



Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA



Response to the Illegal Logging Sunsetting Review

30 September 2021

Introduction

Illegal logging is the world's most profitable natural resource crime and one of the most profitable transnational crimes behind counterfeiting and drug trafficking. Generating between \$72 and \$218 billion dollars annually¹, illegal logging involves more than cutting trees in the wrong place. Illegal timber logging and trafficking facilitates organized crime, perpetuates corruption, and leaves behind violence and destruction in forest countries and communities. Those who try to stop it often risk paying with their lives. A new report by Global Witness² documented 227 deadly attacks on land defenders worldwide during 2020 alone. The report names logging as the sector linked to the most murders.

Demand side laws such as the ILPA, if properly implemented and enforced, have the potential to shift international trade, and cut off significant revenue streams for criminal networks, while strengthening the rule of law and protecting human rights and the environment worldwide. We therefore appreciate the opportunity to contribute to the sunset review of the ILPA and hope that our recommendations to strengthen the effectiveness of the law will be taken into consideration when formulating reforms.

Since 1989, the Center for International Environmental Law (CIEL) has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of earth's inhabitants to live in balance with each other. Furthermore, CIEL seeks to reduce illegal logging and deforestation globally by aiding implementation and enforcement of national and international laws.

The Synod of Victoria and Tasmania is part of the Uniting Church in Australia, the country's third largest Christian denomination. The Uniting Church in Australia was formed in 1977, when three congregations – the Methodist Church of Australasia, the Presbyterian Church of Australia and the Congregational Union of Australia – came together. We are one of six Synods, comprising over 500 congregations and more than 60,000 members. We also have 12 schools. We worship every week in more than 40 languages. Nationally, the Uniting Church has formal partnerships with 32 churches in Asia and the Pacific and have also been instrumental in pioneering interfaith relationships, including other Christian denominations

Jubilee Australia is a Sydney-based not for profit organisation whose purpose is to stand with local communities--particularly in the Asia-Pacific region--against the exploitation of their resources and environments by governments and companies. We collaborate with local communities and partner organisations to equip them in their struggles, we provide quality investigative research, and we advocate for just solutions to an extractive and unequal economic system.

The Environmental Investigation Agency (EIA) has 30 years of experience investigating and exposing environmental crime and campaigning to protect endangered species. Focusing on field evidence and legal frameworks in deforestation and forest degradation hot spots around the globe, EIA works to reform forest governance and shut down networks that trade in illicit wood products and agricultural commodities driving deforestation. On the demand side, EIA works to transform the global timber market by helping to develop and implement new laws against international trade of illegally sourced timber in major consumer countries.

¹ Transnational Crime in the Developing World, Global Financial Integrity 2017 <https://gfintegrity.org/report/transnational-crime-and-the-developing-world/>

² Last Line of Defense, Global Witness 2021 <https://www.globalwitness.org/en/campaigns/environmental-activists/last-line-defence/>

Recommendation Summary

Question 1

Is the Regulation delivering what was intended in an efficient and effective manner, and is it fit-for-purpose? If not, what could be improved?

- There is limited information in the public arena on which to assess the effectiveness of the Illegal Logging Prohibition Regulation. Of concern, the DNA testing results reported by the Commonwealth Government in December 2020 found that 40% of species labels on imported timber sold at retail outlets was inaccurate.
- Regulated entities have now had years to develop and implement due diligence systems, but enforcement is still in its infancy and should increase compliance and reduce illegal timber imports.
- Related to modifications, the two most effective means of strengthening compliance with the ILPA and ILPR are the introduction of an at border declaration requirement (discussed in our response to question 3), and the provision of enhanced enforcement powers (discussed in our response to question 5). We also suggest an expanded definition of illegal logging (discussed in our response to question 17), as illegality related to timber and timber derived products extends well beyond the point of harvest.

Question 2

Do you support the due diligence requirements in the Regulations continuing as the centrepiece obligations placed on timber importers and processors?

- Yes.

Question 3

What are your views on importers having to declare the timber species of a product, where the timber was harvested, and the risk of illegal harvest before it arrives in Australia?

- We agree with the inclusion of a declaration prior to import.

Question 4

Do you have any preferences for how due diligence information is provided to the department?

- Due diligence information should be provided to the Department in a manner that allows for it to be readily translated into a database, and this should in turn be made available to stakeholders for the purposes of identification of high risk trade flows, changes in trends etc.

Question 5

Do you support adding 'at-border' powers such as sampling, seizure and goods control to the Act?

- Yes.

Question 6

Are there any significant costs associated with sampling, seizure and goods control that industry is likely to face in addition to those outlined?

- No.

Question 7

What other measures could ensure that goods entering the country or intended for processing can be verified for due diligence claims?

- An import declaration, or similar declaration for processors, as outlined under Questions 3 and 4, provides a crucial basis for verification, as it allows for the identification of high-risk imports and verification against the information provided by the importer.

Question 8

Are there any particular timber-identification technologies that you support for integrating into the illegal logging legislation?

- Wood anatomy, stable isotopes, DNA and mass spectrometry can all be useful tools to provide independent verification of claims from suppliers and importers.
- The type of technology to be used depends on the question that needs answering, and whether respective samples are available in the global library for comparison.
- For product types, species or countries of origin/production where a known risk of mis-declaration exists, The DAWE should issue guidance suggesting certain timber identification techniques to successfully apply due diligence.

Question 9

Do you support removing the due-diligence system requirement for low-frequency importers and processors?

- No.

Question 10

What other opportunities can you suggest for reducing the regulatory burden for low-frequency importers?

- None.

Question 11

What additional measures can be introduced to ensure high-frequency importers and processors have adequate due diligence systems in place?

- The consultation paper discusses the use of both third party auditing of due diligence systems and the introduction of licensing schemes as a means of reducing the regulatory burden for high frequency importers and processors. The first of these, with certain caveats, is supported, the latter is not.

Question 12

How can due diligence requirements for repeated imports be streamlined?

- Further streamlining for repeated imports is not necessary, as the creation of the due diligence system is the most time consuming and labour intensive piece, after which undertaking due diligence for repeated imports will require less time.

Question 13

Should the potential 'deemed to comply' arrangements be introduced and how should they operate?

- No for private certification schemes (FSC and PEFC).
- No for CITES.

Question 14

Do you support changing the scope of regulated products to add or remove any of the discussed products or other products?

- Yes, we support the inclusion of musical instruments and charcoal recommended in the Sunsetting Review Consultation Paper.
- We also support the consideration of additional wood products categories for inclusion.

Question 15

Do you support adding any of the product exemptions discussed?

- No.

Question 16

Do you have any suggestions for reducing requirements around lower-risk products without compromising the effectiveness of the laws?

- No.

Question 17

What further terms need to be defined under the laws? Should the term 'processing' be defined?

- The current definition in ILPA of *illegally logged* should be expanded beyond simple breaches of harvest related laws; increasing the scope of the modes of illegality regulated by the ILPA would be consistent with the aims of the Act.
- 'Timber' and any other terms relating to 'inscope' products should be defined through the use of HS codes (in Schedule 1 - Regulated Timber Products of the Regulation), rather than via a specific definition. This approach will avoid any ambiguity around whether a product is within the scope of the Act.
- S.17 of the ILPR states "For subsection 18(1) of the Act, this Division prescribes the due diligence requirements for processing a raw log into something other than a raw log." This definition is supported, provided that any definition of 'raw log' includes square logs. Minimal processing, particularly that which occurs at the point of harvest, should not exempt those processing what are effectively still raw or square logs into something else from the Act.

Question 18

Should the laws prevent logs entering the country from nations with a log export ban in place?

- Yes.

Question 19

How can the department add flexibility to the legislation, including improving the use of guidance materials?

- We agree with the recommendation in the Sunsetting Review Consultation Paper to allow for the automatic incorporation of updated guidelines under the framework, without needing to amend the Regulations.

Responses to Questions Posed in the Consultation Paper

1) Is the Regulation delivering what was intended in an efficient and effective manner, and is it fit-for-purpose? If not, what could be improved?

There is limited information in the public arena on which to assess the effectiveness of the Illegal Logging Prohibition Regulation. Of concern, the DNA testing results reported by the Commonwealth Government in December 2020 found that 40% of species labels on imported timber sold at retail outlets was inaccurate.³ While not all inaccurately labelled timber will have been illegally sourced, it raises concerns that there still could be a significant proportion of imported timber that is illegally sourced.

The other indicators of the effectiveness of the Regulation comes from the Department's 2019 - 2020 annual report:⁴

- The self-declared compliance rate was 80%, compared with 82% in 2018–19; and,
- Due diligence assessments of importers found compliance rates rose from around 10% in 2017, during the soft start period, to around 75% in 2019–20.

With the soft start period not ending until 2018, there has been limited enforcement of ILPR's provisions throughout the majority of its existence. While regulated entities have now had years to develop and implement due diligence systems, enforcement itself is still in its infancy. While there are a number of very positive suggestions for reforms in the consultation paper, we hold concerns that some of the proposals discussed would significantly weaken the effectiveness of ILPA and the ILPR, at a time when government should be instead looking towards provisions that strengthen compliance.

Of particular concern is that 'deemed to comply' provisions are again being discussed, despite these having been debated at length during the previous review - including within the Australian Senate, where they were ultimately rejected. As discussed in our response to question 13, the ILPR already recognises certification schemes and provides a form of due diligence that allow importers and processors of certified products to streamline their approach. However, these schemes are not guarantees of legality, and, as our submission shows, illegally harvested products persist within the recognised certification schemes. The proposed 'deemed to comply' provisions are strongly rejected by each organisation involved in this submission.

