

4 May 2011

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

Dear Secretary,

RE: DRAFT ILLEGAL LOGGING PROHIBITION BILL 2011

Building Designers Australia supports the sustainable harvesting of renewable resources, including timber and forest products. Therefore we congratulate the the Government on its preparation of the draft Bill, but urge it to make it stronger and more effective in preventing the importation of illegally harvested timber and forest products.

Along with other signatories to the Common Platform supporting the prevention of illegal logging, we have reviewed the draft of the Illegal Logging Prohibition Bill 2011, and find it lacking in several critical areas. These principally relate to the following features:

1. Delay in implementation;
2. Lack of a requirement for a legally binding declaration by importers;
3. Overly narrow definition of illegal logging;
4. Lack of staged penalties, having imprisonment without financial penalty or forfeiture;
5. Uncertainty in the approval process for certification and importers;
6. Weak ongoing enforcement provisions;
7. Lack of controls relating to trade in illegal imported timber or products beyond importation.

A more detailed explanation of these criticisms is contained below.

BDA urges the Government to amend the draft Bill to rectify these shortcomings, and will then urge the various Members of Parliament to support its passage.

Yours faithfully,



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DETAILED CRITIQUE

1. The prohibition will not come into effect immediately – it could take two or more years

The prohibition in section 6 that sets out the prohibition on importing illegal timber requires, as part of the offence, that the person imports a “regulated timber product” (s6(1)(b)).

“Regulated timber product” is defined in the Draft Bill as “a timber product prescribed by the regulations”(s5). The prohibition is therefore contingent upon the regulations being created and coming into force. These regulations could take up to two years or even longer to come into effect. This is in direct contrast to the commitment made by the Federal Government that a prohibition on illegal timber would become effective upon commencement of the legislation (<http://www.daff.gov.au/forestry/international/illegal-logging/q-and-a#when>).

It is understandable that some details of the regime should be defined within the regulations, but leaving the definition of what timber is covered by the laws renders the Bill ineffective until the regulations come into force. The government has been very clear in both the Regulatory Impact Statement and in workshops about which products would be covered by the laws. There is no reason why the Bill cannot prescribe a non-exhaustive list of regulated timber products that could be expanded upon in the regulations, as has been done in the EU.

2. No requirement for a declaration

The Bill does not include a declaration provision requiring importers to provide information of the timber products they seek to import into Australia. The US Lacey Act has a very clear declaration requirement which has helped drive much of the change in the timber supply chain, by forcing importers and traders to ask important questions of their suppliers. The EU Regulation also clearly states the kind of information that may be required from operators placing timber on the market for the first time. This information includes the species, the supplier, name and address of the recipient trader, the country of origin and even the concession of harvest (Article 6(1)).

Furthermore, Labor’s stated election commitment was unambiguous: that it would require disclosure at point of sale.

“Labor will work with regional governments and industry to:.....

Require disclosure at point of sale of species, country of origin and any certification”

Statement from Prime Minister Rudd, July 23, 2007

There is no requirement in the Bill that there be any type of declaration or point of sale disclosure. The regulations allow such provisions to be imposed but this is entirely discretionary and in the hands of the certifiers.

A declaration or disclosure of information is a fundamental element to both the US and EU regimes and is critical to any effort to control illegal timber imports. It has been seen

by many as the key driver for change in the US alongside the deterrent element of the prohibition.

The Bill should require a declaration in line with the US Lacey Act and its timeline for implementation should be included in the regulations.

3. The definition of illegal logging is too narrow

The definition of illegal logging is very narrow under the definition of the Bill. It is restricted by the use of the term “harvested”.

Section 5 Definitions

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 occur -as well as ignoring disputes over land tenure where indigenous and/or traditional land rights are concerned.

In fact, the Explanatory Memorandum explains that this definition of “illegally logged” is designed explicitly to exclude “technical breaches” such as breaches of logging “codes of conduct” or “where there are disputes over land tenure”.

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 their rights are protected by national laws.

