HOUSE OF COMMONS

International Trade Committee

Oral evidence: UK trade negotiations: Agreement with Australia, HC 1002

Wednesday 9 March 2022

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Watch the meeting

Members present: Mark Garnier (in the Chair); Paul Girvan; Sir Mark Hendrick; Tony Lloyd; Anthony Mangnall; Mark Menzies; Lloyd Russell-Moyle; Martin Vickers; Mick Whitley; Mike Wood.

In the absence of the Chair, Mark Garnier was called to the Chair.

Questions 139 - 161

Witnesses

II: Bill Kovacic, Non-Executive Director, Competition and Markets Authority; Eduardo Perez Motta, Former President, International Competition Network; Anne L Petterd, Partner, Baker McKenzie; and Professor Albert Sánchez-Graells, Professor of Economic Law, University of Bristol Law School.

Examination of witnesses

Witnesses: Bill Kovacic, Eduardo Perez Motta, Anne L Petterd and Professor Albert Sánchez-Graells.

[*This evidence was taken by video conference*]

Q139 **Chair:** Welcome back to the second session of the International Trade Committee's hearing on our sub-inquiry into the UK-Australia free trade agreement. We are on our second panel. We are going to divide this into two. The first half of this will give Members an opportunity to explore the competition policy and consumer protection provisions on the UK FTO, and then the second half we will look at the government procurement, including deviations and a multilateral Government Procurement Agreement, which is quite important. We have four panellists. Could each one of you do name, rank and serial number? Perhaps I could start with you, Bill.

Bill Kovacic: I am a member of the faculty of the George Washington University Law School. I am a visiting professor at King's College in London and I am also a non-executive director with the CMA, where I have been since the shadow Cabinet period of 2013.

Eduardo Perez Motta: I was head negotiator for Mexico with the European Union in Brussels in the free trade agreement that we negotiated at that time. I was ambassador to the WTO after that and then I became the chairman of the competition authority of Mexico. I finished my mandate in 2013 and I have been working with different companies as a practitioner after that.

Anne Petterd: I am a partner at Baker McKenzie in Sydney. Much of the work that I do is working with suppliers in Australia and overseas wanting to sell to the Australian Government. Some of that work is also Australian Government work. I also chair our APAC International Commercial and Trade Group.

Professor Sánchez-Graells: I am a professor of economic law at the University of Bristol Law School. I am a former member of the European Commission Expert Group on Public Procurement, and I am a member of a Europe-wide research network called the European Procurement Law Network.

Q140 **Chair:** Thank you. Perhaps I can start with Bill. How common is it for competition policy and consumer protection to be addressed in free trade agreements? Just as importantly, how important is it for an agreement to cover these areas?

Bill Kovacic: Increasingly, they have become standard equipment in the international framework of policy-making. Several surveys identified that at least 80% and perhaps 90% of all free trade agreements in the world

today have a competition provision, if not a standalone chapter. The information on consumer provisions is a bit less precise, but that number is surely over 60% as well. This is standard international practice.

I think the standard international practice reflects sound judgment about the importance of competition and consumer provisions. They increase the confidence of business operators in both member nations that the jurisdictions will apply their laws in a fair and effective way, that they will discourage any competitive policy restraints that impede the effective operation of the market, and it gives confidence, I think, to the consumers in both jurisdictions that they will be treated well, regardless of the origin of the firm that is providing goods and services.

I think that, especially in the context of the UK-Australia relationship, it provides a very helpful nudge to the competition authorities, the ACCC and the CMA, to continue a deeper level of policy integration that will enable them to achieve collectively results that would not be obtainable through individual initiative.

Q141 **Chair:** We heard some quite interesting evidence in the earlier session, which was on a slightly different subject, but we talked about how some of these free trade deals can bump into local laws and that you can end up having challenges on the local laws by the counterparty of a free trade deal. Do you think there is any possibility on this with these competition or, in particular, consumer protection policies?

