

## Chapter 4

### Definitions and penalties

4.1 This chapter provides an overview of stakeholder responses and common concerns in relation to the exposure draft of the Illegal Logging Prohibition Bill 2011 (the bill). It identifies the issues of primary concern raised in evidence in relation to definitions and penalties outlined in the bill, details suggested amendments to the proposed provisions and provides the department's response to them.

#### General views and concerns in relation to the bill

4.2 The views of stakeholders in response to the bill range from a strong view that the current voluntary scheme is adequate to suggestions that the bill is a thinly disguised form of self-regulation and will not stop illegal timber entering Australia.<sup>1</sup> Some stakeholders argued that if the legislation is not strengthened, it would impose costs and complexity on industry without achieving the result intended.<sup>2</sup> Others held the view that there was not enough detail in the draft bill to assess its impact on industry or that it would not prevent the import and processing of illegally logged timber. However, regardless of their position on the proposed legislation and the approach that underpins it, the overwhelming majority of submitters to this inquiry broadly support the government's efforts to end the importation and trade of illegally logged timber and wood products.<sup>3</sup>

4.3 One of the key points of difference in evidence on the draft bill rests with the differing approach taken by stakeholders to the objective and purpose of the legislation. Most industry stakeholders hold the view that the objective of the bill is to establish a legality verification mechanism.<sup>4</sup> In direct contrast, other submitters, and primarily environmental groups argue that the bill should meet sustainable forest

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1 See for example, Papua New Guinea Forest Industries Association, *Submission 10*, p. 2 and World Grow, *Submission 17*, p. 3, for the first perspective and Greenpeace Australia Pacific, *Submission 9*, p. 2 for the second.

2 Furnishing Industry Association of Australia (VIC/Tas) Inc, *Submission 5*, p. [2].

3 Common Platform, *Submission 1*; Caroline Hoisington, *Submission 2*; Furnishing Industry Association of Australia Ltd, *Submission 3*; Kimberly-Clark Australia Pty Ltd, *Submission 4*; Furnishing Industry Association of Australia Victoria/Tasmania Inc, *Submission 5*; Papua New Guinea Forest Industries Association, *Submission 10*; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 12*, p. 2; Australian Timber Importers Federation Inc, *Submission 14*, p. 2; Wood and Door Industry Council and 7 associations, *Submission 15*, p. 5; Solaris Paper Pty Ltd, *Submission 19*, p. 1; Construction, Forestry, Mining and Energy Union, *Submission 22*, p. [1].

4 See for example, John Halkett, Australian Timber Importers Federation Inc, *Committee Hansard*, 16 May 2011, p. 2.

management objectives.<sup>5</sup> These contrasting positions were reflected in evidence particularly in relation to key issues including views on the definition of 'regulated timber product' and what materials should fall within the definition. To this extent, therefore, the views of such stakeholders in relation to the provisions of the bill are shaped by their position on its objective.

4.4 This debate about the purpose of the legislation was reflected in views in relation to the addition of an objects clause to the draft bill. Stakeholders in support of the draft bill serving a legality verification purpose to prevent the import and processing of illegally logged timber favoured an objects clause focused on preventing illegal logging. The joint submission of Window and Door Industry Council (WADIC) and seven industry associations recommended, for example, an object clause simply stating that the bill 'restrict illegally logged timber'.<sup>6</sup> Solaris Paper Pty Ltd also suggested the addition of an object clause with the objective of preventing trade in regulated timber products which contain illegally logged timber.<sup>7</sup>

4.5 In contrast, stakeholders concerned with the draft bill meeting sustainability objectives argued in favour of an objects clause which reflected such objectives. Humane Society International (HSI) argued that the objective of the legislation is to protect domestic Australian timber producers and importers of legally logged timber as well as to assist in 'protecting the natural carbon/biodiversity stores of the Planet to be found in natural forests'. HSI supported the addition of an object clause that included the following statement:

To contribute to the conservation of biodiversity and natural terrestrial carbon stores in forest ecosystems.<sup>8</sup>

4.6 Similarly, the first recommendation of the industry, wood product sector and civil society stakeholders represented under the Common Platform is that the bill include within its object clauses, 'an objective to help promote ecologically

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5 See for example, Reece Turner, Greenpeace Australia Pacific, *Committee Hansard*, 16 May 2011, p. 50.

