

Legislative Consent Memorandum

Trade (Australia and New Zealand) Bill

Background

1. This memorandum has been lodged by Kate Forbes, Cabinet Secretary for Finance and Economy, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by Ivan McKee, Minister for Business, Trade, Tourism and Enterprise. The Trade (Australia and New Zealand) Bill was introduced in the House of Commons on 11 May 2022. The Bill can be found at: <https://bills.parliament.uk/bills/3152>.

Content of the Trade (Australia and New Zealand) Bill

2. This is a short Bill which confers a power to implement the procurement chapters of the UK's free trade agreements with Australia and New Zealand.

3. The procurement chapters of the Australia and New Zealand agreements are the only chapters of those agreements which require legislative amendments to give effect to them. The legislative amendments required are relatively minor and technical amendments to domestic procurement legislation in Scotland (as well as in the rest of the UK). There is a need for primary legislation in order to implement, or provide for the implementation of, these agreements.

4. The amendments needed are to provide for the equal treatment of suppliers from Australia and New Zealand in relation to covered procurement, and to provide for some minor amendments to the procurement rules in relation to electronic methods of communication, unknown contract values, and making clear that a contracting authority may not terminate a contract for the purposes of avoiding the application of the procurement rules. These rule changes are expected to have minimal impact on existing practice in Scotland.

Provisions which relate to Scotland

5. Because procurement is a devolved matter, the implementation of international agreements is devolved to the extent it relates to procurement. The Bill confers the power to implement these agreements concurrently on UK and Scottish Ministers. The Bill is a relevant Bill under Rule 9B.1.1 of the Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters the executive competence of the Scottish Ministers.

Reasons for considering legislative consent

6. The UK Government has opted not to make the legislative amendments necessary to implement these agreements on the face of its Bill, but to provide for them to be made by Regulations. It argues that this allows for Regulations to be more easily timed to take effect simultaneously with the agreements taking effect.

7. There are constraints on the exercise of the power by Scottish Ministers. No regulations may be made by the Scottish Ministers under the power in clause 1 of the Bill, so far as they contain provision which relates to a matter in respect of which a power to make subordinate legislation, otherwise than under that power, is exercisable jointly with UK Ministers, after consultation with UK Ministers, or with the consent of UK Ministers, unless those regulations are made jointly, after consultation with or with the consent of the UK Ministers, as the case may be. These are not fundamentally new restrictions on devolved competence, and the Scottish Government does not anticipate that joint exercise, consultation or consent would be required for regulations needed to implement these trade agreements as they currently stand.

8. Whilst this is a relatively limited power which extends only to the implementation of the procurement chapters of these two agreements, there are two concerns arising from the way in which the power has been drafted.

9. First, the Bill confers this power concurrently on Scottish and UK Ministers, meaning that UK Ministers would be able to make secondary legislation on this devolved matter without being required to seek further consent.

10. Second, the power also provides for the implementation of the agreements as they may be amended in the future. This means that a need for further primary legislation is avoided if these agreements are refreshed, but at the cost of the Scottish Parliament not knowing what those future amendments might be at the point of giving its consent.

11. This seems a particularly unnecessary aspect to the power given that the agreements have only been very recently signed, and that this Bill is expected to be repealed by the Procurement Act, the Bill for which was also introduced on 11 May, which will provide a replacement general power in relation to the implementation of the procurement chapters of free trade agreements. That will be a power limited to ensuring that equal treatment obligations are given effect, with rule changes still needing primary legislation.

Consultation

12. There has been no specific consultation on the content of this Bill by either the UK Government, or the Scottish Government.

Financial implications

13. There are no significant financial implications arising directly from the decision to give or withhold consent to this Bill. If consent is withheld, the Scottish Government will push the UK Government to bring forward appropriate amendments to the Bill which would make it acceptable. If the provisions relating to Scotland were simply amended out of the Bill altogether, then there would be an onus on the Scottish Ministers to bring forward alternative legislation in the Scottish Parliament to implement these trade agreements.

Conclusion

14. The Scottish Government does not intend to lodge a legislative consent motion in respect of this Bill as introduced. Whilst there is a need for legislation to implement these agreements, and there is an efficiency argument to be made for the possibility of these relatively minor aspects of implementation of these agreements being made by UK Ministers in one pan-UK statutory instrument, there is fundamentally no reason why the UK Ministers need to hold this power in relation to devolved Scottish procurement. In the absence of a requirement for UK Ministers to seek the consent of the Scottish Ministers before exercising this power in relation to Scotland, the Scottish Government does not recommend that the Scottish Parliament consents to this Bill as it is drafted.

15. If the UK Government intends to continue with its approach of creating delegated powers to implement these agreements, the Scottish Government will press it to amend the Bill so that either the power is conferred solely on the Scottish Ministers in relation to Scotland, or that a requirement on UK Ministers to seek the consent of the Scottish Ministers before exercising the power in relation to Scotland is inserted. An alternative approach would be that the necessary legislative amendments are made on the face of the Bill, rather than by secondary legislation. This would allow for proper scrutiny of the actual legislative amendments proposed. The issue of timing of entry into force could be managed by providing for commencement Regulations, so as to ensure it did not precede the entry into force of these international agreements.

Scottish Government
June 2022

This Legislative Consent Memorandum relates to the Trade (Australia and New Zealand) Bill (UK legislation) and was lodged with the Scottish Parliament on 13 June 2022

Trade (Australia and New Zealand) Bill – Legislative Consent Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents