

30 June 2014

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Dear Sirs

### **Discussion Paper on Introducing a Bounded Public Interest Test into New Zealand's Anti-Dumping Regime**

Thank you for the opportunity to comment on the above document.

The New Zealand Manufacturers and Exporters Association (NZMEA) represent the interests of manufacturers and exporters throughout New Zealand.

The Association is New Zealand's only focused and independent voice for manufacturers and exporters. Members make over \$6 billion in sales per year, with an export value of around \$3 billion. The Association can trace its beginning back to the early history of New Zealand.

The Association also includes in its membership affiliate organisations such as the Wood Processors Association, the Engineering Printing & Manufacturing Union Inc, the Heavy Engineering Research Association (HERA), and Plastics New Zealand.

### **Comment Regarding Other Submissions**

The NZMEA is aware of the submissions being made by the Wood Processors and Manufacturers Association, Carter Holt Harvey and the Building Industry Federation regarding the above discussion document, and we support their comments.

### **Our General Comments on Public Interest Test**

Any consideration of dumping and countervailing duties between firms in different jurisdictions is largely equivalent to the consideration around firms in the same jurisdiction using predatory behaviour to build market power. Any action that diminishes competition or harms the capacity of competitors to compete by other than legitimate means are discouraged in legislation.

The Commerce Act sees predatory behaviour by firms in the domestic market as something to be legislated against. So in the local context, at least, the short term consumer/public interest in lower prices is balanced against the longer term consumer/public/business interest in effective market competition. Having lower prices today but facing monopoly rents in the future is not in the consumer/public interest.

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This trade-off of short term lower prices against the medium and long term erosion of competition is not confined to a domestic market and importantly is extended between jurisdictions as policy differences come into play. Multilateral trade agreements have long recognised predatory pricing, “dumping” in trade terms, and the need to balance policy settings between jurisdictions through countervailing duties. The most obvious policy difference in this regard would be export incentives in one jurisdiction that are absent in another, thereby distorting competition. This can operate on both New Zealand imports and exports; an example on exports would be the differential Value Added Tax rates into China on logs and sawn timber to the disadvantage of New Zealand wood processors.

Both dumping (selling under cost or under the selling price in the producers jurisdiction), and countervailing duties (balancing policy differences between countries) are important parts of the multilateral and bilateral trade arrangements, and the public/consumer interest is not best served by a price only focus. Preserving competition is an important part of any balanced and mature consideration.

The suggestion that this changes in a short term crisis is strained – at any time the trade off between the desire for lower prices and healthy competition, and what that does to prices over time remains regardless of any immediate prevailing conditions. It is always a trade-off between short term and long term interests. Any consumer based test will tend towards “lower prices every day” as it is always better to pay less (without any other consideration), but the short term consumer desire for lower prices can only be in the wider interest if, and only if, it does not lead to structurally lower levels of competition. That is lower prices that lessen competition (dumping/predatory pricing or the impact of inter-jurisdictional imbalances) will only be transient in nature and will inevitably rise, extracting economic rent at some point. This would not be in the public/consumer interest.

The introduction of a public interest test that focuses on “lower prices every day” and disregards the protections any local producer should be able to expect from any trade agreement (dumping and countervailing duties) would threaten local productive investment, local jobs and competition in New Zealand.

There is a further danger of focusing on lower prices – what of the quality or specification dimension? Products may be cheap, but are they equivalent? New Zealand has not built infrastructure around product compliance and conformance surveillance or for that matter, long term stability for productive investment. These are factors that need to be considered more closely in trade regulations and negotiations. We have reports from members of offers of completely built up products at 10% of the material cost in New Zealand, others indicate that it is not unusual to be offered product at less than the New Zealand material price. These offers are good cause for worry, cheap absolutely; value, maybe not. This is happening for both for products and capital systems.

