

# Chapter 2

## Provisions of the Bill

### Introduction

2.1 This chapter provides an overview of issues raised by stakeholders in relation to the Illegal Logging Prohibition Bill 2011 (the bill) and considers suggested amendments to the proposed provisions. This includes discussion of general issues in relation to the bill; the Regulations; definitions and intent of the bill; qualifications on prohibitions, due diligence systems and the need for an outreach on the bill.

2.2 The June 2011 Legislation Committee report examined regulatory approaches in other jurisdictions.<sup>1</sup> Many submitters to this inquiry also referred to lessons that could be drawn from those experiences, with particular mention made of developments in the United States related to the implementation of the amended Lacey Act.

### General issues in relation to the bill

2.3 The committee notes that there was broad support for the bill.<sup>2</sup> In particular, submitters welcomed amendments made by the government in response to stakeholder consultations, and the earlier Legislation Committee report and recommendations on the Exposure Draft of the bill.<sup>3</sup>

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1 Senate Rural Affairs and Transport Committee, *Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011*, June 2011, p. 7.

2 Mr Walter Richard Brooks, Executive Officer, Cabinet Makers Association Inc., *Committee Hansard*, p. 13; Greenpeace Australia Pacific, *Submission 3*, p. 2; 10 Importer and Processor Associations, *Submission 4*, [p. 2]; Construction, Forestry, Mining and Energy Union, *Submission 5*, [p. 1]; Papua New Guinea Forest Industries Association, *Submission 8*, [p. 1]; National Timber Councils Association Inc, *Submission 10*, [p. 1]; Timber Queensland, *Submission 13*, p. 1; Ms Natalie Reynolds, Acting Chief Executive Officer, Forest Stewardship Council Australia, *Committee Hansard*, p. 28; and Timber Development Association, *Submission 17*, p. 1.

3 Greenpeace Australia Pacific, *Submission 3*, p. 2; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 9*, p. 1; Australian Timber Importers Federation Incorporated, *Submission 2*, [p. 4]; Australian Forest Growers, *Submission 7*, [p.1]; and Timber Queensland, *Submission 13*, p. 1.

2.4 Submitters emphasised the environmental and social development costs of illegal logging,<sup>4</sup> as well as noting the deleterious effect on the Australian industry of unregulated imports.<sup>5</sup> Mr John Halkett, Technical Manager, ATIF stated that:

We acknowledge that it is important to restrict the entry into Australia of illegally logged products as it damages the good environmental credentials of timber and it damages the commercial viability of the industry and we are keen to see the cowboys in the industry shut down, so the sooner this bill goes through the parliament the better off we are, as far as we are concerned'.<sup>6</sup>

2.5 Ms Catherine James, Environment Project Officer, Justice and International Mission Unit, Uniting Church, supported the bill and the positive contribution it can make to addressing a range of important social and environmental issues:

The Uniting Church welcomes the Illegal Logging Prohibition Bill 2011. We do see it as an improvement on the draft exposure bill released in March this year. We are primarily concerned that the bill achieves in three areas. The first concern is around global poverty. We see this bill as assisting impoverished countries or impoverished communities by ensuring that their forest resources are not taken illegally from them and that they are adequately compensated. The second area of concern is around climate change. This bill will go some way towards addressing deforestation, which is a significant contributor to global greenhouse gas emissions—around 20 per cent. Our third area of concern is around corruption so that Australians are not the beneficiaries of proceeds of crime and that we do uphold our obligations under various international treaties to assist global efforts to eliminate corruption.<sup>7</sup>

2.6 A small number of submitters raised concerns about whether Australia was involving itself in the legal systems of foreign countries, often drawing on the example of actions against Gibson Guitar Corporation. Mr Halkett, from ATIF, told the committee that:

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4 Mr John Halkett, Technical Manager, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 1; Australian Forestry Standard Limited, *Submission 6*, [p. 1]; Australian Forest Growers, *Submission 7*, [p. 1]; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 9*, p. 1; and Mr Grant Johnson, Policy Manager, Australian Forest Products Association, *Committee Hansard*, 14 December 2011, p. 37.

5 Australian Forest Growers, *Submission 7*, [p. 1]; National Timber Councils Association Inc, *Submission 10*, [p. 1]; Australian Forest Products Association, *Submission 11*, p. 3; and Mr Grant Johnson, Policy Manager, Australian Forest Products Association, *Committee Hansard*, 14 December 2011, p. 37.

6 Mr John Halkett, Technical Manager, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 1.

7 Ms Catherine James, Environment Project Officer, Justice and International Mission Unit, Uniting Church in Australia–Synod of Victoria and Tasmania, *Committee Hansard*, 14 December 2011, p. 23.

It is particularly the way the Lacey Act has been interpreted as reaching into domestic laws of supply countries in the case of Gibson guitars into India and whether in fact the company has complied with domestic employment, OH&S and value-added legislation when there is not really an issue about the legality of the timber involved; it is about compliance with Indian domestic law. We are keen to ensure that that does not occur in the case of this act; that it deals with the issue of the legality of timber products that are imported into Australia; that that is the focus of the bill and the intent of the government's policy in our view'.<sup>8</sup>

2.7 Three witnesses raised concerns that the bill may be inconsistent with certain of Australia's international obligations under e.g. the General Agreement on Tariffs and Trade 1994, the ASEAN Australia New Zealand Free Trade Agreement, or the World Trade Organization.<sup>9</sup>

### ***Committee comment***

2.8 The committee notes, and welcomes, the broad support for the bill. The committee is reassured by the Explanatory Memorandum noting that the bill does not contravene Australia's trade obligations as 'like measures for imported timber would also be applied to domestic timber'.<sup>10</sup> The committee notes the importance of ensuring that the subordinate regulations also remain consistent with Australia's trade obligations.

2.9 The committee is of the view that the bill does not reach into, or attempt to reach into, the legal systems of other countries. Rather, the bill introduces a prohibition on importation of illegally logged timber into Australia, with attendant requirements for importers to carry out due diligence. The committee is of the view that a clear distinction can be made between these two approaches.

### ***Review provisions***

2.10 Clause 84 of the bill requires the Minister to cause a review to be undertaken of the first five years of the operation of the bill, with a requirement for the review to be tabled in the Senate and House of Representatives within 15 sitting days after its receipt by the Minister. Many submitters welcomed this provision. One submitter suggested that the bill be amended to incorporate a review of the Regulations within two years of their commencement.<sup>11</sup>

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8 Mr John Halkett, Technical Manager, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 2.

9 Mr Alan Oxley, Principal, ITS Global Consulting, *Submission 15*, pp 1–2; Government of Canada, *Submission 20*, p. 3; and Minister of Trade of the Republic of Indonesia, *Submission 19*, [p. 1].

10 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 54.

11 Australian Network of Environmental Defender's Offices Incorporated, *Submission 18*, [p. 2].

## Regulations

2.11 The bill provides a high-level legislative framework to implement the Government's policy to combat illegal logging, with the power to develop many of the operational elements through subordinate legislation including Regulations. The explanatory memorandum notes that the main areas identified for subordinate legislation include:

- timber products to be regulated;
- due diligence requirements to mitigate the risk of importing or processing illegally logged timber; and
- circumstances under which a trade description relating to due diligence may be used.<sup>12</sup>

2.12 The Explanatory Memorandum clarifies that clause 2 of the bill provides for the commencement of the bill, with different parts of the bill commencing at different times. A number of provisions commence the day after the Act receives Royal Assent, including those that give effect to the prohibition on the importation of illegally logged timber in timber products, whether or not they are regulated (clauses 3–8); forfeiture provisions (clauses 10-11), prohibition on processing illegally harvested raw logs (clauses 15-16), and provisions allowing the Government to monitor, investigate and enforce compliance with relevant clauses of the bill that have come into force (clauses 19–86).