We believe that the two most effective means of strengthening compliance with the ILPA and ILPR are the introduction of an at border declaration requirement (discussed in our response to question 3), and the provision of enhanced enforcement powers (discussed in our response to question 5).

Much of the consultation paper deals with the regulatory burden associated with ILPA and IPLR. Against this light, it is important to note that the information contained with the declaration provisions that we have recommended are in line with what is already required by importers of ILPR regulated products. However, making the provision of such information at the border an enforceable

³ Assistant Minister Jonathon Duniam, 'DNA timber tests to find those who go against the grain', Media Release, 8 December 2020.

⁴ Department of Agriculture, Water and the Environment, 'Annual Report 2019-2020', p. 40.

requirement has the potential to streamline many aspects of enforcement, and to act to reduce the enforcement burden faced by the Department.

Alongside the introduction of a declaration requirement, a broader suite of enforcement powers and options, such as at border seizures, is needed for ILPR to more effectively act as a deterrent, alongside further aligning ILPA with similar legislation in other markets internationally.

It is well recognised internationally that illegality related to timber and timber derived products extends well beyond the point of harvest, and in our response to question 17 we outline some of the modes of illegality commonly associated with illegal logging globally, which could be included in an expanded definition of 'illegal logging'. Alongside supporting the proposal to include log export bans within the types of illegality that ILPR considers (question 18), we recommend how the Regulations could be more effectively amended to take into account these broader forms of illegal activity.

2) Do you support the due diligence requirements in the Regulations continuing as the centrepiece obligations placed on timber importers and processors?

Yes. An enforceable due diligence requirement is key to encouraging behavioural change and transforming markets. Due diligence, when combined with effective enforcement, has the potential to encourage importers and processors to preference low-risk, well-documented supply chains – which, in turn, can encourage producers to improve transparency in their supply chains and compliance with laws.

Current due diligence requirements represent a relatively low cost to importers, based on DAWE figures in the consultation paper, and it can make a substantial difference in reducing imports of illegal goods into Australia. It is important to level the playing field for companies who are already trading responsibly, and who are currently at a disadvantage of having to compete against lower cost imports from unknown and/or illegal sources.

Due diligence also allows for a wider cast enforcement net, and for greater flexibility in enforcement, as per DAWE's differentiated response to non-compliance. Experience in the US, where explicit due diligence requirements do not exist in the Lacey Act, has shown that enforcement of violations of the Lacey Act that require the government to prove imported timber is illegal can be extremely time and resource intensive. Evidence to demonstrate that a particular good is illegal for successful prosecution may be held by those complicit with illegal logging or outside of enforcement agencies' jurisdiction. Enforcement of due care in the US has been more limited than that of due diligence under EUTR. Due diligence can provide a clear framework for assessing company compliance and may even allow for exclusion of certain types of timber and wood products from the Australian market, as has occurred under the EUTR.

Of the other timber legality legislations developed overseas, the ILPA is most similar to the EUTR. Both include prohibition and due diligence provisions. While the ILPA regulates the acts of importation and processing and the EUTR regulates the act of "placing timber on the market," both regulate both domestic and imported timber. The majority of enforcement actions under EUTR relate to due diligence.

The EUTR entered into force in 2013 and has seen broad implementation and enforcement actions by EU Member States. Designated Competent Authorities are responsible for verifying that those placing timber on the EU market ("Operators" under EUTR parlance) are complying with their obligations

under EUTR and undertake checks on both domestic and importing operators, primarily related to their due diligence obligations. Competent Authorities often follow a risk-based approach in developing verification plans and conducting checks. “Competent Authorities carry out checks to ensure operators comply with Article 4 [Obligations of operators] and 6 [Due diligence systems] of the EUTR, which may include an assessment of the operator’s Due Diligence System, examination of documentation or spot checks such as field audits.”⁵

Member States are surveyed on a bi-annual basis regarding the number of operator, trader, and monitoring organisation checks they have undertaken, as well as the number of substantiated concerns (third party reports of suspected non-compliance) they have received and acted upon. UNEP-WCMC analysed the compliance actions of Austria, Bulgaria, Czech Republic, Denmark, Greece, Ireland, Romania, Spain, Sweden and the United Kingdom, reporting for the period March 2017 to February 2019, and the remaining EU countries reported for January 2017 to December 2018. Iceland and Liechtenstein provided no enforcement data.⁶

In total, 21,256 Operator checks were carried out by EUTR Competent Authorities (“CAs”) during the two-year reporting period. CAs undertook a further 2,333 checks on Traders (sellers of regulated products that have already been placed on the market, Traders have no due diligence obligations, but are required to keep purchase documentation to allow for traceability of their products). CAs identified 2,273 infringements and took 2,450 enforcement actions, including fines for inadequate due diligence systems and cease and desist orders. These figures exclude a further 804 cases that were either referred to the police or were on-going for both domestic and imported timber.⁷

In addition to undertaking checks, primarily related to due diligence, the EUTR/FLEGT Expert Group concluded that effective due diligence and risk mitigation to a “negligible” level for timber from Myanmar is not possible. They cited the lack of sufficient information on harvest volumes authorized for cutting, the lack of sufficient information to show clear attribution of origin within the country (so as to exclude conflict timber), and the high-risk of mixing (legally and illegally harvested logs in the saw mills often owned by the Myanmar Timber Enterprise), combined with the high corruption index.⁸

The enforcement of the EUTR due diligence provisions have been used to both require improvements in companies’ due diligence systems (or issue fines when compliance is not forthcoming) and to exclude timber from the EUTR market, when due diligence cannot be demonstrated.

3) What are your views on importers having to declare the timber species of a product, where the timber was harvested, and the risk of illegal harvest before it arrives in Australia?

Identification of species and where timber was harvested, alongside information about the risks of illegality in a supply chain should be provided to the Department prior to import to Australia.

⁵ UNEP-WCMC, Overview of Competent Authority EU Timber Regulation checks, January - June 2019, https://ec.europa.eu/environment/forests/pdf/UNEP%20WCMC%202019_Overview%20of%20CA%20checks%20January-June%202019_FINAL_17.01.2020.pdf, p. 3.

⁶ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union’s Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 44.

⁷ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union’s Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 44.

⁸ European Commission, (2018), Summary Record of the FLEGT/EUTR Expert Group Meeting 19 April 2018, p. 1 http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupMeetingDoc&docid=14014; UNEP-WCMC, (2018), Briefing Note for the Competent Authorities (CA) implementing the EU Timber Regulation, November-December 2018, p. 2, http://ec.europa.eu/environment/forests/pdf/Briefing_note_nov_dec_2018.pdf

Species and area of harvest information are the foundational elements upon which due diligence is built, and represents information that a person 'ought reasonably to know' when identifying and assessing risks of illegality.

If an importer's supplier is unable or unwilling to provide an importer point of harvest information, then an importer should ask why, as this is unlikely to meet the due diligence requirements of the ILPA, which includes the assessment of information that they 'ought reasonably to know'. An importer assigning a low risk to such a product may breach multiple sections of the ILPR, particularly for a product type (such as plywood) or species (such as tropical hardwoods) where risks of illegality are present.

Due diligence systems based upon identifying and assessing risk are described in the ILPR and require an importer to know the area from which the timber was harvested⁹.

It is particularly important that the import declaration contains the country where the timber was harvested, rather than just the country where goods were manufactured, processed or last exported from.

Particular attention should be paid to products that reach the Australian market through indirect supply chains via third countries. For example, China is Australia's largest supplier of imported wood products (imports doubled from \$274 million to \$518 million 2014 to 2019), and is also the world's largest importer of illegal and high-risk timber. EIA has found in its investigations that Chinese importers sell imported logs and sawn wood to thousands of mills, veneer plants and other manufacturers, often without proper origin documentation. Once the timber is further processed and mixed with timber from different species and origins, traceability in the supply chain is broken and the origin of the timber is lost. A 2019 investigation from Chinese media outlet Sixth Tone showed that major Chinese plywood manufacturers were not aware of the origins of the wood used for their veneer¹⁰.

Vietnam is another major supplier of products produced from imported timber. Over half of Vietnam's wood materials import originate from high risk countries. Previous studies have estimated that 21 percent of Vietnam's total import of sawn wood and nine percent of imported logs contain illegal timber¹¹, a clear indicator of risk for anyone conducting due diligence on Vietnam produced products. The same issues regarding lack of country of origin transparency, high instances of corruption and documentation fraud, and risks of illegally harvested timber entering supply chains for most Chinese ILPR regulated products apply equally to Vietnam.

In order to keep illegal timber out of the Australian market, it is therefore important for importers to know and declare the species as well as the country of harvest. Further to the implementation of species, origin and risk declarations requirements prior to import, the Department should consider issuing guidance to importers, stating that knowledge of the area of harvest, and not just the country of last export, is a legal requirement under ILPR, and importers failing to identify this may be in breach of the Regulation.

Under the US Lacey Act, the provision of such information by importers is a requirement, and mis-declaration is in itself an offence. The ILPR should be amended to likewise make mis-declaration an offence in Australia. Such a move would clarify that identification of at least the country of harvest is a critical component of successful due diligence.

