Submission to the

**Australian Law Reform Commission’s**

*Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges*

Laws considered in this submission:

**Illegal Logging Prohibition Act 2012**

**Illegal Logging Prohibition Amendment Regulation 2013**

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Executive Summary

The Illegal Logging Prohibition Act and its regulations breach the fundamental common law legal rights of Procedural Fairness and the Rule of Law. The Act makes Australian citizens criminally liable for the compliance of (unknown and unidentifiable) others to many (unnamed and unknown) foreign laws. A person can be imprisoned for up to five years for unknowingly importing a product made of or containing illegally timber. This is serious breach of a fundamental Human Right – the right for an individual to be free from imprisonment for the wrong doings of others and matters which that individual may not have any ability to control or know of.

A fundamental principle of the Rule of Law, especially in criminal law, is that a person should be entitled to know in advance the legal consequences of their actions. There should be certainty in criminal law, and especially in the definitions of criminal offences.Yet under this Act the definition of the crime is vague, uncertain and broad, and its meaning changes in the Regulations from what it was in the Act.

The law places unreasonable requirements on people. It isn’t possible to know all the foreign laws, trace all wood components of a product back to forest and know that everyone has complied with the relevant laws. Importers may have to assess the compliance of government forestry departments to their ownlaws. The Regulations hold people liable to assess the accuracy and reliability of private and foreign government certification schemes. The Regulations also require people to assess military conflict.

The fault element for the crime of importing illegal timber is negligence. In the case of an importer unknowingly importing illegal timber, his/her defence against negligence and criminal charges would be that he/she shows he/she has done the Due Diligence in accordance with the Regulations. Yet it is not possible for an importer to know if or when they have done Due Diligence to the “right degree” because there is no objective standard for compliance. In this case the importer could lose his/her strength of defence, through no fault of his/her own, and as a result be subject to criminal charges including imprisonment.

The law is disproportionate. By making people criminally liable for unknowingly importing illegal timber, the Act is far harsher than similar laws such as the various State Stolen Goods Acts. These only impose criminal liability if the person *knowingly* received stolen goods and unlike the Illegal Logging Prohibition Act, do not include any Due Diligence requirements.

The Act punishes the innocent whilst ignoring the law-breaker. The person actually breaking a law of harvest in Australia is exempt from the Illegal Logging Prohibition Act, whilst their innocent customer may be criminally liable.

The Act gives officers of the government the power to enter businesses’ premises (under a warrant) to monitor compliance to the Due Diligence requirements, even if the business is not under investigation for importing illegal timber. This is disproportionate - serial and deliberate offenders of serious laws such as theft, and murderers and paedophiles released after serving their sentence, are not even subject to such treatment.

An importer can be held criminally liable for breaches of foreign law without the right to a fair trial in these jurisdictions. A foreign court could make an arbitrary, corrupt, politically or personally motivated judgement of “illegal logging” and the Australian importer has no right of appeal in that jurisdiction. Nor does the law provide any mechanism in Australian jurisdictions whereby foreign laws can be tested or conflicts between foreign laws or land rights resolved, or where foreign judgements can be appealed or foreign laws challenged.

In a recent notice, the Department has implied that it is acceptable for importers to make a declaration on their import documents stating that they haven’t complied with the Due Diligence Regulations, and so exposing importers to the risk of self-incrimination.

The unreasonable compliance burdens of the Regulations will result in high costs and workloads for many businesses and small business owners, with adverse impacts on their incomes, jobs and businesses. This is a breach of a fundamental Human Right – the right to earn a living/achieve economic well-being through one’s own efforts.

It is possible for Australia to have effective laws and policies to reduce legal logging without the removal of the common law legal rights, human rights and freedoms of its citizens and businesses. Their removal cannot be justified: it does not increase the effectiveness of the law or reduce illegal logging. Instead such loss of rights places unfair and uncertain criminal liabilities and onerous burdens on Australia’s 17,000 importers of regulated timber products.

