

**Submission to the Senate Rural Affairs
and Transport Legislation Committee**

Follow-up inquiry into the

Illegal Logging Prohibition Bill 2011

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Inquiry into the Illegal Logging Prohibition Bill 2011

Introduction

Greenpeace Australia Pacific is pleased to provide this submission to the Committee to consider as it undertakes its inquiry into the Illegal Logging Prohibition Bill 2011.

Greenpeace has campaigned to see the Government introduce this legislation and has provided policy advice over at least 3 years to the Department and various Ministers. In broad terms we welcome the Bill and believe that it represents an improvement on the Draft Exposure Bill released in March 2011. However, there are amendments that are required to ensure the legislation delivers on the Government's policies and election promise.

These are set out below with rationales and suggested amendments under the following headings:

1. Sustainability in the objects clause
2. Definition of illegal logging consistent with the EU
3. Standing
4. Due diligence and the declaration form. (ss 13 and 14)
5. Traceability
6. Enforcement and Compliance
7. Greater transparency

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Proposed Amendments

1. Sustainability in the objects clause

In the lead-up to the 2007 election the Australian Labor Party (ALP) announced its policy to bring in a ban on illegal timber imports with the top line “Ensuring sustainable timber imports”. Eliminating illegal timber, the worst of the worst, was seen, as it still should be, as the initial step towards this end goal. In December 2009, then Minister for Agriculture, Fisheries and Forestry, Tony Burke signed-off on changes to the objective of the Government’s policy which remains current. It ‘provides the basis for addressing all five components of the government’s illegal logging election commitment’. It states:

“The policy objective is ‘the Australian Government will combat illegal logging and its associated trade by establishing systems that will promote trade in legally logged timber and wood products **and, in the long term, trade in timber and wood products from sustainably managed forests**’.” (emphasis in bold added)

The explanatory memorandum (EM) recognizes that this is existing Government policy and flags on several occasions the possibility of a shift from legality to sustainability in the legislation.

“Review elements of the policy necessary to meet the government’s policy objective would include consideration of the range of timber products that are covered and the possible timing of a shift from a legality requirement to one based on sustainability (EM p 49)

At some future time, it would be possible to consider whether the legality verification requirement could be replaced with due diligence applied to the sustainability of the products covered by the regulatory elements of the policy; (c) the economic impacts of the due diligence compliance requirements; (d) potential for increasing the legislative requirement from ‘legality’ to ‘sustainability’ of timber products (to meet the long-term objective of the policy); and (e) the effectiveness of the arrangements in reducing illegal logging in producer countries.” (EM p65)

It is clear that the Government recognises the 5 year review as an opportunity to begin to examine this possible shift to sustainability. However, nothing in the Bill reflects this.

Below is a proposed objects clause. This reflects ALP policy and the Government’s commitment to the Montreal process¹ and we believe creates the opportunity for the Government to move, as they have promised, towards sustainability in timber trade and practice. It does so in a way that is cautious and non-prescriptive but allows the 5 year review, which is a review of legislation not policy, to consider the shift from legality to sustainability.

¹ The Montreal process arose from the 1992 Earth Summit and calls for the sustainable management of forests. Australia is part of the process and has committed to developing and implementing the criteria of sustainable forest management.

Objects of Act

(1) The objects of this Act are to:

- a. prevent the trade of forest products derived from illegal logging; and
- b. help reduce illegal logging in Australia's region and globally; and
- c. encourage the sourcing of forest products from sustainable forest practices; and
- d. help Australia become a country that trades only in sustainable forest products; and
- e. assist in the implementation of Australia's international responsibilities to stamp out corruption, including:
 - (i) OECD Convention on Combating Bribery of Foreign Public Officials in International Business
 - (ii) UN Convention Against Corruption
 - (iii) UN Convention against Transnational Organised Crime
- f. assist in the implementation of Australia's international environmental responsibilities, including:
 - (i) The Montreal Process
 - (ii) Convention on International Trade in Endangered Species (CITES)
 - (iii) Convention on Biological Diversity

(2) In order to achieve its objects, the Act:

- a. makes it an offence to import prescribed timber and wood products
- b. makes it an offence to process raw logs without approval in Australia
- c. requires importers to undertake due diligence

Recommendation 1: The Bill include an objects clause which includes sustainability objectives pursuant to Government policy and international commitments

2. Definition of illegal logging consistent with the EU

The current definition of illegal logging in section 7 lacks clarity and certainty.

