

TRADE (AUSTRALIA AND NEW ZEALAND) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Trade (Australia and New Zealand) Bill as brought from the House of Commons on 13 December 2022 (HL Bill 81).

- These Explanatory Notes have been prepared by the Department for International Trade in order to assist the reader of the Bill. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. A glossary of terms used can be found at Annex C.

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These Explanatory Notes relate to the Trade (Australia and New Zealand) Bill as brought from the House of Commons on 13 December 2022 (HL Bill 81)

Overview of the Bill

- 1 The Trade (Australia and New Zealand) Bill provides the necessary measures to implement the United Kingdom's first 'from scratch' free trade agreements (FTAs) in over 50 years. In particular, the Bill provides a power:
 - a. to ensure that the UK can implement in domestic law the government procurement obligations in the UK-Australia FTA and UK-New Zealand FTA (together referred to as "the Agreements"); and
 - b. to make changes to domestic law that apply generally and not only in relation to the operation of the UK-Australia FTA.

Policy background

- 2 The UK-Australia FTA was signed virtually on 16 December 2021 and the UK-New Zealand FTA was signed on 28 February 2022. The government procurement Chapters of these Agreements (Chapter number 16 in each) contain the only obligations that require new primary legislation to provide for their implementation for the entry into force of the Agreements. This legislative implementation of the government procurement obligations in the Agreements is needed before formal entry into force of the Agreements to ensure that the UK is not in breach of them, when they enter into force, and the benefits of the Agreements can begin to accrue.
- 3 Both government procurement Chapters consist of (a) the text of the Chapter setting out the government procurement obligations and (b) the Schedules in an Annex to the Chapter, which set out the procurement market access coverage of each of the parties. The text sets out rules for fair, transparent and non-discriminatory conditions of competition in government procurement. These rules do not automatically apply to all procurement activities of each party. Rather, the Schedules determine which entities and procurements are covered by the scope of the Chapter and must follow the rules. Only procurement activities by covered entities purchasing covered goods, services or construction services, of a value exceeding the specific thresholds, are within the scope of the respective Agreements.
- 4 The Trade (Australia and New Zealand) Bill would provide the Government and the Scottish Ministers, Welsh Ministers or a Northern Ireland Department with the power to make changes to domestic legislation which are necessary to ensure the UK's government procurement obligations arising from the Agreements can be fully implemented.
- 5 The Procurement Bill [HL] introduced into the House of Lords on 11th May 2022 would reform existing procurement legislation. That Bill is expected to provide a power to implement the UK's government procurement market access obligations in trade agreements. Accordingly, the function of the power in this Bill that allows the UK to implement any future updates to the government procurement obligations in the Agreements is only required until the relevant power in the Procurement Bill enters into force.
- 6 The relevant provisions of the Procurement Bill are anticipated to enter into force after this Bill and after the necessary changes to domestic law have been made for entry into force of the Agreements. To the extent that implementation of the Agreements for their entry into force is complete, the Procurement Bill is expected to repeal the Trade (Australia and New Zealand) Bill (as enacted) and save relevant statutory instruments. Ongoing implementation of the market access aspects of the Agreements would be provided for by a power in the Procurement Bill.

Legal background

- 7 The relevant legal background is explained in the policy background section of these notes.

Territorial extent and application

- 8 Clause 4 sets out the territorial extent of the Trade (Australia and New Zealand) Bill. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect rather than where it forms part of the law.
- 9 The Trade (Australia and New Zealand) Bill extends and applies to the whole of the UK.
- 10 The UK Parliament does not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned. It is also the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations in Scotland, Wales and Northern Ireland.
- 11 The Government is seeking legislative consent for the provisions in the Trade (Australia and New Zealand) Bill relating to the powers exercisable by an appropriate authority.
- 12 See the table in Annex A for a summary of the position regarding territorial extent and application in the UK. The table also summarises the position regarding legislative consent motions.

