

TRADE (AUSTRALIA AND NEW ZEALAND) BILL

DELEGATED POWERS – MEMORANDUM BY THE DEPARTMENT FOR INTERNATIONAL TRADE

A. Introduction

1. This Memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist it with its scrutiny of the Trade (Australia and New Zealand) Bill (“the Bill”) published on 11 May 2022. The Memorandum has been prepared by the Department for International Trade (“the Department”). This Memorandum identifies the provisions of the Bill that confer a power to make delegated legislation and explains why the power has been taken and the nature of, and the reason for, the procedure selected.
2. The Bill has one provision containing a delegated power for two purposes provided for respectively in clause 1(1)(a) and (b). These place on the face of the Bill the principal aspect of Government policy for the implementation of the free trade agreements that the UK has concluded with Australia and New Zealand, described further below. Each clause is explained in Section C of this Memorandum. In summary, the power in clause 1 relates to the implementation of the government procurement Chapters of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia, done at London on 16 December 2021 and at Adelaide on 17th December 2021 (“UK-Australia FTA”) and the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and New Zealand, done at London on 28 February 2022 (“UK-New Zealand FTA”) (together “the Agreements”).¹
3. The Department has considered the use of the power in the Bill as set out in this Memorandum and is satisfied that the power is necessary and justified.

¹ “Free trade agreement” is defined in section 5(1) of the Trade Act 2021 to mean “an agreement that is or was notifiable under paragraph 7(a) of Article XXIV of GATT, or paragraph 7(a) of Article V of GATS”.

B. Overview and purpose of the Bill

4. The Bill provides a power to give effect to the UK's procurement obligations in the government procurement Chapters of the Agreements. The power also provides for making regulations for matters arising out of or related to the government procurement Chapters of the Agreements, including to secure that regulations made under clause 1 are of general application.
5. The UK's existing domestic legal regime that regulates public procurement relevant to the Bill is provided for in six sets of secondary legislation (the "Regulations"): the Public Contracts Regulations 2015 (PCRs),² the Utilities Contracts Regulations 2016 (UCRs),³ the Concession Contracts Regulations 2016 (CCRs),⁴ the Public Contracts (Scotland) Regulations 2015 (PCSRs),⁵ the Utilities Contracts (Scotland) Regulations (UCSRs),⁶ and the Concession Contracts (Scotland) Regulations 2016 (CCSRs).⁷ The Regulations were made under Section 2(2) of the European Communities Act 1972 when the UK was still a Member State of the EU. Accordingly, now that the UK has left the EU, it does not have powers to make changes to its domestic procurement law to implement procurement obligations in the Agreements.
6. The Trade Act 2021 provides a power in Section 1 to implement procurement obligations in the World Trade Organization Agreement on Government Procurement, and a power in Section 2 to implement obligations in certain international agreements to which the UK is a signatory if the other signatory or signatories and the European Union were signatories immediately before exit day (31 January 2020). The scope of these powers would not cover implementation of the procurement obligations in the UK-Australia FTA or UK-New Zealand FTA.
7. The UK-Australia FTA will play an important role in levelling up the UK. It is expected to unlock £10.4 billion of additional trade, boost the economy and increase wages. The UK-New Zealand FTA will increase the £2.3 billion worth of

² SI 2015/102.

³ SI 2016/274.

⁴ SI 2016/273.

⁵ SSI 2015/446.

⁶ SSI 2016/49.

⁷ SSI 2016/65.

trade with New Zealand by almost 60%, boost the economy and increase wages across the country. The deals will strengthen trade ties in the Asia Pacific region and deepen links with like-minded democracies. The new delegated power in the Bill will enable the making of regulations to implement the procurement obligations under the Agreements to ensure that the UK is not in breach of the Agreements on their entry into force when businesses will be able to access the benefits of the Agreements.

C. Analysis of the Delegated Power by Clause

Power to make regulations to implement the government procurement Chapters of the Agreements (clause 1(1)(a))

Power conferred on:

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

8. To ensure the UK is compliant with its international obligations in the Agreements on their entry into force, the UK must implement in domestic law the obligations under the Agreements. To this end, the UK will need to implement the obligations under the government procurement Chapters of the Agreements. This is the only aspect of the Agreements that requires new primary legislation for their entry into force. The Bill provides for an anticipatory exercise of the power to make regulations before the Agreements have been ratified (Part 3 of Schedule 2 to the Bill (anticipatory exercise of section 1 power)) so that the UK would be able to make regulations to commence on the dates the Agreements enter into force, when the obligations in the Agreements would become binding on the UK. Making regulations in advance of ratification would help to ensure that the UK can bring

the Agreements into force without delay so that the benefits in the Agreements may begin to accrue.