Successful prosecution of prohibition offences under ILPA can, at times, prove difficult. The documents (if these even exist) required to meet the burden of proof of illegality are often held abroad

⁹ ILPR, Section 13(3)

¹⁰ How illegally harvested timber is "greenwashed" in China, Sixth Tone 2019 <https://www.sixthtone.com/news/1003369/how-illegally-harvested-timber-is-greenwashed-in-china>

¹¹ <https://forestgovernance.chathamhouse.org/countries/vietnam>

and by entities that are facing governance challenges or directly involved in illegal activity. Adding an enforceable declaration requirement that included the provision of country of harvest, species and risk would have the further advantage of providing the Department with a simplified route to successful enforcement, with mis-declaration related offences being much simpler to identify and easier to prove.

4) Do you have any preferences for how due diligence information is provided to the department?

Due diligence information should be provided to the Department in a manner that allows for it to be readily translated into a database, and this should in turn be made available to stakeholders for the purposes of identification of high risk domestic and international trade flows, changes in trends etc. Standardised forms that direct regulated entities towards specific answers, avoiding open text boxes until required will also reduce the burden on regulated entities.

ILPR already requires the importer to collect the below information when undertaking due diligence,¹² which should be included in this process:

- Identification of all entities involved in both harvest and manufacture of a product
- Whether a product has been manufactured outside of the country of harvest, and all countries that the wood has entered prior to arrival in Australia
- The species, region and unit of harvest
- What form of due diligence is being applied (use of a Timber Legality Framework, Country or State Specific Guideline, or a Regulated Risk Factors approach)
- Final risk level assigned - low, medium, high
- Steps taken during risk mitigation process

Similarly, ILPR requires processors to collect the following information when undertaking due diligence,¹³ which should also be included in this process:

- Identification of all entities involved in both harvest and supplying of the raw log
- The species, State or Territory, and unit of harvest
- What form of due diligence is being applied (use of a Timber Legality Framework, State Specific Guideline, or a Regulated Risk Factors approach)
- Final risk level assigned - low, medium, high
- Steps taken during risk mitigation process

5) Do you support adding 'at-border' powers such as sampling, seizure and goods control to the Act?

Criminological literature points to the ability to get away with illegal activity is a far more important determinant of such activity than the level of penalty that may result if there is a successful prosecution. This literature finds that perceived certainty of punishment is associated with reduced intended offending.¹⁴ The conclusion is that certainty of apprehension and not the severity of the legal consequences ensuing from apprehension is the more effective deterrent.¹⁵

¹² ILPR, Section 10

¹³ ILPR, Section 19

¹⁴ Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 201.

¹⁵ Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 202.

A program of sampling of goods being imported will add to the risk of detection of non-compliance with the ILPR. The increased risk of detection is likely to drive greater compliance with doing proper due diligence to ensure imported products are from legal sources.

Experience also shows that deterrence is assisted when the sanction imposed happens immediately after detection of the offence. Delayed sanction is far less effective as a deterrent.¹⁶ Thus, being able to seize illegally sourced products at the border will also assist with deterrence as the sanction is rapidly imposed.

Our organizations agree that at border powers, including capacity to detain goods would help prevent goods with questions about legality from being sold while claims are verified. This could also further incentivise importers to favour low-risk supply chains and ensure that their due diligence system is robust and effective. The need to identify species, assess due diligence, and verify timber legality prior to entry are important measures to ensure the Regulation is being complied with. As noted earlier, the DNA timber testing undertaken by the Australian Government indicated that nearly 40% of imports were incorrectly labelled with a species they were not made of, indicating more tools are needed to encourage compliance.¹⁷ The 2012 work by behavioural economist Dan Ariely, *The (Honest) Truth About Dishonesty: How We Lie to Everyone--Especially Ourselves* found that people generally are non-compliant if they think they can get away with it. They cheat up to the level they feel they can justify (for most people, that is a small amount of cheating). Most people who would consider themselves honest will cheat for personal gain if they are given the opportunity.¹⁸ On-going sampling at the border will reduce any perception that it will be possible to be sloppy with due diligence activities to detect illegally sourced material.

Targeted crackdown periods only have transitory effects, meaning they must be regularly repeated to have a sustained deterrent effect. There is a decline in deterrent response from a crackdown or blitz operation as potential offenders learn through trial and error that they had overestimated the certainty of getting caught at the beginning of the crackdown, leaving a residual deterrence. The crime suppression effect that extends beyond the intervention lasts until the offender learns by experience or word of mouth that it is once again safe to break the law.¹⁹ What is critical in building compliance is the perception of the regulated population of businesses that non-compliance will be detected and subjected to meaningful sanction.²⁰ Thus, a sampling and control regime needs to be a continuous activity and not done as the occasional crackdown activity if it is to maximise its impact on general deterrence.

It is eminently reasonable to align the Regulation under the ILPA with other timber legality legislation internationally, which includes similar 'at-border' powers to those being proposed.

Regarding forfeiture under the Lacey Act in the United States, the US government is not required to prove any level of knowledge by the owner of the underlying illegality of the item, providing for forfeiture on a strict liability basis.²¹ That means that the US government need only show that the item was, more likely than not, taken in violation of an underlying law in the country of harvest²² or in

¹⁶ Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, May 2021, 145.

¹⁷ Assistant Minister Jonathon Duniam, 'DNA timber tests to find those who go against the grain', Media Release, 8 December 2020, <https://minister.awe.gov.au/duniam/media-releases/dna-timber-testing>

¹⁸ Dan Ariely, 'Predictably Irrational', Harper, London, 2009, 197-201 and <http://danariely.com/2012/06/10/women-men-and-math-problems/>

¹⁹ Daniel S Nagin, 'Deterrence in the Twenty-First Century', *Crime and Justice* Vol. 42, No. 1, (August 2013), 215.

²⁰ Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement', *Industrial Law Journal*, May 2021, 145.

²¹ 16 U.S.C §3374(a)(1).

²² Colbourn, Elinor and Swegle, Thomas, (2011), *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, p. 98. United States Attorneys' Bulletin – Environmental Crimes, Vol. 59, Number 4, <https://www.justice.gov/sites/default/files/usao/legacy/2011/12/16/usab5904.pdf>.

violation of any of the prohibited acts listed in the Lacey Act.²³ The Act allows for possible remission or mitigation of forfeiture in both administrative and judicial forfeitures, if the proponent can demonstrate that the good was not taken in violation of laws in the country of harvest or the Lacey Act,²⁴ effectively reversing the burden of proof. The inclusion of similar provisions in the ILPR would enable the use of seizure as a useful enforcement tool, further encouraging importers to verify that their timber and products are not illegal.

6) Are there any significant costs associated with sampling, seizure and goods control that industry is likely to face in addition to those outlined?

Unlikely, but if these should exist, they are most likely to be faced by importers or processors sourcing from high risk supply chains and/or that are high-frequency and repeat-processors or with clear import pathways, and/or with due diligence systems that are insufficiently mitigating risks. One example is that of Peruvian timber forfeitures under the US Lacey Act. As a result of an investigation of illegal timber in Peru, Operación Amazonas 2015,²⁵ US authorities were alerted to two shipments containing illegal timber en route to the United States. The timber was seized by US officials. Subsequent cooperation between US and Peruvian officials under a Customs Mutual Assistance Agreement provided evidence that the timber could not be the species that had been authorized for harvest and declared in paperwork. The incorrect species was corroborated in testing by the U.S. Forest Service's Forest Products Laboratory.²⁶

The ensuing investigation led to the largest amount of illegal timber ever destroyed under the Lacey Act. There was an agreement to destroy the larger shipment worth an approximate \$1 million.²⁷ In addition, the US importer agreed to pay for all costs related to storage, transport, and destruction of the smaller shipment of timber.²⁸

Generally, sampling costs are more upfront to identify potential issues, allow companies to communicate to their suppliers that there are problems, and ongoing costs will be lower as sampling becomes random rather than comprehensive.

7) What other measures could ensure that goods entering the country or intended for processing can be verified for due diligence claims?

An import declaration, as outlined under Questions 3 and 4, provides a crucial basis for verification, as it allows for the identification of high-risk imports and verification against the information provided by the importer. The detection of mis-declarations, for example, played an important role in the successful investigation and prosecution of the Lumber Liquidators case. The case resulted in the

²³ 16 U.S.C. §3372(a), (c), (d), (f). The only offence that does not allow for forfeiture is a violation of marking regulations. 16 U.S.C. §3372(b) and §3374(b).

²⁴ 16 U.S.C. §3374(b).

²⁵ Luna Amancio, Nelly, (2015), Operación Amazonas: la historia del mayor decomiso de madera de origen ilegal, <https://ojo-publico.com/132/operacion-amazonas-la-mayor-incautacion-de-madera-de-origen-ilegal>.

²⁶ Department of Justice, (2017), Justice Department Reaches Agreement to Ensure Destruction of Timber Believed to Have Been Harvested in Violation of Peruvian Law, <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-ensure-destruction-timber-believed-have-been-harvested>.

²⁷ Olsen, Lise, Houston Chronicle, (2017), Illegally Harvested Amazon Wood Destroyed in Unusual U.S. Settlement, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Stolen-Amazon-wood-destroyed-in-unusual-U-S-10870538.php>.

