prejudices; there are many ways that legality may be demonstrated. This need for flexibility and diversity in Due Diligence requirements is reinforced by the finding of the European Timber Regulation's Due Diligence report³, *“operators should define their respective DDS (due diligence systems) and include the most suitable toolset for their implementation. Due to the high degree of different conditions, it is not feasible to develop a fixed and uniform DDS description which would be acceptable for all operators”* P.78

INTRODUCTION

Our Alliance of Associations represents more than 140 timber, panel, veneer and wood based products importers, domestic log processors and approximately 2,500 timber merchant and secondary wood processing businesses. Members create more than 25,000 direct jobs, largely in the outer suburban and light-industrial areas of Australian cities and regional towns. Whilst we cannot speak for non-members, the number of unassociated businesses could be similar to the quoted membership figures.

Secondary wood processing businesses are a major component of Australia's wood-products value-adding sector, comprising furniture, kitchen and joinery manufacturers, cabinet-makers, shop fitters, panel veneering businesses, edge-band and component manufacturers, cut-to-size and re-saw businesses, wall and ceiling systems manufacturers and others. Many of these businesses are dependent, to a varying degree, on imported timber, veneer and imported wood based products. The dependency of Australia's housing, construction, interiors fit-out and secondary wood processing industries on imported timber and wood-based raw materials is often over-looked (refer [Attachment 1 - "Timber Products that have to be imported"](#) and [Attachment 2 - "Availability of Hardwood Species"](#)). This dependency on imports is shown by the finding of recent inquiry into the forestry industry by the House of Representatives committee; in 2010 we had a trade deficit in wood products of \$1.9 billion.

Australia is not of an economic size to competitively manufacture the wide range of non-commodity wood based products required by our secondary wood processing, building, fit-out and manufacturing industries. Additionally, we cannot supply adequate amounts and suitable species and grade of hardwood timber, plywood and veneer from our commercially available forests and plantations. Unlike the US and the EU, our climate, and soils on available land are, in general, not conducive to the commercial growing of a large volume of timber, without removing valuable agricultural land from production, irrigating or clearing native forest or woodland.

We support the intent of the Bill and believe it should substantially stand as it is, with reasons demonstrated in [Attachment 4](#) and [Attachment 3](#) ("[Comparison of Illegal Logging Laws](#)"). As this comparison of laws shows, the Australian Bill *matches or exceeds* the requirements of the US Lacey Act and EU Act in nearly every case. Additionally, Australian importers are significantly disadvantaged compared to those in the EU because we do not have any Government funded Voluntary Partnership Agreements⁶, which ensure automatic legality for timber from supplier partner-countries.

However, we have serious concerns with regards to business compliance burdens, cost impacts, lack of certainty and the extraordinarily unreasonable time frame for compliance (the criminal offense for importing or processing "non-regulated products/logs" comes into force within a day of Royal Assent). We propose five amendments which will not only reduce compliance costs, increase certainty and improve business compliance, but also ensure ongoing supply of competitively priced and/or essential *legal* timber and wood based raw materials for the construction, building and secondary wood processing industry. We do not see that these amendments would decrease regulatory effectiveness, and may increase it.

PROPOSED AMENDMENTS

1. REVIEW - BUSINESS AFFORDABILITY & ACHIEVABILITY OF THE REGULATIONS

- Amendment to be added to Sections 14 and 18:
"The Regulations may provide for a review of the businesses affordability and achievability of the regulations, **one year** after the Regulations come into force."
This to apply for importers *and* first (domestic) log processors, in addition to the 5 year *legislative* review of the Bill.

Illegal logging Due Diligence requirements are untested, not having come into force anywhere in the world. There is the high probability of severe adverse unintended consequences: they will likely prove to be unaffordable and unachievable for many businesses. A recent ² report³ on the European Timber Regulation's Due Diligence system states that "*SME's⁴ (Small and Medium Enterprises) do not have the technical, financial and human resources to carry out complex (Illegal Logging) Due Diligence*"(p.13) and "*SME's do not often have the resources or the expertise to carry out adequate measures.*"(p.78). It is of concern that that the Small Business Impact Statement¹ commissioned by the Australian Government was unable to estimate regulatory and due diligence compliance costs for this sector.

Apart from the costs and burdens of the Due Diligence requirements, there are costs such as increased Customs charges and the cost of “Legality Audits”, which, if FSC, PEFC or AFS Chain of Custody audits are any guide, may be in the order of five thousand, to tens of thousands of dollars per year. Noting that a “legality audit” would likely need to meet Government reporting requirements (unlike FSC, PEFC, AFS), its costs could be considerably greater, more in line with those of *Financial Audits* for “Reporting Entities” under the Corporations Act.

With the majority of Australian importers being SME's⁵, plus many domestic processors being small saw-millers, the matter of non-affordability and inability to carry out Due Diligence and other regulatory requirements is of genuine concern. Businesses without the resources and expertise to comply, may find themselves in a position where the cessation of business is a harsh reality. This may not necessarily be because their timber supply is “illegal”, simply that they do not have the capacity, expertise and resources to carry out all the *regulatory, audit and reporting requirements*. There is more than just the socio-economic impact on businesses, jobs, families and owners; if Australia's domestic processing of legal logs and legal timber imports declines because of unachievable and unaffordable Due Diligence requirements, timber will be replaced with materials of higher embodied carbon.