9. The power in clause 1(1)(a) is needed to ensure that amendments can be made to the Regulations to implement the UK's obligations in the government procurement Chapters of the Agreements. The power has two legislative functions described below.
10. First, it allows for the legislative implementation of the procurement obligations in the government procurement Chapters of the Agreements for their entry into force. This includes amending the Regulations to:
 - (a) extend the duties owed by contracting authorities, and remedies available, in the Regulations to the suppliers of the relevant countries for procurement covered by the respective Agreements. For example, amendments will be required to add the Agreements into the Schedules of International Trade Agreements in the Regulations as appropriate.⁸
 - (b) bring certain rules in the Regulations in line with the rules in the text of the government procurement Chapter of the UK-Australia FTA (the government procurement Chapter of the UK-New Zealand FTA does not contain provision on rules that require changes to domestic law). The specific areas of the Regulations that are expected to be amended relate to rules regarding (i) unknown contract values, (ii) notices advertising procurements, and (iii) termination of awarded contracts.
11. Second, it ensures that the Agreements remain operable in the UK after entry into force, by allowing for subsequent legislative implementation of any adjustments to the obligations over the lifetime of the Agreements. For example, Parties to the Agreements are permitted to modify their market access coverage in their respective Schedules contained in the Annex to the government procurement Chapters of the Agreements, which list the entities, types of procurement (e.g. specific categories of goods or services) covered by the Agreement, and the

⁸ See Schedule 4A of the PCRs, Schedule 3 of the UCRs, Schedule 4 of the CCRs, Schedule 4A of the PCSRs, Schedule 2A of the UCSRs, and Schedule 5 of the CCSR.

financial thresholds which determine coverage. Modifications to the Annex could for example include the transfer of an entity from one Section of the Schedule to another, withdrawal of an entity, or another modification. These modifications may become effective in international law as soon as 45 days from the date of notification if the other Party does not object. The Joint Committee of the relevant Agreement would amend the Schedules to reflect an agreed modification with which, when it enters into force under international law, the UK would be legally required to comply. However, this function of the power is expected to be replaced by a power in the Procurement Bill, which is proposed to provide for the making of provision for the future implementation of procurement obligations of this type in trade agreements (i.e. market access obligations as described in paragraphs 10(a) and 11, but not other rules changes as described in paragraph 10(b)) (see paragraphs 13 to 15 below).

12. Clause 2(1) (further provision about power) provides that regulations made under clause 1(1) may make: provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(a).

Relationship with the Procurement Bill

13. The Procurement Bill was introduced in the House of Lords on 11 May 2022. That Bill is intended to reform the existing procurement regime in the UK and, amongst other things, (i) revoke the Regulations for England, Wales and Northern Ireland and replace them with new primary legislation (the existing Regulations that apply to Scotland will be retained)⁹, and (ii) provide for the implementation of market access obligations in trade agreements (and any amendments or modifications), by providing a power, including for Scotland, to extend the duties owed by contracting authorities, and remedies available, in the relevant procurement

⁹ Clause 115(1) of, and Schedule 11 to, the Procurement Bill, as amended on Lords Report (HL Bill 75, 30 November 2022).

legislation to the suppliers of the relevant countries for procurement covered by those agreements¹⁰.

14. The Procurement Bill's proposed power to implement trade agreements would be able to provide for the matters described in paragraphs 10(a) and 11 (market access obligations). However, the Procurement Bill would not provide for implementation of the rules changes in paragraph 10(b) in the Regulations that apply to Scotland. In addition, relevant provisions of the Procurement Bill are not anticipated to enter into force within the timeframe that applies to the need for implementation of the Agreements (for example, there intends to be a six months' notice "go-live" period before the new regime under the Procurement Bill enters into force). Accordingly, the clause 1(1)(a) power is needed for full implementation in the UK and entry into force of the Agreements without delay.