²⁸ Department of Justice, (2017), Justice Department Reaches Agreement to Ensure Destruction of Timber Believed to Have Been Harvested in Violation of Peruvian Law, <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-ensure-destruction-timber-believed-have-been-harvested>.

most important legal sentence yet in the history of timber import regulations, with a total of \$13.5 million in fines and an agreement to enter into a rigorous compliance plan. Mis-declarations were detected and penalized on two counts of this case. One count was regarding Russian timber declared as German oak, and the other regarding Myanmar teak declared as harvested in Indonesia. Here, it was the combination of both the verification of the declarations, as well as stable isotope testing that contributed to the overall success of the prosecution.

When such declarations are collected in a central database, algorithms can be created to streamline enforcement, automatize identification of “red flags” and trigger further investigations. A wealth of information regarding illegal logging risks in different jurisdictions has been generated to date through NGOs, governments and academia. These databases can be useful tools for enforcement agencies to assess risk of specific imports. Interagency cooperation and data sharing further facilitates effective enforcement.

Information similar to ‘import declarations’ ought to be required from processors. There is no reason processors of domestically-sourced timber ought not be required to provide declaratory statements, given the demonstrated risk of illegality for domestically-sourced timber.²⁹

8) Are there any particular timber-identification technologies that you support for integrating into the illegal logging legislation?

A range of laboratory technologies are available and being adapted for identification of species and geographic origin for timber products. Wood anatomy, stable isotopes, DNA and mass spectrometry can all be useful tools to provide independent verification of claims from suppliers and importers. They are increasingly being applied by importers and enforcement agencies alike. A 2015 study by the UK NMA, for example, analysed samples of imported plywood manufactured in China as part of a compliance assessment with the EUTR. Through microscopic analysis (wood anatomy), it was found that out of 13 products tested, nine did not match the declared species contained in the plywood. In another example, during an investigation in Russia and China, EIA obtained samples of flooring prepared for a shipment to U.S. company Lumber Liquidators at a factory in China and sent them for testing of stable isotopes. The lab tests established with 97 percent certainty that seven out of eight samples came from trees growing in the Russian Far East. The company was sentenced in a landmark case in 2016 to over US\$13 million in fees and fines and a five-year probation, during which it had to completely overhaul its procurement procedures.

The type of technology to be used depends on the question that needs answering, and whether respective samples are available in the global library for comparison.

For product types, species or countries of origin/production where a known risk of mis-declaration exists, the DAWE should issue guidance suggesting certain timber identification techniques to successfully apply due diligence.

However, it is important to note that while technologies can form an important pillar of a due diligence system, and even law enforcement, they do not replace the need to still gather and assess all information that an importer or processor ought to know.

²⁹ The Federal Court found that logging by state-owned VicForests in 66 areas of habitat critical to nationally-listed species contravenes federal law. The court also found that VicForests has not and is unlikely in future to comply with both state and federal laws designed to protect threatened species. Judgement summary is available at: <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0704/summary/2020fca0704-summary>

9) Do you support removing the due-diligence system requirement for low-frequency importers and processors?

The proposal is not supported, as low frequency is not analogous to low-risk. The import of Burmese teak to the EU provides an excellent example of this, where the trade typically involves minimal imports of extremely high-risk timber - importers often only make individual or single or small numbers of imports of Burmese teak to meet specific demand. It is likely that the trade is similarly structured in Australia. EUTR Competent Authorities have made repeated public statements around the unmitigable nature of the risks of illegality associated with teak from Myanmar, and that Operators are unable to comply with EUTR due diligence requirements when placing this timber on the EU market.

Numerous other examples of low frequency, high-risk trade exist, such as the trade in individual pieces of rosewood Hongmu furniture. The removal of due diligence requirements for low frequency importers and processors would remove enforcement options for a trade segment that should be subject to regulatory attention.

10) What other opportunities can you suggest for reducing the regulatory burden for low frequency importers?

The consultation paper estimates that removing the requirement to establish a due diligence system would reduce costs to one-off importers up to \$449. Given the existing dollar value threshold exemption, and that high-risk imports do exist within low frequency importer's supply chain, this cost is considered reasonable and proportionate. It is noted that the identified potential savings to low frequency importers is given as a maximum figure. It is likely that the actual regulatory burden for importers of lower risk products is significantly lower, particularly as multiple approaches to due diligence are accepted under the Regulation.

11) What additional measures can be introduced to ensure high-frequency importers and processors have adequate due diligence systems in place?

The consultation paper discusses the use of both third-party auditing of due diligence systems and the introduction of licensing schemes as a means of reducing the regulatory burden for high frequency importers and processors. The first of these, with certain caveats, is supported, the latter is not.

The introduction of EUTR style Monitoring Organisations could reduce the current burden on the Department to remain up-to-date with changing situations across multiple different jurisdictions. Specialist organisations could take on this role and produce 'off-the-shelf' due diligence systems that may also prove a lower cost option for regulated entities. However, the introduction of Monitoring Organisations to an ILPR context must include:

- Changes to the Regulation that make it clear that the use of a due diligence system developed by an approved Monitoring Organisation does not constitute a 'deemed to comply' arrangement, and that liability from breaches of ILPR requirements remains with the importer or processor;
- Guidance from the Department to the effect that use of 'off-the-shelf' due diligence systems are most appropriate to supply chains that can likely be assigned as low-risk; and

- In an environment where aspects of compliance are effectively being outsourced to the private sector, such due diligence systems should be reviewed by the Department.

Given that due diligence needs to be reactive to changes in the levels of risk present in a supply chain, and the similar issues around licensing not representing a guarantee of legality, the introduction of licensing systems is not supported. The need for due diligence - and enforcement - to be dynamic is discussed in the response to question 12, and the inherent issues with certified products being 'deemed to comply' in the response to question 13.

Indonesia currently operates a licensing system, which requires exporters to obtain "V-Legal" documents through its SVLK certification system. A result of the Indonesia-EU FLEGT VPA negotiations, V-Legal certificates were previously recognised under the ILPR as one of three Timber Legality Frameworks available to importers, before later being removed from the Regulation. The current Country Specific Guideline for Indonesia gives details of how SVLK certification operates, but notes the need for importers to still gather further information.

The model under the Indonesian Country Specific Guideline, where V-Legal certificates are recognised as an indicator, rather than a guarantee, of legality, is appropriate to the ILPR context. The example shows how licensing schemes can already reduce the regulatory burden for ILPR regulated entities. However, they do not entirely remove the risks of illegality from a supply chain. For example, in late 2018 and early 2019, officials confiscated 422 containers with illegally harvested timber from the eastern regions of Papua and Maluku. The seizure in February 2019 comprised 38 containers of highly prized merbau, from the Aru Islands of Maluku province.³⁰ Indonesian NGOs pointed out that the companies involved in the fraudulent transactions were certified by SVLK.

Stronger enforcement of the ILPA's due diligence requirements, including penalising those who breach these, represents the best means of ensuring high frequency importers and processors have adequate due diligence systems in place. The consultation paper notes that most regulated entities appear to be voluntarily complying with the Act's requirements. However, ILPA needs to be viewed as a deterrent by those entities who are choosing to not comply. Stronger enforcement, including publication of such, would significantly increase the motivation of importers and processors to ensure adequate due diligence systems are in place.

12) How can due diligence requirements for repeated imports be streamlined?

The bulk of the costs for due diligence occur upfront, as developing and setting up the system costs more than maintaining it. Given the low costs associated with implementing due diligence systems (as identified by DAWE), there should be no need to streamline once a reliable effective system is in place, particularly given the risk that illegal timber may enter Australia as a result. An important objective of the ILPA is to encourage behavioural change, which includes importers moving to lower risk options - which would also result in lower cost in risk assessment - in cases where effective due diligence for high-risk products is not possible.

The situations on the ground in producing countries are often fluid, and changes can render previously low-risk supply to high-risk - and vice versa. In addition, supply chains and trade routes can change rather rapidly, sometimes in reaction to due diligence or enforcement measures. As such, effective due diligence systems need to continuously monitor changing situations, something that high frequency importers should be doing in order to comply and should be equipped to do. Almost ten years after passing the ILPA and three years after ending the soft start, there is to date a wide range

³⁰ <https://news.mongabay.com/2019/05/in-indonesia-a-flawed-certification-scheme-lets-illegal-loggers-raze-away/>

of practical guidance and experience available on establishing and implementing effective due diligence systems. The Australian Government has made a particular effort in developing and providing guidance materials for importers.

13) Should the potential ‘deemed to comply’ arrangements be introduced and how should they operate?

We provided a comprehensive analysis of this topic with supporting evidence in our previous submission from 23 December 2016³¹. The introduction of ‘deemed to comply’ provisions would severely undermine the effectiveness of the ILPA and unalign Australia from the approach taken by other countries with similar legislation. The question was also discussed at length in the Senate on February 8, 2018 and the ‘deemed to comply’ measure was subsequently disallowed. The points raised in our previous submission remain pertinent.

Indeed, more evidence that private voluntary certification schemes are not equipped to guarantee legality has been coming to light. A recent EIA investigation of tropical plywood manufactured in China³² uncovered that China’s largest plywood exporter, state-owned Arser, over years exported an estimated 100,000 tons of plywood containing at least 20 times the volume of FSC certified pencil cedar from the Solomon Islands than the concession in question was able to produce. A subsequent FSC investigation confirmed that the company had indeed fraudulently inflated the volumes of FSC certified timber.

