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Submission of the Synod of Victoria and Tasmania, Uniting Church in Australia to Department of Agriculture, Fisheries and Forestry to 'Measures to prevent the importation of illegal, unreported and unregulated seafood: discussion paper'

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The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes the opportunity to provide a submission on the 'Measures to prevent the importation of illegal, unreported and unregulated seafood: discussion paper'.

The Uniting Church in Australia has a significant concern for humanity living in harmony with our natural environment and the upholding of human rights. It has also expressed concern about corruption. The Synod of Victoria and Tasmania was on the Commonwealth Government stakeholder group that developed the *Illegal Logging Prohibition Regulation*. We have also advocated for changes in the Thai seafood industry to address modern slavery in the industry. We collaborated with the Seafood Importers Association of Australasian in those efforts and visited Thai seafood processing plants.

To what extent do Australia's seafood imports contribute to global IUU fishing and how are we affected by this activity?

Without the Commonwealth Government being willing to fund a meaningful research project to gain an estimate of the scale of IUU fishing in the Australian seafood market, it is highly likely that the extent of the problem will be underestimated. In moving towards adopting the *Illegal Logging Prohibition Act*, the Department of Agriculture, Fisheries and Forestry funded significant research to estimate the scale of the problem of illegally sourced timber and wood products being imported into Australia.

Examination of illegal fishing in East Africa by the U4 Anti-Corruption Resource Centre reported that fish that is caught illegally, often facilitated by corruption, is likely to be whitewashed into the legitimate value chain if the illegal activity is not detected before the catch is transhipped or landed.¹ They further found that corrupt networks headed by political or senior civil servant 'kingpins' facilitate illegal vessel registration, allocation of fishing licences, and access to ports and port services.

WWF has pointed out that multiple species from multiple jurisdictions may all bear the same packaging for export, masking the origins and actual extent of fishing for a species. Corruption that facilitates the trade in illegal fish, thus allows those products to be concealed, mixed indistinguishably into legal product flows.²

¹ U4 Anti-Corruption Resource Centre, "Corruption as a facilitator of illegal fishing. Insights from East Africa", U4 Issue 2021:7, 2021.

² Ben Freitas, "Corruption in the Fisheries Sector: Import Controls, Transparency, and WWF Practice", World Wildlife Fund, Practice Note April 2021, 13.

Have market-based measures to combat IUU fishing applied in the European Union, United States or Japan, or by multilateral fishery bodies, been effective in curbing IUU fishing?

The discussion paper fails to recognise that the US import control system that applies to seafood has been backed up by the *Lacey Act* since the 1980s. For fish imports, the *Lacey Act* has been quite effective, due in part to the fact that there is a large and detailed regulatory framework to deal with fisheries.³ Fisheries are highly regulated under Food and Drug Administration (FDA) and the National Oceanic and Atmospheric Administration (NOAA). The National Marine Fisheries Service (NMFS, also known as NOAA Fisheries), has the responsibility for oversight of legitimate commercial activity through catch reports, onboard inspections, designated ports, and other activities.⁴

NOAA has a Seafood Inspection Program, which inspects approximately one-fifth of the total fish consumed in the United States through voluntary, fee-based inspections, and has found fraud in approximately 40% of voluntarily submitted products.⁵ NOAA also has an office of law enforcement to investigate illegal fishing and violations of the *Lacey Act*, among other fisheries laws.⁶

Large volumes of illegal fish or other sea life are detected either upon import or at sea through an investigation or inspection. Although they are very small part of a huge agency, NOAA investigators are seen as particularly dedicated. There are also exemplary agents and prosecutors in the northeast and mid-Atlantic regions, and these regions have many fisheries cases. It is also very useful to have prosecutors who know how the industry works. Many of the fisheries cases relate to either the size of the fish,⁷ or fishing for species or in locations with strict quotas and then misdeclaring.⁸ While some fisheries cases are straightforward, it can be very difficult to demonstrate a cumulative violation of an overall catch limit, similar to the challenges faced in showing that the overall volume of timber for a particular harvest area has been exceeded. In the case of *U.S. v. Bengis* the court awarded restitution to be paid by the defendants to the government of South Africa, which had a property interest in the stolen lobsters.⁹ Following that case, courts have increasingly awarded restitution to governments harmed by the illegal take of fish,¹⁰ in addition to the standard penalties of forfeiture, civil and criminal fines, and imprisonment. An overview of key fisheries cases follows.

