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Comments received 11 November 2026

The Trade and Investment Agreements (Consultation) Bill 2026, introduced to the Senate on 1 July 2026, if enacted, would prevent the Minister for Trade from signing any new free trade agreement or bilateral investment treaty containing provisions for investor-state dispute settlement (known as ISDS), with no room for Ministerial discretion.

The Explanatory Memorandum frames the Bill's objective as being to ensure that Australia's agreements "safeguard Australia's interests, benefit the Australian community, and reflect Australian values". Much of the public debate has centred on Australia's exposure as a respondent to investor claims (and the taxpayer dollars spent defending those claims). Neither the Bill nor the Explanatory Memorandum address the larger, and less-discussed, risk to Australian companies investing offshore. For these companies, ISDS is, in effect, the only means by which investment protections can be enforced against a country in the event of adverse government action impacting the company's investment. Where does the Bill leave those Australian companies?

With respect, the public concern regarding ISDS is often overstated. The vice is not ISDS. That is, the vice is not in the form of dispute resolution chosen (arbitration of the dispute between investor and country). The vice, so alleged, stems from the substantive rights granted to foreign investors and the extent to which those rights limit a government's right to regulate.

In older treaties, investment protections were often ill-defined and broadly expressed. Older treaties were notoriously investor-friendly, drafted to give comfort to the investor. But the investment treaty landscape has changed. In recent times there has been a clear movement away from the protection of investors and towards the restoration of a government's right to regulate. Countries, globally, have reconsidered how investment protections are framed, so as to preclude an overly expansive interpretation of an investor's rights, and have confined to whom those protections are afforded, narrowing the definition of "investor" to exclude shell companies for example. There has been a conscious narrowing of state obligations and curtailing of perceived limits on a state's right to regulate. Many treaties now include a range of general exceptions to the investment protections offered within, to expressly permit the host State to regulate in the public interest or in a manner that is sensitive to the environment for example. And, often, the ISDS mechanism cannot be used to challenge a State's public health measures.

Modern treaties aim to, and do in fact, better balance the right of an investor to bring a claim with the right of governments to regulate in the public interest. That work continues in the redrafting and recrafting of state obligations and investment protections within newer international investment treaties. But it is a step too far to remove ISDS from these treaties, which is often the only means by which those recrafted investment protections can be enforced and governments held to account to protect Australian investments where the rule of law is weak. The Australian government's blanket prohibition on ISDS in any new investment agreement should be rejected. At the very least, ISDS should be considered on a case-by-case basis.