

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

Papua New Guinea Forest Industries Association (PNGFIA)

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

Illegal Logging Prohibition Bill 2011

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

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

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

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

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

These points are expanded below.

Poorly defined legal standard presents risk for importers

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

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

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

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

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

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

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

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

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

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

No guarantees for third-party and nationally mandated certification schemes

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

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

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

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

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

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

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

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

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

Discretion to alter regulation introduces ongoing uncertainty for importers and exporters

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

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

Government has failed to engage with trading partners

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

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

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

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

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