Complying with Australia’s illegal logging laws: tough reality after a soft start? Lessons from the United States and the European Union

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Australia’s new illegal logging laws aim at prohibiting the import of illegally harvested forest products from around the world. Soon after adoption, and following an intense debate on the expected costs of compliance, the legislation was reviewed and the proposed amendments finally disallowed. As of 2018 stricter enforcement actions were announced. This article identifies compliance issues observed in Australia and proposes ways to tackle them based on experiences in the United States and the European Union. We find that law enforcement helps shape market behaviour and reinforces compliance. A national legality assurance system, established in the supplier country, is an effective way to ensure legality verification, to alleviate the burden on individual businesses to prove legality, and to support the regulated community to comply with the law.

Keywords: Australia, illegal logging, legislation, compliance

1 INTRODUCTION

For many years illegal logging has been recognized as a significant global problem.1 It is currently the most profitable natural resource crime, outpacing wildlife trafficking.2 It is estimated that the annual worldwide value of illegal logging is up to USD 100 billion, which represents 30 percent of the global timber trade.3 In response to the problem, developed countries, such as the United States, Australia and European countries adopted laws to stop trade in illegally logged timber.

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This article examines Australia’s 2012 Illegal Logging Prohibition Act (ILPA) and the Illegal Logging Prohibition Regulation (Regulation or ILPR), in light of the recent review process and proposed reforms to this legislation. Having reached the end of the review process, Australia’s illegal logging laws are now to be fully implemented. However, some concerns related to legal compliance, debated during the review process, still remain and a need to address them may surface in the near future.

The aim of this article is to identify compliance issues observed in Australia’s illegal logging laws and propose ways to tackle them based on the experience of other countries. The illegal logging laws in the United States (US) and Europe (EU) are used as a benchmark. Similar to Australia, these are developed countries that adopted laws with the same purpose in mind, to combat illegal logging. The US and EU laws have been implemented for a longer period of time, when compared to Australia’s illegal logging laws, and have introduced compliance and enforcement mechanisms that could provide some guidance to Australia. The aim is to draw lessons from these two jurisdictions and identify best practices for Australia.

Section 2 examines Australia’s illegal logging laws, including their origin. Section 3 presents the legislation review process, which started in 2014 and concluded in 2018; in particular, compliance issues were debated during this period as well as projected outcomes. Section 4 provides a benchmark of illegal logging laws in the US and EU, discusses best practices and draws lessons for Australia.

2 DESCRIPTION OF AUSTRALIA’S ILLEGAL LOGGING LAWS

This section presents an overview of Australia’s illegal logging laws and the outcomes of the legislative review process completed in 2018. The aim is to identify issues related to legal compliance, some of which were raised during the review process. This analysis reveals potential weaknesses in Australia’s illegal logging laws that, if addressed, may result in more effective and robust national legislation.

2.1 Origins of Australia’s illegal logging laws

Australia adopted the ILPA in 2012, which came into force on 28 November 2012.4 The 2012 ILPR commenced on 30 November 2014.5

The Australian government has articulated two main reasons for taking measures to combat illegal logging. The first reason is to stop unfair competition with Australian products and the second relates to the social and environmental costs of illegal logging.6 According to the Department of Agriculture and Water Resources (hereinafter the Department): ‘by strengthening our laws we are making Australia a less attractive destination for cheap illegal timber and timber products that can undercut

legitimate Australian businesses. Illegal logging is recognized as a threat in Australia and other countries in the Asia Pacific region.

The Department estimates that up to nine percent of the AUD 8.1 billion of timber being imported into Australia is at risk of being illegally logged. Every year, around AUD 400 million of Australia’s forest product imports come from sources with some risk of having been illegally logged. The ILPA and ILPR are a response to this threat. This legislation also complements other government priorities, such as supporting action to mitigate climate change, combatting organized crime and alleviating the costs of corruption in developing countries.

Illegal logging involves practices such as extracting timber species protected by national laws, buying logs harvested outside concession areas, illegally obtaining logging concessions, or logging in prohibited areas such as on steep slopes, river banks and catchment areas. They also relate to timber smuggling activities, such as the export or import of banned tree species under national and international laws (e.g. Convention on International Trade in Endangered Species of Wild Flora and Fauna, hereinafter CITES), or practices aimed at avoiding payment of taxes and other fees, as well as processing timber without documentation or a processing licence.

The ILPA and ILPR are the result of an election commitment made by the Australian Labour party in 2010, which was supported by the industry and NGOs. On 9 December 2010 the Government conducted a first Regulation Impact Statement (RIS) to examine the most cost-effective approach for individuals, businesses and the government to tackle illegal logging. Following the RIS, the Illegal Logging Prohibition Bill was drafted. On 23 March 2011, the Minister for Agriculture, Fisheries and Forestry (Hon. Joe Ludwig) referred an exposure draft and explanatory memorandum of the Bill to the Senate Committee on Rural Affairs and Transport (Committee) for public inquiry. A few submissions were made to the inquiry along with a public hearing, on 16 May 2011, which further informed the Committee.

The Government undertook revisions to the Bill, which were developed in consultation with members of an Illegal Logging Working Group, involving businesses, industry associations and NGOs. The Illegal Logging Prohibition Bill was submitted to the Senate on 22 August 2012 and voted on 19 November 2012.

