Senate Rural Affairs and Transport Legislation Committee

Questions on Notice – Wednesday, 14 December 2011
CANBERRA

Inquiry into the Illegal Logging Prohibition Bill 2011

Question Number	Page No's.	Witness	Question asked by	Answered
1	9	ATIF	Senator Xenophon	19/12/11
1	16	WADIC	Senator Siewert	15/12/11
1	20	Greenpeace	Senator Xenophon	9/1/12
1	31	FSC	Senator Xenophon	Unanswered as at 3/2/12
1	54	Government of Malaysia	Senator Xenophon	9/1/12
2	58-59	Government of Malaysia	Senator Xenophon	Unanswered as at 3/2/12
1	64	DAFF	Senator Colbeck	6/1/12

SENATE RURAL AFFAIRS AND TRANSPORT
LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

Public Hearing: Wednesday, 14 December 2011

Questions Taken on Notice – Australian Timber Importers Federation Inc

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HANSARD, PG 9

Mr Halkett: ... But I will certainly provide the committee with some advice on Gibson guitar case.

Gibson Guitars and the US Lacey Act – valuable status report

Good Intentions Gone Wrong? Lacey Act Lessons from the Gibson Guitar Raid

Hardwood Review offers lessons to the hardwood industry coming from the recent Gibson Guitar raids and the concerns being raised about the Lacey Act.

By Dan Meyer
1 November 2011

Since late August the media and the Internet have been abuzz with stories and comments about the raid on Gibson Guitar Company facilities in Nashville and Memphis by Homeland Security and Fish and Wildlife Service (FWS) agents. The August 24 raid—the second in less than two years on Gibson—was purportedly in response to suspected violations of the Lacey Act, though many have read into it ulterior motives and even political undertones.

The Lacey Act is a 100-year old law designed to prevent trafficking in "illegal" species. It was amended in 2008 to ban importation into the U.S. of illegal timber, wood and wood products. While championed as a solution to the price-dampening effects of illegal logging, the Lacey Act has in these past few weeks come to symbolize big government overreach, job-killing regulation, and misplaced priorities. These criticisms have only been amplified by the fact that the current allegations against Gibson have nothing directly to do with illegal logging or endangered species protection.

Be clear that we are not asserting that the Lacey Act is a bad law; only that its overzealous enforcement could sweep up well-intentioned, well-respected companies along with the bad.

To be certain, there are many unknowns about this case. Gibson hasn't been charged with anything. In fact, charges have yet to be filed as a result of the first raid on Gibson, though the government still refuses to return the confiscated materials—which Gibson says include $1 million worth of imported Madagascar ebony and rosewood.

More details will come out over time and will reveal whether Gibson acted 1) wilfully in violation of the Lacey Act; 2) unknowingly in violation of the Act; or 3) without violating the Act at all. Even without all the facts, however, there are concrete and alarming lessons that every forest products importer, manufacturer and distributor need to learn from these events.

Lesson #1: Green "partnerships" may be only skin deep

By most accounts, Gibson Guitar Company is an outstanding corporate and environmental citizen and a recognized leader in the certified wood community. In the wake of the latest raid, however, many of Gibson's environmental partners have gone eerily silent.

Gibson's philanthropic division has sponsored Natural Resources Defense Council events for years, and Gibson even produced a custom guitar to raise funds for the NRDC's campaign to end strip mining. As of this writing, NRDC has not issued a statement in "defense" of Gibson since the raid.

Gibson joined forces with Greenpeace and other guitar manufacturers to launch the Music Wood Campaign, an effort to increase the supply of FSC-certified timber-based products.

Greenpeace was apparently still smitten with Gibson's environmental performance in June 21, 2011—two months before the latest raid—when it posted online a video documentary about the efforts of Gibson and other manufacturers to protect Alaska's Sitka Spruce forest. Yet, in response to the raid, a Wall Street Journal article said a Greenpeace official in New York would only say "We have no idea" whether Gibson did everything possible to avoid buying wood from dubious sources.