2. NON-REGULATED IMPORTED PRODUCTS AND DOMESTIC LOGS – FAULT ELEMENT

- Amendment to Section 8 – Importing illegally logged timber:
“A person commits an offense if: (a) the person ***knowingly*** or ***intentionally*** imports a thing; and”
- Amendment to Section 15 - Processing Illegally Logged raw logs
(1) “A person commits an offense if :..... (c) the person has processed the raw log ***knowing*** or ***intending*** that it is illegally logged”

It is unreasonable to make a person liable (and, especially, *criminally* liable) for illegal acts committed by (an unknown number of) third parties, of whom they have no knowledge or control, often far removed in the supply chain and for which there is no definitive test of legality. It is especially unreasonable to hold someone liable for others' compliance to an *unknown number of unidentified foreign laws*. By making the fault elements those of *deliberately* or *knowingly* importing or processing illegal timber or logs, the prohibition (for non-regulated products) becomes fair, holding a person accountable for matters that they *do* have control over, or knowledge of. Such amendments would bring the Bill into alignment with the various State laws regarding receiving stolen goods, the closest type of law to the Illegal Logging Bill. See, for instance (emphasis added):

- The Victorian Crimes Act 1958 – SECT 88
“88. *Handling stolen goods – A person handles stolen goods if knowing or believing them to be stolen goods he dishonestly receives the goods or brings them into Victoria.....”*
- The Queensland Criminal Code 1899 – SECT 433
“433 *receiving tainted property – A person who receives tainted property, and has reason to believe it is tainted property, commits a crime.”*
- The NSW Crimes Act 1900 – SECT 188
“*Whosoever receives, or disposes of, or attempts to dispose of, any property, the stealing where of amounts to a serious indictable offence, knowing the same to have been stolen, shall be guilty.....”*

3. NON-REGULATED IMPORTED PRODUCTS AND DOMESTIC LOGS - “NOTICE FOR COMPLIANCE”

- Amendment to be added to Section 8 and Section 15:
“That there is a ***12 month period*** from the time the bill receives Royal Assent until the time this offense comes into force.”

As it stands, the compliance “prohibition” requirement for non-regulated products will come into force the day after Royal Assent. This would be an impossible timeframe for most businesses to meet, especially because as the Bill stands the fault element includes that of *recklessly* (not just *knowingly* or *intentionally*) importing or processing illegal timber/logs. “Recklessly” is defined in the Criminal Code 1995 as “*he or she is aware of a substantial risk that the circumstance exists or will exist*”.

Businesses will have to develop processes, establish checks, establish new record systems, carry out training, check documentary evidence as legally valid against claims of “recklessly” importing or processing illegal timber, new sources of timber and wood-products may need to be found (if current sources show unacceptable risk), businesses may need to negotiate new contracts with suppliers and suppliers may need to be audited to make sure they comply with the systems. Some businesses may actually have to change the nature of their business and the types of products manufactured or sold. Additionally there will be extensive work to do in foreign language interpretation, and identification and assessment of foreign laws.

It can take up at least six months from the time of placement of order (for a wood based manufactured product) until you receive it. Shipping can take six weeks, add to that manufacturing time, product testing time, lead time to get onto a manufacturing production run/schedule, time to wait for a ship or have enough product to fill a container, and it can easily be six months until one’s import enters the country. In the case of timber, which may be slowly air dried in the country of origin, it is not unusual to have a period of at least twelve months from time of placement of order until the timber is received by the importer.

Many importers (especially of finished, processed and complex products, who generally aren’t members of the consulted associations such as ATIF, AFPA, WADIC, TMA, ASOFIA, TVAA, TABMA, EWPA, CMA etc) may be unaware of this upcoming law. If the Government allows a twelve month period from time of the bill passing until the non-regulated products compliance requirement comes into force, this would allow enough time for the Government to run effective outreach, communication and advertising campaigns, to ensure that *all* importers know about their liabilities, and have time to time to prepare for and reduce their risk of “recklessly” importing product with illegal timber in it.

Similarly, twelve months would give small domestic millers and forest owners/growers the time to ensure they comply. Many small private property saw-millers and land-owners may not be aware of their “overnight” criminal liabilities; many wouldn’t know that the law applies to domestic millers. Also, logs may be held in a miller’s log yard for at least a year. Under the Bill as it stands, this means they could be liable for logs purchased prior to the Act coming into force, and additionally, could have these logs confiscated. (Note that the Illegal Logging Bill isn’t listed as an item under “Domestic Forestry” on the DAFF web-site)

If importers and local processors do not have adequate time to ensure they gather all the necessary information and take action to meet the “reckless” fault element of the non-regulated “prohibition” compliance requirement, it is likely that responsible businesses will act in an overly risk averse way, and so restrict the supply and importation of *legal* timber and timber products. This would not be in the national interest and could have extremely adverse consequences for the business itself, and with adverse flow-on effects to downstream value-adding and Australia’s construction businesses.

