



EXPLANATORY NOTES

Trade (Australia and New Zealand) Act 2023

Chapter 9

£6.90

TRADE (AUSTRALIA AND NEW ZEALAND) ACT 2023

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Trade (Australia and New Zealand) Act 2023 which received Royal Assent on 23 March 2023 (c. 9).

- These Explanatory Notes have been prepared by the Department for Business and Trade in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

- 1 The Trade (Australia and New Zealand) Act 2023 provides the necessary measures to implement the United Kingdom's first "from scratch" free trade agreements (FTAs) in over 50 years. In particular, the Act provides a power:
 - a. to ensure that the UK can implement in domestic law the government procurement obligations in the UK-Australia FTA and UK-New Zealand FTA (together referred to as "the Agreements"); and
 - b. to make changes to domestic law that apply generally and not only in relation to the operation of the UK-Australia FTA.

Policy background

- 2 The UK-Australia FTA was signed virtually on 16 December 2021 and the UK-New Zealand FTA was signed on 28 February 2022. The government procurement Chapters of these Agreements (Chapter number 16 in each) contain the only obligations that require new primary legislation to provide for their implementation for the entry into force of the Agreements. This legislative implementation of the government procurement obligations in the Agreements is needed before formal entry into force of the Agreements to ensure that the UK is not in breach of them, when they enter into force, and the benefits of the Agreements can begin to accrue.
- 3 Both government procurement Chapters consist of (a) the text of the Chapter setting out the government procurement obligations and (b) the Schedules in an Annex to the Chapter, which set out the procurement market access coverage of each of the parties. The text sets out rules for fair, transparent and non-discriminatory conditions of competition in government procurement. These rules do not automatically apply to all procurement activities of each party. Rather, the Schedules determine which entities and procurements are covered by the scope of the Chapter and must follow the rules. Only procurement activities by covered entities purchasing covered goods, services or construction services, of a value exceeding the specific thresholds, are within the scope of the respective Agreements.
- 4 The Trade (Australia and New Zealand) Act 2023 provides the Government and the Scottish Ministers, Welsh Ministers or a Northern Ireland Department the power to make changes to domestic legislation which are necessary to ensure the UK's government procurement obligations arising from the Agreements can be fully implemented.
- 5 The Procurement Bill [HL] introduced into the House of Lords on 11th May 2022 would reform existing procurement legislation. That Bill is expected to provide a power to implement the UK's government procurement market access obligations in trade agreements. Accordingly, the function of the power in this Act that allows the UK to implement any future updates to the government procurement obligations in the Agreements is only required until the relevant power in the Procurement Bill enters into force.
- 6 The relevant provisions of the Procurement Bill are anticipated to enter into force after this Act and after the necessary changes to domestic law have been made for entry into force of the Agreements. 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) Act 2023 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.

Legal background

- 7 The relevant legal background is explained in the policy background section of these notes.

Territorial extent and application

- 8 Section 4 sets out the territorial extent of the Trade (Australia and New Zealand) Act 2023. The extent of an Act can be different from its application. Application is about where an Act produces a practical effect rather than where it forms part of the law.
- 9 The Trade (Australia and New Zealand) Act 2023 extends and applies to the whole of the UK.

Commentary on provisions of the Act

Section 1: Power to implement government procurement Chapters

- 10 Before an FTA can enter into force, the parties to the FTA should ensure that it is implemented domestically, to avoid breaching the FTA on entry into force. This means that each party to the FTA should ensure its domestic legislative framework is consistent with the obligations in the FTA. Not all obligations within an FTA require a change to the law.
- 11 The UK-Australia FTA and UK-New Zealand FTA require changes to UK domestic procurement law. The scope of the power contained in the Act is to implement the government procurement Chapters of these Agreements, including the market access schedules (as they may be modified from time to time), and to make related provision.
- 12 The UK previously implemented its procurement obligations under section 2(2) of the European Communities Act 1972 when the UK was still a Member State of the EU. Now that the UK has left the EU, the power in section 1 of the Act is needed to ensure that the obligations in the government procurement Chapters of the Agreements, and matters arising out of or related to those Chapters, can be implemented in domestic law.
- 13 Section 1 provides a power for appropriate authorities to make regulations for two purposes:
 - a. Subsection 1(a) allows an appropriate authority to make regulations for the purpose of implementing the government procurement Chapters in the FTAs.
 - b. Subsection 1(b) allows an appropriate authority to make regulations for the purpose of making other changes for matters arising out of, or related to, the government procurement Chapters in the FTAs.
- 14 The power in subsection 1(a) will be used to make the following changes:
 - 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;

