

The Trade (Australia and New Zealand) Bill explanatory note outlines three circumstances where the Government anticipates making regulations under the Act, once enacted.

- a) to amend existing secondary legislation for procurement to extend the duties owed by contracting authorities, and remedies available in that legislation to the suppliers of the relevant countries for procurement covered by the respective Agreements, implementing the market access conditions of the Agreements;*
- b) to amend existing secondary legislation for procurement to bring it in line with certain rules in the text of the government procurement Chapter of the UK-Australia FTA. The specific areas of the procurement regulations that may be amended relate to rules regarding (i) unknown contract values, (ii) notices advertising procurements, and (iii) termination of awarded contracts; and*
- c) to amend existing secondary legislation to implement any changes to the government procurement Chapters of the Agreements over their lifetime, for example updates to the market access schedules to reflect certain machinery of government changes. 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 provide for future implementation only until it is replaced by the power in the Procurement Bill.*

I. How does (a) relate to regulation 90 of the Public Contracts regulation?

1. Reg.90 was omitted (1.1.2022) by virtue of The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319).
2. The Public Procurement (Agreement on Government Procurement) (Amendment) Regulations 2021 (S.I. 2021/573) inserted (11.6.2021) reg.90A in relation to economic operators from GPA parties. This would cover Australia and New Zealand, but only in relation to the GPA.
3. The Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 (S.I. 2021/787) inserted (2.7.2021) reg.90B in relation to operators from countries with whom the United Kingdom has an international agreement, other than the GPA. Reg.90B only applies to agreements listed in [Schedule 4A](#). The Schedule does not contain agreements entered into after 16 April 2021.
4. Presumably, the anticipated changes are to Schedule 4A to add both FTAs, so that Reg.90B covers their additional coverage cfr the GPA. Given that reg.90A and reg.90B both have the same effect (ie to extend access to remedies in the same terms as reg.89 foresees for UK and Gibraltar operators), there is no need for any other changes to reflect e.g. the duty owed to operators from countries which could qualify both under reg.90A and reg.90B due to the dual regulation of procurement covered by both the GPA and the FTA.

II. What legal basis does (b) provide for any change the UK may wish to make under the provisions in Article 16.2.9 of the Australia FTA, and does a similar power already exist in legislation in relation to the GPA generally? Please also specify where current UK legislation may need amending.

5. This would be a power without equivalent in the current regs, as it relates to material changes in substantive provisions, rather than an issue of update (see III below). The power would target provisions where the UK-AUS FTA and UK-NZ FTA deviate from the PCR2015 and would likely be used to bring them in line.
6. The three specific changes mentioned in the explanatory memorandum concern the following provisions:
 - (i) Art 16.2(9) UK-AUS FTA would require an amendment of regs.6(17)(b) and 6(19) PCR2015 in relation to contracts without a fixed term, or which term cannot be defined. Whereas the latter (and Art 16.2(8) UK-NZ FTA) require calculating the value over 48 months (and could thus leave the contract below threshold), Art 16.2(9) UK-AUS FTA requires that contracts with unknown total value are deemed covered in all cases. This modification, if extended to all procurement by virtue of clause 1(b) in the Bill (see para 21 of the Explanatory Memorandum and IV below) would expand the coverage of the PCR2015 for operators from all countries with which the UK has a procurement agreement (be it the GPA, reg.90A, or another type of agreement, reg.90B).
 - (ii) Similarly, the rules on publication of notices in Art 16.6 UK-AUS FTA and 16.6 UK-NZ FTA may require some changes to regs.49-50, in particular concerning the content of the notices, which is currently linked to the EU's requirements in Annex 5 of the Public Contracts Directive. I have not carried out an item-by-item comparison, but it may be that some information required under the FTAs is not currently included.
 - (iii) I find this one a little puzzling, as the FTAs do not contain explicit rules on contract termination, which is regulated in reg.73 PCR2015. At a guess, the issue could be that the link of some termination clauses under reg.73 to other regs. (e.g. 57 on exclusion grounds) could be seen as too narrow to allow for termination for (broader?) grounds covered in the FTAs (e.g. 16.7(4) UK-AUS FTA, although I do not readily see any gaps).

III. What legal basis does (c) provide for any change the UK may wish to make under the provisions in Article 16.20 of the Australia FTA, and does a similar power already exist in legislation in relation to the GPA generally? Please also specify where current UK legislation may need amending.

7. Indeed, this relates to Art 16.20 UK-AUS FTA and 16.21 UK-NZ FTA. The equivalent power is in reg.5A PCR2015, inserted (31.12.2020) by The Public Procurement (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1319). This applies to reviews of thresholds under the GPA only. Given that the thresholds in the FTAs are the same, or higher, than the GPA's, it is hard to see the need for a separate power to modify in practice, but this cannot be excluded from a theoretical perspective.

IV. Paragraph 21 of the explanatory notes outlines the effect of subsection 1(b) of The Trade (Australia and New Zealand) Bill. Can the effect of subsection 1(b) be interpreted as: where the procurement benefits in the Australia FTA require changes to UK law, the Government has the power to extend those benefits to all suppliers? If so, does this open an unusual circumstance where Australia's preferential access to the UK procurement market could be comparatively diminished?

8. Regarding para 21 of the Explanatory Memorandum, I do not read it as a most favoured nation treatment clause in terms of preferential coverage, but rather as a rule that will extend the more demanding substantive and procedural standards of the FTAs to all parties with which the UK has a relevant agreement.
9. This links to the conversations we had on how to coordinate conflicting rules between the GPA and the FTAs. Here, the Government is suggesting that they are willing to extend GPA+ elements of the FTAs (e.g. deemed coverage of all contracts with unknown value, rather than only those which exceed the thresholds on the basis of the notional value resulting from their first 48 months), which would mean that any tightening of the rules in an FTA would get propagated to all covered procurement under *any* agreement because the tighter rule would become domestic law.
10. The only open question is what would happen concerning the more problematic GPA- elements of the FTAs, which can clearly not be propagated in this manner. My view is that those elements will simply be deactivated as a result of the tighter domestic rule, which will in practice override the FTA. But this was precisely the legal uncertainty we discussed.