Another investigation published by Earthsight in July 2021 documented how the world’s largest furniture retailer Ikea, has for years sold FSC certified children’s furniture made from wood linked to vast illegal logging in protected forests in Siberia, Russia.³³ Despite being FSC certified, Ikea’s Russian business partner was found involved in numerous illegal deals to harvest over two million cubic meters of wood in protected forests, much of it under the false pretext of “sanitary logging”, falsely claiming that trees to be felled were sick or dead. The investigation came just one year after Ikea had been found selling birchwood chairs made of illegally logged - FSC certified - timber from the Carpathian forests in Ukraine, home to endangered species such as lynx and bear³⁴.

Here in Australia, PEFC-certified wood has been found by the Federal Court, upon appeal, to have been logged illegally, in breach of species protection and other forest management laws.³⁵

Neither the Lacey Act nor the EUTR have ‘deemed to comply’ arrangements and determined that adequate due diligence cannot be completely replaced by certification schemes. Repeated incidents of non-compliant FSC timber in the EU confirm this: When Manchester Magistrate Court in the UK fined the company Hardwood Dimensions Ltd in 2018 for breaching the European Timber Regulation, the UK Timber Trade Federation (TTF) issued a statement pointing out “the need for all importers to conduct thorough Due Diligence assessments on all of their products, even those which carry FSC certification.”

³¹ See Submission on Reforming Australia’s Illegal Logging Regulations by EIA, CIEL, Uniting Church of Australia, Synod of Victoria and Tasmania, Greenpeace Australia Pacific, December 2016: <https://content.eia-global.org/assets/2021/09/Illegal-Logging-Reform-RIS.pdf>

³² The Lie Behind the Ply, EIA, June 2021 <https://eia-global.org/reports/20210630-lie-behind-the-ply-report>

³³ Ikea’s House of Horror, Earthsight, July 2021 <https://www.earthsight.org.uk/news/investigations/ikea-house-of-horror>

³⁴ Flatpacked Forests, Earthsight, June 2020 <https://www.earthsight.org.uk/investigations/flatpacked-forests>

³⁵ Appeal Judgement, where 30 of 31 grounds were upheld: <https://www.envirojustice.org.au/wp-content/uploads/2021/05/VicForests-v-FLP-2021-FCAFC-66.pdf>

TTF's Managing Director concluded: "FSC alone is no guarantee of having complied with legal process."³⁶

We maintain that introducing 'deemed to comply' arrangements would significantly weaken ILPR's potential to detect illegal timber in Australian imports while increasing the risk of illegally sourced products entering the market. The current regulation, which enables the use of certification schemes as a tool for risk assessment while maintaining the necessary due diligence, provides a sensible balance between compliance burden and legality verification.

We note that the ILPR erroneously qualifies private certification schemes, such as PEFC and FSC as 'timber legality frameworks' (or 'voluntary timber legality frameworks'). FSC and PEFC themselves do not define themselves as 'legality frameworks', but as voluntary systems that provide certificates according to a certain set of standards. They do not verify legality, nor are such systems recognized as a substitute for due diligence by actual existing legality frameworks such as EUTR or *Lacey Act*. In order to avoid confusion, we strongly advise that the term 'Timber Legality Framework' be applied only to actual legal frameworks, such as the *Lacey Act*, the EUTR or the *Illegal Logging Prohibition Act*, and that the term 'timber legality framework' in the ILPR be replaced with 'private certification systems.'

For more analysis of 'deemed to comply' arrangement see also the previous submission from CIEL, EIA, Greenpeace, and Uniting Church:

<https://content.eia-global.org/assets/2021/09/Illegal-Logging-Reform-RIS.pdf>

Deemed to comply arrangements for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) should not be introduced either. Although verifying legal acquisition is one of the key requirements for the issuance of the CITES export permit,³⁷ the Convention leaves to the Parties the decision on how to determine whether the specimen was acquired legally. In 2019, recognizing that the absence of guidance may seriously undermine the reliability of the CITES permit system as proof of legality and sustainability, the Conference of the Parties (CoP) developed guidance for the verification of legal acquisition of CITES specimens.³⁸ While such guidance is extremely important, implementation of and systems for verification of legal acquisition vary widely between countries.

The EUTR deems CITES products as compliant with the EUTR, however, between 2017 and 2019 the Czech Republic, Germany, Norway, and Sweden determined that imports of CITES-listed timber species did not comply with the EUTR and the UK identified "timber that should have been covered by CITES."³⁹ Furthermore, due to problems with legality of CITES-listed species imported into the EU, in 2018, the European Commission published a Guidance document on steps to be taken by EU Member States in the case of doubts as to the legality of timber from CITES-listed species imported into the EU.⁴⁰ Given that CITES Guidelines for legality verification for exports of CITES-listed species were only approved in 2019 and national implementation and rigour in verifying legality varies widely, creating a "deemed to comply" arrangement for CITES-listed species under ILPR would create loopholes and increase complexity for the Australian government to assess legality and compliance.

³⁶ Timber Trade Federation: "FSC alone is no guarantee of having complied with legal process", FSC Watch, March 2018 <https://fsc-watch.com/2018/03/07/timber-trade-federation-fsc-alone-is-no-guarantee-of-having-complied-with-legal-process/>
The TTF statement was published in 2018, but is no longer available on its website.

³⁷ Article III, paragraph 2 (b), Article IV, paragraph 2 (b), and Article V, paragraph 2 (a) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

³⁸ CITES, Resolution Conf. 18.7 on *Legal acquisition findings*.

³⁹ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union's Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 52-53.

⁴⁰ European Commission, Guidance document on steps to be taken by EU Member States in the case of doubts as to the legality of timber from CITES-listed species imported into the EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2018:376:FULL&from=EN>

14) Do you support changing the scope of regulated products to add or remove any of the discussed products or other products?

We agree that the additional suggested products of musical instruments and charcoal should be considered for inclusion, due to the fact that they are often made of timber that has a high risk of illegal logging. A market analysis of charcoal in Germany by WWF in 2018 found that 77 percent of the different charcoal products analysed provided no information at all about the type of wood or source country for the charcoal.⁴¹ Further research found that a large part of the charcoal was produced in countries with high rates of illegalities, such as Nigeria, Paraguay and Ukraine. The German Thünen Institute further analysed 4500 samples from 11 EU countries.⁴² Only a quarter had origin or species information, and of those that did, only half were correct. Given that a large part of the charcoal of tropical origin is sourced from Nigeria and Paraguay, the risk of illegality is very high.

Another example of a product that may warrant inclusion is that of essential oils derived from timber. One timber case with Lacey Act violations, *U.S. v. Young Living Essential Oils L.C.*, involved export of oil from 86 tons of rosewood (*Aniba roseaodora* or Brazilian rosewood) from Peru without authorization or CITES permits from the Peruvian government between 2010 and 2014.⁴³ As a result, the US is phasing in a Lacey Act Declaration requirement for certain essential oils on October 1, 2021 (see below for detailed HS codes included).

The following HS codes of products are included in the US Lacey Act Declaration requirement and/or the European Union Timber Regulation, and might be assessed for consideration under the Illegal Logging Prohibition Regulation:

Chapter 44

- 44.01 Fuel wood (EU, US-D)
- 44.02 Wood charcoal (US-D)
- 44.04 Hoopwood; poles, piles, stakes (US-D)
- 44.06 Railway or tramway sleepers (EU, US-D)
- 44.15 Packing (EU - except that which is “used exclusively as packing material to support, protect or carry another product placed on the market”)
- 44.17 Tools, tool handles, broom handles (US-D)
- 44.19 Tableware, kitchenware of wood (US-D)
- 44.20 Wood marquetry, caskets, statuettes (US-D)
- 44.21 Other articles of wood (US-D, including among other products: clothes hangers, dowel pins, blinds, fences, clothes pins, toothpicks, canoe paddles, theatre sets, pencil slats, burial caskets, baby gates)

Chapter 66

- 66.02 Walking sticks, whips, crops (US-D)

Chapter 82

- 82.01 Hand tools (US-D)

⁴¹ The Dirty Business of Barbecue Charcoal, Market Analysis, WWF 2018 https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/WWF_Market_analysis_barbecue_charcoal_2018.pdf

⁴² Microscopy Illustrates Charcoal’s Sketchy Origin, Nature 2020 <https://www.nature.com/articles/d41586-020-02672-z#ref-CR1>

⁴³ Department of Justice, (2017), Essential Oils Company Sentenced for Lacey Act and Endangered Species Act Violations to Pay \$760,000 in Fines, Forfeiture, and Community Service, and to Implement a Comprehensive Compliance Plan, <https://www.justice.gov/opa/pr/essential-oils-company-sentenced-lacey-act-and-endangered-species-act-violations-pay-760000>.

- 8211926000 Hunting knives with wood handles (US-D)
- 8215992400 Table barbeque forks with wood handles (US-D)

Chapter 92

- 92.01 Pianos (US-D)
- 92.02 Other stringed instruments (US-D)

Chapter 93

- 93.02 Revolvers and pistols (US-D)
- 93.051020 Parts and accessories for revolvers and pistols (US-D)

The following products will require a Lacey Act Declaration beginning October 1, 2021:

Chapter 33 Headings (Essential Oils)

- 3301295109—essential oils of cedarwood
- 3301295121—essential oils of linaloe or bois de rose
- 3301295139—essential oils of sandalwood

Chapter 42 (Trunks, Cases, Suitcases)

- 4202292000—trunks, cases, and suitcases of wood
- 4202992000—other, of wood, not lined
- 4202993000—other, of wood, lined

Ch. 44 (Wood and Articles of Wood)

- 441012—oriented strand board (OSB)
- 4415—cases, boxes, crates, drums, containers, pallets, box-pallets, etc.

