

The Welsh Government's Legislative Consent Memorandum on the Trade (Australia and New Zealand) Bill

November 2022



1. Background

The UK Government's Trade (Australia and New Zealand) Bill

1. The Trade (Australia and New Zealand) Bill¹ (the TANZ Bill) was introduced into the House of Commons on 11 May 2022. It is sponsored by the Department for International Trade.
2. The long title to the Bill states that it is a Bill to:

"Enable the implementation of, and the making of other provision in connection with, the government procurement Chapters of the United Kingdom's free trade agreements with Australia and New Zealand."

3. At the time of writing this report, the Bill had completed its Committee Stage in the House of Commons.

The Welsh Government's Legislative Consent Memorandum

4. Standing Orders 29.1 and 29.2 provide that a legislative consent memorandum is required when a relevant UK Bill makes provision in relation to Wales for any purpose within the legislative competence of the Senedd or which modifies the Senedd's legislative competence.
5. On 25 May 2022, Vaughan Gething MS, the Minister for Economy (the Minister), laid before the Senedd a Legislative Consent Memorandum (the Memorandum) in respect of the Bill.²
6. The Business Committee agreed that the Legislation, Justice and Constitution Committee, Economy, Trade and Rural Affairs Committee³ and the Public Accounts and Public Administration (PAPA) Committee should report on the Memorandum by 29 September 2022.⁴

¹ [Trade \(Australia and New Zealand\) Bill, as introduced](#) (Bill 009 2022-23)

² Welsh Government, [Legislative Consent Memorandum, Trade \(Australia and New Zealand\) Bill](#), May 2022

³ On 30 June 2022, the Economy, Trade and Rural Affairs Committee [wrote](#) to the Llywydd to say that, following discussions with the Public Accounts and Public Administration Committee, it would be keeping a watching brief on the Memorandum but did not intend reporting.

⁴ Business Committee, [Timetable for consideration: Legislative Consent Memorandum on the Trade \(Australia and New Zealand\) Bill](#), June 2022

On 20 September 2022, this deadline was extended by the Business Committee to 1 December 2022.⁵

Provisions for which the Senedd's consent is required

7. Paragraphs 11 to 23 of the Memorandum set out the Welsh Government's assessment of which provisions in the Bill require the consent of the Senedd, namely:

- Clause 1 – Power to implement government procurement Chapters;
- Clause 2 – Further provision about power;
- Clause 3 – Interpretation;
- Paragraphs 1 to 4, 6 and 9 of Schedule 1 – Provision relating to Devolved Authorities and Senedd Cymru;
- Paragraphs 1(b), 2(3) and 3 of Schedule 2 – Regulations under Section 1.

8. The UK Government agrees that the Senedd's consent is required for the provisions of the Bill outlined above, and in addition, clause 4 (Extent, commencement and short title) and Schedule 2 paragraph 4 (regarding the anticipatory exercise of the section 1 power).⁶

9. Clause 1 is the key provision in the Bill which gives regulation-making powers to the appropriate authority (in Wales, the Welsh Ministers). These powers will enable a Minister of the Crown or the Welsh Ministers to make regulations to give effect to the government procurement chapters of the free trade agreements (as amended from time to time), and for other purposes connected with those chapters.

The Welsh Government's position

10. According to the Memorandum, the Bill is required to enable the implementation of procurement obligations set out in Chapter 16 of the free trade agreements which the UK has agreed with Australia and New Zealand (the Agreements). The Bill must be in force before formal entry into force of the Agreements to ensure that the UK is not in breach of any obligations set out in the Agreements.⁷

⁵ Business Committee, [Revised timetable for consideration: Legislative Consent Memorandum on the Trade \(Australia and New Zealand\) Bill](#) September 2022

⁶ [Trade \(Australia and New Zealand\) Bill, Explanatory Notes](#), May 2022, Annex A

⁷ Memorandum, paragraph 5

11. Clause 1 of the Bill provides the UK Government and the Welsh Ministers with the power to make changes to domestic legislation stemming from the UK's government procurement obligations under the Agreements.⁸

12. Clause 2 provides for different types of provision that could be made by regulations under clause 1 where needed, for example, consequential provision. Clause 2 also introduces Schedules 1 and 2 which, respectively, set out restrictions on the use of the power by devolved authorities (defined in clause 3 as the Welsh Ministers, the Scottish Ministers and a Northern Ireland department) and provide for how regulations under clause 1 can be made.