Immediately after the latest raid, the Forest Stewardship Council (FSC) stated, "While Gibson has shown important sector leadership by stimulating demand for FSC-certified wood, the federal investigation addresses the wood they use that is not FSC certified. Unless 100% of the wood used is FSC certified, other mechanisms [of due care] are required. In this instance, it is the non-certified wood that is being questioned." We studied the entire 31-page search warrant affidavit, however, and there is no reference in it to FSC or non-certified wood. Further, Gibson says the seized wood is from an FSC-certified supplier and was FSC Controlled (which, by FSC's definition, means it must be legally harvested and sourced). Ironically, only 8 years ago, the FSC-US Board of Directors toured Gibson's Nashville factory and proudly declared that "Gibson USA is in tune with FSC."

Gibson still has at least one environmental friend in the Rainforest Alliance. Gibson CEO Henry Juszkiewicz sat on the board of Rainforest Alliance, helped start its SmartWood program, and has manufactured a "SmartWood" guitar since 1996. While the Rainforest Alliance issued a statement after the raid re-confirming its strong support for the Lacey Act, it also explained in detail those efforts Gibson has taken in recent years to source wood responsibly, many in partnership with the Rainforest Alliance and FSC.

Lesson #2: Things are not always as they seem

In May of 2010, the Environmental Investigation Agency (EIA) launched the Forest Legality Alliance in partnership with the World Resources Institute and USAID—and with the backing of the American Forest & Paper Association, the Hardwood Federation, the International Wood Products Association and others—for the purpose of "reducing illegal logging through supporting the supply of legal forest products." Collectively, alliance members targeted passage of the U.S. Lacey Act amendment and the parallel EU Timber Regulation.

Fast forward several months and we now find the EIA defending the Gibson raid as an important step in the fight against illegal logging, even though there have been no allegations that Gibson's imported Indian rosewood and ebony were illegally harvested. "Nobody [at EIA] wants this law to founder on unintended consequences," said Andrea Johnson, director of forest programs for EIA, on a National Public Radio interview, "because everybody understands the intent here is to reduce illegal logging and send a signal to the markets. This is the new normal."

Lesson #3: Lacey is not about endangered species

The Lacey Act, while officially concerned with all facets of "illegal" trade, has most often been utilized to stop trade in endangered species. The latest Gibson raid underscores that upholding endangered species laws is but one concern of the "new" Lacey Act.

The Indian rosewood (*Dalbergia latifolia*) and Indian ebony (*Diospyros ebenum*) seized in the August raid are not listed by CITES as protected species, nor did the FWS present any

evidence that the Indian government considers these species threatened or endangered. CITES—the Convention on International Trade in Endangered Species of Wild Fauna and Flora—lists 28,000 species of plants it says are threatened with extinction by international trade. In fact, Gibson switched its ebony and rosewood sourcing to India in response to concerns about the legality of Madagascar supplies.

Lesson #4: Green certifications don't satisfy Lacey

FSC, PEFC and SFI are voluntary, private, third-party certifications of sustainable forest management and/or chain-of-custody transmission of sustainably harvested wood products to the marketplace. Compliance with the federal Lacey Act is mandatory, and is only concerned with the legality of the harvest and distribution of products. As Gibson is now fully aware, becoming FSC-certified and sourcing from FSC supply chains does not satisfy Lacey Act requirements for legality verification from the stump to the stevedore. Which begs the question: What does it take to satisfy the Lacey Act's requirement?

Lesson #5: "Due care" under Lacey is in the eye of the 'E. Holder'

The Lacey Act requires importers and manufacturers to take due care to insure the wood they buy and use meets all international laws. What constitutes "due care," however, is highly subjective and ultimately up to the interpretation of the U.S. Attorney General Eric Holder. The EIA website quotes Senate Report 97-123, which says due care means "that degree of care which a reasonably prudent person would exercise under the same or similar circumstances. As a result, it is applied differently to different categories of persons with varying degrees of knowledge and responsibility."

The EIA goes on to say, "Given the lack of certainty around how a court might view due care, it would be prudent for companies to avail themselves of the wide array of tools, technologies and resources available for assessing and eliminating illegal wood…including bar-code or other tracing systems; legality verifications; and certification under third-party schemes." Seems Gibson did at least some of those things.

Nor does taking due care exempt a company from penalty. Companies that unknowingly engage in prohibited conduct under the Lacey Act, even if the government grants that they practiced due care to avoid doing so, are still subject to civil fines and forfeiture of goods. Any way you slice it, importing wood is now very risky business.