15. It is anticipated that the Bill will enter into force before the Procurement Bill. To the extent that implementation of the matters described in paragraphs 10(a) and 10(b) have taken place, the Procurement Bill is proposed to repeal the Trade (Australia and New Zealand) Bill (as enacted) and save relevant statutory instruments. The legislative function for implementing adjustments over the lifetime of the Agreements, described in paragraph 11, would be substantially replaced and provided for by the trade agreement implementing power in the Procurement Bill. Accordingly, the future facing aspects of clause 1(1)(a) are intended to be temporary, filling the gap until new power is provided for in the Procurement Bill.

Justification for delegation

16. Clause 1(1)(a) is delegated to enable the detailed changes needed to be implemented in the current Regulations (broadly described in paragraph 10) to be made for when the government procurement obligations in the Agreements enter into force and to afford the necessary flexibility to enable future changes to the government procurement Chapters of the Agreements (described in paragraph 11) to be implemented over their lifetime or until the power is replaced. This is not solely to meet the exigencies of the timeframe for entry into force but to meet the

¹⁰ Clauses 88(3) and 118(4) of, and Schedule 9 to, the Procurement Bill, as amended on Lords Report (HL Bill 75, 30 November 2022).

principle that detailed implementation may be left to delegated legislation, while the policy is described by the wording of the power.

17. Regarding the changes needed for entry into force of the Agreements, a delegated power may help to address any uncertainty as to domestic procurement law that arises from the outcomes or passage of the Procurement Bill relative to the Trade (Australia and New Zealand) Bill. To ensure the Bill takes account of the status of UK procurement legislation at the time of entry into force of the Agreements (i.e. to provide for both potential situations of pre and post reform, noting the intention that the Procurement Bill would be able to implement some of the necessary changes, as set out in paragraph 14), the power is delegated to afford flexibility to implement any required changes in that legislative framework.
18. Because there are expected to be changes to the government procurement Chapters of the Agreements over their lifetime, a delegated power provides the flexibility needed to enable further implementation in the future, or until the Procurement Bill enters into force and supplies a replacement power for such implementation. As described in paragraph 11, it is not clear what the changes will be or when exactly they will arise, and a delegated power can accommodate that uncertainty. Given such modifications to the Agreements can enter into force and bind the UK quickly, it is also important that a delegated power exists to ensure the UK can implement changes efficiently without the need to find Parliamentary time for primary legislation and that the UK can continue to comply with its procurement obligations in the Agreements.
19. A power for future implementation will also provide greater efficiency and put less burden on Parliamentary resource than passing new primary legislation for future amendments. The Parliamentary time for passing primary legislation to implement these types of changes (i.e. modifications to the schedules in the Annex to the government procurement Chapters of the Agreements) is unlikely to be commensurate with the significance of those changes.
20. There is precedent for taking a delegated power to implement an international agreement which the UK has signed or to which it is about to accede. The Trade Act 2021 contains powers that allow an appropriate authority to make provision by

secondary legislation to implement the World Trade Organization (WTO) Agreement on Government Procurement¹¹, and certain international trade agreements as described in paragraph 6.

Justification for negative procedures

21. For implementation of the procurement obligations for the entry into force of the Agreements, Parliament will have had the opportunity already to scrutinise the Agreements, including the government procurement Chapters, and both the UK's and the other Parties' market access schedules, before the power is exercised. The Agreements will be laid before Parliament pursuant to the Constitutional Reform and Governance Act 2010 (CRAG). Accordingly, the provisions of the Agreements will be clear to Parliamentarians and the procurement obligations in the Agreements will not result in any unexpected changes to domestic law for the entry into force of the Agreements. The scope of the power in clause 1(1)(a) is limited to implementing the government procurement Chapters of the Agreements, and so could not be exercised outside that purpose to make other changes. The negative procedure is appropriate as Parliament is unlikely to need to debate the content of the regulations.

22. The changes to the Regulations, described in paragraph 10, will be largely technical to ensure suppliers from Australia and New Zealand are extended the legal rights and remedies that exist in domestic law for procurement covered by the Agreements, and ensure alignment with certain rules in the UK-Australia FTA. These changes are not anticipated to substantially affect how contracting authorities undertake procurement. Accordingly, the changes that would be made are not significant enough to justify a procedure that involves greater Parliamentary resource.

23. Regarding ongoing changes to the government procurement Chapters, the Agreements specify how such changes may be made, including modification and rectification procedures in the government procurement Chapters¹² or under

¹¹ Agreement on Government Procurement, as amended on 30 March 2012.

¹² See Article 16.20 of the UK-Australia FTA and Article 16.21 of the UK-New Zealand FTA.

general amendment provisions of the Agreements.¹³ In principle, under international law, parties are free to amend treaties notwithstanding that these provisions are included in the Agreements. The amendment provisions of the Agreements, including to adopt changes pursuant to the modification and rectification procedures in the government procurement Chapters will have also been scrutinised as part of the CRAG process for the Agreements. The scope of the power is limited to implementing those changes made to the government procurement Chapters in the Agreements as the Agreement is modified from time to time in accordance with any provision of it (see clause 1(5)). The power accordingly does not apply to amendments made under any additional discretion under international law as to how the UK may amend the Agreements and hereby supports the appropriateness of the negative resolution scrutiny procedure.

24. It is anticipated that most updates, as described in paragraph 11, will reflect uncontroversial machinery of government changes. The types of amendments to the Regulations required to reflect the updates would not justify the use of Parliamentary time that would otherwise accompany an affirmative procedure. In a situation that updates were considered more significant, the Government has previously indicated its intention that the majority of important treaty amendments should be subject to ratification and therefore will be submitted to Parliament for scrutiny in accordance with CRAG.¹⁴ However, as the method of consent to be bound by a treaty amendment (e.g. ratification), is subject to negotiation on a case by case basis with treaty partners, it is not possible for the UK to take a unilateral position as to what modifications will be subject to CRAG. In the circumstances, even given the full extent of the power, the negative procedure is appropriate.

25. As described in paragraphs 13 to 15, the Procurement Bill is expected to provide a power so that the UK can continue to implement its government procurement market access obligations in free trade agreements, including these Agreements, once that new legislation enters into force. Accordingly, the power in this Bill which would allow the UK to implement future updates to the government procurement

¹³ See Article 32.2 of the UK-Australia FTA and Article 33.3 of the UK-New Zealand FTA.

¹⁴ Government Response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices, at page 8. See: <https://committees.parliament.uk/publications/2742/documents/27116/default/>

obligations in the Agreements is only required and applicable during the gap until the relevant provisions of the Procurement Bill enter into force. It is not anticipated that this function of the power would need to be exercised during this period as no changes to the government procurement Chapters that require implementation are likely to arise in the short-term following the entry into force of the Agreements. Nevertheless, the power provides the necessary assurance that the UK can comply with its obligations during this period. It should also be noted that as the Procurement Bill is proposed to make provision for procurement in primary legislation, the clause 1(1)(a) power, which does not allow for the amendment of primary legislation, would not be able to amend that new legislation. These limitations support the choice of a negative resolution procedure for scrutiny of the power.

26. The UK-Australia FTA enters into force 30 days after the date on which the Parties exchange written notifications confirming that they have completed their respective domestic requirements necessary for the entry into force of the Agreement, or on such other date as the Parties may agree.¹⁵ The UK-New Zealand FTA enters into force on a date agreed between the Parties following an exchange of written notifications confirming that they have completed their respective domestic requirements necessary for the entry into force of the Agreements.¹⁶ Making the delegated power subject to the negative resolution procedure enables regulations to be made and the UK to agree to enter into force the Agreements quickly. This will ensure that UK businesses can gain access to the benefits of the Agreements without delay. An affirmative procedure could have the effect of creating an unnecessary burden on parliamentary time. A made affirmative procedure in these circumstances would also carry a risk if it was not subsequently approved, as this would have the potential impact of the UK losing its legislative implementation for the Agreements for when the Agreements are to enter into force and put the UK in breach of its obligations if it was unable to otherwise make the necessary regulations in time. This could also be detrimental to the international reputation of the UK for being a reliable trading partner.

¹⁵ Article 32.7 of the UK-Australia FTA.

¹⁶ Article 33.8 of the UK-New Zealand FTA.

Power to make regulations for matters arising out of, or related to, the government procurement Chapters of the Agreements (clause 1(1)(b))

Power conferred on:

- a) a Minister of the Crown; or*
- b) a devolved authority.*

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative resolution

Context and purpose

27. As described above, the power in clause 1(1)(a) is needed to ensure that amendments can be made to the Regulations to implement the UK's obligations under the government procurement Chapters of the Agreements. The scope of the power in clause 1(1)(a) narrowly relates to the implementation of government procurement Chapters in the respective Agreements. Some of the changes to the Regulations to implement the UK-Australia FTA regard rules on how procurement is conducted (see paragraph 10(b)).