Commentary on provisions of Bill

Clause 1: Power to implement government procurement Chapters

- 13 Before an FTA can enter into force, the parties to the FTA should ensure that it is implemented domestically, to avoid breaching the FTA on entry into force. This means that each party to the FTA should ensure its domestic legislative framework is consistent with the obligations in the FTA. Not all obligations within an FTA require a change to the law.
- 14 The UK-Australia FTA and UK-New Zealand FTA require changes to UK domestic procurement law. The scope of the power contained in the Bill is to implement the government procurement Chapters of these Agreements, including the market access schedules (as they may be modified from time to time), and to make related provision.
- 15 The UK previously implemented its procurement obligations under section 2(2) of the European Communities Act 1972 when the UK was still a Member State of the EU. Now that the UK has left the EU, the power in clause 1 of the Bill is needed to ensure that the obligations in the government procurement Chapters of the Agreements, and matters arising out of or related to those Chapters, can be implemented in domestic law.
- 16 Clause 1 provides a power for appropriate authorities to make regulations for two purposes:
 - a. Subsection 1(a) allows an appropriate authority to make regulations for the purpose of implementing the government procurement Chapters in the FTAs.
 - b. Subsection 1(b) allows an appropriate authority to make regulations for the purpose of making other changes for matters arising out of, or related to, the government procurement Chapters in the FTAs.
- 17 The power in subsection 1(a) will be used to make the following changes:
 - a. to amend existing secondary legislation for procurement to extend the duties owed by contracting authorities, and remedies available in that legislation, to the suppliers of the relevant countries for procurement covered by the respective Agreements, implementing the market access conditions of the Agreements;
 - b. to amend existing secondary legislation for procurement to bring it in line with certain rules in the text of the government procurement Chapter of the UK-Australia FTA. The specific areas of the procurement regulations that may be amended relate to rules regarding (i) unknown contract values, (ii) notices advertising procurements, and (iii) termination of awarded contracts;
 - c. to amend existing secondary legislation to implement any changes to the government procurement Chapters of the Agreements over their lifetime, for example updates to the market access schedules to reflect certain machinery of government changes. The Procurement Bill is expected to include a power to implement the procurement market access obligations in future FTAs, including any updates to these Agreements. Accordingly, this power is intended to provide for future implementation only until it is replaced by the power in the Procurement Bill.
- 18 The power in subsection 1(b) is to be read with clauses 1(2) and 1(3).
- 19 Clause 1(2) allows the regulations under subsection 1(b) to be made also for cases falling outside the scope of the government procurement Chapters to provide for general application.

- 20 Clause 1(3) clarifies that a case is outside the scope of a government procurement Chapter if that Chapter does not impose an obligation on the UK in respect of that case, i.e. it is not an obligation owed specifically in the Chapter.
- 21 The effect of subsection 1(b) read with 1(2) is that certain changes made to domestic law to implement the UK-Australia FTA, i.e. in respect of the rules in the text of the government procurement Chapter (see paragraph 17.b above), can apply generally and not only to suppliers from Australia. This will ensure procurement regulations remain uniform and coherent by not imposing different or conflicting procurement procedures on contracting authorities for procurements covered by the FTA, and ensure the UK can implement its obligations in the FTA in a way that is consistent with the UK's other international procurement obligations.
- 22 Clause 1(4) defines "government procurement Chapters of the UK-Australia and UK-New Zealand FTAs" set out in clause 1(4)(a) and (b) respectively, by reference to the relevant chapters and annexes in the FTAs.
- 23 Clause 1(5) defines the "UK-Australia FTA" and "UK-New Zealand FTA". These definitions include reference to the Agreement as it is modified from time to time in accordance with any provision of it. This clarifies that the scope of the power includes implementation of updates to the Agreements.

Clause 2: Further provision about power

- 24 Clause 2 provides for different types of provision that could be made by regulations under clause 1 where needed, for example consequential provision. Clause 2 also gives effect to Schedules 1 and 2, which, respectively, set out restrictions on the use of the power by devolved authorities and provide for how regulations under clause 1 can be made.

Clause 3: Interpretation

- 25 Clause 3 sets out how certain terms within the Trade (Australia and New Zealand) Bill should be interpreted.
- 26 An "appropriate authority" means a Minister of the Crown or a devolved authority, for the purpose of making regulations under clause 1. "Minister of the Crown" and "devolved authority" are also defined in clause 3. "Devolved authority" is defined as the Scottish Ministers, the Welsh Ministers or a Northern Ireland department.
- 27 Clause 3 also defines the terms "modify" and "subordinate legislation".

Clause 4: Extent, commencement and short title

- 28 Clause 4(1) provides that the Bill extends to England and Wales, Scotland and Northern Ireland.
- 29 Clause 4(2) provides that the Bill comes into force on the day of Royal Assent.
- 30 Clause 4(3) establishes that the short title for this Bill will be the Trade (Australia and New Zealand) Act 2022.

Schedule 1 – Provision relating to devolved authorities and Senedd Cymru

Part 1 - Restrictions on devolved authorities

- 31 Part 1 of the Schedule describes the circumstances in which a devolved authority (defined in clause 3 as the Scottish Ministers, Welsh Ministers and a Northern Ireland department) may use the power in clause 1 to make regulations.

No power to make provision outside devolved competence

- 32 Paragraph 1 provides that a devolved authority may not make provision under clause 1 unless the provision is within the devolved authority's devolved competence. Devolved competence is defined in paragraphs 5 to 7 of the Schedule.