European importers and domestic log processors have been given at least a two year period to comply with their “prohibition” compliance requirements. (The European Illegal Logging Act was enacted in the EU Parliament in 2010 and is planned to be applied in each member country by 2012 at the earliest.) Australian businesses should be treated with a similar degree of consideration.

4. DEFINITION OF “ILLEGALLY LOGGED”

- We propose that this be amended to:
“harvested in contravention of National and Sub-national forest laws in force in the place (whether or not in Australia) where the timber was harvested”

The same definition of illegal logging should apply and be implied throughout the entire Bill, in the associated Regulations and Due Diligence requirements.

Especially in criminal law, definitions need to be specific and unambiguous, so that people understand what, precisely, is expected of them in order that they may avoid criminal prosecution. Additionally, the definition of illegal logging needs to be more specific because this will provide a greater degree of certainty for business, and by providing such certainty the Government will enable improved business compliance and so increase the effectiveness of the law. It will also minimize unnecessary business costs, enabling maximum business financial, human and technical resources and expertise to be *focused* on ensuring that their timber complies with supplier countries’ *forest* laws.

Forest Laws

The object of the Bill is to increase compliance with *forest* codes and laws. To expect importers of timber and wood products to ensure that their product has been harvested in accordance with (potentially hundreds of) foreign *non-forest* laws, and often many stages removed on the supply chain, is unreasonable and would be impossibly expensive, especially for small and medium enterprises. It would also be unfair and inconsistent because no other imported product has to be shown to be compliant with such laws. In particular, no *competing* imported (non-timber) products have to be shown to be compliant with such laws.

Food grown and harvested in breach of agricultural laws (of country of origin) can be freely imported into Australia. Electronic goods, clothing, building products and chemicals whose raw materials may have been mined in breach of OHS, pollution, labour, human and traditional rights and laws can also be freely imported without legal origins needing to be shown, and without any criminal offense being created.

Domestic log processors, importers of timber and wood based products should not be singled out for especially harsh treatment with regards to compliance to non-forest laws, whilst importers of non-timber products are completely exempt from any such laws. Breaches of such laws can do a similar degree of harm to life, the environment and a nation's prosperity, no matter whether the operation is forestry, mining, manufacturing, agriculture or food production.

National and Sub-national laws

Without the jurisdiction of the laws being defined, there would be a large set of international (non-enacted) treaties and conventions that importers would need to be aware of and to ensure compliance with. This is an impossible task to expect from small or medium businesses. This definition also maximises business certainty and minimizes potential (costly) conflicts between laws, for instance where national law is in conflict with (non-enacted) international treaties. Without an "over-riding" law (ie National law) able to be applied, it would be unreasonable to expect business to know what laws their suppliers have to comply with.

"National/Sub-national Law" is the definition that has been implied (and in many cases, used) throughout the "Legal Logging" process and consultation. For instance the Draft Generic Code of Conduct defines "Illegal Logging" as "when wood is harvested, transported, processed, bought or sold in violation of *national* laws, and "Legal Harvest" as when "wood is *cut and removed* in compliance with relevant *national and/or sub-national laws* of the *Country of Harvest*".

Avoidance of unnecessary legal costs

A clear precise definition of illegal logging will save many years of expensive court cases that would otherwise be required to determine the meaning of, and clarify what is meant by, the current broad and ambiguous definition of illegal logging.

5. AMMENDMENT – Delete major part of Section 14 (5), as per

- 14 (5) The regulations may provide for due diligence requirements for importing regulated timber products to be satisfied, wholly or partly, by compliance with specific laws, rules or processes, including the following:**
- ~~(a) laws, or processes under laws, in force in a State or Territory or another country~~
 - ~~(b) rules or processes established or accredited by an industry or certifying body~~
 - ~~(c) established operational processes~~

The crossed out section is unnecessary and too prescriptive, giving detail that is more properly dealt with comprehensively in the Regulations, not in the enabling Act. It could also be interpreted as limiting or favouring only the legality mechanisms mentioned. The Act should not introduce such prejudices; there are many ways that legality may be demonstrated, such as independent credible peer reviewed studies, DNA testing, bilateral agreements, SFM certification etc. Additionally, in future, more ways may be developed.

This need for flexibility and diversity in Due Diligence requirements is reinforced by the European Timber Regulation's Due Diligence report³, "*operators should define their respective DDS (due diligence systems) and include the most suitable toolset for their implementation. Due to the high degree of different conditions, it is not feasible to develop a fixed and uniform DDS description which would be acceptable for all operators*" P.78

The use of the word “rules” and “processes” in this section is too ambiguous and could be interpreted as importers being liable to ensure compliance with “any” rule, for instance those laid down by non-government organizations or specific industry associations. The use of the phrase “certifying body” is inappropriate because it is not defined in the Bill and has several different meanings in the context of illegal logging: for instance, an auditor to a sustainability or legality Standard, the owner of that Standard (eg FSC, AFS), “certifier” as used in the “Draft Bill” and the European Illegal Logging Act or a Government approved certifier.

Section 14 (5) (a) should be deleted because it could be interpreted that the Regulations may require importers to ensure compliance with Australian State or Territory laws, when it is “*laws in force in the place where the timber was harvested*” that must be complied with.

