Public Law Project briefing on the Trade (Australia and New Zealand) Bill

Supported by Trade Justice Movement

August 2022

Summary and Recommendations

1. On 20 July the parliamentary scrutiny period for the UK-Australia Free Trade Agreement (FTA) expired. The Trade (Australia and New Zealand) Bill (the Trade Bill), which provides for the implementation of the government procurement chapters of the UK-Australia[1] and UK-New Zealand[2] FTAs by regulations, was introduced before the scrutiny period for the FTA even commenced. The Commons is being asked to pass bare-bones legislation implementing an agreement that it was not given the opportunity to debate.
2. The regulation-making power in Clauses 1 and 2 has been loosely defined but is intended to enable significant amendments to be made to existing procurement legislation. This method of treaty implementation furthers a wider trend whereby the Government depends heavily on statutory instruments (SIs) to implement its major post-Brexit treaties. In doing so, the Bill compounds the lack of democratic oversight in both treaty and (SI) scrutiny mechanisms in the UK.
3. The purpose of this briefing is to place this seemingly minor piece of legislation into the broader context of a severe treaty and SI scrutiny deficit. We will first outline the nature of the power created by the Bill. An overview will next be provided of the limited mechanisms for parliamentary scrutiny of both treaties and SIs. The Bill will then be analysed as part of a broader post-Brexit trend of treaty implementation via SIs. Finally, the public interest in effective scrutiny of treaties and SIs will be considered.
4. There is significant public interest in ensuring that international agreements and their implementing legislation are sufficiently scrutinised, that parliamentary time is being used effectively, and that changes to the law, particularly procurement, are made in a transparent and open manner. The conclusion of new treaties, particularly relating to trade, has wide-ranging and significant effects on the lives and rights of individuals. International obligations can require substantive changes to be made to various domestic laws, for example, those relating to data transfers, food and agricultural standards, and environmental protection. It is crucial that Parliament has a role in scrutinising these changes, both at the stage of treaty formation and also treaty implementation.
5. We therefore make the following recommendations:

a. That the powers exercisable under Clauses 1 and 2 of the Bill are constrained by an objective test of necessity and/or subject to the affirmative resolution procedure. Moreover, Members should push for greater scrutiny of the UK-New Zealand FTA when it is laid before Parliament to counteract the lack of substantive implementing legislation.

b. That Members question why the Government has undermined the effective parliamentary scrutiny of a major novel trade agreement, particularly when the implementing legislation gives so little opportunity to scrutinise the substance of the treaty. Members may also wish to question whether the Government is attempting to establish a precedent of low scrutiny for other treaties agreed by it and future Governments.

c. That Members use the second reading to build upon the concerns about scrutiny expressed in the urgent question on 19 July[3] and transpose these concerns to the use of SIs to implement treaties. In particular, we remind Members that the Trade Bill in its current form, under which regulations will have to be made after the Bill becomes law, will deny them of any remaining

[1] https://www.gov.uk/government/publications/ukaustralia-free-trade-agreement-cs-australia-no12022
[2] https://www.gov.uk/government/collections/free-trade-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-new-zealand
[3] HC Deb, vol 718, cols 843-855

opportunity to debate the FTA.

d. That Members are critical of the speed at which the Government has sought to complete the ratification process at the expense of effective scrutiny, particularly considering that the projected increase in the UK's GDP as a result of the UK-Australia FTA is only 0.08%, and the Procurement Bill is in the process of being enacted.

e. That Members question whether the broad and unspecified powers to alter public procurement rules in the Trade Bill adequately reflect the values of transparency and openness.