An “all that matters is price” approach will damage our economy and the level of competition within it. The status quo indicates few dumping actions; this means little, seeking a dumping action is incredibly complex, difficult and expensive process - few have the wherewithal to see it through. Some have chosen just to give up, but examples of loss of business to foreign competition abound with comments like “we lost the contract against a price we could not buy the material for” or “our competitors just discharge pollutants to air and we have to spend big to catch them” or “nobody in Wellington gives a bugger it is just about cheap” “dumping duties? It just got too hard”. Far from diluting these provisions with a public interest element, our members would invest more in productive enterprise if the dumping and countervailing duties activity were tightened and amplified.

Local producers, or even potential producers, are entitled to expect protection against predatory practice regardless of its source (local, dumped or policy difference) and any public interest test should have a high bar and the preference within the Act that, "...having made a determination of dumped or subsidised goods and material injury<sup>1</sup>, the Minister shall impose a duty unless there is *considerable evidence* that it is not in the public interest to do so, taking into account the following matters...".

We also agree with the comments in the WPMA submission regarding the decision of the Australian Government to reject the Australian Productivity Commissions recommendation to weaken anti-dumping legislation. The following comments from the Australian Government are particularly important, of which we agree and believe also apply in the case of New Zealand:

"An anti-dumping system has become a standard feature of the international trade policy landscape. More than 90 countries have one. As there is no international competition law regime, an anti-dumping system is the only means by which unfair market behaviour can be deterred at the global level. A well-administered anti-dumping system has several welcome efficiency effects. These include avoiding the depreciation of the skills and capabilities of the labour force and of industry, encouraging capital investment by providing greater certainty in the competitive environment. The Australian anti-dumping system provides an effective and relatively low cost means for import-competing firms to seek redress for material injury caused by unfair trading practices. A rigorous and well-resourced anti-dumping regime will better secure our industries and our workforce from unfair trade practices."

<sup>1</sup> It is worth noting that the material injury should be extended beyond the existing producers to also consider potential new entrants into a market. Clearly if price is destroyed well below any legitimate level there will be no new entrants into a market that has been rubbished once (through dumping etc), lowering potential future competition and acting as a barrier for new industry.

#### **Questions for Submitters:**

*1. Do you agree that MBIE has identified the relevant policy objectives and process criteria for introducing a bounded public interest test? If not, please provide your own views in this respect. This is important because any option examined by MBIE will be measured according to the extent to which it meets the established policy objectives and process criteria identified (see below).*

We do not agree. Are domestic producers a group that are not entitled the protection of domestic legislation? Surely the objective is to prevent cross border predatory pricing (dumping) or balance the competitive impact of cross border policy differences (countervailing duties) – both are anti-competitive. The first applies between domestic competitors, so why dilute them just because it is a cross border issue? In practice it is very hard to progress dumping and countervailing duties, more should be done to support such actions.

For example we received the comment from a member, "It really is bloody hard to get dumping duties imposed and I only know of a couple of cases, and as for safeguards I don't know of a case where they have been used."

\* It is worth noting that the material injury should be extended beyond the existing producers to also consider potential new entrants into a market. Clearly if price is destroyed well below any legitimate level there will be no new entrants into a market that has been rubbished once (through dumping etc), lowering potential future competition and acting as a barrier for new entrants.

**2. Do you agree with the assessment (in the bullet points above) of whether or not the status quo meets the assessment criteria? If not, please provide your own views in this respect.**

Firstly, we disagree with the assessment that, "The status quo maintains the integrity of the anti-dumping and countervailing duties regime in that it ensures that domestic industries continue to have the ability to quickly and effectively seek anti-dumping and countervailing duties when faced with injurious dumped or subsidised goods."

We have had feedback from members that they believe there are cases where dumping is occurring, but it proves too hard to get anti-dumping or countervailing duties in place. The status quo does not adequately protect producers or control dumping into New Zealand, damaging domestic businesses and competition.

Although this may be a problem with the status quo, the introduction of a public interest test would serve only to add additional barriers to putting duties in place when dumping occurs, while also biasing the decision to favour short term lower costs more than the status quo. For this reason we favour upgrading, not diluting, the status quo.