INDICTABLE OFFENCE, JURY TRIAL with UNANIMOUS VERDICT

The illegal logging Bill makes people criminally liable for the knowledge of illegal acts committed by unknown others, to any number of unknown laws, in foreign jurisdictions - adding a dimension of uncertainty unusual in criminal law. Given this, it is crucial that innocent people are provided with maximum possible protection against wrongful conviction: the offence should be classified as an indictable offence requiring *mens rea* to be established beyond reasonable doubt at a jury trial with a unanimous verdict.

In the case of small businesses (which comprise the majority of importers), the defendant will most likely be the business owner himself/herself. If they are wrongfully convicted and imprisoned, this would almost certainly close down their business, putting employees out of work and destroying the owners’ family’s livelihood and investment. Small business people cannot afford expensive defense lawyers, making it even more important that the law ensures best possible protection against wrongful conviction.

FOOTNOTES / REFERENCES

1. Cailum Pty Ltd, “*Illegal Logging Policy – Small Business Impact Statement*”, Report prepared for the Department of Agriculture, Fisheries and Forestry, March 2010, http://www.daff.gov.au/_data/assets/pdf_file/0010/1872631/Cailum_-_Small_Business_Impact_Statement.pdf Page 19
2. July 2011- see <http://forestindustries.eu/content/eu-timber-regulation-support-study-final-report>
3. “*Support study for development of the non-legislative acts provided for in the Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market - Final report*”, EU DG Environment - coordinated by the European Forest Institute (EFI), http://ec.europa.eu/environment/forests/pdf/EUTR-Final_Report.pdf
4. SME’s (Small and Medium Enterprises) are defined by the EU as businesses employing less than 250 people with a turnover of less than €50 million – “*The new SME Definition – Increased opportunities in EU research*”, European Commission Community Research, http://www.euresearch.ch/fileadmin/documents/PdfDocuments/sme_definition_leaflet_en.pdf
5. Our estimate is that at least 95% of importer members businesses would be small and medium businesses. This is supported by the Small Business Impact Statement which stated that 92% of businesses affected by illegal logging initiatives are small businesses¹
6. FLEGT Voluntary Partnership Agreements (VPA’s) ensure automatic legality status for EU importers of timber from Ghana. The Republic of Congo and Cameroon are in the ratification process. Negotiations are ongoing with: Liberia, Gabon, Democratic Republic of Congo, Central African Republic, Malaysia, Indonesia, Vietnam. <http://ec.europa.eu/environment/forests/flegt.htm>

ATTACHMENT 1

TIMBER AND WOOD PRODUCTS THAT HAVE TO BE IMPORTED

(NOT AVAILABLE FROM AUSTRALIAN FORESTS, SAW-MILLS and MANUFACTURING PLANTS)

- Concrete form-ply face veneer
- AA Interior/paint grade hardwood plywood
- Hardwood marine plywood
- Thin/bending plywood
- Model and hobbyist veneers (usually sawn veneers) – eg balsa.
- Hardwood decorative plywood in 95% of species required (birch, maple, cherry, oak, poplar etc).
- Fire Retardant MDF, particleboard and plywood in a wide range of thicknesses and densities
- Fire Retardant exterior grade wood-based panels
- Coloured MDF
- Exterior grade MDF
- 90% of species of hardwood decorative veneers.
- 90% of species of hardwood flooring (solid timber flooring and laminated)
- High pressure laminates
- Reconstituted decorative veneers
- Printed and plain pre-preg (raw/non-impregnated) lamination papers for HPL and LPM laminates
- Pre-preg (raw/non-impregnated) papers for formboard overlays
- Coated paper
- Furniture carcassing - hardwood
- Full range of kraft papers
- Oriented strand board
- High durability species suitable for exterior joinery applications – eg merbau. Suitable Australian species such as Blackbutt and Tallowwood in very, very limited supply
- High value/grade cabinetry hardwoods - very limited supply of suitable Australian species
- Densified wood
- Dyed decorative veneers
- Dyed timbers
- Exterior grade decorative veneered panels
- Super-low-density substrates and panels (eg super low density MDF)