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.

It remains the same as the March Draft Exposure version which Greenpeace and other groups were critical of. It is also contrary to the views in the Common Platform put forward by a wide range of timber industry, timber retail, environmental and social organisations

which explicitly calls for a broad definition of illegal timber.² Indeed the Senate Committee majority report also recommended the definition be expanded for clarity. Instead the Government has opted to retain the vaguer definition and provide some additional detail in the EM. Their reasoning that “An unintended consequence of a prescriptive definition of illegally logged may result in some elements of applicable legislation being overlooked or excluded through omission” (EM p11) is not convincing. The EU definition, which Greenpeace supports, provides additional clarity to the types of legislation that relate to determining whether a timber harvest is legal without being prescriptive. If there remains a concern regarding unintended consequences or omissions, subsection (h) could be altered to read: ““applicable legislation” means the legislation in force in the country of harvest, including but not limited to the following matters’:

EU Definition

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.

Recommendation 2: The definition of “illegally logged” be amended so that it is consistent with the EU definition.

3. Standing

In line with best practice environmental legislation broad standing should be made available to the public including NGOs and timber industry competitors to initiate action for civil breaches of the Act. There are compelling reasons for allowing public interest litigation under the Bill.

In 1995, the Australian Law Review Commission (ALRC) considered standing law and concluded that public interest litigation is an “important mechanism for clarifying legal

² Common Platform, April 2011, Element 2, ‘Definition of Illegal Timber and Wood Products, <http://www.goodwoodguide.org.au/assets/docs/CommonPlatform.pdf>,

issues or enforcing laws to the benefit of the general community.”³ This legislation is public interest legislation and allowing public interest participation in the legislation through standing is not only appropriate but should be seen as a valuable measure to improve the Act and achieve its objectives.

Some within the timber industry have raised concerns with open standing provisions in relation to this bill. A common argument against open standing is that it will open litigation floodgates. This argument was made in relation to the NSW Environmental Planning and Assessment Act 1979. In 1990 the former chief of the NSW Land and Environment Court, Justice Jerold Cripps noted that no such flood of litigation occurred and that the “the argument has been wholly discredited.”⁴

In relation to the same Act, Justice Murray Wilcox noted in 1987 that because of cost provisions, litigation, even with open standing provisions, was not entered into “lightly or wantonly” and that the actual litigation figures in NSW supported this.⁵

Similar concerns regarding litigation floods were raised when the EPBC Act was passed. Section 487 allows any ‘interested person’ to challenge decisions made under the Act. In their first review of the Act, the Senate Standing Committee on Environment, Education and the Arts found that the level of litigation appeared to be “extremely low.”⁶

There are also compelling reasons for allowing public interest litigation. In 1995, the ALRC considered standing law and concluded that public interest litigation is an “important mechanism for clarifying legal issues or enforcing laws to the benefit of the general community.”⁷ This legislation is public interest legislation and allowing public interest participation in the legislation through standing is not only appropriate but should be seen as a valuable measure to improve the Act.

The signatures to the Common Platform also identified broad standing as a critical element to successful legislation.⁸

Greenpeace recommends standing provisions derived from those in the current EPBC Act as per below:

³ Who can sue? A review of the law of standing” (ALRC 61)

⁴ Cripps J “People v The Offenders”, Dispute Resolution Seminar, Brisbane 6 July 1990.

⁵ see *Ogle v Strickland* (1987) 71 ALR 41: 13 FCR 306 at 322 per Wilcox J.

⁶ The operation of the Environment Protection and Biodiversity Conservation Act 1999 First Report by The Senate Standing Committee on Environment, Education and the Arts, 18 March 2009, para 6.43

⁷ “Who can sue? A review of the law of standing” (ALRC 61).

⁸ Common Platform, April 2011, Element , ‘Public Standing’, <http://www.goodwoodguide.org.au/assets/docs/CommonPlatform.pdf>,

Standing for judicial review

(1) This section extends (and does not limit) the meaning of the term **person aggrieved** in the *Administrative Decisions (Judicial Review) Act 1977* for the purposes of the application of that Act in relation to:

- (a) a decision made under this Act or the regulations; or
- (b) a failure to make a decision under this Act or the regulations; or
- (c) conduct engaged in for the purpose of making a decision under this Act or the regulations.