**3. Do you consider MBIE has identified the correct criteria to be considered in relation to whether or not to impose duties (under Option 1)? If not, what additional or different criteria do you consider should be included? Please explain the rationale behind your suggestions.**

It is clear that such criteria will inevitably add further bias towards not imposing anti-dumping or countervailing duties in favor of lower prices in the short term. Although this may have some consumer/public benefit in the short term, dumping will result in long lasting damage to domestic producers, which is vital for sustaining investment, competition, employment and growth.

We agree with the alternative criteria outlined in the BIF submission in this regard.

**4. Do you agree with the assessment (in the bullet points above) of whether or not Option 1 – the provision of criteria on public interest matters – meets the assessment criteria? If not, please provide your own views in this respect.**

In practice, setting and balancing the criteria for Option 1 could be a challenge and a costly exercise. The introduction of the test could act as a further barrier for firms seeking duties as a result of observed dumping, creating far less certainty than the status quo.

We agree with the alternative criteria outlined in the BIF submission in this regard.

**5. What additional benefits, costs, or risks could result from amending the Act to provide criteria on public interest matters that the Minister should take into account when deciding whether or not to impose a duty? Please explain your answer.**

Lower investment in the productive sector in New Zealand flows from less certainty on the expectation of protection against dumping or competitive distortions in the exporting jurisdiction – therefore any effect on future investment should be considered. This should include the effect dumping has on the potential for new domestic industries in New Zealand.

We generally agree with the changes outlined in the BIF submission.

**6. Do you consider MBIE has identified the correct numerical thresholds to be considered in relation to whether or not to impose duties (under option 2)? If not, what additional or different numerical thresholds do you consider should be included? Please explain the rationale behind your suggestions.**

Generally, on this point we agree with the submission by BIF. We reject the notion of thresholds; anti-dumping and countervailing duties are matters of principle, domestic producers are entitled to protection against market distortions. Otherwise investment, employment and jobs are threatened in the productive sector.

**7. Do you agree with the assessment (in the bullet points above) of whether or not Option 2 – the incorporation of numerical thresholds (or ‘black and white’ tests) – meets the assessment criteria? If not, please provide your own views in this respect.**

Generally we do not agree with numerical thresholds for use as a definitive public interest test. While these may be useful indicators, they should not completely define a decision. Numerical thresholds do not allow for discretion and are too ‘black and white’ for considering many of the situations which could arise.

We believe such a test should only be used as additional information in the process if required.

**8. What additional benefits, costs, or risks could result from the amending the Act to provide numerical thresholds (or ‘black and white’ tests) to determine whether or not a duty is in the public interest? Please explain your answer.**

We support the BIF comment.

**9. Do you agree with the overall comparison of Options in Table 1? Please explain your answer.**

See our response to Question 1.

**10. If a combination of Option 1 (public interest criteria) and Option 2 (numerical thresholds) was progressed, what elements of each option would you support and why?**

In any instance, we believe that numerical thresholds have risk of missing key factors in its consideration. As such, numerical thresholds should only be used as added reference information. Any decision based on numerical thresholds would need to be considered with discretion – this could be added in conjunction with the status quo.

We agree with the comments by BIF.

**11.** *Should there be a presumption in favour of imposing duties (where there is injurious dumping or subsidisation) which can be overturned by the application of a bounded public interest test? Or, alternatively, should equal weighting be given to the interests of domestic producers and other parties when applying the public interest test? Please explain your answer.*

To be clear, predatory pricing (dumping) would be illegal behaviour for a domestic company, if dumping is proven then duties should be applied immediately. Any public interest test applied subsequently should address compensation for the local producer and the completion issues. Domestic producers and domestic investment should have some expectation of protection against anti-competitive practices regardless of their origin.

For cases where it can be shown that dumping has occurred, it should be presumed that duties are put in place as a response. We believe it is important, that in the first instance of dumping, domestic producers are protected, while maintaining strong levels of competition.

We believe there should be such assumption as outlined, for example "...having made a determination of dumped or subsidised goods and material injury (or the threat to new entrants), the Minister shall impose a duty unless there is *considerable evidence beyond reasonable doubt* that it is not in the public interest to do so, taking into account the following matters..."

Such a presumption will ensure duties are still available when needed. If the preference is equal, or biased towards consumers, duties will become significantly harder to obtain, even when dumping is proven, due to short term preference for lower prices.