Introduction

This Act and Regulations makes Australian citizens liable for the compliance of (unknown and unidentifiable) others to many (unnamed and unknown) foreign laws, with a criminal penalty of up to five years if found to have imported illegally logged timber, even if they were unaware of the presence of this (with the fault element of negligence).

This law is unjust and breaches a person’s legitimate rights, interests and expectations of law, including many common law rights, fundamental human rights and elements of the Rule of Law. This submission explains these breaches by stepping through the Questions on Australian Law Reform Commission Inquiry Issues Paper5 ‘Traditional Rights and Freedoms - Encroachments by Commonwealth Laws – IP 46’.

I have not addressed the question in the Issues Paper which asks: “what are the general principles or criteria that should be applied to help determine whether a law that that interferes with rights is justified.”

Question 19-1- “Other Rights, Freedoms and Privileges – Abrogation of the liberty of the individual”

Under the Illegal Logging Prohibition Act, a person can be imprisoned for up to five years for unknowingly importing a product made of or containing illegally logged timber. This is serious breach of a fundamental Human Right – the right for an individual to be free from imprisonment for the wrong doings of others, for matters which that individual may not have any ability to control or know of, and also because a flaw in the Due Diligence regulations may result in an importer not being able to properly defend themselves against criminal charges.

The fault element of the crime is negligence. In the case of having been proven to have imported illegal timber (but to have done it unknowingly), the importer’s defence against claims of negligence is that they did Due Diligence in accordance with the Regulations. However, there is no objective standard as to what constitutes acceptable compliance to the Due Diligence Regulations. So in the event that the importer is judged *not* to have done Due Diligence to “the acceptable degree”, he/she may have no- or diminished-ability to defend themselves against criminal charges.

Not only is this a breach of the fundamental human right (Abrogation of the liberty of the individual) but it is against the [Australian Government guidelines for criminal laws](file:///C%3A%5CPrivate%5CLegal%20Rights%20Inquiry%5CAustralian%20Government%20guidelines%20for%20criminal%20law)1: *“Do not use negligence unless it is appropriate for a person’s liability with reference to an objective standard”*

Question 14-2 – “Procedural fairness”

The [2012 opinion by Gavan Griffith QC and Benjamin Jellis](https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8d332357-5e0e-490f-9fb9-877d0ecea50d)2 stated *“it* (the Act) *unreasonably places timber importers at risk of criminal liability on a basis that is uncertain and unpredictable”*

1. **The lack of proper definition of the crime**

Laws should be clearly written so that those who have to comply can readily understand what is required of them and also so that legislators can be held politically accountable3. As stated by Lord Diplock4 *“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to a course of action, should be able to know in advance what are the legal consequences that will flow from it.”* Fundamental rights cannot be overridden by general or ambiguous words5. Clear and unambiguous law is important to minimise the scope for arbitrary or discretionary enforcement, this is especially important in criminal law.

The Illegal Logging Prohibition Act and its Regulations seem to be designed to achieve the opposite. To quote from the Griffith and Jellis Opinion: *“The offences that apply to importers under the Bill are unjust by attaching liability on an unduly broad and unpredictable basis”* 2

The definition of the crime of “Illegal Logging” in the Act is unclear and broad*: “harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested.”* This could include safety, human rights, labour, theft, indigenous, contract, international and even religious laws. What if a foreign government doesn’t enforce some laws, does the importer have to ensure compliance? Does there have to have been a verdict of illegal logging in the foreign jurisdiction, or do allegations, media reports or hearsay evidence count?

Page 40 of the Explanatory Memorandum to the Bill extends the meaning of illegal logging:

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* *Timber bought, sold, exported or imported and processed in breach of law*. This potentially broadens the definition of illegal logging to capture laws at every stage of the supply chain.
* *Timber harvested and traded through corrupt practices.* This means that importers may have to investigate officials from foreign governments. This is unreasonable - Australian citizens do not have any legal right to investigate foreign governments or their staff.