Requirement for consent where it would otherwise be required

- 33 Paragraph 2 sets out that consent of a Minister of the Crown is required if a devolved authority is making a provision using the power in clause 1 acting alone and the provision would otherwise require consent if it were being made under other powers. That could be where the relevant devolved legislature's legislative powers were subject to a consent requirement, or where the devolved authority would normally require consent to make such a provision by secondary legislation. This requirement for consent will not apply if the devolved authority already has power to make such provision using secondary legislation without needing the consent of the Minister of the Crown.

Requirement for joint exercise where it would otherwise be required

- 34 Paragraph 3 sets out that, where a devolved authority would normally only be able to make legislation jointly with the UK Government, the devolved authority will still have to make such legislation jointly when exercising the power in clause 1.

Requirement for consultation where it would otherwise be required

- 35 Paragraph 4 requires consultation with the Government on legislation made by a devolved authority acting alone in the exercise of the powers in clause 1, where the devolved authority would normally be required to consult with the Government when making those kinds of changes in legislation.

Meaning of devolved competence

- 36 Paragraphs 5 to 7 define devolved competence for the purposes of exercise by a devolved authority of the power in clause 1.

Meaning of "Northern Ireland devolved authority"

- 37 Paragraph 8 defines "Northern Ireland devolved authority" for the purposes of Part 1 of the Schedule.

Part 2 - Legislative competence of Senedd Cymru: exclusions from restrictions

- 38 Paragraph 9 in Part 2 of the Schedule disapplies some of the restrictions in paragraphs 8 and 11 of Schedule 7B to the Government of Wales Act 2006 in relation to concurrent functions in this Bill.

Schedule 2 – Regulations under Section 1

Part 1 - Statutory instruments and statutory rules

- 39 Part 1 provides that the power to make regulations under clause 1 of the Bill is exercisable by statutory instrument when exercised by a Minister of the Crown acting alone and makes corresponding provision for each of the devolved authorities acting alone and for a Minister of the Crown acting jointly with a devolved authority.

Part 2 - Scrutiny of regulations under Section 1

- 40 Part 2 of the Schedule provides for scrutiny by the UK Parliament and the devolved legislatures of regulations made under clause 1.

Scrutiny of regulations made by Minister of the Crown or devolved authority acting alone

- 41 Paragraph 2 provides that the negative procedure applies to regulations made by a Minister of the Crown or a devolved authority acting alone under clause 1.

Scrutiny of regulations made by Minister of the Crown and devolved authority acting jointly

- 42 Paragraph 3 provides for the negative procedure to apply to regulations made jointly by a Minister of the Crown and a devolved authority under clause 1.

Part 3 – Anticipatory exercise of Section 1 power

- 43 Part 3 provides that the power to make regulations may be exercised before the agreement or a modification to a government procurement Chapter of the UK-Australia FTA or UK-New Zealand FTA is ratified.

Commencement

- 44 Clause 4(2) provides for the commencement of the provisions in the Trade (Australia and New Zealand) Bill. The provisions will come into force on the day on which the Bill becomes an Act of Parliament.

Financial implications of the Bill

- 45 The Bill enables the implementation of two international agreements. It does not create any new publicly funded bodies or make changes to the machinery of Government. Consequently, the Bill does not have any implications for the public finances beyond minimal expenditure involved in making regulations under the Bill and in contracting public authorities familiarising themselves with changes to procurement rules made by regulations under the Bill. A further note on the assessment of economic impacts can be found at Annex B.

Compatibility with the European Convention on Human Rights

- 46 The Government considers that the Trade (Australia and New Zealand) Bill is compatible with the European Convention on Human Rights (ECHR). Accordingly, Lord Johnson of Lainston, Minister of State (Minister for Investment) at the Department for International Trade, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

Equalities

- 47 The Trade (Australia and New Zealand) Bill does not amend, repeal or revoke any provision of the Equality Act 2006 or any subordinate legislation made under that Act or the Equality Act 2010.

Duty under Section 20 of the Environment Act 2021

- 48 The Department of International Trade is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, Lord Johnson of Lainston, Minister of State (Minister for Investment) at the Department for International Trade, has not made a statement under that section.