Regulation-making powers contained in the Bill

6. The Explanatory Memorandum (EM) to the UK-Australia FTA states that the only primary legislation required to implement the treaty relates to its Procurement Chapter.[4] The Government has identified three changes that must be made to existing procurement legislation (primarily the Public Contracts Regulations 2015):

    - Extension of 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";[5]
    - "[Amending] 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";[6]
    - Implementing "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."[7]

7. To this effect, Clause 1(1)(a) of the Bill provides for a power to implement the Procurement Chapters of the FTAs by regulations. Clause 1(1)(b) enables regulations to be made for matters outside the scope of the procurement chapters, that is, to extend the changes arising out of the FTAs to non-Australian and non-New Zealand suppliers. The stated aim of Clause 1(1)(b) is to "ensure procurement regulations remain uniform and coherent by not imposing different or conflicting procurement procedures on contracting authorities for procurements covered by the FTA".[8]

8. Despite the EM to the UK-Australia FTA identifying the need for primary legislation to implement the terms of Procurement Chapters, the Bill itself does not enact any of the required changes to existing procurement legislation.[9] Nor is the broad power delegated in Clause 1 constrained by a test of necessity; Clause 1(1) provides that regulations can be made where considered "appropriate" to implement the Procurement Chapters or in accordance with Clause 1(1)(b).

[4] Explanatory Memorandum to the UK-Australia Free Trade Agreement, 5.1; n.b., contrary to pt 15 of the Cabinet Office's Guide to Making Legislation, a delegated powers memorandum has not been published for the Bill
[5] Explanatory Notes to the Trade (Australia and New Zealand) Bill, para 17.a
[6] ibid, para 17.b
[7] ibid, para 17.c
[8] Explanatory Notes to the Trade (Australia and New Zealand) Bill, para 21
[9] See Professor Albert Sanchez-Graells' written evidence to the International Trade Committee for an overview of the required legislative amendments

9. Moreover, Schedule 2, Paragraph 2 of the Trade Bill states that regulations made under Clause 1 are subject to the negative SI procedure. This means that any regulation made under the Trade Bill will become law immediately and remain in force unless a motion to reject it is passed by either House within 40 sitting days. The Bill does not provide for any other procedure, so this will be the case regardless of the content of the SI or the extent of the change it provides for.

10. There is a strong case for greater parliamentary involvement in the scrutiny of treaty-implementing legislation now that the UK has left the EU. Although the regulations[10] implementing the UK's procurement obligations under Section 2(2) of the European Communities Act 1972 were laid via the negative procedure, these followed the collaborative approach of the European Commission and Parliament to treaty negotiation and scrutiny. The UK does not have a similar approach to treaty conclusion, therefore Parliamentary scrutiny of the regulations made under this Trade Bill may be the only opportunity that Members are given to debate the UK-Australia FTA.

11. **We recommend that the powers exercisable under Clauses 1 and 2 of the Bill are constrained by an objective test of necessity and/or subject to the affirmative resolution procedure. Moreover, Members should push for greater scrutiny of the UK-New Zealand FTA when it is laid before Parliament to counteract the lack of substantive implementing legislation.**

Treaties and the limitations of parliamentary scrutiny

12. Bills that delegate power in broad terms and without adequate constraint are cause for concern. This concern is amplified in the context of treaty implementation. Parliament has a very limited ability to scrutinise international agreements, which were traditionally considered to be within the remit of the Government's prerogative.

13. The problems with treaty scrutiny are well-documented and significant.[11] The greatest issue lies in the fact that Parliament has no formal involvement in the treaty process when negotiations are underway. There is no requirement for treaties to be laid before Parliament before they are signed and no obligation on the Government to facilitate a debate on the treaty or to obtain Parliament's consent through a vote. This means that there is no parliamentary input at the point at which the terms of a treaty can still be changed.

14. These problems were not resolved by the statutory role given to Parliament by the Constitutional Reform and Governance Act 2010 (CRAG) in treaty oversight. Section 20 of CRAG provides that a treaty cannot be ratified unless a Minister has laid a copy before Parliament, the treaty has been appropriately published, and 21 sitting days pass without either House resolving that the treaty should not be ratified. If there is a resolution against ratification in either House, the relevant Minister may make a statement explaining why ratification should proceed. If the Commons passed such a resolution, this Ministerial statement would trigger another 21-day sitting period in which a resolution and subsequent statement could be made. In theory, this process can repeat itself indefinitely, but in practice this is significantly constrained by the Government's control of parliamentary time.