U.S. v. Rioseco (1988)

³ Cole, Alexa, Engelke-Ros, Meggan, and Galatzan, Jonathan, (2015), Violations: Combating IUU Fishing Through Enforcement of Seafood Traceability Schemes, United States Attorneys' Bulletin, Wildlife Trafficking I, Volume 63, Number 3, p. 33, <https://www.justice.gov/usao/page/file/439556/download>.

⁴ NOAA, NOAA Fisheries – About Us, <https://www.fisheries.noaa.gov/about-us>.

⁵ NOAA Fishwatch, Seafood Fraud, <https://www.fishwatch.gov/eating-seafood/fraud>.

⁶ NOAA Fisheries, Office of Law Enforcement - Press Releases, <https://www.fisheries.noaa.gov/national/enforcement/office-law-enforcement-press-releases>.

⁷ *U.S. v. The Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385 (S.D. Fla. 1993).

⁸ For recent prosecutions see: NOAA Fisheries, Office of Law Enforcement - Press Releases, <https://www.fisheries.noaa.gov/national/enforcement/office-law-enforcement-press-releases>.

⁹ *U.S. v. Bengis*, 783 F.3d 407 (2d Cir. 2015).

¹⁰ Pierson, Melanie and Dilges, Meghan N., (2015), Restitution in Wildlife Cases, U.S. Attorneys' Bulletin, Wildlife Trafficking I, Volume 63, Number 3, p. 82-85, 86-88, <https://www.justice.gov/usao/page/file/439556/download>; Department of Justice, (2018), Illegal Sea Cucumber Trade Nets More than \$1.2 Million Dollars in Fines, Forfeiture and Restitution, <https://www.justice.gov/usao-sdca/pr/illegal-sea-cucumber-trade-nets-more-12-million-dollars-fines-forfeiture-and>.

The US Coast Guard stopped Rioseco in Bahama's claimed Exclusive Economic Zone on a routine check, and he was found to be fishing without a license in violation of Bahamian law.¹¹ Rioseco was arrested on criminal charges because this was his fourth *Lacey Act* violation, suggesting that repeated offenses are significant in determining whether forfeiture or criminal punishment follows. He was convicted of violating the *Lacey Act*, knowing that the fish he had caught were taken in violation of Bahamian law. Upon appeal, Rioseco claimed that the *Lacey Act* constituted an unconstitutional delegation of power to foreign governments, which the court summarily rejected, citing numerous cases from 1910 onwards and the legislative history of the 1981 *Lacey Act* amendments.

U.S. v. Cameron (1989)

Cameron, a commercial fisherman, caught and sold 961 halibut weighing 34,269 pounds, which was well over the 20,000-pound limit established by International Pacific Halibut Commission (IPHC). Cameron plead guilty to unlawfully acquiring and transporting halibut with a market value of more than \$350 and knowingly intending to sell illegally taken halibut in violation of the *Lacey Act*.¹² He claimed that the regulations promulgated by the IPHC did not constitute a proper basis for criminal prosecution under the *Lacey Act*. The IPHC regulates the Northern Pacific Halibut Fishery pursuant to an international fishing treaty between the US and Canada. Because the regulation at issue was agreed to by the United States under the treaty and in US implementing regulations, the violation of those regulations constituted a breach of the *Lacey Act*. The court did not state that IPHC regulations were foreign law, but that *by way of agreement*, there were certain types of non-US laws and regulations that can form the basis of a *Lacey Act* violation. The appeals court affirmed the lower court's sentence for Cameron to pay a substantial fine and to abstain from violating fishing laws.