2.13 The Explanatory Memorandum goes on to explain that a number of other clauses commence on the day after the end of the two year period of the clauses listed above, in order 'to allow government and industry to work together to develop the operational aspects of the Bill with which importers and processors of raw logs must comply'.<sup>13</sup>

2.14 The Explanatory Memorandum notes the additional two years will provide time for:

- timber products to be prescribed by legislative instruments (clause 9);
- importers to develop their due diligence procedures for regulated timber products which will be prescribed in legislative instruments (clauses 12–14); and
- processors of raw logs time to develop their due diligence procedures which will be prescribed in legislative instruments (clauses 17–18).<sup>14</sup>

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12 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, pp 5–6.

13 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 9.

14 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, pp 9–10.

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## ***Implementation arrangements***

2.15 A number of submitters raised concerns that although the Regulations will be developed over a two year period, there are immediate prohibitions (the day following Royal Assent to the Act) on importing or processing illegally logged timber, subjecting importers and processors to unclear legal requirements and the threat of fines and gaol sentences.<sup>15</sup> The Australian Forest Products Association (AFPA) have submitted that:

Of concern to AFPA is that processors and importers, while essentially operating in a policy and regulatory vacuum pending the development of the regulation, will be vulnerable to prosecution for an offence that has not been adequately defined by the Commonwealth, both in terms of what constitutes an offence and what they reasonably need to do to avoid committing that offence. Moreover, in the absence of such criteria, it will presumably also be difficult for the responsible agencies under the Act to adequately enforce the Act.<sup>16</sup>

2.16 Ten Importer and Processor Associations (10I&PA) argued that industry needs more time in which to comply with the Act. It submits that clauses 8 (importing illegally logged timber) and 15 (processing illegally logged raw logs) of the bill should not come into force for 12 months after the bill receives Royal Assent. It argues that that if these provisions come into force immediately this 'would be an impossible and unreasonable timeframe for most businesses to meet'.<sup>17</sup>

2.17 10I&PA went on to note that 'European importers and domestic log processors have been given at least a two year period to comply with their prohibition requirement'.<sup>18</sup>

2.18 This position received some support from Mr Jeremy Tager, Team Leader, Greenpeace Australia Pacific (GAP):

The discussion about the smaller importers is a perfectly legitimate one. They do not have the resources necessarily to understand and undertake the due diligence to the extent that others do. That is part of what needs to be flexible in the regulations. As you bring it in you recognise that this is a supply chain we do not know a lot about. The onus really has to be on the

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15 Australian Forest Products Association, *Submission 11*, p. 2. See also Papua New Guinea Forest Industries Association, *Submission 8*, [p. 2] and 10 Importers and Processor Associations *Submission 4*, [pp 2 and 5].

16 Australian Forest Products Association, *Submission 11*, p. 2.

17 10 Importer & Processor Associations, *Submission 4*, [p. 2]; see also Timber Development Association, *Submission 17*, p. 2.

18 10 Importer & Processor Associations, *Submission 4*, [p. 2].

people within the supply chain to do the right thing rather than on providing them an incentive to be ignorant about what is going on'.<sup>19</sup>

2.19 The AFPA have proposed that, as the requirements for due diligence are not yet developed and will not come into force until 'after the end of a period of two years' following Royal Assent, there is a need for interim criteria to guide importers and domestic industry.<sup>20</sup>

2.20 Officers from DAFF explained to the committee the rationale for the approach that had been taken in drafting the legislation in this way. They responded to concerns regarding immediate prohibition by explaining that 'by implementing the prohibition now, it puts a line in the sand and makes it very clear that the government is implementing and moving to put in place this legislation'.<sup>21</sup>

2.21 However, DAFF officers clarified that the standard fault elements prescribed in the Commonwealth Criminal Code 1995 are automatically applied to this offence; being intention, knowledge and recklessness. They said that this meant that, until the Regulations are in place, these fault elements mean that the standard of proof for showing that someone has imported or processed illegally logged timber is higher.<sup>22</sup>

2.22 DAFF officers went on to explain that following the finalisation of the Regulations, and two years after the enactment of the bill, due diligence would be applied to regulated timber products. They clarified that at that point 'the fault element for the prohibition of importing or processing regulated timber or timber products is negligence'. They emphasised that once the Regulations are in place, for regulated products, it will become easier to pursue people who breach the Regulations and the law.<sup>23</sup>

### ***Consultation mechanisms***

2.23 As outlined in chapter 1, there have been extensive consultations during the drafting of this bill. The Hon. Dr Mike Kelly, Parliamentary Secretary for Agriculture,

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19 Mr Jeremy Tager, Team Leader, Political and Projects Unit, Greenpeace Australia Pacific, *Committee Hansard*, 14 December 2011, p. 19.

20 Australian Forest Products Association, *Submission 11*, p. 2.

21 Mr Tom Aldred, Executive Manager, Climate Change, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 62.

22 Mr John Talbot, General Manager, Forestry Branch, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 60 and Mr Tom Aldred, Executive Manager, Climate Change, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 62.

23 Mr John Talbot, General Manager, Forestry Branch, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 60; and Mr Tom Aldred, Executive Manager, Climate Change, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 62.

Fisheries and Forestry, explained to the Parliament that these consultations are ongoing:

An illegal logging working group comprising industry sectors and non-government organisations is already established to assist the government in this process and help minimise the compliance and administrative costs for both industry and government whilst driving, of course, behavioural change in the global timber trade. The government will continue to work closely with its illegal logging working group and state and territory governments to develop the subordinate legislative instruments required.<sup>24</sup>

2.24 Mr Talbot, from DAFF, also emphasised to the committee 'the intention of the government that industry and key stakeholders will be extensively consulted in the development of the regulations'.<sup>25</sup>

2.25 In addition, the Explanatory Memorandum explains that:

The selection of timber products for regulation will be undertaken in consultation with key stakeholders based on an economic analysis of the coverage, value and volume of timber products imported into Australia and an analysis of their risk profile using appropriate criteria and indicators. The results of this work will be provided by the Australian Bureau of Agricultural and Resource Economics and Sciences in the development of regulations'.<sup>26</sup>

2.26 A number of submitters noted the formation of the Illegal Logging Stakeholder Working Group.<sup>27</sup> Submitters expressed their willingness to continue to be involved in consultations aimed at informing the Regulations.<sup>28</sup>

### *Regulated timber products*

2.27 Officers from DAFF confirmed to the committee that consultations with the Illegal Logging Working Group are taking place in relation to regulated timber products, noting that 'one of the next stages of our work is a study that looks at the countries we import wood and wood products from. It looks at it under HS codes'. Mr Talbot explained further:

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24 The Hon. Dr Mike Kelly, Parliamentary Secretary for Agriculture, Fisheries and Forestry, Second Reading Speech, *House of Representatives Hansard*, 23 November 2011, p. 13569.

25 Mr John Talbot, General Manager, Forestry Branch, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 60.

26 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 11.

27 Construction Forestry Mining and Energy Union, *Submission 5*, [p. 1];

28 Dr Jalaluddin Harun, Director-General, Malaysian Timber Industry Board, Government of Malaysia, *Committee Hansard*, 14 December 2011, p. 52; Mr Jeremy Tager, Greenpeace Australia Pacific, *Committee Hansard*, 14 December 2011, p. 18; Construction Forestry Mining and Energy Union, *Submission 5*, [p. 1]; Australian Forest Products Association, *Submission 11*, p. 3; Timber Queensland, *Submission 13*, p. 1; and Ministry of Agriculture and Forestry, New Zealand, *Submission 16*, [p. 2].

