

Consultation on the public interest test for dumping and subsidy investigations

MBIE's response to key issues

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.

From 22 August to 13 September 2019, MBIE sought comments on a proposed methodology for an objective and robust examination of the public interest now required by the Act.

The Trade (Anti-dumping and Countervailing Duties) Act 1988: Applying the public interest test – Consultation Note (the Consultation Note) was released to obtain stakeholders' views on MBIE's proposed approach to assess each matter specified in section 10F(3) of the Act. The Consultation Note was set out in two parts: Part 1 discussed how the considerations in 10F(3)(a)-(h) of the Act could be analysed; and Part 2 discussed a proposed economic model to inform MBIE's analysis of **some** of the factors covered by Part 1 of the Consultation Note.

MBIE has noted all detailed comments that submitters have made in response to each of the bullet points set out in the Consultation Note under each consideration 10F(3)(a)-(h). MBIE agrees that many of the points raised will need to be considered in the implementation of the public interest test (PIT), but notes that many of the comments can only practically be addressed in an actual public interest investigation.

This paper addresses the relevant overarching issues raised by stakeholders during consultation. MBIE begins by addressing the key issues raised in relation to the PIT, and then comments on the specific issues raised in relation to the Public Interest Partial Economic Simulation Model (PIPES Model).

The Consultation Note was not intended to discuss the scope of the public interest test or any other matters relating to the trade remedies system. Comments were to be restricted to operational matters of the PIT. Issues such as stakeholders not supporting the Bill, the exclusion of upstream industries, the existence of considerations 10F(3)(a)-(h), environmental externalities, and the timeframes set in legislation, are not addressed in this paper.

Submissions on the Consultation Note were invited from a broad range of stakeholders. MBIE received written feedback from Business NZ, Heinz Wattie's Ltd (HWL), Metals New Zealand (Metals NZ) (which commissioned comments from the New Zealand Institute of Economic Research (NZIER)), New Zealand Food & Grocery Council (NZFGC), and New Zealand Steel Limited (NZ Steel).

Key issues raised by submitters

Issues relating to the PIT

- 1. The Consultation Note is heavily weighted in favour of consumers and downstream industries, and does not clearly reflect section 10F(2) of the Act.**

Comments made by submitters

Metals NZ noted that the analysis that the Consultation Note proposes is heavily weighted in favour of consumers and downstream industries, which it states is contrary to the requirement of the Act that the balance of any analysis is found in favour of the local manufacturer. The same issue was raised in a submission by NZFGC, which also noted that the approach proposed does not address nor clearly reflect the words of 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.

MBIE's response

MBIE notes that the purpose of the Act as set out in section 1A is to enable New Zealand to apply anti-dumping and countervailing duties in accordance with its obligations as a party to the WTO Agreement. Anti-dumping and countervailing duties are intended to prevent material injury or the threat of material injury to an industry, or the establishment of an industry being materially retarded, due to dumped or subsidised goods being imported into New Zealand. MBIE will apply its public interest analysis guided by this purpose of the Act.

MBIE further notes that this purpose is reflected by the test in section 10F(2) of the Act as quoted by NZFGC above, which provides 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. The emphasis of the Consultation Note was to focus on the factors MBIE would consider as required by section 10F(2) to help it address the wording in section 10F(3). MBIE will not lose sight of the importance of 10F(2) when assessing the factors set out in 10F(3), nor will it lose sight of the Act's purpose as described in section 1A.

- 2. An opportunity is being created for MBIE to undertake a second material injury analysis, when the purpose of the PIT analysis is to use the information gathered during Step 1 rather than carry out a re-investigation.**

Comments made by submitters

This issue was raised in submissions by Metals NZ and NZFGC. These submitters noted concern that an overly rigorous examination of these issues yet again could lead to a conclusion that the material injury assessment made during investigation Step 1 is being "second guessed" during the PIT

process. Metals NZ further indicated that the Consultation Note suggests a much more in depth analysis than set out in MBIE's Departmental Report to the Commerce Committee.¹

MBIE's response

MBIE notes that, to the extent that the public interest test is to assess factors of injury to the domestic industry, reference may be made to the analysis carried out in the material injury section of Step 1. However, these matters will not be re-investigated in terms of the domestic industry as this would be untimely and unnecessary. The Act does not indicate that the purpose of the PIT analysis is to reconsider the information gathered during Step 1. Additional information can be sought to properly address the matters in Section 10F(3)(a)-(h) of the Act as there are factors to consider in Step 2 that will not have been investigated in Step 1.

3. Quantitative techniques were not suggested as part of the PIT analysis when the Bill was passing through Parliament.

Comments made by submitters

This issue was raised by all submitters.

