Submission to the Senate Rural Affairs & Transport Legislation Committee
Re
Illegal Logging Prohibition Bill 2011.

6th January 2012

This submission is being presented because of very serious concerns about the content, structure and drafting of the current Illegal Logging Prohibition Bill which is currently before the Federal Parliament.

The concerns arise from my 40 years continuous involvement in the national and international timber and forest products sectors. That involvement has been to ensure that there are long term, sustainable timber and forest products operations in Australia and this region.

My details are attached as Appendix I to this submission.

The timber and forest products industries are important to small towns & communities, regions & States of Australia, landowners (small and large) and processors in our major trading partners - especially in South East Asia & the Pacific.

My concern was such that after reading the draft Bill and Explanatory Memorandum I thought I understood what the objectives of the draft Bill are. However, I was totally uncertain about the definitions, duties and obligations imposed by the Bill. They were unclear, did not make sense in policy terms and based on my experience would be almost impossible to implement efficiently and effectively.

I was so concerned that I took the unusual step of seeking, the legal opinion of Dr. Gavan Griffith, AO QC and his junior counsel, Benjamin Jellis. I asked them to provide me with an opinion about the structure, drafting and operation of the Bill.

Dr. Griffith is one of Australia's most eminent lawyers. He is very familiar with Commonwealth legislation and international jurisprudence having served as Commonwealth Solicitor- General for 15 years between 1973 and 1988.

A copy of the opinion is attached to this submission. It is Appendix II.

As one of the major roles of the Senate Committee is to consider the legislation itself as well as the principles that lie behind it I request that the Committee gives serious consideration to Dr.Griffith's and Benjamin Jellis's Opinion.

The key points it makes are:-

- "As currently drafted the Bill is fractured to the point of incongruity"

- The offences that apply to importers under the Bill are unjust by attaching liability on an unduly broad and unpredictable basis,

- "The prosecution of offences under the Bill may involve Australian courts in indirectly enforcing the penal or public law of other States" (countries)

- The Bill creates the likelihood of entangling Australian courts in matters of international relations that are more properly the concern of the executive,

- The scheme and content of the Bill is so deeply flawed in its conceptual approach, based as it is upon the use of Australian courts to enforce the laws of foreign trading partners, that it should be abandoned", and, very importantly,

- "Our opinion is that the entire Bill should be reconsidered to determine whether an acceptable text is capable of being developed to fulfil its objects. We suggest that there is a heavy burden upon those promoting the Bill to demonstrate that this is possible without unacceptable compromise of applicable principles of both public and private international law, comity between courts and the criminal law. Real concerns as to the efficacy of what is proposed must also be addressed".

The legal opinion offers some solutions to drafting deficiencies in relation to the breadth of criminal liability. However, the omissions and uncertainties are matters that should be addressed before the Bill is debated.

My personal opinion is that the key objectives of the Bill to 'reduce the harmful environmental, social and economics of illegal logging' – be it in Australia or overseas, should be separated from the protectionist measures. Elements of the Bill will become 'non-tariff barriers' which, while suiting elements of the Australian forest products processors, will have an adverse impact on a number of our neighbouring, developing countries.

They may also have the unintended consequence of closing down a number of small businesses in Australia – the specialist cabinet makers, furniture manufacturers and carpenters and joiners that are an important part of regional communities.

Having spent most of my life in the timber and forest products industries I have serious practical doubts about the capacity and ability of Australian inspectors to be able to satisfy themselves, to the point where a court would uphold their actions, about whether a log or piece of timber was legally or illegally logged. This is especially the case where individual logs are obtained from subsistence farmers in developing countries.

My detailed observations on these matters are set out in Appendix III to this submission.

In summary my request to the Standing Committee on Rural Affairs and Transport Legislation is as follows:-

- the Bill is reconsidered in line with the conclusions set out in the attached Legal Opinion,

- a new interdepartmental review addresses the key problems now being exposed,

- issues of sovereignty explained in the Legal Opinion attached are further addressed,

- further more comprehensive and profound consultation takes place with neighbouring countries

- a further assessment is made as to whether the Bill breaches Australia's obligations under international agreements, and

- An assessment is made of the practicability and cost of compliance such as the due diligence requirements under the Bill – a reality check.

I understand the politics that surrounds the proposed legislation but it would be reprehensible if short term, political expediency produces a piece of legislation that is fundamentally flawed.

The end result may be a policy that is incapable of effective implementation and ends up in prolonged litigation, the closure of small businesses in Australia and unnecessary tensions with a number of our important regional neighbours. What seemed a good idea at the time may end up being unfortunate policy and public administration.

T H Gunnersen, AM
6th January 2012.

Appendix I

Identification and Credentials

My name is Thorold Harvey Gunnersen, AM. I was honoured in 2002 to be asked to accept the Award in the Order of Australia "for services to the forest industry, particularly to sustainable timber resource management and development, and to the welfare of communities dependent on the timber industry".