The Regulations further extend the meaning of illegal logging to include several “catch-all” provisions:

* *Non-payment for logs* (Section 10 (2) (i) (iii)): How can a person check that payments have been made without legal right of access to a supplier’s accounts and invoices (with all prices visible)? This would require a specific right of warrant under law, which is only available to government officials under specific legislation. What if there is a dispute over payment for the logs, but if judged by Australian contract law the transfer of property rights for these logs was legal?
* *Breaches of rights to use and tenure of forest/place* (Section 10 (2) (i) (iv)): How is an importer to know if some unknown person hasn’t a legal claim over forest or land in a foreign country? In the Ecuadorean Constitution, nature has legal rights. How can an importer be expected to judge whether such rights have been met? Many developing world countries grant two parties the rights to the same trees and/or land. How can an importer resolve such unclear, conflicting or overlapping property rights? In countries which are federations, what about situations where State law conflicts with National law – which law is to trump?
* *The presence of armed conflict* (Section 13 (3) (a) (iii)): Does this mean that timber from a conflict zone is illegal? Assessing armed conflict isn’t just a very harsh and unjust requirement to place on business and their staff, but could place them in a dangerous and illegal situation in a foreign country. Assessing armed conflict is the job of government foreign affairs and defence departments, not business.

Do these clarifications and expanded meanings in the Regulations and Explanatory Memorandum alter the definition of the crime? If so, importers are criminally liable for a near infinite range of matters far beyond their control and knowledge. This is most unjust.

1. **No objective standard or data to enable compliance to the *Risk Assessment* section of the Due Diligence Requirements**

Sections 10 and 13 of the Due Diligence Regulations require importers to do a risk assessment on their imports, including assessing the risk of the country, region, harvest unit and species:

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The government has not published any lists of or reports on the risk of each country, region, harvest unit or species. Instead, importers are referred to various NGO rankings of countries especially [Transparency International’s Corruption Perceptions Index](https://www.transparency.org/cpi2014/results)6 (CPI). The CPI has not been checked or authorised by the government nor is it recognised in law. Nor has the government assessed how accurate, reliable or free from bias the CPI is, or how well it correlates to illegal logging. The [Seneca Creek correlation between “illegal logging”](http://www.illegal-logging.info/sites/default/files/uploads/1_AF_and_PA_summary.pdf)7 and the CPI (Fig 1) which is commonly used to justify the CPI as a reasonable estimate of the risk of illegal logging, is based on a study prepared for the American Forest and Paper Industry in 2004 (which at that time was lobbying for the US Lacey Act to be extended to protect the US timber industry against imports).

 

 **Fig 1. “Illegal Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products**

 **Industry”, Prepared for: American Forest & Paper Association. By: Seneca Creek Associates, USA.  Nov 2004**

Is the “% suspicious log supply” in Fig 1 based on evidence, hearsay, guesses or advocacy? Apart from concerns about Seneca Creek’s lack of publication of methodology, sources, sample sizes and data relating to the amount of illegal logging in each country, plus the possibility of anti-import bias by a protectionist US industry, the large “error bars” (circles) could make this table very imprecise. Compound this imprecision with the “fuzziness” and potential subjectivity of the Corruption Perception Index (i.e. compound the uncertainties) and the result may be quite inaccurate and imprecise.

1. **No objective standard for compliance to the *Risk Mitigation* section of the Due Diligence Requirements**

There is no objective standard as to what constitutes acceptable compliance to the Due Diligence Regulations. The Act says that the importer must “reduce the risk” of illegal timber being imported but does not state the required degree of reduction:

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The Regulations say that importers must do Due Diligence risk mitigation on imports unless they have judged them to be “low risk”. If not “low risk” they must “mitigate*”* the risk of illegal timber “proportionate to the identified risk”:

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Do imports have to be “low risk, or just “risk mitigated”? There is no definition of “low risk”, or of the degree of reduction that is required after “mitigation”. Different importers and officials may have vastly different understanding or interpretations of these words and phrases.

Importers are exposed to fines for not having “mitigated” risk to an “acceptable” level, and could be subject to criminal penalties if found to have (unknowingly) imported illegal timber and not to have reached an “acceptable” level of risk. As already discussed, an importer’s defence against criminal charges would be to show that they were not “negligent” - by demonstrating that they had complied with the Due Diligence requirements. Yet there is no objective standard as to what constitutes compliant Due Diligence.