6 Window and Door Industry Council and 7 industry associations, *Submission 15*, p. 4. The industry associations include the Decorative Wood Veneers Association, Timber Merchants Association, Timber and Building Materials Association (Australia), Timber and Building Materials Association (Queensland), Cabinet Makers Association (Victoria), Cabinet Makers Association (WA), and the Queensland Timber Importers, Exporters and Wholesalers Association.

7 Solaris Paper Pty Ltd, *Submission 19*, p. 14.

8 Humane Society International, *Submission 21*, p. [3].

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sustainable and socially just timber and wood products and to eliminate other forms of timber and wood products'.<sup>9</sup>

4.7 Another theme around which there was considerable debate was that of the prescription of key elements of the policy in regulations. 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. HSI argued that the bill is no more than a 'shell' leaving 'almost all substantive matters to be dealt with by subsequent regulations'.<sup>10</sup> Greenpeace noted the ramifications in this regard:

Regulations that may have significant effect on the affairs of industry, the efficacy of the legislative scheme and the trade in illegal timber are being left to delegated instruments. There is no clarity about whether such instruments will be created and no guidance in the legislation that gives any certainty to the public or industry that the government's policy intention will in fact be implemented. There is an indication from the explanatory memorandum that substantial responsibilities will be delegated under the regulations, although there is no clarity regarding the nature and scope of those delegated responsibilities.<sup>11</sup>

4.8 Further Greenpeace held that leaving a 'vast majority of obligations to subordinate legislation' does not conform to best legislative practice which 'recognises the importance of ensuring that the role of Parliament in reviewing and passing legislation is respected and maintained'.<sup>12</sup> For example, the due diligence scheme, which is central to eliminating imports of illegal timber, will be 'entirely defined, described, implemented and enforced in regulation'.<sup>13</sup> Greenpeace recommended that the government provide, as an alternative, greater clarity and structure within the bill itself so as to clearly define what activity the legal regime will regulate and how this will be monitored and enforced.<sup>14</sup>

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9 Common Platform, *Submission 1*. Members of the common platform include Australian Conservation Foundation, Australian Forestry Standards, Building Designers Australia, Bunnings, Fantastic Furniture, FSC, Greenpeace, IKEA, Kimberly-Clark, SCA, Simmonds Lumber, WWF, The Wilderness Society, Uniting Church in Australia–Synod of Victoria and Tasmania.

10 Humane Society International, *Submission 21*, p. [2].

11 Greenpeace Australia Pacific, *Submission 9*, p. 17.

12 Greenpeace Australia Pacific, *Submission 9*, p. 17.

13 Greenpeace Australia Pacific, *Submission 9*, p. 18.

14 Greenpeace Australia Pacific, *Submission 9*, p. 18.

## Definition of illegal logging

4.9 Section 5 of the draft bill defines illegal logging in relation to timber to mean 'harvested in contravention of the laws in force in the place (whether or not in Australia) where the timber is harvested'.

4.10 The explanatory memorandum indicates that the government defines illegal logging as occurring when:

- timber is stolen;
- timber is harvested without the required approvals or in breach of a harvesting licence or law;
- timber is bought, sold, exported or imported and processed in breach of law; and/or
- timber is harvested or trade is authorised through corrupt practices.<sup>15</sup>

### *Stakeholder concerns and the department's response*

4.11 A number of submitters took the view that the definition of illegal logging is too narrow and restricted to the use of the term 'harvested'. Greenpeace, for example, argued that the use of this term could have the effect of ignoring significant cases of illegality—particularly where corruption, bribery or timber smuggling occurs—as well as ignoring disputes over land tenure where indigenous and/or traditional land rights are concerned.<sup>16</sup> Similarly, the Common Platform argues that the definition should be defined broadly:

to capture all situations where timber has been harvested and traded in contravention of the laws of the country of origin or treaties in force in the country of origin or Australia.<sup>17</sup>

4.12 The Uniting Church in Australia—Synod of Victoria and Tasmania and the Environmental Investigation Agency questioned why the bill's definition appears far narrower than the government's own definition of illegal logging as articulated in the explanatory memorandum and stated above.<sup>18</sup> Building Designers Australia (NSW) (BDA NSW) took issue with the fact that the definition is specifically designed to

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15 *Explanatory Memorandum, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 5.*

16 Greenpeace Australia Pacific, *Submission 9*, p. 6.

17 Common Platform, *Submission 1*. Members of the common platform include Australian Conservation Foundation, Australian Forestry Standards, Building Designers Australia, Bunnings, Fantastic Furniture, FSC, Greenpeace, IKEA, Kimberly-Clark, SCA, Simmonds Lumber, WWF, The Wilderness Society, Uniting Church in Australia—Synod of Victoria and Tasmania.

