



# australian network of environmental defender's offices

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## Submission on the Exposure Draft and Explanatory Memorandum of the Illegal Logging Prohibition Bill 2011

6 May 2011

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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The Australian Network of Environmental Defender's Offices (ANEDO) is pleased to provide the following brief comments on the exposure draft of the *Illegal Logging Prohibition Bill 2011* (the Bill). ANEDO is a network of community legal centres specialising in public interest environmental law and policy.

ANEDO believes there are seven key elements that should be included in any federal legislation attempting to regulate the import and distribution of illegally logged timber. These elements include:

1. **Ambitious objectives and broad scope;**
2. **A prohibition on the *importation or distribution* of illegal timber products in Australia;**
3. **Broad coverage of timber and forest products;**
4. **Due diligence requirements for all operators;**
5. **Strong penalties;**
6. **Effective and transparent enforcement; and**
7. **Legislative review.**

We note from the outset that much of the detail of the illegal logging framework has been delegated to the regulations. This makes it very difficult to assess how effective the Bill will be in reducing “the harmful environmental, social and economic impacts of illegal logging.”<sup>1</sup> We believe public consultation on the content of the regulations will be important, along with further scrutiny as the regulations are developed.

We also acknowledge that a number of mechanisms to combat illegal logging can be adopted in addition to the important steps in this Bill, including industry and consumer driven initiatives to complement this new area of regulation.

The remainder of ANEDO’s comments on the Bill correspond to each of the key elements above.

### **1) Ambitious objectives and broad scope**

There is no “Objects” section in the Bill; instead at section 4 there is a “Guide to this Act.” The legal status of this provision is unclear.<sup>2</sup> ANEDO submits that the important principles in this section should be recast as an “Objects” clause to assist in statutory interpretation and give strength to the section (with some rewording to ensure it fulfils those purposes). Secondly, ANEDO submits that in order for the Bill to be effective, it should not only ban the *importation* of all timber and timber products, but also the *distribution* of such products in Australia. ANEDO believes this is a necessary expansion of the scope of the Bill, as explained below.

### **2) A prohibition on the importation or distribution of illegal timber products in Australia**

The Bill “prohibits the importation of regulated timber products” and the “processing of raw logs by certain persons unless they are approved as processors.”<sup>3</sup> ANEDO understands the importance of preventing the importation of such products, however the creation of an offence for their subsequent distribution needs to be incorporated into the Bill. This is not a novel concept, with the European Parliament expressing the same need to capture the distribution of

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<sup>1</sup> See pg 2 of the Explanatory Memorandum. Available at: [http://www.aph.gov.au/Senate/committee/rat\\_ctte/logging\\_bill\\_2011/explanatory\\_memorandum.pdf](http://www.aph.gov.au/Senate/committee/rat_ctte/logging_bill_2011/explanatory_memorandum.pdf).

<sup>2</sup> Its purpose, described in the Explanatory Memorandum, is ‘to provide a concise overview of the Bill’s operations’.

<sup>3</sup> See section 4 of the *Illegal Logging Prohibition Bill 2011*.

illegally logged materials, noting: “*All operators in the supply chain should be bound by the overriding prohibition against making illegally sourced timber or timber products available on the market.*”<sup>4</sup>

### **3) Broad coverage of timber and forest products**

It is not currently possible to determine what timber and forest products will be captured by the Bill – because the “regulated timber products” to which the legislation would apply “are prescribed by the regulations”<sup>5</sup>, which are yet to be released. ANEDO believes the framework should apply to the broadest range of forest products available (including pulp and paper products). As a guide, a prohibition similar to that in the USA under the Lacey Act<sup>6</sup> would be a good basis for such a prohibition. Under the Lacey Act the prohibition applies to all ‘plants’, defined as: “any wild member of the plant kingdom, including roots, seeds, parts, and products thereof (but excluding common food crops and cultivars).”<sup>7</sup>

### **4) Due diligence requirements for all operators**

The Bill should be amended to include a requirement that all importers and distributors in the supply chain undertake prescribed due diligence requirements. Such requirements at the point of importation should include those proposed under the European Commission approach, i.e.:

*The due diligence system... shall:*

*(a) provide access to the following information on timber and timber products placed on the market by the operator:*

*(i) description;*

*(ii) country of harvest;*

*(iii) volume and/ or weight;*

*(iv) where applicable, name and address of the operator who has supplied timber or timber products;*

*(v) information on compliance with the requirements of the applicable legislation;*

*(b) include a risk management procedure; and*

*(c) provide for audits to ensure effective application of the due diligence system.*<sup>8</sup>

Furthermore, the Bill needs to establish a “chain of custody” scheme that goes beyond importation and instead requires the legality of the products to be verified at every point of trade. Finally, these requirements should be set out in primary legislation and not delegated to subordinate instruments such as policy or guidelines. This would contribute to a robust and effective scheme.