I am Chairman of Gunnersen Pty Ltd, a business which goes back to its origin in 1879, whose activity today is wholesale distribution, covering all Australian States and Territories and New Zealand. I am also a Member of the Board of Midway Limited, a company which owns timber plantations in Victoria, and operates woodchip processing plants in Geelong, Portland and Brisbane.

Gunnersen sources product from all over the world and imports. Midway grows timber, processes it and exports to Asia.

My public sector appointments include having been at various times the Member of the Land Conservation Council in Victoria representing industry and commerce, Chairman of the Forest and Wood Products Research & Development Corporation and Chairman of the Co-operative Research Centre for Wood Innovations.

My public company appointments have been Chairman of Directors of Timber Holdings Ltd, Timber Holdings (Tasmania) Ltd, Deputy Chairman of Softwood Holdings Ltd (Mt Gambier) and Member of the Board of Kiln Dried Hardwoods Ltd (Launceston).

My association appointments have included being Director and President for several terms of National Association of Forest Industries, Director and President of Australian Timber Importers Federation.

My international appointment was to be Board Member for many years and Chairman of the Board for two terms of the World Forestry Center in Portland Oregon, USA. Membership included representatives 29 countries involved in forestry and forest industries. In 2007 the Center recognised my contribution with the Merlo Award, which "honors individuals who have shown extraordinary commitment to forest stewardship for the purpose of producing resources for building materials."

I first came into the forest industry to be Managing Director of Marbut-Gunnersen Pty Ltd in 1968, from being a Lecturer in Economics at LaTrobe University. My specialties were international trade theory and econometrics.

RE INQUIRY INTO THE *ILLEGAL LOGGING PROHIBITION BILL* 2011 (Cth)

JOINT OPINION FOR SUBMISSION TO THE SENATE RURAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

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22 December 2011

Submission to the Senate Rural Affairs and Transport Legislation Committee

IN RELATION TO THE

Inquiry into the *Illegal Logging Prohibition Bill* 2011 (Cth)

JOINT OPINION

PART ONE - Background and Summary

1. We advise as to the operation and effect of the *Illegal Logging Prohibition Bill* 2011 ("**the Bill**") for submission to the Senate Rural Affairs and Transport Legislation Committee ("**the Committee**").

2. The purpose of the Bill is to reduce offshore illegal logging. Primarily, it seeks to do so by the regulation of Australian importers of timber products by making importers subject to mandatory due diligence obligations and by imposing criminal liability upon any person who imports into Australia timber that has been "illegally logged", as determined by the law of the place where that timber was harvested.

3. Our opinion is divided into three categories of concern.

4. **First, uncertainty under the criminal law**. The Bill unreasonably places timber importers at risk of criminal liability on a basis that is uncertain and unpredictable.

5. **Second, improper intrusion into the domestic law of foreign States.** Prosecution of the most serious criminal offences under the Bill requires proof that imported timber has been "illegally logged" as determined in accordance with foreign domestic law.

6. Prosecution of offences under the Bill will consequentially involve Australian courts in indirectly enforcing the public and penal laws of other States. It may also require Australian courts to consider the legality

of conduct by officials of those States, and make findings as to the ownership and title of foreign land and property. This is contrary to general principles of comity between States, and the proper role of the executive in matters of international relations. Furthermore, Australian domestic courts are not well equipped to perform any of these tasks.

7. **Third, other miscellaneous concerns.** The broad definition of "illegally logged" under the Bill appears to breach Australian obligations under international trade law. Further, offences under the Bill may involve the criminalisation of foreign conduct that does not constitute an offence under Australian law.

PART TWO - Legislative background and key provisions of the Bill

8. It is first necessary to briefly set out the relevant legislative history and key provisions of the Bill.

Legislative history of the Bill

9. The Bill has been read a second time in the House of Representatives and has been referred to the Committee for an inquiry and report. It is currently before the Committee.

10. The Bill has been amended from an earlier exposure draft ("**the Exposure Draft**") and accompanying explanatory memorandum ("**Explanatory Memorandum**") that were referred to the Committee on 23 March 2011 for an inquiry and report.

11. On 23 June 2011 the Committee released a report in respect of the exposure draft of the bill ("**the Committee Report**"). The Committee Report made a number of recommendations and included a dissenting report. The Government tabled a response to the Committee Report on 25 November 2011 ("**The Government Response**"). This response included a number of recommendations. The current form of the Bill is intended to take account of those recommendations. No regulations under the Bill

have yet been published for consideration by the Committee.

Key Provisions of the Bill

12. According to the Explanatory Memorandum, the Bill seeks to provide a "high level framework to prohibit the sale of illegally logged timber on the Australian market".[1]

13. In general terms, the Bill addresses this purpose by the implementation of two interconnected mechanisms. The first, are offences under the Bill that criminalise the importation of timber that has been illegally logged. Second, a range of due diligence obligations that must be complied with by any person who imports timber that is identified as a "regulated timber product" by regulations made under the Bill.

