



Submission No 10

Inquiry into Illegal Logging Prohibition Bill 2011

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Sustained Forest Industry for Papua New Guinea

Committee Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

Re: Inquiry into the Illegal Logging Prohibition Bill 2011

Dear Committee Secretary Brown,

The Papua New Guinea Forest Industries Association (PNGFIA) welcomes the opportunity to participate in the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the *Illegal Logging Prohibition Bill 2011*.

The submission addresses concerns over the international implications of the bill which have been expressed by Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea.

Specifically, the Bill addresses trade uncertainty, recognition of existing legality verification schemes and obligations under international bilateral and multilateral agreements, both of which have been raised by the governments listed above. The PNGFIA believes that the Bill will:

- Create trade uncertainty for a two-year period between legislation and regulation and penalise a legal industry;
- Unfairly penalise more than 10,000 families in rural Papua New Guinea that are currently dependent upon legal smallholder timber harvesting;
- Run contrary to Australia's trade obligations under the World Trade Organisation and the South Pacific Regional Trade and Economic Co-operation Agreement, as well as its broader development obligations in the Pacific region.

The PNGFIA therefore implores the Australian Government to re-draft the Bill.

The PNGFIA has made three submissions to previous inquiries into the Bill. Some of the PNGFIA's recommendations have been incorporated into Senate Committee recommendations, but have not been reflected in the re-drafted legislation. We have therefore attached previous submissions for the Committee's reference.

Sincerely,

Mr Robert (Bob) Tate
Executive Officer
PNGFIA

SUBMISSION BY THE PAPUA NEW GUINEA FOREST INDUSTRIES ASSOCIATION (PNGFIA) TO THE JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE'S TRADE SUB-COMMITTEE INQUIRY INTO THE *ILLEGAL LOGGING PROHIBITION BILL (2011)*

Introduction

The Papua New Guinea Forest Industries Association (Inc.) is an incorporated association of companies involved in all levels of operation in the PNG forestry industry. The PNGFIA is PNG's peak forestry industry association, representing the general interests of the forest industries sector. The PNGFIA is committed to the responsible use of forest resources for the benefit of PNG, and supports efforts to encourage sustained forest industries in PNG.

The Australian Government has introduced draft legislation that aims to ban illegal timber imports into the country. The following submission outlines the PNGFIA's concerns relating to the draft legislation.

The submission addresses concern over the international implications of the bill which have been expressed by Canada, Indonesia, Malaysia, New Zealand and Papua New Guinea in their submissions to the Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry.

Specifically, this submission addresses trade uncertainty, recognition of existing legality verification schemes and obligations under international bilateral and multilateral agreements, both of which have been raised by the governments listed above.

Two Years of Trade Uncertainty

The proposed legislation creates an extended period of uncertainty between its passing and the introduction of regulations. In this period, there are no certain actions that exporters and other commercial enterprises will be able to take that will work definitely towards meeting Australia's compliance regime.

As research authored by the Centre for International Economics and commissioned by the Australian Government noted, compliance costs using third-party certifiers for legality is expensive.

The two-year gap between legislation and regulation will effectively deprive timber exporters of the ability to market timber products to Australia. The key reasons for this uncertainty are:

- No certainty over which products will be regulated;
- No certainty over which types of legality verification will be acceptable to the Australian authorities;
- No certainty over which types of information will be required by importers and therefore which information needs to be supplied to importers;
- No certainty over potential crossovers between the proposed Australian regulations and the US-based Lacey Act and European Union Due Diligence requirements.

As a consequence, the passing of the Bill will create a criminal offence, yet there is no certainty for importers as to whether they are committing an offence. This will create further buyer aversion and uncertainty relating to trade.

Recognising Existing Legality Verification

The proposed legislation as it is currently gives no recognition to pre-existing legality verification or certification schemes, whether they are endorsed by the governments, private sector or civil society.

It is understood by the private sector and most exporting nations that third-party legality verification systems (whether endorsed by governments or the private sector) are the most straightforward means to verify legality. Without recognition of these within the legislation, there is no certainty for exporters who have these systems in place, or for those exporters wishing to implement such systems in the two-year window between legislation and regulation.

Papua New Guinea's forest industry introduced a pilot voluntary certification standard that was developed with the assistance of the International Tropical Timber Organization (ITTO) and Société Générale de Surveillance (SGS S.A), which is recognized as the world's leading independent inspection, verification, testing and certification firm.

The PNGFIA would like to note that an arrangement was in place to undertake a second stage of this pilot system with the assistance of the Australian Government through the Australian Department of Agriculture Fisheries and Forestry (DAFF). However, for reasons unbeknownst to the PNGFIA, support for this program was withdrawn.

The PNG Government also contracts SGS as a third party auditor to monitor all log exports from PNG in order to ensure appropriate revenues are paid and the accuracy and completeness of export documentation. The PNG Government is the only government in the world to undertake third-party monitoring of timber exports on this scale.

The PNGFIA would like to note that its comments on third-party verification were accepted in the report of the Australian Senate's first inquiry into the Exposure Draft of the Illegal Logging Prohibition Bill. However, these comments appear to have been ignored in the re-drafting of the legislation.

Recommendation 6 of the Inquiry into the Draft Exposure Bill proposed that:

“regulations prescribe that importers and processors should demonstrate due diligence under one of the following:

- a) an internationally recognised third-party certification scheme, or*
- b) an individual country initiative, or*
- c) have in place a management system to ensure legal compliance.*

The committee holds that the output of this process will be a legally binding and enforceable declaration of the legality of timber supply, signed by the importer.”

The Bill in its current form does not guarantee that third party certification, country initiatives or management schemes will be enough to prove legality, contrary to the recommendations of the Senate Committee Inquiry into the Draft Exposure Bill. We have subsequently attached our previous submissions for the Committee's reference.

Development Implications and Trade Uncertainty for Small Exporters

As noted by the PNGFIA during its appearance before the Senate Committee earlier this year, the Bill will have potentially negative impacts upon smallholder foresters in Papua New Guinea.

The FIA estimates that around AU\$20 million of timber product is exported to Australia every year. The share from our small producers in Papua New Guinea is estimated at AU\$5 million. While this may seem small, the association estimates that these exports support around 10,000 low-income forest producers in PNG, most of whom exercise their rights to harvest up to 500 cubic metres of forest product annually.

Smallholder operators are not required to substantiate the legality of their timber through local authorities as PNG's customary tenure laws provide for local communities to harvest timber with little regulatory oversight.

The immediate threat of being challenged for possibly exporting 'illegal' timber will mean these producers will likely cease supplying the Australian market. This will severely impair the capacity of these people to support families in rural areas of Papua New Guinea.

Any compliance costs of the legislation and implementing regulation are likely to deter smallholder foresters from exporting to Australia. Smallholder foresters process small amounts of legally procured timber in small-to-medium mills. They are then exported to niche markets.

The Bill as it is framed will therefore have a negative impact on these smallholders who have previously exported to Australia.

Legality Objectives versus Sustainability Objectives

The PNGFIA is concerned that the Bill in its current form attempts to use legality standards for forestry as a proxy for standards for sustainable forest management (SFM). This has been confirmed in statements and submissions from the Department of Agriculture, Fisheries and Forestry that appear to treat the two as objectives that are in many ways mutual.

The PNGFIA would like to underline that legality and sustainability are entirely different objectives.

In the arrangement that the Australian Government is considering under the proposed legislation, it is effectively asking both Australian regulators and Australian businesses to act as assessors of legal and regulatory compliance in foreign countries.

With regards to sustainability, the Papua New Guinea Government determines forest legislation and forest regulation based on what it considers the optimal use of its forest resources to meet its development goals.

If Australia's long-term goal is the implementation of sustainable forest management in other territories, it would be better served by taking this up through a bilateral program between governments.

When it comes to assessing legality, it would be less costly and obviate restrictions of supply by smallholders if the system proposed by the Australian Government recognized existing arrangements in PNG that already enable consumers to determine if product supplied is produced in accordance with PNG law.

Australia's Trade and International Obligations

The Government of Indonesia has already foreshadowed the possibility that the Bill will not meet World Trade Organization (WTO) requirements and remain challengeable under the WTO.

An expert legal opinion by Professor Andrew Mitchell of Melbourne University indicated that the agreement would pose problems with WTO compliance, as well as compliance with the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA).

On WTO, Associate Professor Mitchell points out that as well as breaching key provisions of the General Agreement on Tariffs and Trade (GATT), the Bill also breaches provisions of the WTO Agreement on Technical Barriers to Trade (TBT) which do not allow regulations to protect the environment that are more trade restrictive than necessary, and which only *indirectly* seek to address the environmental matter in question.

We note that there has been no published independent assessment of the Bill's compliance with SPARTECA (South Pacific Regional Trade and Economic Agreement) nor with the proposed PACER Plus (Pacific Agreement on Closer Economic Relations).

Pacific Agreement on Closer Economic Relations Plus

The Pacific Agreement on Closer Economic Relations (PACER) Plus is a set of negotiations between Australia, New Zealand, Papua New Guinea and a range of other Pacific Island nations which seeks to help Pacific Islands Forum countries benefit from enhanced regional trade and economic integration.

The negotiations for PACER Plus are ongoing and are aimed at developing a new economic and free trade agreement in the region. The primary aim of PACER Plus is to promote the economic development of Forum Island Countries through greater regional trade and economic integration.

Pacific Island nations have been highlighted by many proponents of the Bill as the primary examples of why legislation for the prohibition on illegal logging is necessary. During the Senate Committee on Rural Affairs and Transport, it was claimed by some that nations such as Papua New Guinea were a high risk nations as exporters of illegal timber.

In the case of PNG, PNGFIA has pointed out regularly to Committees of the Australian Parliament that timber, plantations and agriculture represent an important mechanism to provide opportunity for economic development. Moves by the Australian Government to implement legislation which fundamentally harms the Pacific Islands exports may be viewed by the Pacific Island nations as contrary to the spirit of the PACER Plus negotiations and may hinder efforts to reach agreement.

South Pacific Regional Trade and Economic Co-operation Agreement

The South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA) came into effect in 1981. It is an agreement that seeks to give the Pacific Island nations which are signatories to the Agreement, including Papua New Guinea, Solomon Islands and Tonga, “duty free and unrestricted access to the markets of Australia and New Zealand over as wide a range of products as possible”.

Under the Agreement, Australia granted duty free and unrestricted access to the Australian market for a range of products listed in the Schedule of the Agreement. These products include a range of wood, timber and timber products including but not limited to wood beading, cellular panels of wood, sawn wood panels and paper and paperboard.

The Agreement includes an exemption for measures which are “necessary to protect human, animal or plant life or health” provided such measures are “are not used as a means of arbitrary or unjustifiable discrimination or as a disguised restriction on trade”.

From the above discussion, it is clear that the Bill arguably would not be justified by these exemptions. On this basis, the Bill may also be a breach of Australia’s commitments under SPARTECA.

International Impacts

The Australian Government has in the course of its many reviews of its aid programs underlined the importance of supporting incremental increases in trade as a means of supporting development.

The PNGFIA would also like to note that Australian Government-commissioned research on the impacts of the Bill authored by the Centre for International Economics (CIE) noted that any compliance regime would result in welfare losses in developing countries.

The PNGFIA believes that the Bill’s almost certain negative impact on trade between Australia and PNG and potential welfare losses directly contradict its future development assistance goals.

A better approach

Levels of Illegal logging in PNG are low. The approach suggested by the Australian Government will not address the small incidence of illegal logging in PNG. It will instead reduce PNG timber exports to Australia and undermine the capacity of small holders to derive economic benefits from their right under PNG law to log forest on lands under customary ownership.

PNG forest laws and regulations proscribe practices that engender sustainable forestry. The long-term goal of the PNGFIA is to develop formal standards for forest certification that can be applied by commercial forest operators. For those standards to be commercially viable, significant improvements are required in the management of the forest estate by the PNG Forest Authority.

The Australian Government had previously supported such improvements, including development of a proper forestry inventory of PNG, better technical understanding of forest systems and improvement of the capacity of its corps of forestry officers to develop and implement forestry management systems.

The PNG Government and industry has developed policy initiatives as part of its development goals to increase on-shore processing of raw logs into value-added timber products for export. This has led to greater employment, training and skills development, and has encouraged growth in the manufacturing sector.

In recent years, however, support for better forest management and sustainable industry development has been directed to less central matters such as satellite monitoring of forest carbon stocks and management of carbon emissions from forestry and land clearing.

Poor governance is the core factor in illegal logging in PNG. The solution is to assist PNG authorities to improve the capacity of officials to manage forest laws and to improve the technical understanding of the nature and patterns of PNG forestry and to lay the foundations to practice sustainable forest management.

Restricting imports of PNG timber products will not contribute to that; it will simply impoverish those who can least afford it.

The PNGFIA therefore implores the Australian Government to consider completely re-drafting the Bill as it currently stands.

