

EXPLANATORY STATEMENT

Issued by Authority of the Assistant Minister for Agriculture and Water Resources,
Parliamentary Secretary to the Deputy Prime Minister and Minister for Agriculture and Water
Resources

Illegal Logging Prohibition Act 2012

Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2017

Legislative Authority

The *Illegal Logging Prohibition Act 2012* (the Act) aims to reduce the harmful environmental, social and economic impacts of illegal logging by restricting the importation and sale of illegally logged timber products in Australia. The Act requires importers of regulated timber products and processors of raw logs to conduct due diligence in order to reduce the risk that illegally logged timber is imported or processed.

Section 86 of the Act provides that the Governor-General may make regulations prescribing either: matters required or permitted by the Act to be prescribed; or all matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Illegal Logging Prohibition Regulation 2012* (the primary Regulations) prescribes the ‘due diligence’ requirements for importing regulated timber products and processing domestically-grown raw logs. The due diligence requirements are prescribed to minimise the risk of placing a regulated timber product that contains illegally sourced timber onto the Australian market.

Purpose

The purpose of the *Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2017* is to streamline and clarify how certain elements of the due diligence requirements operate.

Background

The majority of the amendments reflect the outcomes of the ‘Reforming Australia’s Illegal Logging Regulations’ Regulation Impact Statement (RIS), which was finalised by the Australian Government in September 2017. The RIS examined options for amending the primary Regulations to ensure the due diligence requirements do not impose any unnecessary costs on the regulated community.

The other amendment, which clarifies that any assessments of risk must be ‘reasonable’, has emerged from the Department of Agriculture and Water Resource’s experiences in administering the primary Regulations.

Impact and Effect

The amending Regulations will establish a new ‘deemed to comply’ arrangement for timber products certified under the Timber Legality Frameworks (TLFs) prescribed in Part 1 of Schedule 2 of the primary Regulations. This will streamline the due diligence process for products that are verified as being covered by a prescribed TLF. The amending Regulations detail the steps that an importer or domestic processor needs to undertake to verify their

products are covered by a prescribed TLF; as well as the records that need to be maintained in relation to this and the offences associated with those provisions.

The amending Regulations will also remove Forest Law Enforcement, Governance and Trade (FLEGT) licenses from the primary Regulations. This reflects the limited applicability of FLEGT licenses to the Australian market, as these licences are only applicable to timber products exported from specific countries (which doesn't include Australia) to the European Union. This means the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification (PEFC) will be the only prescribed TLFs.

The amending Regulations will also amend the primary Regulations to enable importers and domestic processors who are importing or processing timber for non-business related purposes to comply with certain elements of the due diligence requirements. This will clarify a regulated entity only needs to include certain business information in their due diligence system, such as an Australian Business Number (ABN) or Australian Company Number (ACN); a key business activity statement; or relevant position details, where relevant.

The amending Regulations will also amend the primary Regulations to clarify that any conclusions of risk must be 'reasonable' and supported by the evidence gathered as part of the due diligence process. This establishes a standard against which the outcomes of the risk assessment process can be measured. Similar standards are already established in the information gathering and risk mitigation steps of the due diligence process.

Consultation

A public consultation process was undertaken between November 2016 and January 2017. This resulted in 46 written submissions being provided to the department from a range of regulated businesses, industry associations (including representatives of the timber importing, furniture, paper, building and domestic timber processing sectors), environmental organisations, certifying bodies, and foreign governments. These consultations informed the development of the associated "Reforming Australia's Illegal Logging Regulations" Regulation Impact Statement (RIS) process (OBPR ID: 20673).

Details/ Operation

Details of the amending Regulations are set out in the [Attachment A](#).

An education and communication program, including updates to the department's website, will be implemented to ensure that the regulated community (including both importers and domestic processors) are aware of the reforms and understand how they can comply with the amended due diligence requirements.

Other

The amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulation is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in [Attachment B](#).

Details of the *Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2017*

Section 1 – Name of Regulation

This section provides that the name of the amending Regulations is the *Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2017*.

Section 2 – Commencement

This section provides for the amendments to the *Illegal Logging Prohibition Regulation 2012* to commence on 1 January 2018.

Section 3 – Authority

This section provides for the amendments to the Regulation to be made under the *Illegal Logging Prohibition Act 2012*.

Section 4 – Schedules

This section provides for the *Illegal Logging Prohibition Regulation 2012* to be amended as set out in Schedule 1.

Schedule 1 – Amendments

Item 1 updates the note included at the end of the timber legality framework definition in section 3 that refers to the relevant paragraphs dealing with Timber Legality Frameworks (TLFs).