The Offences

14. The Bill contains two primary offences. Both rest upon the definition of "illegally logged" timber in section 7 of the Bill that provides:

> *"illegally logged, in relation to timber, means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested".*

15. Section 8 ("**the section 8 offence**") provides:

> *"A person commits an offence if:*
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> *(a) the person imports a thing; and*
>
> *(b) the thing is, made from, or includes, illegally logged timber; and*
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> *(c) the thing is not prescribed by the regulations for the purposes of this paragraph."*

16. No fault element is expressly provided for under the section 8 offence. By operation of the *Criminal Code* this offence will therefore require proof of intention or recklessness.[2]

17. Section 9 provides ("**the section 9 offence**"):

> *"A person commits an offence if:*
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> *(a) the person imports a thing; and*
>
> *(b) the thing, is, is made from, or includes, illegally logged timber; and*

[1] Explanatory Memorandum at 2.
[2] S 5.6 *Criminal Code* (1995).

(c) the thing is a regulated timber product; and

(d) the thing is not prescribed by the regulations for the purposes of this paragraph."

18. The fault element for paragraph 9(1)(b) is negligence.[3] This is relevantly defined under the *Criminal Code*:

> *"A person is negligent with respect to a physical element of an offence if his or her conduct involves:*
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> *such a great falling short of the standard of a care that a reasonable person would exercise in the circumstances; and*
>
> *such a high risk that the physical element exists or will exist;*
>
> *that the conduct merits criminal punishment for the offence."*

19. The penalty for each of the offences is 5 years imprisonment or 500 penalty units, or both.

20. It is not clear how the section 8 offence and the section 9 offence are intended to fit together.

21. It appears as if the primary provision is the section 9 offence, which apples to any timber product that has been prescribed as a "regulated timber product" by the regulations.

22. Where a timber product has not been so identified under the regulations, then the applicable offence is s 8, as this applies to any illegally logged timber product.

23. The application of both offences may be excluded under the regulations.

The Due Diligence Obligations

24. Division 2 of the Bill provides that a person who imports a "regulated timber product" must comply with specified due diligence obligations.[4] The due diligence obligations are to be set out in the regulations. [5] The purpose of the obligations is "reducing the risk that imported regulated

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[3] S 9 (3) *the Bill.*
[4] S 12 *the Bill.*
[5] S 14 *the Bill.*

timber products are, are made from, or include, illegally logged timber".[6]

25. Failure to comply with the due diligence obligations is punishable by a fine.[7] The Bill also requires that timber importers make a declaration to customs as to their compliance with the due diligence obligations, on each occasion that regulated timber products are imported.[8]

Other Provisions

26. The Bill further provides for obligations that attach to the domestic processing of raw logs.[9] This opinion does not consider those obligations, and instead focuses upon those parts of the Bill that are directed towards timber importers.

27. In aid of the enforcement of its obligations, the Bill provides for a system of monitoring, investigation and enforcement by accredited officers.[10]

PART THREE - Opinion

Three Categories of Concern in Respect of the Bill

Part 3.1

The offences under the Bill do not meet the fundamental criterion of certainty for criminal prohibition

28. It is a fundamental principle of the rule of law that a person should be entitled to know in advance the legal consequences of his or her conduct.[11] Of this, Lord Diplock has observed:

> *"The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it".*[12]

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[6] S 14(2) *the Bill.*
[7] S 12 *the Bill.*
[8] S 13 *the Bill.*
[9] S 15 *the Bill.*
[10] See Part 4 of *the Bill.*
[11] J Raz, 'The Rule of Law and its Virtue' *(1977) 93 Law Quarterly Review* 195, 198
[12] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638 (HL). See also: *Sunday Times v UK* (1979) 2 EHRR 245, [49].

29. This has been identified as a basic principle of the criminal law in both civilian code and common law jurisdictions. Under the *European Convention on Human Rights* an "offence must be clearly defined in law",[13] a criterion that includes the requirement that a person be able to know before they act, the legality (or otherwise) of their conduct.[14] In the United States, "fair warning" and "void for vagueness" principles apply to prevent the prosecution of uncertain criminal offences.[15] Similar considerations also arise under Canadian fundamental law.[16]

30. Although Australian constitutional law has not yet completely developed uncertainty and due process as a separate basis for the invalidity of criminal offences,[17] certainty and ascertainability are foundational principles of our common law. Such principles are embodied, for example, in the longstanding rule that the prosecution of an offence will be stayed where it is not possible to particularise with any certainty the factual circumstances that are said to constitute the offending conduct.[18]

31. In our view no parliament should enact a criminal law that does not enable its subject to predict with any certainty whether his or her proposed course of conduct is prohibited under that law. This is a test that any proposed criminal prohibition must satisfy in order to be workable and just.