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 **From - ‘Illegal Logging Prohibition Bill 2012 Revised Explanatory Memorandum’ Clause 9**

The lack of any such standard means that businesses will likely over-comply to best protect themselves against claims of negligence. This is expensive and would very likely exclude large amounts of legal timber, with adverse social and economic impacts for Australia and our trading partners. This problem was foreshadowed by Gavan Griffith and Benjamin Jellis in their opinion2:

*“the offences as presently drafted are likely to give rise to undesirable and unintended consequences at the point of compliance and of prosecution. A prudent importer seeking to comply with the Bill is likely to avoid trade with certain places, regions or indeed countries altogether.”*

1. **Unreasonable requirements – information and capacity**

A person cannot be expected to know of and understand all the relevant foreign laws, regulations and codes. Besides being an unreasonable expectation, this is against [Australian Government guidelines for criminal law](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/)1: *‘When the content of an offence is delegated to a subordinate instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence can readily ascertain their obligations.’*

A study conducted by industry associations for their [submission to the second Senate Inquiry](https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=ffc35aa4-4183-4ee3-aefa-2f4fff533fd4) into the Bill found that there could be around 1000 relevant laws relevant for an importer bringing in timber from just five countries8. Each year, Australian businesses import timber products from around 80 countries. Additionally, most foreign laws, regulations and codes are not written in English, not all are publicly available on the internet and some may be unrecorded (for instance customary and tribal laws and rights).

A person cannot be expected to be an investigator to identify the unknown third parties associated with the harvest of the timber in their imported products, in order to assess the probability or “risk” that such third parties have complied with all relevant foreign laws (as required in Sections 10 to 13 of the Due Diligence requirements). As stated by Griffith and Jellis, *“It is plainly an inapt and unreasonable expectation for an Australian importer to know, or ascertain as he buys timber products, whether any foreign laws have been breached by the harvest of that timber in a foreign country”* 2

There are requirements in the Regulations that do not make it clear whether an importer has to comply with them or not. The importer may have to:

* (Identify) the country, the region of the country and the *forest harvesting unit* in which the timber in the product was harvested (Section 10 (2) (b))
* Assesses whether the harvesting of the *species of tr*ee from which the timber in the product is derived is prohibited *in the place where the timber has been harvested* (Section (2) (i) (i))
* Assess the *prevalence of illegal logging in general in the area* in which the timber in the product is harvested (Section 13 (3) (a) (i))
* Assess the *prevalence of illegal harvesting in the area of the species* of tree from which the timber in the product is derived (Section 13 (3) (a) (ii))
1. **Unreasonable requirements - rights and powers**

The law could place people in the unreasonable position of having to assess the compliance of foreign and Australian State governments to their ownlaws: Government departments are the principal owners and managers of forests in Australian States and many supplier countries. Australian citizens have no right (such as via FOI applications) to get information from foreign government departments. It is not the job of private individuals to deal with foreign governments; this is the job of the Australian government.

The Regulations hold people liable to assess the accuracy and reliability of private certification schemes and foreign government legality schemes (timber legality frameworks). This is completely unreasonable. Individuals and businesses do not have the powers or resources to do this.

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Question 19-1 – “Other Rights, Freedoms and Privileges – Rule of Law”

The law applies a disproportionate penalty: it makes people criminally liable for actions of others, over whom they may have no knowledge or control. This is unjust and against [Australian Government guidelines for criminal law](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/)1: *‘Central to the concept of criminality are the notions of individual culpability and the criminal intention for one’s actions’*

The Act applies liability disproportionate to that of similar laws such as the various State laws for receiving stolen goods. These only impose criminal liability if the person *knowingly* received stolen goods and unlike the Illegal Logging Prohibition Act, do not require any Due Diligence compliance or legality declarations:

* The Victorian Crimes Act 1958 – Section 88

*“88. Handling stolen goods – A person handles stolen goods if knowing or believing them to be stolen goods he dishonestly receives the goods or brings them into Victoria…….”*