Bill Kovacic: In both jurisdictions there is a culture within the authorities, the ACCC and the CMA, through a variety of policy tools to draw to the attention of Government policies that tend to diminish effective competition or policies that discourage the provision of good results to consumers. I think it will deepen a culture of examination and reflection about existing policies that arguably limit competition in unnecessary ways and perhaps operate in some instances to the disadvantage of consumers. I see it encouraging policy trends that are evident in both jurisdictions to examine existing regulatory frameworks with an eye towards improving performance.

Q142 **Chair:** You see that when a challenge would come about it would be to the improvement of consumer protection rather than to the detriment of our existing laws?

Bill Kovacic: I believe that it will be in the direction of enhancement, indeed. A good deal of the policy work I see taking place in the collaboration between the ACCC and the CMA points in the direction of enhancements that improve the lot of consumers. I think part of what we will see here is the drawing upon the common experience of the two jurisdictions so that we will see a level of experimentation and improvement that again would exceed the grasp of each jurisdiction acting alone. I think this will press in the direction of improved protection rather than a diminishing of protection.

Chair: Fantastic, thank you very much.

Q143 **Martin Vickers:** I have another question for you, Bill. Much of the competition policy and consumer protection chapter is very similar to the competition policy chapter in CPTPP. What are the key areas where it diverges and how important are those divergences?

Bill Kovacic: The divergences point in the direction of improvements. That is, in many respects I see the UK-Australia agreement as being an enhancement of the existing framework, with upgrades that did not exist previously. Some of the enhancements that are notable are that the commitment in the competition chapter of the UK-Australia agreement commits the nations to include merger review as one ingredient of the competition policy framework and to have effective merger review. That is a step ahead of what one saw in the CPTPP treaty.

There is also a reference to maintaining operationally independent authorities. That is not a command to change the specific governance structure or operation of the relevant institutions, but it is encouragement for both Governments to maintain competition authorities that are, of course, accountable to the political process but have decision-making independence that creates confidence that they are making decisions on the merits.

There is a useful additional provision on non-discrimination based on government ownership. That is that state-owned enterprises do not get a special break in the analysis or the application of competition law. There is a specific provision in the Australia-UK FTA that encourages competition on consumer protection matters and that is missing in the other agreement. In these respects, I see enhancements, upgrades, that take the existing state of the art and carry them forward.

Martin Vickers: It is a real challenge to have an independent authority and also have political accountability, but we will pass on that. It is an ever present challenge, Chairman.

Bill Kovacic: Yes, and I would say a universal one that is a top of the line discussion around the world.

Q144 **Anthony Mangnall:** Could I bring in Eduardo? I am interested and I would just like to start off with this. Have we simplified this in the Australia free trade agreement versus what is in CPTPP?

Eduardo Perez Motta: What I would add to what Bill has said is that the CPTPP is already one of the two most advanced agreements in the chapter of competition and consumer protection. The UK-Australia improves that agreement. In this situation, you have the best in the art of competition and consumer protection in the UK-Australia. I think there are additional opportunities that could be taken into account, especially considering that these two countries have two of the most advanced competition authorities. The CMA and the ACCC are the top of the line authorities in competition and consumer protection.

I think there is a good opportunity to explore some other areas. I would say that normally in these agreements you are looking from the trade

side to the competition side, so you are trying to avoid using competition or antitrust enforcement decisions that damage the advantages or the benefits of trade.

What has not been explored in many of these agreements is the other side and the other direction of the relationship between competition and trade, which is how competition authorities could improve the trade relations. One important advance that has been taking place in very few countries has to do with the elimination of trade defences and substitution with competition authority enforcement. That has taken place in the Australia-New Zealand and a few other agreements where EFTA countries participate, and also Canada with Chile. That would be an interesting area to discuss.

The second area would be to explore dispute settlement mechanisms. All these chapters—I think without exception—do not have a dispute settlement mechanism that enforces the decisions in those chapters.

Q145 **Anthony Mangnall:** Can I push you on that, Eduardo? There is so much in your answer that I would like to unpack and in reverse. Is this the opportunity missed, that we have not gone with a better dispute mechanism? Is this the opportunity missed in this agreement with Australia that we have not explored further how this chapter could improve free trade? Where have we gone wrong? Then we will go to where we may have got it right.