ANEDO notes that Appendix 4 to the Bill’s Regulatory Impact Statement (“Due Diligence regulation implementation”<sup>9</sup>) outlines a range of important due diligence measures. However, it is not clear that the Bill gives effect to all of these measures. For example, point 5 relating to disclosure of species, country of origin etc. It may be expected that such requirements will be given effect in industry codes of conduct or ‘legal logging requirements’ (see ss 13-14 of the Bill).

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<sup>4</sup> *Proposal for a regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market*, 19 (Recital 12) (emphasis added). The European scheme to ban imports of illegal timber begins in 2012. See, eg: <http://www.bbc.co.uk/news/10557228>.

<sup>5</sup> See section 4 of the *Illegal Logging Prohibition Bill 2011*.

<sup>6</sup> *Food, Conservation and Energy Act of 2008* (USA).

<sup>7</sup> See section 8204 of the *Food, Conservation and Energy Act of 2008* (USA).

<sup>8</sup> *Proposal for a regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market*, Article 4.

<sup>9</sup> Explanatory Memorandum to the Bill, p 43.

However, the Bill does not appear to require these aspects to be included. ANEDO recommends that the requirements set out in Appendix 4 be given clear effect in the Bill, rather than being a discretionary inclusion in subordinate legislation.

## 5) Strong Penalties

ANEDO would support a broader and stronger penalty regime within the Bill, which could include civil as well as criminal penalties. The Bill creates a number of offences for acts such as “Importing illegally logged timber”<sup>10</sup>, the penalty for which is five years imprisonment. Although such offences will have some deterrent effect, ANEDO submits that there should be an expansion of offences. One suggested expansion would be the inclusion of strict liability offences, which would provide a strong incentive for both importers and distributors to conduct due diligence to verify the source and legality of timber. A planned transition period will assist in ensuring the necessary self-regulatory checks are in place. ANEDO understands the seriousness of including strict liability offences in the Bill, however the Scrutiny of Bills Committee has noted that:

*strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation*<sup>11</sup>

If the Committee considers the inclusion of strict liability offences is not appropriate, ANEDO proposes an alternative option would be for more severe penalties to apply where there is intent to illegally import or distribute timber. The US Lacey Act has introduced such a tiered penalty system, where different penalties are available according to whether an importer knowingly or unknowingly engages in prohibited conduct.

Finally, in relation to civil penalties, the current Bill does not allow any person to take action to enforce or restrain a breach of the legislation.<sup>12</sup> ANEDO submits that an open standing provision should be introduced to allow any person to enforce or restrain a breach, noting other precedents.<sup>13</sup> This would increase the deterrence effect and bolster monitoring and compliance, supplementing the enforcement role of Government departments.

## 6) Effective and transparent enforcement

The Bill needs to provide strong enforcement powers, both at the point of importation and throughout the supply chain. ANEDO therefore supports the proposed enforcement framework at Part 5 of the Bill subject to the comments above. In prior research on an appropriate, effective and transparent enforcement framework, ANEDO found that the NSW *Protection of the Environment Operations Act 1997* framework would provide an excellent basis for the effective regulation of the importation and distribution of timber products. That legislation contains a number of powers which would prove useful in combatting illegal logging such as powers of entry and search, to ask questions, to identify persons and also provides powers allowing officers to require the provision of information or documentary records. Part 5 of the Bill also contains many of these powers.

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<sup>10</sup> See section 6 of the *Illegal Logging Prohibition Bill 2011*.

<sup>11</sup> Report 6/2002 of the Scrutiny of Bills Committee: *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* at p 243.

<sup>12</sup> It is understood that enforcement would rely on prosecution by the Director of Public Prosecutions following a brief of evidence from Government officers (see, eg, EM to the Bill, “Division 3 – Offence-related powers”, p 57).

<sup>13</sup> There are precedents for open (or broad) standing for enforcement in other environmental protection and regulatory laws. See, eg, the *Trade Practices Act 1975* (Cth), ss 80 and 163A; the *Environmental Planning and Assessment Act 1979* (NSW), s 123; and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 475 and 487.

## **7) Legislative review**

In order to ensure that the legislation is operating effectively and achieving its outcomes, the Bill must be amended to incorporate a review of the legislation within two years of the Act's commencement, followed by ongoing review every two to five years. Such a review could consider, for example, statistics on offences, monitoring and non-compliance; international developments and best practice; whether requirements initially made in regulations should be incorporated into primary legislation; along with an evaluation of the Bill's overall effectiveness.

ANEDO thanks the Committee for the opportunity to provide input into the development of the Bill and looks forward to further consultation on this matter, including the scope and content of the regulations in the near future.