ATTACHMENT 2

AVAILABILITY OF HARDWOOD SPECIES

<u>SPECIES</u>	<u>Origin</u>	<u>Availability as cabinetry timber/veneer</u>
IMPORTED HARDWOOD SPECIES (Cabinetry/Decorative veneer grade)		
Alder, Red	Imported - USA	Readily available
Ash Burr	Imported - EU	Readily available
Ash, White	Imported - EU	Readily available
Beech, Curly	Imported - EU	Readily available
Beech, European	Imported - EU	Readily available
Beech, Unsteamed	Imported - EU	Readily available
Birch, Curly	Imported - EU	Readily available
Birch, European	Imported - EU	Readily available
Birch, Masur	Imported - EU	Limited availability
Birch, Quilted European	Imported - EU	Readily available
Cherry, American	Imported - USA	Readily available
Gum, Red Heart	Imported - USA	Readily available
Madronna Burr	Imported - USA	Readily available
Maple Burr	Imported USA/Canada	Readily available
Maple, Birds Eye	Imported USA/Canada	Readily available
Maple, Figured Rock	Imported USA/Canada	Readily available
Maple, Rock	Imported USA/Canada	Readily available
Myrtle Burr, American	Imported - USA	Limited availability
Oak Burr	Imported USA/Canada	Readily available
Oak, American White	Imported USA/Canada	Readily available
Oak, European	Imported - EU	Readily available
Oak, Rift	Imported - EU/USA	Readily available
Oak, Smoked	Imported - EU/USA	Readily available
Pearwood	Imported - EU	Readily available
Poplar Burr	Imported - EU	Readily available
Sen, Japanese	Imported - Japan	Readily available
Sycamore, Figured	Imported - EU	Readily available
Sycamore, White	Imported - EU	Readily available
Vavona Burr	Imported - USA	Limited availability
Walnut Burr	Imported USA/Canada	Readily available
Walnut, American	Imported - USA	Readily available
Willow, Figured	Imported - EU	Limited availability

**28 imported species readily
available**

AUSTRALIAN HARDWOOD SPECIES from Domestic forests

(Cabinetry/Decorative veneer grade)

Alder, Rose	Australia	Very limited availability
Ash, Candle	Australia	Very limited availability
Ash, Silver	Australia	Limited availability
Ash, Tasmanian	Australia	Readily available*
Ash, Victorian	Australia	Readily available
Birch, Australian White	Australia	No
Blackbean	Australia	Very limited availability
Blackbutt	Australia	Limited availability
Blackwood, Tasmanian	Australia	Somewhat limited availability*
Brush Box	Australia	Limited availability
Cedar, Australian Red	Australia	Very limited availability
Cherry, Queensland	Australia	Limited availability
Coachwood, NSW	Australia	Very limited availability
Gum, Figured River Red	Australia	Very limited availability
Gum, Forest Red	Australia	Limited availability
Gum, Rose	Australia	Somewhat limited availability
Gum, Southern Blue	Australia	Somewhat limited availability
Gum, Spotted	Australia	Somewhat limited availability
Gum, Sydney Blue	Australia	Somewhat limited availability
Ironbark, Grey	Australia	Somewhat limited availability
Ironbark, Red	Australia	Somewhat limited availability
Jarrah	Australia	Somewhat limited availability
Jarrah Burl	Australia	No
Jarrah, Figured	Australia	No
Karri, Western Australian	Australia	Limited availability
Maple, Figured Queensland	Australia	Very limited availability
Maple, Queensland	Australia	Very limited availability
Marri	Australia	Very limited availability
Myrtle, Flame	Australia	Very limited availability
Myrtle, NSW	Australia	Very limited availability
Oak, Figured Tasmanian	Australia	Readily available*
Oak, Silky	Australia	Very limited availability
Oak, Tasmanian	Australia	Readily available*
River Red Gum	Australia	Very limited availability
Sassafras, Golden	Australia	Limited availability
Stringybark	Australia	Readily available*
Sycamore, Queensland	Australia	Very limited availability
Tallow Wood	Australia	Very limited availability
Turpentine	Australia	Limited availability
WA Blackbutt	Australia	Very limited availability
Walnut, Queensland	Australia	Very limited availability
Wattle, Silver	Australia	Limited availability

Only 5 Australian species readily available (with proviso below*)

NOTE: Most Australian species are of low availability not because of lack of forest or poor regeneration, but because of Australia's unusually high forest reservation percentage. Our publicly owned forest area in formal conservation reserves is about 2.5 times that available as multiple-use public native forests available for wood production - <http://adl.brs.gov.au/forestsaustralia/facts/type.html>

* Availability of adequate quantities of Tasmanian species in decorative veneer/cabinetry grade - not certain. Will depend on outcome of current situation and availability of suitable resource.