- 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.
- 15 The power in subsection 1(b) is to be read with sections 1(2) and 1(3).
 - 16 Section 1(2) allows the regulations under subsection 1(b) to be made also for cases falling outside the scope of the government procurement Chapters to provide for general application.
 - 17 Section 1(3) clarifies that a case is outside the scope of a government procurement Chapter if that Chapter does not impose an obligation on the UK in respect of that case, i.e. it is not an obligation owed specifically in the Chapter.
 - 18 The effect of subsection 1(b) read with 1(2) is that certain changes made to domestic law to implement the UK-Australia FTA, i.e. in respect of the rules in the text of the government procurement Chapter (see paragraph 17.b above), can apply generally and not only to suppliers from Australia. This will ensure procurement regulations remain uniform and coherent by not imposing different or conflicting procurement procedures on contracting authorities for procurements covered by the FTA, and ensure the UK can implement its obligations in the FTA in a way that is consistent with the UK's other international procurement obligations.
 - 19 Section 1(4) defines "government procurement Chapters of the UK-Australia and UK-New Zealand FTAs" set out in section 1(4)(a) and (b) respectively, by reference to the relevant chapters and annexes in the FTAs.
 - 20 Section 1(5) defines the "UK-Australia FTA" and "UK-New Zealand FTA". These definitions include reference to the Agreement as it is modified from time to time in accordance with any provision of it. This clarifies that the scope of the power includes implementation of updates to the Agreements.

Section 2: Further provision about power

- 21 Section 2 provides for different types of provision that could be made by regulations under section 1 where needed, for example consequential provision. Section 2 also gives effect to Schedules 1 and 2, which, respectively, set out restrictions on the use of the power by devolved authorities and provide for how regulations under section 1 can be made.

Section 3: Interpretation

- 22 Section 3 sets out how certain terms within the Trade (Australia and New Zealand) Act 2023 should be interpreted.
- 23 An "appropriate authority" means a Minister of the Crown or a devolved authority, for the purpose of making regulations under section 1. "Minister of the Crown" and "devolved authority" are also defined in section 3. "Devolved authority" is defined as the Scottish Ministers, the Welsh Ministers or a Northern Ireland department.
- 24 Section 3 also defines the terms "modify" and "subordinate legislation".

Section 4: Extent, commencement and short title

- 25 Section 4(1) provides that the Act extends to England and Wales, Scotland and Northern Ireland.

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- 26 Section 4(2) provided that the Act came into force on the day of Royal Assent.
- 27 Section 4(3) establishes that the short title for this Act will be the Trade (Australia and New Zealand) Act 2023.

Schedule 1 – Provision relating to devolved authorities and Senedd Cymru

Part 1 - Restrictions on devolved authorities

- 28 Part 1 of the Schedule describes the circumstances in which a devolved authority (defined in section 3 as the Scottish Ministers, Welsh Ministers and a Northern Ireland department) may use the power in section 1 to make regulations.

No power to make provision outside devolved competence

- 29 Paragraph 1 provides that a devolved authority may not make provision under section 1 unless the provision is within the devolved authority's devolved competence. Devolved competence is defined in paragraphs 5 to 7 of the Schedule.

Requirement for consent where it would otherwise be required

- 30 Paragraph 2 sets out that consent of a Minister of the Crown is required if a devolved authority is making a provision using the power in section 1 acting alone and the provision would otherwise require consent if it were being made under other powers. That could be where the relevant devolved legislature's legislative powers were subject to a consent requirement, or where the devolved authority would normally require consent to make such a provision by secondary legislation. This requirement for consent will not apply if the devolved authority already has power to make such provision using secondary legislation without needing the consent of the Minister of the Crown.

Requirement for joint exercise where it would otherwise be required

- 31 Paragraph 3 sets out that, where a devolved authority would normally only be able to make legislation jointly with the UK Government, the devolved authority will still have to make such legislation jointly when exercising the power in section 1.

Requirement for consultation where it would otherwise be required

- 32 Paragraph 4 requires consultation with the Government on legislation made by a devolved authority acting alone in the exercise of the powers in section 1, where the devolved authority would normally be required to consult with the Government when making those kinds of changes in legislation.

Meaning of devolved competence

- 33 Paragraphs 5 to 7 define devolved competence for the purposes of exercise by a devolved authority of the power in section 1.