ATTACHMENTS

ATTACHMENT 1:

Harming PNG: Australia's Illegal Logging Prohibition Bill

A PNGFIA Submission to the Australian Senate's exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011

Submitted 6 May 2011

ATTACHMENT 2:

Papua New Guinea Forest Industries Association Submission to the Senate Standing Committees on Rural Affairs and Transport Inquiry into Illegal Logging Prohibition Bill 2011 and Supplementary Submission

Submitted 14 December 2012

ATTACHMENT 3:

Australia's Illegal Logging Bill: A More Effective Approach

A Submission by the Papua New Guinea Forest Industries Association to the Senate Standing Committee on Rural Affairs and Transport Inquiry into the Illegal Logging Prohibition Bill 2011

Submitted 20 January 2012

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Harming PNG: Australia's Illegal Logging Prohibition Bill

*A PNGFIA Submission to the Australian Senate's exposure draft and
explanatory memorandum of the Illegal Logging Prohibition Bill 2011*

Submitted 6 May 2011

Recommendations

The Papua New Guinea Forest Industries Association (PNGFIA) welcomes effective measures to combat trade in illegally logged timber. Illegal logging undermines the productivity, sustainability and reputation of legitimate forestry industries.

However the draft legislation tabled before the Australian Senate Committee has a number of significant shortfalls: in its current form, it is not an effective measure.

Proportionality should be the basis of sound government regulation. In this case, the legislation does not stand up to principle - the risks of illegal timber entering Australia simply do not warrant the costs involved in imposing heavy handed regulation.

In its draft form, the legislation has the potential to cause a number of perverse effects with harmful repercussions. Papua New Guinea (PNG) relies significantly on the economic contribution of the forestry sector. Restricting imports from PNG and raising the costs for legitimate operators will cause significant harm to PNG's economic development. It penalises legitimate operators, meanwhile doing little to combat illegal loggers.

The PNG forestry industry already acts responsibly under robust domestic legislation and export monitoring procedures. Accusations of rampant illegal logging in PNG are part of a misleading campaign against PNG's forest industry by environmental campaign groups.

The PNGFIA notes with disappointment a lack of local consultation throughout the development of this legislation. This submission is intended to breach such shortcomings. In response to the Senate's call for submissions, the PNGFIA recommends:

- 1. That final legislation reflect the findings of the report 'A Final Report to inform a Regulation Impact Statement for the proposed new policy on illegally logged timber' produced by the Centre for International Economics for Department of Agriculture, Fisheries and Forestry (DAFF). This assessment effectively shows that the risk of illegal wood products entering Australian markets is not proportional to the costs of implementing current draft legislation and recommends implementing a 'quasi-regulatory' approach.*
- 2. That any final legislation should recognise the International Tropical Timber Organization's definition of illegal logging: "harvesting, transporting, processing, and trading of forest products in violation of national laws", and that any final legislation recognise the legal sovereignty of partner countries such as PNG, and respect partner country legal and regulatory frameworks.*
- 3. That Australian efforts to reduce illegal logging focus on developing on-the-ground capacity in targeted forestry industries rather than disproportionate trade regulation. It further*

recommends an approach that integrates Australian aid policy and the development goals of Australia's development partners such as PNG is required.

The current draft legislation will do little to reduce global rates of illegal logging as i) little illegal timber currently enters Australian markets and ii) under the draft legislation, that which does enter would simply be re-directed to alternative markets. Instead it will cause significant harm to the economic development of countries such as PNG, whose legitimate forest producers are penalised; along with the significant population that relies on the industry's economic contribution.

- 4. That if Australia decides to continue with this heavy handed regulatory approach, independent third party verification schemes should be officially recognised as an effective method of demonstrating legality. The PNGFIA further recommends that such schemes, especially SGS's timber legality traceability and verification (TLTV) standard for PNG, be recognised in the legislation. It is also important that any legislation recognise the range of credible schemes in existence; and that choosing from amongst credible schemes is a commercial decision best left to the discretion of the forest operator.*

Acronyms

CIE	Centre for International Economics
COC	Chain of Custody
DAFF	Department of Agriculture, Fisheries and Forestry
FAO	Food and Agricultural Organisation of the United Nations
FSC	Forest Stewardship Council
GDP	Gross Domestic Product
ITTO	International Tropical Timber Organisation
PNG	Papua New Guinea
PNGFIA	Papua New Guinea Forest Industries Association
RIS	Regulatory Impact Statement
SGS	Société Générale de Surveillance
TLTV	Timber Legality Traceability Verification
VLC	Verification of Legal Compliance
VLO	Verification of Legal Origin

Contents

Introduction.....	6
The Illegal Logging Prohibition Bill 2011	6
The PNGFIA	6
1. Proportionality in Regulation.....	7
Overstated Rates of Illegal Logging	7
Heavy Handed Regulation.....	7
2. Respect for Legal Sovereignty	9
PNG Industry Regulations	9
PNG Industry Monitoring	9
Defining Illegal Logging	10
3. Harm to PNG Development.....	12
Illegal logging in PNG	12
The Economic Contribution of PNG’s Forest Industry	12
Effects on the PNG Industry	13
Lack of Local Consultation	13
Australian Government Engagement with PNG Forest Industries	14
4. Third Party Audit Systems	16
Timber Legality Schemes	16
References	18

Introduction

The Australian Government has introduced draft legislation that aims to ban illegal timber imports into the country. The following submission outlines the PNGFIA's concerns relating to the draft legislation.

The Illegal Logging Prohibition Bill 2011

The Australian Government's Department for Agriculture, Fisheries and Forestry (DAFF) placed before the Senate Standing Committee an Exposure Draft of the *Illegal Logging Prohibition Bill* on 23 March 2011.

The purpose of the Bill is to *"reduce the harmful environmental, social and economic impacts of illegal logging by prohibiting the importation and sale of illegally logged timber products in Australia."*

The Bill prohibits the importation of illegally logged timber and timber products that contain illegally logged timber. It aims to achieve this by:

- Restricting importation of products to those approved by the Minister, or a timber industry certifier.
- Requiring importers of regulated products and domestic processors of raw logs to meet legal logging requirements.
- Requiring accurate information to confirm the legality of logged timber products being placed into the Australian market; and
- Introducing monitoring and enforcement powers to ensure compliance with the legislation, including the appointment of officers to undertake necessary duties.

The draft Bill has not yet been finalised and may be altered before being tabled in Parliament for consideration. The following submission serves to inform these considerations.

The PNGFIA

The Papua New Guinea Forest Industries Association (inc.) is an incorporated association of companies involved in all levels of operation in the PNG forestry industry. The PNGFIA is PNG's peak forestry industry association, representing the general interests of the forest industries sector. The PNGFIA is committed to the responsible use of forest resources for the benefit of PNG, and supports efforts to encourage sustained forest industries in PNG.

1. Proportionality in Regulation

Sound government regulation should be based on a principle of proportionality – in this case, that the risks of illegal timber entering Australia are weighed against the costs involved in imposing regulation. The current draft legislation does not conform to this principle.

Overstated Rates of Illegal Logging

The draft legislation mistakenly presumes high global levels of illegal logging and related trade. This is based on obsolete data with a high margin of error. The dominant source informing the draft legislation is a study produced by consultants Seneca Creek and commissioned by the American Forest Product Association.¹ This study suffers from a number of limitations, yet it is being used as a justification for Australia to regulate trade in illegally logged timber.²

Seneca Creek (2004) is based on out-dated, unrepresentative and often biased data sources, which leads to overestimated rates of illegal logging. More recent research indicates that global rates of illegal logging are less significant. Chatham House, a respected UK research institute, has found rates of illegal logging have fallen by as much as 75% over the last decade.³ The reasons for this are somewhat unclear: it may be as a result of poverty reduction and increasing affluence in a number of tropical forested countries; improved enforcement measures; or recent advancements in remote sensor technology that allow more accurate assessments and monitoring of forest resources. Alternatively, there is a high likelihood that the initial benchmark data used by Seneca Creek was inaccurate. Whatever the case, it appears that the issue of illegal logging figures disproportionately in policymaking circles.

Heavy Handed Regulation

This was effectively the conclusion drawn by a report commissioned by the Australian Government to inform a Regulatory Impact Statement (RIS).⁴ The report, undertaken by consultants - Centre for International Economics (CIE) - found that trade restrictions would be ineffective, expensive, and largely unwarranted.

The CIE found that Australia's imports account for around 2.5% of world timber trade; and only 0.034% of global timber production. Using the Seneca Creek estimates of global illegal logging rates, the CIE calculated Australian imports may account for 0.34% of products incorporating illegally logged timber.

Simply put, any measure to restrict importation of illegal timber imports - no matter how stringent or costly - has the potential to reduce global illegal logging by only 0.34%. In reality, even this figure is overstated as unilateral steps would likely divert illegally sourced products to other markets rather than eliminate it altogether.

¹ Seneca Creek Associates, LLC & Wood Resource International, *"Illegal" Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry*, (2004)

² The Parliament of the Commonwealth of Australia, *Illegal logging Prohibition Bill 2011 Explanatory Memorandum*, (2011)

³ Chatham House, *Illegal Logging and Related Trade: Indicators of the Global Response*, (2010)

⁴ Centre for International Economics, *A Final Report to inform a Regulatory Impact Statement for the proposed new policy on illegal logged timber*, (2010)

CIE advised against implementing heavy handed trade restrictions as the implementation costs and benefits of taking action were not proportional to the risk that illegal products would enter Australia. In what appears to be an unusual legislative development process, DAFF chose to disregard these findings and commissioned a second study to inform the RIS.

This was undertaken by the Australian Government's research facility, Australian Bureau of Agricultural and Resource Economics (ABARE). The report claimed to "supplement" the initial RIS analysis performed by the CIE. The ABARE report justifies many of the recommendations made in the final RIS that conflicted with the CIE's findings.

The final RIS recommended that the Government utilise a due diligence approach despite findings by CIE recommending a 'quasi-regulatory' or voluntary approach.

RECOMMENDATION: The PNGFIA recommends that final legislation reflect the findings of the report 'A Final Report to inform a Regulation Impact Statement for the proposed new policy on illegally logged timber' produced by the Centre for International Economics for Department of Agriculture, Fisheries and Forestry (DAFF). This assessment effectively shows that the risk of illegal wood products entering Australian markets is not proportional to the costs of implementing current draft legislation and recommends implementing a 'quasi-regulatory' approach.

2. Respect for Legal Sovereignty

The PNG forestry industry already acts responsibly under robust legislation and export monitoring procedures. Accusations of rampant illegal logging in PNG are part of a misleading campaign against PNG's forest industry that does not reflect the facts. Australia must recognise the sovereignty of PNG existing legislation through an appropriate definition of illegal logging.

PNG Industry Regulations

The draft legislation outlines provisions for potentially costly systems. It is unlikely these costs can be passed onto the consumer. Despite the high costs involved in the Australian Government's regulatory approach, there is currently little risk of illegal timber from PNG entering Australia.

PNG industry is governed by robust forestry legislation. PNG's current legislative forestry framework has the main elements required to ensure that forestry operations in the country are conducted legally. Under this framework, forestry operations must conform to a stringent system that includes:

- The Forestry Act 1991 (as amended);
- The National Forest Policy of 1991 (as amended);
- The National Forest Plan (as amended);
- Forestry Regulations 1998 (as amended);
- Logging Code of Practice; and

Furthermore, PNG has a comprehensive set of conservation and environment protection laws, including the Environmental Planning Act. Any application for a timber permit under the Forestry Act must be accompanied by an environmental plan approved under this Act.

The United Nations Food and Agricultural Organisation (FAO) commissioned an assessment of PNG's forest legality framework in 2002. The consultant involved in the assessment found PNG's forestry and environment protection laws to be "comprehensive".⁵

PNG Industry Monitoring

PNG's legal requirements are monitored through an independent, third-party export monitoring system. This system demonstrates that accusations of widespread illegality in PNG's timber exports are baseless.

Under the monitoring system, all log exports are independently checked for species, measurement, volume, taxes and royalties, validity of harvesting permit and validity of export permits and licences. The system is carried out by Société Générale de Surveillance (SGS), a respected provider of inspection, verification, testing and certification services. SGS is contracted to the Government, making PNG one of the few tropical countries in the world to adopt an arms-length log export monitoring system.

Since its implementation in 1994, the independent monitor has not uncovered any large-scale log smuggling in the PNG's log export trade. Though the monitoring system does not provide a

⁵ Jim Fingleton *Regional Study of Pacific Islands Forestry Legislation*, FAO Legal Papers Online, (2002)

guarantee that all forestry activities in PNG are legal, it does provide verifiable proof that allegations of widespread illegality and log export smuggling are spurious.

Rather, these spurious allegations are based on dubious data. For instance, Seneca Creek estimated that 70% of PNG timber was illegally logged based on an assumption that PNG and Indonesia have identical rates of illegal logging. The researchers ignored the fact that PNG is a separate country with individual forest legislation and a distinct forestry sector. Even if one were to assume identical illegal logging rates, the Indonesian estimate is likely to be grossly overstated (itself being based on data sourced from environmental campaign groups). These overstated estimates have allowed campaigners to make grandiose statements about illegality in PNG's forestry sector. They have been effectively critiqued, and are quite plainly inaccurate.⁶

Defining Illegal Logging

Environmental campaigners have also arrived at overstated estimates of illegal logging rates in PNG by applying unreasonable definitions of illegal logging. By using broad definitions that encompass areas of responsibility which are beyond the mandate of the forestry industry and the appropriate regulatory authorities, campaigners have attempted to discredit the industry. Based on these definitions, commercial harvesting activities in almost all countries in the world could be considered 'illegal' in one way or another.