(2) An individual is taken to be a person aggrieved by the decision, failure or conduct if:

- (a) the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and
- (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.

(3) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:

- (a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and
- (b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities relating to logging, illegal timber or related areas

<p>Recommendation 3: The Bill include standing provisions derived from those in the current EPBC Act.</p>
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4. Due diligence and the declaration form. (ss 13 and 14)

The provisions relating to the declaration form are very unclear. DAFF officials, in a working group meeting in August 2011 proposed, without prejudice, a declaration form modelled on the Lacey Act. This is included below in Appendix 1. It required information regarding the species and genus of the timber, the country of origin, the value of the import and other information critical to satisfying due diligence. It is not clear what the declaration form is in the current bill. It appears to be primarily a declaration of legality. That is supported, but it isn't clear that this form will contain any other information apart from that.

Section 13 imposes the declaration requirement. 13(c) makes it an offence if a person importing timber:

“does not make a declaration to the Customs Minister, in the manner and form prescribed by the regulations, about the person’s compliance with the due diligence requirements for importing the product”

The explanatory memorandum does not clarify this requirement. Importers - or their agents - will then be required to answer a “community protection question” on a customs import declaration in relation to their compliance with due diligence requirements of the Bill, as provided for in clause 13.”(EM p14)

Neither the Bill nor the EM explains what a “community protection question” is. Is this simply a declaration of legality or satisfaction of due diligence or is it a requirement that specific questions relating to the nature, value, origin etc of the imported product must be answered?

The EM later argues that “a pre-importation statement of compliance, together with a customs import declaration stating compliance with the due diligence requirements of the Bill, will enable the status of all imports of regulated timber products to be monitored at the border by the Australian Customs and Border Protection Service and enforced under the monitoring, investigation and enforcement powers of Part 4 of the Bill.”

This appears to be both an unnecessary duplication of purpose and a failure to ensure that the import declaration form provides critical information to those responsible for ensuring the legality of the imported product.

The declaration form should allow customs officials to easily and efficiently identify matters that are critical to determine whether inspections of imports or a review of due diligence documents is required.

Section 14 outlines information that may be required in the due diligence process. This includes some of the matters that should be part of the declaration form provided at the point of import as part of satisfying due diligence. However, section 14 is discretionary and does not indicate whether any of this information must be included in the declaration form or in other due diligence documents.

Greenpeace supports (following the Committee’s recommendation number 2) the requirement that the declaration form be a legally binding and enforceable declaration of legality.

Recommendation 4: Section 13 explicitly state information that must be supplied in the declaration form.

Greenpeace recommends the following amendments:

13(c) – insert ‘legally binding’ prior to ‘declaration’ in the first line.

Add a subsection 13(c)(1) – the declaration form must include the following information:

- a) name of importer
- b) name of supplier
- c) botanical name and common name for the timber being imported
- d) value of the import
- e) countries of origin
- f) region/coup
- g) permit or approval details or harvest concession details in country of origin
- h) vessel name
- i) voyage number
- j) container number
- k) description of product
- l) trade name and type of product
- m) component of the product
- n) tariff code
- o) quantity of timber
- p) due diligence system/components used to verify legality
- q) identifying the level of risk of illegality in the imported timber (high, low, medium)
- r) other information as required in the regulations

Amend s 14(3)(a) - gathering information for the purposes of assessing that risk (delete all text after ‘risk’).

Delete sections 14(3)(a)(i)-(iv).

Amend s 14(3) ‘The requirements **must** include requirements in relation to the following’

It should be noted that several of these provisions as drafted are appropriately contingent and will only be required in certain circumstances.

The purpose of these amendments is to clarify that the declaration form must contain certain information relating to the timber products being imported and that the information required to satisfy due diligence requirements are mandatory.

Section 14(5)(a) gives application of this provision to both domestic and imported timber products. (*laws, or processes under laws, in force in a State or Territory or another country*). However, section 14 generally only applies to imported timber and timber products. Greenpeace recommends deleting references in this section to ‘State or Territory’ as it is already covered in section 18(5)(a).

Greenpeace also recommends deleting section 14(5). Greenpeace would be quite concerned should the Bill provide that due diligence could be satisfied by reliance solely on certification schemes or solely on laws in force in a particular country. The standard being imposed on importers is a negligence standard and it requires that importers make informed decisions regarding the nature of the evidence that must be provided in order to reasonably assure legality. Allowing existing schemes to replace the obligations on importers runs contrary to the Bill.