13. Part 1 of Schedule 1 describes the circumstances in which a devolved authority may use the power in clause 1 to make regulations. In particular:

- paragraph 1 provides that a devolved authority may not make provision under clause 1 unless the provision is within the devolved authority's devolved competence (as defined in paragraph 6);
- paragraph 2 provides that the consent of a Minister of the Crown will be required if the Welsh Ministers are making a provision using the power in clause 1 and the provision would otherwise require consent if it were being made under other powers;
- paragraph 3 provides that regulations made under clause 1 must be made jointly by the Welsh Ministers and the UK Government, if they contain provision(s) which are covered by another regulation-making power which has to be exercised jointly;
- paragraph 4 requires consultation with the UK Government on legislation made by the Welsh Ministers acting alone in the exercise of the powers in clause 1, where the Welsh Ministers would normally be required to consult with the UK Government when making those kinds of changes in legislation.

14. Schedule 2 to the Bill provides that all powers to make regulations under the Bill are exercisable by statutory instrument and subject to the negative procedure.

15. However, the Bill is to be repealed by clause 107 of the UK Government's Procurement Bill (as introduced), a bill which also requires the legislative consent of the Senedd.⁹ Clause 107 will

⁸ Memorandum, paragraph 6

⁹ Memorandum, paragraph 10

be brought into force by regulations to be made by the UK Government to which no scrutiny procedure will apply.

16. The reasons given by the Welsh Government for making provisions for Wales in the Bill are set out in paragraphs 27 to 30 of the Memorandum. Paragraphs 27 and 28 state:

"The Welsh Government agrees that there is a need to amend the procurement legislation in Wales to meet the requirements of the government procurement chapters in the UK-Australia and UK-New Zealand Free Trade Agreement. The powers given in this Bill would ensure that procurement law in Wales does not cause the UK to be in breach of the Agreements as soon as the Agreements come into force.

There is insufficient time available to bring forward an equivalent bill in the Senedd and so in principle I consider it appropriate for the UK Parliament to legislate for Wales in this case. The changes proposed are also narrow in scope and have been subject to discussion between Welsh Government and UK Government officials."

17. However, the Minister notes that although Welsh Government officials were involved in the development of the policy requiring the Bill, namely the government procurement chapters of the Agreements, they were not involved in the development of the Bill itself.¹⁰ The Minister also notes that when the Welsh Government became aware of a UK Bill being taken forward, it made it clear to UK Government officials that a Bill which granted concurrent regulation-making powers would not be acceptable to the Welsh Government.¹¹ He adds that although UK Government officials:

"have initially provided timing and efficiency as a reason and justification for the inclusion of concurrent powers, it is unclear why DIT believe the Bill should contain concurrent powers only. My officials were given first sight of the draft Bill on 6 May."¹²

¹⁰ Memorandum, paragraphs 7-8

¹¹ Memorandum, paragraph 8

¹² Memorandum, paragraph 8

18. The Minister notes that the inclusion of concurrent powers in clause 1 is “contrary to the Welsh Government’s principles for UK Bills”¹³ and that he wrote to the UK Government on 16 May to request that the Bill “instead include either equivalent or concurrent plus powers.”¹⁴

19. At paragraph 29 of the Memorandum the Welsh Government states that it is of the view that the Senedd should not give its consent to the relevant provisions in the Bill:

“I cannot however recommend that the Senedd gives consent because although the Bill gives Welsh Ministers powers to make regulations in devolved areas, it also gives those powers to UK Ministers without any requirement to obtain Welsh Ministers’ consent.”

