



Submission

in response to

Sunsetting Review of the Illegal Logging Prohibition Regulation 2012

Submission to the Department of Agriculture, Water and the Environment

prepared by

Environmental Justice Australia

30 September 2021

## **About Environmental Justice Australia**

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

Thank you for the opportunity to provide feedback on the Sunsetting Review of the Illegal Logging Prohibition Regulation 2012.

### **For further information on this submission, please contact:**

Bruce Lindsay, Environmental Justice Australia

T: 03 8341 3100

E: [Bruce.Lindsay@envirojustice.org.au](mailto:Bruce.Lindsay@envirojustice.org.au)

Submitted to: [illegallogging@awe.gov.au](mailto:illegallogging@awe.gov.au)

## Overview

We welcome suggested changes to improve enforcements, effectiveness and strengthen the regulation of timber import and processing to ensure the risk of illegal logs in supply chains in Australia is reduced. However, we have serious concerns regarding the proposed introduction of deemed to comply arrangements. We consider that proposal to seriously undermine the effectiveness of the legislation at a time when ensuring illegal timber is removed from Australian supply chains could not be more pressing – an extinction crisis in which Australia holds the fastest rate of mammal extinction globally. Habitat loss caused by logging is a key threat to many species at risk of extinction in Australia and overseas, and is recognised as such in Commonwealth legislative instruments such as Conservation Advices under the *Environment Protection and Biodiversity Conservation Act 1999*.

### **Q 13 - Should the potential 'deemed to comply' arrangements be introduced and how should they operate?**

Deemed to comply arrangements ought not be introduced in the interests of best achieving the legislation's purposes of effectively reducing the risk of illegally logged timber being imported or processed in Australia<sup>1</sup>, and due to fundamental accountability, rule of law and governance issues. The proposal appears to be to introduce arrangements whereby an importer (and, potentially a processor although this is not express in the consultation paper) who takes timber certified by a specified private entities, is deemed to comply with the requirements to conduct due diligence to reduce the risk that the timber is illegally logged. The effect is that the question of whether the wood was illegally logged is, in practice, answered by the private certifier.

As to achieving the purpose of the legislation, it is notable that one of the certification schemes suggested in the consultation paper for the deemed to comply arrangement – PEFC – certifies all VicForests wood. This includes wood from 66 coupes that the Federal Court found in 2020 were being logged illegally by VicForests contrary to numerous Victorian environment protection laws concerned with safeguarding species listed under both State and Commonwealth law as being at a high risk of extinction – the Leadbeater's Possum and Greater Glider.<sup>2</sup> All such findings of logging in breach of Victorian environment laws were upheld on appeal by the Full Court of the Federal Court in 2021:

*FLP was overwhelmingly successful at trial in establishing, as matters of fact, that VicForests contravened State legislative instruments with respect to the endangered Greater Glider and Leadbeater's Possum species. Those factual findings were not disturbed on appeal.*<sup>3</sup>

In these circumstances, it simply cannot be contended that certification is reliable whatsoever in answering the question of whether wood is illegally logged. Absent reliability, there is no justification for a deemed to comply arrangement.

---

<sup>1</sup> s6 Illegal Logging Prohibition Act 2012

<sup>2</sup> *Friends of Leadbeater's Possum Inc v VicForests* (No 4) [2020] FCA 704 (the Possums Case); [The Possums Case Summary provided by the Federal Court in complex or public interest matters](#)

<sup>3</sup> *VicForests v Friends of Leadbeater's Possums Inc* [2021] FCAFC 66 at [161]-[271], and *VicForests v Friends of Leadbeater's Possums Inc* (No 2) [2021] FCAFC 92 at [8(b)], noting that the Full Court of the Federal Court confirmed that logging had occurred in breach of multiple Victorian laws, though it held that such unlawfulness did not result in an additional breach of Commonwealth law.

Secondly, there is a fundamental rule of law and accountability issue arising from the proposed deemed to comply arrangements. The effect is to outsource the determination of whether timber has been harvested legally to a private entity. Yet, it is the fundamental role of the Courts to determine compliance with the law. Further, it is the role of the executive to administer the law for the purpose of regulating compliance, including by investigating, enforcing and prosecuting. A private certification scheme can in no way displace the critical public functions of the Courts and the executive. Outsourcing either role, or as proposed here, both such roles, to a private entity, who is paid by the very companies set to benefit from certification, poses real and stark issues of accountability, conflict of interest, governance, transparency and rule of law.