The offences under the bill are uncertain

32. The offences under sections 8 and 9 use the same definition of "illegally logged", which picks up the law of the place where the timber was harvested. Consequentially, a prosecution under either offence requires proof, *inter alia*, of the following physical elements:

(a) the place where the imported timber was harvested;

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[13] *Kokkinakis v Greece* (1994) 17 EHRR 297, [52].
[14] *Hashman and Harrup v UK* (2000) 30 EHRR 241.
[15] See the authoritative commentary of Professor Andrew Ashworth in A Ashworth *Principles of Criminal Law* (5th ed) at 74. *Kolender v Lawson* (1983) 103 S Ct 1855.
[16] *Prostitution Reference* (1990) 77 CR (3d) 1.
[17] *Hughes v R* [2000] HCA 22 at 94]-[106] (Kirby J).
[18] *Johnson v Miller* (1937) 59 CLR 467.

(b) the law in the place where that timber was harvested; and

(c) that this law was breached.

33. The mental element that must be proven against an importer depends upon whether the section 8 or 9 offence is relied upon. However, under neither section is the prosection required to prove that the importer had knowledge of the physical elements of the offence, including that the imported timber had been illegally harvested. This is a significant departure from other similar laws relating to the importation or handling of prohibited products.[19]

34. In our opinion, the device of picking up the foreign law of the place of harvest places an impossible burden of obligation upon an importer. This arises in three respects.

35. **First, in relation to an importer's knowledge of the applicable law of the place of harvest.** The definition of "illegally logged" is not limited to breaches of forestry or environmental laws. Possibly, by implication, the scope of its application might be limited to breaches of the law that arise out of the manner in which the timber was "harvested".[20] However, the definition remains unjustifiably broad, so as to encompass laws concerning health and safety, labour, discrimination and even theft. On any view its terms should be narrowed.

36. These difficulties are compounded by other related issues such as language barriers to accessing the law of other jurisdictions and access to relevant legal instruments (such as permits or other official documents).[21]

37. It is plainly an inapt and unreasonable expectation for an Australian importer to know, or to ascertain as he buys timber products, whether any foreign laws have been breached by the harvest of that timber in a foreign country.

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[19] Compare for example the offence of handling stolen goods s 118 *Crimes Act* 1900 (NSW), s 88 *Crimes Act* 1958 (Vic), s 433 *Criminal Code* (Qld) 1899.

[20] If read in light of the weak presumption that penal laws may be *read down* where ambiguous Beckworth v R (1976) 135 CLR 569 at 576 (Gibbs J).

[21] Indeed, it may be that in many cases a successful prosecution under the Bill is not be possible, due to the difficulty of proving foreign laws and the fact of their breach.

38. **Second, in relation to the requirement that an importer must identify the law "in force" in the place of harvest.** Whether a law is properly considered to be "in force" may depend upon a number of matters that are beyond the knowledge of an Australian importer. If an importer is faced with a conflict between competing claims to land title, what law is properly considered to be "in force"? Should an importer consider that foreign official documents are correct, or are competing indigenous customary claims decisive? The Bill provides no guidance or answer as to the resolution of these extremely complex issues. Thus an importer is unable to take anticipatory steps to ensure compliance.

39. **Third, the Bill does not make clear how far up the supply chain an importer is expected to inquire.** Do the offences under the Bill include the importation of timber that is merely a component of products assembled offshore? Once again, no guidance is provided under the Bill, with the consequence that that the importer is unable to take required steps of anticipatory compliance.

40. The "due diligence" obligations placed upon importers under the Bill may assist with identifying risks, but they cannot eliminate uncertainty as to the matters identified above. Indeed, in relation to the s 9 offence (that contains a fault element of negligence) it may be that such inquires will only succeed in identifying uncertainty (and therefore risk).

41. The obvious injustice caused by the uncertain scope of the offences is underlined by the relatively high maximum penalty applicable.[22] The proscribed characteristic of illegal timber is one that is unlikely to be evident on the face of the product. This distinguishes illegally logged timber from other products that are subject to importation offences with similar maximum penalties.[23]

42. **Fourth, the offences as presently drafted are likely to give rise to undesirable and unintended consequences at the point of compliance**

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[22] "5 years imprisonment or 500 penalty units, or both" s 8 & s 9 of *the Bill*.

[23] For example the Explanatory Memorandum refers to the comparable penalty under the s 21 *Industrial Chemicals (Notification and Assessment) Act* 1989 & s 69B *Agricultural and Veterinary Chemicals (Administration) Act* 1992.

and of prosecution. A prudent importer seeking to comply with the Bill is likely to avoid trade with certain places, regions or indeed countries altogether. There is some material to suggest that this is the approach taken by importers who are subject to comparable legislation in the United States.[24] Further, persons who "run the gauntlet" and continue to import timber products, risk liability arising as a consequence of circumstances they did not, or perhaps could not, have known or anticipated. As a matter of principle, this result is plainly unacceptable and unjustifiable.

Part 3.2 Improper intrusion into the domestic law of other states.

43. As is set out above, a prosecution for either the section 8 or 9 offence will require proof that the defendant has imported "illegally logged" timber.

