
Australia's Illegal Logging Bill: A More Effective Approach

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

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ACRONYMS

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

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 1: INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

The PNGFIA considers these adverse consequences can be avoided.

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

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

About the PNGFIA

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

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

CHAPTER 2: AN ILLEGAL LOGGING PROBLEM?

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

2.1 Defining Illegal Logging

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

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

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

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

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

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

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

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

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

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

2.2 Global Estimates of Illegal Logging

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

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

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

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

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

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

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

⁶ Greenpeace

⁷ WALHI

⁸ Seneca Creek Associations and Wood Resources International (2004)

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

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

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

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

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

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

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

⁹ Ibid, pp. 2

¹⁰ Ibid, pp ES 3

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

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

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

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

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

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

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

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

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

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

¹³ Ibid

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

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

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

2.3 Australian analysis of imports of illegal timber

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

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

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

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

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

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

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

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

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

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

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

2.4 Analysis of Illegal Logging in Papua New Guinea

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

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

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

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

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

¹⁸ Australian Department of Foreign Affairs and Trade data

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

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

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

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

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

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

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

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

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

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

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

²² Ibid page 4

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

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

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

CHAPTER 3: A CRITIQUE OF THE BILL

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

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

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

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

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

3.1 Impact on Papua New Guinea

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

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

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

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

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

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

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

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

3.2 Uncertainties in the Bill

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

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

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

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

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

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

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

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

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

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

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

²⁶ Above n 1, page 30

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

3.3 Regulatory Uncertainty and the Impact on Business

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

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

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

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

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

²⁷ Above n 1, page 27

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

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

²⁹ Ibid

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

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

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

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

3.4 Pointless regulation of Australian forestry

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

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

³⁰ Above n 1, page 68

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

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

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

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

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

3.5 Recommendations

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

CHAPTER 4: PROBLEMS REGULATING TRADE IN ILLEGAL PRODUCTS

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

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

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

4.1 The EU and US Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2 Limitations to Enforcement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.1 World Trade Organisation

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

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

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

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

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

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

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

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

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

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

5.2 ASEAN-Australia-New Zealand Free Trade Agreement

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

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

5.3 Pacific Agreement on Closer Economic Relations Plus

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

³⁶ TBT Agreement Annex 1(1).

³⁷ Technical Barriers to Trade Agreement, Article 2.1

³⁸ Technical Barriers to Trade Agreement, Article 2.2

³⁹ ASEAN Australia New Zealand Free Trade Agreement, Article 7.1

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

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

5.4 South Pacific Regional Trade and Economic Co-operation Agreement

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

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

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

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

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

5.5 Australia-New Zealand Closer Economic Relations Trade Agreement

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

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

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

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

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

CHAPTER 6: CONCLUSIONS

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

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

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