Eduardo Perez Motta: I am not saying that the direction has been wrong. I think this is the most advanced agreement, CPTPP and now the UK-Australia FTA, without any doubt. Given the level of development and the maturity of these two competition agencies, there is always a possibility to explore something additional that could even improve it and could even put some examples for future free trade agreements or future chapters of competition in free trade agreements.

Q146 **Anthony Mangnall:** For the benefit of the Committee, do you have some examples about the new powers or obligations that were already not in common practice or in existence under the parties' domestic law? How does this chapter go further?

Eduardo Perez Motta: One could be the introduction of dispute settlement mechanisms. They do not exist in this practical area. They do not exist in any agreement. I think this could be a good opportunity to re-explore it in this agreement. It would be a state of the art advance. Obviously, I am thinking about a mechanism that should be ad hoc and not exactly the dispute settlement mechanism that applies to the rest of the agreement. In my view, that would be an important advance.

A second one would be to eliminate trade defences and to substitute it by competition authority enforcement. That already exists, as I said, in Australia-New Zealand and a very few other agreements, but I haven't seen that kind of movement in two major developed countries like the UK and Australia.

Q147 **Mick Whitley:** Good morning to all the witnesses. My question is to Eduardo. How does the agreement affect the roles of the UK Competition and Markets Authority and Australia's equivalent national competition authority? Does it do everything necessary in this regard?

Eduardo Perez Motta: We have to consider that not all the goods and services in our economies are tradable and they do not necessarily fit or work in the trade definition rules. Competition authorities would be the best instrument to have a basic platform of competitiveness in the country, especially in regulated sectors like energy, transport, financial services, and telecoms. If you have a pro-competitive regulation in those sectors, you are going to be able to have a minimum platform of competitiveness that would allow you to be successful in your exporting strategy in the rest of the commodities and goods and services that are tradable. In that sense, I think this is a clear benefit not only for consumers but also for the productive sector.

Q148 **Chair:** Thank you. We have come to the end of that session, but I am slightly conscious we have a few minutes. Bill or Eduardo, is there anything else that you think we have missed out on in our questions about the whole area of consumer protection in this trade agreement?

Bill Kovacic: Could I suggest two possibilities? One that is reflected in a number of your questions would be the benefit of having in the agreement a mechanism that commits the parties to a periodic assessment as a way of determining whether it is working in the way that is anticipated and whether there are evident areas in which improvements could take place. I think we would regard this type of relationship as being evolutionary and adaptable—so a formal commitment in the document that says we will come back on this to see whether we are happy about how it is working, with particular reference to the competition and consumer provisions, but that could incorporate other areas.

My own personal preference would have been a stronger nudge in the direction of encouraging the jurisdictions to improve information sharing as a component of law enforcement and policy-making, to facilitate common work on specific projects, both research and law enforcement, because I think we are observing in so many areas that the good solution to observed problems will involve a broader comprehensive collaboration across jurisdictions. The Australians and the UK are already engaged in a promising co-operation under the framework that is called MMAC, but perhaps a stronger push in the document that said that this type of collaboration and efforts to develop better information sharing would be valuable. I suppose most of all is that there is a commitment to come back on this in a few years and ask whether it is working in the way that we hoped.

Chair: Fantastic. Eduardo, do you have any final thoughts?

Eduardo Perez Motta: What Bill says is something that is already an open possibility in the agreement that you already have. When you look

at the agreement in the area of co-operation, I think it is quite modern and quite constructive because it allows you to do what Bill says, which is to improve the exchange of information between the two agencies, which is normally one of the best instruments to understand how the other party is behaving and what kind of decisions they are taking and what kind of priorities they are defining in terms of regulatory pro-competitive proposals.

Q149 **Chair:** That is very helpful. Thank you very much indeed. Albert, perhaps I can turn to you now and start looking at the Government procurement chapter. Obviously, both the UK and Australia have signed up to the multilateral Government Procurement Agreement, which is a great thing, but we also have a chapter in this free trade agreement. What is the legal position if the two texts appear to conflict with each other; if they do not agree with each other?