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7. Illegal Logging Compliance Statement (n 3) 4.
8. Explanatory Memorandum (n 1) 2.
10. Illegal Logging Compliance Statement (n 3) 4.
13. Explanatory Memorandum (n 1) 3.
15. Ibid, 36.
17. Ibid, 36.
18. Ibid.
2.2 Overview of Australia’s illegal logging laws

Australia’s 2012 ILPA prohibits imports of illegally logged timber and the processing of Australian grown raw logs that have been illegally logged. The 2012 ILPR defines what is asked of Australian importers and domestic processors in relation to the process to be undertaken prior to importing timber or processing raw logs.21

The Regulation imposes an obligation upon importers22 of timber and processors23 of Australian grown raw logs to conduct due diligence. The due diligence requirements for importing timber products includes a three-step process. Step 1 involves collecting information of the kind, origin and manner of harvest of the timber or timber products, details about the supplier and any other relevant data. Step 2 requires importers to assess the risk that the regulated timber product is made from or may include illegally logged timber. In order to do so, they must consider factors such as the prevalence of illegal logging in the area in which the timber has been harvested, existence of armed conflicts, the complexity of the supply chain or any other information. Step 3 involves mitigating the risk that the regulated timber product was illegally logged.24 To mitigate risks the importer must obtain additional information from the exporter, for example certification or independent assessments. Where there remains doubt about a serious risk, the importer should refrain from importing.25

The ILPA defines timber to be illegally logged when harvested in contravention of laws in force in the place where the timber was harvested.26 The Act and Regulation apply to imported timber and timber products, and to domestically grown logs processed in Australia.27 Timber products under the Act are made from or include timber.28 A regulated timber product is a product listed in Schedule 1 to the Regulation. These products are identified using customs tariff codes and include a range of products such as wood in rough, sawn or chipped, wooden frames, builders’ joinery, doors, newsprint, cigarette paper, envelopes, toilet paper, tissues, wooden furniture among others.29 Importers must declare that they have complied with the due diligence requirements each time they bring a regulated timber product into Australia. They must provide a full import declaration into the Integrated Cargo System managed by the Department of Immigration and Border Protection.30 This allows the Department of Agriculture and Water Resources to monitor trade of regulated products.31 Only products imported into Australia as part of a consignment where the combined value of the regulated products in the consignment does not exceed AUD 1000 can be excluded from the due diligence process.32 For example, if an importer brings in a
shipping container with goods worth AUD 950 of regulated timber products, that importer will not need to undertake due diligence on that import.

The Department of Agriculture and Water Resources administers the ILPA and ILPR. The Department appoints inspectors who monitor businesses’ operations and investigate offences. Inspectors exercise monitoring, investigation and enforcement powers. These powers allow inspectors for example to search premises, observe operations and sample items to determine whether information provided is accurate. Inspectors can also obtain search warrants and secure evidence.

Under the ILPA, there are both criminal and civil penalties for non-compliance. The Act makes it a criminal offence knowingly, recklessly or intentionally to import illegally logged timber and timber products into Australia, or to process domestically grown raw logs that have been illegally logged. The penalty for importing illegally logged timber includes imprisonment plus forfeiture to the Commonwealth of the products or logs. A person found guilty of committing a criminal offence may receive a criminal record, a fine and/or imprisonment. If the department considers prosecution to be the most appropriate measure to address an alleged offence and sufficient evidence is gathered, a brief of evidence will be prepared and referred to the Commonwealth Director of Public Prosecutions.

In proceedings for civil penalties, strict liability applies. It is not necessary to prove the person’s intention, knowledge, recklessness, negligence or any other state of mind. Civil penalties under the Act are assessed based on the degree to which the defendant exercised due diligence when undertaking the activities in question. The Act gives the Court discretion to determine the amount of the civil penalty. It will consider the nature and extent of the contravention, and any loss or damage suffered, the circumstances in which the contravention took place, and any past similar conduct.

2.3 Soft-start compliance period

Since the adoption of the ILPA and ILPR the Government adopted a soft-start compliance period. The soft-start compliance period ran from 30 November 2014 to 1 January 2018. The soft start meant that no penalties were to be issued in regard to the due diligence requirements of the Regulation. This was intended to support

34. Act, Part 4.
36. Act, Part 2, Division 1. This provision applies to imports of illegally logged timber, and follows the ‘Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers’ as it relates to forfeiture. The clause is consistent with elements of the Proceeds of Crime Act 2002.
38. Hipson et al (n 35) 76.
39. Act, Section 80; Hipson et al (n 35) 76.
40. Hipson et al (n 35) 76.
41. Department of Agriculture and Water Resources (n 9) 43.
42. Regulation, Part 2, Division 2 and 3.
businesses to become familiar with the legislation and to provide education on how to comply with the new legislation. Therefore, for four years, since the Regulation came into effect in 2014, businesses were not issued penalties for failing to comply with the law.

2.4 The legislation review process

In December 2014, the Department of Agriculture and Water Resources launched an independent review, led by KPMG, on the impact of Australia’s illegal logging laws on small businesses. The review was triggered by concerns from the regulated community regarding the compliance costs of Australia’s illegal logging laws. In particular, small businesses were apprehensive that the costs in complying with the ILPA might be disproportionate to the risk of their bringing illegal timber into the Australian market. The review process, as defined by the Australian Government, aimed at clarifying four points, as follows:

1. A better understanding of the role played by small businesses within the ‘regulated community’, detailing how they would be affected by the legislation, type and nature of products they were dealing with and potential costs in complying with the new requirements.

2. An assessment of whether applying the Regulation in its current form would make a material difference in reducing the entry of illegally logged timber products onto the Australian market.

3. An assessment of whether the existing due diligence requirements achieved an appropriate balance between the cost of compliance for small businesses and reducing the risk of illegally logged timber entering into the Australian market.