HS are the Customs codes. There is a code for each import category or group. We have a number of variables we are looking at that we will be talking about at a meeting with the illegal logging working group next week. What we are trying to do is work through the HS codes, the countries we have got, the range of different importers we have in Australia and a number of other variables to start to put it all into a risk framework so we can work out what products coming into Australia we should be regulating. It is also based on quantity and dollar value as much as anything else. On this particular area there is a huge range of variables which we have got to start nutting down to get those regulated products.<sup>29</sup>

## **Definitions and intent of the bill**

### ***Object clause***

2.28 The bill does not contain an objects clause. However, three submitters addressed the issue of an objects clause.<sup>30</sup> Greenpeace Australia Pacific (GAP) submitted that the bill should include 'an objects clause that includes sustainability objectives pursuant to Government policy and international commitments. GAP provided a proposed objects clause.<sup>31</sup>

2.29 The 10I&PA submit that any object clause should be 'to restrict illegally logged timber', noting that other object clauses that are 'wider, vague or ambiguous are not acceptable'. 10I&PA also argued 'that the bill is about Illegal Logging, not Sustainability (an important and separate matter)'.<sup>32</sup>

### ***Definition of 'illegally logged'***

2.30 Clause 7 of the bill defines 'illegally logged' as, 'in relation to timber means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested'.<sup>33</sup> This has implications for the prohibition on importing or processing illegally logged timber (clauses 8 and 15) and the due diligence requirements which will be addressed in the Regulations (clauses 14 and 18).

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29 Mr John Talbot, General Manager, Forestry Branch, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 61.

30 Greenpeace Australia Pacific, *Submission 3*, pp 3–4; 10 Importer & Processor Associations, *Submission 4*, [p. 17]; and Australian Network of Environmental Defender's Offices Incorporated, *Submission 18*, [p. 1].

31 Greenpeace Australia Pacific, *Submission 3*, pp 3-4.

32 10 Importer & Processor Associations, *Submission 4*, [p. 17].

33 Clause 7, Illegal Logging Prohibition Bill 2011.

2.31 Many submitters addressed the definition of 'illegally logged', some arguing that the definition is too broad and lacks specificity,<sup>34</sup> while others argued that it should be made consistent with definitions used in other jurisdictions, or by other organisations.<sup>35</sup>

2.32 A number of submitters argued that the prohibition on illegally logged timber, and the consequent requirements of due diligence, should be restricted to forest laws. Some of these submitters also argued that that the prohibition on illegally logged timber should be qualified so that only national and sub-national laws apply, thereby excluding a range of other legal instruments. A further qualification was suggested such that only national and sub-national laws, *as enforced*, should apply.

2.33 The ATIF submitted that the definition of illegally logged is too broad. ATIF argued that:

The objective of the law is to ensure compliance with forest laws. To expect importers or the Australian timber and wood products supply chain to attest that products have been produced in accordance with non-forest laws is inconsistent with this goal. No other product has to be shown to be compliant with such a potentially wide range of law.<sup>36</sup>

2.34 IOI&PA also raised concerns about the scope of laws, including non-forestry laws, that importers need to take into account, with attendant costs associated with compliance. IOI&PA argued that the bill 'seems to assume that importers are aware of, and understand, all the foreign laws that have to be complied with'.<sup>37</sup>

2.35 Several submitters raised the use of the Lacey Act in actions against Gibson Guitar Corporation as a high-profile example of the risks associated with using a broad definition of 'illegally logged'. These submitters argued that the implementation of the amended Lacey Act has produced either unintended or unwanted consequences and that this should be heeded in considering the Illegal Logging Prohibition Bill.<sup>38</sup>

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34 Australian Timber Importers Federation Incorporated, *Submission 2*, p. 4; 10 Importer & Processor Associations, *Submission 4*, [p. 2]; and Papua New Guinea Forest Industries Association, *Submission 8*, [p. 2]; see also Timber Development Association, *Submission 17*, p. 2.

35 Australian Timber Importers Federation Incorporated, *Submission 2*, p. 4; 10 Importer & Processor Associations, *Submission 4*, [p. 2]; and Papua New Guinea Forest Industries Association, *Submission 8*, [p. 2].

36 Australian Timber Importers Federation Incorporated, *Submission 2*, p. 4. See also Mrs Bronwyn Foord, General Manager, Window and Door Industry Council Incorporated, *Committee Hansard*, 14 December 2011, p. 12.

37 10 Importer and Processor Associations, *Supplementary Submission 4*, [p. 2].

38 Dr Jalaluddin Harun, Director-General, Malaysian Timber Industry Board, Government of Malaysia, *Committee Hansard*, 14 December 2011, p. 52; Mr John Halkett, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 2 and Mrs Bronwyn Food, General Manager, Window and Door Industry Council Incorporated *Committee Hansard*, 14 December 2011, p. 16.

2.36 The following section discusses the Lacey Act and the Gibson Guitars' actions.

*The Lacey Act and the Gibson Guitars' actions*

2.37 Until 2008, the United States' Lacey Act principally prohibited trafficking in wildlife and fish taken in violation of United States, state, tribal, or foreign laws, but almost all tropical timber and the majority of other plants were not covered.<sup>39</sup> Under 2008 Amendments to the Lacey Act it is now 'unlawful to import certain timber products into the US without an import declaration or to import these products in contravention of the laws of the country where the timber was harvested'.<sup>40</sup>

2.38 In 2009, a raid was conducted on premises of the Gibson Guitar Corporation in Nashville, Tennessee in relation to the import of a shipment of ebony wood originating from Madagascar. Since 2000, the Republic of Madagascar has had various laws restricting the harvest and export of ebony wood. An affidavit completed by a United States Fisheries and Wildlife Service (FWS) Special Agent alleged that the consignment of ebony was exported from Madagascar and imported into the United States in violation of provisions of the Lacey Act, and is consequently subject to forfeiture. Gibson Guitars has filed a claim to dismiss the forfeiture complaint and investigations into the case are continuing.<sup>41</sup>

2.39 In 2011, further raids were conducted on premises of the Gibson Guitar Corporation in Nashville and Memphis, Tennessee, with FWS agents seizing ebony and rosewood material, guitars and guitar parts as evidence of suspected violation(s) of the United States Lacey Act.<sup>42</sup> The Chairman and CEO of the Gibson Guitar Corporation, Henry Juskiewicz, has claimed that the 2011 raid did not come about because the wood was illegally harvested:

Rather, the U.S. government alleges that the wood was imported in violation of an Indian export restriction designed to keep wood finishing work in India. To make matters worse, although the Indian government certified that the wood was properly and legally exported under this law, the U.S. Fish and Wildlife Service substituted its own opinion and reinterpreted Indian law. Its analysis suggested that if Gibson would just

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39 Elinor Colbourn and Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, United States Attorney's Bulletin, Vol 59, No. 4, p. 92, appended to Uniting Church in Australia–Synod of Victoria and Tasmania, *Supplementary Submission 9*.

40 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 41.

41 Elinor Colbourn and Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, United States Attorney's Bulletin, Vol 59, No. 4, pp 102–3, appended to Uniting Church in Australia–Synod of Victoria and Tasmania, *Supplementary Submission 9*.