The PNG Forest Authority (PNGFA) defines illegal logging as "harvesting, transporting, processing and trading of forest products in violation of national laws". This is based on the definition accepted by the FAO and ITTO and reflects inter-governmental consensus. Australia is a member of the ITTO, and as such, should endorse this definition. This approach - assessing legality against the legislation existing in the country of origin - is also consistent with the European Union's proposed timber import regulations.

Commercial forest activities should be assessed against this definition, rather than that of environmental campaigners. Currently the Bill adequately defines "illegally logged" as that which is "harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested."⁷

It is important that the Bill does not expand the definition to impose foreign requirements beyond the scope of PNG's legislation. In a democratic country such as PNG, legislation and policy is developed to reflect national interests. Australia must recognise PNG's national sovereignty and laws, and not seek to impose their own requirements.

Until now, the PNG forestry industry has operated responsibly under these legislative requirements. The annual sustainable log harvest has never been exceeded, while the most accurate studies of deforestation rates indicate that forest resources are being utilised at sustainable rates.⁸ At the same time PNG has established effective forest conservation measures and has allocated significant

⁶ See for instance: Tim Curtin, 'What Constitutes Illegal Logging?', *Pacific Economic Bulletin* vol. 22, pp. 125-134 (2007)

⁷ The Parliament of the Commonwealth of Australia, *Illegal Logging Prohibition Bill 2011 Exposure Draft*, (2011)

⁸ Colin Filer, Rodney Keenan, Bryant Allen and John McAlpine, 'Deforestation and Forest Degradation in Papua New Guinea', *Annals of Forest Science* vol.66, pp.813-826 (2009)

forest resources as protected areas.⁹ PNG's environmental indicators reflect a sustainable industry that contributes significantly to the PNG economy and national development.

RECOMMENDATION: The PNGFIA recommends that any final legislation should recognise the International Tropical Timber Organization's definition of illegal logging: "harvesting, transporting, processing, and trading of forest products in violation of national laws", and that any final legislation recognise the legal sovereignty of partner countries such as PNG, and respect partner country legal and regulatory frameworks.

⁹ Department of Environment and Conservation, *Papua New Guinea's Fourth National Report to the Convention on Biological Diversity* (2010)

3. Harm to PNG Development

PNG relies significantly on the economic contribution of the forestry sector. Australian legislation restricting PNG imports will cause significant harm to PNG's economic development. Furthermore, legislation will do little to achieve its intended goals of reducing illegal logging.

Illegal logging in PNG

The effect of Australian legislation regulating timber imports has significant consequences for PNG. Australia is a significant market for PNG timber exports, accounting for over half of all processed timber exports (including plywood, sawn timber, mouldings, and furniture components). But by restricting imports from legitimate forest operators, Australian legislation has the potential to harm PNG development.

The PNGFIA is strongly committed to combatting illegal logging. Illegal logging undermines the financial viability of the legal forest products industry; it raises consumer aversion - which is further compounded by misleading environmental campaigns - to the use of tropical timbers; it impedes efforts to achieve rural based growth, employment and poverty alleviation. It is often associated with odorous labour conditions and environmental degradation. Where illegal logging is allowed to prosper, legal forest operations often face declining returns as they are unable to compete with the lower cost illegal activities. As legal forest operators and activities are restricted, a perverse incentive for forest owners to seek higher returns from alternate land use activities – such as agriculture - is created. This can drive permanent forest conversion.

Illegal logging works against the goals of PNG's forest industry. There is a need to eradicate the phenomenon. However, Australian legislation serves to harm PNG development without combating incidences of illegal logging.

The Economic Contribution of PNG's Forest Industry

The forest industry is a significant contributor to PNG's economic development. Export taxes on logs account for 3% to 6% of all tax. Between 1990 and 2005 such taxes represented an average of around 30% of all development expenditure by the national government. It is estimated that PNG's forestry industry contributes between 5% and 9% to national GDP.¹⁰

Furthermore, the forestry industry is one of the few industries that operate in - and directly support - remote rural areas. The industry creates one of the few opportunities for rural communities to enter the formal workforce. Employment benefits, such as income, are further supplemented by royalties paid to land owners for access to the natural resources located on their land. Forest companies create basic infrastructure such as roads, housing, medical facilities and schools, that often form the only infrastructure spending in remote communities.¹¹ This contribution is particularly significant given PNG's failing development indicators.

¹⁰ ITS Global, *The Economic Importance of the Forest Industry to Papua New Guinea*, (2006)

¹¹ PriceWaterhouseCooper, *Economic Analysis and Potential of PNG Forestry Industry*, (2006)

Effects on the PNG Industry

Rather than assisting PNG development, the proposed legislation will harm the significant number of people that rely on PNG's forestry sector. In effect the proposed legislation will close the Australian market to those most deserving of a 'jump start': small-scale forest operators operating legally in developing countries such as PNG.

The draft legislation places the onus to verify legality on the forest operator. The costs of verifying legality can be high regardless of the legality of the forestry operations. These costs are often considerably higher for forestry operators in developing countries, due to high implementation costs, weaker local infrastructure and a lack of demand for legality verification by domestic consumers.¹² Depending on the scale of the operation, these costs can render legality verification economically implausible.

There are examples in PNG where forestry operations have managed to absorb the costs of certification. However, these tend to be large-scale operations run by dominant industry actors with access to capital, high levels of forestry expertise and advanced business infrastructure.

Forestry smallholders - such as family or village forest operators - are unlikely to be able to absorb such costs and lack the technical capability and manpower to implement certification. These, rather than the isolated operations of illegal loggers, are the individuals who will most suffer from the legislation. PNG's small number of illegal operators - already restricted by PNG's export monitoring scheme - are linked to domestic markets and are already unlikely to export produce to Australia from the outset.

Lack of Local Consultation

The negative consequences to small forestry operators in developing countries resulting from the draft legislation may have been noted and avoided, had adequate consultation taken place during its preparation. The PNGFIA believe this legislation has been developed in a method inconsistent with Australian government guidelines and best practice. The PNGFIA is disappointed to note lack of local consultation throughout the process.

The Australian Government is committed to "meaningful consultation with key stakeholders" as outlined in the Government's *Best Practice Regulation Handbook*.¹³ These guidelines outline provisions for effective consultation, specifically referring to industry associations as a target for consultation.

Despite this guidance, DAFF did not consult the PNGFIA during the development of the draft legislation. More so, at no point was PNG's supreme policy advisory to the forestry Minister – PNG's National Forest Board - consulted. The oversight is alarming; if PNG's dominant industry association and policy advisory body were not consulted, one can reasonably assume smaller organisations and individuals were given insufficient opportunity to express their positions.

¹² Axel Marx and Dieter Cuypers, 'Forest Certification as a Global Environmental Governance Tool. What is the Macro-impact of the Forest Stewardship Council?', *Regulation & Governance* vol.4, pp. 108-434 (2010)

¹³ Australian Government, *Best Practice Regulation Handbook*, (2010)

Australian Government Engagement with PNG Forest Industries

From the industry's perspective, it appears as though the Australian Government has avoided engaging with the forest industry in Papua New Guinea, despite potentially positive outcomes for both groups.

In 2008 the PNG forestry industry – through the PNGFIA – commenced negotiations with the DAFF and AusAID to implement internationally recognised legality verification systems for PNG's timber exports.

The objective was to have this activity placed under the auspices of Phase I of the Asia-Pacific Forestry Skills and Capacity Building Program (APFSCB), which specifically addressed the need for improvements to forest governance and illegal forest activity.

The concept for proposed activity would have directly addressed the issue that the proposed legislation seeks to address: illegal harvesting of timber.

While the PNGFIA and other stakeholders in PNG's forest industry - including PNG government agencies and regulatory bodies - were keen for these negotiations to continue, DAFF and AusAID had an abrupt change of heart, and negotiations ceased.

It should also be noted Phase II of APFSCB effectively removed any attempts to address illegal logging or legal verification of harvested timber.

Any such work under the APFSCB would have proved an invaluable addition to work undertaken jointly between the PNGFIA and the International Tropical Timber Organisation (ITTO), which developed and implemented pilot chain-of-custody and Timber Legality Traceability and Verification (TLTV) schemes for Papua New Guinea. Much of this work utilised the expertise of Australian forestry professionals.

In 2009, Australia and PNG signed a Memorandum of Understanding (MoU) on forestry. The document has never been released publicly by either the PNG nor Australian governments.

However, the PNGFIA understands that Parties agreed to:

- identify the capacity building needs for the industry in Papua New Guinea to expand;
- facilitate processes to develop certification schemes; and
- pursue further ways to collaborate through intergovernmental bodies, such as the ITTO;
- improve knowledge sharing between forestry professionals in both countries.

It should be noted that in developing its pilot CoC and TLTV schemes, the industry in PNG and the ITTO:

- identified a capacity shortage within the country, i.e. legality verification;
- facilitated the development of certification of legality;
- sought this opportunity through an intergovernmental body; and
- utilised Australian professional forestry expertise in PNG.

The PNGFIA considers it most disappointing that the Australian Government chose not to engage with the industry further, which would have assisted both the PNG forest industry and the Australian Government in their attempts to address illegal logging.

RECOMMENDATION: The PNGFIA recommends that Australian efforts to reduce illegal logging focus on developing on-the-ground capacity in targeted forestry industries rather than disproportionate trade regulation. It further recommends an approach that integrates Australian aid policy and the development goals of Australia's development partners such as PNG is required

The current draft legislation will do little to reduce global rates of illegal logging as i) little illegal timber currently enters Australian markets and ii) under the draft legislation, that which does enter would simply be re-directed to alternative markets. Instead it will cause significant harm to the economic development of countries such as PNG, whose legitimate forest producers are penalised; along with the significant population that relies on the industry's economic contribution.

4. Third Party Audit Systems

Independent third party audit systems are the most effective way of demonstrating timber legality. Any final legislation should therefore recognise credible legality verification schemes. Legislation must also recognise that a range of credible legality schemes operate; and that choosing between credible schemes is ultimately the forest operator's commercial decision.

Timber Legality Schemes

The PNGFIA believe the best way of ensuring that timber imports are legal is through creditable and independent third party audits. This view has itself been publically supported by high level Australian officials such as the Australian Minister for Forestry, Senator Ludwig.¹⁴

There are a number of robust schemes that operate globally. The variety of credible schemes reflects the specific conditions of national forestry industries, and the unique national interests of forested countries.

In PNG, voluntary legality and chain of custody verification schemes have been welcomed by the forestry sector. Currently the dominant operating scheme is SGS' Timber Legality Traceability Verification (TLTV), which includes Verification of Legal Origin (VLO) and Verification of Legal Compliance (VLC) within the standard. At this stage, five member companies of the PNGFIA are TLTV certified or in the process of gaining certification. FSC's 'Controlled Wood' certification also currently functions in PNG as a legality verification scheme.

The TLTV system is an environmental management standard specifically addressing issues of legality in PNG's forest sector.¹⁵ The standard was developed with stakeholder consultation - including environmental NGOs - to address the following issues:

- 1) National laws relating to business conduct
- 2) Necessary approvals and authorizations
- 3) Social obligations towards local communities and workers' rights
- 4) Environmental obligations required by national and international laws and regulations
- 5) Up-to-date payment of taxes and required financial transparency
- 6) Compliance with forest harvesting regulations
- 7) Compliance with processing transport and trade regulations
- 8) Maintenance of registers containing relevant acts, codes of practice and disputes
- 9) Requirements for chain of custody system to monitor products throughout the whole supply chain

A forest product with TLTV certification effectively guarantees operations conform to PNG's legal requirements throughout all stages of production. Certification against this legality standard is performed by a 'third party' in order to provide assurance that the operator is complying with relevant legal requirements. Under TLTV requirements, a certified operator must assume regular auditing, continuous monitoring and verification of their wood production and tracking information.

¹⁴ Timber and Forestry e-News, 'Third party certification market requirement', issue 166, pp. 12, 28 March (2011)

¹⁵ SGS, *Timber Legality and Traceability Verification (TLTV) Standard for Papua New Guinea*, (2008)

The TLTV is a robust legality verification system. It rated highly in the report commissioned by the Australian Government to inform the development of a framework for recognising legality verification and chain of custody schemes. TLTV “ranked highly in terms of rigour and robustness” for chain of custody, and was deemed a highly rigorous scheme in terms of legal verification.¹⁶

The ITTO has also supported the development of TLTV in PNG. In 2007 the ITTO assisted by co-funding the first pilot system of TLTV certification in PNG through their ‘Initiative on Timber Tracking for Private Sector Companies’.¹⁷ Australian retailers have since embraced the scheme, with prominent retailers such as *Bunnings* giving their endorsement.¹⁸ Australian legislation and policy should reflect this consensus.

It is important that the final legislation recognise the existence of a range of credible independent legality audit schemes. The choice of which scheme to utilise – assuming it adheres to adequate technical capability - should be the forest operators, and not the Australian Government’s. This is a decision based on commercial factors and local considerations.

For the forestry operator, the cost of gaining certification often depends on local infrastructure, capacity, and manpower. Depending on the local context, it may simply not be viable to apply a specific audit scheme regardless of operator legality.

Furthermore, there is little consistency between the different approaches taken by national governments to regulate trade in illegal timber. If each national government were to require certification under a specific scheme, the high costs of certification would impose onerous costs upon legitimate forestry operators, effectively reducing access to global markets. The proposed Australian legislation should serve to avoid this scenario by allowing forestry operators flexibility to choose between credible third party audit schemes best suited to intended export markets.

RECOMMENDATION: The PNGFIA recommends that if Australia decides to continue with this heavy handed regulatory approach, independent third party verification schemes should be officially recognised as an effective method of demonstrating legality. The PNGFIA further recommends that such schemes, especially SGS’s timber legality traceability and verification (TLTV) standard for PNG, be recognised in the legislation. It is also important that any legislation recognise the range of credible schemes in existence; and that choosing from amongst credible schemes is a commercial decision best left to the discretion of the forest operator

¹⁶ URS Australia, *Legal Forest Products Assurance: a framework for differentiating legality verification and chain of custody schemes* (2010)

¹⁷ Bob Tate, *Trade in Challenging Times - a role for the ITTO?* (2008)

¹⁸ Bunnings, *Timber and Wood Products Purchasing in Australia Policy Review Update* (2006)

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Papua New Guinea Forest Industries Association Submission to the Senate Standing Committees on Rural Affairs and Transport Inquiry into Illegal Logging Prohibition Bill 2011

Papua New Guinea Forest Industries Association (PNGFIA)

The Papua New Guinea Forest Industries Association (Inc.) is an incorporated association of companies involved in all levels of operation in the PNG forest industry. The PNGFIA is PNG's peak forestry industry association, representing the general interests of the forest industries sector. The PNGFIA is committed to the responsible use of forest resources for the benefit of PNG, and supports efforts to encourage sustained forest industries in PNG.

Illegal Logging Prohibition Bill 2011

The Illegal Logging Bill 2011 was introduced into the Australian House of Representatives on 23rd November 2011. The Bill is intended to provide a policy and legal framework for the prohibition of the importation or processing of illegal logged timber in Australia.

PNGFIA supports the broad intent of the Bill. It endorses the removal of the 'certification' process proposed in the Draft Exposure Bill which would have restricted the importation of products to those approved by the Minister, or a timber industry certifier.

PNGFIA is nonetheless concerned that the Bill in its current form does not address many of the issues raised by the PNGFIA and the Senate Committee on the Draft Exposure Bill.

Specifically, PNGFIA is concerned that the Bill will have an overall chilling effect on timber imports into Australia. PNGFIA believes the Bill:

- **Does not clearly define the legal standard applicable to importers in relation to the general prohibition on importing illegally logged timber, presenting a risk for importers;**
- **Does not contain an appropriate or complete definition of 'illegally logged timber' or the due diligence requirements, presenting risks for developing country trading partners;**
- **Does not provide guarantees for third-party or nationally mandated certification schemes, ignoring the recommendation of Senate Committee Review into the Draft Exposure Bill;**
- **Does not provide regulatory certainty;**
- **Reflects a lack of consultation with trading partners.**

These points are expanded below.

Poorly defined legal standard presents risk for importers

The general prohibition against importing illegal timber will apply immediately. The Act once adopted imposes an immediate ban and make it a crime to import a product made from or including illegally logged timber. The penalty is 5 years imprisonment or a fine.

This will mean that any product imported for two years after the entry into force of this Bill – but prior to entry into force of the regulation – will make the importer liable for gaol or a fine if it contains illegally logged timber. It is unclear from the Bill what legal standard will apply to importers. The Bill, as written, indicates the general prohibition against importing illegal timber applies to importers regardless of any defence. However, the Bill's explanatory memorandum indicates that an offence is committed only when an importer 'knowingly' imports timber which is illegally logged or with 'reckless indifference to the truth'.

The risk to importers from the poorly defined legal standard on the general prohibition is that if importers believe they will have committed an offence if they import any illegally harvested timber, regardless of whether they knew it was illegally logged, they will be more likely not to import timber products at all, creating a serious chilling effect for timber imports.

Broad definition of 'illegally logged timber' presents risks for exporters in developing nations

The term 'illegally logged timber' is defined in the Bill as meaning "harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested". It is unclear how this will be interpreted and whether this definition will cover only environmental laws and timber harvesting rights or whether it will extend to labour laws or land tenure laws. The Department of Agriculture, Forestry and Fisheries has admitted that it has made the definition of 'illegally logged timber' "deliberately broad".

Despite the Senate Committee on the Exposure Draft of the Bill calling for greater clarity on the definition, none has been provided.

This raises a risk particularly for developing nations with unclear legal regimes, enforcement or overlapping regimes between regions or Departmental authorities. There is a risk that the Department of Agriculture, Forestry and Fisheries will interpret 'illegally logged timber' to cover any piece of legislation impacting on the harvesting of timber, creating a highly restrictive import barrier.

Inherent in the Bill is the intrusion of the Australian judiciary into foreign legal systems and structures. The Bill opens the possibility for Australian courts to pass judgement on actions in foreign jurisdictions and whether oversight and compliance with foreign legal regimes is sufficient. PNGFIA urges the Committee to continue to recognise the sovereignty of foreign nations and uphold their legal and judicial regimes.

PNGFIA continue to recommend that the legislation should recognise the International Tropical Timber Organization's definition of illegal logging: "harvesting, transporting, processing, and trading of forest products in violation of national laws", and that any final legislation recognise the legal

sovereignty of partner countries such as PNG, and respect partner country legal and regulatory frameworks.

No guarantees for third-party and nationally mandated certification schemes

The Committee Inquiry into the Draft Exposure Bill found that “the committee recognises the importance of enabling companies which wish to import, to assess the risks to them and to introduce or utilise appropriate systems to demonstrate legality of product”.

Recommendation 6 of the Inquiry into the Draft Exposure Bill proposed that:

“regulations prescribe that importers and processors should demonstrate due diligence under one of the following:

- a) an internationally recognised third-party certification scheme, or
- b) an individual country initiative, or
- c) have in place a management system to ensure legal compliance.

The committee holds that the output of this process will be a legally binding and enforceable declaration of the legality of timber supply, signed by the importer.”

The Bill in its current form does not guarantee that third party certification, country initiatives or management schemes will be enough to prove legality, contrary to the recommendations of the Senate Committee Inquiry into the Draft Exposure Bill.

Instead the Bill creates a ‘risk assessment’ procedure. This indicates the possibility that different countries or regions will be subject to different levels of risk mitigation based on the assessed risk that exported timber will be illegally logged.

PNGFIA urges that the Department of Agriculture, Forestry and Fisheries formulate due diligence regulations which treat third party certification, management systems and national schemes by themselves as sufficient to prove legality.

The Bill also does not mandate that compliance with a third party certification scheme or other external risk assessment mechanism will be enough to satisfy the due diligence requirements (as opposed to proving the legality of imported timber). Non-compliance with the due diligence requirements constitute a separate offence to the importation of illegally logged timber. This will create a multi-layered measure which does not necessarily recognise certification schemes or management schemes as sufficient to meet the due diligence requirements. PNGFIA recommends that compliance with due diligence requirements is not considered to constitute an offence in its own right, but be included as part of the greater offence of negligently importing illegally harvested timber to indicate negligence.

Discretion to alter regulation introduces ongoing uncertainty for importers and exporters

The explanatory memorandum to the Bill indicates how it will empower authorities to alter regulations to meet changing circumstances. This will give authorities wide discretion to change at will the import requirements. They will be open to pressure from external sources to continuously tighten the restrictions. There is no obligation on authorities to consult with or secure the agreement of affected parties or foreign governments if and when they make such changes. This structure will erect a barrier to long-term timber import arrangements into Australia.

PNGFIA recommends a mandatory consultation process for any changes to the due diligence requirements including an economic cost-benefit analysis.

Government has failed to engage with trading partners

The Government committed at the last election to “continue to work through our bilateral agreements with Indonesia, China and Papua New Guinea to ensure a consistent global approach to eliminating illegal logging”. The Department of Agriculture, Forestry and Fisheries also states on their Illegal Logging website that “this legislation will be supported by continued bilateral cooperation with Asia—Pacific countries and multilateral engagement on forestry through existing forums.”

However there has been little consultation with these Governments over the content of the Bill or the standards which will apply in the future. There is little scope in the Bill for ongoing consultation between the Australian Government and other Governments over changes to the regulations.

The European Union’s Forest Law Enforcement, Governance and Trade (FLEGT) arrangement as it is intended to operate in Indonesia and Malaysia agrees to establish a body in Indonesia with a degree of independence, but still part of the Forests Ministry, which assesses the extent to which timber products for export comply with Indonesian law.

The EU’s regime appears to have greater scope for consultation, negotiation and collaboration with timber exporting countries than exists under the current Bill.

PNGFIA urges the Government to implement a regime which mandates greater ongoing collaboration and negotiation with countries such Papua New Guinea for the formulation and alteration of illegal logging regulations.

Supplementary Comments

Bob Tate, Executive Officer, PNG Forest Industries Association.

Impact of the Draft Bill on PNG

The initial ban in the Bill will deter exports of timber products from PNG. With the high level of uncertainty about how the legislated ban will operate, most PNG forest operators, large and small, will not take the risk of exporting to Australia. We would expect Australian importers to be similarly averse about taking such risk.

The reality about this draft is that it will stop all timber trade with PNG: that was never its formal intent.

The Association estimates around \$A 20 million of timber product is exported to Australia each year.

The share from small holders is around \$A 5 million. While that may seem small, the Association estimates those exports support around 10,000 low income forest producers in PNG. Most will be exercising their legal right to harvest up to 500 m³ of forest product.

The immediate threat of being challenged for possibly exporting illegal timber will mean these producers will cease supplying to the Australian market. This will severely impair the capacity of these people to support their families.

In the long run, when the detailed controls on imports, which are to be introduced two years after entry into force of the bill, are enacted, we anticipate the cost to the processors of meeting the compliance requirements of the bill will also deter them from seeking to export to Australia product derived from harvesting by small holders.

In the case of smallholders, the timber is processed typically by small to medium mills who then export in small quantities to niche markets. Such Australian importers will be even more averse to being exposed the risks created in the proposed legislation.

Overall, this bill as currently framed will significantly harm the welfare of a large number of semi-subsistence Papua New Guinean Nationals. Was this the intention of the Government?

PNGFIA recommends that the initial ban not be legislated and that attention in the two year period envisaged be focussed on intense consultation with the forest industries PNG and other developing exporting economies so arrangements can be settled in consultation which meet the concerns of the Australian Government in ways that do not cause economic damage in PNG.

In this respect, PNGFIA noted with satisfaction in the first round of hearings that members of the Committee seemed quite receptive to the idea of recognizing national and third systems to verify legality in producer economies. However this same sentiment is not expressed in the latest draft, it merely notes they may be considered among a range of options.

The bill should not be implemented until these matters are settled. We have experience with this type of problem in PNG where legislation unsupported by regulation becomes unworkable.

Australia's Illegal Logging Bill: A More Effective Approach

**A Submission by the Papua New Guinea Forest Industries Association to the
Senate Standing Committee on Rural Affairs and Transport Inquiry into the *Illegal
Logging Prohibition Bill 2011***

January 2012

CONTENTS

EXECUTIVE SUMMARY	4
CHAPTER 1: INTRODUCTION	7
CHAPTER 2: AN ILLEGAL LOGGING PROBLEM?	9
2.1 Defining Illegal Logging	9
2.2 Global Estimates of Illegal Logging	10
2.3 Australian analysis of imports of illegal timber	13
2.4 Analysis of Illegal Logging in Papua New Guinea	14
CHAPTER 3: A CRITIQUE OF THE BILL	17
3.2 Uncertainties in the Bill	18
3.3 Regulatory Uncertainty and the Impact on Business	20
3.4 Pointless regulation of Australian forestry	21
3.5 Recommendations	22
CHAPTER 4: PROBLEMS REGULATING TRADE IN ILLEGAL PRODUCTS	23
4.1 The EU and US Approach	23
4.2 Limitations to Enforcement	25
CHAPTER 5: IMPLICATIONS FOR AUSTRALIAN TRADE POLICY AND INTERNATIONAL TRADE OBLIGATIONS	27
5.1 World Trade Organisation	28
5.2 ASEAN-Australia-New Zealand Free Trade Agreement	29
5.3 Pacific Agreement on Closer Economic Relations Plus	29
5.4 South Pacific Regional Trade and Economic Co-operation Agreement	30
5.5 Australia-New Zealand Closer Economic Relations Trade Agreement	31
CHAPTER 6: CONCLUSIONS	32
REFERENCES	33

ACRONYMS

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ABARE	Australian Bureau of Agricultural and Resource Economics
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
ASEAN	Association of South East Asian Nations
CIE	Centre for International Economics
COC	Chain of custody
DAFF	Department of Agriculture, Fisheries and Forestry
EU	European Union
FLEGT	Forest Law Enforcement, Governance and Trade
GATT	General Agreement on Tariffs and Trade
GMC	Governance management capacity
HS	Harmonized system
ITTO	International Tropical Timber Organization
MDF	Medium-density fiberboard
NGO	Non-government organization
PACER	Pacific Agreement on Closer Economic Relations
PNG	Papua New Guinea
SPARTECA	South Pacific Regional Trade and Economic Co-operation Agreement
TICPI	Transparency International Corruption Perception Index
TPPA	Trans-Pacific Partnership Agreement
TRIEC	Trade Import Export Classification
US	United States
VLC	Verified legal compliance
VLO	Verified legal origin
WADIC	Window and Door Industry Council
WTO	World Trade Organization

EXECUTIVE SUMMARY

The Australian Government is currently planning to introduce legislation that will block the import of 'illegal' timber products into Australia. It should reconsider its approach.