Professor Sánchez-Graells: That is a crucial question, and I guess it is one that will only get more and more complicated as the multilayering of procurement regulation stacks up. If the UK were to access CPTPP but the UK is also engaging in bilateral relationships, for example, with New Zealand, which is also a member of CPTPP, we can have more scope for potential divergences. I think this is a question of relevance to the Committee. I will try to explain the position under international law as best as I understand it and try not to make it too complicated, but please interrupt me or follow up at any point.

The potential clash between one existing treaty and a new treaty is regulated under Article 30 of the Vienna Convention on the Law of Treaties. Of course, the first thing to say is that a clash will only exist to the point that the parties do not find a way to interpret both treaties in concordance to each other. The parties could always agree that, even if the treaty says something that seems to be against the GPA, for example, they interpret it in line with the GPA. Let us take the position that the UK and Australia cannot agree on that GPA-compliant interpretation. Then Article 30 kicks in and, to make it simple, where the parties have not set a clause in the agreement specifically dealing with a conflict—because if there is such a clause whatever that clause says will control—then we need to rely on whether the parties can regulate changes from the multilateral position between themselves.

The other thing to consider is whether under the specific treaty, say the GPA, there was a specific clause that allowed a subgroup of its parties, in this case the UK and Australia, to modify the GPA either between themselves or for everyone. That exists in the GPA, but under the GPA it requires two-thirds of the GPA members to participate, so that is also out of the question.

Then we are in a situation that is called unregulated treaty conflict, which means that we have to distinguish where the distinction between the GPA and the FTA concerns only Australia and UK relationships. Then the newer treaty prevails. In this specific case, the FTA would trump the GPA for those things that affect the UK and Australia only. Where there is any

effect on the rights of the rest of the members of the GPA, the GPA controls.

The difficulty that we have when we talk about procurement is that there will be almost no strictly bilateral situations. If the UK and any of its contracting authorities advertises a contract opportunity, it will be most of the time covered by both the GPA and the UK-Australia FTA, which means that by its own mechanism procurement is always what I could call a triangular situation, one that is going to affect more parties than just the UK and Australia. The problem in that case is that the UK is in a difficult position because it can either choose to infringe one of the two treaties—for example, in this case it could go back to Australia and say, "We are really sorry, we cannot do the specific thing we said under the FTA and we will accept international liability for it"—or it could meet the highest of the standards to try to make sure that it complies with both treaties at the same time. It is a bit of a complicated case-by-case situation.

If I could give you an example, maybe it would help. Under the GPA, one of the crucial elements is the judicial review of procurement decisions. That links up to the point of how to enforce the procurement chapter that is parallel to what Bill and Eduardo were discussing about how to enforce the competition chapter. In procurement, we do have specific requirements of the domestic review systems and under the GPA all parties—so the UK, Australia and all of the other parties—commit to ensuring that their domestic review systems will provide both for interim relief where possible but also for financial compensation in cases of breach of their commitments.

In that, there is one specific clause that allows the deactivation of interim relief on the basis of a public interest. For example, if the UK was trying to build something of strategic importance and it thought that it was not adequate to suspend the procedure because of the complaint of an Australian tenderer, it could tell the tenderer, "We are sorry, we do not provide interim relief because there is a public interest in going ahead, but we will make a decision on the substance later on".

By contrast, under the FTA, the possibility to exclude remedies on public interest also affects the decision on substance. In this specific case, if the complainant is Australian, the court could say, "Given the public interest, not only am I not granting interim relief but I am also deciding not to make a decision on substance", whereas the UK court could not do that if the complainant was a company from any of the other GPA members. According to the rules that I explained earlier, the difficulty here is that because the specific issue of remedies is strictly bilateral—it only concerns a UK court and an Australian tenderer—in that case the FTA controls, which means that, counterintuitively, even if there is an FTA that deepens the procurement relationship between the UK and Australia, Australian tenderers would have less access to remedies under the UK courts. The same applies the other way around.