18 Uniting Church in Australia—Synod of Victoria and Tasmania, *Submission 12*, p. 3; Environmental Investigation Agency, *Submission 29*, p. 2.

exclude 'technical breaches' such as breaches of the logging codes of conduct or where there are disputes over land tenure and argued that the definition will 'ignore, and in fact could legitimise, cases where the traditional landowners' land is logged against their wishes – even where their rights are protected by national laws'.<sup>19</sup>

4.13 Congressman Earl Blumenauer, who authored the US Lacey Act amendments in the US House of Representatives and Jim McDermott, Member of the US House of Representatives encouraged harmonisation of the definition of illegal logging with the definition provided for in the US Lacey Act and EU laws.<sup>20</sup> Greenpeace and BDA (NSW) noted, moreover, that both the US Lacey Act and EU regulation use a definition that is far broader and they supported a similarly wide definition whilst the Uniting Church in Australia–Synod of Victoria and Tasmania argued in favour of the definition being brought into line with that of Article 2 of the EU regulation.<sup>21</sup>

4.14 The Papua New Guinea (PNG) Forest Industries Association argued that the definition should reflect the International Tropical Timber Organization's definition as 'harvesting, transporting, processing, and trading of forest products in violation of national laws'. It also recommended that the legislation should recognise the legal sovereignty of partner countries, including PNG, and respect partner country legal and regulatory frameworks.<sup>22</sup> Concerns regarding sovereignty and the risk of potential conflicts between laws from different jurisdictions were also raised in the joint submission of the Window and Door Industry Council (WADIC) and seven other industry associations in relation to the definition.<sup>23</sup>

4.15 As a means of comparison, section 8204 of the US Lacey Act amendments apply to any plant:

- (i) taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates –
  - (I) the theft of plants;
  - (II) the taking of plants from a park, forest reserve, or other officially protected area;
  - (III) the taking of plants without, or contrary to, required authorization;

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19 Building Designers Australia (NSW), *Submission 13*, p. [3].

20 Congressman Earl Blumenauer and Jim McDermott, Member of US House of Representatives, *Submission 16*, p. [1].

21 Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 12*, p. 3.

22 Papua New Guinea Forest Industries Association, *Submission 10*, p. 2.

23 Window and Door Industry Council and 7 industry associations, *Submission 15*, p. 4.

- (ii) taken, possessed, transported, or sold without payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or
- (iii) taken, possessed, transported or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants;...<sup>24</sup>

4.16 EU Regulation 995/2010 states that illegally harvested means 'harvested in contravention of the applicable legislation in the country of harvest'. Applicable legislation in this context means the legislation in force in the country of harvest and covering:

- rights to harvest timber within legally gazetted boundaries;
- payments for harvest rights and timber including duties related to timber harvesting;
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting;
- third parties' legal rights concerning use and tenure that are affected by timber harvesting; and
- trade and customs, in so far as the forest sector is concerned.<sup>25</sup>

4.17 In response to concerns regarding the definition of illegal logged timber in the draft bill, the Department of Agriculture, Fisheries and Forestry (DAFF) noted in its submission that when compared to other definitions of illegal timber, the draft bill's definition is 'broad, and refers to timber harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested'.<sup>26</sup>

4.18 The committee strongly encourages DAFF to amend the explanatory memorandum to provide that clarity.

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24 United States Government, Amendments to the Lacey Act from H.R.2419, Sec.8204, [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/background--redlinedLaceyamndmnt--forests--may08.pdf) (accessed 23 May 2011).

25 Office Journal of the European Union, Regulation (EU) No 995/2010 of the European Parliament and of the Council, 20 October 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF> (accessed 23 May 2011).