Item 2 repeals paragraph 9(2)(c) and (d) and substitutes those paragraphs with a new paragraph 9(2)(c). The new paragraph 9(2)(c) prescribes the information that needs to be included in an importer's due diligence system. This clarifies that the importer only needs to include certain business information in their due diligence system, such as an Australian Business Number (ABN) or Australian Company Number (ACN); a business activity statement; or relevant position details, if the timber product is imported in connection with a business carried on by the importer. An importer who contravenes subsection 9(1) of the Regulations is liable to a civil penalty of 100 penalty units.

Item 3 inserts a new section 9A that establishes a 'deemed to comply' arrangement for imported timber products that are certified or licensed under a TLF, as prescribed in Part 1, Schedule 2 of the Regulations.

The new section 9A lists the specific steps that an importer needs to undertake to verify their products are covered by a TLF and the records that need to be maintained by the importer. Section 9A is subject to a civil penalty of 100 penalty units.

Item 4 inserts a new subsection 10(1A) to make it clear that the requirements set out in section 10 do not apply to parties who elect to use the new deemed to comply arrangement for TLFs set out in Section 9A.

Item 5 amends subsection 10(1) to remove the unnecessary duplication of the term “regulated timber” when describing the products.

Item 6 amends paragraph 10(2)(a) to remove the reference to “regulated timber”.

Item 7 repeals paragraph 10(2)(g), which details the information that needs to be collected by an importer when they use a TLF as part of their due diligence process. The new arrangements set out in section 9A supersede this requirement.

Item 8 repeals section 11 that details how a TLF can be used by an importer to identify and assess risk. The new deemed to comply arrangement set out in Section 9A supersedes this requirement.

Item 9 amends paragraph 12(2)(b) to clarify that when using a Country Specific Guideline, the risk identification and assessment process is subject to the standard set out in the new subsection 12(2A). An importer who contravenes subsection 12(2) is liable to a civil penalty of 100 penalty units.

Item 10 inserts a new subsection 12(2A) that establishes the standard by which the risk identification and assessment process set out in paragraph 12(2)(b) is measured. This clarifies that the outcomes from this process must be reasonable.

Item 11 updates the heading of section 13 to make it refer to the newly established section 9A and existing section 12. It previously referred to sections 11 and 12.

Item 12 amends paragraph 13(1)(a) to omit subsection 11(2) and substitute subsection 9A(2) to make reference to the new section 9A.

Item 13 amends subparagraph 13(1)(b)(i) to remove the existing reference to subsection 11(2).

Item 14 amends paragraph 13(2)(a) to clarify that when using the risk factors set out in that section, the risk identification and assessment process is subject to the standard set out in the new subsection 13(2A). An importer who contravenes subsection 13(2) is liable to a civil penalty of 100 penalty units.

Item 15 inserts a new subsection 13(2A) that establishes the standard by which the risk identification and assessment process set out in paragraph 13(2)(a) is measured. This clarifies that the outcomes from this process must be reasonable.

Item 16 amends paragraph 14(3)(b) to remove the existing reference to subsection 11(2).

Item 17 inserts a new requirement in subsection 16(1) that requires an importer to keep a record of the procedures carried out in relation to the use of a TLF for a period of 5 years. An importer who contravenes subsection 16(1) is liable to a civil penalty of 100 penalty units.

Items 18 removes any references to TLFs in table item 3 in subsection 16(1). These references are superseded by the new requirement established in Item 17.

Item 19 amends table item 3 in subsection 16(1) to remove the reference to paragraph 11(2)(d).

Item 20 repeals paragraphs 18(2)(c) and (d) and substitutes those paragraphs with a new paragraph 18(2)(c). The new paragraph 18(2)(c) prescribes the information that needs to be included in a domestic processor's due diligence system. This clarifies the processor only needs to include certain business information in their due diligence system, such as an Australian Business Number (ABN) or Australian Company Number (ACN); a business activity statement; or relevant position details, if the raw logs are processed in connection with a business carried on by the processor. A processor who contravenes subsection 18(1) is liable to a civil penalty of 100 penalty units.

Item 21 inserts a new section 18A that establishes a 'deemed to comply' arrangement for domestically grown raw logs that are certified or licensed under a TLF.

The new section 18A lists the specific steps that a domestic processor needs to undertake to verify their products are covered by a TLF and the records that need to be maintained by the processor. Section 18A is subject to a civil penalty of 100 penalty units.