In contrast to that, where there are situations in which the GPA and the FTA deviate in such a way that the FTA provides higher standards—for example, there are rules on the use of electronic means of procurement that the Committee might want to go back to later—in that case, even if the FTA only binds the UK and Australia, what is clear is that the UK could not practically say, "I run the procurement electronically for Australian companies but I run the procurement on paper for everybody else". In that case, where the FTA goes beyond the GPA, for the UK to comply with the FTA it is, in fact, benefiting all of the members of the GPA. That is why there is a difficult asymmetry depending on whether we are talking about strictly bilateral relationships but also on whether the FTA goes further or reduces the commitments under the GPA.

Q150 **Chair:** This is a really helpful and comprehensive reply, and I shall probably have to go and have a read through the notes afterwards to get my head around it. As a very quick response to that, if you are a business that finds itself wanting to try to appeal against something—for example, you are an Australian business that wants to get stuck into this in the courts—it sounds hideously expensive in terms of legal fees to get started. In any practical sense, is this something that businesses can—clearly, they are going to be big businesses that will be good at this sort of stuff, but the legal process can be very expensive, very extended and very difficult. In a practical sense, does this really protect people or is it just a lot of complicated wordage that is going to be difficult for people to enforce?

Professor Sánchez-Graells: You are absolutely right that it is very complicated to enforce. It depends a bit on the structure of procurement remedies in different countries. For example, in other jurisdictions there is a very quick and free administrative review procedure where maybe tenderers from other jurisdictions could seek relief more quickly. In the UK, effectively the competent authority is the High Court and that comes with high costs and significant delays.

The other thing to say is that in the current process of reform of the UK procurement regulation and under the "Transforming Public Procurement" Green Paper, there is also a very clear steer towards limiting the financial compensation that can be given for procurement disputes fundamentally to the costs of participating in the tender, which also means that the financial incentive for foreign operators to engage in this very complicated and protracted procedure is very limited. That is why the UK is one of the jurisdictions with the lowest levels of procurement litigation compared to others.

I would absolutely concur that, even if on paper there are requirements for judicial review, in practice they provide very limited protection or comfort to entities. That is why I think that creating legal uncertainty in the treaty by diverging from the GPA or by introducing open-ended possibilities to, for example, localise procurement is basically going to have a chilling effect and make tenderers not bother either coming to the UK to try to make contracts or for UK tenderers to go to Australia and do the same.

Q151 **Chair:** That is really interesting. This is going to put people off in a practical sense. That is quite an important point, I think.

Professor Sánchez-Graells: Yes. I think that there is a specific point regarding the suppliers, if you would like me to explore that possibility. One of the main divergences between the FTA and the GPA is that under the GPA a supplier of any other parties is protected and cannot be discriminated against as long as they provide goods or services of any of the other parties. For example, a UK supplier providing European goods to Australia has to be protected under the GPA. However, under the text of the GPA there is no reference to which goods are protected. The FTA simply says UK and Australian suppliers have to be protected, but then later on it says that discrimination against suppliers cannot be permissible as long as they provide UK or Australian goods.

In the example I was giving you, a UK supplier that buys from the EU to try to sell on to Australia would have the uncertainty of whether they are protected under the UK-Australia FTA or they are not. In that case, the mere existence of that uncertainty could put them off from bidding because they will have to spend time and resource putting together the tender. If then they are turned down, they probably will not have the incentive to go and litigate that decision in Australia. That is why the deviations in themselves can have a chilling effect on the trade that the chapter is supposed to facilitate.

Q152 **Chair:** Not only does it affect businesses that are trying to tender for these things but it also affects the taxpayers that are buying it in the various countries, because you may not get the breadth of the tenders coming forward and, therefore, the best price.

Professor Sánchez-Graells: That is a very good point. It also raises the costs for the contracting authority to just understand what is the regulatory position. For, say, any Department of the UK Government seeking to tender a contract, now they have to check multiple treaties to see which economic operators offering which goods and services are allowed to tender for it and which ones can be excluded. The more complicated the situation the higher the cost of running the procurement in itself.