¹³ Memorandum, paragraph 25; [Letter from the Counsel General and Minister for the Constitution](#), 22 October 2021, Annex B - Welsh Government’s principles for UK Bills

¹⁴ Memorandum, paragraph 26

2. Our view

20. We considered the Memorandum at our meeting on 11 July 2022.¹⁵

21. Together with the PAPA Committee, we wrote to the Minister on 25 August 2022¹⁶ requesting clarification on a number of matters and received a response on 28 August 2022.¹⁷

22. We agreed our report at our meeting on 24 October 2022.

General comments

23. We note the Welsh Government's reasons for making provision for Wales in the Bill, as set out in the Memorandum. These matters are discussed below.

Conclusion 1. We agree with the Welsh Government's assessment that all the clauses and Schedules listed in the Memoranda fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.

24. However, we note that the Minister agrees with our view that paragraph 4 of Schedule 2 to the Bill requires the Senedd's consent.¹⁸ As regards clause 4, the Minister stated that it is "a technical provision which does not encode substantive policy ... and for this reason we do not as a matter of practice generally include these kinds of clauses within Legislative Consent Memoranda."¹⁹

25. We believe that, for the avoidance of doubt, the Senedd's consent should be sought for clause 4. In reaching this view, we note that the UK Government considers that consent is required.

Conclusion 2. We believe that clause 4 and paragraph 4 of Schedule 2 to the Bill also fall within a purpose within the legislative competence of the Senedd, as described in Standing Order 29.

¹⁵ [Legislation, Justice and Constitution Committee, 11 July 2022](#)

¹⁶ [Letter to the Minister for Economy, 28 July 2022](#)

¹⁷ [Letter from the Minister for Economy, 25 August 2022](#)

¹⁸ Letter from the Minister for Economy, 25 August 2022, response to question 8

¹⁹ Letter from the Minister for Economy, 25 August 2022, response to question 8

Recommendation 1. The Senedd's consent should also be sought for clause 4 and paragraph 4 of Schedule 2, and any future memoranda in respect of the Bill should identify them accordingly.

Concurrent powers

26. The Welsh Government's principles for UK Bills states that "UK Bills should not create concurrent powers". Definitions of concurrent and concurrent plus powers (from guidance for Welsh Government staff²⁰) is included at Box 1:

Box 1: Definitions

A **concurrent power** is a power which can be exercised:

- (a) by Welsh Ministers, in relation to Wales; or
- (b) by UK Ministers in relation to Wales (for example, where UK Ministers are exercising powers in relation to the whole of the UK; or in relation to England and Wales).

UK Ministers should not normally exercise their powers in relation to Wales without the agreement of the Welsh Ministers, but (unless it is a concurrent plus power – see below) they are not legally required to obtain consent in order to legislate.

A **"concurrent plus" power** is a special type of concurrent power which can be exercised:

- (a) by the Welsh Ministers, in relation to Wales; or
- (b) provided that the Welsh Ministers consent, by UK Ministers in relation to Wales.

When the Welsh Ministers are considering whether to give consent to UK Ministers exercising a concurrent plus power, they are exercising a statutory function. If they do not consent, UK Ministers cannot exercise these powers in relation to Wales.

27. The guidance for Welsh Government staff includes the following principle:

Principle 8: New concurrent functions should only be created in very exceptional circumstances and teams should ensure that a carve out will apply such that no consent will be required when removing them (to protect

²⁰ [Letter from the Minister for Climate Change](#), 6 August 2021

legislative competence), and that they are concurrent plus (to protect executive competence).

28. The Minister told us he shares our concerns about the increased use of concurrent powers in UK Bills and that this has been made clear to UK Government officials.²¹

29. In response to our question asking in what circumstances the Minister would accept the inclusion of concurrent-plus regulation-making powers in the Bill, the Minister said:

"The elements of the TANZ Bill that require the Senedd's consent relate to the powers needed to implement the procurement chapters of the UK-Australia and UK-New Zealand FTAs. The scope of these powers is relatively narrow, and the changes needed to implement both agreements were discussed at length between UKG and Welsh Government officials before they were agreed in negotiations. Because of the scope of the powers, and because sufficient engagement regarding the legislative changes needed to implement proposed procurement provisions had taken pace during the trade negotiations, I would be willing to accept the inclusion of concurrent-plus regulation making powers in the TANZ Bill if the UKG were to remain unwilling to grant equivalent powers."²²