15. Section 22(1) of CRAG allows for Section 20 to be circumvented "if a Minister of the Crown is of the opinion that, exceptionally, the treaty should be ratified without the requirements of that section having been met". This section was used recently for the urgent ratification of Sweden and Finland's NATO accession protocols.[12] Further, legislation can disapply CRAG entirely, as happened for both the

[10] The Public Contracts Regulations 2015 (SI 2015/102) and the Public Contracts Regulations 2006 (SI 2006/5)

[11] See Written evidence from The Public Law Project to the Public Administration and Constitutional Affairs Committee

[12] Secretary of State for Foreign, Commonwealth and Development Affairs, Statement of 6 July 2022

UK-EU Withdrawal Agreement and the UK-EU Trade and Cooperation Agreement (TCA).[13]

16. While Parliament, in theory, maintains its sovereignty through its general control over implementing legislation, this sovereignty is limited in two significant ways. Firstly, not only can the highly technical terms of treaties predetermine the nature and content of any implementing legislation, but they can also constrain the ability of Parliament to legislate in the future if doing so would contradict its international commitments. Secondly, as explored further below, treaties are overwhelmingly implemented by delegated legislation. Parliamentary input into what is essentially ministerial legislation is minimal, particularly because the majority of SIs are made under the negative procedure outlined above.

17. The difficulty Parliament experiences in scrutinising international agreements was exemplified by the passage of the UK-Australia FTA, which this Trade Bill seeks to implement. The International Trade Committee (ITC) published two reports on the UK-Australia FTA, the first of which details the failures of the Government to facilitate the ITC's scrutiny of the FTA.[14] In particular, the Government refused the ITC's request for fifteen sitting days in between the publication of the Government's section 42 report on the FTA and the triggering of the CRAG process, which would have enabled the ITC to identify any potential concerns before the limited time period under CRAG began.[15]

18. The ITC further noted the Secretary of State for International Trade's lack of cooperation with respect to giving oral evidence to the Committee. Evidence was eventually given on 6 July,[16] only eight sitting days before the expiry of the CRAG period. One day before this expiry date, and in response to an urgent question on scrutiny of the FTA, the Government announced that, contrary to the ITC's recommendations and the Government's own assurances,[17] there would neither be a Commons debate on the treaty, nor would the Minister be using her powers under Section 21 of CRAG to extend the 21-day period.[18] While a debate was held in the House of Lords,[19] the CRAG period expired on 20 July, leaving the Government free to ratify its first independently negotiated trade agreement in over fifty years with little, if any, oversight from the Commons.

19. **We encourage Members to question why the Government has undermined the effective parliamentary scrutiny of a major novel trade agreement, particularly when the implementing legislation gives so little opportunity to scrutinise the substance of the treaty. Members may also wish to question whether the Government is attempting to establish a precedent of low scrutiny for other treaties agreed by it and future Governments.**

Statutory instruments and the limitations of parliamentary scrutiny

20. The parliamentary scrutiny deficit is exacerbated by the excessive use of SIs. The power delegated by the Trade Bill has been outlined above at paragraphs 6-11. PLP has carried out extensive research on

Conservative

[13] International Agreements Committee, *Working Practices: One Year On* (HL 2021-22, 75) para 13

[14] International Trade Committee, *UK trade negotiations: Scrutiny of Agreement with Australia: First Report of Session 2022–23* (HL 2022-23, 444)

[15] ibid, 8

[16] International Trade Committee, *Oral evidence: UK trade negotiations: Agreement with Australia*, 6 July 2022

