



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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**LABOUR,
SCIENCE AND
ENTERPRISE
GROUP**



Timeframes for Dumping and Subsidy Investigations

Public Consultation Note

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Introduction

The Ministry of Business, Innovation and Employment (MBIE) has responsibilities relating to trade and trade remedies.

As a part of this role, MBIE conducts investigations under the Trade (Anti-dumping and Countervailing Duties) Act 1988 (the Act) into alleged dumping and subsidies, as well as reviews of duties imposed by previous investigations. We use the term “investigation” to cover both of these processes.

MBIE is proposing legislation to allow the timeframes for these investigations to be extended by the Minister of Commerce and Consumer Affairs where good cause can be demonstrated. Good cause could include the complexity of issues that arise, the diversity of goods or number of interested parties involved in the investigation, or to allow natural justice obligations to be discharged.

Under the Act, the first step of an investigation requires a determination by the Minister, within 180 days, on whether dumping or subsidisation is causing, or threatening to cause, injury to a New Zealand industry. Where applicable, the second step of an investigation requires a determination by the Minister, within 90 days, on whether the imposition of duties is in the public interest.

MBIE has almost always met the statutory deadlines. Forty-seven trade remedies investigations and reviews were carried out between 2000 and the time of three judicial reviews in 2018. Only two of these ran past the deadline (both in 2007). The complexity of those cases and the large numbers of interested parties were significant factors causing the overruns.

A recent High Court decision has found that these time frames can be extended in “extenuating circumstances”. MBIE’s proposal aims to align the express process in the Act with the approach of a recent High Court judgment and clarifies the circumstances that might justify MBIE exceeding the time limits.

MBIE seeks to consult with bodies representing domestic manufacturers, importers, unions and other parties with this document. Subject to the outcome of the consultations, the Trade (Anti-dumping and Countervailing Duties) Act 1988 could be amended through the next available Regulatory Systems Amendment Bill.

The problem

New Zealand’s timelines for trade remedies investigations are tight by international standards, being much shorter than the one year (extendable to 18 months) allowed by the World Trade Organization (WTO), and shorter than those of most investigating authorities in other WTO member countries (see Annex A). MBIE is mindful however that to achieve a fair and just outcome, interested parties must be given a full opportunity to defend their interests.

Although MBIE has nearly always met its statutory deadlines for dumping and subsidy investigations, there are circumstances where MBIE will need additional time to complete an investigation satisfactorily. An extension of time is currently not provided for in the Act.

A recent High Court judgment¹ found that meeting the statutory time limits for dumping and subsidy investigations should not be at the expense of discharging obligations of natural justice to parties to the investigation; and that the time limits may be exceeded in “extenuating circumstances”.

The judgment did not define the scope of “extenuating circumstances” and MBIE considers it is in the interests of all stakeholders for changes to be made to the legislative regime to achieve greater transparency, certainty and oversight of the process of when the time frames in the Act can be extended.

Amendments could be made to the Trade (Anti-dumping and Countervailing Duties) Act 1988 to give the Minister the discretion for limited extension of the statutory investigation timeframes where required, for example in cases of unusual complexity or to meet natural justice obligations.

MBIE also considers that the Minister may, on their own initiative, need to extend the time to allow them to make a determination, particularly where the Minister needs to consider complex or unusual matters.

In all cases, investigations and determinations would need to be completed within a maximum of one year.

In November 2017, legislative amendments were made to the now Trade (Anti- Dumping and Countervailing Duties) Act 1988. This proposal does not seek to affect the Act or any of those amended provisions outside the issue of timeframes for investigations and reviews.

Suggested modification

Amend the Act to allow the Minister to extend the time limits where necessary, conditional on good cause being demonstrated, up to a maximum of 360 days.

MBIE considers that multiple extensions should be allowed, with the cumulative number of days extended totaling no more than 90 days. An additional 90 days would bring the total time for an investigation to 360 days, including the public interest test where applicable, which is within the one year requirement set out in the WTO Agreements.

The decision to extend an investigation could be made at the start of or during an investigation or review if the Minister considers the investigation is likely to be unusually complex and requires a longer timeframe. A decision on the Minister’s own initiative to extend the time to allow him/her to make a determination would likely be made towards the end of an investigation.