30. The Minister also said that "at the very least" the Welsh Government "would need concurrent plus powers ... being included in the TANZ Bill before we could recommend the Senedd give its consent..."²³

31. We consider that the inclusion of powers for the Welsh Ministers in the TANZ Bill equivalent to those provided to the UK Ministers would be the best available option. We note the Minister's comments in relation to this point and the circumstances in which he is willing to accept the inclusion of concurrent-plus regulation making powers. In this regard, we also note that paragraph 9 of Part 2 of Schedule 1 to the TANZ Bill amends the *Government of Wales Act 2006* so that the Senedd could pass legislation to remove the concurrent power without Minister of the Crown consent.

²¹ Letter from the Minister for Economy, 25 August 2022, response to question 7

²² Letter from the Minister for Economy, 25 August 2022, response to question 6

²³ Letter from the Minister for Economy, 25 August 2022, response to question 1

Legislating using a Welsh Government Bill

32. We asked the Minister why an equivalent Bill to the UK Government's Bill could not be brought before the Senedd:

"Q10. This legislation is time-critical and you have said that there is insufficient time available to bring forward an equivalent Bill in the Senedd. What were the barriers to introducing an Emergency Bill, which would have overcome the inclusion of concurrent powers in the Bill?"

The Department for International Trade initially believed that Second Reading of the TANZ Bill in the House of Commons would take place before summer recess and that the TANZ Bill would need to progress quickly once the UK Houses of Parliament reconvened. This is because the legislation needs to be in place in order for both trade deals to enter into force. Therefore, we did not believe that there was sufficient time available for us to bring forward an Emergency Bill, or that this would be a proportionate approach given the scope of the provisions in the legislation.

A Senedd bill would not of itself overcome the inclusion of concurrent powers in the TANZ Bill. A Senedd bill could give Welsh Ministers powers to implement in Wales, and so there would be no need for the TANZ Bill to do so; but a Senedd bill could not prevent the TANZ Bill giving powers to UK Ministers to implement legislative changes in Wales. If that is what the UK Parliament decided to do, the end result would be concurrent powers, albeit contained in different Acts."²⁴

33. We note the Minister's view that the Bill needs to progress quickly through the UK Parliament to enable the Agreements to enter into force. At the time of writing this report the Bill remains at Committee Stage in the House of Commons and still has to pass through the House of Lords.

Recommendation 2. The Minister should keep the Committee up to date with the timing of the Bill's passage through the UK Parliament.

34. The Memorandum said that "There is insufficient time available to bring forward an equivalent bill in the Senedd". While the reason for this view is not explained, we wish to highlight again that, as a matter of principle, it is inappropriate for the Welsh Government to use

²⁴ Letter from the Minister for Economy, 25 August 2022, question 10 and response

arguments relating to the Senedd's timetable for scrutiny or capacity to justify using a UK Bill to legislate in a devolved area.²⁵

35. As regards the use of the Senedd's Emergency Bill procedure, we note the Minister's view.

36. However, we wish to highlight the second paragraph of the Minister's response to question 10 of our letter, reproduced above.

37. The Welsh Government's legislative consent memorandum on the UK Government's United Kingdom Infrastructure Bank Bill states:

"Devolution remains the settled will of the Welsh electorate, and our position must be to protect the powers of the Senedd..."²⁶

38. We consider that the Minister's view expressed in the second paragraph of his response to question 10 appears to be at odds with this statement.

39. By pursuing a separate Welsh Bill, the Welsh Ministers, subject to the views of the Senedd, would have been able to create the powers it needs rather than having to negotiate for their inclusion in the TANZ Bill.

40. While we accept that a Welsh Bill could not prevent the TANZ Bill giving powers to UK Ministers to implement legislative changes in Wales, it would, however, change the nature of the conversation between governments and, significantly, the nature of the question put to the Senedd on the matter of consent. This issue may be of little consequence given the intended repeal of the TANZ Bill should it be enacted (because of provisions in the UK Government's Procurement Bill) but as a point of principle, it remains valid.