4. If the balance was not considered to be appropriate, an assessment of, and recommendations on, appropriate options for reducing or removing the regulatory impacts of the due diligence requirements on small business.

The KPMG review report was released in February 2016. The report highlighted that 60 percent of companies affected by the Regulation are likely to fall within government criteria for a small business. It also estimated that their operations accounted for only 20 percent of Australia’s regulated timber imports by value. The report also asserted that the legislation did not ‘account for the varying capacity of individual businesses, particularly small businesses, to absorb the associated


46. A Small business refers to a business with turnover over AUD2 million but under AUD 10 million, KPMG (n 43) (Acronyms and Definitions).
compliance burden’. In conclusion, the report suggested that the Regulation should be amended to reduce its compliance costs, especially to small businesses. The report provided a few options that could simplify the Regulation’s due diligence requirements.

The Department estimated that complying with the Regulation’s due diligence requirements would cost the regulated community around AUD 28.2 million per year. The regulated community consists of approximately 19,522 importers and around 400 domestic processors, with a large number of small and microbusinesses. According to the Government, the aim of the KPMG independent review was to ensure that the Regulation ‘does not impose any unnecessary compliance costs on regulated businesses and individuals, while continuing to be effective in combatting illegal logging and its associated trade’.49

In November 2016, the Department published a Regulation Impact Statement (RIS), which opened a public consultation process. This consultation sought public feedback until January 2017, on the options for legislative reform proposed by KPMG. Domestic and international stakeholders made submissions. Feedback received as part of this process was intended to assist the Department to develop a final RIS that would guide the decision on the possible reform of the Regulation.

2.5 Proposed law reform

In September 2017, the Department published a final RIS based on the options raised during the consultation process. The RIS considered six regulatory options, some of which were recommended in the KPMG report. The Department chose Option 4, which was ‘to establish deemed to comply arrangements for timber legality frameworks’. The recognised legality frameworks would include the Forest Stewardship Council (FSC) and Programme for Endorsement Certification (PEFC). The proposed deemed to comply arrangement would allow businesses to rely on such certification schemes while conducting due diligence.

In the original text of the Regulation, an importer or processor using timber that has been certified or licensed under the FSC or PEFC can use a timber legality

48. Department of Agriculture and Water Resources (n 9) 16.
49. Ibid.
50. Department of Agriculture and Water Resources (n 11).
51. Hontelez (n 44) 1.
52. A total of 46 submissions were received from a range of interested stakeholders, including seven regulated businesses, 16 peak industry associations, eight environmental NGOs, three forest certification organizations, nine foreign governments and several other interested parties. Department of Agriculture and Water Resources (n 9) 26.
53. Department of Agriculture and Water Resources (n 9).
54. They include: Option 1 – The Status Quo; Option 2 – Changing the consignment value threshold; Option 3 – Removing ‘personal’ imports from the Regulation; Option 4 – Deemed to comply arrangements for timber legality frameworks; Option 5 – Deemed to comply arrangements for Country Specific Guidelines (CSGs) and State Specific Guidelines (SSGs); Option 6 – Deemed to comply arrangements for low-risk countries.
55. Department of Agriculture and Water Resources (n 9) 30.
framework risk assessment pathway.\textsuperscript{56} In using this pathway, an importer or processor is required to: (1) gather information, including sourcing a copy of the FSC/PEFC certificate or licence that provides evidence of compliance with the timber legality framework’s requirements; (2) assess whether the information obtained using this framework is accurate and reliable; (3) identify and assess whether there is a risk that the product is made from or includes illegally logged timber; (4) consider any other information the importer or processor knows or ought reasonably to know that may indicate the product is made from or includes illegally logged timber; and, finally, (5) make a written record of the process.\textsuperscript{57}

In practice, an importer or processor using that pathway must identify and assess any risks that have emerged, through either their assessment of the certificate or licence or the additional information they have gathered. The requirement to consider any other information the importer or processor knows also ensures that importers cannot solely rely on a timber legality framework to assure themselves of the legality of a product.

The proposed \textit{deemed to comply} arrangement would simplify the due diligence process by limiting the information that a business needs to collect as part of Step 1 (information-gathering). It would also simplify Step 2 (risk assessment), as businesses would only need to verify that a certification claim is legitimate, current and covers the products being supplied and keep record of transaction documents (e.g. invoices, delivery receipts, etc.\textsuperscript{58}).

According to the Department, the \textit{deemed to comply} arrangement would require an importer or processor (1) to confirm if their supplier is certified under the FSC or PEFC; (2) to confirm that the FSC or PEFC certificate is valid for the relevant period of supply; (3) to ensure that the products being imported or processed fall within the certificate’s scope; (4) to check invoices and/or delivery notes to make sure that the certification number is quoted; and (5) to maintain appropriate records that provide evidence of certification.\textsuperscript{59} The proposed reform would require amendments to the Regulation, particularly sections 10 and 19, in order to remove or refine the existing information-gathering requirements for parties using a timber legality framework, as well as changes to sections 11 and 20 to limit the information to be considered as part of the risk assessment requirement.\textsuperscript{60}