Ch. 92 (Musical Instruments)

- 9205902000—wind musical instruments: bagpipes
- 9205904020—clarinets
- 9205904080—other (woodwind instruments)
- 9205904060—flutes and piccolos
- 9206002000—drums
- 9207900040—musical instruments (fretted string instruments)
- 9209.92—parts and accessories for musical instruments of heading 9202
- 9209992000—parts and accessories for bagpipes
- 9209994040—parts and accessories for other woodwind instruments
- 9209998000—other

Ch. 96 (Miscellaneous Manufactured Articles)

- 9620005500—monopods, bipods, tripods and similar articles of wood

Additional chapters of products made from wood, which could be considered for inclusion under ILPR are listed below. Notably, the Lacey Act trafficking and due care requirements apply to all plants and plant products except common cultivars (although all trees are always included, even if they are common cultivars) and food crops.

- 3806 Rosin and resin acids, and derivatives thereof; rosin spirit and rosin oils; run gums
- 3912 Cellulose and its chemical derivatives, not elsewhere specified or included, in primary forms.
-
- Chapter 49 Printed books, newspapers, pictures and other products of the printing industry; manuscripts, typescripts and plans
- Chapter 89 Ships, boats, and floating structures
- Chapter 91 Clocks and watches and parts thereof
-
- 9402 Medical, surgical, dental or veterinary furniture
- 9405 Lamps and lighting fittings

Chapter 95 Toys, games and sports requisites, parts and accessories thereof

- 9603 Brooms and brushes
- 9608 Pens
- 9609 Pencils
- 9614 Smoking pipes
- 9616 Scent sprays and similar toilet sprays, and mounts and heads therefor, powderpuffs and pads for the application of cosmetics or toilet preparations
- 9619 Sanitary towels (Pads) and tampons, napkins and napkin liners for babies and similar articles, of any material
-
- Chapter 97 Works of art, collectors' pieces and antiques

15) Do you support adding any of the product exemptions discussed?

The consultation paper states, “[u]nder the United States’ Lacey Act, any product with less than 5% wood content is exempt from their illegal logging regulatory framework.” In reality the exemption is much narrower; products that require a Lacey Act declaration with less than 5% wood content are exempt from having to submit a declaration if the total amount of the wood of the products with the same 10 digit HS code in the shipment is less than 2.9 kg.⁴⁴ The exemption does not apply to CITES listed species or those listed as threatened or endangered under the US Endangered Species Act. The *de minimis* rule is a narrow exemption designed to allow imports with very small amounts of wood products that are components of another product to enter without submitting a Lacey Act declaration; however, both the trafficking and due care provisions of the Lacey Act still apply to the wood product. A frequently cited example for the creation of a *de minimis* exemption is that of wooden buttons on a shirt. As such, the *de minimis* rule does not parallel any of the proposed product exemptions, which deal with much larger values (\$1,000 to \$5,000 or even \$10,000) or the exemption of products more than 100 years old, regardless of percentage or amount of wood in the product.

We agree with the Consultation Paper’s assertion that low value does not correlate with low-risk. The existing exemption serves to exempt low value personal imports and commercial shipments of \$1,000 or less, and there is no compelling reason to unalign the ILPR with other import requirements - particularly given that this would increase costs for brokers and others submitting information through the customs system. Reducing the 100-year exemption would likely increase work for the Australian

⁴⁴ De minimis Final Regulation, <https://www.regulations.gov/document/APHIS-2013-0055-0014>.

government, which would have to verify such claims, while likely exempting a relatively small number of products.

According to the Regulation Impact Statement (RIS) from 2016, the option to increase the consignment value threshold from its current level seeks to “reduce the number of consignments covered by the due diligence requirements and the associated reduced due diligence compliance costs.”⁴⁵ We acknowledge that there are certain actions the ILPR does not intend to regulate, such as a tourist returning from an overseas holiday with a small wood product. However, it is our opinion that the current consignment value of \$1,000 is sufficient to achieve that goal, and that increasing the consignment value presents several risks. First, the RIS is right to pinpoint that each excluded consignment could provide “an avenue for illegal timber products to enter Australia.”⁴⁶ Changing the consignment value could result in exempting a significant total volume and value of wood shipments. As a result, there is the risk that increasing the consignment value threshold could create a significant loophole for shipment splitting to remain under the threshold.

Further, as noted by the KPMG review from 2015, the cost savings of increasing the consignment value threshold are likely to be overstated as a portion of importers will have already developed due diligence systems to be compliant with the regulations and these represent sunk costs.⁴⁷

16) Do you have any suggestions for reducing requirements around lower-risk products without comprising the effectiveness of the laws?

With multiple options around how to conduct due diligence already available, the actual burden on low-risk supply chains is minimal. There is no need to further reduce this.

17) What further terms need to be defined under the laws? Should the term ‘processing’ be defined?

The current definition in ILPA of *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,” should be expanded to include not only harvest, but other relevant laws applying to the regulation of timber in the supply chain.

Numerous and well documented breaches of non-harvest related laws persist in many supply chains globally, including those that supply the Australian market. These extend beyond simple breaches of log export bans and other trade related laws, and increasing the scope of the modes of illegality regulated by the ILPA would be consistent with the aims of the Act.

In the development of its National Risk Assessment Framework⁴⁸ FSC aligned itself with EUTR requirements when the latter entered into force in 2013, identifying as categories for legality risk assessment legal rights to harvest, taxes and fees, timber harvesting, third party rights, trade and transport, and due diligence. Preferred By Nature (formerly NepCon) based its own requirements on this FSC document when developing its Country Risk Assessments⁴⁹, and aimed to align with the

⁴⁵ RIS, Section 5.3, p. 25

⁴⁶ RIS, Section 5.5, p. 27

⁴⁷ KPMG & Department of Agriculture, *Independent Review of the impact of the illegal logging regulations on small business* (28 March 2015), p. 82, <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/independent-review-impact-illegal-logging-regulations.pdf>

⁴⁸ <https://fsc.org/en/document-centre/documents/resource/377>

⁴⁹ <https://preferredbynature.org/sourcinghub/timber>

ILPA, the Lacey Act and the EUTR. Preferred by Nature identify six categories (with 21 subcategories), against which risks of illegality are assessed:

- Legal rights to harvest
- Taxes and fees
- Timber harvesting activities
- Third parties' rights
- Trade and transport
- Processing

ILPR's requirements should remain clear and accessible, to provide clarity for regulated entities seeking to comply. As such, text similar to that used under the Lacey Act could present another option for ILPR:

'a person shall not import any regulated product that has been harvested, transported, sold, traded, imported, exported, acquired, purchased or processed in violation of any law in the country of harvest, or a country of processing or manufacture, or of any other country in which the product has been transported, sold, traded, imported, exported, acquired, purchased or processed; nor shall a person import any regulated product where unmitigated risks of the above exist'

The expansion of the definition of illegal logging would broaden the options for enforcement, while simultaneously reducing the Department's burden. Enforcement related to trying to prove that the particular tree that a product was produced from was felled illegally, particularly when the proof required is held by an overseas government that may have significantly poorer forest governance than Australia. Broadening the Act to allow enforcement to instead ask "did your supplier violate the relevant laws of the countries in your supply chain" presents expanded enforcement opportunities.

There is a strong link between corruption offences and illegal logging. The UN Office on Drugs and Crime reported in 2019 that "corrupted licences given to plantation firms in Indonesia are among the main underlying causes of Indonesia's deforestation."⁵⁰ They indicated that "examples of common corruption schemes included falsified origin of logs being cut in protected forests, invalid Environmental Impact Assessments, or falsified numbers of logs or size of the area authorised for plantations."⁵¹

INTERPOL has reported that organised criminals make more than \$200 million a year from illegal logging from tropical forests.⁵² These operations often occur hand-in-hand with other criminal activity, such as document fraud, money laundering, violence, intimidation and murder.⁵³ A 2016 review of INTERPOL's databases found that the most common corruption offences associated with forestry crime were, in order of most to least common, were bribery, fraud, abuse of office, extortion, cronyism and nepotism.⁵⁴ INTERPOL reported that between 2009 and 2014, a 13 country survey identified an average of 250 cases of corruption related to the forestry sector, per year per country.⁵⁵

⁵⁰ UNODC, 'UNODC and KPK pilot a Corruption Risk Assessment in the Forestry Sector in South-Sumatra Province, Indonesia', 11 January 2019.

⁵¹ Ibid.

⁵² INTERPOL, 'International Day of Forests: protecting Earth's most biologically diverse ecosystems', 20 March 2020.

⁵³ Ibid.

⁵⁴ INTERPOL, 'Uncovering the Risk of Corruption in the Forestry Sector', 9 December 2016, 1.

⁵⁵ Ibid, 1.

