Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

Justice and International Mission Unit
130 Little Collins Street
Melbourne Victoria 3000
Telephone: (03) 9251 5271
Facsimile: (03) 9251 5241
jim@victas.uca.org.au

Committee Secretary
Senate Standing Committees on Rural Affairs and Transport
PO Box 6100
Parliament House
Canberra, ACT, 2600

Justice and International Mission Unit
Synod of Victoria and Tasmania, Uniting Church in Australia

Submission to
Inquiry into the Illegal Logging Prohibition Bill 2011
December 2011

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia (the Unit) welcomes this opportunity to make a submission to the inquiry into the *Illegal Logging Prohibition Bill 2011*. The Unit believes the Bill is an improvement over the Draft Exposure Bill released in March 2011 and subject to a previous inquiry of this Committee.

The Uniting Church's position on Illegal Logging and Corruption

The Unit welcomed the Government's commitment in the lead up to the last Federal election that it would ban the importation and sale of illegally logged timber into Australia. The Synod of Victoria and Tasmania also supports such a policy outcome from three perspectives:

- That the policy will strengthen global efforts to stop local impoverished communities from having their forest resources taken illegally from them, and thus losing the resource without any compensation;
- That the policy will contribute to more sustainable management of global forest resources, noting that deforestation currently contributes in the order of 20% of greenhouse gas emissions globally; and
- That the policy is consistent with Australia's obligations under international treaties to assist in the global efforts to eliminate corruption.

In 2004, as part of a broad resolution on forestry, the annual meeting of representatives of the Synod of Victoria and Tasmania resolved:

(v) To call on the Australian Government to:

- *Work with other governments in the Asia-Pacific region (especially those of Indonesia, Papua New Guinea and Malaysia) to end illegal logging activities;*
- *only allow the importation of certified timber and wood products, certified under internationally recognised schemes such as that of the Forest Stewardship Council or the Pan-European Forestry Council;*

The Justice and International Mission Unit believes there is a need to combat corruption, which is a factor in efforts to eradicate poverty globally. The Uniting Church in Australia at its Inaugural Assembly in 1977 stated that in response to the Christian gospel:

We pledge ourselves to seek the corrections of injustices wherever they occur. We will work for the eradication of poverty and racism in our society and beyond.

The 2007 annual meeting of representatives of the Synod of Victoria and Tasmania passed a resolution acknowledging "*there is a need to address corruption within developing countries to work towards the eradication of poverty"* and "*some wealthy countries continue to maintain laws and practices that foster, reward and allow them to benefit from corruption in developing countries".* The resolution commended the Australian Government for the steps it had taken to combat corruption globally and urged that a number of further measures be taken. It also lamented that church members had been the beneficiaries of corruption in developing countries largely through the purchase of goods at lower prices due to corruption being involved in their production.

In March 2008, the Justice and International Mission Unit published a report on global corruption, *From Corruption to Good Governance,* which outlined Australia's performance in tackling corruption and what further actions could be taken. The report was endorsed by TEAR Australia, the Christian World Service of the National Council of Churches in Australia and Transparency International Australia.

The Unit therefore supports a ban on the sale of all timber and wood products that have not been sustainably logged. However, the Unit realises that from a scientific perspective there is no clear definition of 'sustainable' forest management at this point in time. Defining sustainability is complicated by the need to balance conflicting social, environmental and economic demands. Thus, defining sustainable forest management performance thresholds would not just be a technical matter, but a social and political matter as well.

Thus, the Unit accepts that measures to ban illegally logged timber and wood products from being imported and sold into Australia is a more achievable outcome. The ban also needs to include any timber and wood products that fit the definition of being produced from illegally logged timber in Australia.

In considering a ban on the sale and importation of products made with illegally logged timber, the Unit believes there is a moral and values dimension. Simply, Australia should not be accepting products that are the proceeds of crime. This is different to the amoral approach that argues that Australia should not act to stem corruption in logging globally (and therefore embrace the proceeds of crime entering the Australian market) until it can be sure that the actions it takes will have a practical impact. The argument the Unit supports is that Australia should not participate in corruption, even if other countries fail to live up the same standard.

