



13 September 2019

Trade Remedies Group
Ministry of Business, Innovation and Employment
PO Box 1473
The Terrace
Wellington 6140
NEW ZEALAND

Email: traderem@mbie.govt.nz

Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Trade (Anti-dumping and Countervailing Duties) Act 1988: Applying the Public Interest Test: Consultation Note*.

Yours sincerely

A large black rectangular redaction box covering the signature area.

A smaller black rectangular redaction box covering the name of the signatory.

Chief Executive





Trade (Anti-dumping and Countervailing Duties) Act 1988: Applying the Public Interest Test: Consultation Note

Submission by the New Zealand Food & Grocery Council

13 September 2019

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“NZFGC”) welcomes the opportunity to comment on the *Trade (Anti-dumping and Countervailing Duties) Act 1988: Applying the Public Interest Test: Consultation Note* (the Consultation Note).
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$34 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$31 billion in export revenue from exports to 195 countries – some 72% of total merchandise exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 44% of total manufacturing income. Our members directly or indirectly employ more than 400,000 people – one in five of the workforce.

OVERARCHING COMMENTS

1. While NZFGC appreciates the opportunity to comment on the Consultation Note, we were strongly opposed to the concept of the Public Interest Test and the proposals in the Consultation Note confirm the worst of our concerns. We are particularly concerned that the approach proposed in the Consultation Note in implementing the Public Interest Test provisions does not address or clearly reflect the words of the *Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017* (the Act), that:
“A duty is in the public interest unless the cost to downstream industries and consumers of imposing the duty is likely to materially outweigh the benefit to the domestic industry”.
2. Many elements to be analysed under the Public Interest Test provision (investigation Step 2) will have already been reviewed by officials in the investigation Step 1 in terms of the material injury suffered by the local industry. An overly rigorous examination of these issues yet again, could lead to the conclusion that the material injury assessment made during the investigation Step 1 is being “second guessed” during the Public Interest Test process. It can only shift the balance in favour of the consumer/downstream industry.
3. In relation to the extent the factors discussed in Part 1 of the Consultation Note are appropriate in addressing the requirements set out in the Act, our view is that the analysis proposed is flawed. This is on the basis that the factors and analysis so strongly favours the consumer/downstream industry, that we consider it to be contrary to the provisions of the Act which are that the balance of any analysis should favour the local manufacturer.
4. Finally, we consider that the PIPES model has the potential to produce an unbalanced analysis of the public interest and generate a bias likely to be in favour of the consumer/downstream industry.
5. We consider there will be some general issues using a partial equilibrium model such as availability of information feeding the model, the accuracy of the model itself, and not accounting for the broader impacts on the economy which have been noted briefly in the Consultation Note. In our view, more weight can often be given to the numbers from such modelling, which tend to outweigh qualitative conclusions. This is contrary to the wording and intent of the legislation.

BACKGROUND

6. Following submissions and consultation on a Discussion Paper published in June 2014 by MBIE, a paper was prepared for the Cabinet Economic Growth and Infrastructure Committee in 2015, recommending the adoption of a bounded Public Interest Test into

New Zealand's antidumping and countervailing duty regime. This Paper was confirmed by Cabinet on 2 June 2015.

7. In the Cabinet Economic Growth and Infrastructure Committee Paper, it was noted as follows:

“The test also incorporates a presumption in favour of imposing duties which can be overturned only if the harm of imposing duties on downstream industries and consumers materially outweighs the benefit of imposing the duty for domestic producers. The likely impact of the duties will be assessed over a time period sufficient to take into account any relevant longer term effects which may result from their imposition.” (para 8)
8. This arose from a concern that the impact of the duties was likely to be felt over different time periods for each of the factors listed in the Public Interest Test consideration, and for each of the parties affected by the duty. For example, while the impact of the duties on prices might be evident almost immediately, the impact on employment levels of local producers may be long term.
9. Support for the presumption in favour of imposing duties was set out in the Regulatory Impact Statement (RIS):

“If the test did not have a requirement that the cost to downstream industries and consumers must materially outweigh the benefits to the domestic industry, but rather involved a simple comparison of costs and benefits without any weight in favour of the domestic industry, it is unlikely that the test would ever find the imposition of duties is justified. This would likely mean there would not be an effective anti-dumping and countervailing duties regime available to domestic producers. Maintaining an effective trade remedies regime is one of the three key policy objectives identified in this RIS.” (para 131).
10. In its presentation to the Commerce Committee in 2016, MBIE specified the factors that it would consider in conducting the Public Interest Test, specifically the effect of the duties on:
 - Prices of the goods
 - Choice and availability of the goods
 - Product and service quality
 - The financial viability of the domestic industry
 - Employment levels
 - Alternative supplies of the goods
 - Competition generally.
11. In the subsequent report of the Commerce Committee on the *Trade (Anti-dumping and Countervailing Duties) Amendment Bill*, the Opposition members of the Committee at the time (Labour Party, Green Party and New Zealand First), now the Coalition Government, voiced several concerns about the criteria and methodology of the Public Interest Test. They did not support the Bill.
12. In 2017 the legislation was amended to include an assessment of the Public Interest Test in trade remedies investigations. NZFGC strongly opposed the concept of the Public Interest Test at that time. In particular we noted that “The introduction of a public interest test will add time, cost and uncertainty to the existing process, and create a significant disadvantage to New Zealand industry through the application of a test which is not readily used by the vast majority of other countries' administrations and which has been specifically rejected by Australia.”