HWL indicated that in MBIE's Departmental Report, the Committee was informed that the then Bill would follow the below interpretation, and therefore did not contemplate a quantitative test:

Factors/criteria are specified in legislation but no quantitative weighting given to the factors. A conclusion will be reached based on the totality of information collected

HWL also included the following extract from the Commerce Committee report²:

Part 4 of the bill as introduced contains the criteria that the chief executive must investigate in the public interest test. The assessment of whether imposing an anti-dumping or countervailing duty is in the public interest test in the bill is subjective in nature. We were advised that MBIE would make assessments and recommendations on non-numerical values across multiple (and sometimes competing) factors. The committee examined at length how the public interest test would work in practice.

HWL further made reference to the extract below from the Consultation Note indicating that there is no mention in the Act or the Commerce Committee's report that envisages a partial quantitative test:

If the sum of the monetary impact on downstream industries and consumers materially outweighs the benefit to the domestic industry, this is a partial indicator that imposing duties will not be in the public interest (equation (19)). This will then be weighed against the other mandatory considerations in section 10F(3) for the final determination under the Act.

¹ MBIE's Departmental Report can be accessed at: https://www.parliament.nz/resource/en-NZ/51SCCO_ADV_00DBHOH_BILL69249_1_A531460/1a81cd0629cc8f00f0d89b7d4e92ea052c866c1c

² Commerce Committee Report can be accessed at: https://www.parliament.nz/resource/en-NZ/51DBSCH_SCR72071_1/b75999d48ecd6b11a77a51c6c67ed55501758f65

Lastly, HWL indicated that the Consultation Note notes that “The data requirements in these cases are substantial and not practicable for the test required in the Act”, but the use of a quantitative tool seems to be outside of Parliament’s intentions, and is not “a test required under the Act”. HWL notes that it would seem that MBIE is not acting within the intention of the legislation regarding a quantitative element.

Metals NZ and NZFGC noted that the original public interest legislation (and the relevant Cabinet paper) made no reference to an economic analysis. NZFGC noted that this appears to be a source of analysis developed post-legislation by officials.

MBIE’s response

MBIE notes that the application of economic techniques to aid in the investigation of the factors in Step 2 is no different in process from the application of the quantitative analyses that MBIE makes use of in Step 1. The techniques relied on in assessing the factors in the Act are operational matters. The Act does not specify how any factor is to be assessed: it only sets out what these factors are.

In relation to the first extract referred to by HWL, MBIE notes that this is referring to quantitative weighting of the factors in 10F(3) of the Act, not to quantitative techniques. This is intended to mean that no consideration is to necessarily carry a greater or lesser weight than another in examining the public interest, and it does not exclude the use of quantitative techniques in the assessment of each factor where appropriate, or in arriving at a conclusion based on the totality of the information.

4. The PIT needs to be able to assess and calculate the lifetime costs of the proposed purchase.

Comments made by submitters

This issue was raised by Metals NZ noting that in the building environment, the ongoing maintenance and operational costs over the life of the building are significantly greater than the initial capital costs, indicating the PIT needs to be able to assess and evaluate the life time costs of the proposed purchase.

MBIE’s response

As specified in the Consultation Note, the timeframe over which the public interest is to be considered will vary on a case-by-case basis, as different goods will be subject to different factors, such as seasonality, timing of relevant contracts, etc. Where lifetime costs of a proposed purchase are relevant, MBIE will take this into account.

5. A number of proposals in the note appear to be departures from the Canadian or European Union (EU) tests without an adequate explanation as to why New Zealand is now proposing to depart from what any other country in the world does.

Comments made by submitters

Metals NZ noted that a PIT is currently only applied in two jurisdictions, the EU and Canada, and neither of those includes an economic simulation model. NZ Steel also made reference to this issue, indicating that when introducing the public interest test the focus was on basing New Zealand’s

approach on those of Canada and the EU. This submitter noted that a number of proposals in the Consultation Note appear to be departures from the Canadian or EU tests without adequately explaining why New Zealand is now proposing to depart from what any other country in the world does. NZ Steel believes that New Zealand should be aiming for closer harmonisation with New Zealand's key trading partners, not less.

MBIE's response

MBIE's test has been developed for the New Zealand situation (where appropriate) rather than relying on overseas models. MBIE again notes that New Zealand's public interest test differs from the EU and Canadian public interest tests. Canada's test includes different factors to New Zealand's PIT and the EU's test does not specify factors in regulations, rather factors are considered on a case-by-case basis. A complete reliance on the methods of the EU and Canada would result in a departure from the Act.

Specific issues relating to the PIPES model

- 6. There are difficulties in accessing the necessary data, and PIPES oversimplifies economic effects rendering it only useful for very simplistic insight.**

Comments made by submitters

Submitters noted several concerns relating to this point.