ATTACHMENT 3 - COMPARISON OF ILLEGAL LOGGING LAWS

date: 8/12/11

	<u>US - LACEY ACT</u>	<u>EUROPEAN TIMBER REGULATION (EUTR)</u>	<u>AUSTRALIA - ILLEGAL LOGGING PROHIBITION BILL</u>	<i>AUSTRALIAN bill?</i>	
1. CURRENTLY ENACTED IN A COUNTRY?	Yes	No	In progress	Will come in before the EU law is enacted in any country	
2. OBJECT CLAUSE exists?	No specific Object Clause.	To "fight against illegal logging and related trade"	No	We believe that if the Australian bill has any object Clause it should be - "To restrict illegally logged timber"	
3. PUBLIC INTEREST LITIGATION WITH OPEN STANDING ("PILOS")?	Public Interest Litigation - Yes ⁸ Open Standing - No ⁸	No ¹⁵ .	No	Matches the EU. Partially matches Lacey.	
4. PROHIBITION REQUIREMENT	(a) Exists?	Yes ⁶	Yes	Yes	Matches Lacey. Matches the EU.
	(b) Is breaching the Prohibition Requirement a serious Criminal Offence?	Yes ⁵	Not specified - to be determined under each country's law.	Yes	Matches Lacey. EU unknown.
	(c) Strict liability for the Criminal Offence of breaching the Prohibition Requirement?	No ⁴ ("Due care" must be taken.)	No. (Liable if <i>negligent</i> in carrying out Due Diligence requirements?)	No. (Liable if " <i>knowingly</i> ", " <i>intentionally</i> " or " <i>recklessly</i> " import/process illegal timber)	Matches Lacey. Matches the EU.
	(d) Applies to all imported timber and wood products (including all finished products)	Yes	No	Yes	Matches Lacey. Exceeds the EU.
	(e) Applies equivalently to domestic and imported timber?	Yes	Yes	Yes	Matches Lacey. Matches the EU.
	(f) Does the offence and penalty under any "Prohibition requirement" apply equally to local and imported timber/products?	Yes	Yes ¹² - but the actual Criminal Offence and penalty can only be created/enacted under each country's criminal code/laws.	Yes	Matches Lacey. Matches the EU.
	(g) Government officials to have power to enter and search	Yes	Not specified - to be determined under each country's law?	Yes, with a warrant	Matches Lacey. EU unknown.
	(h) Does the accused have the right to remain silent and protection against self-incrimination (pre court)?	Yes ¹⁴	Unknown	No	Lacey offers greater degree of justice than the Australian bill ¹⁴ . EU Unknown.
	(i) Time from enactment until law is/was/will be enabled/enforced	Unknown	Prohibition requirement and Due Diligence requirements - 2 years (EUTR enacted 2010, enabled in each country 2012)	Non-regulated products Prohibition requirement - Immediate Regulated products - 2 years	Exceeds EU for Prohibition requirement. Matches EU for Due Diligence requirements. Lacey unknown.

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5. SIGNIFICANT GOVERNMENT ASSISTANCE and PROGRAMS to enable compliance at least business impact and cost?	No	Yes - EU FLEGT VPA's give automatic legality status from VPA signatory supplier countries ⁷	No	Australia is severely disadvantaged compared to EU countries - we do not have any VPA's.	
6. REGULATIONS APPLY AT WHAT POINT	Point of entry declaration only	Due Diligence requirements/ regulations - "first seller of timber/wood-product"	Point of Entry declarations plus Due Diligence requirements/ regulations for importers and "first processors" of Australian logs	Exceeds Lacey. Exceeds the EU.	
7. COMPULSORY CUSTOMS / POINT OF ENTRY DECLARATION	Yes	No	Yes	Matches Lacey. Exceeds the EU.	
8. INDEPENDENT AUDITS OF DUE-DILIGENCE	Not applicable - no Due Diligence requirements	Yes	Yes	Exceeds Lacey. Matches the EU.	
9. ANNUAL LEGALITY REPORTS / STATEMENT OF COMPLIANCE	No	Unknown	Yes	Exceeds Lacey. EU unknown (national laws not finalised)	
10. "PUBLIC REPORTING / PUBLICATION REQUIREMENT"	<i>(a) Of Customs/Point of Entry Declaration Information</i>	Only if FOI'd and then name of importer, exporter or consignee cannot be revealed ²	No Point of Entry Declarations required	Will be specified via the Regulations	To be determined in Regulations.
	<i>(b) Of Audit results</i>	No audits	Not in Act - Part of later negotiations ²	Will be specified via the Regulations	To be determined in Regulations.
11. APPLICATION POINT of REGULATIONS	<i>(a) Compliance requirements/Point of Entry/Due Diligence</i>	Point of entry declaration only	First "person" selling that product in the EU	Importer or Primary processor of Australian logs	Matches the EU. Matches Lacey.
	<i>(b) Prohibition</i>	Every US transaction/business on the supply chain US	First "person" selling that product in the EU	Importer/first processor of domestic only	Matches the EU. Less than Lacey.
12. OTHER	<i>(a) Requirement for Sustainability</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(b) Requirement for Social Justice and Indigenous Land Rights</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(c) Mandatory identification of forest coup/concession</i>	No	No ³	No	Matches the EU. Matches Lacey.

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12. OTHER (continued)	<i>(d) Explicit statement of legality required</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(e) Compulsory SFM (PEFC/ /AFS/FSC) Certification/Chain of Custody</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(f) Compulsory SFM Certification/ Chain of Custody for <u>Government procurement</u></i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(g) The law to be applied at all steps in the (domestic/ customer country) Supply Chain</i>	Prohibition - Yes Point of Entry Declarations - No	No	No	Matches EU Law. Less than Lacey.
	<i>(h) Government procurement rules mandate SFM (FSC/AFS/PEFC) certification?</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(i) Compulsory product labelling, trademarks, trade-description?</i>	No	No	No	Matches the EU. Matches Lacey.
	<i>(j) Explicit import declaration of legality required?</i>	No	No	No	Matches the EU. Matches Lacey.
13. REVIEW OF THE LAW		Unknown	Unknown	Yes	
14. PRODUCTS/ TIMBERS AVAILABLE FROM DOMESTIC SUPPLY/LOCAL FORESTS? ¹³	<i>(a) Specialist wood panels (eg waterproof/exterior grade MDF)</i>	Yes	Yes	No	Compared to the US and the EU, the Australian domestic supply of a diverse range of timber and wood products is extremely limited, especially in hardwood and specialty products. These products have to be imported, if we are to meet demand from the secondary-wood processing, fit-out, construction and consumer market.
	<i>(b) Hardwood marine ply, most other hardwood plywoods</i>	Yes	Yes	No	
	<i>(c) Specialist plywoods (eg bending plywood)</i>	Yes	Yes	No	
	<i>(d) Specialist veneers (eg balsa or birch sawn-veneers for models)</i>	Yes	Yes	No	
	<i>(e) Ready and reliable range of suitable domestic hardwoods available to meet the range of market and trade-industrial needs?</i>	Yes	Yes	No	
	<i>(f) Number of hardwood species readily available as high grade cabinetry/joinery timbers and veneers.</i>	14	15	5	
	<i>(g) High Pressure Laminates</i>	Yes	Yes	No	
	<i>(h) Lamination and impregnation papers (eg for concrete formply overlays, and melamine)</i>	Yes	Yes	No	
	<i>(i) Concrete formply face veneer</i>	Yes	Yes	No	
	<i>(j) Dyed and reconstituted decorative veneers</i>	No	Yes	No	
<i>(k) Hardwood furniture carcassing</i>	Yes	Yes	No		