26 Department of Agriculture, Fisheries and Forestry, *Submission 26*, p. 18.

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## Prohibition on importing illegally logged timber

4.19 Under section 6 of the bill, it is an offence to import a 'regulated timber product' where the product is made from or includes any illegally logged timber. The offence carries with it a maximum penalty of five years imprisonment.<sup>27</sup>

4.20 An offence is committed if:

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

4.21 For the purposes of the bill, a 'regulated timber product' is a product that the Commonwealth seeks to regulate for the purpose of minimising the risk of containing illegally logged timber. Subsection 6(2) specifies that the regulations may exclude certain regulated timber products from this offence as a means of ensuring 'flexibility in allowing for particular circumstances or risks associated with certain *regulated timber products* to be taken into account'.

### *Stakeholder concerns and the department's response*

*The prohibition will not come into effect immediately*

4.22 Greenpeace, BDA (NSW), and the Uniting Church in Australia–Synod of Victoria and Tasmania raised concerns that the prohibition in relation to the import of a 'regulated timber product' as prescribed by the regulations is therefore contingent upon the regulations being created and coming into force.<sup>28</sup> Greenpeace highlighted that the regulations could take up to two years or more to come into effect which is contrary to the commitment of the government that the prohibition on illegal timber would come into effect upon the commencement of the legislation. Greenpeace continued:

It is understandable that some details of the regime should be defined within the regulations, but leaving the definition of what timber is covered by the laws renders the Bill ineffective until the regulations come into force. The government has been very clear in both the Regulatory Impact Statement, Ministerial statements and in workshops about which products would be covered by the laws. There is no reason why the Bill cannot prescribe a non-exhaustive list of regulated timber products that could be expanded upon in the regulations, as has been done in the EU.<sup>29</sup>

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27 Exposure Draft of the Illegal Logging Prohibition Bill 2011, s. 6.

28 Greenpeace Australia Pacific, *Submission 9*, pp. 4–5; Building Designers Australia (NSW), *Submission 13*, p. [2]; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 12*, p. 5.

29 Greenpeace Australia Pacific, *Submission 9*, pp. 4–5.

4.23 This position was supported by the Uniting Church in Australia–Synod of Victoria and Tasmania, HSI and the BDA (NSW).<sup>30</sup> ATIF argue that the definition of a 'regulated timber product' will require comprehensive attention in order that it is prescribed in the regulations accordingly as it is a 'critical' aspect of the Government's illegal logging policy.<sup>31</sup> The Uniting Church–Synod of Victoria and Tasmania as well as BDA (NSW) recommended that that the bill provide a definition of a 'regulated timber product' in order that the prohibition for schedule 1 timber takes effect immediately and that a timeframe be included in the bill in relation to the remaining regulated timber products.

4.24 The government's justification for the delay is detailed in the following section of the report which considers the offence provisions set out in sections 7 and 8 of the bill.

#### *A narrow prohibition*

4.25 A number of submitters raised concerns that the prohibition detailed in section 6 of the bill is too narrow as it does not extend to other links along the supply chain beyond that of importation.<sup>32</sup> Greenpeace continued:

The prohibition should cover any trade in illegal timber or the placing of timber on the market. It should ensure that all those involved in and benefitting from a trade in timber and timber products are responsible for ensuring that all imported timber is legal.<sup>33</sup>

4.26 HSI argued that it should be an offence to 'possess, sell or buy wood or wood products derived from inappropriate sources—not just to import them' and that the legislation should match the provisions of the US Lacey Act in this regard.<sup>34</sup> Also drawing on the US Lacey Act which has a broader prohibition, Greenpeace raised concerns that the omission of logging and trading from the prohibition will result in different standards and penalty regimes applying which could 'raise WTO issues and will certainly raise equity issues'.<sup>35</sup> Greenpeace, BDA (NSW) along with the Australian Forestry Standard Limited recommends therefore that section 6(a) be

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30 Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 12*, p. 5; Humane Society International, *Submission 21*, p. [4]; Building Designers Australia (NSW), *Submission 13*, p. [2].

31 Australian Timber Importers Federation Inc, *Submission 14*, p. 5.

32 Australian Forestry Standard Limited, *Submission 6*, p. [2]; Building Designers Australia (NSW), *Submission 13*, p. 7; Greenpeace Australia Pacific, *Submission 9*, p. 12; Australian Network of Environmental Defender's Offices, *Submission 20*, p. [1]; Humane Society International, *Submission 21*, p. [5].