More specifically, we have real concerns that decisions of private certifiers will not be transparent, will represent private rather than public interests, and it is unclear whether such decisions would be subject to judicial review. We note the breadth of the effect of certification – that an importer or processor would be entitled to assume that certified timber was logged in compliance with *all laws, everywhere*, bar some potential extreme examples (such as war).

There is a question as to whether the ‘deemed to comply’ provisions amount to an attempt to delegate private entities the power to make judicial or administrative decisions. As to judicial decisions, the certifier may be conferred decision-making power that amounts to a determination of questions of law, in practice. If so, there are potential constitutional questions raised.

*The question of whether a decision-making power is ‘judicial power’ is one of the more conceptually contested questions in Australian constitutional law. Judicial power is a concept that seems ‘to defy, perhaps it were better to say transcend, purely abstract conceptual analysis’. Whether a power is ‘judicial’ turns on the analysis of a range of related features. This includes whether the power determines existing rights of the parties; involves the application of legal standards; is binding and authoritative; and is exercised in accordance with the judicial process.<sup>4</sup>*

If the certifier is conferred power to, in practice, make administrative decisions, the interests of the private entity may not align with the government or with the ‘public good’, and raise risks to democracy and accountability<sup>5</sup>. This risk is amplified in the context of the private certifier receiving payment, and being financed, by the entities to which it provides affirmative certification decisions. Plainly, the Courts and administrative decision-makers have no pecuniary interest in their determinations.

A critical further question, left unanswered on the current proposal, is whether the decisions of the private entities exercising such power will be subject of judicial review, or independent judicial authority.<sup>6</sup> Absent such oversight, there lacks any form of legal accountability for certifier decisions and real questions arise as to the permissibility of such a delegation of government power. It is unclear

---

<sup>4</sup> Anna Olijnyk and Stephen McDonald, ‘The High Court’s decision in *Burns v Corbett*: consequences, and ways forward, for state tribunals’ (2019) 95 *AIAL Forum* 10, p14.

<sup>5</sup> Catherine Donnelly, ‘Delegation of Governmental Power to Private Parties: A Comparative Perspective’, Chapter 3: The Benefits and Challenges of Private Delegation

<sup>6</sup> *Ibid*; David Latham ‘Delegation of governmental power to private parties’

whether the proposal may in effect shield decisions as to the lawfulness of forestry operations for the purposes of the Act from judicial power, and be a form of ouster of jurisdiction of the Courts to exercise inherent supervisory authority by way of judicial review.

For administrative decisions in particular, it is impermissible to delegate or sub-delegate the *entirety of a decision in substance* to a private actor<sup>7</sup>. On the other hand, if the views or decision of a delegated private actor is considered in the decision of another person, that is permissible – which is as far as the current law goes, and it should not be altered.

The possibility of reduced regulatory burden by a possible 14%, as stated in the consultation paper, provides no justification for seriously risking both the effectiveness of the Act in achieving its purposes of reducing the risk of illegally logged timber entering supply chains in Australia, and important principles of governance, accountability and public administration.

The proposed ‘deemed to comply’ arrangements should not be introduced. The proposal raises serious issues of accountability and transparency in terms of appropriate standards of public administration. It risks outsourcing decision-making to a private, non-government actor absent oversight of an independent public entity, and such decisions risk reflecting the interests of the private actor rather than the public interest. In particular here, the private actor will make decisions under contract for remuneration and accordingly is not acting at arms’ length, independently or solely on the merits of the matter.

The current law achieves the correct balance of permitting processors and importers to consider certification as part of conducting due diligence. This is the appropriate use of such schemes and they ought not be elevated to determinations of the legality of timber for the purposes of the Act.

### **Other proposals**

We support the proposals at 5 to add ‘at-border’ powers such as sampling, seizure and goods control to the Act, as it improves administration, accountability and effectiveness of the Act in achieving its purposes.

---

<sup>7</sup> Mark Robnison SC, ‘Delegations and Sub-Delegations Making Decisions without Authority’, paper delivered to LegalWise conference 26 March 201; *Conroy v Shire of Springvale and Noble Park* [1959] VR 737