Lesson #6: HS codes matter…a lot

The FWS claims in its search warrant affidavit that Gibson 1) improperly filed Customs declarations, and 2) imported Indian rosewood guitar backs and ebony fretboard blanks under the wrong Harmonized Tariff Schedule (HS) codes. These shipments allegedly left India as "finished parts for musical instruments" (HS 9902) and arrived in the U.S. classified as "veneer" (HS 4408), but should have been classified as "lumber" (HS 4407) all along. Indian law allows the exportation of HS 9902 items of rosewood and ebony, but not lumber (HS 4407) of the same species, unless sawn from imported logs.

Under the Lacey Act, the burden falls on the importer of record to ensure that everyone in the supply chain classifies the products correctly. In this case, Gibson is on the hook for

misclassifications by the shipper, the broker, and the receiving company—whether or not Gibson had any role in or knowledge of those misclassifications. Not knowing is no excuse.

With the Lacey Act amendment in place, a "knowingly" misclassified shipment could result in jail time and fines of up to $250,000. "Unknowing" misclassifications carry less significant penalties, but what importer or manufacturer can afford to defend a position of ignorance of proper codes? As such, proper HS classification ought to be of primary concern to everyone in the trade from this day forward. Improper codes may be the "broken taillight" that gives officials probable cause to pull companies over and search for more serious violations.

Lesson #7: You must uphold other countries' laws, even if they don't

We were able to verify that India has banned exports of some lumber species since at least 2009, including Indian ebony and rosewood. However, there is anecdotal and possibly some tangible evidence that India doesn't enforce these bans very strictly, if at all. Over the last three years, U.S. International Trade Commission trade data show, for example, after correcting for errors, that India shipped to the U.S. an average of 10 containers of "hardwood lumber" every month. Further, India's Department of Commerce actually reports in its own trade data export volumes of HS 4407 items that it officially bans from export!

Neither of these facts are irrefutable evidence that India knowingly allowed the export of banned items, but they leave us with just two possibilities: 1) all of this lumber was produced from imported logs, and was thus exempt from the ban, or 2) Indian officials have allowed (and recorded) at least some shipments of contraband lumber.

If Gibson can demonstrate that Indian officials are lax in their enforcement or routinely ignore their own law, and the U.S. Department of Justice still decides to prosecute the case, it will be mandating that U.S. firms uphold foreign laws that foreign countries themselves don't uphold.

Lesson #8: You could be next!

Why Gibson? The fact that a single, iconic American manufacturer and a recognized environmental leader has been singled out for possible prosecution under the Lacey Act is worrisome. The EIA is correct that the Lacey Act raids on Gibson have sent a signal to the industry. The problem is that nobody seems to know how to interpret the signal. If Gibson can get caught up in Lacey Act violations, who will be next? To be certain, other guitar manufacturers who purchase the same woods from the same supply chain are nervous

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LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

Public Hearing: Wednesday, 14 December 2011

Questions Taken on Notice – Window and Door Industry Council Inc

1. HANSARD, PG 16

Senator SIEWERT: So any international laws should not apply?

Mrs Foord : I would have to take that on notice. I would not dare say that no international law should apply.

Senator SIEWERT: If you could take it on notice because by specifying it as you are you are basically then saying any international laws and to tell you the truth I cannot—

Senator COLBECK: You want to pick up CITES type stuff?

Senator SIEWERT: Yes. Why should they not apply?

Mrs Foord : We are most concerned about the broad brush, that it could to apply to laws with just like they had with the Gibson guitars situation, which was all about the government requirement that you could not exclude a certain thickness of timber and call it a veneer. That was the debacle which happened there. We do not want that situation to happen with, whether there is an OH&S law or something like that.

Senator SIEWERT: There are two issues there: national and subnational and then there are forest laws. I know time is precious about if you could take it on notice, I would appreciate it.

QUESTION ON NOTICE – FROM RACHAEL SIEWART - DEFINITION ILLEGAL LOGGING

Why "National and Sub-national" laws"?

Clarification - By this we also include enacted and signed international treaties and conventions, but not non-enacted treaties, or those international treaties which the country of harvest is not a signatory to.