U.S. v. 594,464 Pounds of Salmon and U.S. v. Lee (1989, 1991)

Two cases arose out of illegal salmon harvest by Taiwanese squid fishing vessels, and the subsequent conspiracy to smuggle the fish into the United States. The initial case related to forfeiture of the salmon¹³ and the subsequent criminal seven-count indictment charged six fishermen with violating the *Lacey Act* trafficking provisions and two with money laundering.¹⁴ The National Marine Fisheries Service began an undercover investigation after receiving information that the captain of a Taiwanese vessel was advertising the sale of salmon. The undercover agent agreed to accept the transfer of the salmon on the high seas and smuggle the salmon into the United States with fraudulent United States Certificates of Origin. In exchange, the NMFS agent, through a series of transactions, would pay \$1.3 million. After the initial payment was made, all of the defendants were arrested. In both cases, the court found that the Taiwanese regulation barring squid fishing vessels from harvesting salmon constituted "foreign law" under the *Lacey Act*. Furthermore, although the Taiwanese regulation only carried civil penalties and was violated only by the captain, all of the other defendants had also violated the *Lacey Act*, because they knew that the fish was taken in violation of a foreign law.

U.S. v. McNab (2003)

NMFS received a tip that the McNabs were about to illegally import undersized lobster in violation of Honduran law.¹⁵ After working with Honduran authorities to determine the applicable law related to size limits, catch reporting requirements, and a prohibition on harvesting egg-bearing lobster, prosecutors in Alabama charged the defendants. The defendants were convicted in US District Court of conspiracy, smuggling, money laundering, and *Lacey Act* violations. The defendants appealed on the grounds that Honduran law had changed and

¹¹ *U.S. v. Rioseco*, 845 F.2d 299 (11th Cir. 1988).

¹² *U.S. v. Cameron*, 888 F.2d 1279 (9th Cir. 1989).

¹³ *U.S. v. 594,464 Pounds of Salmon, More or Less, Appeal of Union, Inc.*, 871 F.2d 824 (9th Cir. 1989).

¹⁴ *U.S. v. Lee*, 937 F.2d 1388 (9th Cir. 1991).

¹⁵ *U.S. v. McNab*, 331 F.3d 1228 (2003).

provided an insufficient basis for a *Lacey Act* violation. The court rejected the argument when it determined that the Honduran law was valid at the time of the underlying legal violation. In addition to a \$10,000 fine, McNab, Blandford, and Schoenwetter were sentenced to ninety-seven months of imprisonment because they were convicted of knowingly importing merchandise into the United States. Huang was sentenced to twenty-four months because she should have known in the exercise of due care that the lobsters were illegal.

U.S. v. 144,774 pounds of Blue King Crab (2005)

This forfeiture case is notable for the different type of foreign law involved. Defendants violated a Russian resource protection law that required them to report fish they had obtained and were transporting.¹⁶ Specifically, the defendants failed to abide by a Russian monitoring law when it turned off its vessel monitoring system, which is meant to provide information about the location of the vessel and the amount of catch on board. The fish were transported to Canada and then the United States, where they were detected by customs officials. Defendants claimed the *Lacey Act* did not make the fish per se illegal to possess and thus asserted an innocent owner defence, but the district court rejected this. The court of appeals, in interpreting language in both the *Lacey Act* and the *Civil Asset Forfeiture Reform Act*, held that the district court was proper in rejecting the innocent owner defence because the imports themselves were per se illegal to possess and affirmed forfeiture.

U.S. v. Bengis (2011, 2013, 2015, 2017)

U.S. v. Bengis was a significant case that dealt with the illegal harvest off the coast of South Africa and export to the United States of huge volumes of rock lobsters and Patagonian toothfish between 1987 and 2001. It is notable particularly because the court required the defendants to provide restitution to the South African Government for financial losses it incurred as a result of defendants' multi-year scheme to illegally harvest rock lobsters in South Africa and export them to the United States.¹⁷