Greenpeace would propose that certification schemes and laws of other countries are legitimate forms of evidence that should comprise part of the due diligence requirements in section 14 and should be incorporated into that section.

Note that amendment of the due diligence requirements relating to imports would require parallel amendments in Part 3 relating to domestic timber.

Recommendation 5: The Bill recognise that certification or legality schemes, whether sanctioned by Governments, industry or third parties be recognised as evidence of, but not proof of, legality.

5. Traceability

It is clear that most of the pressure to ensure timber and wood product legality is driven from the retail end of the market. Requiring all subsequent traders to obtain and retain documentation to demonstrate legality will encourage more questions to be asked in the supply chain, will increase the speed with which supply chains respond to the new legislation and provide assurity to those further down in the supply chain, including consumers.

The EU Timber Regulation has 'obligation of traceability' as a core element within its framework. Article 5 requires traders to keep records of all timber and wood products purchased and sold and make this available to authorities upon request so that illegal timber may be tracked within the market. This is an important enforcement tool especially when considering the challenges of enforcing the central criminal offence of illegal timber importation.

The Minister has resisted calls to require mandatory labelling on the basis that it would be too onerous despite the Labor election policy from 2007 clearly stating a commitment to requiring labelling at point of sale (See Appendix 2). In the absence of such a requirement for labelling, Greenpeace proposes there be a requirement for all traders in the supply chain to confirm the legality of products they are trading in.

Greenpeace recommends that a new part be inserted into the Bill following Part 3 – Processing. The part should be titled, Supply Chain:

‘Each subsequent purchaser or handler of imported timber or processed timber up to the point of retail sale must be provided with a copy of the declaration form (s 13) and due diligence documentation must be provided upon request.’

Recommendation 6: The Bill include traceability requirements for timber merchants and retailers and that due diligence documentation be available at all points on the supply chain.

6. Enforcement and Compliance

The effectiveness of the legislation (as with any law) hinges upon its enforcement. Enforcing the Act will undoubtedly prove challenging given the inherent transborder element of the key offence of the Bill (prohibition on the *importation* of illegal timber products). It is therefore important that the Government demonstrate its commitment to enforcement by producing quarterly reports of aggregated data and annual compliance audits.

Annual compliance audits was a measure proposed by DAFF following the Senate report. See Appendix 3. The Minister’s office did not appear opposed to its inclusion.

Greenpeace recommends that section 83(1) be amended in the following way:

- 83(1) The Secretary must publish
- (a) an annual compliance audit
 - (b) quarterly aggregate data reports
 - (c) materials that would otherwise be available by way of freedom of information
 - (d) any other materials designated in the regulations

Greenpeace recommends a new section 83(3) and (4)

- 83(3) Annual compliance audits
- “The Department shall prepare and publish an annual compliance audit on timber imports. Information must include:
- a) Companies audited
 - b) Products audited, including a breakdown by timber species
 - c) How many imports audited, with a breakdown of numbers by country of origin
 - d) Level of risk of timber products assessed
 - e) declaration requirements – accuracy, consistency etc
 - f) due diligence requirements – thoroughness, accuracy, consistency
 - g) Any investigation(s) undertaken

h) Status or result of any investigation(s) undertaken.

83(4) Quarterly aggregated data reports

The Department shall prepare and publish quarterly reports aggregating data relating to imported timber, including the following information:

- a) Volume of timber products imported
- b) Breakdown of imports by
 - i. Product type
 - ii. Timber species
 - iii. Country of origin
 - iv. Country of processing

Recommendation 7: The Bill require Government to publish annual compliance audits and quarterly data reports.

7. Greater transparency

In addition to no public interest standing, the Bill does not currently have any requirements for publication or transparency. We have proposed making section 14 mandatory, which would then require the publication of information as part of the due diligence requirements (presumably the regulations would identify specific publishing requirements) and amended section 83 to require specific reporting and transparency requirements of government. This ensures both consistent reporting, common reporting standards and that Government will be responsible for ensuring that the data produced by importers is available in a single location or report on a regular basis.