Meaning of "Northern Ireland devolved authority"

- 34 Paragraph 8 defines "Northern Ireland devolved authority" for the purposes of Part 1 of the Schedule.

Part 2 - Legislative competence of Senedd Cymru: exclusions from restrictions

- 35 Paragraph 9 in Part 2 of the Schedule disappplies some of the restrictions in paragraphs 8 and 11 of Schedule 7B to the Government of Wales Act 2006 in relation to concurrent functions in this Act.

Schedule 2 – Regulations under Section 1

Part 1 - Statutory instruments and statutory rules

- 36 Part 1 provides that the power to make regulations under section 1 of the Act is exercisable by statutory instrument when exercised by a Minister of the Crown acting alone and makes corresponding provision for each of the devolved authorities acting alone and for a Minister of the Crown acting jointly with a devolved authority.

Part 2 - Scrutiny of regulations under section 1

- 37 Part 2 of the Schedule provides for scrutiny by the UK Parliament and the devolved legislatures of regulations made under section 1.

Scrutiny of regulations made by Minister of the Crown or devolved authority acting alone

- 38 Paragraph 2 provides that the negative procedure applies to regulations made by a Minister of the Crown or a devolved authority acting alone under section 1.

Scrutiny of regulations made by Minister of the Crown and devolved authority acting jointly

- 39 Paragraph 3 provides for the negative procedure to apply to regulations made jointly by a Minister of the Crown and a devolved authority under section 1.

Part 3 – Anticipatory exercise of section 1 power

- 40 Part 3 provides that the power to make regulations may be exercised before the agreement or a modification to a government procurement Chapter of the UK-Australia FTA or UK-New Zealand FTA is ratified.

Commencement

- 41 Section 4(2) provides for the commencement of the provisions in the Trade (Australia and New Zealand) Act 2023. The Act came into force on the day on which it received Royal Assent.

Related documents

- 42 The following documents are relevant to the Act and can be read at the stated locations:

- UK-Australia Free Trade Agreement
 - Text of UK-Australia Free Trade Agreement and associated documents – <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-australia>

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- Text of an Explanatory Memorandum – <https://www.gov.uk/government/publications/uk-australia-fta-draft-explanatory-memorandum>
- Impact Assessment – <https://www.gov.uk/government/publications/uk-australia-fta-impact-assessment>
- UK-Australia FTA: benefits for the UK – <https://www.gov.uk/government/publications/uk-australia-fta-benefits-for-the-uk>
- UK-New Zealand Free Trade Agreement
 - Text of UK-New Zealand Free Trade Agreement and associated documents – <https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-new-zealand>
 - Text of an Explanatory Memorandum – <https://www.gov.uk/government/publications/uk-new-zealand-fta-draft-explanatory-memorandum>
 - Impact Assessment – <https://www.gov.uk/government/publications/uk-new-zealand-fta-impact-assessment>
- UK-New Zealand FTA: benefits for the UK – <https://www.gov.uk/government/publications/uk-new-zealand-fta-benefits-for-the-uk>

Annex A – Hansard References

43 The following table sets out the dates and Hansard references for each stage of the Act’s passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Commons</i>		
First Reading	11 May 2022	Votes and Proceedings, No 2
Second Reading	6 September 2022	House of Commons Vol. 719 Col. 138
Public Bill Committee	12 October 2022	First sitting: Col. 1
		Second sitting: Col. 25
	18 October 2022	Third sitting: Col. 59
		Fourth sitting: Col. 89
Report and Third Reading	12 December 2022	House of Commons Vol. 724 Col. 747
<i>House of Lords</i>		
First Reading	13 December 2022	House of Lords Vol. 826 Col. 552
Second Reading	9 January 2023	House of Lords Vol. 826 Col. 1230
Committee of the whole House	23 January 2023	House of Lords Vol. 827 Col. 24
Report	14 March 2023	House of Lords Vol. 828 Col. 1241
Third Reading	20 March 2023	House of Lords Vol. 828 Col. 1547
Commons Consideration of Lords Amendment	22 March 2023	House of Commons Vol. 730 Col. 384
Royal Assent	23 March 2023	House of Commons Vol. 730 Col. 475
		House of Lords Vol. 828 Col. 1957

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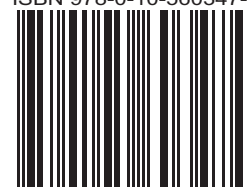
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