In October 2017, the Department announced that, in line with the RIS’s findings, the Regulation’s due diligence process should be amended. The proposed reform suggested the introduction of the \textit{deemed to comply} clause for products certified under the FSC and PEFC.\textsuperscript{61} According to the Department, this would streamline the due diligence requirements for importers and processors, providing an estimated annual regulatory saving of AUD 4.2 million.\textsuperscript{62} Nevertheless, a number of stakeholders, particularly NGOs, strongly opposed the proposed \textit{deemed to comply} arrangement, arguing that ‘fraud within even the most robust certification schemes is an increasingly well-documented problem’.\textsuperscript{63} Fraudulent activities can occur, for example,
within the scheme (e.g. mislabelling of products or misleading of auditors) and outside it (e.g. the fraudulent misuse of scheme logos). Despite the proposed reform, the Department acknowledged that certification systems continue to face challenges in dealing with deliberate fraudulent activity.⁶⁴

2.6 Outcomes of the review process

The main compliance issue raised during the legislation review process related to the high compliance costs of Australia’s illegal logging laws and potential adverse impact on small businesses. The whole review was triggered by concerns from the regulated community that the cost for small businesses to comply with the law was disproportionate to the risks that they may bring illegal timber into the Australian market. The Australian Government, however, recognized that small businesses ‘accounted for at least their share’ of illegal timber still entering the Australian market.⁶⁵

On 8 February 2018, the proposed deemed to comply clause was debated in the Australian Senate and the proposed amendments to the Regulation were disallowed. This means that FSC and PEFC products will still require the full due diligence process.⁶⁶ The due diligence process, as originally defined under the ILPA and Regulation, remains unchanged. The Government’s decision to maintain the original legislation is, to a great extent, due to the criticism echoed during the review process by various stakeholders that the proposed reform would weaken Australia’s illegal logging legislation. With the end of the review process, the initial soft-start period also came to an end. Therefore, since January 2018, businesses and individuals who import regulated timber products, and Australian processors, may face penalties for failing to comply with the due diligence requirements.⁶⁷ The legislation shall, since January 2018, be fully complied with and enforced.

2.7 Current compliance plan

With the end of the soft-start period, the Department announced a plan for managing compliance. It intends to use similar principles and approach used for biosecurity.

⁶⁴. Ibid.
⁶⁵. KPMG (n 43) 4.
⁶⁶. Department of Agriculture and Water Resources, Illegal Logging Laws, e-update No. 23, March 2018. According to this document, other technical amendments were progressed in the same package, but were not affected by the disallowance process. These amendments have now entered into force and include: (1) removal of Forest Law, Enforcement, Governance and Trade (FLEGT) licences from the certification schemes recognized by the Regulation. This reflects the fact that FLEGT licences are only issued for products exported directly from certain countries to the European Union. (2) Clarification that parties importing or processing timber for personal or non-commercial purposes do not need to include business related information (e.g. an Australian Business Number) as part of their due diligence system. (3) Clarification that parties undertaking the due diligence process must come to ‘reasonable’ conclusions of risk. This will ensure parties cannot ignore the information they have gathered to come to unsupported conclusions of risk.
⁶⁷. Department of Agriculture and Water Resources (n 66). The maximum penalties for a breach of the due diligence requirements are AUD 21,000 for an individual and AUD 105,000 for a corporation or body corporate (although any penalties will be at the discretion of a court).
The approach focuses on encouraging voluntary compliance and responding to non-compliance in a commensurate way.68

The Department intends to focus on voluntary compliance by means of education and guidance to assist the regulated community.69 The importance of raising awareness and educating the regulated community should not be underestimated. For example, surveys with timber operators in Europe demonstrated a strong relationship between an awareness of the European Union Timber Regulation (EUTR) and a positive attitude towards the EUTR. It thus seems that, when a company has become aware of the illegal logging problem, it has allocated resources to address this matter.70 Therefore, the more awareness the more compliance. Those surveys have also showed that timber companies wish to create a positive impression about themselves, and they recognize the benefits provided by EUTR in preventing illegal timber entering the EU market.71 There are various platforms that have been built to educate and assist European operators in complying with EUTR, such as: legal-timber.info or guidance on EUTR from European timber trade federations.72

To ensure compliance with Australia’s illegal logging legislation the Department conducts regular audits. A business that is chosen for an audit receives a Request for Information Notice from the Department. It shall then be required to provide information about its due diligence system. Once the response is provided, the Department makes an assessment of the due diligence system undertaken by the business against the Regulation’s requirements. There are four possible outcomes. The Department may provide feedback; issue an administrative measure; commence civil or criminal investigation; or take no action, when the importer has met the requirements.73 To track the imports of regulated timber the Department works closely with Australia’s customs officials. When a customs declaration is made for a regulated tariff code, the Department of Home Affairs transfers this information to the Department of Agriculture and Water Resources. There are approximately 19,000 importers of consignments that contain at least one regulated timber product every year.74

With the move to full compliance mode in 2018, the Australian Government has also forged relationships with counterparts in Australia75 and abroad working on forestry and wildlife crime enforcement.76 According to the Department, compliance

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68. Department of Agriculture and Water Resources (n 37) 8.
69. Ibid.
70. Nam Phuong Hoang, The EU Timber Operators’ Perceptions of FLEGT Action Plan with Focus on EUTR (University of Helsinki, 2013) 88.
71. Ibid, 88.
72. Ibid, 94.
73. Department of Agriculture and Water Resources (n 37) 9.
74. Ibid, 11.
75. For example, the Department of the Environment and Energy, which regulates the importation of internationally endangered plants and animals, www.environment.gov.au, accessed 23 January 2019.
efforts will focus on the areas considered to be of highest risk, in particular fragile and conflict-affected countries with ‘weak institutional capacity, ineffective laws and governance arrangements and political instability’. The Department also intends to work with NGOs that monitor and track illegal logging as a source of information and support for compliance operations. The Department also warns that complex supply chains increase the risk of a product containing illegally harvested timber. The more complex the supply chain, the more information businesses need to gather to determine the risk of the product containing illegal timber.