Q153 **Chair:** Anne, could I turn to you? I have a specific question and I will read the question, but I am interested in your comments on all of this. The question is that the chapter on Government procurement deviates from the GPA around national treatment and on conducting procurement by electronic means and how legally and practically significant you think these deviations are, but what I am really interested in is how you see the comments by Albert just now. Do you agree with those and would you like to add anything to that?

Anne Petterd: I certainly agree with the comment that bidders bidding for government work, if they are dissatisfied with the decision, can have a lot of difficulty in working out what their legal remedies are. It might be because of a remedy under the terms of the contract created by the tendering process. Because we signed up to the Government

Procurement Agreement, as Albert mentioned, at a federal level, there is an ability to seek interim relief under the Government Procurement and Judicial Review Act, but that Act is still fairly new and it hasn't really been used much. Then there are administrative law remedies.

I do not have experience of seeing suppliers looking at the different free trade agreements, which Australia has signed up to a lot, and most of them, if not all of them, contain Government procurement chapters with small differences in them. I absolutely agree that it is a lot to navigate, but I do not see suppliers looking to those agreements necessarily for their remedies. The problem they have is trying to work out how the remedies are being implemented under Australian local law so that they can work out what their legal avenue is if they do have an issue that they want to take up with the Government authority that is conducting the tender.

Chair: Okay, that is really helpful.

Q154 **Mike Wood:** I have another question for Anne. In practical terms, what changes would you expect in the way that UK suppliers approach Australian procurement markets or how they view the opportunities that are open to them as a result of this agreement?

Anne Petterd: I don't think there will be a lot of change in terms of access to information about procurements. I think that there are more commitments in this agreement than there have been before about giving electronic access to notices about procurements. I am particularly pleased to see the strongest commitments I have seen in the Australia-UK FTA about using electronic means to submit tenders, but in practice that was largely already the case. At the federal level there is a website called AusTender. Anybody can register to go on and see what is coming up, both in terms of active opportunities for the federal Government and in longer term what is on the horizon coming up in procurement opportunities.

The state and territory Governments also have that, and in at least the Commonwealth procurement rules that Government bodies are required to follow, it has been well established in that electronic notices for tenders should be used where possible. There is not at the moment a requirement in those rules to also allow for electronic submission of tenders, but that is the general practice, and I think it will continue to be the general practice.

In terms of process for procurement and understanding the rules and specific opportunities, I don't think a lot will change from this agreement other than that some of the procurement rules will be updated to reflect the stronger standard that in practice is already implemented on notices and submitting responses. This might be a question for later, but it might be other aspects of the free trade agreement that change how potential suppliers to Australia look at what the better opportunities are that they might have to make it more cost effective to deliver the Government contracts that they end up winning.

Q155 **Mike Wood:** To what extent do you think this is creating something new and how much of it is really just formalising pre-existing arrangements?

Anne Petterd: I think that a lot of it is formalising pre-existing arrangements. When the Australia-US free trade agreement commenced in 2005, a lot of the non-discrimination type rules for national treatment were built into the state, territory and Commonwealth relevant procurement rules then. They have largely stayed the same. Some will be added to a bit and then, like I said before, particularly on that electronic tendering, the established practice for some time for most agencies, not all, has been to do everything electronically.

I do think it is important, though, even though that is established practice, that it becomes enshrined in rules. If you think about it, if you have a foreign bidder for a procurement, maybe not so much in the last two years but previously if there was a requirement to submit documents in hard copy, the foreign bidder could lose a couple of days thinking, "Do I send people out to Australia to assist with printing? Do I get a third party in Australia to print for me? Do I know them well? Am I letting them have access to my sensitive confidential information and pricing details?" Those sorts of aspects certainly in the past were a bit of a disadvantage and maybe led to a foreign bidder losing a couple of days when it is critical to get every day you can to be able to submit those Government bids.

Q156 **Anthony Mangnall:** Could I bring Albert back in on this? The Department for International Trade has perhaps been quite ambitious in saying that this is going to be worth an additional £10 billion to British businesses from the Australian public sector. I am interested in your view on that in general, but I would also be very interested in how you think they have reached that figure. Is it realistic or is it a bit brash?