In 2000, approximately 90% of the West Coast rock lobsters were illegally harvested and the South African Government undertook an investigation of the landing of stolen fish, whereby they identified bribery of fishing inspectors and off-loading at night, to conceal the overharvesting in violation of South Africa's *Marine Living Resources Act 18* of 1998. In 2001, South African authorities seized a container and then alerted the US of authorities of another container of illegally harvested lobsters in transit to the United States. South African law enforcement engaged in their own prosecution of the defendants, which resulted in a plea agreement with a fine, forfeiture of the seized container of lobsters, and forfeiture of two fishing boats. South African authorities coordinated with the US authorities investigation through a Mutual Legal Assistance Treaty (MLAT). In 2003 the US arrested the defendants and charged them with *Lacey Act*, smuggling, and conspiracy charges. After the plea agreement, Bengis, the leader of the conspiracy, was sentenced to 46 months incarceration and others were sentenced to time served up to 30 months. Defendants together forfeited a total of US\$13.3 million to the United States. Subsequently, through additional legal proceedings, the court concluded restitution should be US\$29.5 million. As approximately US\$7 million had already been paid to the South African Government, that amount was reduced to US\$22.5 million.

The defendants actively sought to place their funds out of the reach of US jurisdiction.¹⁸ As a result, in 2017 the defendants were resentenced and both imprisonment and restitution were increased. As Bengis does not reside in the United States, he has not served the additional time of imprisonment. In addition, the court of the Isle of Jersey will only make funds available to fulfil

¹⁶ *U.S. v. 144,774 pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005).

¹⁷ See *U.S. v. Bengis*, 631 F.3d 33, 41 (2d Cir. 2011). The District Court ordered defendants to pay South Africa \$22,446,720 in restitution. *U.S. v. Bengis*, 2013 WL 2922292, at *7 (S.D.N.Y. 2013). *U.S. v. Bengis*, 783 F.3d 407 (2d Cir. 2015).

¹⁸ *U.S. v. Arnold M. Bengis et al.*, No. 1:03-CR-00308 (S.D.N.Y. 2017).

the restitution order if the US Government can show that the funds in Jersey trusts are those acquired through criminal activity or a tainted gift. Such proof is a challenging prospect given that the funds have been transferred between trusts and companies numerous times.¹⁹

Sea Cucumbers from Mexico (2018)

The *Sea Cucumbers* case also demonstrates how one prosecution can have a significant reduction in illegal imports for a particular species. Between 2010 and 2012 a father and son bought approximately US\$13 million worth of illegally harvested sea cucumbers harvested by poachers off the coast of the Yucatan in Mexico.²⁰ They paid bribes to Mexican officials, subsequently smuggled the sea cucumbers into the United States, and resold the sea cucumbers to Asian buyers for US\$17 million. In the plea agreement, the two (and their business) pled guilty to false labelling, importing sea cucumbers that were harvested in violation of Mexican law (in excess of permit limits, without a proper license or permit, or out of season), and illegal exports to Asia, and were sentenced to pay US\$1.2 million in fines, forfeiture, and restitution.²¹ As a result, and with increased cooperation of Mexican officials, sea cucumber imports through the port of San Diego, California declined 93% during 2014-2017.²²

What policy reforms are necessary to prevent the importation of seafood derived from IUU fishing practices?

The Synod favours the introduction of an offence to knowingly or recklessly import seafood derived from IUU. The offence should be backed by a due diligence system on importers and processors, similar to the *Illegal Logging Prohibition Act 2012*. However, we acknowledge that such a system is resource intensive, and thus the importation of IUU sourced seafood needs to be of a sufficient proportion of the product to justify the resources required. The impact on seafood importers and processors and the level of enforcement resources can be minimised by targeting the due diligence requirements to specified seafood types and above a particular total import threshold of the product in a 12 month period.

The Department of Agriculture, Fisheries and Forestry commissioned research that estimated that 10% of imported timber into Australia, worth approximately \$900 million annually, came from sources with a high risk of illegality.²³ That proportion of likely illegal product justified the introduction of the *Illegal Logging Prohibition Act*.

The discussion paper raises doubts about the impact of unilateral market measures to combat illegality in the production of goods, in the case in question being seafood. However, the *Illegal Logging Prohibition Act 2012* appears to have had impact on the trade in illegally sourced timber and wood products in Australia. There has been high compliance amongst reporting entities with the obligation to have a due diligence system. The Department's 2019 - 2020 annual report stated:²⁴

- The self-declared compliance rate was 80%, compared with 82% in 2018–19; and,
- Due diligence assessments of importers found compliance rates rose from around 10% in 2017, during the soft start period, to approximately 75% in 2019–20.