INTERPOL also reported that corruption was identified as occurring 50% of the time at the point of harvest, 23% of the time related to road transport and 27% of the time at the point where the timber is processed.⁵⁶

Corruption in forestry operations have been found to be common in our region. Between 2004 and 2019, 88 public officials in Indonesia were convicted for corruption at provincial level, including 52 regents and vice-regents, 23 mayors and vice-mayors, and 13 governors. Most of the cases involved bribes in relation to licensing approval and procurement.⁵⁷ Between 2004 and 2016, the Indonesian anti-corruption commission *Komisi Pemberantasan Korupsi* (KPK) has carried out six prosecutions for forestry-related corruption involving 30 defendants.⁵⁸ However, between 2016 and 2020 there was only one prosecution for corruption in the forestry case.⁵⁹ All of these cases resulted in guilty verdicts.⁶⁰ The cases involved mainly the charges of abuse of power, bribery, gratuities and, in one case, obstruction of justice related to a bribery offence.⁶¹

Analysis by the U4 Anti-Corruption Resource Centre found corruption is still significant in the logging sector in Indonesia. Unfortunately, even when it is identified, enforcement and recovery of assets does not always happen.⁶² Even where cases have been brought, not all the individuals identified as being involved in the corruption have ended up being prosecuted.⁶³ Those involved in the corruption from the private sector side are less likely to be prosecuted than their co-offenders who are government officials or elected representatives.⁶⁴ The companies that benefited from the corrupt arrangements were not fined and never lost their illegally obtained logging licences.⁶⁵

Analysis by the U4 Anti-Corruption Resource Centre of an illegal logging network in Indonesia in which serious corruption was involved found a sense of impunity helped to feed the corruption and illegal logging the network was involved in.⁶⁶ Having timber and wood product importers having to look for signs of possible corruption in their supply chains would help erode the sense of impunity that some perpetrators may feel.

Detection of corruption in the sourcing of imported timber and wood products will not be easy for importers to achieve, so it is a matter of importers taking reasonable steps to identify the presence or risk of corruption in the products they are sourcing. For example, an importer could be expected to seek information of the beneficial ownership of companies supplying the timber or wood products, especially where the countries in question have a publicly accessible beneficial ownership register. The presence of a government official as a beneficial owner of a company supplying timber may be red flag for the possibility for corruption in the supply chain. The risk would be significant if the government official in question is involved in authorising the logging operation or enforcing tax and royalty collection from the operation. There exist a number of commercial tools that list government officials and their associates, Politically Exposed Persons, used by entities required to do due diligence for anti-money laundering laws.

⁵⁶ Ibid, 2.

⁵⁷ UNODC, 'UNODC and KPK pilot a Corruption Risk Assessment in the Forestry Sector in South-Sumatra Province, Indonesia', 11 January 2019.

⁵⁸ Sofie Schutte and Laode Syarif, 'Tackling forestry corruption in Indonesia', U4 Anti-Corruption Resource Centre, 2020, 2.

⁵⁹ Ibid.

⁶⁰ Ibid, 9.

⁶¹ Ibid, 17.

⁶² Ibid, 4-5.

⁶³ Ibid, 9.

⁶⁴ Ibid, 21-22.

⁶⁵ Ibid, 33.

⁶⁶ Jacqui Baker, 'Corrupt networks in the Indonesian forestry sector. Politics and pulp in Pelalawan, Riau', U4 Anti-Corruption Resource Centre, 2020, 27-28.

In Southeast Asia, Indonesia is the only country that has established a central registry of beneficial owners.⁶⁷ Beneficial ownership must be updated annually and any change must be reported within 14 working days.

In 2019, the Malaysian Government issued their *Guideline for the Reporting Framework for Beneficial Ownership of Legal Persons*. The reporting framework introduced a requirement for domestic and foreign companies and limited liability partnerships to hold accurate, up-to-date and verified information on beneficial owners.⁶⁸ The requirement also applies to government-owned or state-owned companies. The information needs to be updated annually. However, it is only made accessible to competent authorities and law enforcement agencies.

As another example of alleged corruption in an illegal logging operation, an investigation by Global Witness published in May 2021 raised concerns that a planned rubber plantation on Manus Island may be a front for an illegal logging operation by a Malaysian owned company.⁶⁹ The PNG National Forestry Board allegedly unlawfully issued a forest clearance permit by overruling the opposition from the provincial committee. Further, the legally required land demarcation process to verify land ownership does not appear to have occurred.⁷⁰ Global Witness raised the concern of corruption being involved, as the company in question, Maxland (PNG) Ltd, allegedly gifted houses to several community leaders in the area, including at least one elected ward councillor.⁷¹ As of October 2019, Maxland is reported to have exported almost 19 thousand cubic meters of timber, worth over K6 million (\$2.3 million). Maxland's development plans stated that it would have planted 1,333 hectares with rubber seedlings by 2018 – 2019. Yet, by January 2020, Maxland had cleared less than 100 hectares for rubber planting, but it appeared no rubber saplings had been planted. At the same time, the company had engaged in selective logging of valuable trees within an estimated 1,000 hectares of the supposed rubber project area.⁷²

Detecting corruption when timber is sourced from locations where Indigenous owners have a legal right to provide free, prior and informed consent may be possible in a due diligence process by looking for a red flag such as the time taken to obtain the consent is clearly unrealistically short. An unrealistic time frame to gain consent from Indigenous owners, would at least trigger the need to dig deeper to verify legal consent had been obtained and corruption had not been involved.

'**Timber**' and any other terms relating to 'inscope' products should be defined through the use of HS codes (in Schedule 1 - Regulated Timber Products of the Regulation), rather than via a specific definition. This approach will avoid any ambiguity around whether a product is within the scope of the Act.

S.17 of the ILPR states "For subsection 18(1) of the Act, this Division prescribes the due diligence requirements for processing a raw log into something other than a raw log." This definition is supported, provided that any definition of '**raw log**' includes square logs. Minimal processing, particularly that which occurs at the point of harvest, should not exempt those processing what are effectively still raw or square logs into something else from the Act.

⁶⁷ UNODC, 'Beneficial Ownership Regulations and Company Registries in Southeast Asia. Analysis of Regulatory Deficiencies', 2020, 3.

⁶⁸ Ibid, 4.

⁶⁹ Ed Davey, 'Bending the Truth', Global Witness, 11 May 2021.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

Abuse of Free, Prior and Informed Consent (FPIC) in PNG's Logging Sector

The overwhelming majority of Papua New Guinea's land area is under customary ownership, and PNG law requires the consent of customary landowners for most types of logging permits.⁷³ The UN Declaration on the Rights of Indigenous Peoples also recognises the rights of Indigenous peoples to give their Free, Prior and Informed consent to development that affects their land. Despite this, PNG government reviews in 2001 and 2004 found that customary landowners were, in general, not giving informed consent to logging operations on their land.⁷⁴ Research conducted since that time has also found repeated instances of logging operations taking place without informed consent from landowners.⁷⁵

A particularly egregious example of this was PNG's Special Agricultural and Business Lease (SABL) scheme. The scheme, designed to facilitate agricultural development, gave customary landowners a lease over their land that they could then sublease to a developer for agriculture projects. The scheme saw more than 12% of PNG's total land area pass out of the hands of customary owners and into the control of foreign developers, often the PNG-based subsidiaries of Malaysian logging and oil palm companies.⁷⁶ Following widespread reports of abuses of the SABL scheme, in 2011, the Government of PNG appointed a Commission of Inquiry to investigate it. The Commissioners who reported back found that 38 of the 42 SABLs they investigated demonstrated a lack of landowner consent. They found numerous instances of landowner consent being fraudulently obtained through misrepresentation, resulting in SABL leases issued directly to foreign companies with landowners in the dark about claims being made over their customary land.⁷⁷ Despite commitments from the then Prime Minister of PNG to cancel the leases, as of 2016, around 1 million cubic metres of logs were being exported annually from SABLs.⁷⁸

18) Should the laws prevent logs entering the country from nations with a log export ban in place?

Yes, we agree that the ILPR and ILPA should be amended to require due diligence and prohibit imports that violate log export bans in the country of harvest. As noted in the Sunsetting Review

⁷³ *Forestry Act 1991*, s 46, 57; *Land Act 1996* s 11, 102; See also commentary of the Supreme Court in *Rimbunan Hijau (PNG) Ltd v Enei* [2017] PGSC 36 at [29] – [31], available at: <http://www.paclii.org/pg/cases/PGSC/2017/36.html>.

⁷⁴ See Forest Trends (2006): *Logging, legality and livelihoods in Papua New Guinea: Synthesis of Official Assessments of the Large-Scale Logging Industry*, volume 1, available at: <https://www.forest-trends.org/wp-content/uploads/imported/png-volume-1-pdf.pdf>, p. 18.

⁷⁵ See Sam Lawson, "Illegal Logging in PNG" (2014) *Energy, Environment and Resources EER PP 2014/04*, Chatham House, London, https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/20140400LoggingPapuaNewGuineaLawson.pdf; ActNow! And War on Want (2018) *The SABL Land Grab: Papua New Guinea's Ongoing Human Rights Scandal*, <https://actnowpng.org/blog/new-report-highlights-sabl-human-rights-abuses>

⁷⁶ ActNow! And War on Want at p. 6.

⁷⁷ See ActNow! And War on Want at p. 11-12.

⁷⁸ Pacific Islands Report, "PNG PM Confirms Cancellation Of All Special Agriculture And Business Leases", 13 March 2017, <http://www.pireport.org/articles/2017/03/13/png-pm-confirms-cancellation-all-special-agriculture-and-business-leases>; Global Witness (2017) *Stained Trade: How US Imports of Exotic Flooring from China Risk Driving the Theft of Indigenous Land and Deforestation in Papua New Guinea*, <https://www.globalwitness.org/en/campaigns/forests/stained-trade/>, Annex A.

Consultation Paper, it would take only an estimated two minutes per product line to verify whether there is a log export ban in place; checking would likely take even less time once companies become familiar with the resources to check for log export bans and know which countries they source from have log export bans in place.