Related documents

49 The following documents are relevant to the Bill and can be read at the stated locations:

- UK-Australia Free Trade Agreement
 - Text of UK-Australia Free Trade Agreement and associated documents – <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia>
 - Text of an Explanatory Memorandum – <https://www.gov.uk/government/publications/uk-australia-fta-draft-explanatory-memorandum>
 - Impact Assessment – <https://www.gov.uk/government/publications/uk-australia-fta-impact-assessment>
 - UK-Australia FTA: benefits for the UK – <https://www.gov.uk/government/publications/uk-australia-fta-benefits-for-the-uk>

- UK-New Zealand Free Trade Agreement
 - Text of UK-New Zealand Free Trade Agreement and associated documents – <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-new-zealand>
 - Text of an Explanatory Memorandum – <https://www.gov.uk/government/publications/uk-new-zealand-fta-draft-explanatory-memorandum>
 - Impact Assessment – <https://www.gov.uk/government/publications/uk-new-zealand-fta-impact-assessment>
 - UK-New Zealand FTA: benefits for the UK – <https://www.gov.uk/government/publications/uk-new-zealand-fta-benefits-for-the-uk>

Annex A – Territorial extent and application in the United Kingdom

50 The Trade (Australia and New Zealand) Bill extends and applies to the whole of the UK.

51 The information provided is the view of the UK Government.

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1-4	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 1, Part 1	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Schedule 1, Part 2	No	Yes	Yes	No	No	No	No
Schedule 2	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Subject matter and legislative competence of devolved legislatures

52 The UK Parliament does not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned. It is also the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations in Scotland, Wales and Northern Ireland.

53 The Government will seek legislative consent for the provisions in the Trade (Australia and New Zealand) Bill relating to the powers exercisable by an appropriate authority.

54 See the table above for a summary of the position regarding territorial extent and application in the UK. The table also summarises the position regarding legislative consent motions.

Annex B – Assessment of economic impacts

- 56 This assessment of economic impacts focusses only on the impact of the powers in the Trade (Australia and New Zealand) Bill, rather than the impacts of the UK-Australia FTA and UK-New Zealand FTA as Agreements. The overall impacts of these Agreements have already been assessed in impact assessments that were published alongside the full text of the Agreements (See [Australia Impact Assessment](#) and [New Zealand Impact Assessment](#)).
- 57 Given that impact assessments for the Agreements have been published and that no direct costs to businesses from this Bill are expected (as the powers in this Bill apply to public sector organisations), this economic assessment has taken a proportionate, qualitative approach.
- 58 Without the powers in the Bill, the UK would be unable to give effect to its government procurement obligations in the Agreements and would not be able to comply with the Agreements when they enter into force. The overarching objective and intended effect of this Bill is therefore to allow the UK to benefit from the UK-Australia FTA and UK-New Zealand FTA, by implementing its government procurement obligations in domestic law and ensuring compliance when the FTAs enter into force. The impact assessments that were published alongside the full text of the Agreements estimate that by 2035, UK gross domestic product (GDP) could increase by 0.08% and 0.03% as a result of the UK-Australia FTA and UK-New Zealand FTA respectively. It should be noted that these impacts cannot be disaggregated by individual chapters (for example the government procurement Chapter).
- 59 Apart from allowing for the benefits of the Agreements to be realised, the Bill will have no other direct impacts, as the changes to procurement regulations will be implemented through secondary legislation. The secondary legislation is not predicted to result in significant changes to how UK procurements are run. The Bill would therefore have no direct impact on costs to business.

Annex C – Glossary

Term	Definition
Act of Parliament	An Act of Parliament is a law that both Houses of Parliament and the King have agreed to. An Act may be enforced in all the areas of the UK where it is applicable.
Bill	A proposal for a new law or an amendment to an existing law that has been presented to Parliament for consideration. Once agreed and made into law, it becomes an Act.
Devolved administrations	The governments of the devolved nations of the UK. These are the Scottish Government, the Welsh Government and the Northern Ireland Executive.
Devolved competence	The areas in which the devolved legislatures are responsible for making laws ('legislative competence') or the devolved administrations are responsible for governing or making secondary legislation ('executive competence').
Devolved legislatures	The law making bodies of the devolved nations of the UK. These are the Scottish Parliament, the Senedd Cymru and the Northern Ireland Assembly.
Negative procedure	<p>Negative procedure is a type of parliamentary procedure that applies to statutory instruments. Its name describes the form of scrutiny that the statutory instrument receives from Parliament.</p> <p>A statutory instrument laid under the negative procedure becomes law on the day the Minister signs it and automatically remains law unless a motion – or 'prayer' – to reject it is agreed by either House within 40 sitting days. Certain SIs on financial matters are only considered by the Commons.</p>
Secondary legislation	Legal instruments (including regulations and orders) made under powers delegated to ministers or other office holders in Acts of Parliament. They have the force of law but can be disapplied by a court if they do not comply with the terms of their parent Act or the

Statutory instrument

Human Rights Act. Also called subordinate or delegated legislation.

A form of secondary legislation to which the Statutory Instruments Act 1946 applies.

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