Specific provisions in the Bill

41. We also noted that the Scottish Government's legislative consent memorandum on the Bill highlighted that the regulation-making power in clause 1 provides for the implementation of the agreements as they may be amended in the future. In their view this meant that "a need for further primary legislation is avoided if these agreements are refreshed, but at the cost of the Scottish Parliament not knowing what those future amendments might be at the point of giving its consent".²⁷ The Scottish Government's memorandum went on to say:

²⁵ See Legislation, Justice and Constitution Committee, [Annual Report 2021/22](#), October 2022, paragraphs 54-55

²⁶ Welsh Government, [Legislative Consent Memorandum, UK Infrastructure Bank Bill](#), May 2022, paragraph 47

²⁷ Scottish Government, [Legislative Consent Memorandum: Trade \(Australia and New Zealand\) Bill](#), paragraph 10

"This seems a particularly unnecessary aspect to the power given that the agreements have only been very recently signed, and that this Bill is expected to be repealed by the Procurement Act, the Bill for which was also introduced on 11 May, which will provide a replacement general power in relation to the implementation of the procurement chapters of free trade agreements. That will be a power limited to ensuring that equal treatment obligations are given effect, with rule changes still needing primary legislation."²⁸

42. We therefore asked the Minister about the suitability and necessity of the regulation-making powers in clause 1 enabling the UK Government to make regulations reflecting the content of the Agreements as they may be amended in the future. The Minister told us:

"I believe it is helpful to be able to use the power in clause 1 to reflect future amendments to the content of the Free Trade Agreements (FTAs). The power itself is limited to making regulations in connection with the procurement chapters of the FTAs so it is not a power to reflect changes across the entire Agreements. Given the nature and scope of what is covered by procurement chapters in FTAs generally, as well as in these chapters in particular, I believe there is very little prospect that the power could be used in unexpected or wholly unforeseeable ways. In light of this I consider the power is a suitable and useful addition to the TANZ Bill."²⁹

43. We agree with the Minister that clause 1 would only apply to amendments to the procurement chapters of the Agreements, rather to them as a whole, and note the position he has taken. However, as a general principle, we do not believe that regulation-making powers in Bills should be used as a means of reflecting future changes to international agreements as this inhibits scrutiny. We have raised similar concerns in relation to international healthcare agreements.³⁰

44. In response to another of our questions, the Minister clarified the process by which the Bill will be repealed and said:

²⁸ Scottish Government, Legislative Consent Memorandum: Trade (Australia and New Zealand) Bill, paragraph 11

²⁹ Letter from the Minister for Economy, 25 August 2022, response to question 5

³⁰ LJC Committee, The Welsh Government's Legislative Consent Memorandum on the Health and Care Bill, December 2021, paragraphs 59 to 72

*"I am not aware of any role for the Welsh Government or the Senedd in the repeal of the TANZ Bill."*³¹

45. While we note the position, we would highlight that a consequence of the approach adopted is that the Senedd will have no role in repealing primary legislation within its legislative competence.

Intergovernmental relations

46. The Minister also told us that he had not received a response to his letter of 16 May 2022³² and that:

*"The UK Government have not offered any further discussions with regard to any amendments. Second Reading of the TANZ Bill in the House of Commons is scheduled to take place on 6 September. UK Government have indicated that they are currently considering how to proceed in light of our concerns."*³³

47. When we asked if he had engaged the mechanisms within the new intergovernmental relations arrangements to resolve matters of concern, the Minister said:

*"I repeated my concerns about the TANZ Bill in a bi-lateral meeting with the Minister of State for Trade Policy, Penny Mordaunt MP, on 24 May. I am now awaiting further information from UK Government on how it intends to address our concerns."*³⁴

48. We are disappointed that at the time of writing to us in August, the Minister had still not received a reply to his letter of 16 May.

Recommendation 3. The Minister should provide an update regarding his engagement with the UK Government within three weeks of the date of this report being laid.

³¹ Letter from the Minister for Economy, 25 August 2022, response to question 11

³² Letter from the Minister for Economy, 25 August 2022, response to question 2

³³ Letter from the Minister for Economy, 25 August 2022, response to question 3

³⁴ Letter from the Minister for Economy, 25 August 2022, response to question 4