Illegally logged timber meets the international definition for the proceeds of crime. Australia is a State Party to the UN Convention Against Corruption (UNCAC) and the UN Convention against Transnational Organised Crime (UNTOC). Both Article 2 of UNTOC and Article 2 of UNCAC defines "Proceeds of Crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offence".

The Unit notes Australia's anti-corruption treaty obligations to take steps to end corruption in the logging industry and ensure the Australian market for timber and wood products does not foster or reward corruption. These obligations include taking steps to ensure there is not bribery of foreign public officials and Australia is not a haven for the proceeds of crime. Such obligations are contained within the following treaties Australia has committed itself to uphold:

- UN *Convention Against Corruption;*
- OECD *Convention on Combating Bribery of Foreign Public Officials in International Business;* and

- UN *Convention against Transnational Organised Crime*.

The UN Office of Drugs and Crime has recently concluded that it is necessary to deal with illegal logging as:

> *Even when a product is legally available in international trade, it is often cheaper to obtain it from illicit sources. Once one key player takes advantage of this cost savings, market pressure makes it very difficult for competitors to avoid doing the same. Over time honest players are eliminated from the market, unable to compete with those who cut corners. To avoid this downward cycle, it is necessary to create disincentives that outweigh the advantages of profiting from natural resource trafficking… Buyers must be able to distinguish the illegal from the legal – there must be no grey area.*

The Unit's preferred model is for a certification process with independent auditing that guarantees chain of custody to ensure the timber used was not illegally logged and corruption was not involved in the logging process. Independent auditing and regular sampling by accredited auditors are vital to have an effective scheme to detect illegal logging, given the ability to obtain forged authorisation documents or to pay bribes to get the legitimate documentation.[1] The due diligence requirements of the Bill must not to allowed to have the effect of simply ensuring bodies back down the supply chain pay enough bribes to ensure legitimate documentation for illegally logged timber. Rather, they need to be robust enough to ensure this is not the outcome.

Bribery plays a significant role in illegal logging. For example, an analysis of corruption related to logging in Papua by the internationally renowned U4 Anti-Corruption Resource Centre points out all the levels at which bribes can be paid to facilitate illegal logging with a resulting loss of legitimate revenue to the Indonesian Government:[2]

> *District Level*
> *Under the current payment system, local governments – through the district forestry service unit (DFSU) – have the primary responsibility for collecting forest revenues. They have information on the planned and actual logging conducted by each forestry company within their jurisdiction. They also have the power to issue payment documents and to control this payment. Finally they have the authority to examine the consistency of wood produced by a forestry company and the amount paid in fees.*
>
> *These cash payments must go directly to bank accounts owned by the MoFOR [Ministry of Forestry]. There are three main opportunities for bribery here, however. First, the DFSU can allow certain amounts of logs to go unreported so that forestry companies do not have to pay fees. This corrupt practice is very costly to the forestry company, however, since it must then also bribe all government and law enforcement officers involved in the wood's movement from forest to market. Second, the DFSU may take bribes for allowing companies to plan more logging than their concessions allow. This practice allows forestry companies to incorporate illegal logs they collect or buy in their wood production reports. Third, the DFSU can work with bank officials to endorse false payment documents as if the forestry company had made payments. A key weakness here is that the current payment system does not provide solid sanctions for improper payment, while it is also difficult to track payments for each individual forestry company.*
>
> *Provincial Level*

[1] Saskia Ozinga and Leontein Krul (2004), 'Footprints in the forest: Current practice and future challenges in forest certification', FERN, UK, pp. 34-35.
[2] U4 Anti-Corruption Resource Centre, "Corruption and forest revenues in Papua", June 2008, pp. 2-3.

