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Committee Secretary
Senate Standing Committees on Rural Affairs and Transport
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Dear Members of the Committee

Follow-up Inquiry into the *Illegal Logging Prohibition Bill 2011*

The Australian Network of Environment Defender's Offices (**ANEDO**) welcomes the opportunity to make a submission to this Inquiry into the revised *Illegal Logging Prohibition Bill 2011*.

ANEDO is a network of nine community legal centres in each State and Territory specialising in public interest environmental law and policy. Our perspective concerns the public interest in laws that support a safe and healthy environment.

As you would be aware, ANEDO made a submission on the exposure draft legislation¹ and provided evidence to the previous inquiry by teleconference. While the majority report and the Government response did not accept all of ANEDO's recommendations, we recognise and welcome some positive changes to the exposure draft legislation. This includes in the areas of increased penalties and forfeiture provisions, civil penalty provisions, and the adoption of elements of United States and European Union illegal logging legislation. Our purpose in making this submission is to update our initial comments, and outline our remaining top priorities to best achieve the aims of the legislation across the following areas:

- **Objectives**
- **Regulations**
- **Due diligence**
- **Compliance and enforcement.**

¹ See, *ANEDO Submission on the Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011*, 6.5.11, at <http://www.edo.org.au/edonsw/site/policy.php>

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Objectives

Recommendation: Reframe s 6 of the Bill from a “Guide to this Act” to an “Objects” clause.

As noted in our previous submission, ANEDO recommends the replacement of the “Guide to this Act” under section 4 of the Bill with an “Objects” clause. This will better assist with statutory interpretation; whereas the guide alone serves a limited purpose (a brief overview of the Act).

Regulations

Recommendations:

- Ensure a transparent and inclusive public consultation process in developing the Illegal Logging Regulations.
- Incorporate an independent review of the Regulations within 2 years of their commencement.

As noted in ANEDO’s earlier submission, many of the important details of the illegal logging framework have been delegated to the Regulations. For example:

- the definition of a “regulated timber product”
- the manner and form of any Customs Declarations
- Due Diligence requirements for importing regulated timber products
- Due Diligence requirements for processing raw logs, and
- Civil penalty provisions.

All of these elements are central components of the Illegal Logging Framework. As such, effective scrutiny of the framework in its entirety is not possible until the development and release of the Regulations.

ANEDO would welcome a transparent and inclusive consultation process when developing the Regulations, to allow public scrutiny of these important details. Community and conservation groups, industry bodies, government departments and other interested parties should have the opportunity to comment.

We welcome the Bill’s inclusion of a five year review following the Act’s commencement. Noting the central role that the Regulations will play, and in order to ensure they are best able to contribute to the Act’s aims, we recommend the Bill be amended to incorporate a review of the Regulations within two years of their commencement.

Due diligence

Recommendation: Amend sections 14(3) and 18(3) by replacing the phrase “The requirements *may include* requirements in relation to one or more of the following” with stronger terminology. Without limiting the regulations, the Act should require *all* of the listed matters to be included in the regulations on due diligence, to the extent practicable.

ANEDO welcomes inclusions in the revised Bill concerning due diligence requirements, but suggests these need to be more definitive. Whilst the detailed due diligence requirements are delegated to the regulations, the Bill gives an indication as to what requirements *may be* required for both importing regulated timber products and processing raw logs. We recommend replacing discretionary language (“may include”) with more prescriptive baseline requirements. This would increase the clarity and certainty of these sections and the contents of the Regulations to follow.

For example, ANEDO recommends amendments to sections 14(3) and 18(3) by replacing the phrase “The requirements *may include* requirements in relation to *one or more of* the following” (emphasis added) with, “The requirements *must, to the extent practicable*, include requirements in relation to the following”.

The current phrasing is far too broad and discretionary. For example, it would seem to allow the regulatory requirements for importing or processing logs to deal with one of the listed issues (eg, “assessing and identifying” the risk that timber was illegally logged), while remaining silent on all the other suggested issues (eg, risk mitigation, audits, compliance reports, remedial action, publication and transparency). Clearly a combination of all these elements, ‘to the extent practicable’, would be desirable – both for domestic effectiveness and for consistency with overseas standards. Such amendments would also reflect the Government’s Response to the Committee Reports.² The phrasing of sections 14(3) and 18(3) does not give any certainty that the Regulations will sufficiently address any or all of these listed requirements.