**12.** *What should be the process for initiating a public interest assessment as part of the decision of whether or not to impose a duty (e.g. should a public interest assessment be undertaken automatically or only on request from an affected interested party who provides sufficient evidence that the duties would not be in the public interest)? Please explain your answer.*

If a public interest test were to occur, it would make sense to be a second step, only if initiated by an interested party or identified as an area of particular importance warranting a public interest test. As explained in the above Question 11, we believe it is important for businesses to be able to have duties imposed immediately if dumping is observed and the claim is substantiated.

We believe this order of consideration would be correct if a public interest test were introduced, ensuring that in the first instance, domestic producers are protected against dumping or predatory pricing from offshore.

Once dumping is proven and duties applied it would be up to the dumping entity to argue that public interest test should be applied.

**13.** *Should interim duties apply during the public interest assessment if dumping/subsidisation and material harm have been found? Please explain your answer.*

Yes, as we should be discouraging any form of predatory pricing, even during the testing process – the timeline for this should fit current guidelines. Imposing interim duties will stop a loop hole forming where dumping occurs during the testing process.

**14.** *Do you agree with that the above procedural matters should be dealt with in the manner proposed above?*

We agree with requiring assessment of a public interest test within a limited timeframe, such as 60 days. This would be important for keeping certainty and consistency in the process. Decisions should also be made public to ensure transparency of the system.

**15.** *Should there be a limit on the time allowed for undertaking a public interest determination? If so, how much time should be allowed and why should the limit be set at the level you have proposed?*

Time frames need to be fast enough as to limit administration costs, to keep a high level of transparency and certainty for the applicants and effected parties.

If the dumping entity applies to have the public interest test applied, the company who won the dumping action should have any protection in law to comment and resist the public interest test?

**16.** *In addition to the matters listed above, do you consider there are other procedural matters MBIE would need to consider if it adopted a public interest test? If so, what are these other procedural matters and how could MBIE best address them in any public interest test adopted?*

Yes MBIE should consider:

- How it can be demonstrated that a public interest test is required.
- How criteria will evolve and who will be included in the discussion, beyond those immediately involved.
- Imposing strict timelines on the application of a public interest test to a decision to apply dumping duties.

We received late comment from a member and this is included as part of our comment and we refer you to the attached paper. . We generally agree with the comments made in this post script.

We appreciate the opportunity to comment on the above and should you require clarification on any of the points made, please do not hesitate to contact me.

Yours sincerely



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Encl

30 June 2014

*Post Script:*

We received late comment from a member and this is included as part of our comment. We generally agree with the comments made as follows:

*"I understand that you are finalising a submission to MBIE on a public interest test in regard to dumping and countervailing duties, you may wish to think about the following bullet points:*

- *Including a public interest test in New Zealand's legislation may compromise access to the WTO disputes procedure for interested parties.*
- *The perception of industry in New Zealand is that the trade remedies mechanism is difficult to access. Adding a further layer of investigation, time and cost will not improve this perception.*
- *It seems likely that the public interest test will be analysed under competition law principles. Competition law and trade remedy law are not compatible.*
- *The introduction of a public interest test will result in uncertainty, increased political intervention, and dilution of the effectiveness of the trade remedies regime.*
- *The inclusion of a public interest test may well compromise current and future free trade agreement negotiations.*
- *It is unclear whether the public interest test analysis would be undertaken by the same officials who investigated the allegations of dumping/subsidisation. These two functions require different skill sets and approaches.*
- *The extended timeframe that will necessarily arise out of a public interest test analysis might reduce the timeliness of any trade remedy mechanisms that are imposed.*
- *Should it be decided that a public interest test will be included, this should be limited to dumping measures only, and not to countervailing measures.*

*As a general comment, the short timeframe for submissions suggests to us that MBIE is trying to rush this through with minimum consultation. It is important that these submissions are taken into account in a subsequent **issues paper**, which could also be circulated for comment before a final report goes to Ministers. There is time to do this as officials have advised us that nothing is going to happen with this Study before the Election."*