Support for National Sovereignty

One of the best ways that Australia can reduce illegal logging is by supporting national sovereignty in the countries of harvest, that is, doing all that we can do to support the Governments in these countries in formulating, passing and enforcing their own forest laws. This will improve forest governance. Australia should *not* act in a way that diminishes Government authority or responsibility, such as by "imposing" non-enacted/unsigned international treaties or conventions on such countries.

Multiplicity of laws

There could be a very large set of ambiguous international (non-enacted) treaties and conventions that importers would need to be aware of and to ensure compliance to. Add to this the potentially thousands of non-enacted tribal, customary, religious and archaic laws, and you would be creating an impossible (and impossibly expensive and confusing) compliance task to expect from small importing businesses. Additionally, it would create many unknown liabilities for such businesses. Businesses need certainty in order to comply with the illegal logging law.

Justice

It is unjust and unreasonable to expect businesses (or anyone) to ensure compliance to what may be thousands (of potentially) conflicting non-enacted/unsigned international treaties, tribal, customary, religious and archaic laws in tens of countries of harvest. We are not international, tribal or religious lawyers, we are business people, with a common-sense understanding of Australian and Western legal tradition, that is the tradition of obeying National and Sub-national laws and enacted international Treaties/Conventions.

Resolves Potential conflict between laws

Such a definition (National and sub-National laws) 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 businesses to know what laws they or their supplier has to comply with.

Consultation History

Furthermore, "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".

SENATE RURAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

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Questions Taken on Notice – Greenpeace Australia Pacific

1. HANSARD, PG 20

Senator XENOPHON: I have a couple of quick questions. Mr Tager, we heard evidence earlier today from the Australian Timber Importers Federation that we need to be vigilant of the errors of the US Lacey Act. I think it is fair to say that Mr Halkett did say that the act has many good features, but in the recent Gibson guitar case there were some unintended consequences in the legislation or there was a messiness in that legislation. On notice, could Greenpeace provide their view on that, given what has been raised by Mr Halkett?

Secondly, you referred to the way the EU has looked at the legislation. What can we learn from that jurisdiction in terms of the practical application of their definition and their legislation? Again, because of time constraints, you may want to take that on notice.

Mr Tager: I will take that on notice because I am not sure about the EU act; we have heard far more about the Lacey Act and the effect that it has had. It has generally been really positive about driving change in the market.

Senator XENOPHON: Sure. I think Mr Halkett was quite careful to say he was not rubbishing the entire act. He did say that the Gibson guitar case was a problem. If you could give us your perspective on that, that would be useful. We are trying to avoid what Senator Gallacher referred to in terms of perverse outcomes.

Mr Tager: One thing I would identify in terms of the US legislation, the Lacey Act in particular, is that the US has a very different way of approaching enforcement than Australia does. They do tend to go for the high-profile, big impact case rather than actually having an enforcement regime in a kind of steady state. I think that is very different from what we have done here. They may have made mistakes with it; I cannot tell you that, but I will take that on notice.

Committee Secretary
Via email rat.sen@aph.gov.au

Dear Committee Secretary,

Questions on Notice & Follow-up

Senate Committee – Inquiry into the Illegal Logging Prohibition Bill

Thank you for the opportunity to provide Greenpeace's perspective to the Committee during hearings in December last year. Below are responses to questions on notice and further commentary.

Questions on notice

Q: Senator XENOPHON: *I have a couple of quick questions. Mr Tager, we heard evidence earlier today from the Australian Timber Importers Federation that we need to be vigilant of the errors of the US Lacey Act. I think it is fair to say that Mr Halkett did say that the act has many good features, but in the recent Gibson guitar case there were some unintended consequences in the legislation or there was a messiness in that legislation. On notice, could Greenpeace provide their view on that, given what has been raised by Mr Halkett?*

A: In the United States, Greenpeace was actively involved in the campaign for amendments to the Lacey Act to criminalise illegal timber imports. Greenpeace continues to strongly support the legislation in the US. There is no doubt that the recent, high-profile investigation against Gibson guitars has whipped up debate in the US about the Lacey Act; however much of the press coverage and commentary contains factual inaccuracies which has caused some alarm.

Greenpeace has not been intimately involved in the case however we support comments made by the Environmental Investigation Agency, an NGO that has been more closely involved in the detail of the case and has indeed helped expose illegal logging of Rosewood in Madagascar: http://www.eia-global.org/News/Update_GibsonRaid.html

It is unclear from Mr Halkett's submission exactly what are the "unintended consequences" from the (Lacey Act) and so it remains difficult to comment on specifics.