44. Proof that timber has been "illegally logged" will require the prosecution to establish both the law in the place where the timber was harvested and that this law was breached by the harvest of that timber.[25]

45. Proceedings in respect of the offences will therefore involve a combination of unusual characteristics:

(a) proof of the breach of a foreign law;

(b) in a foreign country; and

(c) by persons, probably based and located in a foreign country, who are not parties to the proceeding before the court.

46. Such proceedings may also require allegations to be made against the officers of foreign States. The Explanatory Memorandum indicates that illegal logging may occur where "timber is harvested or trade is authorised through corrupt practices".[26] Allegations of corruption against foreign officials will need to be particularised and proven, wherever that

[24] R Salzman, *Establishing a 'Due Care' Standard under the Lacey Act Amendments of 2008* 109 Mich L Rev 1 at 3.
[25] S 7 *the Bill.*
[26] Explanatory Memorandum at 5.

corruption is a part of the basis upon which it is alleged that the imported timber has been "illegally logged".

47. As a consequence of each of the matters set out above, the Bill may place Australian courts in conflict with fundamental principles of international law relating to state sovereignty and comity between foreign courts.

48. Of such principles, Learned Hand J has observed:

> *"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbour. ... No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper".*[27]

49. Similar considerations have compelled Australian and overseas courts to, at times, refuse to exercise jurisdiction over acts occuring in other States. The High Court has referred, for example, to the principle that domestic courts should not be used to enforce foreign criminal laws[28] and the related principle that the courts of one country should not judge the actions of the foreign officials in another.[29]

50. That is not to say that such matters will always be beyond the jurisdiction of Australian courts. Depending upon the circumstances, Australian courts may rule upon the legality of conduct by reference to foreign law, even where the question of legality concerns the officers of another State.[30]

51. It is a general principle of common law, however, that domestic courts are restrained from review of the legality of acts by foreign nationals pursuant to foreign national law.[31] The fundamental principles that

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[27] *Moore v Mitchell* (1929) 30 F (2d) 600. referred to in *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd ("the Spycatcher Case")* (1988) 165 CLR 30 at 40-41 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ). Through See *Moti v R* [2011] HCA 50, at [52] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).

[28] *The Spycatcher Case* at 40-41.

[29] Ibid at 41.

[30] *Moti v R* at [50]-[53].

[31] A revealing comparison that illustrates the broad scope of the Bill is provided by current Australian legislation prohibiting certain sexual activity by Australians whilst overseas. These have extra-territorial effect, but are are directed towards the legality of conduct by Australian citizens under

augment this exclusion of jurisdiction are illustrative of a number of potential difficulties that may arise out of attempts to prosecute the offences under the Bill, as discussed below under the broad categories of comity, justiciability and ascertainability.

Comity

52. A primary reason why a court may be reluctant to make findings as to the legality of acts that have taken place within another jurisdiction, is the possibility that such findings may be inconsistent with a decision by a court within that other jurisdiction.

53. This issue is not addressed by the Bill, creating the potential for both uncertainty and unfairness. Two examples are illustrative of problems that may arise under the Bill.

54. **First inconsistent verdicts**. The Bill does not explain, for example, how an Australian court seeking to determine whether timber has been "illegally logged": should treat a decision by a foreign court, that is based on substantially the same facts as those before the Australian court? What would be the implications if such a decision came after a conviction in Australia?

55. **Second, self-incrimination**. Proof that a law has been breached in the place of harvest, may require findings against non-parties whose conduct has not (but perhaps will) be the subject of proceedings in the jurisdiction where the harvest occurred. Additionally, a successful prosecution under the Bill *will* require findings against the importer defendant, whose possible complicity in any illegal activity in the place of harvest might be the subject of future proceedings in the foreign jurisdiction.

Justiciability

56. As a general principle, Australian courts do not adjudicate upon the

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Australian domestic law. See *XYZ v Commonwealth* (2005) 227 ALR 495 at [27] (Gummow, Hayne and Crennan JJ).

legality of the conduct of foreign officials. Although the High Court has recently emphasised that this is not a universal prohibition, and courts may at times be required or willing to consider such matters,[32] cases where courts have refused to consider the legality of conduct by foreign officials highlight a number of the difficulties that a prosecution under the Bill might face.

57. **First, diplomacy and the primacy of the executive in foreign relations.** Australian courts have recognised the risk of embarrassment to the amicable relations between governments, which may occur if the acts of one State are subject to examination by the courts of another.[33] In the Australian constitutional system, international relations is a subject matter firmly and exclusively entrusted to the executive arm of government. The historical materials accompanying the Bill (such as the Explanatory Memorandum) do not indicate that any consideration at all has been given to the diplomatic issues that may arise out of the operation of the Bill.

58. **Second, unfairness caused by the inability of an Australian court to receive evidence from relevant foreign officials.** The availability of foreign officers to provide evidence is likely to be limited by a range of extra-legal considerations. This may affect the likelihood of a successful prosecution under the Bill.