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- 1 http://www.illegal-logging.info/item_single.php?it_id=1095&it=document. In particular, the secondary legislation setting out the rules for implementation in more detail is only due to be finalized in 2012. Further information can be found at http://ec.europa.eu/environment/forests/timber_regulation.htm .
- 2 Rupert Oliver, Private Correspondence. And "Under existing legal frameworks, it is anticipated that any information provided to third parties will not contain identifying information for the importer, exporter, or consignee" - http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf point 27.
- 3 Rupert Oliver, Private Correspondence. "Traceability only necessary to the extent required to make a credible determination of negligible risk of illegal logging in Due Diligence Process" (not point of entry)
- 4 "Criminal penalties may also be imposed for certain violations, with the offense being either a felony or misdemeanor depending on, primarily, the **defendant's knowledge, or mens rea**, of the underlying illegality of the product at issue" http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf Point.39.
- 5 "Not more than five year's imprisonment" http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf Point.39. (same as Australia)
- 6 For more details see http://www.aphis.usda.gov/plant_health/lacey_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf page 2
- 7 The EU - Under FLEGT Voluntary Partnership Agreements (VPA's) - automatic legality status to timber from Ghana. Republic of Congo and Cameroon are in the ratification process. Negotiations are ongoing with: Liberia, Gabon, Democratic Republic of Congo, Central African Republic, Malaysia, Indonesia, Vietnam <http://ec.europa.eu/environment/forests/flegt.htm>
- 8 Public Interest Litigation (Citizen Suits) possible and common under US environmental law (http://en.wikipedia.org/wiki/Citizen_suit), but "standing" must shown (ie Lacey does not allow for "Open Standing"). "Standing" can only be tested in case law - not defined in Act.
- 9 <http://dotearth.blogs.nytimes.com/2011/10/08/drop-that-guitar-and-put-up-your-hands/>
- 10 http://cooper.house.gov/images/stories/relief_act_one-sheet_overview.pdf
- 12 Article 4 Para 1 of the EU regulation relating to "Obligations of operators" - "1. The placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited." (This is regardless of domestic or imported origin.)
- 13 For more information see following pages "Timber_Wood_prod_not_avail_Aust"
- 14 In the USA, the right to remain silent and protection against self-incrimination are protected by the Fifth Amendment of the US Constitution.
- 15 Future potential PILOS provisions/ability in each country may differ depending on legal tradition in each member country? Note that European countries do not have the same tradition of Third Party Litigation as the US and Australia. In the EU "there is an absence of the drivers of, and any will to adopt, the full blown US model, or at least a wish to avoid its excesses" **Class Actions and Third Party Funding of Litigation** - An analysis across Europe, Freshfields Bruckhouse Derringer, 2007 <http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf> p.5. No evidence for PILOS in criminal law can be found for any EU state.

ATTACHMENT 4

THE BILL SHOULD SUBSTANTIALLY STAND AS IT IS:

1. No Public Interest Litigation with Open Standing

We **cannot** accept the inclusion of a provision for Public Interest Litigation, either with or without Open Standing (PILOS) because such provisions are:

Unnecessary – PILOS advocates promote it on the grounds that it enables citizens to take direct action to ensure laws are properly enforced. However, this is not necessary in the case of the Illegal Logging bill, where the offense will come under *criminal* law, and as such citizens and organizations not only are entitled to report breaches of criminal law, but have a duty to do so.

Unfair - It would single out timber importers for Third Party Litigation, whilst not subjecting other importers to similar provisions in *their* import laws.

Increased Business legal costs and Uncertainty - PILOS will increase the chances of expensive legal and court costs for all timber importers, growers and primary processors. Such legal costs would not be insignificant, especially for small and medium businesses. Small business owners need to be running their businesses, not attending vexatious court cases. Additionally, there are current trends to exempt public interest litigants from having to pay the defendant's costs in the case of "not guilty" verdicts, adding to the likely costs for innocent business defendants.