Compliance and Enforcement

Recommendations:

- Incorporate open standing provisions for the public (third parties) to bring enforcement proceedings for a breach of the Illegal Logging Prohibition Act.
- Insert an additional offence (and extend forfeiture) for individuals and corporations who knowingly distribute/sell illegal timber products *beyond* the point of importation or processing.
- Incorporate strict liability offences along with other civil penalties.

ANEDO welcomes a range of changes to the Bill regarding enforcement and compliance, particularly the significant increased range of penalties for various offences. We suggest additional measures in three areas to improve compliance with and enforcement of the illegal logging laws.

Open standing

A remaining limitation is the absence of ‘open standing’ provisions to allow any person to enforce or restrain a breach of the Act or regulations. In light of the removal of the Timber Certifiers regime from the revised Bill, ANEDO reiterates the need for strong monitoring and enforcement provisions, in particular the provision of open standing to supplement government agency enforcement. There are highly successful examples demonstrating the utility and public benefit of broad or open standing provisions, including in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Environmental Planning and Assessment Act 1979* (NSW). By contrast,

² See Government Response to the Senate Committee Report on the *Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011* (June 2011). In its response to recommendation 1.3(f) of the Dissenting Report, the Government “agreed in principle” to recommendations that the “declaration information be as broad as EU and US legislation”.

NSW forestry laws prevent the general public from prosecuting breaches,³ which in turn may have contributed to a culture of non-compliance.⁴ Relatedly, the Committee should also consider whether the Act and regulations will provide for sufficient scrutiny of compliance with domestic harvesting laws, in addition to overseas laws. Local timber should not be ‘rubber-stamped’.

Offence for knowing sale of illegal timber (throughout supply chain)

ANEDO notes the Government’s decision not to pursue a ‘chain-of-supply’ approach to regulating the import and distribution of illegal timber, principally on the basis of industry burden.⁵ However, without some further amendment, we believe this creates a gap in the regulatory framework – by not preventing persons further down the supply chain from knowingly selling illegal or unverified timber. This would disadvantage the honest majority and undermine the aims of the Act.

ANEDO therefore recommends inserting an additional offence for individuals and/or corporations who knowingly distribute or sell illegal timber products *beyond* the point of importation or processing. That is, this offence should be the whole supply chain. Forfeiture provisions should be similarly extended. Neither of these additions would cause regulatory burden.

To assist compliance and enforcement investigations, we would also support requirements on the industry to maintain proper records of timber supply.

Civil Penalties and Strict Liability Offences

ANEDO supports the inclusion of civil penalty provisions in the Bill (Division 5), and we look forward to public consultation on related content in the regulations. In addition, as outlined in our prior submission,⁶ we recommend an expansion to include strict liability offences. This would extend the range the enforcement tools available, and provide a stronger incentive for compliance. As noted above, the inadequacy of penalties has been detrimental to compliance elsewhere in the Australian forestry industry. For example, in NSW, “low penalties for forestry offences provide a disincentive to the prosecutor to bring proceedings and an inadequate deterrent to the offender”.⁷ In this context, we understand the US Lacey Act uses a tiered penalty system for illegal logging, where different penalties (criminal, civil *and* strict liability) are available according to whether an importer knowingly or unknowingly engages in prohibited conduct.

The Australian Network of Environment Defenders Offices

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³ For example, s 40 of the *Forestry and National Park Estate Act 1998* (NSW) excludes the public (third parties) from bringing legal proceedings in the Land and Environment Court to enforce an Integrated Forestry Operations Approval.

⁴ See, eg, *Sydney Morning Herald*, “Repeated logging breaches go unpenalised, says report”, 28/7/2011, at <http://www.smh.com.au/environment/repeated-logging-breaches-go-unpenalised-says-report-20110727-1i072.html>.

⁵ See, eg, Committee Majority Report on the *Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011*, para 5.49; Government response to recommendation 1.3(c) to the previous Inquiry’s Dissenting Report (November 2011).

⁶ See, *ANEDO Submission on the Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011*, p.4, 6 May 2011, at <http://www.edo.org.au/edonsw/site/policy.php>

⁷ See, Nature Conservation Council of NSW (2011), “*If a Tree Falls*”, p.15, at http://nccnsw.org.au/sites/default/files/110728%20If%20A%20Tree%20Falls%20Report_1.pdf.