42 Environmental Investigation Agency, EIA Statement Regarding 24 August 2011 Gibson Guitars Raid by US Fish & Wildlife Service, [http://www.eia-global.org/News/Update\\_GibsonRaid.html](http://www.eia-global.org/News/Update_GibsonRaid.html), accessed 11 January 2012.

finish its fingerboards using Indian labor rather than Tennessee craftsman, there would be no issue.<sup>43</sup>

2.40 The ATIF contended that:

Australia needs to be vigilant that the "errors" of the US Lacey Act are not repeated. There appears to be a complete shambles in the US at the moment with possible prosecution of Gibson Guitars under the Lacey Act when the company has used FSC certified wood-based components and the reality that allegations of illegal activity relate to possible breaches of Indian employment and/or value-added manufacturing laws.<sup>44</sup>

2.41 Some submitters have claimed that the provisions of the Lacey Act reach into non-forestry related domestic laws of supply countries, with others stating that this bill does the same thing.<sup>45</sup> By way of example the PNGFIA stated that:

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.<sup>46</sup>

2.42 Mr John Halkett, General Manager, ATIF submitted that one of the problems with the Lacey Act is that 'it requires importers to have a duty of care, but no due diligence systems have been built yet to allow importers to demonstrate that duty of care'.<sup>47</sup>

2.43 Other submitters have urged caution in using the Gibson Guitar Corporation actions to draw conclusions about problems with the Lacey Act.<sup>48</sup> In addressing the question of whether the 2011 raids on the Gibson Guitar Corporation premises had strayed into Indian domestic law, Greenpeace Australia Pacific (GAP) drew the attention of the committee to a statement by the Washington-based NGO, Environmental Investigation Agency (EIA).<sup>49</sup> The EIA stated that:

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43 Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make it Stronger*, Huffington Post, 2 November 2011, [http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act\\_b\\_1071770.html](http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act_b_1071770.html), accessed 11 January 2012.

44 Australian Timber Importers Federation Incorporated, *Submission 2*, [p. 3].

45 Mr John Halkett, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 2 and Mrs Bronwyn Food, General Manager, Window and Door Industry Council Incorporated *Committee Hansard*, 14 December 2011, p. 16.

46 Papua New Guinea Forest Industries Association, *Submission 8*, [p. 2].

47 Mr John Halkett, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 7.

48 Uniting Church in Australia–Synod of Victoria and Tasmania, *Supplementary Submission 9*, [p. 1].

49 Greenpeace Asia Pacific, answers to questions on notice, 9 January 2012.

The Lacey Act violation in question concerns Gibson's import of pieces of rosewood and ebony that the government alleges to have been falsely declared both during export from India and during import to the U.S. The sawnwood in question had been exported from India under an incorrect tariff code (HS 9209), allegedly to avoid the Indian government's prohibition on export of sawnwood products (HS 4407); and had been declared upon import as veneer (HS 4408). The affidavit states that this description "fraudulently presents as a shipment that would be legal to export from India, and, in turn, would not be a violation of the Lacey Act." According to the affidavit, discrepancies among the paperwork accompanying the shipment suggest that the recipients knew they were purchasing sawnwood.

The affidavit describes eleven shipments of Indian ebony and rosewood imported in this manner over the past two years, despite what appears to be a publicly available Indian law prohibiting it. The facts in the affidavit appear to have been sufficient for a judge to approve search warrants on probable cause.

EIA trusts that the current case will receive due process through the U.S. justice system. It is important to be clear, in general terms, that the Lacey Act is a U.S. law that reinforces and supports the laws of other countries concerning the sourcing, harvest and trade of wildlife, plants and wood products. It is common for countries to have bans and restrictions on export of logs or sawnwood; these laws are directly linked to forest management and protection efforts. They are often an important tool to help control export flows of illegally logged timber, and to ensure that the benefits of value-added processing contribute to development within these often poor countries.<sup>50</sup>

2.44 GAP went on to argue that it is important to dispel the myth that the Lacey Act covers any domestic law at the point of harvest, noting by way of example that a truck driver exceeding the speed limit whilst transporting timber would not be subject to the provisions of the Lacey Act. As GAP explained:

Lacey is limited to laws that specifically go to the problem of illegal logging and plant trade: "the theft of plants; the taking of plants from a park, reserve or protected area; the taking of plants without or contrary to required authorization; taking, possessing, transporting or selling plants without payment of appropriate taxes, royalties or stumpage fees; and taking, possessing, transporting or selling plants in violation of a law governing their export or transshipment." (§ 3372 (B)(i), 7).<sup>51</sup>

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50 Environmental Investigation Agency, EIA Statement Regarding 24 August 2011 Gibson Guitars Raid by US Fish & Wildlife Service, [http://www.eia-global.org/News/Update\\_GibsonRaid.html](http://www.eia-global.org/News/Update_GibsonRaid.html), accessed 11 January 2012.

51 Greenpeace Asia Pacific, answers to questions on notice, 9 January 2012.

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*Other definitions of illegally logged*

2.45 Submitters, including ATIF, 10I&PA and PNGFIA, proposed alternative definitions of 'illegally logged'. ATIF proposed that the definition of illegally logged should be amended to read:

... timber harvested in contravention of **national and sub-national forest laws in force in the place (whether or not in Australia) where the timber was harvested, as enforced by that national/sub-national government and/or determined in the jurisdiction of that country.**<sup>52</sup>

2.46 A number of submitters were supportive of the intent of the broad definition of 'illegally logged' in the bill, but felt that more clarification needed to be provided. GAP noted that the Legislation Committee's report had also called for greater clarity, but the definition had remained the same in the revised bill.<sup>53</sup>

2.47 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church, outlined his view to the committee that a balance must be struck in the definition:

You have got the two risks: if you make it too broad, potentially you catch things you did not want to catch and may be prosecuting for trivial breaches of law that you did not really intend. They do not address illegal logging as we are really trying to address it; on the flip side, if you make it too narrow, then you may allow for crimes that really are associated with illegal logging and you will do nothing about them. It is getting that balance right.<sup>54</sup>

2.48 Dr Zirnsak went on to propose the addition of some guidance for interpretation, noting 'there probably is some need...to set some boundaries around what is actually intended to be caught'.<sup>55</sup> GAP submitted that the use of the European Union definition would provide 'additional clarity to the types of legislation that relate to determining whether a timber harvest is legal without being prescriptive'.<sup>56</sup>

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52 Australian Timber Importers Federation Incorporated, *Submission 2*, p. 4. See also 10 Importer & Processor Associations, *Submission 4*, [p. 2].

53 Greenpeace Australia Pacific, *Submission 3*, pp 4–5;

54 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia–Synod of Victoria and Tasmania, *Committee Hansard*, 14 December 2011, p. 26. See also Mr Jeremy Tager, Greenpeace Australia Pacific, *Committee Hansard*, 14 December 2011, p. 19.

55 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia–Synod of Victoria and Tasmania, *Committee Hansard*, 14 December 2011, p. 26.

56 Greenpeace Australia Pacific, *Submission 3*, p. 5; see also Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 9*, pp 4–5.

2.49 PNGFIA supported the definition of 'illegally logged' used by the International Tropical Timber Organization which refers to 'harvesting, transporting, processing, and trading of forest products in violation of national laws'.<sup>57</sup>

2.50 The Uniting Church advocate a definition of 'illegally logged' in the bill more aligned with Article 2 of the European Union Regulation 995/2010. It suggested that the definition could read:

Illegally logged, in relation to timber, means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested. 'Laws in force' means the legislation in force in the country of harvest including, but not limited to, covering the following matters:

- rights to harvest timber within legally gazetted boundaries,
- payments for harvest rights and timber including duties related to timber harvesting,
- timber harvesting, including environment and forest legislation including forest
- management and biodiversity conservation, where directly related to timber harvesting,
- third parties' legal rights concerning use and tenure that are affected by timber harvesting, and
- trade and customs, in so far as the forest sector is concerned.<sup>58</sup>

### ***Committee comment***

2.51 The committee notes that the government has explicitly taken a broad approach to the definition of illegally logged, and the reasons for this are laid out in the Explanatory Memorandum:

Illegally logged is a high level definition that provides scope and flexibility for importers and processors of raw logs to undertake due diligence in relation to the applicable laws in place where the timber is harvested, which may be prescribed by regulations, without the limitations of a prescriptive set of legislative requirements.