HWL indicated that the use of a static model cannot predict changes to competition.

Metals NZ commissioned NZIER to provide an informed and independent economic response to the questions raised by MBIE. The key points raised by NZIER were:

The PIPES model is not well suited for the purpose of measuring the relative impact on domestic producers, final consumers and downstream industries, since the model oversimplifies the economic effects and does not have mechanisms to model the flow-on downstream effects on other industries and the ultimate effects on consumers.

It is well established that the major limitation of partial equilibrium models is that they only consider first-round effects and they do not consider the flow-on effects. Therefore, it cannot provide definitive insight into the public interest test, which it has been proposed to be used for.

It might offer some insight into the initial direct first-round effects, but it cannot help MBIE understand the flow-on effects upstream or downstream. It might be possible to consider the effects very broadly across multiple markets, roughly modelling markets in isolation. This means that the PIPES model could only be used to give MBIE very simplistic insight into the effect on markets. There would be no insight into the flow-on effects in the economy.

NZ Steel has also noted issues relating to PIPES' inability to reflect dynamic behaviour through time, take account of various party decisions, industry production decisions, or temporal matters. NZ Steel noted that PIPES assumes the shocked state is static, but that may only be the first round in a

dynamic environment, and noted the inability of the model to account for long term economic effects.

All parties noted difficulties in accessing reliable data, as interested parties are not obliged to provide responses, and the data may not always be reliable.

MBIE's response

MBIE notes that it was not its intention for undue emphasis to be given to the quantitative approach presented through the PIPES Model. In light of the comments received, MBIE has clarified PIPES as a framework for assessing the public interest, to reemphasise its role as a tool to help inform, where useful, some of the economic impacts of imposing duties.

In the Consultation Note, MBIE states that “the assessment of points (a), (b) and (e) **may** be informed, **to the extent practicable**, by the PIPES Model (emphasis added)”. Where sufficient reliable data is unavailable, MBIE does not intend to use the PIPES framework in its full capacity, as economic applications are only useful where the data used is complete and reliable. Where sufficient and reliable data is not available, the PIPES framework could provide empirical insight by indicating the direction of trends, or alternatively, it may not be relied on at all. The intention of the PIPES framework is to only inform considerations (a), (b), and (e), not to assess them in their entirety or to provide a definitive assessment of the public interest.

NZIER provided some detailed comments with respect to the PIPES framework. MBIE notes that it has itself identified these shortcomings. The PIPES framework is not intended to reflect dynamic behaviour through time, to account for broader impacts on the economy, to consider flow-on effects, to consider long-term impacts, or to account for changes in competition. In fact, as NZIER stated, the PIPES framework is intended to simplify economic effects and provide simplistic, and not definitive, insight. This will be reflected in the degree of importance given to any outcome of the application of the PIPES framework; no decision will be made on the base of the PIPES framework alone and it may only partially inform MBIE on considerations (a), (b) and (e).

7. PIPES does not take account of the fact that the calculated surplus to the domestic industry can be significant, whereas a loss of consumer surplus is likely to be negligible.

Comments made by submitters

This matter was raised by NZ Steel, noting that PIPES does not take account of the fact that the calculated surplus to the domestic industry can be 100% of that industry's total EBIT or economic activity (i.e. it can be 100% felt by one entity), whereas a loss of consumer surplus in the same case (on an individual consumer basis) is likely to be a negligible amount of that consumer's total economic activity, i.e., the latter is not individualised.

MBIE's response

When assessing the economic effect on consumers, a term commonly referred to is the “representative consumer”, i.e. the typical decision maker in the situation being assessed. PIPES measures how much the representative consumer in the market would lose or gain, given the effect of the duties, thereby individualising the impact on a per-consumer basis. If, as stated in the

submission, the calculated surplus to the domestic industry was 100% of that industry's total EBIT on economic activity, and the loss of consumer surplus in the same case was a negligible amount of that consumer's total economic activity, then PIPES would indicate that the cost to consumers was negligible compared to a large gain for the domestic industry.

8. It is not explained how PIPES has overcome the problems identified in the Consultation Note for other economic models.

Comments made by submitters

HWL and NZ Steel noted that it is unclear how PIPES addresses the issues arising from the other models that MBIE discussed. Both submitters made reference to the following extract from the Consultation Note:

Although these models have good theoretical foundations, they are very difficult to apply in practice. Data availability limits the level of sophistication possible when applying economic models to real life scenarios. The data requirements in these cases are substantial and not practicable for the test required in the Act. Because of this, MBIE has developed the PIPES model to assist in the considerations set out in the Act. The framework of the PIPES model is set out below.