Ascertainability

59. Where a matter concerns alleged conduct outside of the territorial jurisdiction of a court, that court may refuse to exercise jurisdiction where there is no ascertainable law or manageable standard against which the court could adjudicate upon that conduct.[34]

60. For the purposes of the offences under the Bill, the applicable law is

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[32] *R v Moti* at [50]-[53].
[33] *Buttes Gas & Oil Co v Hammer [No 3]* [1982] AC 888, 938 (Wilberforce L).
[34] Ibid at 931.

identified as the law of the place where the timber was harvested. The simplicity of this definition may, however, mask significant complexity in determining what that law is.

61. One example suffices to illustrate this difficulty. The ownership of land is likely to be a contested issue of fact in circumstances where illegal logging is alleged. Australian courts are at a significant disadvantage if required to determine issues of foreign land ownership. Indeed, the principles of private international law mandate that they should not do so. Such difficulties may be acute in prosecutions that concern Australia's less developed trading partners, where findings in respect of disputed land may depend upon customary title or other forms of indigenous land usage.

62. Indeed, it is significant to observe that in the field of private law, domestic courts will refuse to adjudicate any matter that relates to the ownership of foreign land.[35] Such reticence may principally be an issue of jurisdiction,[36] but issues of ascertainability are also pertinent. Such issues are likely to be significant impediments to any attempt to prosecute an offence under the Bill.

Conclusion

63. In the determination of a prosecution under the Bill, Australian courts may be required to adjudicate issues that are properly and exclusively within the jurisdiction of foreign courts. The historical materials in respect of the Bill (such as the Explanatory Memorandum) confirm, by omission, that no due consideration has been given to the capacity of Australian courts to adjudicate these issues. Nor has consideration been given to the potential impact upon Australia's relations with its trading partners.

Part 3.3 Further miscellaneous concerns

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[35] *British South Africa Company v Companhia de Moçambique* [1983] AC 602.
[36] *R v Moti* at [52]; *Dagi & Ors v BHP & Anor* [1997] 1 VR 428.

64. Three further concerns arise in respect of the Bill.

Breach of Australia's international trade obligations

65. The Bill may place a discriminatory burden upon international trade in timber. Primarily, this arises out of the definition of "illegally logged" that, in effect, restricts the importation of timber by the reference to the domestic law of the place (country) of harvest.

66. Such concerns were raised in a recent article that considered the Exposure Draft of the Bill.[37] The authors' concluded that the Exposure Draft might place Australia in breach of its international obligations in respect the *Marrakesh Agreement Establishing the World Trade Organization*[38] and the *ASEAN-Australia-New Zealand Free Trade Agreement*.[39] It does not appear that the current draft of the Bill has been subject to any amendment that would undermine the basis for the authors' conclusions in respect of the Exposure Draft.

May cover conduct not prohibited under Australian law

67. The definition of "illegally logged" is not limited to conduct that would constitute an offence under Australian law.[40] Consequentially, it has the potential to criminalise conduct that is not an issue of moral concern to the Australian community.

Extra-territorial application of the inspection regime

68. It is not clear whether the powers of inspection granted to officers under Part 4 of the Bill, are intended to enable the investigation of matters outside of Australian territory. If so, such activities may have significant legal and political consequences, unless appropriate memorandum of understanding are developed with the countries in which it is intended that the inspectors may operate. It is not clear that this issue has been

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[37] A Mitchell and G Ayres *The Consistency of Australia's Illegal Logging Prohibition Bill With International Trade Rules* (2011).
[38] 15 April 1994.
[39] 1 January 2010.
[40] Compare for example s 337A of the *Proceeds of Crime Act* 2002 that for the purposes of confiscation of assets acquired from foreign criminal activity, includes within the definition of "foreign indictable offence" a requirement that the relevant offence must also be an offence under Australian law.

properly addressed by the Bill.

PART FOUR – Summary of Conclusions

Conclusion in respect of the current form of the Bill.

69. As currently drafted the Bill is fractured to the point of incongruity.

70. The offences that apply to importers under the Bill are unjust by attaching liability on an unduly broad and unpredictable basis. If enacted in their present form they are likely to have the following consequences:

(a) over-compliance by Australian importers who may refuse to import timber from certain places, regions or countries; and

(b) criminalisation of conduct by importers who did not, and perhaps could not, have known that imported timber had been illegally logged.

71. The prosecution of offences under the Bill may involve Australian courts in indirectly enforcing the penal or public law of other States. It may also require Australian courts to consider the legality of conduct by officials of other States, as well as make findings as to the ownership of foreign land and property. As a general principle, domestic courts should not adjudicate such matters. Further, they are not equipped to exercise this jurisdiction. The Bill creates the likelihood of entangling Australian courts in matters of international relations that are more properly the concern of the executive.

72. Finally, the issues set out in Part 3.3, such as compliance with Australia's international trade obligations, have not been addressed by the current form of the Bill.

Should the Bill be amended?

73. The scheme and content of the Bill is so deeply flawed in its conceptual approach, based as it is upon the use of Australian courts to enforce the laws of foreign trading partners, that it should be abandoned.