Professor Sánchez-Graells: Thank you for that question. Before I address the question, can I make a follow-up comment on the electronic means? What I would add to what Anne was saying is that the free trade agreement is not at all ambitious in the way electronic means are regulated. For example, it talks only about the submission of tenders and general communications, but it does not talk about other important aspects such as electronic invoicing and, in particular, the recognition of electronic signatures. It could be that this is done elsewhere in the FTA, but if it is not, that will also diminish the practical relevance of that electronic procurement because it could be that you still have to comply with domestic regulations, either in the UK or Australia, to benefit from that electronic procurement. That was just a follow-up point.

On the £10 billion, I think we have to be very cautious about the calculation for two reasons. The first one is that, as the Department explains in a tucked away footnote in the impact assessment of the FTA, the figure was given by the Australian negotiators and what the Department says is that it has checked the methodology with which it was calculated. For example, the figure was calculated on the basis of 2019 procurement, which given how the pandemic has changed public

expenditure, for example, might no longer be a good reflection of future procurement.

The other thing is that I have a few questions about the £10 billion. The first one is about how much is new access or whether that access was already covered by the GPA. I can give you a specific example in a different, maybe more marketing-oriented document from the Department for International Trade, which is about the benefits for the UK of the FTA. This was published shortly after the impact assessment. One of the specific examples that is given is that the contracts procured by the Australian Financial Security Authority will now be accessible to UK tenderers, but the reality of it is that under the GPA this was already a covered entity. It was simply that the value threshold of its contracts has been lowered for them to be accessible to UK companies. I wonder if that is a specific case where there is only a marginal increment, but whether part of that £10 billion could already be available to UK businesses.

The other thing that I don't have a very clear view on, but I think it is useful for the Committee to think about, is how much of that access will actually be practically interesting to UK businesses. Another of the economic sectors that is identified in that benefits document is, for example, railroad concessions, where apparently Australia is planning to massively invest in future years. Given that in the UK itself a very large number—I think it is 70%—of railroad concessions are operated by groups of a foreign ownership, I wonder how much capacity there is in the industry in the UK to go and tender for those opportunities in Australia. Even if it is a theoretical opportunity, I wonder who stands to benefit from it. Those are two things I would say about how relevant the £10 billion is.

Q157 **Anthony Mangnall:** Just to jump in there, because again there is a lot in this, you are saying that we may be counting things that we would never have any chance of bidding in for?

Professor Sánchez-Graells: That would be my worry, and we have not seen a detailed or itemised impact assessment saying, "This £10 billion is £1 billion in this sector, £2 billion in that sector".

The other thing that I would say is that in the FTA itself—and Anne will be able to comment on that because I came across one of her publications preparing for this session—there are requirements allowed under the FTA, for example, in terms of social value of the procurement that could relocalise or tangentially relocalise those procurements. For example, under UK law, in any works contracts of more than £10 million, there is a requirement for the contracting authority to think about what the social value is that is being created by the investment, and 10% of the points for the award of that contract have to be given to social value.

I believe that under Australian law there is a similar requirement for contracts above AUD$4 million to consider what the benefit is to the Australian economy. Of course, those are requirements that are going to have to be interpreted in line with the non-discrimination clauses, but I

think the initial tendency of the contracting authority could be to already see lower social value if a foreign tenderer is to be winning these contracts.

Q158 **Anthony Mangnall:** There must also be an element here—and I would like to bring in Anne—that if you are opening it up there is also hopefully the encouragement that some businesses in the UK might be set up to bid in for those tenders. There is potentially a benefit there, but I take the point. Anne, how will the provisions in other chapters, such as temporary access for businesspersons and recognition of professional qualifications, help UK suppliers take advantage of the procurement opportunities in this agreement?

Anne Petterd: Can I just make one comment on what Albert was talking about? There is not a lot of information, but I believe 30 additional state and territory Government agencies have opted in that would not have opted in to any other agreements beforehand. I don't have any more information than that.

