Reforming Australia's illegal logging regulations

Submission to the Consultation Regulation Impact Statement

December 2016

ABN 63 000 014 504

Introduction and overview

The NSW Business Chamber (the Chamber) welcomes the opportunity to respond to the Reforming Australia's Illegal Logging Regulations - *Consultation Regulation Impact Statement* (the RIS).

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 19,000 businesses and providing services to over 30,000 businesses each year. The Chamber works with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, the Chamber represents the needs of business at a local, State and Federal level.

At the outset the Chamber notes its support for the policy objective of reducing the harmful environmental, social and economic impacts of illegal logging by restricting the importation and sale of illegally logged timber products in Australia.

While the Chamber represents a broad range of businesses, many of which are not impacted by illegal logging regulations, many of our members may be affected either directly as importers or indirectly through supply chain relationships. Given this as well as particular concerns raised by our members, this submission has been prepared in response to the RIS with a view to improving the requirements from a user perspective.

The Chamber encourages the Department to consider the potential that an overly onerous framework can weaken its effectiveness by giving importers additional incentives to skirt the framework altogether — an outcome that is both bad for law abiding businesses and the policy objective itself.

This submission touches on a number of issues including:

- Assessing the costs and benefits of illegal logging regulation;
- The use of reasonably practicable as a mechanism to achieve proportionality;
- Making it easier for businesses to rely on recognised frameworks (both domestic and international);
- The need for clearer guidance and processes; and
- The preferred approach.

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Assessing the costs and benefits of illegal logging regulation

The Chamber welcomes the RIS' efforts to assess the costs and benefits of illegal logging regulation. Assessing the benefits is a particularly challenging task given the complexity of the issues and poor visibility over the indirect costs of illegal logging.

One aspect that the Chamber considers is not adequately dealt with in the RIS is an assessment of the marginal or threshold impacts that Australian regulatory action has on illegal logging. The relevant question is the extent to which the cost of illegal logging reduces as Australian consumption of illegally sourced timber and products reduces. It is unlikely that this is a one-to-one relationship given the potential for illegally procured wood to be supplied elsewhere as Australian consumption declines. Further, many of the costs of illegal logging are not proportionate to supply at the margin, but follow threshold effects (for example, impacts on habitation may have cost impacts which are equal once past a given threshold).

The Chamber does not have a deep understanding of these dynamics, however the RIS ought to consider the extent to which they apply as part of the RIS. If Australian action only marginally improves the problem, then this needs to be factored into the analysis of costs and benefits. If action is nonetheless justifiable as part of Australia's contribution to a global public good (that is, the problem can only be resolved by coordinated action which Australia is committed to participating in), then the RIS should be upfront about this and put this in the context of steps taken to promote international action in other jurisdictions.

The RIS notes that the maximum benefit would be up to $800 million (based on third party estimates of the worldwide costs of illegal logging and estimates of Australia's share of the consumption), but the actual benefits are likely to be an amount less than this when considering:

- the extent to which illegally supplied wood shifts to other buyers and therefore still incurs the associated costs;
- the extent to which the regulatory framework fails to stop Australian consumption of illegally harvested wood; and
- the costs of the regulatory scheme itself.

Given this, the Chamber believes that the costs of the existing framework could be considerably more than the potential benefits (as, for the reasons above, it is likely that the benefits to be achieved are substantially lower than the $800m maximum stated in the RIS). As we will outline later in this submission, the Chamber believes that the policy objectives of the regulation could be achieved without the significant costs imposed by the current system.

Further, when considering the different options for reform the RIS does not engage in much discussion around the interaction between particular regulatory features and the extent (in a quantifiable sense) to which they may reduce illegal logging. Some kind of assessment is needed to determine whether different regulatory mechanisms are warranted, particularly given some features (such as the threshold at which consignments are subject to regime) are scalable.

In the absence of a more detailed assessment, it would appear that the benefits of pursuing a less cumbersome approach are likely to exceed the associated costs.

The use of reasonably practicable as a mechanism to achieve proportionality

The Chamber notes that apart from the "*reasonably practicable*" requirement at the information gathering stage, there is nothing inherent in the current regime which scales back requirements for less risky consignments above $1000.

While a flexible interpretation of the "*reasonably practicable"* requirement could potentially lend itself to a less onerous approach in circumstances where the cost of gathering the required information is high, it is incredibly unclear how it works in practice. The best guidance made available to importers is set out below:

> ***What does 'reasonably practical' mean?***
>
> *The term 'reasonably practicable' is a common legal term used in other Australian legislation, such as workplace health and safety. It means what a reasonable person would have done in the particular circumstances.*
>
> *For businesses importing goods into Australia, what is 'reasonably practicable' will depend on the individual circumstances of the importer. There are a number of factors that should be considered when gathering information, such as:*
>
> - *the availability of the prescribed information*
> - *the time, expense and difficulty involved in obtaining information*
> - *the steps required to gather the necessary information.*
>
> *Each factor is as important as the others and they should all be taken into consideration equally. Importers need to balance the likelihood that the timber product they are proposing to import has been illegally logged against the time, cost and resources required to gather the information needed to justify a conclusion that the risk is low.*
>
> *This should not be an onerous process. Businesses should be able to use existing systems, practices and processes to gather the information to allow them to assess the risk.*
>
> *The Act and Regulation recognise there are a range of circumstances that may make it difficult, or impossible, to gather each element of the required information. Importers should be able to show that they have made reasonable efforts in seeking to obtain the information.*

Noting that it *"will depend on the individual circumstances of the importer"* and that "*each factor is as important as others and they should all be taken into consideration equally*" is not likely to clarify things for users.