* The Queensland Criminal Code 1899 – Section 433

*“433 receiving tainted property – A person who receives tainted property, and has reason to*

*Believe it is tainted property, commits a crime.”*

* The NSW Crimes Act 1900 – Section 188

*“Whosoever receives, or disposes of, or attempts to dispose of, any property, the stealing where of amounts to a serious indictable offence, knowing the same to have been stolen, shall be guilty…..”*

Other laws such as the *Industrial Chemicals (Notification and Assessment Act)* 1989 and the *Agricultural and Veterinary Chemicals (Administration) Act* 1992 have similar harsh criminal penalties and liabilities as the Illegal Logging Prohibition Act. However these laws cannot be compared to the Illegal Logging Act. It is easy to test a chemical to determine its composition and toxicity, so there is no excuse for wrongful importation or use. It is nearly always impossible to test wood products to ascertain the legality of harvest of the timber.

The Act gives officers of the government the power to enter businesses’ premises (under a warrant) to monitor compliance to the Due Diligence requirements, even if the business is not under investigation for importing illegal timber. This is disproportionate. Serial and deliberate offenders of serious laws such as theft, and murderers and paedophiles released after serving their sentence, are not subject to such treatment.

The law should apply equally to all: The Act does not treat importers and domestic processors in the same way. It applies a harsher fault element (negligence) to importers than to domestic processors (the default element of recklessness, knowledge, intention). Additionally, domestic processors do not have to sign a declaration attesting to their compliance to the Due Diligence Regulations (but importers do).

The Act punishes the innocent whilst ignoring the law-breaker. The person actually breaking a law of harvest in Australia is exempt from the Illegal Logging Prohibition Act, whilst their innocent customer may be criminally liable. Surely the person committing the crime should be the one held liable?

Question 8-2 - “Right to a fair trial” (and appeal)

An importer can be held criminally liable for breaches of foreign law without the right to a fair trial or appeal in these jurisdictions. Nor do they have the right to bring a matter to foreign courts to resolve conflicting laws or disputes over legality. The importer cannot place a “freedom of information” claim on a foreign government to force them to reveal details of harvest and management of forests under their ownership. The importer cannot compel witnesses to come from overseas to act in their defence.

Neither does the law provide any process or mechanism in *Australian* jurisdictions whereby foreign laws can be tested or conflicts in foreign laws or land rights resolved, or where foreign judgements can be appealed or foreign laws challenged. These problems were raised by Gavan Griffith in his 2012 opinion: *“Prosecution of offences under the Bill will consequently involve Australian courts in indirectly enforcing the public and penal laws of other States. It may also require Australian courts to consider the legality of conduct by officials of those States, and make findings as to the ownership and title of foreign land and property.”* 2

A foreign court could make an arbitrary or corrupt judgement of “illegal logging” and the Australian importer has no right of appeal against this in that foreign jurisdiction. And what of a foreign offense which does not constitute an offense in Australian law?

Question 15-2 – “Delegating Executive Power”

In the Regulations (which were written after the Act passed), the Department of Agriculture broadened the meaning the crime of “Illegal logging” from the definition in the Act (*see “Question 14-2 – “Procedural fairness”- 1.The lack of proper definition of the crime*). Additionally, the Department incorporated timber legality framework private rules (FSC, PEFC) and foreign government laws (European Union FLEGT) into the Regulations without any scrutiny by the Legislature of these schemes or of the assessment criteria, mechanism and process used to recognise such schemes. (See *“Question 14-2 Procedural fairness”- 5.**Unreasonable requirements - rights and powers)*

Question 17-2 – “Executive Immunities”

Question 10-2 – “The Privilege against Self-incrimination”

The Regulations place significant penalties on importers for non-compliance to the regulatory Due Diligence requirements - 100 penalty units for each of the four sections of risk management. And the government has stated that although the Regulations are now under review, importers must still comply with these Due Diligence requirements. Additionally, importers must sign a declaration that they have complied with the due diligence requirements:

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 **From - ‘Illegal Logging Prohibition Bill 2012 Revised Explanatory Memorandum - Section 4.3 - Penalties’**