2.8 Compliance issues under the current legislation

There are at least two compliance issues that remain after the review process. The first relates to the capacity of individual businesses to conduct due diligence, in particular legality verification. The second relates to compliance costs, especially for small businesses.

Surveys with timber operators in Europe showed that there was a strong positive association between a company’s size and the perception that EUTR is easy to comply with. Therefore, the perception is that the larger the company, the easier it is to comply with EUTR. The size of a company also affected its perception of responsibility. This result indicated that larger companies were more responsible with respect to the control of illegal timber trade than were smaller size companies.

Under the Regulation, businesses, big or small, must provide proof that the timber and timber products that are being imported comply with the laws of the country where the timber has been harvested. The question here is: can Australian businesses adequately verify compliance with foreign laws? To conduct legality verification individual businesses will need first, to identify relevant laws of timber producing countries; second, to understand these laws; and third, to prove that they have been complied with. This is no easy task, particularly in a sector where weak governance, corruption and fraud are all too common. These challenges were described in a study looking at transnational forest governance, particularly in Indonesia and Ghana: ‘[E]very license, every piece of paper bears a price. And that price goes to an official, who then pays up and down the network, set[s] fees … that are all worked out so everybody has a bonus at the end of the year’.

There are estimates showing that each year USD 10–23 billion worth of timber is illegally felled in part due to deeply engrained corruption. For example, in most Latin American countries corruption in the forest sector is widespread.

77. Department of Agriculture and Water Resources (n 37) 14.
78. Ibid, 15.
79. Ibid, 14.
80. Hoang (n 70) 87.
81. Examples of producing countries include. for example. Malaysia, Indonesia, Brazil and Thailand. China is also a major exporter of timber, mainly of processed timber products. Hoang (n 70) 14.
82. This extract is about Indonesia. See Christine Overdevest and Jonathan Zeitlin, Experimentalism in Transnational Forest Governance: Implementing European Union Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements in Indonesia and Ghana (University of Florida, 2018) 73.
and occurs at all levels of administration.\textsuperscript{84} It is not restricted to the forest sector and affects for example land administration, agrarian reform, trade and other sectors.\textsuperscript{85}

The Department might then need to provide extra support to the regulated community, notably small businesses, to help them comply with legality verification. In practice, even legitimate operators have struggled to understand what constitutes an adequate level of due diligence, which has led to inefficient, highly variable and potentially inadequate legality verification practices.\textsuperscript{86}

The second compliance issue relates to compliance costs. The Regulation makes no distinction between importers and their varying capacities. It may prove difficult to ensure compliance across a large and diverse regulated community, which includes businesses of different sizes and capacity.\textsuperscript{87} The capacity to absorb the Regulation’s compliance burden varies amongst (micro, small and large) businesses within the regulated community.\textsuperscript{88} The potential high compliance costs for small business will probably continue to be problematic for the Government in the years to come. Therefore, considering ways to reduce compliance costs will help ensure that the law is well accepted and complied with among the regulated community.

3 BENCHMARK: BEST PRACTICES IN THE UNITED STATES AND THE EUROPEAN UNION

This section provides an overview of a benchmark of illegal logging laws adopted by the US and the EU and draws some of the lessons learned in relation to law compliance, which might be valuable to Australia.

3.1 The US 1900 Lacey Act

The 1900 Lacey Act (named after Iowa Congressman John Lacey) bans trafficking in illegal wildlife and was primarily designed to preserve wild game and make poaching a federal crime.\textsuperscript{89} In 2008, the Lacey Act was amended to include plant products, such as timber and paper, making it the world’s first ban on the trade of illegally sourced wood products. The 2008 Lacey Act Amendments entered into force on 22 May 2008.\textsuperscript{90}

The ban on trade in illegally sourced wood products applies to all traders of timber products.\textsuperscript{91} It also covers all products, except for certain scientific specimens

\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid.
\textsuperscript{86} Explanatory Memorandum (n 1) 2.
\textsuperscript{87} KPMG (n 43) 4.
\textsuperscript{88} Ibid.
and food crops. It includes common products such as raw logs, sawn timber, plywood, composite materials, furniture, pulp, paper and musical instruments, etc.  

The Lacey Act makes it unlawful to import, export, transport, sell, receive, acquire or purchase any plant taken, possessed, transported or sold in violation of any federal, Native American tribal, or any foreign, laws or regulations. Illegal timber is defined as wood that has been harvested or transported in violation of a law or regulation of the country in which it was sourced. The Act imposes an obligation of due care on individuals and companies. Due care means the degree of care which a reasonably prudent person would exercise under the same or similar circumstances. The Act covers the entire supply chain, which means that all parties are equally liable under the law, not just the first placer into the American market. Importers are required to declare and provide detailed information about the plant products that they import (e.g. country of origin, species, volume, value, supplier, etc.).

The Lacey Act is a fact-based statute with strict liability, which means that only actual legality counts. Therefore, violators of the law can face civil and criminal sanctions even if they did not know that they were dealing with an illegally harvested product. Violations of the Lacey Act can carry serious penalties for individuals and businesses, including forfeiture of goods, fines and criminal penalties including up to five years of imprisonment for each violation separately. The stiffest penalties are reserved for those who knowingly traded in illegal products. For those who unknowingly violate the Act, penalties depend on whether they did everything they could to attempt to buy legal products, in other words, whether they exercised due care. The primary agency with enforcement responsibility is the US Fish and Wildlife Service. The US Farm Bill legislation also requires importers to submit a declaration to the US Department of Agriculture at the time of importation, citing the scientific name of plants, its value, quantity and name of the country from which the plant was taken.