¹⁹ *First Trust Management Limited AG v The Attorney General* [2018] JRC 064.

²⁰ Department of Justice, (2017), Three Charged with Illegal Trafficking of \$17 Million Worth of Sea Cucumbers, <https://www.justice.gov/usao-sdca/pr/three-charged-illegal-trafficking-17-million-worth-sea-cucumbers>.

²¹ Department of Justice, (2018), Illegal Sea Cucumber Trade Nets More than \$1.2 Million Dollars in Fines, Forfeiture and Restitution, <https://www.justice.gov/usao-sdca/pr/illegal-sea-cucumber-trade-nets-more-12-million-dollars-fines-forfeiture-and>.

²² Department of Justice, (2017), Three Charged with Illegal Trafficking of \$17 Million Worth of Sea Cucumbers, <https://www.justice.gov/usao-sdca/pr/three-charged-illegal-trafficking-17-million-worth-sea-cucumbers>.

²³ <https://www.agriculture.gov.au/agriculture-land/forestry/policies/illegal-logging>

²⁴ Department of Agriculture, Water and the Environment, 'Annual Report 2019-2020', 40.

In the 2019 to 2020 financial year, the number of regulated entities was estimated at 20,000.²⁵ An earlier review by KPMG found regulated entities were shifting suppliers in response to the Act to reduce the risk of exposure to illegal logging in their supply chains. Of 65 entities that were interviewed, seven had changed suppliers in response to the Act, and one had stopped importing a particular product.²⁶

The EU Timber Regulation (EUTR) also appears to have had a meaningful impact on the trade in illegally sourced timber and wood products. It raises the question why the EU Catch Certification Scheme appears to have had such limited impact in contrast.

The EUTR entered into force in 2013 and has seen broad implementation and enforcement actions by EU Member States. Designated Competent Authorities are responsible for verifying that those placing timber on the EU market (“Operators” under EUTR parlance) are complying with their obligations under EUTR and undertake checks on both domestic and importing operators, primarily related to their due diligence obligations. Competent Authorities (CAs) often follow a risk-based approach in developing verification plans and conducting checks.

“Competent Authorities carry out checks to ensure operators comply with Article 4 [Obligations of operators] and 6 [Due diligence systems] of the EUTR, which may include an assessment of the operator’s Due Diligence System, examination of documentation or spot checks such as field audits.”²⁷

Member States are surveyed on a bi-annual basis regarding the number of operator, trader, and monitoring organisation checks they have undertaken, as well as the number of substantiated concerns (third party reports of suspected non-compliance) they have received and acted upon. UNEP-WCMC analysed the compliance actions of Austria, Bulgaria, Czech Republic, Denmark, Greece, Ireland, Romania, Spain, Sweden and the United Kingdom, reporting for the period March 2017 to February 2019, and the remaining EU countries reported for January 2017 to December 2018. Iceland and Liechtenstein provided no enforcement data.²⁸

In total, 21,256 Operator checks were carried out by EUTR Competent Authorities during the two-year reporting period. CAs undertook a further 2,333 checks on Traders (sellers of regulated products that have already been placed on the market). Traders have no due diligence obligations, but are required to keep purchase documentation to allow for traceability of their products. CAs identified 2,273 infringements and took 2,450 enforcement actions, including fines for inadequate due diligence systems and cease and desist orders. These figures exclude a further 804 cases that were either referred to the police or were on-going for both domestic and imported timber.²⁹

In addition to undertaking checks, primarily related to due diligence, the EUTR/FLEGT (Forest Law Enforcement, Governance and Trade) Expert Group concluded that effective due diligence

²⁵ Department of Agriculture, Water and the Environment, ‘Sunsetting Review of the Illegal Logging Prohibition Regulation 2012: consultation paper’, 2021, 10.

²⁶ KPMG, ‘Independent Review of the impact of the illegal logging regulations on small business’, 28 March 2015, 4.