[17] International Trade Committee, *UK trade negotiations: Scrutiny of Agreement with Australia: First Report of Session 2022–23* (HL 2022-23, 444), 6

[18] HC Deb 19 July 2022, vol 718, col 845

[19] HL Deb 11 July 2022, vol 823, cols 1279-1319

the Government's use of delegated legislation,[20] and our primary concerns about SIs are as follows:

- The large volume of delegated legislation means that there is limited parliamentary time to effectively scrutinise long and technical instruments. For example, between 2018 and 2020, 622 Brexit related SIs were laid. The level of scrutiny received by many of these instruments was disproportionate to their size and complexity.[21]
- The scrutiny procedures for SIs are weak. These instruments "face no realistic prospect of defeat within Parliament"[22] as a motion to annul an SI (a prayer motion) made under the negative procedure can only be debated in the Commons if the Government allocates parliamentary time for this. Moreover, MPs and Peers cannot amend SIs – they must be accepted or rejected in their entirety. Therefore, while motions to regret are commonly tabled in the Lords, these only enable the House to put its opinion on record, and do not stop the SI coming into force.
- Skeleton Bills are being used with increased frequency. These Bills contain only outlines of policy principles and delegate powers to Ministers to determine the content at a later date, most commonly through the use of SIs.[23]
- Henry VIII powers are becoming increasingly common. These enable the executive to amend or repeal primary legislation via SIs.
- Delegated powers are being drafted too broadly and without adequate consideration of whether key policy provisions should be allocated to primary or secondary legislation.

21. The overuse of SIs sidelines the role of Parliament in its primary constitutional role as the legislature. Echoing the recommendation at paragraph 11, we urge Members to question whether the Government is continuing to exclude Parliament from scrutiny of the UK-Australia FTA by legislating for a broad power to implement the Procurement Chapters via regulations made under the negative procedure.

Implementing treaties through SIs: a scrutiny deficit

22. The Trade Bill compounds the two scrutiny deficits highlighted above. Secondary legislation that is unlikely to be meaningfully scrutinised will be used to implement an international agreement that suffered from a similar lack of parliamentary involvement.

23. In the EM to the UK-Australia FTA, it is stated that regulations will be used in two further respects. Firstly, to implement the tariffs in the FTA under the Taxation (Cross-border Trade) Act 2018; secondly, "to extend UK copyright protection to Australian wired broadcasts to comply with the provisions of the Intellectual Property chapter".[24]

24. There are no formal rules governing the connection between treaty scrutiny and the scrutiny of implementing legislation. Despite recommendations that the Government should refrain from introducing implementing legislation until the International Agreements Committee (IAC) has been able to report on the treaty and until the CRAG process is complete,[25] the Trade Bill was introduced

[20] Alexandra Sinclair and Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation system' (Public Law Project, October 2020)
[21] ibid, 21
[22] Alexandra Sinclair and Joe Tomlinson, 'Plus ça change? Brexit and the flaws of the delegated legislation system' (Public Law Project, October 2020), 12
[23] Brigid Fowler, Ruth Fox, Tom West and Dheemanth Vangimalla, 'Delegated legislation: the problems with the process' (Hansard Society 2021), 8
[24] Explanatory Memorandum to the UK-Australia Free Trade Agreement, 5.5-5.6
[25] International Agreements Committee, *Working Practices: One Year On* (HL 2021-22, 75) paras 87-88

to Parliament on 11 May, over a month before the FTA was laid before Parliament and the CRAG process began.

25. PLP has carried out research tracking the implementation of international agreements.* It is clear that Brexit rollover and post-Brexit agreements are being implemented in large part through secondary legislation. The EU (Withdrawal Agreement) Act 2020 (EUWAA) and the EU (Future Relationship) Act 2020 (EUFRA) contained sweeping regulation making powers under Sections 3 and 31 respectively to implement the UK-EU Withdrawal Agreement and the UK-EU TCA.[26]

26. The power in Section 8 of the EU (Withdrawal) Act (EUWA) 2018 has also been used extensively to implement the UK's post-Brexit agreements with non-EU countries. EMs to the UK's trade agreements with, inter alia, Japan, Korea, Singapore, Vietnam, the CARIFORUM States and Ukraine state that implementing regulations will be introduced under EUWA.