The public policy debate that has surrounded the proposed legislation has been dramatic and protracted. Over a five- to ten-year period, campaign groups such as Greenpeace have lobbied the Australian Government and public intensely. They have staged media stunts that have been intended to smear private sector importers of timber products.

Parts of the Australian timber and wood products industry have at various points seen the legislation as an opportunity to erect trade barriers against imports from trading partners with a greater comparative advantage.

The political logic of introducing such legislation is simple: it demonstrates action to address a supposed environmental problem in developing countries and at little cost to Australian consumers. Yet there are significant flaws in this political reasoning.

The 'problem' that the legislation is supposed to solve is non-existent in some trading partners, like New Zealand and PNG, and is small in others. The data that has been used to inform the debate on illegal logging is at best highly uncertain; at worst it is completely flawed.

There is no internationally-accepted definition of 'illegal' timber; it varies among nations. There has been no or little empirical fieldwork using a robust methodology to assess levels of illegal logging. Nor has anyone created a benchmark to assess whether the problem is increasing or decreasing.

The estimates of illegal logging that have been used in the public policy debate have more often than not been those of environmental campaigners, who are arguably more concerned with discrediting the forestry sector than engaging in a constructive dialogue on forest governance.

The Australian Government's own modelling indicates that Australia's share of the global 'illegal' timber is likely to be as low as 0.34 per cent.

The 'problem' as so defined is not really a problem at all.

The impact on Australia has been noted in the Australian Government's research; it is likely to drive domestic prices up for products that are covered by the regulation.

Moreover, the Australian Government's intention to date is to adopt the Bill which makes imports of illegal product a crime with without adopting regulations which define the terms and establish enforcement mechanisms.

The draft legislation leaves a period of two years in which implementing regulation would be determined, and which products would be covered by the regulation. This would create business conditions that make it difficult for businesses to forward plan effectively.

The Papua New Guinea Forest Industries Association estimates that approximately \$AUD12 million of timber product is exported to Australia every year. Approximately \$AUD5 million of timber is produced by landowners.

Under *Forestry Regulation 1998* (incorporated into the Forestry Act 2001), landowners may harvest up to 500 cubic metres of timber per year, per person annually from customary land.

This type of harvesting requires no legal compliance and requires no environmental management. Under PNG law, this type of harvesting is not classified as 'forest industry activity'.

The PNGFIA estimates that these exports support around 10,000 low income livelihoods in Papua New Guinea, often in rural areas. These smallholders are often exercising their legal right to harvest a small amount of forest.

The immediate threat of the general prohibition against exporting illegal timber will mean these producers will cease supplying the Australian market. This will severely impact the livelihoods of these rural populations.

Further, while the legislation attempts to regulate against imported products, the legislation would also require the same measures to be imposed against domestically produced products. This would impose greater costs on the Australian forest product sector, which is already struggling due to adverse economic conditions and long-term supply problems.

The outline of regulatory measures that have been considered so far by the Government do not provide any further certainty for exporters or importers. Australia is considering introducing proxy standards for legality in other jurisdictions. As with the Lacey Act in the US and the European Union's illegal logging measures, such a move would effectively determine the legality of operations in another country – raising questions of disregard of national sovereignty.

If Australia chooses to determine the legality of the operations of the forestry sector in other countries, there is no reason it would not attempt to determine the legality of other sectors. This would be an effective response to satisfy political constituents in 'trade exposed' sectors seeking industry protection.

Underlying this international trade problem are broader problems with the consistency of the agreement with Australia's international trade obligations. It is highly likely that the legislation is incompatible with Australia's trade agreements with New Zealand (under the Australian New Zealand Free Trade Agreement and the Australia New Zealand Closer Economic Relations Treaty), Pacific nations (under the Pacific Australian Closer Economic Relations agreement) and broader obligations under the World Trade Organization.

That Australia has seemingly not taken its international trade obligations into account is symptomatic of the inward-looking nature of the legislation.

The voice of exporting nations and Australia's largest trading partners in forest products have largely been absent from the debate. These include Papua New Guinea, Malaysia, Indonesia, and New Zealand. That the legislation may be a barrier to trade and have an adverse economic impact on these trading partners does not appear to have figured in calculations.

PNGFIA proposes that passage of legislation be deferred until regulations have been developed. It further proposes Australian officials engage formally and in a sustained way with officials and industry representatives of affected trading partners to develop approaches that will provide confidence about legality of imports in ways that respect national sovereignty and aim to produce collaboratively solutions to the problem of illegal logging where it occurs.

CHAPTER 1: INTRODUCTION

The Australian Government has proposed to introduce measures to ban the import of 'illegally' harvested timber.

Australia has followed the lead of other major developed economies such as the United States and the European Union in attempting to address the 'illegal logging' problem.

However, the problem, and many of the arguments that have been used to justify imposing strict measures to regulate trade in forest products, is poorly defined.

What has been apparent throughout the much of the illegal logging debate over the past decade has been that much of the economic burden that any such regulation will introduce will fall almost entirely upon developing countries.

For Australia, much of the burden will fall on three of its largest and closest trading partners: Malaysia, Indonesia and Papua New Guinea (PNG).

The significance of the forest industry in Papua New Guinea cannot be underestimated. The industry employs around 10,000 people and contributes substantially to GDP.

Economically, PNG is at a crossroads. Current investments from the mining boom threaten to swamp other parts of the economy. Economists have previously underlined the importance of maintaining other industry sectors in the face of such massive investments.

Maintaining Papua New Guinea's forest sector is therefore vital to the broader economy. However, the Australian illegal logging legislation will most likely have an adverse impact on the forestry sector in Papua New Guinea.

This has been underlined in the Australian Government's own research, which stated that the greater economic burden of the legislation would fall on exporting countries – such as Papua New Guinea.

The same research also pointed out that the legislation would have a negative impact on Australian importers and consumers.

There are significant parallels between the proposed Australian legislation and the implementation of amendments to the Lacey Act in the United States.

A zealous approach to Lacey Act by environmental campaigners in the United States has had a negative impact on the US manufacturing sector. The introduction of what is effectively an 'environmental prosecutor' with wide-ranging powers has prompted a political backlash from the business sector and from the public at large

– particularly at a time when economic questions rather than environmental ones have a higher priority among voters.

The PNGFIA considers these adverse consequences can be avoided.

This submission seeks to broaden understanding of the issues and their implications for neighbouring states like Papua New Guinea.

The PNGFIA has made clear its willingness to work with Australian authorities to develop an approach which both contributes to addressing the problem of illegal logging and produces an outcome which does not harm the interests of Papua New Guinea and obviates the trade policy difficulties the current legislation presents for Australia.

About the PNGFIA

The Papua New Guinea Forest Industries Association (inc.) is an incorporated association of companies involved in all levels of operation in the timber industry in Papua New Guinea. It has the following objectives.

- A. To promote Membership of the Association to all bona fide corporate and like entities engaged in the logging, mining, manufacturing, merchandising, exporting utilization and associated servicing and support industries directly or otherwise dealing with PNG forest resources.
- B. To support and protect the integrity, character and status for the forest industry sector and collective interests of Members of the Association.
- C. To represent the collective interests of Members through representatives participation on the National Forest Board, direct communication to Government and through contact with other available agencies or media.
- D. To foster balanced environmental, communication and economic responsibility and practical forest management principles within the forest industry sector.
- E. To oppose any dishonorable conduct or unlawful practice among entities engaged in or associated with the forest industry sector.
- F. To consider and promote the Associations policy position on matters relating to the forest industry sector.
- G. To assess the effect of Government policy, legislative and regulatory measures and other matters on the forest industry sector and where necessary represents the collective views of Members of the Association on these matters to Government, the National Forest Authority, and the community.

CHAPTER 2: AN ILLEGAL LOGGING PROBLEM?

There few robust global estimates of illegal logging indicate that it is a small problem. Studies of individual countries – such as Papua New Guinea – suggest that the problem is insignificant.

2.1 Defining Illegal Logging

Issues surrounding illegal logging are both complex and diverse. Legal, political, social and economic factors shroud the dialogue. These complexities are evident from the onset, with little consensus as to the definition of 'illegal logging'. The term plainly refers to legal transgressions. However there is little agreement as to what constitutes legality. Smith simply defines illegal logging as "timber harvesting related activities that are inconsistent with national (or sub-national) laws."¹ Jaako Poyry expands to include "Harvesting either without, or in excess of authority or in some way avoiding full payment of royalty, taxes or charges".² Seneca Creek, in their benchmark report, provide perhaps the most accepted definition among contemporary analysts. They define 'illegal logging' as:

- i. harvesting without authority in designated parks or forest reserves,
- ii. harvesting without authorization or in excess of concession permit limits,
- iii. failing to report harvesting activity to avoid royalty payments or taxes,
- iv. violating international trading rules and agreements.³

The lack of a standard international definition has led to a large data range throughout the literature. Papua New Guinea is an extreme example where conflicting definitions has led to estimates of illegal logging that range from marginal levels to 90 per cent. Greenpeace reaches the latter figure by applying an encompassing definition that includes violations of laws governing health and safety, workers' rights, tax and transfer pricing.⁴

The difference that this convergence in the definition of illegal logging can make is illustrated through the example of Estonia. The Estonian Government estimates that 1 per cent of timber harvesting in their country is illegal. By contrast,

¹ Smith, W. (2002), *The Global Problem of Illegal Logging*, page 3, www.ito.int/direct/topics/topics_pdf_download/topics_id=1570000&no=1

² Jaako Poyry Consulting (2005), *Overview of Illegal Logging*, page 1.

³ Seneca Creek Associates, LLC & Wood Resource International (2004), "*Illegal*" *Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry*', page 4.

⁴ Turner, J., Katz, A., Buongiorno, J. (2007), *Implications for the New Zealand Wood Products Sector of Trade Distortions due to Illegal Logging*, page 29.

environmental NGO “Estonian Green Movement” claims that 50 per cent of harvesting is illegal.⁵

Under the Greenpeace definition, any Australian business in conflict with authorities over compliance with labor laws or meeting tax obligation would be operating “illegally”.

2.2 Global Estimates of Illegal Logging

The global extent of illegal logging is unclear. Environmental NGOs regularly claim that illegal logging is rampant. NGOs have variously claimed that all logging in Papua New Guinea is illegal⁶, 90 per cent of logging in Indonesia is illegal⁷ and that between 5 and 10 per cent of global industrial wood production was illegal⁸.

In reality, there have been very few studies undertaken which empirically measure the extent of global illegal logging.

Most published reports are based on data contained in a 2004 report by Seneca Creek Associates, which was prepared for the American Forest and Paper Association (AF&PA). Seneca Creek contended that between 5 and 10 per cent of global industrial wood production was illegal and that between 12 and 17 per cent of internationally traded roundwood was from ‘suspicious origins’. The report also contended that illegal logging was more prevalent in relation to hardwood than softwood.

This study has informed a number of later reports, including a 2005 report for the Australian Department of Agriculture, Fisheries and Forestry (DAFF) by Jaako Poyry Consulting and a 2010 report for Australian Department of Agriculture by the Centre for International Economics. The Seneca Creek Report has also provided the basis for World Bank and Organisation for Economic Co-operation and Development reports into illegal logging.

However, there are significant flaws in the Seneca Creek Report which render its conclusions, and the conclusions of reports relying on the Seneca Creek report, unreliable.

The conclusions in the report are reached following an analysis of only eight countries or regions, covering just 43 per cent of global timber trade. These profiled areas were Russia, Indonesia, Brazil, Malaysia, Western or Central Africa, Japan, China and the European Union. Estimates for other countries were reached as a ‘weighted regional average’ rather than an evidence-based approach.

⁵ Estonian Green Movement (2004) *Illegal forestry and Estonian timber exports*

⁶ Greenpeace

⁷ WALHI

⁸ Seneca Creek Associations and Wood Resources International (2004)

Those countries and regions which were profiled by Seneca Creek were profiled in a non-uniform manner which involved supplementing existing claims by environmental NGOs and governments with literature reviews and a limited amount of field research. The authors of the paper have also noted that “hard data on trade of forest products from illegal operations is virtually impossible to consistently gather”⁹ and “no matter how broad or narrow illegal forest activity might be interpreted, its extent is impossible to know with any degree of certainty ... reported estimates are generally only supported through anecdotal information and supposition”.¹⁰

The methodology used by the researchers is also flawed. The main approach seems to be anecdotal observation of timber produces combined with a heavy reliance on existing data (often from problematic sources). This contrasts with the methodologies used to examine trade flows if illegally procured products, such as tobacco.

The World Bank developed such a methodology to assist analysts calculate the amount of tobacco smuggled globally.¹¹ The report details five approaches:

- i. Observe the producers and ask the experts for smuggling data;
- ii. Observe consumers directly and ask them about their methods of obtaining the product;
- iii. Monitor and analyse data on the export and import of the product;
- iv. Compare the sale of the product with estimated consumption by using household surveys;
- v. Compare the sale of the product with estimated consumption by using a mathematical formula and economic inference.