This narrow definition also contrasts starkly with the US Lacey Act which is much broader:

§ 3372. Prohibited acts

(B) any plant—

(i) taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates—

(I) the theft of plants;

(II) the taking of plants from a park, forest reserve, or other officially protected area;

(III) the taking of plants from an officially designated area; or

(IV) the taking of plants without, or contrary to, required authorization;

(ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or

(iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants;..

The EU Regulation also uses the term “harvest” but then goes on to provide a broad definition 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

The definition of illegal timber must be broad and explicitly include all relevant laws such as those which are made clear in the US and EU laws.

4. No fine for the prohibition

The penalty specified for the prohibition is five years imprisonment. This is a good deterrent, in line with the Lacey Act. However, there is no fine associated with the penalty, as is the case in the Lacey Act (US\$500,000).

An additional penalty of up to 5000 penalty units should be made available for an offence found under s6(1) in line with the Lacey Act. Forfeiture of goods should be mandatory and explicit.

5. Process for approving certifiers and importers is unclear and weak

The proposed Bill sets out a process for approving certifiers who will certify importers of regulated timber products (Part 3). This structure is similar to the EU Regulations but is substantially weaker and vaguer.

Key weaknesses:

- I. There is no process to ensure the neutrality of certifiers. There is no legal reason why an importer could not certify itself under this section.
- II. There is no provision that requires timber be checked or monitored by a certifier (or any other entity) at the border or any other place.
- III. The Minister must be satisfied that the certifiers will comply with applicable certifier requirements (s9(2)(a)) and applicable legal logging requirements (s9(2)(b)), neither of which are mandatory (see sections 11(a) and 13(1)). Both sets of requirements are discretionary and without standards. This is a subjective and non transparent test which should be removed and delegated to an independent authority or at least made appealable on detailed criteria. Standards of certification must be part of the Bill, not the regulations.
- IV. The Minister may cancel the industry certifier (s10). This is not satisfactory. An independent neutral body (court or tribunal) should be the arbiter for deciding whether a certifier has acted against the law. Determinations should be based on clear criteria in the legislation.
- V. There is no assurance as to how certifiers will be audited, reviewed or checked, or by whom and how regularly. There is no complaint mechanism or government oversight.
- VI. There is no requirement that certification be reviewed either in light of changing circumstances in other countries or simply in order to determine levels of compliance. As currently worded, certification may operate in perpetuity.
- VII. The matters that “may” be included in the timber industry certifier requirements (s12) are discretionary. There are no minimum standards even if requirements on certifiers are imposed.
- VIII. The requirements of timber certifiers (s12) should be specified more clearly and minimum mandatory standards are necessary. S12(1) is couched in optional terms – what it “may” do, rather than requirements or obligations. There is no requirement that standards be developed or imposed.
- IX. There are too many “mays” written into Part 3. eg ss 9(1), 10, 11(1), 12, 13(1) and 13(2). The laws should be definitive in prescribing the obligations of the certifiers and the categories of requirements that will be established, etc. Otherwise these are simply voluntary measures.
- X. S15 allows the Minister to approve an importer/processor independently, but there is no criteria for this approval.

The US Lacey Act has no provisions for accrediting certifying bodies; however, the EU Regulation clearly establishes “Monitoring Organisations” which are responsible for ensuring that companies which place timber on the market abide by a clearly set out “due diligence” framework.

Article 8 of the EU Regulations clearly establishes the monitoring organizations’ roles and responsibilities in unambiguous language. It stipulates that monitoring organizations must not have a conflict of interest (Art 7(2)(c)) and requires that government authorities undertake “checks at regular intervals” to ensure monitoring organizations are fulfilling their role (Art 8(4)). There is no such requirement in the Draft Bill.

Under the EU Regulation monitoring organizations may lose their status if the Commission finds that they fail to fulfil clearly laid out functions. (Art 6).

In addition to checks upon the monitoring organizations, the EU Regulations also stipulate that authorities carry out checks to verify that timber operators comply with

their requirements (Art 10 (1)) and keep records of such checks (Art 11(1)) which are made publicly available (Art 11(2)). Once again, the Draft Bill fails to set out any such requirements.