The Chamber notes there is often reluctance among regulators to provide any advice about legal matters for fear that it is incorrectly relied upon. This fear only serves to make it harder for businesses to find the balance intended by the "*reasonably practicable*" requirement. In practice, this leads to businesses over servicing their information gathering requirements for fear that they fail to meet the required benchmark.

Further, the Chamber contends that the "*reasonably practicable*" requirement is not sufficient in meeting the principle of proportionality. This is for a number of reasons, including because the current framework:

- imposes disproportionately high costs on irregular and new importers given their need to establish a potentially costly due diligence framework;

- in effect increases the obligations on importers of complex products given these products contain multiple wood sources yet may not necessarily represent higher risks;
- establishes the same requirements on a consignment value of over $1000 and one worth millions of dollars (apart from the extent to which the "*reasonably practicable*" requirement may limit obligations);
- does not reward or provide incentives for importers or suppliers that can be regarded as inherently low risk; and
- takes a positive vetting approach whereby every consignment must be proved (to the satisfaction of the importer) to be from legal sources as opposed to a negative vetting approach.

A number of the options considered as part of the RIS may serve to limit requirements; however, apart from an increase in the consignment threshold the RIS does not consider whether options could be designed to include requirements proportionate to the likely risks involved.

Making it easier for businesses to rely on recognised frameworks

The Chamber strongly supports the establishment of "*deemed to comply*" arrangements for timber legality frameworks as well as country and state specific guidelines.

Feedback from our membership indicates that it is currently difficult to rely on timber legality frameworks and that this imposes considerable costs.

Once an importer can satisfy that a particular consignment is within the scope of a recognised framework, it is unclear what additional value is derived from collecting additional information or following extra processes. While the RIS discusses the potential for additional information collected to reveal conflicting information, requiring the collection of additional information is not an appropriate balance of the risks involved.

Given that other frameworks apply in North America and Europe (and elsewhere) it also begs the question whether these frameworks cannot be leveraged to make things easier for Australian businesses.

One concern for Australian importers is the difficulties associated with getting foreign suppliers to comply with our framework. While it may be similar to other international frameworks, a supplier unfamiliar with the framework may simply regard it as too hard to take on board the additional requirements and simply not enter the market (in these circumstances, perception matters as even if compliance is relatively straightforward, expectations of complexity may dissuade a supplier from working within the Australian framework).

In this respect it could be asked why an Australian importer could not follow one of these foreign frameworks (which a foreign supplier is likely to be more familiar with) in satisfying itself that wood has not been illegally logged. The RIS should consider which features of the Australian framework would require adjustment to the extent that the Australian approach implies different or additional processes.

The RIS (p22) notes that:

> *"Anecdotal evidence outlined in the KPMG review indicated that the requirements were already encouraging some businesses to avoid suppliers who were unable, or unwilling, to assist the importer minimise the risk associated with their products."*

This does not necessarily mean that these suppliers engaged in illegal practices, but rather that they didn't wish to engage with the Australian system (which could be for other reasons

such as additional compliance burdens). Ultimately this produces costs for Australian firms by reducing the set of potential suppliers they could draw upon which will increase costs of supplying wood to Australia over the longer term.

Need for clearer guidance and processes

The Chamber contends that the amount of guidance available to users is poor. While a 43 page industry guide has been prepared by the Australian Timber Importers Federation (ATIF), information provided by the Department is uninformative.

The RIS notes that the Department is working to provide updated and improved guidance — the Chamber welcomes these efforts.

The Chamber suggests that guidance ought to be significantly upgraded from the current level once the new framework is embedded. In the interim, further clarification of more complex features of the system would be useful. For example guidance around what can be regarded as meeting the "*reasonably practicable*" requirement could be better illustrated via practical examples of what is or isn't expected.

In addition, the guidance materials made available by the Department provide a sense of what is required in general terms however this does not guide users as to what might be required in practice. The ATIF guidance note offers a system and risk matrix, however this is just one approach that could be taken. Providing a few examples of "*due diligence systems*" could assist users.

The Chamber welcomes any additional steps taken to engage with the business community, including through webinars or other discussions with affected importers.

The preferred approach

The RIS presents a number of options borne out of the KPMG review. These are presented separately but can be combined to form the recommended approach.

The Chamber strongly supports adopting all of the measures which reduce the regulatory burden faced by affected businesses, except where those compliance costs can be demonstrated as being more than offset by the measure's benefits. Given the difficulty in establishing a direct relationship between the two, the Chamber's judgement — in the absence of more detailed information — is that there is a compelling case for implementing all of KPMGs recommendations to their full extent and for further compliance cost saving measures to be considered.

Conclusion

The framework should be designed with the user in mind. The Chamber is strongly supportive of initiatives that seek to streamline the "front end" of regulatory interactions without necessarily weakening the effectiveness of regulatory oversight.

The existing framework fails to do this as it its process rather than outcomes focussed. Providing greater flexibility to importers has the potential to reduce costs as they can integrate risk assessments in a manner that is complementary to existing business practices.

There is a degree of futility in requiring Australian importers to go "above and beyond" as part of a due diligence system as fraudulent activities by foreign suppliers are unlikely to be picked up either way. Indeed, the best mechanism for Australian importers to rely upon is the credibility and reputation of suppliers. Yet reputation and credibility have only a relatively minor role in the current framework which prefers a "paper trail approach". Apart from being potentially ineffective, the "paper trail approach" also happens to be very costly for business.

For this reason the Chamber would prefer an approach where individual importers are able determine the balance of risks rather than artificially prescribing how such an assessment should occur.

The Chamber appreciates the opportunity to make a submission to this consultation