93. Tanczos (n 89) at 550.
95. The Lacey Act 16 USC SS 3373(a)(1).
96. EUFLEGT (n 92).
97. Tanczos (n 89) 562.
98. The Lacey Act 16 USC SS 3372(f)(1).
100. Ibid, 1283.
101. Ibid.
102. Ibid.
103. Ibid, 1280.
The Lacey Act provided the first precedent for prosecution under illegal logging laws globally\(^{105}\) with the Gibson Guitar Corporation, and the Lumber Liquidators Settlement.\(^{106}\) The first one consisted of charges levied against the Gibson Guitar Corporation, headquartered in Nashville (Tennessee), for allegedly importing illegally sourced decorative woods from Madagascar, including ebony, used in the assembly of musical instruments. The company came under federal scrutiny in 2009 and again in 2011 for violations of the Lacey Act. Since 2006, Madagascar had banned by law the harvest of ebony and export of unfinished ebony.\(^{107}\) However, Gibson continued to receive Madagascar ebony for fingerboard blanks used in manufacturing guitars. The case was settled in 2012 with the US Justice Department agreeing to defer prosecution provided that the company paid in full the prescribed fines and complied with agreed corrective actions, including community service payments.\(^{108}\)

The second example involved Lumber Liquidator, a Virginia-based hardwood flooring retailer. The company imported wood flooring from China and distributed it throughout the US. However, the timber used to manufacture the flooring in China was harvested from different countries, including Far East Russia and Myanmar.\(^{109}\) Evidence procured by WWF Russia, the Environmental Investigation Agency,\(^{110}\) and a 2013 federal agency raid on the retailer’s Virginia headquarters confirmed that Lumber Liquidators ignored red flags that it was importing wood illegally harvested in Russia. Charges were made on the grounds that the company was using illegally logged timber and submitted false declarations required under the Lacey Act that obfuscated the true species and the source of the timber. Lumber Liquidator finally agreed to pay fines and fund community services.

### 3.2 Lessons from the US

One of the main aims of current illegal logging laws is to create supply chains free of illegal timber by changing market behaviour\(^{111}\). Governments must then send the right signals to the industry that they take the law seriously and are ready to repress non-compliance. The two examples of enforcement measures in the US have served this purpose. They show to the business community that non-compliance should not be tolerated. This ultimately helps change market behaviour and leads to higher levels of law compliance.

Hernawan refers to ‘soft law enforcement’ and ‘hard law enforcement’ of forest related laws and regulations.\(^{112}\) The first relates to measures that provide incentives,
not penalties, and that encourage compliance through methods such as education, prevention and community relation. The hard law enforcement involves the actual criminalization of violators of the law through arrests, the filing of charges, court judgments and the imposition of punishments. Enforcing Australia’s, and other illegal logging laws, probably require these two types of enforcement.

3.3 European Union Timber Regulation

The European Union Timber Regulation (EUTR) came into force on 3 March 2013 and is an outcome of the Forest Law Enforcement, Governance and Trade (FLEGT) licensing scheme established in 2005. The FLEGT introduced two policy instruments: the Voluntary Partnership Agreements (VPAs) and the EUTR. Both instruments address the issue of illegal logging. VPAs are bilateral agreements between the European Union and timber-exporting countries that aim to ensure that the wood exported to the EU has a legal source. Exporting countries commit to creating national licensing schemes that verify the legality of their shipments of timber to the EU. The EUTR, on the other hand, established a compulsory regime aimed at European importers to ensure the legality of imported timber. According to the EU Council Regulation No 2173/2005, ‘legally produced timber’ means timber products produced from domestic timber that was legally harvested or timber that was legally imported into a partner country in accordance with national laws determined by that partner country as set out in the Voluntary Partnership Agreement.

Similarly to Australia’s legislation, the EUTR introduces a due diligence process to ensure that companies mitigate the risks that timber they import has been illegally harvested. Due diligence, like in Australia, involves a three-step process: information gathering, risk assessment and risk mitigation. The first step involves providing documents that indicate compliance with the legislation in the country of harvest. The onus is placed on individual businesses to demonstrate that due diligence has been exercised.

The EUTR applies to timber and timber products being placed for the first time on the EU market. Timber is considered to be placed on the market if it is supplied on

116. The voluntary licensing agreement was established by the FLEGT Regulation (n 117). Its licensing scheme is implemented through Voluntary Partnership Agreements (VPAs) with timber producing countries.
118. Ibid.
120. Hernawan (n 12) 7.
121. EUTR Art 4.
123. EUTR Art 2.
the internal market. This means that the timber must be physically present in the EU, being either harvested in the EU or imported, and it must have cleared customs for free circulation. Products only acquire the status of European Union goods before they have entered the territory of the customs union. Timber products already placed on the EU market are not covered by the EUTR.

Under the EUTR, operators shall exercise due diligence, while traders must only keep information about their suppliers and customers (for at least five years) to make timber easily traceable. The EUTR gives operators the choice to use their own due diligence process or a system maintained by a recognized monitoring organization. Monitoring organizations are one of the vital parts in the EUTR. They are third-party organizations responsible for assisting and monitoring whether timber companies meet the requirements of the Regulation. The EUTR provides criteria for granting recognition to monitoring organizations and a protocol by which competent authorities audit such organizations and withdraw recognition if needed. The requirements to becoming a monitoring organization are: possessing legal personality and being legally established within the EU; having appropriate expertise and the capacity to exercise the relevant functions; and ensuring the absence of any conflict of interest in carrying out these functions. The monitoring organization is recognized and regularly checked by competent authorities. The use of a monitoring organization is optional and does not remove individual operators of their responsibility or liability.

