



Department for International Trade

Stuart McMillan MSP
Convener of the Delegated Powers and Law Reform Committee
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7th October 2022

Dear Stuart,

Thank you for recent letter to the Secretary of State for International Trade (7 September 2022) regarding the Trade (Australia and New Zealand) Bill. As the Ministerial lead for the Bill, I wanted to respond to your questions in turn and share further detail on our approach.

1. Why is it considered appropriate for the regulation-making power in clause 1 to be sought rather than provision implementing the free trade agreements being set out on the face of the Bill?

The nature of the delegated power is that it has two purposes. First, it allows for the timely legislative implementation of the procurement obligations in the government procurement chapters of both the UK-Australia and UK-New Zealand FTAs for their entry into force.

Secondly, the delegated nature of the power allows for subsequent legislative implementation of any adjustments to the obligations over the lifetime of the FTAs. Most changes are expected to be minor and will not affect the balance of commitments. For example, updating the names of government departments following machinery of government changes.

Given such modifications will be minor and technical, a delegated power will allow changes without placing a burden on parliamentary resource that would come with passing new primary legislation each time legislative amendments are necessary. As it is unlikely the time for passing primary legislation to implement these types of changes will be commensurate with the significance of those changes, a delegated power is appropriate in this context.

2. Why is it appropriate that the regulation-making power in clause 1 of the Bill applies to the implementation of the free trade agreements as amended, particularly if:

a. it is expected that the power will be repealed once the Procurement Bill comes into force; and

The Procurement Bill will repeal the power in the Trade (Australia and New Zealand) Bill. This is a sensible approach to allow for quicker implementation of the UK-Australia and UK-New Zealand FTAs under the Trade (Australia and New Zealand) Bill but avoid duplicate powers existing in perpetuity.

We cannot say with certainty when this repeal will occur, given the Procurement Bill must still complete its passage through the UK Parliament. In the event minor amendments to procurement chapters in either FTA are made prior to the Procurement Bill entering into force, it is right devolved administrations (DAs) and the UK Government have the necessary powers to ensure we can continue to meet international obligations. As it is not clear when exactly these amendments may arise, the delegated power in clause 1 can accommodate that uncertainty in the short-term.

b. the Scottish Parliament may not know what any future amendments might be at the point of considering whether to consent to the Bill?

The UK Government and the Scottish Government have developed a constructive approach to engagement on the UK's international trade policy. This includes discussion at political level through the Interministerial Group for Trade, known previously the Ministerial Forum for Trade, and at official level through a dedicated procurement policy forum. We will continue this constructive approach following entry into force of both FTAs.

Our approach allows for discussions between governments on any amendments being considered or made by Parties to the FTAs. The UK Government is committed to keeping the Scottish Government informed and they should update Scottish Parliament on legislative developments when the power in clause 1 is exercised by a UK Government Minister. When secondary legislation is made by the Scottish Government under clause 1, this will be subject to scrutiny by the Scottish Parliament.

3. Whether, as a minimum, if a regulation-making power is to be taken rather than provision implementing the agreements being set out on the face of the Bill, regulations made under the power would more appropriately be subject to the affirmative procedure?

For implementation of the procurement obligations for the entry into force of the FTAs, the UK Parliament will have had the opportunity already to scrutinise both FTAs before the power is exercised. This will include the government procurement Chapters, and both the UK's and the other Parties' market access schedules.

Accordingly, the provisions of the FTAs will be clear to Parliamentarians and the procurement obligations in the FTAs will not result in any unexpected changes to domestic law for the entry into force of the Agreements.

The negative procedure is appropriate for the scope of the power in clause 1 as the UK Parliament is unlikely to need to debate the content of the regulations given their scrutiny of the FTAs before secondary legislation is made and the length of time the power is likely to be in force.

The changes to the regulations for entry into force 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 FTAs 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.

As noted above, modifications to the FTAs over their lifetime are expected to be minor and technical and would not justify the use of Parliamentary time that would otherwise accompany an affirmative procedure.