Not necessarily in the Public good:

The Promotion of narrow interests - Public Interest Litigation is not necessarily done principally for reasons of public good, rather, "the public good" may be put forward as a smokescreen for other reasons, such as:

- To promote political or ideological agenda not shared by the broad community or majority.
- To increase the media profile for organizations, and so provide "free advertising".
- To reduce business competition, or to provide advantage to specific business interests.

Reduced investment in native timber plantations and native timber saw-milling – Sovereign risk resulting from expectations of vexatious litigation would act as a disincentive for investment in native timber plantations and saw-mills, having adverse impacts on timber industry jobs and the availability and price of native species timber.

PILOS would support the "strong against the weak" – Public interest litigation is often advocated on the grounds that it enables the "small to stand against the great". The defendant is assumed to be a large well resourced corporation/government body, the litigant a small under-resourced organization/individual. However, in the case of the Illegal logging legislation, the reverse would most likely apply: the majority of likely defendants would be Small and Medium businesses, usually far less well resourced and smaller than organizations proposing provisions for, and likely to bring litigation under PILOS. Additionally, businesses have to pay full legal costs, whilst NGO's/individual litigants often have access to free legal services.

Detrimental to Regulatory Effectiveness

PILOS would drive selective, inconsistent, arbitrary and less than effective application of the law, not determined by impartial assessments of the likelihood of illegal timber being present, but set according to the priorities of non-government organizations. This would result in misallocation of investigation- and law enforcement priorities and funds, decreasing such resources from where they could be best spent to have maximum impact on reducing illegally logged timber. It would also result in a serious loss of faith and trust in government and the law.

Detrimental to Regulatory Efficiency

PILOS would add unnecessary public costs for no improvement in enforcement or reduction in illegal logging. Vexatious challenges and those not put forward principally for the public good, potentially over-load the court system and draw on public funds for no public benefit.

2. That the Offenses not be ones of Strict or Absolute Liability

The criminal Offenses (under the non-regulated products Prohibition sections of the bill) should *not* be ones of strict or absolute liability. Strict liability may be acceptable when a person has direct control or supervision over their own acts or of their staff, such as in the case of OHS laws, and where they know precisely which laws they have to ensure compliance with.

Strict liability under *criminal* law should be reserved for crimes where the person had the intent to commit the crime, knowledge of precisely which laws must be complied with and reasonable access to information regarding compliance to these laws. Additionally, Strict (or absolute) liability will drive overly risk-averse behaviour by importers and domestic log processors with adverse consequences:

- The supply of *legal* timber/wood-products will be restricted and/or subject to unnecessary price increases.
- If *legal* timber (or other wood based products required as raw materials) becomes unnecessarily more expensive or in short supply due to overly risk-averse behaviour by importers and processors, this will impact jobs in downstream businesses such as joinery, furniture and kitchen manufacturers. Flow-on effects could also impact the housing and construction industry.
- The expenditure of unreasonable (and unaffordable) amounts of business funds, time and resources in attempts to reach “zero-risk”, so as to avoid criminal charges “at all costs”. In the case of small and medium businesses, such a drain on business resources would threaten their viability.
- Honest businesses will be punished by such increased costs and restrictions of supply, with likely business closures. This will leave a vacuum into which criminals move, with the perverse outcome that imports of illegal timber could actually *increase*.

3. That the Bill is about Illegal Logging, *not* Sustainability (an important, but separate matter).

The Government web-sites, consultation, seminars, studies and reports at all stages of the Illegal Logging process have been about legality - not sustainability.

4. That the Bill not mandate Sustainable Forest Management (SFM) Chain of Custody Certification its Regulations, rather that the Regulations are founded on a **Risk-based Due-Diligence system.** Compulsory SFM (FSC/PEFC) certification would be an unjustifiable restriction of trade in breach of competition law because SFM certification is *not* the only way that legality can be demonstrated. For instance credible independent studies and properly enforced national and state laws/forest codes (in countries high on the transparency index) can be used to demonstrate legality. This is the approach taken in the EUTR (European Illegal Logging Act) Regulations.

5. That the Bill not require an Explicit Import Declaration of Legality. *Explicit* declarations of legality are not possible, even the FSC and PEFC/AFS systems are risk-based.

6. That the bill applies at Point of Entry and First (Domestic) log processing only – not all the way along the supply chain.

7. Government Procurement rules or guidelines should not require compulsory SFM (eg FSC/PEFC) certification; this would be an unjustifiable restriction of trade in breach of competition law (see 4. above).

8. Commercial Confidentiality – Valuable intellectual property and commercial confidentiality must be protected in all the requirements of the Bill and the Regulations

9. No compulsory labeling, trademarks or trade descriptions – It is a commercial decision for each business as to whether or how they wish to label their products. The important thing is that businesses comply with the Prohibition and Due Diligence requirements of the law.

10. Object Clause - If there is an Object Clause introduced to the Bill it should be “to restrict illegally logged timber”. This is in accordance with the Title of the Bill, is the definition that has been used throughout the consultation process, is on the DAFF web-site and in the studies and reports that have been produced by the Government throughout the process. Other Object clauses (apart from being solely about illegally logged timber), “wider”, vague or ambiguous Object clauses are *not* acceptable.