33 Greenpeace Australia Pacific, *Submission 9*, p. 12.

34 Humane Society International, *Submission 21*, p. [2].

35 Greenpeace Australia Pacific, *Submission 9*, p. 13.



amended in order that the prohibition covers any trade and not just importation as in the Lacey Act.<sup>36</sup>

4.27 In response to such concerns, DAFF noted that the draft bill prohibition is similar to the amendments to the US Lacey Act which makes it unlawful to trade in any plant that is 'taken, possessed, transported, or sold' in violation of any US law or regulation, or any foreign law that protects plants. Similarly, the EU regulation prohibits 'the placing on the market of illegally harvested timber or timber products derived from such timber'.<sup>37</sup>

#### *Fines and forfeiture*

4.28 The Common Platform lists amongst its recommendations for effective laws, that appropriate penalties be applied to provide an 'effective deterrent against those who knowingly or negligently break the law or fail to show due diligence'.<sup>38</sup> It does not, however, elaborate on what penalties it considers to be appropriate.

4.29 Greenpeace supported the prohibition penalty of five years imprisonment, noting that it was in line with the Lacey Act. However, it and BDA (NSW) raised concerns that there is no fine associated with the penalty, as in the case of the Lacey Act (US\$500 000).<sup>39</sup> Furthermore, Greenpeace noted that there was no forfeiture requirement and that whilst the explanatory memorandum suggests that forfeiture may occur under the Custom Act, it is not mandatory and 'seems to leave open the possibility that illegal timber could conceivably be sold on the Australian market even after being identified as illegal'.<sup>40</sup> Greenpeace, BDA (NSW) along with the Uniting Church in Australia–Synod of Victoria and Tasmania, which supported strengthening the penalty as a deterrent, recommended that forfeiture of goods be made mandatory and explicit for breaches under sections 6, 7 and 8 of the bill.<sup>41</sup>

4.30 However, DAFF clarified in its submission that the absence of a prescribed financial penalty in the bill does not exclude the possibility of one being imposed by the courts. The *Crimes Act 1914* allows for a financial penalty to be imposed instead of or in addition to imprisonment. Under this provision a five year prison term equates

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36 Greenpeace Australia Pacific, *Submission 9*, p. 13; Building Designers Australia (NSW), *Submission 13*, p. [8]; Australian Forestry Standard Limited, *Submission 6*, p. [2].

37 Department of Agriculture, Fisheries and Forestry, *Submission 26*, p. 19.

38 Common Platform, *Submission 1*.

39 Greenpeace Australia Pacific, *Submission 9*, p. 7; Building Designers Australia (NSW), *Submission 13*, p. [4].

40 Greenpeace Australia Pacific, *Submission 9*, p. 7.

41 Greenpeace Australia Pacific, *Submission 9*, p. 7; Building Designers Australia (NSW), *Submission 13*, pp. 4–6; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 12*, p. 5.

to a maximum of 300 penalty units for an individual and 1500 penalty units for a corporation/body corporate.<sup>42</sup> Therefore:

The maximum penalty for the importation of illegal timber products is prescribed at five years imprisonment, which, at the discretion of a court when sentencing, equates to a maximum fine for an individual of \$33,000, and \$165,000 for a corporation or body corporate.<sup>43</sup>

4.31 The committee notes that on the question of forfeiture, the explanatory memorandum wording is far stronger than suggested by concerned submitters as it states that it is 'expected' that section 229 of the *Customs Act 1901* 'may be invoked by the Commonwealth to direct the forfeiture of goods found in breach of the prohibition and thereby prevent their entry onto the Australian market'.<sup>44</sup> DAFF also noted that forfeiture provisions are also present in existing legislation such as Parts 2-2 and 2-3 of the *Proceeds of Crime Act 2002*.<sup>45</sup>

4.32 The committee appreciates that many of the concerns regarding fines and forfeiture would have been alleviated if the legal framework had been set out more clearly in the explanatory memorandum. The committee encourages revision of the explanatory memorandum with a view to providing a clear and concise overview of the legal framework which sets out all the penalties including imprisonment, fines and forfeiture.

