



HOUSE OF LORDS

Select Committee on the Constitution

11th Report of Session 2022–23

Trade (Australia and New Zealand) Bill

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Select Committee on the Constitution

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Committee staff

The current staff of the committee are John Turner (Clerk), Rachel Borrell (Policy Analyst) and Jackie Lam (Committee Operations Officer). Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

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Trade (Australia and New Zealand) Bill

Introduction

1. The Trade (Australia and New Zealand) Bill was introduced in the House of Commons on 11 May 2022 and brought to the House of Lords on 13 December 2022. Second reading took place on 9 January 2023 and committee stage is scheduled to begin on 23 January 2023.
2. The Bill implements the Free Trade Agreements with Australia and New Zealand concluded on 16 December 2021 and 28 February 2022 respectively. It gives UK and devolved ministers the power to change UK domestic procurement law to implement the public procurement chapters of each agreement. The resulting Act is intended to be superseded by the Act resulting from the Procurement Bill, passed by the House of Lords on 13 December 2022 and currently in the House of Commons, when its relevant provisions are commenced.

Parliamentary scrutiny of treaties

3. Under Part 2 of the Constitutional Reform and Governance Act 2010 (CRAg), before the Government can ratify a treaty it must be laid before Parliament for 21 sitting days.¹ Further 21-day periods may be triggered, either on the initiative of the minister or following a resolution of the House of Commons. The Australia and New Zealand Free Trade Agreements were laid before Parliament for 21 days on 15 June and 27 October 2022 respectively.
4. The House of Commons International Trade Committee criticised the lack of scrutiny time afforded to the draft agreement with Australia and requested an extension to the original 21 days, arguing that its ability to scrutinise the agreement within that time had been “hindered by Government delays”.² The 21-day period was not extended.
5. In our report *Parliamentary Scrutiny of Treaties* we said:

“...section 21 of the Constitutional Reform and Governance Act 2010 allows for the 21 sitting day period to be extended at the discretion of ministers. A treaty committee should not be constrained in its scrutiny by the 21 sitting day provision in the CRAg. We recommend that the Government commits to extending the treaty consideration period if

1 Each House may pass a resolution that a treaty should not be ratified. If the House of Commons does so this triggers another 21-day period before ratification can be confirmed. The House of Commons may repeat this process of rejection. Constitutional Reform and Governance Act 2010, [section 20](#). The minister’s power to extend is in [section 21](#).

2 International Trade Committee, [UK trade negotiations: Scrutiny of Agreement with Australia](#) (First Report, Session 2022–23, HC 444), paras 1–2. However, the International Trade Committee did not request an extension to the 21-day period for which the draft Free Trade Agreement with New Zealand was laid before Parliament. International Trade Committee, [UK trade negotiations: Agreement with New Zealand](#) (Third Report, Session 2022–23, HC 78)

requested by the proposed treaty committee to allow for the completion of scrutiny, unless there are exceptional reasons not to do so.”³

6. *We reiterate our previous recommendation that, unless there are exceptional reasons not to do so, the Government should extend the 21-day treaty consideration period if requested by the treaty committee. In the present case this would have helped ensure improved treaty scrutiny.*
7. *The House may wish to seek further explanation from the Government as to how it intends to facilitate better treaty scrutiny in the future.*

Delegated powers

Delegated Powers Memorandum

8. A Delegated Powers Memorandum was not published until 14 December 2022, after the Bill was brought to the Lords.⁴ The Cabinet Office’s *Guide to Making Legislation* requires such a memorandum to be submitted when a bill is first introduced.⁵ This memorandum was not therefore available to assist House of Commons scrutiny of the Bill.
9. **We draw the late publication of the Delegated Powers Memorandum to the attention of the House. However, we note that the Delegated Powers and Regulatory Reform Committee, in its report on the Bill, did not consider that the power contained in the Bill needed to be drawn to the attention of the House.**⁶

The Procurement Bill

10. The Procurement Bill creates processes for updating procurement rules in line with future Free Trade Agreements. The Procurement Bill is expected to repeal the Trade (Australia and New Zealand) Bill as enacted, although it is also intended that changes which this Bill introduces will be retained in law.⁷ The Government states:

“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

3 Constitution Committee, *Parliamentary Scrutiny of Treaties*, (20th Report, Session 2017–19, HL Paper 345), para 116. The House of Lords International Agreements Committee, however, praised the Government for its engagement with that Committee during its scrutiny of the Free Trade Agreements. International Agreements Committee, *Scrutiny of international agreements: UK-Australia free trade agreement* (4th Report, Session 2022, HL Paper 26), paras 160–161. International Agreements Committee, *Scrutiny of international agreements: UK-New Zealand free trade agreement* (9th Report, Session 2022–23, HL Paper 8), paras 60–64

4 Department for International Trade, *Delegated Powers Memorandum*, 14 December 2022

5 Cabinet Office, *Guide to Making Legislation* (August 2022), p 139: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1099024/2022-08_Guide_to_Making_Legislation_-_master_version_4_.pdf [accessed 18 January 2023]