In addition to the quarterly aggregate data reports and the compliance audit, Greenpeace would like to see the declaration forms published as a matter of course and that due diligence documentation published to the extent that trade secrets aren't revealed.

Recommendation 8: The Bill make provision for declaration forms and due diligence forms to be published on the internet.

Due Diligence Declaration form

DRAFT WITHOUT PREJUDICE

COMPANY LOGO OR LETTERHEAD

Vessel Name*: _____ Voyage Number*: _____
 Container Number*: _____
 Consignment identifier(s) or Numerical Link(s)*: _____
 (i.e.: Bill of Landing Number, invoice number)

ILLEGAL LOGGING PROHIBITION ACT (2011) DUE DILIGENCE DECLARATION

☆ **Q1. DESCRIPTION OF PRODUCT**
 (a) Trade name and type of product/article*: _____
 (b) Component of the product/article: _____
 (c) Percentage of recycled material: _____
 (d) Tariff code*: _____
 (e) Common name and where applicable full scientific name of the timber or wood product: _____

☆ **Q2. INFORMATION ABOUT ORIGIN***
 a) Country of harvest: _____
and where applicable
 a) sub-national region: _____
 b) concession of harvest: _____

☆ **Q3. NAME AND ADDRESS OF TIMBER OR WOOD PRODUCT SUPPLIER***

Q4. NAME AND ADDRESS OF TIMBER OR WOOD PRODUCT IMPORTER*

☆ **Q5. QUANTITY OF TIMBER (unit of measurement)*:** _____

Q6. VALUE OF TIMBER*: _____

Q7. DUE DILIGENCE SYSTEM USED TO VERIFY LEGALITY OF PRODUCT: _____
 (i.e. Forest certification scheme; Timber legality verification scheme; Country led initiative; Company management system)

I, _____ (name) of _____ (company) have undertaken due diligence for this consignment in compliance with Illegal Logging Prohibition Act (2011).

Signature: Printed Name:

Date

☆ = As per US Lacey Act

* = information currently provided on Import Declaration Form

Appendix 2 – Labor’s 2007 election commitment.

ALP ELECTION COMMITMENTS ON RESTRICTING IMPORTS OF ILLEGALLY LOGGED TIMBER.

Ensuring sustainable timber imports.

Labor will encourage sourcing of forest products from sustainable forest practices and seek to ban the sale of illegally logged timber imports.

Trade in illegally logged timber is a significant global problem and of considerable concern to environmentalists and industry alike. The Organisation for Economic Cooperation and Development estimates that 5-10 per cent of global industrial round wood trade is illegally harvested. This proportion is much higher in some high risk countries where it accounts for between 20-90 per cent of timber production. This translated to a loss of assets and revenue in developing countries of up to US\$23 billion every year.

Illegal logging occurs when:

- Timber is stolen
- Timber is harvested without the required approvals or in breach of a harvesting licence or law
- Timber is bought, sold, exported or imported and processed in breach of law, and/or
- Timber is harvested or trade is authorised through corrupt practices.

Illegal logging is responsible for considerable ecological damage, significant greenhouse gas emissions and the degradation of traditional lifestyles and local property rights. It also provides unfair competition to legitimate timber concerns, including the Australian industry.

Illegal products are thought to be responsible for around \$400 million – or 9 per cent of Australia timber imports. These products are almost all from Southeast Asia, particularly Indonesia, Malaysia and possibly China.

The products include wooden furniture, paper and paper board, wood based panels, sawn wood, doors and mouldings. Although some countries have polices and regulations that require sustainable practices, they have problems implementing them.

Some retailers - notably Bunnings in Australia – have policies to source “good wood’ in response to consumer concerns. However, it is currently difficult to identify illegal products and a credible certification system or chain of custody requirement is lacking in Australia.

Germany is seeking to ban illegal imports and the European Union is currently considering legislation that would extend the German ban across Europe.

Labor will work with regional governments and industry to:

- Build capacity within regional governments to prevent illegal harvesting
- Develop and support certification schemes for timber and timber products sold in Australia
- Identify illegally logged timber and restrict its import into Australia
- Require disclosure at point of sale of species, country of origin and any certification and
- Argue that market-based incentives aimed at reducing emissions from deforestation and forest degradation should be included in a future international climate change agreement

Appendix 3 - Overview of the function of the Illegal Logging Prohibition Bill as presented to Illegal Logging Working Group August 2011 showing Government audits.