One important myth to dispel is that the Lacey Act covers *any domestic law* in the point of harvest, so for example if a truck driver exceeds the speed limit whilst transporting the timber in question – this is not true. Lacey is limited to laws that specifically go to the problem of illegal logging and plant trade:"the theft of plants; the taking of plants from a park, reserve or protected area; the taking of plants without or contrary to required authorization; taking, possessing, transporting or selling plants without payment of appropriate taxes, royalties or stumpage fees; and taking, possessing, transporting or selling plants in violation of a law governing their export or transshipment." (*§ 3372 (B)(i), 7)*

Importantly, as highlighted by Senator Heffernan's comments and questions during the Committee's hearings, this also covers instances of bribery and other corruption – behaviour

that is arguably overlooked under the Australian bill and would be explicitly excluded if the Australian Timber Importers Federation recommendations were followed.

Australian law and law enforcement lacks the historical and cultural extra-jurisdictional nature that characterises US laws. The Australian Government also has far less resources to investigate and clearly prove cases of illegal logging in other countries. For this reason it is vital that there be a positive obligation of timber importers to demonstrate due diligence as is included within clause 12. Something not made explicit in the Lacey Act.

Q: Senator XENOPHON: *Secondly, you referred to the way the EU has looked at the legislation. What can we learn from that jurisdiction in terms of the practical application of their definition and their legislation? Again, because of time constraints, you may want to take that on notice.*

The EU timber regulation is not due to come into effect until March 2012 so at this stage it is too early to take learnings from its practical application.

However, a key area where the EU legislation surpasses the Australian bill is in providing much clearer detail of how illegal timber is defined, as we noted in our submission to this Committee.

Under s5 of the Australian bill '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.

The use of the term "harvested" could have the effect of ignoring significant cases of illegality – particularly where corruption, bribery or timber smuggling occurs -as well as ignoring disputes over land tenure where indigenous and/or traditional land rights are concerned.

This definition is particularly unsatisfactory because it will ignore, and in fact could legitimise, cases where the traditional landowners' land is logged against their wishes - even where national laws protect their rights.

This narrow definition within the Draft Bill contrasts starkly with the US Lacey Act, which as discussed above, is much broader.

The EU Regulation also uses the term "harvest" but then goes on to provide a broaddefinition of the "applicable legislation" that is relevant:

Article 2

Definitions

(g) 'illegally harvested' means harvested in contravention of the applicable legislation in the country of harvest

(h) 'applicable legislation' means the legislation in force in the country of harvest covering the following matters:

— rights to harvest timber within legally gazetted boundaries,

— payments for harvest rights and timber including duties related to timber harvesting,

— timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,

— third parties' legal rights concerning use and tenure that are affected by timber harvesting, and

— trade and customs, in so far as the forest sector is concerned

Further Follow-up: Practicalities of enforcement at the border

In our recent submission to the Inquiry into the Illegal Timber Prohibition Bill Greenpeace expressed concern at the lack of certainty regarding enforcement, monitoring and compliance in the bill. We highlighted the lack of clarity regarding risk assessment and how that would link into inspection and compliance testing at the border.

Recently, Greenpeace attended a meeting of the Illegal Timber working group, where there were discussions regarding some of the issues associated with the Bill and the regulations.

One of the attendees was Zoran Kostadinoski, a representative of the Customs Brokers and Forwarders Council and a former broker with experience in a number of areas associated with import processes and inspection and compliance, including food and biosecurity.

It was clear from comments he made during the meeting and in conversation afterwards that a great deal more thought is required to consider how monitoring, inspection and compliance will work at the border.

He pointed as an example to the AQIS Imported Food Inspection Scheme (http://www.daff.gov.au/aqis/import/food/inspection-scheme), which, structurally, has similarities to the Illegal Timber Import Prohibition bill. Importers are responsible for ensuring compliance with the relevant legislation (Food Standards Code). AQIS operates the inspection scheme under the Imported Food Control Act based on risk profiles provided by Food Standards Australia New Zealand (FSANZ). Foods identified as high risk are subject to a 100% inspection and testing regime. Other foods are considered 'surveillance' foods and are subject to random inspections and different tests depending on risks identified. Surveillance foods are tested at a rate of 5%.