6. Weak penalties, no explicit forfeiture provisions

The five years penalty for a breach of the prohibition (s6) is laudable; however, this should be accompanied with a penalty as in the Lacey Act. Elsewhere the penalties for breaches are very small (ss 7, 8) and will not act as an effective deterrent.

For example, importing timber when not authorised to do so (s7) carries a maximum penalty of 100 penalty units (\$11,000 AUD) which is not a sufficient deterrent given the potential value of the timber.

There are no penalties associated with the failure of certifiers to perform their functions.

A key deterrent within the Lacey Act is the strict liability element within the prohibition. Persons found guilty of unknowingly importing illegal timber imports are subject to forfeiture of the timber goods. This should be set out explicitly in the Act.

7. No enforcement or monitoring for illegal timber

A clear and central element to the government's stated election commitment was to:

"Identify illegally logged timber and restrict its import into Australia"

Statement from Prime Minister Rudd, July 23, 2007

While the Bill has created a prohibition on the import of illegally logged timber and wood products, there is no provision within the Bill for ongoing enforcement of this prohibition. The provisions that allow an officer to be appointed do not constitute an enforcement regime. Enforcement and monitoring are needed both in relation to point of import inspections and testing, and of certifiers.

As currently worded, this legislation will not take effect until regulations defining regulated timber are passed. Once passed, there is effectively only one provision that is enforceable - the need to ensure that timber is certified before entering the country. The only mechanism of enforcement is certification from an approved certifier. Certification is of importers, not of imports, and remains valid for an indeterminate period. There is no requirement that even certification is checked at the point of import. There is no detail on whether the prohibition will be enforced, or the frequency or intensity of enforcing the prohibition, which depends solely upon diligence by the authorities.

As the Bill is currently drafted, the certifier could conceivably be an importer certifying itself without a single standard or criteria. Additionally, the only mandatory government involvement in this process is that the Minister must be satisfied that the certifiers will comply with applicable certifier requirements (s9(2)(a)) or applicable legal logging requirements (s9(2)(b)). It is not, however, mandatory to prepare either certifier

requirements or legal logging requirements and, if prepared, there are no standards governing those regulations.

Equally, there are no obligations on the certifier to ensure that imported timber is legal. The Minister must only be satisfied that the certifier will comply with regulatory requirements that do not currently exist.

8. The prohibition is too narrow – restricted to the importation

The prohibition in Section 6 reads:

6 Importing regulated timber products

(1) A person commits an offence if:

- a. the person imports a thing; and
- b. the thing is a regulated timber product; and
- c. the thing is, is made from, or includes, illegally logged timber.

While this legislation is rightfully targeted at importation, the prohibition does not extend to other links along the supply chain.

The prohibition should cover any trade in illegal timber or the placing of timber on the market. It should ensure that all those involved in and benefitting from a trade in timber and timber products are responsible for ensuring that all imported timber is legal.

For example, the US Lacey Act has a much broader prohibition:

§ 3372. Prohibited acts

...It is unlawful for any person-

to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce –

(B) any plant—

(i) taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates—

(l) the theft of plants;

(II) the taking of plants from a park, forest reserve, or other officially protected area;

(III) the taking of plants from an officially designated area; or

(IV) the taking of plants without, or contrary to, required authorization;

(ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or

stumpage fees required for the plant by any law or regulation of any State or any foreign law; or

(iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants;

Greenpeace is concerned that the failure to include Australian logging and trading within the Bill will result in different standards and penalty regimes applying. This could raise WTO issues and will certainly raise equity issues.

The prohibition within the EU Regulations is narrower than the US Lacey Act but still captures all domestic timber as it intervenes when the timber is “placed on the market” for the first time.

Article 4

Obligations of operator

1. The placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited.

Although the prohibition in the EU applies only to the first handler of the timber, all subsequent traders in the supply chain are required to retain records of a “one-up, one-down, chain of custody” (Article 5 ‘Obligation of traceability’)

Section 6(a) of the Bill must be amended so the prohibition covers any trade and not just importation, as in the Lacey Act.