#### *Enforcement or monitoring of illegal timber*

4.33 A number of submitters raised concerns that whilst the bill created a prohibition on the import of illegally logged timber and wood products, there is no provision within the bill for ongoing enforcement of it.<sup>46</sup> Greenpeace and BDA (NSW) noted in this regard that the provisions detailed in Part 5 of the bill enabling an officer to be appointed does not constitute an enforcement regime which, it argued is required along with monitoring in relation to point of import inspections and testing, and certifiers.<sup>47</sup> The ATIF questioned whether there was any connection between the roles of officers appointed under this part and that of timber industry certifiers.<sup>48</sup> Greenpeace argued that whilst the explanatory memorandum claims that the bill

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42 Department of Agriculture, Forestry and Fisheries, *Submission 26*, p. 17.

43 Department of Agriculture, Forestry and Fisheries, *Submission 26*, p. 5.

44 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 46.

45 Department of Agriculture, Forestry and Fisheries, *Submission 26*, p. 17.

46 Kimberley-Clark Australia Pty Ltd, *Submission 4*, p. [2]; Greenpeace Australia Pacific, *Submission 9*, p. 11; WWF-Australia, *Submission 11*, p. [1]; Building Designers Australia (NSW), *Submission 13*, p. [6].

47 Greenpeace Australia Pacific, *Submission 9*, p. 10; Building Designers Australia (NSW), *Submission 13*, p. [6].

48 Australian Timber Importers Federation Inc, *Submission 14*, p. 13.

provides officers with necessary powers to investigate and collect evidence of suspected offences with the purpose of ensuring that adequate enforcement of the bill takes place:

[T]his is highly misleading. The provisions in the Bill that relate to the powers of officers will not ensure or require that any enforcement take place.<sup>49</sup>

4.34 Greenpeace held that the bill must identify that enforcement will occur at the point of import and that an enforcement regime be established in regulations and developed within six months of Royal Assent.<sup>50</sup> However, in contrast the Australian Network of Environment Defender's Offices (ANEDO) supported the proposed enforcement regime in Part 5 of the bill, noting that the bill provides for officers with an appropriate range of powers.<sup>51</sup>

4.35 Indeed, the explanatory memorandum details the provisions in Part 5 of the bill which set out the compliance monitoring powers of officers. It details the general powers available to officers for monitoring compliance, specific monitoring powers, and procedures in relation to issuing a monitoring warrant. The explanatory memorandum states that such powers are consistent with other Commonwealth Acts which allow for the use of monitoring warrants and in particular, the *Quarantine Act 1980* (Part VIA, Division 2) which allows for the application of monitoring warrants.<sup>52</sup> The committee has no concerns in relation to the enforcement regime.

4.36 The committee notes in this regard that subsection 36.1 provides that an officer executing a monitoring warrant or an offence-related warrant may use 'such force against persons or things as is necessary and reasonable in the circumstances'. Similarly, a person assisting an officer (provided for in section 34) may also use such force as is necessary and reasonable in the circumstances.

4.37 The committee appreciates that this power is 'commensurate with other powers found in similar Commonwealth Acts that employ monitoring and offence-related powers'.<sup>53</sup> However, the committee recognises training as important to ensure that such officials carry out their duties appropriately. Therefore, the committee strongly encourages the establishment of an appropriate training regime in order to ensure that powers conferred on officers, and particularly those in relation to the use of force, are exercised safely and appropriately.

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49 Greenpeace Australia Pacific, *Submission 9*, pp. 10–11.

50 Greenpeace Australia Pacific, *Submission 9*, pp. 11–12.

51 Australian Network of Environment Defender's Offices, *Submission 20*, p. [3].

52 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft–23 March 2011, p. 54.

53 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft–23 March 2011, p. 64.

## Defining 'regulated timber product'

4.38 The bill establishes that the definition of 'regulated timber product' will be prescribed in the regulations. There was considerable discussion throughout the inquiry about what materials may be included in the definition, what should be included and of the consequences for industry stakeholders and the competitiveness of their products.