Mr Kostadinoski also noted that sometimes Customs will require mandatory inspections for new producers for a certain number of imports. Food import risk levels are embedded in the tariff codes, allowing brokers and customs officials to determine quickly whether inspection is required. Producers with problem histories are flagged so that inspections are more common. Essentially, Mr Kostadinoski made it clear that in order to have an effective border inspection and compliance regime, the indicators of risk need to be rigorous and the triggers for inspection need to be directly related to the level of risk. The use of tariff codes in which to embed the risk level is not the only mechanism that can be used, but it is clear that a simple flagging system for degree of risk is needed.

He also made it clear that Customs officials and brokers need to be trained in order to implement the law properly.

Greenpeace has argued that a clear statement or identification of the level of risk of illegality with each import of timber or timber products is necessary for an effective border inspection and compliance regime to prevent the import of illegal timber. Currently, the Bill does not provide any certainty that the border inspection and compliance regime will be designed to capture high risk imports and at the same time reduce the impost on those imports from low risk countries or species.

We are not arguing for a specific scheme, but do believe that the Food Import scheme provides some useful guidance to the kinds of provisions that the current timber bill should contain.

Greenpeace suggests the Committee to consider input from Mr Kostadinoski prior to issuing its report in February.

Yours Sincerely,

Reece Turner
Forests Campaigner
Greenpeace Australia Pacific

Jeremy Tager
Manager Political and Projects Team
Greenpeace Australia Pacific

SENATE RURAL AFFAIRS AND TRANSPORT
LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

Public Hearing: Wednesday, 14 December 2011

Questions Taken on Notice – Forestry Stewardship Council Australia

1. HANSARD, PG 31

Senator XENOPHON: I do not want to put you on the spot. Mr Halkett gave his evidence and his submission from the Australian Timber Importers Federation referred to it. Could you take on notice what the view of the FSC is in relation to that case? Again, Mr Halkett made it clear that he thought the Lacey Act had many good features in terms of illegal logging but that there was an anomalous aspect of that, and I think that also Dr Zirnsak made reference to that in a different context, but I just want to get your take on the Gibson Guitar case decision. Some say that it is anomalous; others say that it is not. I just want to see where FSC comes from, if you could take that on notice.

Ms Reynolds: Yes.

SENATE RURAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

Public Hearing: Wednesday, 14 December 2011

Questions Taken on Notice – Government of Malaysia

1. HANSARD, PG 54

Senator XENOPHON: As I understand it, Rimbunan Hijau, or RH, has been one of the main logging companies in Papua New Guinea. In October 2008, it admitted it had been awarded logging rights in Papua New Guinea illegally, I think, through its operating subsidiary Wawoi Guavi Timber Co. If there was evidence that a Malaysian company had done something wrong in another jurisdiction, for instance, in Papua New Guinea, are there any sanctions or do you simply rely on what the sanctions would be in that country? Is there any additional oversight or mechanisms of accountability in Malaysia? It reflects on corporate Malaysia in a sense and, more broadly, on the industry. In other words, with RH, are there any specific legal sanctions? I am not saying there should be. Different countries have different approaches. Would there be any sanctions against that company in Malaysia or is there additional oversight? Is there closer monitoring? What would the consequences be if there was a finding against a company? I have to emphasise there have been Australian companies who have done the wrong thing overseas and they get prosecuted in overseas jurisdictions.

Dr Harun: This is quite a heavy question.

Senator XENOPHON: It was not intended to be.

Dr Harun: If a Malaysian company is operating in foreign countries and doing things—

Senator XENOPHON: For instance, Woodside Petroleum is a well respected company. They were involved in Africa in some payments that some would see as bribes. There was no consequence for Woodside under Australian law. I give the example by way of counterpoint. I am not saying we have a pure approach under Australian law. I am saying there is an issue there.

Dr Harun: What I can say here is that any timber that we import, even if it is from a Malaysian company, we normally have to ensure that the chain of custody is fairly clear and the timber is not illegal. As far as the Malaysian government's acts on those companies goes, at this moment I am not be able to answer. I may have to refer that question.