A second level of corruption takes place in the Provincial Forestry Services Unit (PFSU). PFSU officers control annual wood production plans by forestry companies with valid logging licences. They can approve annual plans, however, only once the forestry companies pay their fees. With this power, they can examine all fee payment records, including evidence of transfers to accounts held by the MoFOR. Ideally, the PFSU should receive documents related to actual wood production and the payment of fees by all forestry companies from its DFSU colleagues. Unfortunately, however, under the current autonomous local government system, the DFSU is not subordinate to the PFSU. As a result, the former can potentially ignore the latter's requests without sanction, including where there are an obligation to provide documents related to forestry companies.

Bribes worth more than a billion Rupiah (or about US$100,00) per year, can lead the PFSU to approve a company's annual plans without proper control of its fee payments or the amount of logs to be cut. An annual plan approved in this way will typically indicate much higher annual wood production than that under a sustainable forest logging operation. This is used by forestry companies to include illegal logs in wood production reports as if they were from legal logging concessions. This form of 'wood-laundering' has been practised by forestry companies in other parts of Indonesia for many years.

Definition of Illegal Logging

The Bill defines illegally logged as:

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 previous Explanatory Memorandum noted that:

The Australian Government defines illegal logging as occurring 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.*

The Government has attempted to address the encouragement the Committee gave to the Department to amend the explanatory memorandum to provide clarity around the definition of illegally logged timber.[3] The Government's argument has been 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."[4]

However the Unit would still prefer to see the definition in the Bill more aligned with Article 2 of the EU Regulation 995/2010. For example, it could read:

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. 'Laws in force' means the legislation in force in the country of harvest including, but not limited to, covering the following matters:

- rights to harvest timber within legally gazetted boundaries,

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

[3] Senate Rural Affairs and Transport Legislation Committee, 'Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011', June 2011, p. 26.

[4] Illegal Logging Prohibition Bill 2011, Explanatory Memorandum, p. 11.

- timber harvesting, including environment 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.

Penalties
The Unit supports the penalties provided in the Bill under Sections 8, 9, 10, 12, 13, 15, 16, and 17. These penalties should now be at a sufficient level to act as a deterrent to any business calculation based on the likelihood of escaping detection or calculating that the person or company can afford to wear the penalty from importing or processing illegally harvested product.

The Unit notes that the imprisonment penalty is in line with the US *Lacey Act.*[5] A person found guilty of a *Lacey Act* felony faces up to five years in prison, significant fines and forfeiture. A failure to exercise due care can expose an organisation or an individual to civil penalties of up to US$10,000 per violation of the Act.

The *Lacey Act* provides that plant products that contain illegally taken plant material are subject to forfeiture even if the owner had no reason to know that the products are illegal. Although the illegal plant content may be hard to prove, if the government manages to do so, each person or entity along the supply chain may be required to forfeit their goods, regardless whether the person or entity exercised due care or knew of the illegality.

The Unit would also argue for a penalty under Sections 8 and 9 that allows for suspension of the authorisation to import timber or wood products, as suggested in Article 19 of the EU Regulation 995/2010.

Entry into Force
The Unit is pleased that sections 3 to 8, 10, 11, 15, 16 and 19 to 86 all come into force the day after the Act receives the Royal Assent. It would not like to see the other Sections come into force any later than two years after the commencement of the provisions covered by table item 2.

Requirement for Retailers
The Unit strongly supports a requirement being placed on timber and wood product retailers to be required to obtain a copy of the documentation required under the Act to demonstrate the legality of the timber products they purchase and sell. It should be an offence for a retailer to purchase, offer for sale or sell timber products for which the retailer has not obtained a copy of the documentation verifying the legality of the timber product. The Unit suggests a penalty of 50 penalty units for this offence.