19) How can the department add flexibility to the legislation, including improving the use of guidance materials?

Amending the Act to allow updates to Country Specific Guidelines to be automatically incorporated into the Regulation would streamline the process and is supported.

If the Department chooses to produce guidance materials, then these could

- Recognise country risk reports produced to support similar legislation, such as those produced by UNEP-WCMC for use while conducting EUTR due diligence
- List the different types of illegality that a regulated entity should be looking for, such as that produced by Preferred By Nature (given in the response to question 18), and of other sources that anyone conducting due diligence should include within their information gathering (such as, and not limited to, UNEP-WCMC reports, EUTR Monitoring Organisation and NGO reporting, UNODC, Country Specific Guidelines etc.)
- Clarify that importers must know where the timber in their products was harvested, and not only where a product was manufactured, and further minimum requirements for due diligence information gathering

Other areas of concern

Domestically-sourced timber, and processors of domestically-sourced timber

This review provides an opportunity to ensure that importers, as well as processors of domestically-sourced timber, are treated similarly for legality, and risk of illegality, regardless of the source. Illegal logging—no matter where it occurs or is at risk of occurring—must not be enabled by inconsistent instruments or regulatory requirements, or inconsistent application, enforcement, or compliance with these.

We acknowledge that while the regulated community might interface with the regulatory framework differently, as the acts of importing and processing are indeed different, we maintain that if the ILPA and Regulation are to operate to fulfil the stated policy objective of promoting trade in wood and timber from 'sustainably managed forests', they must regulate for legality consistently. There cannot be one set of rules for imported timber and another for domestically-sourced timber. ILPA must operate to support and ensure legality in a 'tenure-blind' manner, and the risk that a regulated timber produced has been illegally harvested must be assessed robustly, regardless of the source of the timber.

We therefore suggest that, similar to a declaration requirement for imported timber suggested in Question 3, identification of species and where timber was harvested, alongside information about the risks of illegality in a supply chain should be provided by processors of domestically-sourced timber to the Department prior to processing. This is information that should already be collected as part of a processor's due diligence system, as required by ILPR, Part 3. Species and area of harvest

information are the foundational elements upon which due diligence is built, and represents information that a person 'ought reasonably to know' when identifying and assessing risks of illegality. This is also a demonstrated risk domestically, with harvesting having occurred outside of specified allocated areas, or concessions.⁷⁹

Furthermore, in addition to the sampling and seizure measures for imported products proposed as an 'at-border' power in Question 5, a similar approach including sampling and expanded enforcement powers for domestically-sourced timber being processed can add to the detection of non-compliance with the ILPR and result in stronger compliance.

For domestically-sourced timber products, the need to identify species, assess due diligence, and verify timber legality prior to processing are important measures to ensure the Regulation is being complied with. On-going sampling at point-of-processing will reduce any perception that it will be possible to be sloppy with due diligence activities to detect illegally sourced material.

The regulatory burden vs a level playing field

The consultation paper makes regular mention of the 'regulatory burden' associated with ILPA, quantifying the costs to regulated entities to develop, maintain and utilise due diligence systems. However, the paper does not counterbalance this cost with any estimate of the cost to Australian businesses from the prevalence of illegal timber on the Australian market.

While illegally harvested timber is not necessarily available at lower cost than that from legal sources, many of the costs associated with harvest, such as payment of royalties or taxes, the provision of ethical and safe employment, or costs associated with bringing a plantation to maturity, are often avoided by illegal loggers. As such, illegal loggers can undercut and outcompete legal sources, undermining legitimate Australian businesses involved in the import of responsibly sourced timber and those involved in the production (both harvest and manufacture) of domestic timber and wood products.

Any assessment of the regulatory burden must also take into account the costs associated with the above, and of ILPA's capacity to 'level the playing field' for legitimate businesses. Other non-monetary costs, such as exposing Australian consumers to illegally harvested timber and the unwitting financing of organised crime, should also be considered before any attempt to lessen the regulatory burden through a weakening of ILPR's provisions.

The consultation paper also does not attempt to differentiate the costs associated with due diligence for low- and higher risk supply chains. It is not only likely, it is also appropriate that such costs will be higher for non-certified products produced from high-risk species and harvested in countries with high instances of illegal logging, given the ILPAs' role as a demand side measure. All other factors being equal, regulated entities faced with two possible supply chains will favour that with the lower risks and, therefore, lower associated costs (including preferencing lower risk domestic supply).

Effective implementation of the ILPA has the potential to drive a market shift toward lower risk supply chains, lessening Australian consumer's exposure to illegal products, and also providing a market

⁷⁹ State government logging agency programs of logging activities have been materially undertaken outside of allocated areas, in breach of state laws, laws that form a fundamental part of the forest management system on which the federal RFAs are based. These logging activities have had, and will have, significant impacts on matters of national environmental significance (many of these forest areas contain habitat for nationally-listed threatened species, which are protected by law, and therefore require approval under the EPBC Act). See: <https://www.abc.net.au/news/2018-11-21/victorian-forests-appear-to-have-been-logged-illegally/10496424>, and <https://www.abc.net.au/news/2019-12-19/vicforests-plan-to-log-native-ash-trees-on-public-land-maps-show/11805812?nw=0&r=HtmlFragment>. Where processors have processed any logs felled from within these areas, then prohibition offences will have likely occurred, and due diligence offences will have occurred unless a processor's due diligence system specifically excludes logs harvested from these areas.

incentive for suppliers to improve documentation and governance arrangements. This perspective on market regulation is in line with the role assigned to the EUTR, which is viewed as an integral part of the FLEGT program, aimed at improving forest governance globally.

Recommendation: The Department should attempt to quantify the financial and non-monetary costs to Australian businesses and consumers associated with the presence of illegal timber on the Australian market.

Injunction and enforceable action powers, publication powers

Provision of a broader suite of enforcement options and the power to publish details of ILPR infractions is raised in the consultation paper, but none of the question prompts provided specifically addresses these points. The introduction of both of these measures is supported.

The introduction of injunction and enforceable action powers will align well with the Department's differentiated approach to compliance, as described in its Illegal Logging Compliance Plan⁸⁰, which recognises that a diverse toolkit of enforcement powers is appropriate in dealing with a wide range of offending, from unintentional, one-off offences through to intentional, repeated law breaking.

Enforceable corrective action notices have proved to be an effective tool within the European context, allowing lower tier offending to be addressed without entering the court system (and thus reducing the burden on enforcement). When issued, these generally state that an Operator found in breach of EUTR due diligence requirements must not place any further affected timber products on the market until the identified deficiencies in due diligence have been addressed. Where breaches of such notices is in itself an offence, their use provides an efficient means to escalate repeat breaches into the court system, again lowering the burden on enforcement.

While the use of corrective action notices is an efficient means of dealing with lower tier offences (as described by the Department), it is important to note that they should not replace more punitive measures when dealing with more severe and/or deliberate offences.

As discussed above, for ILPA to function as an effective demand-side measure, it must be an effective deterrent against non-compliance and offending. For those intentionally breaching the Act, this means that the penalties associated must be larger than the profits made from illegal imports or processing. Alongside ensuring that the Act allows for sufficiently large penalties to be awarded by the Department or Court, it should also be amended to allow for the Department to publish the details of breaches detected. Such a name-and-shame would risk an offender's wider market share, and would also present a resource that consumers could refer to when choosing suppliers.

Publication would have the further effect of making due diligence easier for other regulated entities, who would be able to see suppliers, species, and production areas where risk exists, and help in encouraging a shift towards lower risk supply chains. As discussed above, the introduction of both injunctive and seizure powers would also contribute to the effectiveness of ILPA as a deterrent.

⁸⁰ <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/forestry/illegal-logging-compliance-plan.pdf>

Transparency and accountability encourage and increase compliance

Reporting

The Department should publish an annual report that informs about the number and nature of educative actions taken, compliance actions taken, due diligence checks, and any other relevant compliance and enforcement actions, including fines, court cases, and audits.

This “Compliance Report” could also provide updates on specific risks identified and what the main focus of law enforcement has been, such as particular species, products or countries/regions.

Data

Availability of information and data regarding the international trade in timber products is essential for due diligence and identifying risks. The exclusions of HS44, 48 & 94 from ABS data should be removed, and data should be made available on a shipment level, rather than aggregate. Such trade data should be made available upon request. Customs data is publicly available in the US.

Declarations

Declarations should contain the product species, volume, value and country of harvest and should be made available via public information requests, as is done under the Freedom of Information Act in the United States.

Resourcing

Enforcement agencies need to be fully funded and staffed to be able to undertake a comprehensive program of checks, and further compliance actions, as needed.

3rd party submissions

EUTR Competent Authorities have developed guidelines both for submitters of, and for Competent Authorities receiving, substantiated concerns, and some Member States include Competent Authority obligations for responding to these in national legislation. In a recent UNEP-WCMC report analysing 2017-2019, 98 percent of the 289 Operators identified in substantiated concerns were checked, with enforcement actions implemented against 73 (some checks were ongoing at the time of reporting).⁸¹ A further 188 Traders were identified in substantiated concerns, all of which were checked and 165 penalties applied.⁸² The high rate of enforcement resulting from such investigations suggest that third party reporting can provide strong intelligence, and it is recommended that the Australian government consider the creation of similar procedures within the Australian context.

⁸¹ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union’s Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 51.

⁸² Ibid, 52.