Item 22 inserts a new subsection 19(1A) to make it clear that the requirements in section 19 do not apply to parties who elect to use the new deemed to comply arrangement for TLFs set out in section 18A.

Item 23 makes a minor amendment to subsection 19(1) to allow for the new language provided for under Item 22.

Item 24 repeals paragraph 19(2)(e), which details the information that needs to be collected by a processor when they use a TLF as part of their due diligence process. The new arrangements set out in section 18A supersede this requirement.

Item 25 repeals section 20, which details how a TLF can be used by a processor to identify and assess risk. The new deemed to comply arrangement set out in section 18A supersede this requirement.

Item 26 amends paragraph 21(2)(b) to clarify that when using a State Specific Guideline, the risk identification and assessment process is subject to the standard set out in the new subsection 21(2A). A processor who contravenes subsection 21(2) is liable to a civil penalty of 100 penalty units.

Item 27 inserts a new subsection 21(2A) that establishes the standard by which the risk identification and assessment process set out in paragraph 21(2)(b) is measured. This clarifies that the outcomes from this process must be reasonable.

Item 28 updates the heading of section 22 to make it refer to the new section 18A and the existing section 21. It previously referred to sections 20 and 21.

Item 29 amends paragraph 22(1)(a) to make reference to the new subsection 18A(2).

Item 30 amends subparagraph 22(1)(b)(i) to remove the existing reference to subsection 20(2).

Item 31 amends paragraph 22(2)(a) to clarify that when using the risk factors set out in that section, the risk identification and assessment process is subject to the standard set out in the new subsection 22(2A). A processor who contravenes subsection 22(2) is liable to a civil penalty of 100 penalty units.

Item 32 inserts a new subsection 22(2A) that establishes the standard by which the risk identification and assessment process set out in paragraph 22(2)(a) is measured. This clarifies that the outcomes from this process must be reasonable.

Item 33 amends paragraph 23(3)(b) to remove the existing reference to subsection 20(2).

Item 34 inserts a new requirement in subsection 25(1) that requires a processor to keep a record of the procedures carried out in relation to the use of a TLF for a period of 5 years. A processor who contravenes subsection 25(1) is liable to a civil penalty of 100 penalty units.

Items 35 removes existing references to TLFs in table item 3 in subsection 25(1). These references are superseded by the new requirement established in Item 34.

Item 36 amends table item 3 in subsection 25(1) to remove the reference to paragraph 20(2)(d).

Items 37 and 38 repeals table item 1 and note 1 of Clause 1 of Schedule 2 to remove the existing references to Forest Law Enforcement, Government and Trade licences from Schedule 2 of the Regulation. This reflects the limited application of Forest Law Enforcement, Governance and Trade licences to the Australian market.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

**Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations
2017**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Illegal Logging Prohibition Amendment (Due Diligence Improvements) Regulations 2017* (the amending Regulations) amends the *Illegal Logging Prohibition Regulation 2012* (the primary Regulations) to simplify and streamline how certain elements of the due diligence requirements operate.

Human rights implications

Items 3 and 21 of the amending Regulations insert new sections into the primary Regulations which seek to prescribe conduct that is subject to a civil penalty. These replace existing sections in the primary Regulations that outline the use of Timber Legality Frameworks to identify and assess risk, and mirror their civil penalty provisions. The penalty for contravention of these sections is 100 penalty units for each provision.

Prescribing conduct that is subject to a civil penalty could engage criminal process rights if the imposition of the penalty is classified as ‘criminal’ under international human rights law.

Guidance Note 2: Offence provisions, civil penalties and human rights (December 2014), which is published by the Parliamentary Joint Committee on Human Rights, states that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the *International Convention on Civil and Political Rights* (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is required as to whether it amounts to a ‘criminal’ penalty for the purposes of the ICCPR.

The penalty provisions inserted by items 3 and 21 of the Regulations are expressly classified as civil penalties. New subsections 9A and 18A of the Principal Regulations seek to create solely pecuniary penalties in the form of a debt payable to the Commonwealth. The purpose of these penalties is to encourage compliance with the steps an importer or domestic processor needs to undertake to verify their products are covered by a prescribed timber legality framework. The new civil penalty provisions of the Principal Regulations do not seek to impose criminal liability, and do not lead to the creation of a criminal record. Further, the imposition of the civil penalties is not dependent on a finding of guilt.

Conclusion

The measures in the amending Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they do not engage any human rights issues.

Senator the Hon. Anne Ruston
Assistant Minister for Agriculture and Water Resources
Parliamentary Secretary to the Deputy Prime Minister and Minister for Agriculture
and Water Resources