In the Seneca Creek report, import and export data is for the better part ignored, and dismissed because it would somehow ‘launder’ illegally procured timber volumes. This, however, is not something that trade data can actually measure on its own – hence the methodology outlined above.

Subsequently the conclusions of the report on actual rates of illegal logging have high margins of error.

The flaws in the Seneca Creek approach have been recognised in other reports. The Jaako Poyry Consulting report prepared on behalf of the Australian Department of Agriculture, Forestry and Fisheries recognised that “the actual volume and value of

⁹ Ibid, pp. 2

¹⁰ Ibid, pp ES 3

¹¹ World Bank, *Economics of Tobacco Tool Kit – Understand, Measure and Combat Tobacco Smuggling*, page 11. <http://www1.worldbank.org/tobacco/pdf/Smuggling.pdf>

illegal harvesting around the world is impossible to assess accurately"¹² and that "accurate data does not exist and is unlikely to exist in the future"¹³.

The authors were only able to find that Brazilian estimates of illegal logging were in a range "between 20 and 90 per cent". Similarly, illegal logging in Russia constituted "between 20 and 50 per cent" and in the European Union the figure was "up to 80 per cent". Even in highly developed and regulated markets such as the United States and Canada, the Seneca Creek report could only find that illegal logging was somewhere between zero and 10 per cent of forest production.

Despite its methodological flaws, the Seneca Creek report has had a significant impact on perceptions of the magnitude of the illegal logging problem among policymakers since its publication seven years ago.

The most recent global survey of illegal logging was undertaken by the UK-based think tank Chatham House.¹⁴ The study examined twelve producer, processor and consumer nations and found that in the last decade, illegal logging has declined between 50 per cent and 70 per cent in Indonesia, Brazil and Cameroon.

The data used relies primarily on perceptions of the importance of illegal logging as a problem. It also uses media coverage as a key indicator in measuring the response to the problem. This underlines the fact that no robust empirical measures for levels of illegal timber harvesting have been used, nor of how much illegal harvesting contributes to forest loss more broadly.

One methodology is to assess the "balance" between recorded timber production and reported timber traded. The Chatham House report does not indicate how data is acquired and appears to rely principally on the opinions of analysts.

The paper restricts itself to a definition of illegal logging that rests on the industrial commercial end-use of the timber, despite there being a consensus among experts consulted that this type of logging wasn't necessarily the most significant type of illegal logging. In Brazil, for example, small-scale community logging and illegal logging for mining operations – rather than industrial commercial use – were thought to be much more significant.

Similarly, the paper at no point addresses the drivers of illegal logging in a substantive way.

¹² Jaako Poyry Consulting (2005) Overview of Illegal Logging, Report prepared for the Australian Department of Agriculture, Fisheries and Forestry, No. 51A05753

¹³ Ibid

¹⁴ Lawson, S. and MacFaul, L., (2010) Illegal logging and related trade: Indicators of the global response, Chatham House report, accessible at: <https://www.illegal-logging.info/uploads/0904CHAillegalloggingbriefingpaper09.731.pdf>

It refers to illegal logging as being a driver of forest loss. Yet the most comprehensive methodology on determining causes of deforestation¹⁵ sensibly refers to illegal logging as simply being a type of wood extraction (a proximate cause of forest loss) or a variation within weaknesses in governance structures (an underlying cause of forest loss).

The conclusions drawn from the Seneca Creek report, and more generally from the current knowledge of the extent of global illegal logging indicate that there is no sufficient basis for implementing a burdensome and costly regulatory regime on both Australian domestic timber processors and timber producers from importing nations.

2.3 Australian analysis of imports of illegal timber

There have been a small number of reports that have examined imports of illegal timber into Australia.

Jaako Poyry (2005) found that approximately 9 per cent of Australian imports of forest products and wooden furniture was considered illegal and was valued at approximately \$AUD452 million. It has been estimated that 22 per cent of wooden furniture may be illegally harvested, as well as 14 per cent of forest products such as doors and mouldings, 11 per cent of wood based panels and 8 per cent of sawn wood.

Many of these products are thought to contain illegally harvested timber, but they have been processed in nations such as India and China and exported to Australia. This supply chain makes the identification of illegal harvested timber very difficult.

A report by the Australian Timber Importer's Federation (ATIF) for the Australian Department of Agriculture, Fisheries and Forestry¹⁶ found that a considerable number of companies already have policies in place to prevent acquisition of illegal product. The report found that it was estimated that 60 per cent of importers had policies for the legal verification of the timber they purchased and 26 per cent had no formal policies in place, but had developed ethical relationships with suppliers to provide legal assurances. It was found that only 14 per cent of companies had no formal policy.

Arguably the most robust report on illegal timber in Australia was produced by the Centre for International Economics (CIE) in 2009. It undertook an issues paper on a proposed new regulatory regime to deal with "illegal logging".¹⁷ The issues

¹⁵ Geist, Helmut J., and E. F. Lambin, 2001. What drives tropical deforestation? LUCR Report Series no.4. Louvain-la-Neuve, Belgium: CIACO

¹⁶ Australian Timber Importer's Federation (2006) "A Review of the Current Policies & Practices Employed by Timber and Timber Product Importers to Determine the Legality of Supply, accessible at: http://www.daff.gov.au/__data/assets/pdf_file/0007/37591/procurement_practices_report_june26.pdf

¹⁷ Centre for International Economics (2010) "A Final Report to inform a Regulation Impact Statement

paper found that in Australia, approximately 10 per cent of sawn wood imports come from nations which are considered “high risk” countries by the Chatham House study – namely, Indonesia and Malaysia. In 2007-08, those imports were valued at AUD 74 million.

The CIE found that Australia's imports account for around 2.5% of world timber trade; and only 0.034 per cent of global timber production. The CIE also calculated that Australian imports may account for only 0.34 per cent of products incorporating illegally logged timber.

The Australian legislation to implement a new regulatory regime on top of companies' existing policies to ensure legality of timber is a large regulatory burden to potentially change the buying behaviour of just 14 per cent of timber importers and 0.34 per cent of timber products potentially including illegal logged timber.

2.4 Analysis of Illegal Logging in Papua New Guinea

In 2010, Papua New Guinea exported approximately AUD12 million of timber products to Australia.¹⁸ The majority of exports were in the form of sawn wood, which constituted just over \$US4 million in and plywood \$US1 million. Australia is a relatively minor source for Papua New Guinea's timber exports, with the vast majority of exports going to China and India.

While Papua New Guinea has been characterised by environmental groups as a prime example of why a prohibition on illegal logging is required, it is clear that the Australian legislation will have a minor influence over logging practices in Papua New Guinea.

The amount of illegal logging in Papua New Guinea has also been vastly overstated by environmental NGOs as well as analyses.

Seneca Creek (and consequently the World Bank¹⁹) both claim that 70 per cent of timber exports of timber are illegal. However this figure is derived from the Seneca Creek Report derived 'regional average' of illegal logging – primarily based on estimates from Indonesia, Malaysia and Thailand – because there was little or no data relating to illegal logging.

for the proposed new policy on illegally logged timber”, accessible at:
http://www.thecie.com.au/content/news/Illegal_logging.pdf

¹⁸ Australian Department of Foreign Affairs and Trade data

¹⁹ World Bank Group, “Strengthening Forest Law Enforcement and Governance Addressing a Systemic Constraint to Sustainable Development”, August 2006

The Seneca Creek report explicitly stated no empirical analysis of illegal logging in PNG was undertaken.

Jaako Poyry further claims that all of PNG's hardwood exports to Australia are illegal.²⁰ Jaako Poyry does not cite any fieldwork, such as tracer studies, to track the journey of an illegal log entering an Australian port.

To determine this figure, Jaako Poyry assessed producer countries against Transparency International's Corruption Perceptions Index (TICPI) to develop an assessment of governance and management capacity (GMC). The GMC rating effectively determines percentages of illegal timber according to this methodology.

The assessment ignores country-specific measures governing exports, and particularly those regulating forestry exports, which are in place in Papua New Guinea. They include an audited, third-party system to verify payment of royalties before timber is exported.

The existence of this system led consultants who were contracted by DAFF to advise on models to verify legality of exported timber to observe in their draft report that the export monitoring system made it unlikely that the incidence of exports of illegal timber from PNG was high.

Analysis of this data in the ITTO's *Annual Review* of discrepancies in reporting of international trade in tropical timber trade discrepancies in 2005 showed that the difference between the log export volumes reported by PNG authorities and Chinese importers was only 2 per cent.^{21,22} Major discrepancies between export data and data recording the import of that product in destination economies are considered the leading "red light" indicator of trade in illegal products. A discrepancy of 2 per cent does not show that. It is a normal variation when export and import statistics are compared.

Considering China is the largest importer of PNG roundwood logs, it is fair to regard the Seneca Creek and Jaako Poyry assessments as technically uninformed and grossly exaggerated in the case of PN, and to set them aside.

Greenpeace claims that up to 90 per cent of all logging in Papua New Guinea is illegal. However the Papua New Guinea Government claims that all timber harvesters have appropriate permits and licenses and there is no illegal logging in Papua New Guinea. The PNGFIA underlines that its members, which undertake 85 per cent of timber harvesting in PNG, may not engage in illegal harvesting.

²⁰ Curtin, T. Is logging in Papua New Guinea illegal and unsustainable? IPA Review, vol.58 no.3, October 2006. Accessed at http://www.timcurtin.com/images/IPA_CURTIN.pdf.

²¹ Asumadu, K., (2006), *ITTO Tropical Forest Update* 'Papua New Guinea – The Other Side of the story'.

²² Ibid page 4

Instead, environmental NGOs have mounted a misinformation campaign which suggests that most timber from Papua New Guinea is illegally harvested, as part of a strategy to curtail growth in the national forestry industry. This campaign is backed with reference by anti-forestry NGOs to reports of rates of deforestation in PNG which have been shown to be drawn from inaccurate and erroneous base numbers.

The *Illegal Logging Prohibition* Bill as presented, with its draconian penalties and proposed implementation procedures, will serve as a costly and discriminatory set of regulations which will harm the local people of PNG as well as Australian businesses which import and manufacture timber products.

Given how little illegal timber is imported into Australia, it will have negligible impact on those economies where illegal logging exists in any sort of significant way.

CHAPTER 3: A CRITIQUE OF THE BILL

The Australian Bill to prevent 'illegal' timber exports creates such high levels of uncertainty it will severely restrict imports.

The Illegal Logging Prohibition Bill 2011 ('the Bill') was tabled in the Australian Parliament on 23rd November 2011. The declared purpose of the Bill is to make it a criminal offence to import timber products that contain illegally logged timber. The effect will be to block trade. The Bill also prohibits the importation of regulated timber products containing illegally logged timber or the processing of illegally harvested raw logs by domestic processors.

When enacted, the Bill will impose a ban on imports of illegal timber without any supporting regulations to define its terms or guide implementation. This is not normal parliamentary practice.

The Bill binds the Government to introduce two years after passage refined controls on imports. That will include a requirement for importers to comply with a 'due diligence' standard before imports are permitted. As well importers will be liable for a secondary prohibition against negligently importing a 'regulated timber product' containing illegally logged timber. A schedule of 'regulated products' is to be developed. The terms of the due diligence standard are unclear. They may encompass recognition of national standards in the exporting economy, standards set by the industry or private certification schemes.

Australian officials have indicated they will consult a working group of industry representatives as these are fleshed out. This process appears not to have advanced far.

3.1 Impact on Papua New Guinea

The Papua New Guinea Forest Industries Association estimates that approximately \$AUD12 million of timber product is exported to Australia every year. Approximately \$AUD5 million is produced by landowners.

Under *Forestry Regulation 1998* (incorporated into the Forestry Act 2001), landowners may harvest up to 500 cubic metres of timber per year, per person annually from customary land.²³

This type of harvesting requires no legal compliance and requires no environmental management. Under PNG law, this type of harvesting is not classified as 'forest industry activity'. It is, rather, considered by many landowners as a customary right.

²³ .Government of Papua New Guinea. Forestry Regulation (1998). Accessed at http://www.paclii.org/pg/legis/consol_act/fr199823

The PNGFIA estimates that these exports support around 10,000 low income livelihoods in Papua New Guinea, often in rural areas. These smallholders are often exercising their legal right to harvest a small amount of forest.

The immediate threat of the general prohibition against exporting illegal timber will mean these producers will cease supplying the Australian market. This will severely impact the livelihoods of these rural populations.

When the detailed controls on imports, which are to be introduced only two years after this bill enters into force, are enacted, it is anticipated that the cost to the processors of meeting the compliance requirements of the Australian bill will act as a further deterrent to those producers seeking to export to Australia product derived from harvesting by smallholders.

Overall the bill as currently framed will significantly harm the welfare of a large number of semi-subsistence Papua New Guinean nationals. A significant number of uncertainties surrounding the operation of the legislation were noted in the Senate Transport and Rural Affairs Committee Report on the Exposure Draft of Bill. Many of these uncertainties still exist in the new Bill.