27. Concerns about the lack of scrutiny that the UK-Australia FTA has received were briefly raised in Parliament in the urgent question on 19 July.[27] Members expressed concern about the impact of the agreement on domestic agricultural, animal welfare, and environmental standards. They also questioned whether the Government were seeking to avoid scrutiny by failing to hold a debate. These concerns should be raised again in the context of this Trade Bill, which comprises the only piece of implementing legislation for both FTAs and may represent the only further opportunity for debate.

28. **We urge Members to use the second reading debate to build upon the concerns about scrutiny expressed in the urgent question. In particular, it should be highlighted that the Trade Bill in its current form, under which regulations will have to be made after the Bill becomes law, will deny Members any remaining opportunity to debate the substance of the UK-Australia FTA. This is a scrutiny deficit squared.**

* There have been limitations to this task:

- Not every treaty is subject to the requirements of the Ponsonby Rule/Section 20 CRAG. Treaties excluded from these mechanisms are not subject to the requirement of publishing an accompanying EM.[28] Treaty EMs outline the Government's intended forms of implementation and in their absence, it is difficult to track implementing legislation. 17 treaties laid before Parliament since January 2019 have not been laid with an EM.[29]
- Even where treaties do have EMs, many of these simply state that the agreement does not require any new implementing legislation to be brought into force. In the absence of a formal monitoring procedure and the difficulty of tracking whether provisions of primary or secondary legislation are implementing parts of a specific agreement, it cannot be said for certain that in practice no legislation is passed in line with the EM.[30]

Public interest in effective scrutiny

29. There is significant public interest in ensuring that international agreements and the legislation that implements them receive sufficient parliamentary oversight. This is especially the case in relation to

[26] See the Delegated Powers and Regulatory Reform Committee's reports on the European Union (Withdrawal Agreement) Bill (HL 2019-21, 3) and the European Union (Future Relationship) Act 2020 (HL 2019-21, 207)
[27] HC Deb 19 July 2022, vol 718, cols 843-855
[28] See Section 23(2) and (2A) CRAG for excluded treaties
[29] See Appendix
[30] Written evidence from the Public Law Project to the Public Administration and Constitutional Affairs Committee, para 44

the UK-Australia and UK-New Zealand FTAs.

30. Firstly, it is concerning that the Government's avoidance of scrutiny of the UK-Australia FTA may have established a precedent. As the implementing legislation for the UK-New Zealand FTA will already be in place when that agreement is laid before Parliament, it is increasingly unlikely that a debate will be scheduled, or the CRAG period extended, as the Government will be able to ratify as soon as the 21 sitting days are over.

31. Secondly, while it is Government policy to refrain from ratification until domestic implementing legislation is in place,[31] the rush towards ratification has not been justified by the Government. During the Secretary of State for International Trade's oral evidence session, the Chair of the ITC noted that the Australian legislative process would conclude towards the end of November.[32] Similarly, the Government's urgency was questioned in the House of Lords, Viscount Waverley suggesting that ratification should be delayed and the timeline of the scrutiny process in the UK brought in line with that in Australia.[33]

32. Thirdly, it is questionable whether the passage of this Trade Bill constitutes an effective use of parliamentary time. The Procurement Bill is also making its way through Parliament, and when passed, will repeal this Trade Bill and replace the power within it with a more general power to "implement the UK's government procurement market access obligations in trade agreements".[34] Again, this raises the question of why ratification is being pursued as a matter of such urgency, especially as reform of procurement legislation is already part of the legislative agenda.