### *Stakeholder concerns*

4.39 The Furnishing Industry Association of Australia Ltd (FIAA) argued strongly against any exceptions regarding products that only have a small percentage of timber constituting its final value or its final volume or surface area emphasising that exceptions will 'only lead to the perception of corruption'.<sup>54</sup> This position was supported by the Furnishing Industry Association of Australia (Vic/Tas) Inc, which also held that if finished and semi-finished products such as flat-packed fit-outs and coffins are not regulated, illegal timber is likely to be 're-routed into the country via such finished products', the effect of which would be to:

...negate much of the effectiveness of The Bill and will result in Government-supported preferential treatment for overseas wood-products manufacturing over local manufacturers and jobs.<sup>55</sup>

4.40 The joint WADIC submission also expressed concern that an estimated 50 per cent of timber that enters Australia comes in the form of finished products. The submission highlighted that if it is not regulated, illegal timber will 'likely just be re-routed into the country via such finished products' and:

This would negate much of the effectiveness of The Bill and will result in Government supported preferential treatment for overseas wood-products manufacturing over local manufacturers and jobs. For reasons of fair competition and regulatory-effectiveness, we call on the Government to regulate all *imported finished products* containing wood. A suggested approach would be to regulate, in The Bill itself, all products containing more than 5% wood.<sup>56</sup>

4.41 Miss Juel Briggs of the Decorative Wood Veneer Association noted the changes that have taken place over the past five years in relation to imported materials and the need to be responsive to them. She said that five years ago, the ratio of timber imported to Australia compared to finished product has changed with the amount of finished product rapidly accelerating. Miss Briggs argued that it has to be addressed because a point may be reached where:

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54 Furnishing Industry Association of Australia Ltd, *Submission 3*, p. [3].

55 Furnishing Industry Association of Australia (Vic/Tas) Inc, *Submission 5*, p. [2].

56 Wood and Door Industry Council and 7 industry associations, *Submission 15*, p. 4.

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...10 per cent of the timber coming into Australia comes in as raw timber and 90 per cent comes in as finished product. It would be absurd for us not to, in some way, go part way towards covering the finished product that comes in.<sup>57</sup>

4.42 ATIF shared such concerns regarding finished or manufactured products. Mr John Halkett, Technical Manager, ATIF, described the risks involved in relation to such products:

There are manufactured products that come from countries like China, Vietnam, Korea and so on, and the work that has been done and supported by the department to date suggests that in those manufactured products there is a greater probability of illegally logged timber being incorporated into them. They have a long supply chain and it is very difficult to track the timber back to source, so there is some risk there.<sup>58</sup>

4.43 Mr Halkett conceded that there were complexities involved in relation to certification of manufactured products as they become more 'sophisticated and go up the value chain it is often difficult to determine whether they have a wood component or not. They might just be described, for example, as lounge room furniture made of leather and so on'.<sup>59</sup>

4.44 Contrastingly, Solaris Paper Pty Ltd argued that pulp and paper products are unlikely to be involved in illegally logged timber and that there was no need to include such products within the definition of 'regulated timber product'.<sup>60</sup> Solaris Paper suggested as an alternative that a comprehensive risk analysis by type of pulp and paper be mandated and that those products with minimal risk of inclusion of illegal material be excluded from the regime.<sup>61</sup>

4.45 Consistent with its argument that the bill should address the issue of sustainability, HSI argued in favour of a definition beyond that of timber to 'forest products' in order to capture within it other illegally or unsustainably produced forest products and plants such as rattan. In determining the definition of 'forest products', HSI argued in favour of a definition that draws on the US Lacey Act definition of a 'plant'.<sup>62</sup>

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57 Juel Briggs, Decorative Wood Veneer Association, *Committee Hansard*, 16 May 2011, p. 29.

58 John Halkett, Australian Timber Importers Federation Inc, *Committee Hansard*, 16 May 2011, p. 3.

59 John Halkett, Australian Timber Importers Federation Inc, *Committee Hansard*, 16 May 2011, p. 3.

60 Solaris Paper Pty Ltd, *Submission 19*, p. 6 and 14.

61 Solaris Paper Pty Ltd, *Submission 19*, p. 14.

62 Humane Society International, *Submission 21*, p. [3].

### *The department's response*

4.46 DAFF noted that the list of three product categories that may be regulated was identified in the RIS and include solid timber and wood products; processed timber and wood products; and complex wood products. However, DAFF emphasised that further work will be undertaken by ABARE and stakeholders to identify timber and wood products that may be effectively regulated, taking into account the complexity of the product.<sup>63</sup>