3.2 Uncertainties in the Bill

Many submissions to the Senate Committee on the Draft Exposure Bill complained that “leaving the government's policy intent to delegated or subordinate instruments is contrary to best legislative practice and had created uncertainty for an industry unable to estimate the legislation's potential financial and other impacts on itself”²⁴.

The Bill does not define what a ‘regulated timber product’ is. Under section 9 of the Bill, it will be an offence to negligently import a ‘regulated timber product’ if contains illegally logged timber. There is currently considerable confusion over which products will be included as a ‘regulated timber product’. There is a large level of uncertainty in the industry about whether ‘regulated timber product’ includes any product with any wood fibre content or a certain threshold of content.

The Wood and Door Industry Council (WADIC) submitted to the Senate Transport and Rural Affairs Committee that approximately 50 per cent of wood products enter Australia in ‘finished’ form²⁵. WADIC argued that ‘regulated timber product’ must include any product with any fibre content, otherwise it would constitute any

²⁴ Senate Committee Legislation Committee on Rural Affairs and Transport, Report on Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011, page 27

²⁵ Joint submission by Window and Door Industry Council, Decorative Wood Veneers Association, Timber Merchants Association, Timber and Building Materials Association (Aust), Timber and Building Materials Association (Qld); Cabinet Makers Association (Vic); Cabinet Makers Association (WA); Qld Timber Importers, Exporters and Wholesalers Association, “Submission to the Senate Inquiry on the Illegal Logging Prohibition Bill 2011” (sic), page 4

unfair advantage to any imported finished products against Australian wood processors.

The legal standard for the implementation of the general prohibition against importing illegal timber is also unclear. From a strict reading of the Bill, the general prohibition is a *no defence* or *strict liability* offence. That is, an offence will be committed if illegally-logged timber is imported regardless of the importer's attempts to ensure the timber was not illegally logged. However, the Explanatory Memorandum to the Bill indicates that an offence will only be committed if an importer 'knowingly' or 'recklessly' imports a product containing illegally logged timber. The lack of clarity surrounding the application of the general prohibition creates significant uncertainty over the risk associated with importing timber and timber products and has the potential to impede the importation of timber to Australia.

Further uncertainties exist around the actual definition of 'illegal logging'. The Bill defines 'illegal logging' as harvested in a manner which breaches the law of the place in which it was harvested. Many environmental NGOs have argued that 'illegality' should take into account factors such as indigenous peoples' rights or where harvesting would breach the law in Australia if the harvest was to have occurred in Australia.

The Department of Agriculture, Fisheries and Forestry noted that the definition of 'illegal logging' was deliberately "broad"²⁶. The Senate Committee urged the legislators to provide greater clarity on the definition on 'illegal logging'. This legislation makes it very unclear whether factors beyond normal timber cultivation and harvesting, such as native people's land tenure, will be considered as a part of deciding legality.

Australian industry has raised significant concerns regarding the uncertainty surrounding the intent and implementation of the Bill. Due to the number of unresolved issues surrounding the operative terms of the legislation and regulation, industry is unable to factor in expected costs increase. The introduction of 'due diligence requirements' under this Bill will certainly act as a brake to investment in the timber and timber products industry in Australia.

It is also unclear where the Australian Federal Government derives constitutional power to implement these regulations on domestic timber producers. A reading of sections 15 and 17 of the Bill implies that the Federal Government is primarily relying on the 'corporations powers' under section 51 (xx) of the Australian Constitution. This would amount to an unprecedented incursion into Australian State Government powers. Whilst a precedent was set by the 'Work Choices' case in 2006, the Work Choices case related to the use of the corporations power to regulate the internal and systemic operations of a corporation – it is an entirely

²⁶ Above n 1, page 30

new issue for the Federal Government to use the corporations power to intrude on the day-to-day business decisions of all corporations in Australia. The precedent set by this legislation has the potential to have wide-ranging ramifications for the regulatory regime under which all Australian businesses operate.

3.3 Regulatory Uncertainty and the Impact on Business

The first and most obvious impact of regulatory uncertainty is that it impedes the ability of business to forward plan for future investments or business conditions. By delegating the bulk of the operative standards in the Bill to subordinate legislation or regulation, the Australian Government has left a significant number of questions unanswered regarding the operation of the legislation. In addition, given that regulations are not mandatorily subject to a Parliamentary process in Australia there is no guarantee that the 'due diligence requirements' will not be tightened by stealth in coming years to closer resemble the agenda of interest groups, including environmentalists.

Furthermore, the Bill involves a two-year delay before the 'due diligence requirements' comes into operation. As noted in the Senate Committee report into the draft Exposure Bill "[a] number of submitters argued that leaving the government's policy intent to delegated or subordinate instruments is contrary to best legislative practice and had created uncertainty for an industry unable to estimate the legislation's potential financial and other impacts on itself".²⁷

A primary purpose of the Bill is to include a regulatory regime to cover domestic producers as well as importers of timber and timber products. There are currently a series of regulations in force across the different Australian State and Territory Governments. Any attempt to set regulatory standards may seek to harmonise existing State and Territory laws without adding additional layers of bureaucracy and red-tape to timber harvesting in Australia.

This concern was raised directly in the Senate Committee hearings by a number of domestic local producers. This was also backed by the regulatory impact statement completed on behalf of the Australian Department of Agriculture, Fisheries and Forestry, could not estimate the cost impact of the new regulations on small business owners²⁸ – even though 92 per cent of the businesses impacted by the legislation are small businesses.²⁹

The Department of Agriculture, Fisheries and Forestry has also indicated that it will seek to 'harmonise' the regulatory regimes between the US, EU and Australia.

²⁷ Above n 1, page 27

²⁸ Cailum Pty Ltd, Illegal Logging Policy – Small Business Impact Statement (Report prepared for the Department of Agriculture, Fisheries and Forestry, March 2010)

http://www.daff.gov.au/data/assets/pdf_file/0010/1872631/Cailum_-_Small_Business_Impact_Statement.pdf

²⁹ Ibid

There is no guarantee that the three regimes will not contain differing standards³⁰. There are already a number of international 'illegal logging' schemes in existence. Both the European Union and the United States have implemented regimes for the verification of timber and timber product imports. This will obviously increase the cost of imports into Australia and further reduce the competitiveness of the Australian furniture industry.

The additional layers of red-tape for Australian forestry producers will also mean that the inherent value of their forestry assets will be downgraded. As with all legislative changes, a higher regulatory burden will mean that potential buyers will be willing to pay less for the asset at sale.

It is clear that the Australian consumers, processors and producers will suffer as a result of poorly executed legislation which will introduce significant cost and uncertainties for Australian business and consumers without achieving any real improvement in forestry standards across the globe. In a report to the Australian Department of Agriculture, Fisheries and Forestry, CIE noted that:

“[a]ny action Australia takes to restrict imports will impose costs on all products consumed in Australia. However, benefits will only relate to the tiny influence Australia has in foreign markets. In assessing the effectiveness and efficiency of any regulatory policy aimed only at restricting imports, the mathematics of the market is stacked convincingly against success. Moreover, there is no evidence that the balance of intangible costs and benefits could change this. Indeed, because the effectiveness of the policy is so small, intangible benefits will be commensurately low. For this reason, TheCIE recommends that Australia consider only non-regulatory policy options to combat illegal logging”³¹.

3.4 Pointless regulation of Australian forestry

The new legal logging regime proposed in the Bill for Australian domestic producers will create a new layer of bureaucracy to fix a problem that does not exist. All timber harvesting in Australia complies with existing State and Federal Government laws. There has been no suggestion by any proponents of the Bill that 'illegal logging' in Australia is a problem which requires regulation.

The mandatory 'legal logging requirements' for Australian domestic producers were implemented to address assertions that the prohibition on importing illegally

³⁰ Above n 1, page 68

³¹ TheCIE, “[Final Report to inform a Regulation Impact Statement for the proposed new policy on illegally logged timber](#)”, page 17

logged timber was contrary to Australia's obligations under the World Trade Organization (WTO). The contention is that if the same regulatory controls apply to both importers and domestic producers, the law will not be contrary to the rules of the WTO.

This is an uninformed understanding of Australia's obligations under as member of the WTO. As noted in the next section, expert trade law opinion is that the Bill is clearly open to challenge in the WTO by other members of the World Trade Organization.

Timber in Australia is legally planted and harvested. There are numerous authorities throughout Australia which currently have responsibility for overseeing the forestry industry to ensure that they comply with existing laws.

This misreading of the provisions of the Agreements of the World Trade Organization will result in imposition of an unnecessary and costly regulation of domestic timber producers and will simply increase the costs to Australian producers of harvesting timber in Australia.

3.5 Recommendations

The PNGFIA recommends that the general prohibition against the importation of illegally logged product not be legislated and that attention in the two-year period envisaged be focused on intense consultation with forest industries in PNG and other developing exporting economies so arrangements can be settled in consultation which meet the concerns of both the Australian government and the exporters in ways that do not cause economic damage in the exporting country, in our case PNG.

CHAPTER 4: PROBLEMS REGULATING TRADE IN ILLEGAL PRODUCTS

The Government efforts to define legality in other jurisdictions raise questions of sovereignty and highlights implementation problems.

As stated in earlier chapters, 'illegal logging' is a relatively new concept. Similarly, measures dealing with the legality of production of a commodity in another jurisdiction are also new.

The nearest comparison is in the global tobacco trade, in which a number of countries demand assurances that appropriate taxes and levies have been paid. However, there are no international requirement on tobacco exports for legality assurance that parallel those being demanded from environmental campaigners in relation to timber, such as conformity with labour laws (e.g. the use of child labor) and appropriate transport documentation.

4.1 The EU and US Approach

Measures that have been considered by sovereign governments that attempt to prohibit or curb imports of illegal logging include:

- *Amendments to the US Lacey Act* – The Lacey Act was originally designed to prevent the poaching of game in one state and sale in another; the Act prohibits transportation of illegally captured animal species over state lines. In 2008 it was extended plant species, with a specific application to the import of illegal timber. The act requires timber importing companies to declare quantities and species contained in shipments. The Act also permits the search and seizure of property if goods are suspected to be harvested contrary to the laws of the exporting country.
- *VPA-FLEGT (Voluntary Partnership Agreement – Forest Law Enforcement, Governance and Trade)* – The European Union's FLEGT program requires an intergovernmental agreement between the European Union and a partner country. The agreement provides a mechanism for both governments to determine a standard for the legality of forest products, or nominate proxies for this standard.
- *EU Due Diligence* – The European Union Due Diligence Regulation makes it an offence for sellers of domestic or imported timber to knowingly place illegally procured timber on European markets, whether imported or domestically produced. The regulation consequently requires sellers to undertake due diligence in relation to supply chains by using legality assurance systems (see below).

The policy debate on timber legality and subsequent policy development has been the catalyst for the establishment of a number of voluntary assurance systems for

the private sector and for mandatory systems for national governments. These include:

- *Verification of Legal Origin/Compliance (VLO/VLC)* – These are private, voluntary systems that have been developed by companies such as SGS and Smartwood to provide legality assurance systems for timber producers.
- *Chain of Custody (CoC) Systems* – Private, voluntary systems that allow the tracking of timber and timber products back to its source.
- *Mandatory Government-backed systems for legality verification* – these include Indonesia's *System verifikasi legalitas kayu*.

In voluntary private sector systems, a standard for legality is developed based on relevant national legislation and regulations, as well as stakeholder consultation processes. The development of the standard provides the basis for conformity assessments.

The determination of the legality of any product or activity in any sovereign state is for the relevant national authorities to determine and police, not an international instrument designed to regulate the terms of commerce to enable economies to secure the benefit of the comparative advantage of their national economies.

The imposition of requirements on exporting nations to supply information relating to legality raises the question of which authority determines what is illegally or legally produced in another national jurisdiction.

Recently introduced or amended regulations under which this has occurred include the European Union FLEGT (Forest Law Enforcement, Governance and Trade) Voluntary Partnership Agreements, and the recent amendments to the United States' Lacey Act, to include plant-based materials.

EU FLEGT requires an intergovernmental agreement between the European Union and a partner country. The agreement provides a mechanism for both governments to determine a standard for the legality of forest products, or nominate proxies for this standard. However, the problem is the ongoing determination of the standard, and the authority that will house this power. By the nature of the agreement, the authority must necessarily lie in part of fully outside of the exporting country.

The Lacey Act at a bare minimum requires importing companies to declare quantities and species contained in shipments. However, the Act permits the search and seizure of property if goods are suspected to be harvested contrary to the laws of the exporting country.

The nature of the Act requires US officials to interpret and effectively adjudicate on laws outside of the United States.

In such cases it may be possible for the assurances provided by exporters – either through experience or even legality systems – may not necessarily equate to the findings of US authorities.

It may also be the case that exports may not follow the 'letter of the law' in other jurisdictions where legal systems are poor, and implementing regulation has not been finalised, or laws are considered out-dated and rarely enforced.

The Australian draft legislation does not attempt to take the step of determining legality in another jurisdiction. However, the implementing regulation is likely to determine proxies for legality in other jurisdictions by accepting voluntary forms of third-party legality verification as assurance of legality.

The measure does not directly attempt to determine legality of harvesting, etc., but the net result is the same: an external body, outside of a country's legal system determines the legality of a product when it enters Australia.

The measure further ignores the fact that these systems are voluntary systems that are designed for business-to-business assurance of legality. They are not designed to make government-to-government legal determinations per se.