6 Delegated Powers and Regulatory Reform Committee, *22nd Report* (Session 2022–23, HL Paper 126)

7 The explanatory notes to the Trade (Australia and New Zealand) Bill note that the powers created by the Bill are required for a limited period of time until the new Procurement Bill is enacted. The Procurement Bill proposes equivalent delegated powers to update the UK procurement rules: “Procurement is covered by a number of the UK’s international trade agreements ... The regime in the Bill is compliant with these obligations and will allow a degree of future-proofing through targeted delegated powers to update the regime in the event that new agreements are signed when required to implement new free trade agreements.” *Explanatory Notes to the Procurement Bill*, para 23.

provide for future implementation only until it is replaced by the power in the Procurement Bill.”⁸

11. At second reading the Minister, Lord Johnson of Lainston, noted that it could be 12–18 months or longer before the Procurement Bill comes into effect. He added: “all the provisions relating to Scotland are not in the Procurement Bill ... we need to have this [Trade (Australia and New Zealand)] Bill relating to Scotland to follow through on top of the Procurement Bill, even when the Procurement Bill cancels this Bill.”⁹
12. The explanatory notes state:

“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.”¹⁰
13. Schedule 11 to the Procurement Bill would repeal this Bill in its entirety, albeit with a saving provision under clause 123.¹¹
14. **We draw the relationship between this Bill and the Procurement Bill to the attention of the House. *The House may wish to ask the Government to clarify during the passage of this Bill what steps will be taken to ensure that there will be no legal uncertainty as a result of the repeal of the Act resulting from the Bill.***

Devolution

15. The Bill extends to the whole of the United Kingdom. It gives powers to UK ministers and to Scottish ministers, Welsh ministers and Northern Ireland departments to make changes to domestic procurement legislation necessary to implement the Australia and New Zealand Free Trade Agreements.

Regulation-making powers

16. Schedule 1 provides that the devolved authorities can make regulations under clause 1 only within areas of “devolved competence”.¹² In certain instances devolved authorities can make regulations only with the consent of UK ministers,¹³ or jointly with UK ministers¹⁴ or after consulting a Minister of the Crown.¹⁵
17. The implementation power is conferred concurrently on devolved and UK ministers, which means that UK ministers can make secondary legislation on a devolved matter without being required to seek consent from the relevant devolved minister.

8 [Explanatory Notes to the Trade \(Australia and New Zealand\) Bill](#), para 17c

9 HL Deb, 9 January 2023, [col 1283](#)

10 [Explanatory Notes to the Trade \(Australia and New Zealand\) Bill](#), para 6

11 [Procurement Bill](#), Schedule 11 and clause 123

12 [Trade \(Australia and New Zealand\) Bill](#), schedule 1, para 1

13 *Ibid.*, schedule 1, para 2

14 *Ibid.*, schedule 1, para 3

15 *Ibid.*, schedule 1, para 4

18. In our report *Brexit Legislation: constitutional issues* we said:

“While the legislative consent convention—that the UK Parliament will not normally legislate in areas of devolved competence without consent—does not apply to delegated legislation, we believe formal engagement with the devolved institutions on the use of such powers should be a requirement.

We recommend that powers for UK ministers to make delegated legislation in devolved areas, including the power to supersede law made by devolved legislatures, should include a requirement either to consult devolved ministers or to seek their consent, depending on the significance of the power in question. The more significant the power, the greater the need for consent to be sought. We note that this approach has been adopted in the Fisheries Bill and we encourage the Government to follow this precedent in future legislation.”¹⁶

19. During second reading in the House of Lords the Minister, Lord Johnson of Lainston, said in relation to the concurrent powers in the Bill: “the Government are committed to not normally using this Bill’s powers without the consent of the devolved Administrations, and we will never use them without consulting the devolved Administrations first.”¹⁷
20. **We welcome the Government’s commitment that UK ministers will not normally use concurrent powers without the relevant devolved administration’s consent. We reiterate the importance of making every effort to achieve consent in the exercise of delegated powers in devolved areas.**

Legislative consent

21. The UK Government is seeking legislative consent from Senedd Cymru, the Scottish Parliament and the Northern Ireland Assembly for this Bill.¹⁸ The Welsh and Scottish parliaments have not yet given consent, and the Northern Ireland Assembly is not in a position to do so.¹⁹
22. The Welsh Government has recommended that the Senedd withhold its consent from the Bill in its current form. While the Welsh Government accepts that procurement legislation in Wales must be amended to meet the requirements of the two Free Trade Agreements, it opposes powers given to UK ministers to make regulations without the consent of Welsh Ministers.²⁰
23. The Scottish Government also objects to the lack of a consent requirement for the power under the Bill:

“In the absence of a requirement for UK Ministers to seek the consent of the Scottish Ministers before exercising this power in relation to

16 Constitution Committee, *Brexit Legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), paras 64–65

17 HL Deb, 9 January 2023, [col 1234](#)

18 *Explanatory Notes to the Trade (Australia and New Zealand) Bill*, paras 50–54

19 No Northern Ireland Executive has been formed since the May 2022 Northern Ireland Assembly elections. A caretaker Executive is currently in place but cannot make new decisions on legislative consent.