Each Member State designates the authorities in charge of implementing and enforcing the EUTR. Enforcement actions include, for example, seizure of timber and timber products, fines and prosecution for criminal conduct. Each Member

124. EUTR Art 2. The Definition of ‘Placed in the Market’ is further developed when defining ‘Supply’ wherein it states: on the internal market – so the timber must be physically present in the EU, either harvested here or imported and cleared by customs for free circulation as products do not acquire the status of ‘European Union goods’ before they have entered the territory of the customs union. Goods under special customs procedures (e.g. temporary importation; inward processing; processing under customs control; customs warehouses; free zones) as well as transits and reexportation are not considered to be placed on the market. See also European Commission, ‘Guidance Document for the EU Timber Regulation’ (EC 2013) 2, http://ec.europa.eu/environment/eutr2013/_static/files/guidance/guidance-document-5-feb-13_en.pdf, accessed 13 July 2018.
125. Geraets and Natens (n 117) 3.
126. EUTR Art 6.
127. EUTR Art 5.
128. EUTR Art 8. See also Fisman et al (n 122) 262.
129. A list of approved monitoring organizations and the countries that they can operate in is available from the European Commission. A monitoring organization must: be legally established within the EU; have an appropriate level of expertise; have the capacity to do the required work; ensure that it has no conflict of interest during its work; take appropriate action, including notifying competent authorities in the event of significant or repeated failure by the operator. Section Regulation (EU) 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market [2010] Art 8.
130. Ibid.
131. Hoang (n 70) 24.
132. Ibid.
133. EUTR Art 7.
134. EUTR Art 8.
States defines the level of penalties for non-compliance, but the EUTR states that penalties must be *effective, proportionate and dissuasive*.¹³⁵

### 3.4 Lessons from the EU

There are two key lessons that can be learned from the EU in terms of law compliance, these being related to Voluntary Partnership Agreements and Legality Assurance Systems under the FLEGT.

#### 3.4.1 Legality verification

The VPAs introduced under the FLEGT require that exporting countries create national schemes that verify legality and ensure that timber exported to the EU has a legal source. A VPA is a binding agreement between the EU and a partner country.¹³⁶ This agreement aims to ensure that the wood imported into the EU has complied with the legal requirements and improves forest governance of the partner country.¹³⁷ The process of making Voluntary Partnership Agreements has four phases:¹³⁸ (1) preparation, during which the countries explore the scope of the partnership; (2) negotiation, in order to agree on standards and legality assurance system upon which the agreement will be based; (3) development, during which the parties develop the system and assess its credibility; and (4) full implementation, in which the system is functional and able to provide licensed wood for exports to the European market.¹³⁹ The common key element of VPAs is that partner countries have to develop legality assurance systems and verify their validity *in accordance with national laws*.¹⁴⁰ The process to define timber legality is the core element of a FLEGT/VPA, and other important elements include timber supply chain control, verification, independent monitoring and licensing.¹⁴¹ Each VPA sets out a *Legality Assurance System* (LAS), designed to identify, monitor and license legally produced timber. The LAS often includes: a definition of what constitutes legal timber under domestic law; a procedure for verifying control of the supply chain; tools for verification; licensing by a national authority; and independent audits.¹⁴² Each partner country appoints an independent auditor to check that all the LAS components have been met.¹⁴³ The audits are done by an independent third party, which is an institution that is selected by the Government of the partner country after consulting with the European Commission. The auditor is responsible for checking all aspects of the system, identifying non-compliances and system failures.¹⁴⁴ Importantly, each LAS defines procedures to trace and control timber throughout the supply chain.

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¹³⁵ EUTR Art 19.
¹³⁶ Hernawan (n 12) 3.
¹³⁷ Ibid.
¹³⁸ Ibid.
¹³⁹ Ibid, 4.
¹⁴⁰ Ibid.
¹⁴¹ Ibid, 5.
¹⁴³ Ibid.
¹⁴⁴ Hoang (n 70) 24.

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the supply chain, from the forest where the timber is harvested, to its transport, storage facilities and processing, through to the point of export. The outcome of this process is the issuance of a ‘FLEGT licence’ for legally harvested timber. The FLEGT licence is issued and validated by a partner country’s licensing authority. Timber and timber products with valid FLEGT licences are exempt from further requirements set by the EU timber regulation.

A Legality Assurance System reduces the burden on individual businesses to conduct legality verification. It is up to the country where the timber is harvested to ensure that national laws are complied with and to prove legality. Such domestic systems are certainly still susceptible to inefficiencies, fraud and corruption, but they involve checks by independent auditors and government agencies. Moreover, the national authorities of a timber exporting country are better positioned to understand their own laws and verify compliance, as compared to individual businesses based in foreign countries.

VPAs, and Legality Assurance Systems, are challenging systems for developing countries to implement because of the breadth of the policy issues they involve and the depth of the governance changes they mandate. The experience with VPA in Indonesia, for example, presented various challenges, such as the slow implementation of the national timber legality assurance scheme (acronym in Indonesian: SVLK), the costs related to legality verification, limited number of accredited auditing bodies, and quality of auditors. Governance challenges included for instance poor spatial planning capacity, bureaucratic silos, corruption and administrative fragmentation, as ministries tend not to share information across agencies, often driven by official corruption. Likewise, there were big challenges in the initial phase of VPA implementation in Ghana, which involved issues concerning land use and allocation of rights to natural resources. However, it has been observed that the implementation of VPAs in both countries has resulted in significant improvements in forest governance, including measurable declines in illegal logging. It has also been noted that, at a deeper level, the VPA process has led to substantially increased participation by civil society and other stakeholders in forest governance, greater transparency and accountability, and heightened recognition of community rights in both countries.