74. In respect of the concerns raised in part 3.1 of this opinion, concerning the breadth of criminal liability under the Bill, this could potentially be addressed by two simple amendments:

    (a) First, amending the definition of "illegally logged" in s 7 of the Bill to clarify that it relates only to the breach of environmental and forestry laws; and
    (b) Second, amending the fault element of the s 8 offence and the s 9 offence, so as to require proof of knowledge that imported timber had been illegally harvested.

75. The other concerns raised in this opinion, particularly those considered in part 3.2, are not so easily addressed by means of amendment.

76. Our opinion is that the entire bill should be reconsidered to determine whether an acceptable text is capable of being developed to fulfil its objects. We suggest that there is a heavy burden upon those promoting the Bill to demonstrate that this is possible without unacceptable compromise of applicable principles of both public and private international law, comity between courts and the criminal law. Real concerns as to the efficacy of what is proposed must also be addressed.

We advise accordingly.

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* Liability limited by a scheme approved under the professional standards legislation.

Appendix III

Practicalities

I am concerned about the new dimension of risk, attended by lurking criminality, that adoption of the ILP Legislation will introduce into the Australian forest industry. My fear is that the consequences that are intended to flow from the new law will not be realised and that, instead, unfortunate unintended consequences will result.

The foremost of these are the fundamental problems of legality, dealt with above in Appendix II. These foreshadow similar legal and policy problems for the Government to those the Malaysian solution has caused over the illegal immigrant/refugee problem.

Another consequence, not intended, will be the harm to environmental, social and economic values the new law is designed to protect. And I think it actually contains the potential to create adverse consequences for local Australian producers, not unlike those in the beef industry caused by the Live Export Ban.

My position stands against the tide of timber industry opinion, as stated by producers and importers alike. I have noted the industry's approval of the Bill as it foreshadows the erection of a non-tariff barrier to trade; and a similar enthusiasm being shown by importers at the prospect of seeing "the cowboys of the industry closed down", see John Halkett's Submission to the Standing Committee, 14 Dec 2011. Each of these reactions is naturally, and understandably, protectionist.

But the purpose of the Bill is not protectionist. It is "to reduce the harmful environmental, social and economic aspects of illegal logging". This objective begs a number of seemingly condescending questions about these values in other countries and other countries' management of them.

It is a tenuous claim to assume or assert that a causal relationship exists between a prohibition of imports into Australia of illegally logged timber and the lessening of harmful environmental, social and economic impacts in other countries, countries some of which are much larger than ours is.

The Committee has received submissions showing that there is not much illegal timber entering Australia. In my 40-odd years of experience I have not ever encountered or been aware of any illegal timber entering Australia. There is no reason to assume that the Bill as drafted will be sufficiently powerful, or have the reach, to change behaviour of people in other countries in ways that will reduce environmental, social and economic harm caused by illegal logging.

Illegal logging (logging that occurs outside the ambit of forestry laws) manifests itself in subsistence situations and in officially-condoned changes in land use to do with development. In subsistence, villagers clear patches in the jungle to make way for their gardens; in development, land is cleared for urbanization, highways and changing agricultural practices.

The social and economic development problems that some countries face could be more directly addressed by way of aid to help build capacity in infrastructure and to set up mechanisms to reduce illegal behaviour where it occurs, rather than create new regulatory regimes in Australia that will suppress activity here and in the supplying countries.

Illegal logging may also occur through explicit corporate criminality, but people in organised crime will quarantine themselves from the effect of our law, being sufficiently organised to organize a veneer of legality as their products enter markets. If the capability exists to undertake illegal commercial scale harvesting and transportation of logs, the capability will exist to fake the required documentation to give the appearance of legality.

My question is whether anyone actually believes that these behaviours in distant places in different cultures will be altered by Australia adopting punitive and ineffective controls on trade by passing into law the Illegal Logging Prohibition Bill as currently drafted.

Complexity and Variety: are there 3 categories of wood?

Members of the Standing Committee are aware of the complexity and variety which are found in forest industries. Complexity and variety make it difficult to frame enabling legislation or over-arching regulation which makes sense without creating anomalies.

Distinction has been made in submissions between hardwood and softwood, between lineal and panel products, between "pure" single wood species and composites, and between assembled products which contain wood in various forms. It is tempting to view products as emanating from a lineal supply chain with simple conversion transformations – of log to timber, green timber to dry, kiln dried timber to sized, packed salable product. But this represents only one strand of conversion reality.

A single tree is usually cut or "bucked" into several logs – head log, butt log etc – each of which becomes destined for different further processing applications. Each log "explodes" into a plethora of products (as does a butchered beast) from lengthy quarter-sawn or backsawn baulks or boards to flimsy shorts, from full sheet rotary cut face veneers to "backs" and strips used for centre-laying, or from flitches to sliced cut fancy veneers, and then there are chips and flakes and sawdust. I cannot imagine a document attesting to legality being created for the myriad of outputs, documents which accompany each product unit through respective value adding chains. Imagine a single finger-jointed mouldings blank, composed of wood from disparate provenances, being accompanied by either multiple certifications of legality, or one certificate testifying to all the provenances!