The challenge of prescribing individual requirements in a definition is complicated by the range of legislation given the number of countries—85 in total—from which Australia imports timber products. An unintended consequence of a prescriptive definition of illegally logged may result in some elements of applicable legislation being overlooked or excluded through omission.<sup>59</sup>

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57 Papua New Guinea Forest Industries Association (PNGFIA), *Submission 8*, [p. 2].

58 Uniting Church in Australia—Synod of Victoria and Tasmania, *Submission 9*, pp 4–5; see also Greenpeace Australia Pacific, *Submission 3*, pp 4–5.

59 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 11.

2.52 The committee notes that in the Legislation Committee's inquiry into the exposure draft of the bill, the majority of submitters felt that harmonisation with the United States Lacey Act and European Union legislation to the fullest extent possible would be very beneficial. This was reflected in the Legislation Committee's June 2011 report' recommendation that certain aspects of a revised bill – the declaration requirements –should be consistent 'to the fullest extent possible, with those in the United States Lacey Act and European Union Timber Regulation and others that meet a similar standard'.<sup>60</sup> Based on the recommendations of the Legislation Committee, the revised bill contains provision for 'an explicit and mandatory declaration at the border for imports of regulated timber products, similar to the US Lacey Act requirement'.<sup>61</sup>

2.53 The committee remains of the view that is desirable that the bill should, as much as possible, be aligned with other international regimes. Further, that in establishing the Regulations, the government should, to the greatest extent possible, align with the measures being introduced in the United States under the 2008 amendments to the Lacey Act and the European Union Timber Regulation 2010. This minimises the cost of compliance, guards against product substitution, and helps facilitate greater compliance amongst exporting countries.

2.54 The committee notes the concerns of submitters in relation to possible unintended consequences of the Lacey Act, but is of the view that caution should be applied in drawing conclusions based on the yet to be concluded actions against the Gibson Guitar Corporation.

2.55 The committee notes that similar issues about the purpose of the bill, and whether an objects clause should be included, were raised during the Legislation Committee's inquiry into the exposure draft of the bill.<sup>62</sup> The view of the committee at that time was that 'there would be no value added in including an object clause in the draft bill'.<sup>63</sup> Clause 6 of the amended bill makes it clear that the purpose of the Act is to 'prohibit[s] the importation of illegally logged timber and the processing of illegally logged raw logs' and 'requires importers of regulated timber products and processors of raw logs to conduct due diligence in order to reduce the risk that illegally logged timber is imported or processed'.<sup>64</sup> The committee remains of the view that an object clause does not add anything to clause 6.

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60 Senate Rural Affairs and Transport Committee, *Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011*, June 2011, p. ix.

61 Explanatory Memorandum, *Illegal Logging Prohibition Bill 2011*, p. 38.

62 Senate Rural Affairs and Transport Committee, *Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011*, June 2011, p. 26.

63 Senate Rural Affairs and Transport Committee, *Exposure draft and explanatory memorandum of the Illegal Logging Prohibition Bill 2011*, June 2011, p. 70.

64 Clause 6, *Illegal Logging Prohibition Bill 2011*.

## Qualifications on prohibition

2.56 Submitters presented a variety of views to the committee on whether the prohibition on importing or processing illegally logged timber, found in clauses 8 and 15 of the bill, should be subject to qualification. In particular, submitters addressed whether the prohibition should be subject to an absolute or strict liability; as well as whether the prohibition should be restricted to a narrower range of foreign laws, as enforced. The issues raised in relation to qualifying prohibition with a narrower range of laws have been discussed above. The following section addresses issues associated with absolute or strict liability.

### *Absolute or strict liability*

2.57 A number of submitters were of the view that the prohibition on importation or processing of illegally logged timber should not be subject to an absolute liability. They argued that the prohibitions should be restricted to situations where importers 'knowingly' import or trade products containing illegally logged timber. Many of these submitters made reference to the recent actions against the Gibson Guitar Corporation in the United States under the Lacey Act, described in chapter 2, to support their view that the prohibition is too broad. The ATIF argued that:

A person should not be held liable for knowledge of illegal acts committed by unknown third parties, often far removed up the supply chain in foreign jurisdictions (for imported products) and for which there is no definitive product test.<sup>65</sup>

2.58 ATIF went on to submit that this kind of qualification is present in a variety of state-based laws related to receiving stolen goods, including the NSW *Crimes Act 1900*, the Victorian *Crimes Act 1958* and the Queensland *Criminal Code 1899*. In these Acts the qualification is indicated by words such as 'knowingly', 'knowing or believing' or 'has reason to believe'.<sup>66</sup>

2.59 Mr Halkett, ATIF, argued that the use of the qualification is particularly important in a situation where a probability assessment needs to be made. He told the committee that:

A risk assessment means that you go through a due diligence process and you make a determination about whether you want to take the risk, whether the risk stacks up so that you are comfortable enough to import timber from Lithuania, from Chile, from Canada or from Papua New Guinea and that it is legally sourced. Then you get a third-party assessment of that. The declaration requires third-party audit, and if that all stacks up and you say, 'Yes, I'm comfortable', you import the product but, at the end of the day, there is evidence that appears to suggest that the timber may not be legal

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65 Australian Timber Importers Federation Incorporated, *Submission 2*, [p. 3].

66 Australian Timber Importers Federation Incorporated, *Submission 2*, [pp. 3–4].

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but you have followed due process, the 'knowingly' gives you the opportunity to argue that case.<sup>67</sup>

2.60 Mrs Foord, from WADIC, expressed a similar view, submitting that amendments should be made to clauses 8 and 15 of the bill, so that 'people [are] only being held accountable for matters they had control over or knowledge of'.<sup>68</sup>

2.61 Other submitters strongly opposed the inclusion of any qualification on this prohibition, arguing that to do so would make the bill 'pointless'. Mr Jeremy Tager, from GAP, explained this view to the committee:

...part of the purpose of the bill is to create standards that ensure that people who are importing timber make efforts to determine that what they are importing is legal and legally obtained. If you have a 'knowingly' standard, as I think Senator Heffernan or Senator Colbeck said, it is pretty easy to be ignorant. If you have a strict liability standard as you do now then you make sure that the entire supply chain becomes aware very quickly. It imposes a big responsibility on the supply chain.<sup>69</sup>

2.62 These sentiments were echoed by Dr Mark Zirnsak from the Uniting Church. He explained further:

We are deeply concerned about any inclusion of a 'knowingly' requirement within section 8 and other sections that allow for prosecution in this case. To think this through, let us take a fairly simple supply chain. We will assume that we have a logging company in a source country. That logging company pays bribes in order to obtain access to timber it should not legally be allowed to log and then it also pays bribes in order to avoid having to pay taxes and royalties on that timber. So it has committed a number of offences there. It sells that illegally sourced timber on to a trader. That trader then sells it to an Australian importer. Our understanding of the way a prosecution might come about is that eventually the long arm of the law will catch up with that logging company and they will be prosecuted in the source country. Therefore, the proof of illegality has been established by the fact that there has been a successful prosecution back in the source country. But if you then want to take an action against the importer here, the importer is going to be able to say: "I didn't actually know that was going on. I bought from this trader". Effectively, if they never asked any questions about where that timber was sourced or how it was obtained and

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67 Mr John Halkett, Technical Manager, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 5.