4.2 Limitations to Enforcement

The Australian draft regulation does not introduce definitions of what a 'regulated timber product' is, or at the very least, introduce an approach to classify timber products under an internationally recognised system such as the harmonised system (HS) code for international trade.

For example, Chapter 44 of the HS defines 'Wood and articles of wood'. However, these chapters exclude articles manufactured from wood, such as wooden furniture and wooden toys, which may come from a single source.

The Chapter does, however, include items made from composite wood products, such as medium density fibreboard (MDF), veneers and paper.

Global furniture manufacturer and retailer IKEA noted in its submission to consultations on the US Lacey Act that fibre board may use as many as 70 to 100 different species in its production, with a large number of points of origin.

The IKEA submission also noted that in the case of paper products – such as melamine paper – production processes use as many as 5 to 150 species in production.

The IKEA issues raise the difficulty of assessing the legality of processed primary products and manufactured products without imposing a significant regulatory burden on producers and importers, or an additional strain on resources within the government.

While the concerns raised by IKEA apply to a US context, there are parallels in an Australian setting, particularly in relation to classifications used by the Department of Foreign Affairs and Trade for imports and exports.

Australia's Trade Import Export Classification (TRIEC) system was introduced last year. The system harmonises levels of manufacture with existing HS codes. The TRIEC establishes a basic set of criteria for determining the levels of processing or manufacture in products. They also provide a framework for determining the complexity of assessing product legality, beginning with unprocessed primary products (e.g. logs) through to processed primary products (e.g. sawn timber), manufactured products (e.g. veneers, MDF, doors, mouldings) and elaborately transformed paper products (e.g. paper labels).

As it stands, the Australian legislation makes no distinction between these processes and levels of transformation and therefore does not attempt to address levels of complexity within these products. It simply refers to proposed 'regulated timber products'. While it is not necessarily the place of the legislation to do this; the distinction between the levels of transformation or processing of products and associated complexity has been referred to only in passing.

Indeed, the economic modelling undertaken by CIE and by ABARE instead uses the implementation categories that have been proposed for the Lacey Act in the US, which are, at best, incongruous with the TRIEC system, and at best illogical. For example, the categories place newsprint and printing/writing paper, which requires greater transformation and most likely has a broader range of sources, ahead of all types of pulp.

Similarly, the Cailum Small Business Assessment uses the ABARE classifications for primary and secondary wood products, but makes no distinction between the levels of transformation among the sub-categories provided by ABARE.

The most straightforward approach would be to commence with the least transformed exported/imported products, i.e. logs. This, and this alone, should be the commencement point. It should also be undertaken at a government-to-government level in order to identify genuine problems rather than applying blanket solutions.

CHAPTER 5: IMPLICATIONS FOR AUSTRALIAN TRADE POLICY AND INTERNATIONAL TRADE OBLIGATIONS

The legislation reverses a long standing convention on both sides of politics that Australia supports on open global market and does not endorse use of trade barriers to advance non-trade objectives. This measure will put Australia in conflict with the WTO and regional trade agreements with New Zealand, ASEAN and South Pacific states. This is not in Australia's long-term interest.

Australia has historically been at the forefront on the free trade agenda, particularly in the Asian Pacific region. This commitment to free trade and trade reform has involved playing a leading role in the negotiation of the World Trade Organization and advancing the APEC goal of free and open trade in the Asian Pacific region. Australia has negotiated a number of bilateral and regional agreements across Asia and the Pacific.

This Bill will put Australia in a position where it will impose trade controls on its closet neighbours and some important trading partners, in contravention of its commitments to open trade in multilateral, regional and bilateral agreements.

A recent House of Representatives Standing Committee on Economics Report into the mandatory labelling of palm oil found that such a measure was likely to breach Australia's obligations under the World Trade Organisation.

The Report noted a legal opinion by Professor Andrew Mitchell³² which found that the mandatory labelling of palm oil was discriminatory against imports of palm oil and was "more restrictive than necessary to achieve either a health or environmental purpose", which would render a trade restrictive measure allowable.

The Report also noted the conclusion that "in order to meet an environmental objective, the Bill would have to show that it reduces the amount of unsustainable palm oil produced and that this reduction makes 'a material contribution to' reduced deforestation". The Committee Report concluded that Australia was unlikely to win any case brought against it in front of the WTO on the mandatory labelling of palm oil.

There are parallels between the food labelling bill and the proposed illegal logging legislation with regards to their consistency with Australia's trade obligations.

³² Mitchell and Sheargold (2010) "The Consistency of the Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2009 with the WTO Agreements", Submission to the Australian Senate Community Affairs Legislation Committee, accessed at: http://www.aph.gov.au/Senate/committee/clac_ctte/food_standards_amend_bill_2010/submissions/sub301a.pdf

5.1 World Trade Organisation

Australia is a founding member of the World Trade Organisation and a signatory to the General Agreement on Tariffs and Trade (GATT) and the Technical Barriers to Trade (TBT) Agreement. Under both these agreements, the Australian Government's *Illegal Logging Prohibition* Bill has the potential to breach Australia's WTO obligations.

The Bill could be argued to breach Article I:1 of the GATT – the most favoured nation treatment. Article I:1 of the GATT grants “any advantage, favour, privilege or immunity” to any product in international trade, the Member must also grant it to any other “like product” originating in or destined for the territories of all other Members³³. It is arguable that the Bill creates an advantage for timber and timber products produced in some nations as opposed to other nations, because the Bill defines ‘legality’ by the country it comes from, thereby naturally favouring imports from one nation ahead of another.

The second limb of Article I:1 is that an offending measure must discriminate between “like products”. While there has not been a considerable amount of interpretation of ‘like products’ under WTO law, ongoing WTO jurisprudence appears not to include ‘processes and production methods’ as a valid ground for claiming products are not ‘like products’. On these grounds, the Bill would potentially breach Article I:1 of the GATT.

It is also arguable that the Bill is not exempted from the requirements in Article I:1 under Article XX which includes an exemption for a measure which is “necessary to protect human, animal or plant life or health”³⁴. It can be argued that the Bill is not “necessary” for the protection of plant or animal life or health because it is “more trade restrictive than necessary”. Under these circumstances, the Bill would not attract the coverage of the exemptions in Article XX.

Article XI:1 of the GATT also prohibits ‘prohibitions or restrictions’ of any kind, other than duties, taxes or other charges, on ‘the importation of any product’³⁵. It may be argued that the criminal charges stemming from any breach of the Bill may constitute a ‘prohibition or restriction’ on importation. It may also be argued that the Bill will result in a *de facto* prohibition or restriction on the importation of any product with a high risk of containing illegally logged timber. As a result, it may be argued that the Bill also breaches Article XI:1 of the GATT.

In its current states, the Bill does not come within the ambit of the Technical Barriers to Trade Agreement (TBT Agreement). However, when the regulations to implement the Bill are enforced, these regulations may fall under the TBT Agreement by virtue of setting down “product characteristics or their related

³³ Article I:1, General Agreement on Tariffs and Trade

³⁴ Article XX(b), General Agreement on Tariffs and Trade

³⁵ Article XI:1, General Agreement on Tariffs and Trade

processes and production methods, including the applicable administrative provisions, with which compliance is mandatory”³⁶. If this was the case, the regulations applying Bill may be contrary to Articles 2.1 and 2.2 of the TBT Agreement. It can be argued that such a technical regulation would breach the requirement that “products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”³⁷ whilst also being more trade restrictive than necessary to reach a legitimate objective³⁸.

5.2 ASEAN-Australia-New Zealand Free Trade Agreement

The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) came into force on 1 January 2010 and was Australia's first regional free trade agreement. Article 7.1 of the AANZFTA contains the same ban on prohibitions or restrictions' of any kind, other than duties, taxes or other charges, on 'the importation of any product'³⁹ as is contained in Article XI:1 of the GATT. Therefore, if the Bill is found to breach Article XI:1 of the GATT, it will also breach Article 7.1 of the AANZFTA. Chapter 15 of the AANZFTA also contains the same exemptions for certain trade restrictive measures that are included in Article XX of the GATT. However, as it was argued above, those exemptions do not justify the restrictions contained in the Bill.

The AANZFTA also includes a number of prohibitions which can be claimed in relation to the Bill. Chapter 11 of the AANZFTA includes a prohibition against treating investors from signatory countries any less favourably to national investors in like circumstances. If the Bill imposed less favourable conditions on investors with property rights in timber or timber production facilities, it may be argued that the Bill is also in breach of Chapter 11 of the AANZFTA.

5.3 Pacific Agreement on Closer Economic Relations Plus

The Pacific Agreement on Closer Economic Relations (PACER) Plus are a set of negotiations between Australia, New Zealand, Papua New Guinea and a range of other Pacific Island nations which seeks to help Pacific Islands Forum countries benefit from enhanced regional trade and economic integration. The negotiations for PACER Plus are ongoing and are aimed at developing a new economic and free trade agreement in the region. However, the primary aim of PACER Plus is to

³⁶ TBT Agreement Annex 1(1).

³⁷ Technical Barriers to Trade Agreement, Article 2.1

³⁸ Technical Barriers to Trade Agreement, Article 2.2

³⁹ ASEAN Australia New Zealand Free Trade Agreement, Article 7.1

promote the economic development of Forum Island Countries through greater regional trade and economic integration.

Pacific Island nations have been highlighted by many proponents of the Bill as the primary examples of why legislation for the prohibition on illegal logging is necessary. During the Senate Committee on Rural Affairs and Transport, it was noted that nations such as Papua New Guinea was a high risk nation as an exporter of illegal timber. Timber, plantations and agriculture represent an important mechanism to provide opportunity for economic development. Moves by the Australian Government to implement legislation which fundamentally harms the Pacific Islands exports may be views by the Pacific Island nations as contrary to the spirit of the PACER Plus negotiations and hinder any future possibility of reaching an agreement.

5.4 South Pacific Regional Trade and Economic Co-operation Agreement

The South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA) came into effect in 1981. It is an Agreement which seeks to give the Pacific Island nations which are signatories to the Agreement, including Papua New Guinea, Solomon Islands and Tonga, “duty free and unrestricted access to the markets of Australia and New Zealand over as wide a range of products as possible”⁴⁰.

Under the Agreement, Australia granted duty free and unrestricted access to the Australian market for a range of products listed in the Schedule of the Agreement. These products include a range of wood, timber and timber products including but not limited to wood beading, cellular panels of wood, sawn wood panels and paper and paperboard.

The Agreement includes an exemption for measures which are “necessary to protect human, animal or plant life or health” provided such measures are “are not used as a means of arbitrary or unjustifiable discrimination or as a disguised restriction on trade”⁴¹. From the above discussion, it is clear that the Bill arguably would not be justified by these exemptions. On this basis, the Bill may also be a breach of Australia’s commitments under SPARTECA.

⁴⁰ South Pacific Regional Trade and Economic Cooperation Agreement, entered into force June 1982, accessible at: <http://www.worldtradelaw.net/fta/agreements/spartecafa.pdf>

⁴¹ South Pacific Regional Trade and Economic Cooperation Agreement, Article II(a)

5.5 Australia-New Zealand Closer Economic Relations Trade Agreement

The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) was signed on 28 March 1983 and has been recognised in the WTO as among the world's most comprehensive, effective and multilaterally compatible free trade agreement, covering substantially all trans-Tasman trade in goods, including agricultural products, and services⁴². ANZCERTA is supported by over 80 other Trans-Tasman Agreements.

The New Zealand Commissioner to Australia noted in the Senate Committee hearings on the Bill that under the ANZCERTA, goods produced in New Zealand can be legally sold in Australia with no further sales related requirements placed on it, however the Bill would place New Zealand timber outside of the scope of the ANZCERTA thereby imposing new regulations on the importation of New Zealand timber to Australia⁴³.

The Commissioner noted that the Bill set a precedent for setting up regimes to declare the legality of any products, thereby removing them from the auspices of ANZCERTA. This is obviously a retrograde step and precedent for the trade relations between Australia and New Zealand and contrary to the spirit of ANZCERTA.

⁴² Australia-New Zealand Closer Economic Relations Trade Agreement summary, Department of Foreign Affairs and Trade, accessible at: http://www.dfat.gov.au/fta/anzcerta/anzcerta_history.html

⁴³ New Zealand High Commissioner to Australia Dunne, statements before the Australian Senate Rural Affairs and Transport Committee Hearings on *the Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011*, accessible at: <http://www.aph.gov.au/hansard/senate/commtee/s22.pdf>

CHAPTER 6: CONCLUSIONS

The information outlined in this paper points to a number of directions Australian lawmakers can take with regards to the proposed draft legislation. The PNGFIA recommends that the Australian Government:

- Address more closely and engage in organized consultation with its trading partners – particularly in developing countries – on the proposed legislation and seek solutions which will respect national sovereignty; not adversely impact developing countries; and engage their cooperation in collaborative action to address illegal logging where it is a problem ;
- Defer passage of the legislation until implementing regulations have been developed;
- Re-assess the economic impact of the proposed legislation on both Australia's trading partners and its own domestic industries;
- Seek the explicit opinion of the Department of Foreign Affairs and Trade (DFAT) on the compatibility of the proposed legislation with Australia's trade obligations under multilateral, regional and bilateral trade agreements;

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