Reasons for the extended timeframe would be notified in the *New Zealand Gazette* in each case. Amending the legislation to allow for extensions as proposed would include allowing for natural justice obligations to be met in the situation that was the subject of the High Court judgment, namely where MBIE receives information after its provision of an Interim or EFC Report which has the potential to change MBIE’s final conclusions and where further consultation is required.

¹ *Heinz Wattie’s Limited v The Ministry of Business, Innovation and Employment* [2018] NZHC 2309, available at [www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2018/2309.html?query=title\(%222018%20nzhc%202309%22\)](http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2018/2309.html?query=title(%222018%20nzhc%202309%22))

The decision maker for the extension of a deadline could be either the MBIE Chief Executive or the Minister. However MBIE considers it is preferable that the decision maker is the Minister as it is the Minister who ultimately makes determinations. Consistent with Australian trade remedies legislation, the Chief Executive (or in practice the Chief Executive's delegate) would ask the Minister to extend the timeframe (except where the Minister is extending the time on their own initiative) and publish a notice if the Minister agreed to an extension. Giving the Minister this discretion, rather than the Chief Executive, would act as a check on MBIE's ability to extend timeframes. In addition, the requirement in the WTO Agreements that investigations are to be completed expeditiously but no later than one year would still apply and could be made explicit in the Act.

MBIE considers that the circumstances in which timeframes may be extended could be defined in the Act. MBIE suggests that the timeframes for investigations or reviews could be extended where the Minister declares it necessary for one or more of the following reasons:

- (a) the complexity or novelty of the issues presented by the investigation or review
- (b) the diversity of goods or number of interested parties involved in the investigation or review
- (c) the difficulty of obtaining satisfactory evidence in the investigation or review
- (d) to allow natural justice obligations to be discharged
- (e) any other circumstances specified in the *Gazette* notice that, in the opinion of the Minister, make it unusually difficult for the Minister to make the determinations².

Amendments may need to be made to other timing elements in the legislation to allow for extensions of time, for example where an extension affects the 150-day deadline for notification to parties of the essential facts and conclusions that are likely to form the basis for a determination to be made by the Minister.

Questions for submitters

1. To what extent do you consider MBIE has proposed an appropriate response to the identified problem?
2. What other criteria, if any, do you consider should be applied?
3. What advantages or disadvantages could result from amending the Act, including any unanticipated consequences?
4. What other comments on the matter of providing powers to extend timeframes do you have?

Making a submission

You are invited to make a written submission on the issues raised in this paper. Submissions should be received by MBIE by 5pm on 17 May 2019.

Your submission may respond to any or all of the issues outlined, depending on your interest. Please also include your name, or the name of your organisation, and contact details.

² Reasons (a), (b), (c) and (e) were set out in a previous version of the Act where preliminary determinations were required to be made within 60 days, extendable to 90 days.

Please be aware that submissions will be subject to the Official Information Act 1982. If your submission contains information that you consider should be treated as confidential, please clearly identify such information and provide justification for why you believe it should be withheld.

Submissions may be made electronically (preferred) or by post. Electronic submissions should be in Adobe Acrobat or Microsoft Word or compatible format and sent as an attachment to: traderem@mbie.govt.nz.

Annex A: Investigation timeframes for other jurisdictions

Other WTO members' investigating authorities have a range of different timeframes for investigations and, in some cases, flexibility to extend time limits. In practice, most investigations conducted by other jurisdictions take longer than New Zealand's investigations. In New Zealand, reviews follow the same time frame as investigations, so this annex examines only investigation time limits in other jurisdictions.

Australia

The Australian Anti-Dumping Commission is required to make a recommendation by day 155, but in about half of cases this deadline is extended to 225 days. A further 30 days is provided for the Minister to make a decision whether or not to impose duties. Any appeals take up to another 120 days. The Minister may approve extensions of certain periods of time for dumping and subsidy investigations.

Canada

Under the Canadian bifurcated system, investigations normally take about 210 days but may be extended to 255 days. If required, a public interest test follows the imposition of duties.

European Union

The EU Anti-Dumping Regulation requires investigations to be completed within 12 months where possible, and in any case within 15 months. In practice, 15 months is usually required.

United States

Under the US bifurcated system, final determinations are made in 260 days and up to 400 days in complicated, extended dumping cases. Shorter periods may apply to subsidy investigations.