There are supply chains, but outside integrated enterprises they are few. Complexity is compounded by intra-industry transactions as one producer's discard or waste becomes another's valued input. Agents and pocket-book merchants, stockists and distributors facilitate these. Whilst these people are smart, relying on connections, market intelligence and communication, not many have "corporate capability" for documenting certification.

This transactional milieu is mirrored by the transportation arrangements across the technology spectrum in which wood and products are transferred: barges and bullock carts, shipping containers and bulk carriers, rail cars and road trucks. It is a tangled skein not a supply chain.

There is no "supply chain" as such in the forest industries; there is an imbroglio of chaotic transactions and transfers. It is not realistic in any circumstances to seek to control a foreign supply chain with domestic legislation, but this is especially so in an industry in which few lineal supply chains exist.

Is it practicable to imagine a continuity of documentation which formally attests with integrity to the legality of every piece and parcel of wood? Without such documentation how can an importer truly be confident that he/she is not in breach of the law of a foreign country as required by the Bill?

The Bill foreshadows two categories of wood – legal and illegal. But most timber which is traded internationally will be in **a third category**: I shall call it **unattributed wood**. This is wood that is not actually "illegal", but suffers from lack of proof of its legality. It is not practicable to assume that unattributed wood, by its lack of attribution, is therefore illegal. Any presumption that it will be is not realistic.

Unintended Consequences

Number One will thus be that the result of passing the new law will be perverse – the opposite of what it was intended to promote in supply countries.

Lower levels of activity will have harmful effects throughout the sector: less forest management will be deleterious for the forest environment, less activity will be bad for the social aspects and lower levels of business will be bad for local economies.

Unanticipated Consequence Number Two will be at the level of producers and importers inside Australia. Submissions to the Standing Committee by associations show that the legislation, with minor modification, will be positive to these groups due to its protective influence. We in Gunnersen believe, but at this stage cannot prove, that many of our existing sources and products will be capable of passing a legality test, but there will be others which may not and we may not for some products be able to furnish the necessary verification. Thus our business, and that of others in similar circumstances, may contract.

Unanticipated Consequence Number Three will be that users of imported timber products in general industry will be penalised. When the Bill leads to cessation of supply of components or substrates, there are manufacturing processes which will be constrained with flow-on deleterious effects. Examples of products that may be unattributed, unable to be proved legal, are some hardwood and reconstituted veneers and plywoods, medium density fibreboard products, some of the high grade cabinetry timbers and decorative hardwoods and some of the overlays used on panel products.

Local industry will not be able to take up this slack, especially during the two years in which the Law preventing imports from illegal logging will be in place, but during which no regulations or guidance will be in place.

Industries into which such products are sold in which restricted supply will have negative impact are: mining (transportable buildings), recreation vehicles (caravans), transport (refrigerated containers), building, joinery, cabinet making, boat building, theatre and film, shop fitting, chemical (transportation) and wine making (barrels).

Timber products used in these industries are specialized as to strength, durability or other properties such as being light-weight or recycle-able; they are tailored in species selection and in manufacture to meet utility requirements. They will not be readily substituted.

The contraction in imported timber supplies will cause contraction in the customer industries and a likely rise in costs to consumers.

Conclusion

Australia's part in world timber trade is small. (One of my visits to an Indonesian plywood supplier coincided with a visit by a Japanese counterpart. "How much plywood do you buy for Australia," he asked? Taking a breath and exaggerating slightly I said, "12,000 cubic metres each year." He looked at me in a pitying way, "I buy 12,000 cubic metres for Japan every month".) Passage into legislation of the ILP Bill by Australia will have little or no commercial impact in the outside world, although its condescending nature may leave our diplomatic relations in nearby countries somewhat scarred. However, whatever impact there is to be, will be negative.

The importance of imported timber in the Australian economy is critical to a number of industries and trades. Some imported timber products are vital. Many are products which Australian industry used to be able to provide, but now cannot, due to withdrawal of timber resources for conservation and high cost structures in Australian manufacturing. Imported products that are not explicitly "illegal", but not able to be verified as "legal" either, will be withdrawn from being available.

There will be surprise when new products have to be found in which to transport cyanide to gold mines for example, or when the caravan industry suddenly contracts, or when more building sites are delayed for the want of plywood product for concrete pours.

My conclusion for the Standing Committee is to beware of the ILP Bill, its legal status, its effect on sovereignty issues, its extension of criminality into legitimate business and its deleterious effect in the Australian economy. These negatives are all cause for caution.

As for me, now from a personal perspective, how will I be able to expect my Board to authorize a company officer to certify the legality of wood when, he or she, acting in good faith, has to rely on third parties overseas providing

certification of legality, when a mistake will involve a criminal charge from which a jail sentence is possible?

The hope of certainty the Minister is holding out to consumers and businesses about the legality of timber products may well prove illusory when the practicalities unfold.

T H Gunnersen AM
6 Jan. 12