33. **We recommend that Members are critical of the speed at which the Government has sought to complete the ratification process at the expense of effective scrutiny. Not only is the projected increase in the UK's GDP as a result of the UK-Australia FTA only 0.08%,[35] but legislation is also in the works under which the Procurement Chapter of this agreement could be implemented.**

34. Finally, there is significant ongoing public interest in ensuring that changes to government procurement rules are transparent. While the Government states that it is committed to increasing "transparency and openness in public procurement"[36], it is our view that transparency should feature in not only the rules of procurement practice, but also in the process of enacting those rules. The dangers of poor public procurement practice were highlighted during Covid-19[37], during which contracts amounting to over £10 billion were awarded without competition and emergency regulations were used to make rapid awards.[38] While the Government's subsequent interest in transparency is to be welcomed, fair procurement procedures must be regarded as those that Parliament has adequately scrutinised.

35. **We urge Members to question whether the broad and unspecified powers to alter public procurement rules in the Trade Bill adequately reflect the values of transparency and openness that the Government says it supports.**

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[31] Department for International Trade, 'New Bill to enable implementation of Australia and New Zealand trade deals' (11 May 2022)

[32] International Trade Committee, *Oral evidence: UK trade negotiations: Agreement with Australia*, 6 July 2022,

[33] HL Deb 11 July 2022, vol 823, cols 1305-1306

[34] Explanatory Notes to the Trade (Australia and New Zealand) Bill, para 5

[35] Department for International Trade, 'Impact assessment of the Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia' (10 May 2022), 5

[36] House of Lords Library, *Procurement Bill Briefing*, 2

[37] National Audit Office, 'Investigation into the management of PPE contracts' (30 March 2022)

[38] Public Accounts Committee, *COVID-19: Government procurement and supply of Personal Protective Equipment* (HC 2019-21, 928), 11

Appendix – Treaties published without Explanatory Memoranda

Treaty	Date Laid
UK/Switzerland: Agreement on Police Cooperation	27-Jan-22
UK/Secretariat of UN Framework Convention on Climate Change, Kyoto Protocol and Paris Agreement: Agreement regarding the 26th Session of the Conference of the Parties to the UNFCCC and sessions/conferences of the other treaties	28-Oct-21
UK/EU and EAEC: Agreement on the Establishment and the Privileges and Immunities of the Delegation of the EU to the UK	21-Oct-21
UK/Norway: Agreement on Cross-Border Trade in Electricity and Cooperation on Electricity Interconnection	16-Sep-21
UK/France: Agreement concerning the Tripoint between Maritime Areas under the Jurisdictions of the UK, Antigua and Barbuda and France	16-Sep-21
UK/Bank for International Settlements: Host Country Agreement	25-Jun-21
UK/EU: Agreement concerning Security Procedures for Exchanging and Protecting Classified Information	30-Apr-21
UK/EAEC: Agreement for Cooperation on the Safe and Peaceful uses of Nuclear Energy	30-Apr-21
UK/USA: Agreement regarding Mutual Assistance in Customs Matters between their Customs Administrations	9-Feb-21
UK/Japan: Agreement on Co-operation and Mutual Administrative Assistance in Customs Matters	4-Feb-21
UK/New Zealand: Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters	3-Feb-21
UK/China: Agreement on Cooperation and Mutual Administrative Assistance in Customs Matters	3-Feb-21
UK/Belize: Treaty concerning the Status of UK and Northern Ireland Forces in Belize and Defence Cooperation	3-Mar-20
UK/Colombia: Convention for the Elimination of Double Taxation with respect to Taxes on Income and on Capital Gains and the Prevention of Tax Evasion and Avoidance	17-Jan-20
Agreement concerning the Shipwrecked Vessel RMS Titanic	19-Dec-19
UK/Lesotho: Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion	18-Mar-19
UK/Austria: Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion	18-Mar-19

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