

ECONOMY AND FAIR WORK COMMITTEE

**22nd Meeting, 2022 (Session 6), Wednesday 5
October 2022**

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

Note by the Clerk

Introduction

1. The [Trade \(Australia and New Zealand\) Bill](#) is a UK Government Bill introduced in the House of Commons on 11 May 2022.
2. The Sewel Convention is the convention that the UK Parliament will not normally legislate on matters devolved to the Scottish Parliament without its consent. [Chapter 9B of the Parliament's Standing Orders](#) sets out the rules and procedures for seeking legislative consent under the convention.
3. The Trade (Australia and New Zealand) Bill falls under Rule 9B.1.1 of the Standing Orders, as it will make provision in areas devolved to the Scottish Parliament and alter the executive competence of the Scottish Ministers.
4. The Bill is about to enter committee stage in the first house, scheduled to begin on 12 October. Following this stage, it will return to the floor of the House of Commons for the report stage.
5. For any views of the Parliament to be considered at Westminster, it must conclude its considerations before the last amending stage (report stage in the second house). However, best practice is for the Committee to report ahead of the last amending stage in the first house where possible. At the time of writing this has not yet been scheduled.
6. Ivan McKee, Minister for Business, Trade, Tourism and Enterprise and Scottish Government officials will attend the meeting to give evidence on the LCM.

Legislative Consent Process

Legislative Consent Memorandum

7. When a Bill that will impact on areas devolved to the Scottish Parliament goes through the UK Parliament, the Scottish Government will normally prepare a Legislative Consent Memorandum (LCM). This explains how the Bill will affect Scotland and why, for example the Bill may:

- change the law on a “devolved matter” (an area of policy which the UK Parliament has devolved to the Scottish Parliament); or
- alter the “legislative competence” of the Scottish Parliament (its powers to make laws) or the “executive competence” of Scottish Ministers (their powers to govern).

8. The Economy and Fair Work Committee has been designated by the Parliamentary Bureau as lead committee to consider the Trade (Australia and New Zealand) Bill LCM and report its views to the Parliament.

9. The Scottish Government’s Legislative Consent Memorandum can be found at **Annexe A**.

Legislative Consent Motion

10. If the Scottish Government recommends in its LCM that consent be given, it will normally be decided by a motion taken in the Chamber known as a Legislative Consent Motion. This motion is usually drafted by the Scottish Government. If, however, the Scottish Government does not recommend consent be given, a debate on the LCM may be scheduled in the Chamber.

11. In this case, the Scottish Government has noted in its LCM that it does not intend to lodge a Legislative Consent Motion for the Bill as introduced, recommending that legislative consent should not be given on this occasion. Further information on the Scottish Government’s reasons for this is detailed below and in the LCM itself.

12. Paragraphs 13 and 15 of the LCM indicate that the Scottish Government may press the UK Government to amend the Bill.

Trade (Australia and New Zealand) Bill

13. This relatively short Bill is intended to confer the necessary powers to implement the procurement chapters of the UK’s free trade agreements with Australia and New Zealand.

14. The main provisions of the Bill are as follows—

- a power to ensure that the UK can implement in domestic law the government procurement obligations in the UK-Australia FTA and UK-New Zealand FTA; and
- a power to make changes to domestic law that apply generally and not only in relation to the operation of the UK-Australia FTA.

Scrutiny by other Scottish Parliament Committees

Delegated Powers and Law Reform Committee

15. The Delegated Powers and Law Reform Committee considered the LCM on 6 September and agreed to [write to the Minister for the Cabinet Office and Paymaster General](#). The Committee has not yet received a response and will reconsider the LCM shortly.

Scottish Government Legislative Consent Memorandum

16. A legislative consent memorandum was lodged by Kate Forbes MSP, Cabinet Secretary for the Finance and the Economy, supported by Ivan McKee MSP, Minister for Business, Trade, Tourism and Enterprise, on 13 June 2022.

17. The LCM states—

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.

18. It then continues—

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.

19. As the Scottish Government is not recommending that the Parliament give its consent, a draft legislative consent motion is not included with the LCM.

Decisions

20. After considering today's evidence from the Minister, Members are invited to—

- consider what views to include in the Committee report; and
- to agree to consider a draft report on the LCM in private at a future meeting.

Economy and Fair Work Committee Clerks
30 September 2022

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