Senator XENOPHON: You could take that on notice, and you may want to take this on notice. If there has been a court finding that a company has been participating in illegal logging practices in another country, and presumably some of that has gone back to Malaysia, does that mean that the company would come under greater scrutiny? Would there be greater enforcement? Is there heavier regulatory scrutiny of that company if it has been found to have done the wrong thing somewhere else?

Dr Harun: We will take that question on notice and we will definitely come back to you. This is illegal and something that we do not tolerate, even though it is a Malaysian company.

2. HANSARD, PG 58-59

Senator XENOPHON: In terms of international consistency or international standards, the Lacey Act in the United States has been in force for a number of years—I think since 2008—to deal with issues of illegal logging. You may want to take this on notice because of time constraints, but would you be able to comment about how the Malaysian forestry industries have dealt with the United States legislation that deals with the illegal logging in terms of compliance and regulatory approaches and any regulatory burdens and what you thought of that? Some of the witnesses earlier today from the Australian forestry importers made the point that there was an anomalous decision, in their view, relating to the Gibson guitar case. That is in their submission. If you could reflect on that, that would be useful in terms of how you see the Lacey Act operating and how you would see differences between that act and this piece of legislation here.

Ms Mustapha: As far as complying with the Lacey Act is concerned, at this point it does not seem to be too prohibitive, in the sense that it is only required that the exporters provide an information paper, a declaration paper, to the importers, to be submitted to the government, to declare the name of the species of the consignment. This information is provided. The prohibitive part of it is that you have to list all the species involved in one product. I think MDF is now exempted, but, if you are importing furniture, if there are a lot of other species that go into it and you do not know what species they are, you have to guess and you have to list what possible species there are. This is submitted to the US. Now the worry is that the American government can pick on any legal aspect in the whole chain. The burden of proof is up to the industry. The concern we have is that people will shy away from using timber. This is the biggest concern basically because of all the requirements. You do not know which legal—

Senator XENOPHON: Ms Mustapha, I do not want to cut you short, but I wonder whether you able to provide some further details on notice—what is the time frame, chair? Is it the next week or two—in the next week or two just to elaborate on that. I think it is quite interesting in terms of weighing that up. The final issue is that in terms of RH can you clarify, in terms of any forestry products that may have been logged illegally in Papua New Guinea, would that have been picked up if it was going back to Malaysia? Was that actually picked up in the accountability process or not? Did any of that product go back to Malaysia and was it picked up in the regulatory framework?

Dr Harun: We will take note of that. Implementation of it is quite recent. I think we will see the response from our industry. On RH, definitely we will come back to you. It is easy to see those issues in Tasmania are everywhere now under Rimbunan Hijau. They are also in Africa, also in Siberia, also in Oceania and the Pacific. We will respond to that later.

PAPUA NEW GUINEA FOREST INDUSTRIES ASSOCIATION (INC)

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Sustained Forest Industry for Papua New Guinea

Senator Glenn Sterle
Chairperson
Senate Standing Committee on Rural Affairs and Transport
Parliament House
Canberra ACT 2600
Australia

Date: 9th January 2012

Dear Senator Sterle,

At the hearing of the Senate Committee on Rural Affairs and Transport into the Illegal Logging Bill, Senator Xenophon asked the following question of the representatives of the Malaysian Government.

> *As I understand it, Rimbunan Hijau, or RH, has been one of the main logging companies in Papua New Guinea. In October 2008, it admitted it had been awarded logging rights in Papua New Guinea illegally, I think, through its operating subsidiary Wawoi Guavi Timber Co. If there was evidence that a Malaysian company had done something wrong in another jurisdiction, for instance, in Papua New Guinea, are there any sanctions or do you simply rely on what the sanctions would be in that country? Is there any additional oversight or mechanisms of accountability in Malaysia? It reflects on corporate Malaysia in a sense and, more broadly, on the industry. In other words, with RH, are there any specific legal sanctions? I am not saying there should be. Different countries have different approaches. Would there be any sanctions against that company in Malaysia or is there additional oversight? Is there closer monitoring? What would the consequences be if there was a finding against a company? I have to emphasise there have been Australian companies who have done the wrong thing overseas and they get prosecuted in overseas jurisdictions.*

I have been advised by Rimbunan Hijau (PNG) of the following.

Presumably, Senator Xenophon is referring to the legal challenge to the initial decision to award to the Wawoi Guavi Timber Company Limited, one of the companies of the Rimbunan Hijau (PNG) Group, of a timber concession in the Kamula Doso area.

At no stage has Rimbunan Hijau (PNG) Group stated that it had been awarded logging rights illegally to this or any other concession.

This concession concerned adjoins a concession in the Kamula Doso region and was initially awarded as an extension of the existing Wawoi Guavi concession. The Ombudsman Commission investigated the PNG Forest Authority's decision to award the concession to the company and subsequently, Wawoi Guavi Timber Company Limited withdrew the court order it had obtained that the Authority should proceed to complete the allocation process. One reason was that subsequent amendments made to the Forest Act disallowed such extensions.

It has become a practice of groups opposed to commercial forestry in PNG to lodge continuous appeals against legally-awarded concessions as a means to delay development of new forestry projects.

Access to the Kamula Doso timber area is important to the continuing functioning of the Panakawa Veneer Plant, also owned by Rimbunan Hijau (PNG) Group which is one of the largest manufacturing businesses in PNG.

It is the most significant investments in PNG to support the policy of the Government of PNG to promote value adding of natural resources and expansion of manufacturing in PNG. The plant employs 600 staff and has contributed significantly to improving the social, educational and economic standards of the people in the immediate vicinity. The Kamula Doso area has been nominated by the Forest Authority as an area for the practice of sustainable forestry.

The Wawoi Guavi Timber Company Limited, along with the PNG Forestry Authority made submissions to the court to demonstrate the decision-making process in the awarding of the concession was legal.

During the process of legal review of these submissions, the PNG Forest Authority advised the court that the original document transferring timber rights from the landowners to the State could not be located. Copies were available, but were not deemed acceptable to the court.

In light of these circumstances, the Wawoi Guavi Timber Company Limited decided to cease its legal proceedings to contest the legal claims of those opposing development of the Kamula Doso forest area since without the basic documents there was no basis for a court to rule on the matters before it.

This action provides no basis for Senator Xenophon to observe or contend that RH (PNG) had acted erroneously.

In respect of Senator Xenophon's questions about Malaysian law applying to subsidiaries of Malaysian companies operating in foreign jurisdictions, Rimbunan Hijau (PNG) Group advises that the company is established under the national laws of Papua New Guinea and is accountable to the jurisdiction of national Papua New Guinea entities.

Senator Xenophon implied the Group may export timber product to Malaysia. Very little of Rimbunan Hijau (PNG) Group's product from forestry operations is exported to Malaysia.

I request that these corrections to the errors and erroneous imputations in Senator Xenophon's remarks be fully recorded in the proceedings and report of the Committee.

Yours sincerely,

Bob Tate
Executive Officer
PNG Forest Industries Association

SENATE RURAL AFFAIRS AND TRANSPORT
LEGISLATION COMMITTEE

Inquiry into the Illegal Logging Prohibition Bill 2011

Public Hearing: Wednesday, 14 December 2011

Questions Taken on Notice – Department of Agriculture, Fisheries & Foresty

1. HANSARD, PG 64

Senator COLBECK: Does Customs maintain a record of people who have imported over a period of time? Some of this can be fairly ad hoc. Is there some sort of record that Customs maintains that you might have access to so that it might be possible to provide to somebody who has imported something in the last five years a warning or advice that this is coming down the pike?

Mr Talbot: I will check on this. My understanding is that Customs does keep records over a number of years, but I will take that on notice. The reason I am hesitant is that, in the work we are doing at the moment, I think two-thirds of importers are regular and one-third are ad hoc—they would probably only do one shipment a year. I will take that on notice and provide some more information. But my understanding is that Customs does have the records.

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Question: 1
Proof Hansard Page: 64

Senator Colbeck asked:

Does Customs maintain a record of people who have imported over a period of time? Some of this can be fairly ad hoc. Is there some sort of record that Customs maintains that you might have access to so that it might be possible to provide to somebody who has imported something in the last five years a warning or advice that this is coming down the pike?

Answer:

The Customs Act (1901) places obligations on importers (or their agents) to provide certain information to Customs and Border Protection at the time of importing goods. Customs and Border Protection maintains records of these reports for more than 5 years and shares relevant details with other agencies, where the receiving agency will use the information for a lawful purpose.