In terms of the other parts of the FTA, like I was talking about before, when a foreign business is looking to win Government work, and substantial Government work, in Australia, at some point they probably want to create more of a footprint in Australia. It might be because there is a need to be close to the customer to deliver the services. They might want to not use a third-party contractor to deliver services that might involve handling more sensitive intellectual property and commercially sensitive information. Or they might be using Australia as a springboard for regional expansion or to expand from Government to private sector opportunities.

As part of doing that, businesses will tend to look at how easy it is for them to set up business in Australia. Things like setting up a company, there is not much involved in that, but aspects of the free trade agreement may well come into thinking for businesses in the UK about when they expand in Australia and how easy it is. Particularly with some of the people movement provisions, the three-year ability to have your more senior managers and specialists come over could be quite significant in helping to establish presence. Being able to move your skilled workers in and out a bit more I think is quite important.

Some of the areas that I am more hopeful will bring some improvements but I think will be a careful watching brief is whether some of the commitments on removal of non-tariff barriers to trade and also in recognition of equivalence of sanitary and phytosanitary measures—just so that there gets to be more harmonisation, that the standard for UK is also accepted as a standard for Australia—will decrease cost to business. To what extent those measures are implemented and the timing I think is something that both Governments are going to have to focus on.

Q159 **Anthony Mangnall:** Very briefly, the temporary access for businesspersons, we are into visa territory here, right? Is this going to set the bar for what we do with other countries? Many on this Committee

are heading out to the Gulf at the end of this week to see whether or not there is any viability in the UK signing up to the GCC. Visas are top of the list and certainly access for businesspersons is top of the list. Are we setting a benchmark with what we have done with Australia? That is to you, Anne, or have I stumped you?

Anne Petterd: You have stumped me a little bit.

Anthony Mangnall: It is a non-sensible question, I suspect.

Anne Petterd: No, it's not. My take on what has been agreed for Australia is that it is fairly specific for what was already in place between the UK and Australia with the visa allowances for younger people, the working holidays, all those sorts of things. I think that this is building on it. We have touched on the CPTPP a few times. That sort of detail is not really contemplated in it, so I guess a key question for the trip to the Gulf is whether more specific particularly senior management visas are going to be set going forward?

Anthony Mangnall: That is very helpful. Thank you.

Q160 **Chair:** Fantastic. We have a few more minutes. Albert, is there anything that you think we have missed that you would like to raise before we draw this session to a close?

Professor Sánchez-Graells: The questions touched on the key issues, but one of the things that I would consider is—going back to the first question that we had about how these things interact, for example—what is the point of having this procurement chapter if the UK also accedes to CPTPP, because Australia is also a member of CPTPP. Then we have created a three-layer regulation.

There is a strategic question that I am not sure the Government are considering in the rush to replicate and to enter into a new free trade agreement, which is: what the end point is of the regulatory architecture and whether, for example, it would make sense on accession to the CPTPP, if there is nothing that deviates from the procurement chapter in the FTA, to just withdraw the procurement chapter from the FTA, to at least take one layer out. I think at some point there is going to have to be some thought about rationalising the multi-layered approach that is resulting from this rush to sign FTAs, so to speak.

Q161 **Chair:** Yes, that is really helpful. Anne, do you have any last thoughts?

Anne Petterd: Just to note on Albert's point, I think it is a really interesting point. As I said before, Australia has signed a lot of free trade agreements and most of them do have Government procurement commitments. The way Australia then translates that into its procurement rules is really common rules for all. In the procurement rules it is set that there are common non-discriminatory rules, including on foreign affiliation and origin of goods baked into the Commonwealth procurement rules, for example. I guess that puts Government procurement chapters in the context of the broader FTA deals and probably needs to be

considered in that broader context as well as on the merits of particular Government commitments.

Chair: That is very helpful. Thank you very much indeed. To Bill, Eduardo, Anne and Albert, thank you all very much for your contribution today. It is fascinating, if not unbelievably complicated, and we really appreciate it. I think that there will be a lot of reading through of the transcript afterwards to try to get our heads around all this stuff. Thank you for your time and thank you to the Committee members.