28. Because the Agreements set out obligations that are owed by the UK to the other Party, the power in clause 1(1)(a) to implement the government procurement Chapters of the Agreements would not be able to make changes to domestic law that provide for anything other than specific treatment to suppliers and products of those countries. Changes made using the power in clause 1(1)(a) alone would result in two parallel sets of rules and procedures for procurement, regarding (i) Parties to the Agreements and (ii) non-parties, creating conflicting domestic law and adding burden to how contracting authorities undertake procurements. Accordingly, the power in clause 1(1)(b) allows for those changes to be made to domestic law generally, that is, not providing specific treatment to suppliers from Australia only. This will allow the UK to implement its obligations in the UK-Australia FTA in a way that is consistent with the UK's other international procurement obligations and legislate in a cohesive and uniform manner that would not cause burden for UK contracting authorities, or give rise to potential conflict between UK procurement rules.

29. Clauses 1(2) and 1(3) together limit the scope of the power by clarifying that the power may be used to make provision with general application for an obligation that is imposed on the UK in the government procurement Chapters of the Agreements, only.
30. Clause 2(1) provides that regulations made under clause 1(1) may make: provision for different purposes or areas; general or specific provision; incidental, supplementary or consequential provision; and transitional, transitory or saving provision. This clarifies the scope of the power in clause 1(1)(b), in addition to clarifying the scope of the power in clause 1(1)(a).
31. As set out in paragraph 11, ongoing modifications to the market access schedules in the Agreements are anticipated to occur regularly, but further changes to the rules in the government procurement Chapters in the Agreements are not anticipated or would be infrequent. Since the Procurement Bill is proposed to put relevant procurement legislation into primary legislation, the power in the Bill would not be able to make such changes to that legislation once the Procurement Bill enters into force (note the Procurement Bill's proposed power for implementation of trade agreements is not intended to extend to the implementation of rules changes of this type).

Justification for delegation

32. As explained, clause 1(1)(b) will be used to amend domestic procurement law generally as part of implementing certain obligations in the procurement Chapters in the Agreements. Clause 1(1)(b) therefore complements clause 1(1)(a) by allowing those changes to be made to legislation under clause 1(1)(a) in a cohesive and uniform manner as described in paragraph 28. Delegating a single power to provide for these changes provides greater coherence than providing for implementation separately in primary and secondary legislation.
33. As also described in paragraphs 16 and 17, to enable the detailed rules changes described in paragraph 10(b) needed for the UK-Australia FTA to be implemented in the current Regulations and afford flexibility to accommodate the status of domestic legislation on entry into force of the Agreements, a delegated power is appropriate. As previously mentioned, this is not solely to meet the exigencies of

the timeframe for entry into force but to meet the principle that detailed implementation may be left to delegated legislation.

34. The power in clause 1(1)(b) is not expected to be exercised with respect to ongoing modifications to government procurement rules. However, to provide for the uncertainty as to whether the provision would be needed for this purpose, a delegated power is provided.

35. Precedent for such power exists in section 31(1)(b) of the European Union (Future Relationship) Act 2020.

Justification for negative procedures

36. As described in paragraph 21, Parliament will have had the opportunity already to scrutinise the government procurement Chapters in the Agreements pursuant to CRAG. The clarification of the scope of the power in clauses 1(2) and 1(3) ensures that the power is limited to regulations for matters arising out of or related to those Chapters only and not for other purposes. Accordingly, the power will have limited application, only implementing the rules changes identified in paragraph 10(b) in a general way (complementing the changes made under clause 1(1)(a)) to ensure coherence in domestic law and ease in how contracting authorities undertake procurements). The nature of the additional changes for which the power in this clause is needed therefore does not justify the Parliamentary resource that would be required for an affirmative procedure.

37. Clause 1(1)(b) is not expected to be used for the implementation of any future amendments or modifications, as such future updates should not entail updates to the rules in the government procurement Chapters and changes to market access coverage do not need to be implemented in a general manner. However, if it were unexpectedly used for rule changes before the Procurement Bill was enacted, in the circumstances, even given the full extent of the power, the negative procedure is appropriate.

38. In addition, as described in paragraph 26, in relation to implementing the necessary rules changes in domestic law for entry into force of the UK-Australia FTA, a

negative resolution procedure would enable the regulations to be made quickly for the entry into force of the UK-Australia FTA.