4.47 For comparative purposes, DAFF noted that under the US Lacey Act, the prohibition applies to all plants and plant products and that the products which require the import declaration are being phased in, and currently include 'sawn wood, chipped wood, shaped wood, sheets for veneers, wood for joinery or carpentry, plywood, wooden frames and seats with wood frames'. Products that are yet to be phased in include particle board, fibreboard, packing cases and pulp and paper products.<sup>64</sup>

### **Importing or processing without being approved**

4.48 Division 2 of the bill provides the basis for the introduction of legal logging requirements on industry with the aim of 'minimising the risk of illegally logged timber entering the Australian market, and to assist importers to not incur the prohibition offence'.<sup>65</sup> The requirements targets importers of regulated timber products and processors of raw logs as the two entry points of timber onto the Australian market. This division places a legal obligation for importers and Australian domestic processors of raw logs to comply with the legal logging requirements for regulated timber producers by requiring them to be approved.<sup>66</sup>

4.49 Section 7 provides that it is an offence to import a regulated timber product without being approved as an importer of regulated timber products of that kind either by a timber industry certifier or the Minister. Section 13 of the bill enables regulations to be made that may list regulated timber products. The overall intention of the offence and penalty in Section 7 is to 'make sure importers have been granted approval by a *timber industry certifier* or by the Minister, before importing a *regulated timber product*'.<sup>67</sup>

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63 Department of Agriculture, Fisheries and Forestry, *Submission 26*, p. 25.

64 Department of Agriculture, Fisheries and Forestry, *Submission 26*, pp. 21–22.

65 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft–23 March 2011, p. 47.

66 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft–23 March 2011, p. 47.

67 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft–23 March 2011, p. 47.

4.50 The importation of a regulated timber product without approval will attract a maximum penalty of 100 penalty units.<sup>68</sup> According to the explanatory memorandum, the penalty has been set at this level to 'influence compliance with the *legal logging requirements*' and to ensure that an unapproved import cannot take place as part of a calculated business decision.<sup>69</sup>

4.51 Similarly, under section 8, an offence is committed if a person processes raw logs in Australia without being approved to do so by a timber industry certifier or the responsible Minister. The purpose of the section is to promote adherence amongst domestic timber mills to the legal logging requirements. According to the explanatory memorandum, the maximum penalty of 100 penalty units for the section 8 offence is intended to act as a strong deterrent against the unapproved processing of domestic raw logs and is intended to ensure that these mills undertake appropriate steps to minimise the risk of placing illegally logged timber products on the Australian market.<sup>70</sup>

4.52 The explanatory memorandum also notes that sections 7 and 8 will commence two years after proclamation. The intention of the two-year delay is to 'allow government and industry to work together to develop the co-regulatory aspects under the policy; that is, the processes by which industry will be required to comply'.<sup>71</sup>

4.53 The committee notes the criticisms of this delay as detailed above. The government's position is that the delay is necessary to provide for a period of time to enable the development of the co-regulatory aspects of the policy:

The intention of the two-year delay is to allow government and industry to work together to develop the co-regulatory aspect under the policy; that is, the processes by which industry will be required to comply. In particular it will give industry time to develop *timber industry certifiers* and approve importers and processors to comply with the *legal logging requirements* that will be prescribed in subordinate legislation made under Section 13 of this Bill.<sup>72</sup>

4.54 Questions were also raised about the involvement of the Minister in terms of powers to approve importers and processors where no appropriate timber industry certifier is established to implement the approval. In response to such concerns, DAFF clarified that the provision is designed partly to accommodate businesses, industry

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68 Exposure Draft of the Illegal Logging Prohibition Bill 2011, s.7.

69 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 47.

70 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 48.

71 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 45.

72 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, Consultation Draft—23 March 2011, p. 45.

associations or organisations who do not seek to become a timber industry certifier or to join a timber industry certifying body. DAFF continued:

This may occur for importers of particular categories of product which are not administered by a timber industry certifier, such as importers of specialised timber products. In this circumstance, approval by the responsible minister avoids the legislation having perverse impacts on importers whose products are not covered by a timber industry certifying entity.<sup>73</sup>

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73 Department of Agriculture, Fisheries and Forestry, *Submission 26*, p. 17.