²⁷ UNEP-WCMC, Overview of Competent Authority EU Timber Regulation checks, January - June 2019, https://ec.europa.eu/environment/forests/pdf/UNEP%20WCMC%202019_Overview%20of%20CA%20checks%20January-June%202019_FINAL_17.01.2020.pdf, p. 3.

²⁸ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union’s Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 44.

²⁹ UNEP-WCMC, EUTR Analysis 2019 Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union’s Timber Regulation (Regulation EU No 995/2010), <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>, p. 44.

and risk mitigation to a “negligible” level for timber from Myanmar is not possible. They cited the lack of sufficient information on harvest volumes authorized for cutting, the lack of sufficient information to show clear attribution of origin within the country (so as to exclude conflict timber), and the high-risk of mixing (legally and illegally harvested logs in the saw mills often owned by the Myanmar Timber Enterprise), combined with the high corruption index.³⁰ The enforcement of the EUTR due diligence provisions have been used to both require improvements in companies’ due diligence systems (or issue fines when compliance is not forthcoming) and to exclude timber from the EUTR market, when due diligence cannot be demonstrated.

The advantage of a targeted due diligence system that seeks to exclude suppliers engaged in IUU fishing is that it is targeted at those that are engaged in IUU fishing or that have inadequate systems to prevent IUU fishing. By contrast, country of origin labelling that implies all producers from a particular jurisdiction are associated with IUU fishing can see consumers punish suppliers that are not engaged in IUU fishing.

Poorly resourced and superficial due diligence systems can have minimal impact on the criminal activity they are supposed to address while providing cover to the industry involved to make it look like they are doing something. For example, Global Witness published a critique of the International Tin Supply Chain Initiative (ITSCI) in April 2022.³¹ The ITSCI aims to provide a reliable chain of custody of minerals that are not linked to child labour or the influence of armed groups or military forces. In both the Democratic Republic of Congo and Rwanda, government agents acting on ITSCI’s behalf seal and tag bags of legitimate minerals before they are transported for processing or export. In 2018, the OECD evaluated ITSCI’s standard as fully aligned with its own due diligence guidance on mineral supply chains.³² The findings of the Global Witness investigation suggest that ITSCI’s system has permitted the laundering of tainted minerals in the Democratic Republic of Congo. The evidence suggests that large amounts of minerals from unvalidated mines, including ones with militia involvement or that use child labour, enter the ITSCI supply chain and are exported.³³ One of the mines supplying into the ITSCI system was Lukoma, where a militia has used violence against the local population and forced miners to work unpaid. The Ministry of Mines is said to tag bags from the Lukoma mine.³⁴

ITSCI were aware of the risk of conflict minerals contaminating its supply chain around Nzibira since at least 2014, when its own governance assessment acknowledged the danger. A 2015 report by a local NGO presented evidence of large volumes of tagged minerals being falsely passed off as coming from unproductive validated mines in the area. A 2018 UN report again found evidence of laundering of minerals from mines controlled by a militia and the Congolese army.³⁵ ITSCI’s minimal field staff and lack of oversight make it easy for miners and traders to launder minerals.³⁶ The International Tin Association (ITA) has ultimate oversight of the ITSCI. It is supposed to run the system to prevent tainted tantalum, tin and tungsten from entering

³⁰ European Commission, (2018), Summary Record of the FLEGT/EUTR Expert Group Meeting 19 April 2018, p. 1
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=14014>; UNEP-WCMC, (2018), Briefing Note for the Competent Authorities (CA) implementing the EU Timber Regulation, November-December 2018, p. 2,
http://ec.europa.eu/environment/forests/pdf/Briefing_note_nov_dec_2018.pdf

³¹ Global Witness, ‘The ITSCI Laundromat. How a due diligence scheme appears to launder conflict minerals’, April 2022.

³² Ibid., 3.

³³ Ibid., 4.

³⁴ Ibid., 4.

³⁵ Ibid., 4.

³⁶ Ibid., 5.

international markets, while at the same time representing the interests of some of the largest buyers of these minerals.

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