68 Mrs Bronwyn Foord, General Manager, Window and Door Industry Council Incorporated, *Committee Hansard*, 14 December 2011, p. 12.

69 Mr Jeremy Tager, Team Leader, Political and Projects Unit, Greenpeace Australia Pacific, *Committee Hansard*, 14 December 2011, p. 19.

so engaged in wilful ignorance of the circumstances of their sourcing, the prosecution here has a barrier in trying to provide the 'knowingly'.<sup>70</sup>

2.63 Dr Mark Zirnsak, from the Uniting Church, went on to explain how importers may be afforded some protection in situations where due diligence has been undertaken.

What we would probably prefer to see is a situation where a prosecution might be brought but that the mitigating circumstance of the importer here would be that they have to be able to demonstrate that they took all reasonable steps to identify that they were sourcing legal timber. That would become, hopefully, the defence in a legal case. Further, even before you got to court, you would hope that the prosecution would not mount a case against a company that has demonstrated that it has taken all reasonable steps to ensure that it is sourcing legal timber.<sup>71</sup>

2.64 Mr Talbot, from DAFF, responded to the issues raised by submitters on the prohibitions and the issue of absolute or strict liability. Mr Talbot told the committee that:

As the prohibition has been raised a number of times today, I would like to provide some further information on the prohibitions. The prohibition in clauses 8 and 15, which come into effect on the day after royal assent if the bill is passed in its current form, relate to the importing and processing of all timber and timber products. The standard fault elements prescribed in the Commonwealth Criminal Code are automatically applied to this offence. As specified by the Criminal Code Act 1995, these are intention, knowledge and recklessness. Therefore, including them in this bill would be to duplicate provisions already contained in the Criminal Code Act 1995. These fault elements are subjective: they look to the state of mind of the person. This prohibition is the first step and signals that the government is committed to introducing its policy.

Once the regulations have been finalised, and two years after the enactment of the bill, due diligence would be applied to regulated timber products. The fault element for the prohibition of importing or processing regulated timber or timber products is negligence. It is the intention of the government that industry and key stakeholders will be extensively consulted in the development of the regulations.<sup>72</sup>

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70 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia–Synod of Victoria and Tasmania, *Committee Hansard*, 14 December 2011, p. 23.

71 Dr Mark Zirnsak, Director, Justice and International Mission Unit, Uniting Church in Australia–Synod of Victoria and Tasmania, *Committee Hansard*, 14 December 2011, p. 23.

72 Mr John Talbot, General Manager, Forestry Branch, Department of Agriculture, Fisheries and Forestry, *Committee Hansard*, 14 December 2011, p. 60.

## Due diligence

2.65 The bill provides for the development of Regulations to prescribe due diligence requirements and timber products to be regulated. Criminal and civil penalties apply to offences for a failure to comply with these requirements.

2.66 The Explanatory Memorandum explains that 'importers must complete a statement of compliance with the due diligence requirements of the bill prior to making a customs import declaration at the border. Criminal and civil penalties apply to offences for a failure to comply with these requirements'.<sup>73</sup>

2.67 DAFF explained that due diligence will involve a three step process:

- Identifying and gathering information to enable the risk of procuring illegally logged timber to be accessed
- Assessing and identifying the risk of timber being illegally logged based on this information and
- Mitigating this risk depending on the level identified, where it has not been identified as negligible.<sup>74</sup>

2.68 The due diligence elements of the bill are intended to be responsive and flexible. As the Hon. Dr Mike Kelly explained to the Parliament:

To help meet their due diligence obligations and minimise compliance costs, importers and processors may utilise laws, rules or processes including those in force in a state, a territory or another country. Individual country initiatives and national schemes including national timber legality verification and forest certification schemes that can demonstrate that timber products have been harvested in compliance with the applicable laws of the country of harvest may be used, where applicable, as part of an importer's due diligence process.<sup>75</sup>

2.69 Mr Halkett, ATIF, told the committee that there is already significant work underway to develop the due diligence requirements necessary to implement the legislation. He explained that:

The department already has a working group that is starting to put together the due diligence risk assessment process. Forest and Wood Products Australia, which is the research and development arm of the industry, has allocated some funding to undertake some risk assessment and due diligence research, which is about to commence, and I would have thought

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73 *Explanatory Memorandum*, Illegal Logging Prohibition Bill 2011, p. 10.

74 Department of Agriculture, Fisheries and Forestry, 'Legislation Details', [http://www.daff.gov.au/forestry/international/illegal-logging/legislation\\_details](http://www.daff.gov.au/forestry/international/illegal-logging/legislation_details), accessed 17 January, 2012.

75 The Hon. Dr Mike Kelly, Parliamentary Secretary for Agriculture, Fisheries and Forestry, Second Reading Speech, *House of Representatives Hansard*, 23 November 2011, p. 13570.

that there would be a very robust due diligence risk assessment process which is developed by officials, which is given force through a regulation, which will involve not only some real rigour in terms of due diligence but also third-party audits, so that system will be third-party audited.<sup>76</sup>

2.70 A number of submitters expressed support for the due diligence model contained in the revised bill, in preference to the timber industry certifier framework contained in the exposure draft.<sup>77</sup> Australian Forestry Standard Limited (AFSL) stated its preference for the due diligence and Customs declarations approach taken in the bill, 'rather than a potentially complex and bureaucratic licensing and code of practice based approval system'. AFSL submitted that the due diligence approach:

... provides greater flexibility for importers and domestic processors to comply in an efficient and effective manner appropriate to the nature of their activities and ... reduces the likelihood of an importer or domestic processor being able to claim that the system gives them some form of Government "endorsement" that can be used in promoting themselves or their products.<sup>78</sup>

### ***Balance between the bill and the Regulations***

2.71 Submitters provided a variety of views on the balance of due diligence requirements that should be contained in the bill and the Regulations. GAP submitted that the bill should be more prescriptive in relation to the elements of due diligence required, as well as more prescriptive about information that should be contained in the declaration form. GAP raised concerns that the requirements are currently unclear. It submitted that the list of elements of due diligence is currently discretionary and the requirements of the declaration form are not articulated in either the bill or the Explanatory Memorandum. GAP proposed a series of amendments to the wording of the bill in order to:

... clarify that the declaration form must contain certain information relating to the timber products being imported and that the information required to satisfy due diligence requirements are mandatory.<sup>79</sup>

2.72 10I&PA, on the other hand, submitted that paragraph 14(5) (due diligence requirements for importing regulated timber products) is too prescriptive and should be dealt with comprehensively in the Regulations, rather than in the enabling Act.

2.73 10I&PA argue that the majority of the paragraph should be deleted as follows:

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76 Mr John Halkett, General Manager, Australian Timber Importers Federation, *Committee Hansard*, 14 December 2011, p. 8.

77 Australian Forest Growers, *Submission 7*, p.3. See also Australian Forestry Standard Limited, *Submission 6*, [p. 1]; Timber Queensland, *Submission 13*, p. 1.