4. Why does the UK Government consider it appropriate that the power has been conferred so that it is exercisable independently by a Minister of the Crown in relation to devolved matters?

The concurrent power in clause 1 provides an administratively efficient option for making secondary legislation to implement the procurement Chapters in both the UK-Australia and UK-New Zealand FTAs. It allows for a Scottish Minister to make secondary legislation, or for a UK Minister to do so when practical.

This is the same approach as taken with the Trade Act 2021, which includes a concurrent power to implement international trade obligations. Earlier this year, the concurrent power in the Trade Act 2021 allowed for the Public Procurement (International Trade Agreements) (Amendment) Regulations 2022 to be made.

This single statutory instrument implemented procurement obligations under the UK- Iceland, Liechtenstein and Norway (EEA) Agreement in both UK and Scottish procurement regulations. This avoided the need for separate statutory instruments in both the UK Parliament and Scottish Parliament.

This single statutory instrument was made in consultation with the Scottish Government and with their agreement. The concurrent power in the Trade (Australia and New Zealand) Bill allows us to continue to make use of this convenient arrangement, when practical, for procurement chapters in both the UK-Australia and UK-New Zealand FTAs.

5. Why does the UK Government consider it appropriate that when the power is exercised independently by a Minister of the Crown in relation to devolved matters, there is no requirement to obtain the consent of the Scottish Ministers?

Placing a requirement to obtain consent in statute risks undermining the devolution statutes which enshrine international relations as a reserved matter.

Acceptance of this requirement for this Bill would set the expectation that all UK primary legislation regarding international treaties would include similar clauses. This would establish the principle that the UK Government and the UK Parliament cannot act without agreement of the Scottish Government when taking steps to enable international treaties to enter into force. This would curtail the supremacy of the UK Parliament and restrict the UK Government when acting regarding a reserved matter.

Requiring consent of Scottish Ministers to be obtained would also discourage consensual intergovernmental working and incentivise legal challenge. This is disproportionate and would threaten the timely implementation of the trade agreements thereby delaying the benefits they offer to UK businesses and consumers.

Whilst in practice the UK Government does engage with DAs on the reserved matter of international relations, it is important that the legal position of international relations as a reserved matter is preserved.

6. Does the UK Government intend to amend the Bill to either ensure the power is conferred solely on the Scottish Ministers in relation to Scotland, or to require a Minister of the Crown when exercising the power in relation to devolved matters to obtain the consent of the Scottish Ministers?

It is important to reiterate that the power can be exercised concurrently; it is open to both devolved and UK Government ministers to use. It is designed in this way in order to respect the competence of the devolved legislatures and governments, whilst allowing for certainty in respect of the reserved matter of international relations.

We recognise the Scottish Government and Scottish Parliament will seek assurances that the concurrent power in the Trade (Australia and New Zealand) Bill will be used appropriately by the UK Government. Therefore, during Second Reading, the previous Secretary of State, made a commitment at the despatch box to not normally use the concurrent power in this Bill without the consent of the relevant DA and never without consulting them first.

This is the same despatch box commitment made on the use of concurrent powers in the Trade Act 2021. This commitment was sufficient for the Scottish Government to recommend legislative consent for the Trade Act 2021 and for the Scottish Parliament to subsequently vote in favour of a legislative consent motion.

I recognise your Committee session to consider the Trade (Australia and New Zealand) Bill was held shortly before Second Reading of the Bill. Now this commitment has been made, I trust this provides the necessary assurances on the use of concurrent powers as was the case with the Trade Act 2021.

I will shortly be writing to the Minister for Business, Trade, Tourism and Enterprise with a commitment to continue engagement on the Bill and I am grateful for the work of your committee. I would be pleased to continue to support your consideration of the Bill as you believe beneficial.

I am copying this letter to the Rt Hon Alister Jack MP, Secretary of State for Scotland; Ivan McKee MSP, the Minister for Business, Trade, Tourism and Enterprise and Claire Baker MSP, Convener of the Scottish Parliament's Economy and Fair Work Committee.

Yours sincerely,

JAMES DUDDRIDGE MP
Minister for International Trade