Such a measure means there would be greater pressure and safeguards to ensure compliance with the Act by importers and processers of timber products. It makes it harder for any black market in illegally logged timber products to develop in Australia. It does not require the retailer to verify the legality of the timber products by auditing their supply chain (unless the retailer themselves is the importer or processor of the timber products). Rather it simply requires them to obtain a copy of the documentation verifying legality from their suppliers, meaning the supplier must provide this documentation if they wish to do business in Australia.

[5] Marcus A. Asner and Grace Pickering, The Lacey Act and the World of Illegal Plant Products, Environmental Law in New York, Volume 21, No. 6, June 2010, pp. 101 – 105.

Due Diligence Requirements

The Unit believes that Section 14(3) should be amended to read:

(3) The requirements must include requirements in relation to:….

The Unit believes Section 14(3) should also include the additional due diligence requirements that will be specified in the regulations and these should include the elements contained within Article 6 of the EU Regulation 995/2010:

- Country of harvest, and where applicable:
    - Sub-national region where the timber was harvested; and
    - Concession of harvest;
- Quantity (expressed in volume, weight or number of units);
- Name and address of the trader to whom the timber and timber products have been supplied; and
- Documents or other information indicating compliance of those timber and timber products with the required standard of legality.

Section 18(3) may then also need to be adjusted to ensure equal treatment for imported timber products and domestic raw logs, to ensure the legislation is compliant with the non-discrimination clauses of the World Trade Organisation rules.

Open Standing Provisions

The Unit seeks the inclusion of open standing provisions in Division 5 of the Bill, as an additional mechanism to deter the importation and processing of illegally logged timber and wood products. Based on similar provisions in existing Australian legislation and overseas legislation, such a mechanism is likely to be rarely used. It requires a third party, which will normally be a non-government organisation, to undertake extensive research in the location where the illegal logging is taking place and prove its connection to the company importing or processing the timber. The organisation bringing the action is likely to be cautious in doing so, as it will face the risk in the Australian judicial system of having costs awarded against it should it bring a trivial or vexatious case. Open standing could be used by other industry bodies, where a competitor is acting illegally to gain an advantage on price in the Australian market. In such a case, open standing provisions provide an effective industry 'self-regulation' mechanism.

In Australia, the ability to avoid the risk of costs being awarded against an unsuccessful plaintiff is limited. In the case of *Ruddock v Vadarlis*,[6] it was held by the majority that '[i]n cases where public interest factors are invoked, the court is not excused from the obligation to exercise its discretion in relation to costs by reference to all the circumstances of the case.' In that case, several factors regarding the case were considered by the majority to support a decision of there being no order as to costs. Some relevant factors include, whether:

- proceedings raise novel and important questions of law;
- there was divided judicial opinion on the relevant issues that illustrate their difficulty;
- there was financial gain to parties bringing claims;
- legal representation for parties bringing claims was provided free of charge; and
- a case involved matters of high public importance.

The limited public interest qualification to the award of costs acts strongly against NGOs being willing to take up cases against corporations, even where such a civil remedy may exist.

[6] Ruddock v Vardarlis (No 2) (2001) 115 FCR 229, 236.

Given the difficulties in being able to mount such as case, the risk of a large number of cases being generated would appear extremely low. This is borne out by the very limited number of such extraterritorial cases brought by NGOs under the US *Alien Tort Act*, which probably has the lowest barriers to bringing such a case anywhere in the world.

While they will be rarely used, open standing provisions would provide added incentive for companies to comply with the requirements of the legislation.

Publishing Reports
The Unit believes that Section 83 should be expanded to require publication of key information about the operation of the Act on an annual basis. This would include a requirement to publish information about the number of audits that have been conducted and which companies have been audited. It should list the quantities of timber and wood products imported and countries of origin. It should also list offences that have been committed under the act, including which part of the Act was breached and the penalty imposed

Review
The Unit welcomes Section 84 of the Bill, providing for a review of the efficacy of the legislation within five years from the commencement of the Act.

Dr Mark Zirnsak
Director
Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Church in Australia
Phone: (03) 9251 5265
E-mail: mark.zirnsak@victas.uca.org.au