78 Australian Forestry Standard Limited, *Submission 6*, [p. 1].

79 Greenpeace Australia Pacific, *Submission 3*, pp 7–9.

The regulations may provide for due diligence requirements for importing regulated timber products ~~to be satisfied, wholly or partly, by compliance with specific laws, rules or processes, including the following:~~

- ~~(a) laws, or processes under laws, in force in a State or Territory or another country~~
- ~~(b) rules or processes established or accredited by an industry or certifying body~~
- ~~(c) established operational processes~~<sup>80</sup>

### ***Cost and burden of compliance***

2.74 A number of submitters raised concerns about the potential cost of compliance with as yet undetermined due diligence systems, and voiced apprehension about whether small to medium enterprises, or small exporters in developing countries, would have the capacity to undertake the required compliance.<sup>81</sup>

2.75 However, ATIF told the committee that 'timber importers accept that they will be required to bear the costs of maintaining due diligence, documentation, auditing and accreditation control systems'. Nevertheless, ATIF went on to propose:

...that where elements of such systems do not exist sufficient to meet the requirements of the proposed legislation and need therefore to be developed the Government must fund such development to give effect to their broader illegal logging policy goals'.<sup>82</sup>

2.76 Timber Queensland submitted that in order to deliver a system that minimises any additional cost or administrative burden, 'it needs to be explored whether domestic due diligence requirements can be achieved either wholly or partly through compliance with specified laws, rules or processes'.<sup>83</sup>

### ***The declaration form***

2.77 GAP submitted that there is a lack of clarity relating to due diligence and the declaration form (clauses 13 and 14), with unnecessary regulatory duplication and gaps. It submits it is unclear whether a 'community protection question', referred to in the Explanatory Memorandum, is a declaration of legality, a satisfaction of due diligence, or a requirement for specific information.<sup>84</sup>

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80 10 Importer & Processor Associations, *Submission 4*, [p. 3].

81 10 Importer & Processor Associations, *Submission 4*, [pp 4–5], Australian Forest Growers, *Submission 7*, p. 3; Gunnersen Pty Ltd, *Submission 14*, [p. 3].

82 Australian Timber Importers Federation, *Submission 2*, p. 2.

83 Timber Queensland, *Submission 13*, p. 2.

84 Greenpeace Australia Pacific, *Submission 3*, pp 7–8.

2.78 GAP supports (following Legislation Committee Recommendation 2) 'the requirement that the declaration form be a legally binding and enforceable declaration of legality' and that clause 13 'explicitly state information that must be supplied in the declaration form'.<sup>85</sup>

2.79 Explanation about how the customs import declaration process would work was provided by the Hon. Dr Mike Kelly to the Parliament. Dr Kelly stated that:

The customs import declaration will include a community protection question asking importers of regulated timber products whether they have undertaken due diligence in compliance with this bill. This will be linked to importers' statements of compliance to provide a legally binding basis for enforcement of compliance with the legislation. The government will monitor the importation of regulated timber products at the border for compliance with the customs declaration, whilst government compliance and investigation officers will carry out border and post-border checks, as required, using the monitoring, investigation and enforcement powers of the bill.<sup>86</sup>

### *Possible elements of due diligence systems*

2.80 Many submitters, while noting that the details of the due diligence requirements contained in the bill will be determined following consultations on the Regulation, were keen to propose elements of due diligence that they held would improve compliance with the intention of the bill.

2.81 The Ministry of Agriculture and Forestry, New Zealand (NZMAF) supported the concept introduced in the Explanatory Memorandum that subordinate legislation outline circumstances in which a trade description relating to due diligence may be used. It elaborated:

If trade descriptions are linked to certain species/products from specified countries, it would enable costs and requirements to match the risks posed, reduce compliance costs for Australian importers of products from low-risk countries and, importantly, could provide incentives for high risk countries and/or companies to establish appropriate systems to address illegal harvesting.<sup>87</sup>

2.82 NZMAF went on to submit that:

In order to encourage other positive environmental outcomes, wood-based products derived from recycled sources should automatically qualify for the special trade description. The same approach should be extended to paper

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85 Greenpeace Australia Pacific, *Submission 3*, p. 8.

86 The Hon. Dr Mike Kelly, Parliamentary Secretary for Agriculture, Fisheries and Forestry, Second Reading Speech, *House of Representatives Hansard*, 23 November 2011, p. 13570.

87 Ministry of Agriculture and Forestry, New Zealand, *Submission 16*, [p. 1].

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and packaging made from recycled sources (if the trade in these products is covered under the Bill).<sup>88</sup>

2.83 AFSL submitted that clauses 14(5) and 18(5) should 'set out a number of principles for acceptable due diligence requirements rather than providing examples of the types of mechanisms that may satisfy due diligence requirements'.<sup>89</sup> AFSL proposed that the principles set out in the regulations should require that any/all due diligence systems be:

- risk-based (i.e. dealing with higher risk sources in a more stringent manner);
- comprehensive (i.e. cover all products);
- documented with documents retained for a defined period;
- auditable;
- required to be considered and endorsed by responsible officers (Directors);
- flexible and supportive of existing certification processes; and
- required to be reviewed and updated on a regular basis.<sup>90</sup>

2.84 GAP proposed that the declaration form must be made legally binding and that the following elements should be prescribed information: name of importer, name of supplier, botanical name and common name for the timber being imported, value of the import, countries of origin, region/coup, permit or approval details or harvest concession details in country of origin, vessel name, voyage number, container number, description of product, trade name and type of product, component of the product, tariff code, quantity of timber, due diligence system/components used to verify legality, identifying the level of risk of illegality in the imported timber (high, low, medium), other information as required in the Regulations.<sup>91</sup>

2.85 The Uniting Church submitted that clause 14(3) should also include the additional due diligence requirements that will be specified in the Regulations and these should include the elements contained within Article 6 of the European Union Regulation 995/2010, noting that clause 18(3) may then also need to be adjusted 'to ensure equal treatment for imported timber products and domestic raw logs, to ensure the legislation is compliant with the non-discrimination clauses of the World Trade Organisation rules'.<sup>92</sup>

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88 Ministry of Agriculture and Forestry, New Zealand, *Submission 16*, [p. 1].

89 Australian Forestry Standard Limited, *Submission 6*, [p. 2]. See also Timber Deelopment Association, *Submission 17*, p. 4.

90 Australian Forestry Standard Limited, *Submission 6*, [p. 2].

91 Greenpeace Australia Pacific, *Submission 3*, p. 9.

92 Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 9*, p. 6.

2.86 The committee heard from one submitter about the role that Australian DNA Technology can play in supporting legal timber supply chains and forest governance globally through the application of cutting edge genetics.<sup>93</sup>

2.87 Double Helix noted that Australian DNA Technology is increasingly used in Australia and globally, making it possible to identify species and geographic location of timber products; independently verify claims and prevent illegal logs being laundered into legitimate supply chains.<sup>94</sup>

2.88 Double Helix submitted that the bill should provide for inspectors to have the right to take small wood samples for DNA and other analysis.<sup>95</sup>

#### *Certification schemes*

2.89 The committee heard a variety of evidence about the contribution that various certification schemes can make to the conduct of due diligence. Some submitters considered that third party certification schemes or national schemes should be considered sufficient, or better than, other ways of demonstrating legality.<sup>96</sup> However, other submitters cautioned that such schemes could make a contribution to due diligence but could not be considered adequate in themselves.

2.90 Timber Queensland welcomed the recognition of 'rules or processes established or accredited by an industry or certifying body' as a means of delivering on due diligence requirements, noting that 'this should be of assistance for importers and most larger domestic processors in meeting their due diligence requirements through existing certification and other legality verification systems'.<sup>97</sup>

2.91 PNGFIA urged that due diligence Regulations should 'treat third party certification, management systems and national schemes by themselves as sufficient to prove legality'.<sup>98</sup>

2.92 However, GAP raised concerns that the due diligence requirements of the bill should not be satisfied by reliance solely on certification schemes or solely on laws in force in a particular country. As GAP explained to the committee:

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93 Double Helix Tracking Technologies, *Submission 12*, [p. 1].