3.4.2 Handling compliance costs

Each LAS sets out the legal requirements that must be met for a FLEGT licence to be issued. FLEGT-licensed timber is then free to enter the EU market as it is deemed to automatically meet the requirements of the EUTR. The LAS, as noted earlier, alleviates the burden placed on individual businesses to conduct legality verification, but

145. EU FLEGT Facility (n 142).
146. Overdevest (n 82) 72.
147. Ibid.
148. Ibid, 73.
149. Ibid.
150. Chatham House studies estimate that the share of illegally logged wood in domestic production fell from 60 percent to 40 percent in Indonesia and from 59 percent to 49 percent in Ghana between 2010 and 2013 alone. See Overdevest (n 82) 81.
151. Ibid.
also reduces the costs associated with legality verification. Therefore, the VPAs are also a way of reducing compliance costs for businesses. Moreover, the EUTR gives operators the choice to use their own due diligence process or a system maintained by a recognized monitoring organization. These entities can assist businesses by offering services that they may be unable to perform in terms of due diligence. This is also a way to providing support businesses to meet their due diligence obligations.

4 LESSONS LEARNED FROM A BENCHMARK OF ILLEGAL LAWS

There are a few compliance lessons that can be learned from the proposed benchmark of illegal logging laws in the US and Europe, which may be valuable to Australia now that the soft-start compliance period has ended.

4.1 Lesson 1: enforcement reinforces compliance

The enforcement actions under the Lacey Act signal to the industry that the Government is committed to applying the law and repressing non-compliance. Effective enforcement helps change market behaviour. With the end of the soft-start period, the Australian Government is committed to continue supporting Australian businesses. However, similarly to the US, the Department should also repress and address non-compliant behaviour. By doing so, the Government will probably help to shape good practices within the regulated community.

The Department has already conducted assessments on a number of regulated entities into three categories: assessments on the 512 largest importers (which account for nearly 80 percent of regulated imports by value); on imports of high-risk products (e.g. on importers of flooring, products from fragile and conflict states, and furniture from Vietnam); and on selected domestic processors. These initial assessments have showed that most of the importers (nearly 60 percent) were non-compliant with some or all of their due diligence obligations.\(^{153}\) This was largely inadvertent non-compliance, as businesses were unaware of the law or of how to comply with it. In the future, the Department might need to take stringent enforcement actions to repress non-compliance if such practices persist.

4.2 Lesson 2: support in legality verification

The VPAs under FLEGT require that exporting countries create Legality Assurance Systems to verify legality. The LAS reduces the burden on individual businesses to conduct legality verification. These systems can probably better interpret domestic law and verify compliance than individual businesses located in a developed country. Australia should consider the option of creating agreements similar to VPAs with timber exporting countries. Having legality assurance systems in place are useful in a sector where information may be scarce, difficult to access or unreliable.

The Australian Government has developed Country-Specific Guidelines (CSGs) with a few supplier countries, such as Canada, Finland, Italy, New Zealand,

153. Department of Agriculture and Water Resources (n 37) 13.
Indonesia, Malaysia, Papua New Guinea and Solomon Islands. The CSGs contain information for example about domestic timber harvesting laws and contact details in the supplier country. The CSGs, however, do not involve legality verification done through a legality assurance system set up in the supplier country, as is the case for the VPA/LAS. While useful to provide guidance to importers, CSGs do not involve legality verification. The EUTR also gives operators the choice to use their own due diligence process or use monitoring organizations. Entities such as these could be considered in Australia to provide further assistance to Australian businesses with regards to due diligence obligations.

4.3 Lesson 3: alternatives for reducing compliance costs

The Australia Government’s compliance focuses on areas of highest risk, such as fragile and conflict-affected countries with weak institutional capacity and poor governance. While timber imports from such areas are not prohibited, the Department warns that businesses importing timber from high-risk areas shall invest significant resources to ensure robust due diligence and risk mitigation practices. However, in a sector where low institutional capacity and weak governance prevail, Australian businesses are likely to always need to invest significant resources in conducting due diligence. The use of national assurance systems, as those established under VPAs, may reduce the financial burden placed on businesses to conduct due diligence, as legality verification is done by the timber exporting country. The VPAs are an interesting way to ensure that the legality verification requirement is met and to reduce associated compliance costs.

5 CONCLUSIONS

Australia is ready to fully implement its illegal logging laws, with the end of the soft-start compliance period. The challenge now is to ensure that the regulated community complies with the law and meets its due diligence obligations. The compliance issues that may require attention in the years to come relate to the capacity of the industry, notably small businesses, to conduct due diligence, in particular legality verification, and the costs associated with effective legal compliance. This article suggests that there are lessons to be learned from a benchmark of illegal logging laws in the United States and the European Union. Our first conclusion is that strict law enforcement is essential to shape market behaviour and to reinforce compliance. Second, we find that a national legality assurance system, established in the supplier country, may be a more effective way to ensure legality verification and alleviate the burden on individual businesses to prove legality. Such system also alleviates financial costs on businesses and supports the regulated community to comply with the law.

155. Department of Agriculture and Water Resources (n 37) 14.
156. Ibid.