Yet in conflict with this, the Department has implied that it is acceptable for importers to sign that they haven’t done Due Diligence:

*"Importers will also need to answer a simple declaration question about their compliance with their due diligence obligations. This will be via a community protection question as part of their full import declaration to Customs. Regardless of whether an importer answers yes or no to the declaration question, their goods will not be held up at the border."* (Addendum to this Submission – Department of Agriculture ‘Notice to Industry’ 19 August 2014, ‘New illegal logging laws to apply to timber importers from 30 November 2014’)

The Department might be willing to request Customs not to hold up the import. But by signing “No” on the import declaration, the importer is saying that he/she hasn’t complied with the Due Diligence regulations, i.e. is signing to the fact that they have broken the law and so risk incriminating them-selves.

The Act enables self-incrimination: “*Proof that a law has been breached in the place of harvest, may require findings against non-parties whose conduct has not (but perhaps will) be the subject of proceedings in the jurisdiction where the harvest occurred. Additionally, a successful prosecution under the Bill will require findings against the importer defendant, whose possible complicity in any illegal activity in the place of harvest might be the subject of future proceedings in the foreign jurisdiction.” 2*

Question 19-1- “Other Rights, Freedoms and Privileges”

**Economic well-being/Interference with the liberty to carry on a business/Right to earn a living**

The unreasonable compliance burdens of the Regulations will result in high costs and workloads for many businesses and small business owners, with adverse impacts on the incomes and jobs of owners and staff. This is a breach of a fundamental Human Right – the right to earn a living and conduct a business without undue interference.

**Right to silence**

Section 54 of the Act removes the right to silence:

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Conclusion

It is possible for Australia to have effective laws and policies to reduce illegal logging without the removal of the common law legal rights, human rights and freedoms of its citizens and businesses. Their removal cannot be justified: it does not increase the effectiveness of the law or reduce illegal logging. Instead such loss of rights places unfair and uncertain criminal liabilities and onerous burdens on Australia’s 17,000 importers of regulated timber products.

This law creates a precedent that could be used to further strip-away rights from Australia’s businesses and citizens, not just in the timber industry but broadly across the community.

By the adding of unjustified compliance costs, unfair and uncertain liabilities (including criminal liabilities) and the creation of the wrong incentives (such as driving overly risk-averse behaviour), the loss of these rights will ultimately have an adverse effect on entrepreneurialism and freedom of enterprise in Australia, and hence on the creation of prosperity and jobs, with a resultant decline in opportunity and equality.

Footnotes

1. ‘Principled Regulation: Federal Civil and Administrative Penalties in Australia’, Report 95 (2003) *Australian Law Reform Commission* <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>
2. Gavan Griffith QC and Benjamin Jellis, Opinion *(6th January 2012)* *part of a Submission to the Senate Rural Affairs and Transport Legislation Committee re Illegal Logging Prohibition Bill 2012* <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8d332357-5e0e-490f-9fb9-877d0ecea50d>
3. Chief Justice RS French, ‘The Common Law and the Protection of Human Rights’ *(4th September 2009)* *Sydney Anglo Australasian Lawyers Society* 2 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>
4. Lord Diplock in J Raz, ‘The Rule of Law and its Virtue’ (*1977) 93 Law Quarterly Review* 195,198
5. Australian Law Reform Commission, ‘Traditional Rights and Freedoms - Encroachments by Commonwealth Laws – Issues Paper’ IP 46 (*December 2014)* 15
6. ‘Corruption Perceptions Index 2014’ *Transparency International* <https://www.transparency.org/cpi2014/results>
7. ‘Illegal Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood

Products Industry’ *(November 2004)* *Seneca Creek Associates – prepared for the American Forest & Paper Association* <http://www.illegal-logging.info/sites/default/files/uploads/1_AF_and_PA_summary.pdf>

1. ‘Supplementary submission to the Senate Inquiry of the Illegal Logging Prohibition Bill’ *(22nd December 2011)* *Several Industry Associations* <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=ffc35aa4-4183-4ee3-aefa-2f4fff533fd4>

Addendum