94 Double Helix Tracking Technologies, *Submission 12*, [p. 1].

95 Double Helix Tracking Technologies, *Submission 12*, [p. 3].

96 Ms Natalie Lynn Reynolds, Acting Chief Executive Officer, Forest Stewardship Council Australia, *Committee Hansard*, 14 December 2011, p.28; Mr Richard Stanton, National Secretary, Australian Forestry Standard Limited, *Committee Hansard*, 14 December 2011, p. 33.

97 Timber Queensland, *Submission 13*, p. 1. See also Australian Forestry Standard Limited, *Submission 6*, [p. 2].

98 Papua New Guinea Forest Industry Association, *Submission 8*, [p. 3].

The standard being imposed on importers is a negligence standard and it requires that importers make informed decisions regarding the nature of the evidence that must be provided in order to reasonably assure legality. Allowing existing schemes to replace the obligations on importers runs contrary to the Bill.<sup>99</sup>

2.93 Both GAP and Double Helix Technologies submitted that certification or legality schemes, whether sanctioned by governments, industry or third parties be recognised as evidence of, but not proof of, legality.<sup>100</sup> DoubleHelix Tracking Technologies noted that:

Whereas certification represents a commitment to sourcing from acceptable sources it does not represent proof of origin or legality in itself. Further, that as certification conveys a premium value onto a product...there is an incentive to forge successful certification brands.

2.94 AFSL welcomed the fact that clause 14(5) (b) specifically recognises 'rules or processes established or accredited by an industry or certifying body' but queried why the words 'or certifying body' have been omitted from clause 18 (5) (c). It was suggested that they be added.<sup>101</sup>

#### *Assessing compliance and due diligence standards*

2.95 Mr Tager, GAP, proposed to the committee that in order to determine the levels of compliance and assist in assessing the standards used in due diligence documentation on an ongoing basis, the bill would benefit from a requirement for annual compliance audits and aggregate data reports. GAP proposed specific amendments to clause 83 of the bill to effect this amendment. GAP has noted that 'annual compliance audits was a measure proposed by DAFF following the Legislation Committee's report ... [and] the Minister's office did not appear opposed to its inclusion'.<sup>102</sup>

2.96 The Hon. Mike Kelly clarified to the Parliament how the bill provides for compliance audits and statements and public reporting that can be used to improve due diligence and enforcement systems over time. He explained that:

The bill also provides requirements for importers and processors to provide statements and declarations of compliance, undertake audits and remedial action, provide reports and other information to the minister and publish information for compliance and enforcement purposes. The results of audits will provide a basis for continuous improvement of importers and processors due diligence systems and processes where deficiencies are identified, and for enforcement purposes by the Commonwealth where

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99 Greenpeace Australia Pacific, *Submission 3*, p. 10.

100 Greenpeace Australia Pacific, *Submission 3*, p. 10.

101 Australian Forestry Standard Limited, *Submission 6*, [p. 2].

102 Greenpeace Australia Pacific, *Submission 3*, p. 11–12.

breaches are detected. To ensure there are satisfactory levels of transparency of compliance with the due diligence requirements of the bill, importers and processors are required to make an annual statement of compliance. The nature and detail of these statements will be prescribed by regulations to be developed in consultation with key stakeholders. This information may be used by the Commonwealth to publicly report on the performance and level of compliance of importers and processors, consistent with privacy and commercial-in-confidence considerations. The coverage and detail of public reporting requirements will be developed in consultation with key stakeholders.<sup>103</sup>

### ***Committee comment***

2.97 The committee notes that this is the first legislation in the world designed from the outset to address illegally logged timber. The bill evidences the commitment that the Government is making to combating illegal logging, with its multiple adverse environmental, social and economic effects.

2.98 The committee appreciates that many concerns raised by submitters relate to uncertainty about the nature of the due diligence requirements that will be prescribed by regulation. The Government has taken a due diligence approach based on its own research and the work of the European Union which indicates that the best way to minimise trade in illegally harvested timber is to implement a due diligence framework. The committee is of the view that ongoing consultations with stakeholders on the nature and content of the due diligence requirements will be critical to ensuring that the requirements are robust, yet flexible and responsive to emerging situations and developing knowledge and technologies.

2.99 The committee is concerned that a number of submitters appear confused by the difference between the immediate prohibition on illegal logging and the subsequent due diligence requirements that will be addressed by regulations. It appears that many of the submissions were based on a misunderstanding regarding the burden of proof for a criminal conviction in such a case. The committee is of the view that this matter needs to be clarified, in a timely manner, through an information campaign that forms part of a broader outreach strategy. This will be an important step in gaining broader support for the objectives of the bill.

2.100 The committee emphasises again the importance of ensuring that due diligence requirements are developed in a way that reflects the best regulatory practice, while ensuring this is balanced by consideration of the cost and burden of compliance on importers and processors. The committee is of the view that using pre-existing laws, rules or processes, individual country initiatives and national schemes including national timber legality verification and forest certification schemes, where they are found to be appropriate, will contribute greatly to reducing compliance costs.

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103 The Hon. Dr Mike Kelly, Parliamentary Secretary for Agriculture, Fisheries and Forestry, Second Reading Speech, *House of Representatives Hansard*, 23 November 2011, p. 13571.

2.101 The committee is also of the view that the consultation process is an opportunity to examine the most effective contribution that due diligence processes can make to Australia fulfilling its treaty obligations to combat corruption.

### **Need for outreach**

2.102 A number of submitters raised the importance of carrying out a substantial program of outreach in order to inform the domestic supply chain and supplier countries about the requirement of the bill and the ensuing Regulations, particularly in relation to due diligence.<sup>104</sup>

2.103 Mr Halkett, from ATIF addressed the importance of government support for such an outreach program:

I understand from the minister that some support for that work will be provided. To date, all the outreach that has been done has been wholly and solely funded by the industry. We would expect, given this is government policy and government legislation, that the minister will provide some sort of funding support for that work post the passing of this bill'.<sup>105</sup>

2.104 Some submitters noted that the nature of the industry provides some challenges for outreach. As Mr Brooks, from the Cabinet Makers Association, told the committee:

For example, in Victoria there are over 2,000 cabinetmakers and quite often it is a movable feast. Part of the exercise is how you educate people in those 2,000 businesses about the requirements. Probably only five per cent go into the area we are talking about but it is how we target that five per cent and get the message through with regard to the need for compliance'.<sup>106</sup>

### ***Committee comment***

2.105 The committee is of the view that significant and well-targeted outreach efforts to explain the purpose and operation of the bill and accompanying Regulations will be critical to the successful implementation of the bill. This will need to be carried out domestically and internationally utilising bilateral mechanisms and existing multilateral arrangements. This will complement Australia's capacity building initiatives designed to combat illegal logging in the region.

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104 Mr Grant Johnson, Policy Manager, Australian Forest Products Association, *Committee Hansard*, 14 December 2011, pp 37–38 and Mr Gavin Matthew, Chamber Manager, Resources, Australian Forest Products Association, *Committee Hansard*, 14 December 2011, p. 39.

105 Mr John Halkett, Technical Manager, Australian Timber Importers Federation Incorporated, *Committee Hansard*, 14 December 2011, p. 7.

106 Mr Walter Richard Brooks, Executive Officer, Cabinet Makers Association Incorporated, *Committee Hansard*, 14 December 2011, p. 16.