20 Welsh Government, *Legislative Consent Memorandum: Trade (Australia and New Zealand) Bill* (25 May 2022), paras 28–29: <https://senedd.wales/media/143lqnxi/lcm-ld15123-e.pdf> [accessed 12 January 2023]

Scotland, the Scottish Government does not recommend that the Scottish Parliament consents to this Bill as it is drafted.”

24. The Scottish Government does not intend to lodge a legislative consent motion with the Scottish Parliament.²¹
25. The UK Parliament can pass the Bill in the absence of legislative consent from one or more of the devolved assemblies. However, in *Brexit legislation: constitutional issues* we said:

“When consent has been refused, or not yet granted by the time of third reading, the Government could make a statement to the House before third reading commences. This could set out the efforts that were made to secure consent and the reasons for the disagreement—and include any statement the devolved institution wished to make.”²²
26. **It will be a matter of great regret if consent to the Bill is ultimately not achieved, particularly as there is little substantive disagreement between the Government and the devolved administrations over the need for this legislation.**
27. ***We encourage the Government and the devolved administrations to work towards securing consent to the Bill. The House may wish to ask the Government to explain during the progress of the Bill, rather than at third reading, what efforts it has made to secure consent and the reasons why, in its view, this has so far proven impossible.***

Intergovernmental relations on trade

28. At committee stage in the House of Commons the Minister, Sir James Duddridge, observed that the Interministerial Group for Trade²³ had met eight times since its inception in 2020. He said that departmental officials regularly met their devolved counterparts, allowing ministers from devolved administrations to contribute their views.²⁴
29. The ‘Review of Intergovernmental Relations’, published in January 2022, stated:

“Recognising that international relations is a reserved competence, the importance of engagement on the UK Government’s approach to international issues as it affects devolved responsibilities is embedded

21 Scottish Government, *Legislative Consent Memorandum: Trade (Australia and New Zealand) Bill* (13 June 2022), para 14: <https://www.parliament.scot/-/media/files/legislation/bills/lcms/trade-australia-and-new-zealand-bill/legislative-consent-memorandum.pdf> [accessed 12 January 2023]

22 Constitution Committee, *Brexit Legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), para 60

23 The Ministerial Forum for Trade was established in 2020 and became the Interministerial Group for Trade in August 2022. It is the primary forum for discussing the UK’s international trade agenda. Its membership includes the UK Government, Northern Ireland Executive, Scottish Government and Welsh Government. Department for International Trade, *Terms of reference for Interministerial Group for Trade* (25 August 2022): <https://www.gov.uk/government/publications/interministerial-group-for-trade-terms-of-reference> [accessed 12 January 2023]

24 HC Deb, 18 October 2022, [col 104](#)

in the system ... IMGs [Interministerial Groups], including the Trade IMG [will] discuss agreements with the UK's new trading partners ..."²⁵

30. **The January 2022 Review of Intergovernmental Relations committed to firmer structures for intergovernmental cooperation in the negotiation and implementation of international agreements. We encourage the Interministerial Group for Trade to endeavour to ensure that, where devolved matters are affected, the making of any statutory instruments designed to implement these agreements, and any future free trade agreements, adhere to the principles of intergovernmental relations set out by the review.**²⁶
31. **We urge the Government and devolved administrations to explore whether, by way of intergovernmental agreement, sufficient good faith can be established to enable devolved consent to this Bill.**

25 Cabinet Office and the Department for Levelling Up, Housing and Communities, *The Review of Intergovernmental Relations* (13 January 2022), para 13: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf [accessed 12 January 2023]

26 The Review of Intergovernmental Relations states: "Collaborative working will be founded on the following principles: a) Maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK; b) Building and maintaining trust, based on effective communication; c) Sharing information and respecting confidentiality; d) Promoting understanding of, and accountability for, their intergovernmental activity; e) Resolving disputes according to a clear and agreed process." Cabinet Office and the Department for Levelling Up, Housing and Communities, *The Review of Intergovernmental Relations*, para 1

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
 Lord Falconer of Thoroton
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Hope of Craighead
 Lord Howard of Lympne
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Robertson of Port Ellen
 Lord Sherbourne of Didsbury
 Baroness Suttie
 Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
 Lord Falconer of Thoroton
No interests declared
 Lord Faulks
No interests declared
 Baroness Fookes
No interests declared
 Lord Hennessy of Nympsfield
No interests declared
 Lord Hope of Craighead
No interests declared
 Lord Howard of Lympne
No interests declared
 Lord Howarth of Newport
No interests declared
 Lord Howell of Guildford
No interests declared
 Lord Robertson of Port Ellen
No interests declared
 Lord Sherbourne of Didsbury
No interests declared
 Baroness Suttie
No interests declared
 Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: <https://members.parliament.uk/members/lords/interests/register-of-lords-interests>

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.