DETAILED COMMENTS

Consultation Note – Applying the Public Interest Test

13. While NZFGC appreciates the opportunity to comment on the Consultation Note, the proposals in the Consultation Note confirm the worst of our concerns raised at the time of the Act's passage as the following sets out.
14. The Consultation Note seeks responses to the following three questions:
 - What comments do you have on the proposed methodology?
 - To what extent do you consider the factors discussed in Part 1 of this paper are appropriate in addressing the requirements set out in the Act?
 - To what extent do you consider the PIPES model, discussed in Part 2 of this paper, is useful in informing the analysis of the public interest?

What comments do you have on the proposed methodology?

15. It is important that the approach taken by officials in implementing the Public Interest Test provisions clearly reflect the words of those provisions, that is:
"A duty is in the public interest unless the cost to downstream industries and consumers of imposing the duty is likely to materially outweigh the benefit to the domestic industry".
16. Our concern is that the approach proposed in the Consultation Note does not address this requirement.
17. Many elements to be analysed under the Public Interest Test provision (investigation Step 2) have already been reviewed by officials in the investigation Step 1 in terms of the material injury suffered by the local industry. An overly rigorous examination of these issues again, could lead to the conclusion that the material injury assessment made during the investigation Step 1 is being "second guessed" during the Public Interest Test process.
18. In the RIS (paragraph 106) a factor to be considered was identified as follows:
"The extent to which the harm of imposing duties is likely to be excessive compared to the benefit."
19. This factor has in fact been extended in the legislation as set out in section 10F(3)(h) of the *Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017* (the Act) which potentially gives the Ministry more scope to justify NOT imposing duties. There was no reference to such a "wash up" clause which appeared very late in proceedings in the Bill, and now is in the Act. This enables the consideration of "any factor that the Chief Executive considers essential to ensure the existence of competition in the market". This is a significantly more rigorous test than the consideration of "competition generally" that was presented to the Commerce Committee by MBIE when the Bill was being considered. It can only shift the balance in favour of the consumer/downstream industry.
20. We consider it important that section 10F(3)(h) is implemented in terms of the intent set out in the RIS, and signed off by Cabinet.
21. In any event, with a New Zealand produced product such as peaches or tomatoes where the dumped product led to a decline in peach orchards or tomato growing for canning in New Zealand due to their being unable to compete, it is not clear that the methodology would place a value on the consumer having local choices due to 'buy local' preferences, rather than having to buy imported peaches or tomatoes if that is the only choice left. As BusinessNZ points out, the problem with 100% importation of a commodity like peaches is twofold: the emissions implications of going to a totally imported product and the fact

that the consumer may prefer to buy local than be forced, through lack of choice, to buy imported.

22. If the result of implementation of the Public Interest Test is that it does not include the impact of allowing dumped or subsidised product into New Zealand that also has a negative impact on climate change, it would seem that the policy approach is not taking into account the environmental externalities.

To what extent do you consider the factors discussed in Part 1 of this paper are appropriate in addressing the requirements set out in the Act?

23. In considering the appropriateness of factors discussed in Part 1 of the Consultation Note to address the requirements set out in the Act, it is useful to compare the comments made in MBIE's Departmental Report to the Commerce Committee dated 22 September 2016. Those comments included examples of how the Public Interest Test factors would be assessed, which should align with the proposed approach contained in Part 1 of the Consultation Note.
24. For virtually all of the factors identified, the nature of the investigation proposed in the Consultation Note is not only more extensive than was proposed in the Departmental Report but is also a repeat of what has been reviewed in the investigation Step 1. The way in which MBIE has conducted trade remedies investigations for a long period of time is to analyse, not only the historical injury suffered by an applicant industry, but also whether this will be sustained into the future.
25. Together with the use of the PIPES model to analyse some of these factors, the impression is given that the material injury analysis that was decided in favour of the local industry in the investigation Step 1, is now being re-examined to determine whether it can be diluted to the extent that the interest of the consumer/downstream industry surpasses that of the local industry. Such a bias is of great concern to NZFGC.
26. In particular, the last factor identified (any factor that the Chief Executive considers essential to ensure the existence for competition in the market) was not only not considered when the Cabinet Paper was prepared, but also is heavily weighted in favour of the consumer/downstream industry. It appears to have been inserted so that if it seems that the Public Interest will be in favour of the local industry, this factor can be used to swing the balance back to the consumer/downstream industry. This is not what the legislation requires.
27. To summarise, the analysis that the Consultation Note proposes so strongly favours the consumer/downstream industry, that we consider it to be contrary to the provisions of the legislation that the balance of any analysis should favour the local manufacturer.

To what extent do you consider the PIPES model, discussed in Part 2 of this paper, is useful in informing the analysis of the public interest?

28. An economic model was not suggested as part of the Public Interest Test analysis when the Bill was passing through Parliament. This appears to be a source of analysis developed post-legislation by officials. We question the efficacy of such an approach.
29. There will be some general issues using a partial equilibrium model such as availability of information feeding the model, the accuracy of the model itself, and not accounting for the broader impacts on the economy which have been noted briefly in the Consultation Note. Often more weight can be given to the numbers from such modelling, which tend to outweigh qualitative conclusions.

-
30. In summary, we consider that the PIPES model has the potential to produce an unbalanced analysis of the public interest and generate a bias likely to be in favour of the consumer/downstream industry. This is contrary to the wording and intent of the legislation.

