

New public interest test for anti-dumping regime?

The Government is considering inserting a new public interest test into New Zealand's anti-dumping and countervailing duties regime.

Submissions are due by 30 June 2014.

The proposal is among a number of reform options outlined in a discussion paper released by Commerce Minister Craig Foss last week. It follows the suspension last month of anti-dumping duties on imported construction products.

The current regime

The present law is intended to protect local manufacturing industries. It effectively requires the Minister of Commerce to impose anti-dumping duties on imported goods where:

- an investigation finds the imported goods to be dumped or subsidised, and
- the dumping of those goods is causing or threatening to cause material injury to a domestic industry.

But the Government is increasingly concerned that these protections may be doing more economic harm than good by:

- reducing competition in local industries
- causing higher prices to domestic consumers, and
- adversely impacting New Zealand's terms of trade.

Reform options

The Ministry of Business, Innovation and Employment (*MBIE*) is suggesting that officials should have flexibility not to impose anti-dumping duties in some cases under a "bounded public interest test". This approach is in line with EU and Canadian law. Australia, however, recently decided not to follow this route. It instead retains a ministerial discretion (which is hardly ever used) not to impose duties on public interest grounds.

The discussion paper offers two alternative approaches:

- the provision of (subjective) public interest criteria, or
- the provision of (objective) numerical thresholds.

In both cases the tests would be an additional final step in the existing decision making process.

Public interest criteria

This option would give the decision maker (MBIE or the Minister) a broad discretion to impose duties after taking account of factors such as:

- the competitive effects on local markets (including any lessening of competition)
- the impact on employment in the domestic industry and associated upstream industries
- any potential harm on downstream industries, including their ability to access necessary inputs, and
- whether duties would restrict consumer choice or availability of goods at competitive prices.

Numerical thresholds

In contrast to the public interest test, this option would include fixed thresholds and so limit the amount of discretion the Minister can exercise.

Suggested criteria include:

- the market share of the domestic industry (as an indicator of the number of market participants that would benefit), and
- the domestic cost of production vs. the price of the imported goods when duties are imposed (as an indicator of the effectiveness of the duties in reducing the harm suffered by the domestic industry).

Neither list is fixed

MBIE has requested submissions on both criteria lists and whether any other factors should be added. MBIE, for example, suggests that the long term viability of the domestic industry absent the duties should be included in the public interest criteria.

MBIE also invites feedback on the weight to be given to domestic producers' interests relative to other participants in the New Zealand economy, such as consumers. This wider question overarches the entire proposal.

Chapman Tripp comments

While anti-dumping duties may be imperfect, any reform of the anti-dumping regime needs to be careful to ensure a fair competitive platform for New Zealand manufacturers. Relaxing the anti-dumping test will make it harder for New Zealand manufacturers to withstand price undercutting from low-cost importers.

Even if we choose reform, the two MBIE proposals are quite different, and their policy goals and potential consequences will need to be carefully thought through. For example, the public interest test is far more fluid than the existing regime. It potentially gives elected Ministers a much greater role in deciding which industries to protect. The thresholds, while appearing more "certain", are likely to be hard to draft and may deprive the Government of future flexibility.

We encourage local industries and importers to participate in the consultation.

Our thanks to
Colin Fife and
Campbell Herbert
for writing this
Brief Counsel.



DANIEL KALDERIMIS – PARTNER

T: +64 4 498 2409
M: +64 27 599 5839
E: daniel.kalderimis@chapmantripp.com



MATT SUMPTER – PARTNER

T: +64 9 357 9075
M: +64 27 531 3919
E: matt.sumpter@chapmantripp.com



CHRIS DANN – SENIOR ASSOCIATE

T: +64 3 353 0026
M: +64 27 672 8721
E: chris.dann@chapmantripp.com

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AUCKLAND

23 Albert Street
PO Box 2206, Auckland 1140
New Zealand

T: +64 9 357 9000
F: +64 9 357 9099

WELLINGTON

10 Customhouse Quay
PO Box 993, Wellington 6140
New Zealand

T: +64 4 499 5999
F: +64 4 472 7111

CHRISTCHURCH

245 Blenheim Road
PO Box 2510, Christchurch 8140
New Zealand

T: +64 3 353 4130
F: +64 3 365 4587