MBIE's response

MBIE notes that the explanation of how PIPES overcomes the problems identified in the Consultation Note for other models could have been clearer. PIPES was developed by MBIE with the intention of creating a more simplistic framework than those already available in the literature. As stated in the Consultation Note, the models mentioned are highly sophisticated and require significantly more data than PIPES, which in turn limits their applicability. As noted by submitters, PIPES already presents several shortcomings related to the availability of data which will result in it not always being practicable; if MBIE was to rely on sophisticated models, the substantial data requirements would render it an impossible task. MBIE has therefore attempted to overcome these shortcomings by the creation of a simplistic framework.

9. PIPES doesn't address all considerations set out in the Act, doesn't take account of downstream industries, and has the potential to generate bias likely to be in favour of the consumer/downstream industry.

Comments made by submitters

NZIER indicated, through Metals NZ's submission, that PIPES is not helpful for providing insight for points 10F(3)(a)-(g) because the model does not capture the following considerations:

- The flow-on effects on prices for imported goods or domestic goods.
- Changes in capital to labour ratios in production.
- Any aspect of quality.
- Effects in financial performance.
- Labour market effects.
- Effects of alternative product markets.

NZFGC considers that PIPES has the potential to produce an unbalanced analysis of the public interest and generate a bias likely to be in favour of the consumers and downstream industry, which was also noted by other submitters.

NZ Steel indicated that as far as it can ascertain, PIPES cannot take account of downstream industries.

MBIE's response

In relation to the fact that PIPES does not address all considerations set out in the Act, MBIE would like to reiterate that PIPES is only intended as a framework to aid in the consideration of (a), (b) and (e).

It was also noted that PIPES does not take account of downstream industries. MBIE would like to draw attention to the following extract from the Consultation Note.

The approach taken in regards to consumers and downstream industries in the PIPES model is the same; consumers buy the good for final consumption and downstream industries buy the good for intermediate use, as an input in the production of other goods, but they all follow the economic behaviour of consumers. However, the process outlined below is carried out separately for consumers and downstream industries in order to isolate the effects. The total effect on the domestic industry is the sum of the effect derived from the consumer side modelling and the downstream industry side modelling.

The effect on downstream industries can be assessed, and this takes place separately from the effect on consumers. To assess all effects PIPES is to be run twice: once to assess the effect on consumers and the domestic industry; and a second time to derive the effect on downstream industries and the domestic industry.

Several comments provided by submitters relate to the perceived potential of the PIPES framework to produce an unbalanced analysis of the public interest and generate bias likely to be in favour of the consumer/downstream industry. MBIE notes that where PIPES is used, the exercise may provide insight into all parties that the Act states are to be considered; there is no internal weighting mechanism to attribute any more weight to consumers or downstream industries than the domestic industry: it is an objective framework that takes account of all parties equally.

10. More weight is given to numbers arising from economic modelling, which tend to outweigh qualitative conclusions.

Comments made by submitters

This issue was raised by NZFGC, indicating that more weight is usually given to numbers arising from economic modelling, which tend to outweigh qualitative conclusions, and would be contrary to the wording and intent of the legislation.

MBIE's response

MBIE would like to reiterate that no weighting is given to any of the considerations. Any outcome from economic assessments would be considered alongside all other considerations in the Act.

11. MBIE advised that consumer welfare empirical analysis will always drive to duty imposition failing to be in the public interest.

Comments made by submitters

NZ Steel indicated that MBIE previously advised that consumer welfare empirical analysis will always drive to duty imposition failing to be in the public interest. NZ Steel notes that this known outcome is precisely why the empirical welfare approach was rejected. The submitter referred to the extract below from the Commerce Committee Report:

We are aware that a number of options were considered regarding the development of a public interest test for New Zealand's anti-dumping and countervailing duties regime. One of these options was a total welfare analysis, which proposed an analysis of both economic and non-monetary impacts of imposing duties. It is likely to have involved complete cost-benefit quantification. We see that this option was subsequently rejected because it would result in duties almost never being imposed because of a net loss to the economy.

NZ Steel noted that it is difficult to see why MBIE would wish to inform its PIT using an empirical, non-subjective model which it knows will only ever drive for duty non-imposition.

MBIE's response

In relation to this point, MBIE notes that the extract above makes reference to the rejection of a total welfare analysis, not to the rejection of quantification techniques for a bounded public interest test. The above extract was followed by the paragraph below:

National Party members conclude that the bounded public interest test proposed in the bill achieves the appropriate balance between continuing to provide assurance to domestic producers that they can seek relief from dumped and subsidised injurious imports, and taking into account the wider public interest.

As indicated by submitters, this concern was confirmed by the worked example included in the Consultation Note. MBIE would like to note that this exercise was purely a demonstration of the PIPES framework, and is not indicative of the direction of the outcome in future exercises.