

11 April 2014



Mr David Sullivan  
Committee Secretary  
Foreign Affairs, Defence and Trade References Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)

Dear Mr Sullivan

### **Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014**

The Law Council of Australia welcomes the opportunity to make submissions on the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (the Bill).

The Law Council notes that the Bill seeks to prohibit the Commonwealth of Australia from entering any agreement with one or more countries if that agreement contains an investor-state dispute settlement (**ISDS**) provision.

The Law Council also notes that the Bill provides no exceptions to this blanket prohibition and, at least according to its title, purports that such a blanket prohibition is in the “public interest”. That presumably is the same as the “national interest”, however there is no rationale in the Bill or Explanatory Memorandum as to why such a blanket prohibition is in the “public interest”.

The Law Council does not support a blanket prohibition, particularly as no justification is provided for such a blanket prohibition. The Law Council considers that the inclusion of an ISDS provision in an agreement being entered into by the Commonwealth of Australia and one or more other countries needs to be evaluated in the context of the particular agreement being entered into on a case-by-case basis and whether the inclusion of such a provision in that particular agreement is in the “public interest”. This should also be the case if the Commonwealth were to consent to an ISDS provision through an ad hoc agreement with a specific investor – a possibility which is not mentioned in the Bill or the Memorandum, again without any explanation.

The Law Council notes that agreements being entered into by the Commonwealth with other countries are referred to the Joint Standing Committee on Treaties for review and that Committee provides the opportunity to evaluate whether the inclusion of an ISDS provision in the particular agreement being reviewed is in the “public interest”. Enacting this sort of Bill would set a precedent adversely impacting on other treaty negotiations conducted by the Commonwealth Government.

The Law Council also notes that exceptions to ISDS provisions can be provided similar to the exceptions in Article XX of the *General Agreement on Tariffs and Trade 1947* (such as, exceptions for the protection of human and animal health and welfare, the environment, public morals.) For example, investment treaties concluded by Australia,

such as the Free Trade Agreement with Chile and the Free Trade Agreement with Korea, include provisions providing various safeguards to protect various public interests, including transparency of proceedings, while retaining ISDS provisions.

Finally, the Law Council considers that, in some circumstances, the inclusion of ISDS provisions in agreements such as free trade agreements and bilateral investment treaties can provide investors with a level of certainty regarding the treatment of their investments. As such, the inclusion of ISDS provisions in agreements could enhance foreign investment, whereas a blanket prohibition against such provisions would likely discourage investment in Australia.

If you have any queries or require further information, please contact the ILS Administrator on (02) 6246 3753 or [ils@lawcouncil.asn.au](mailto:ils@lawcouncil.asn.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Hagan', is positioned above the typed name.

MARTYN HAGAN  
SECRETARY-GENERAL

### **Acknowledgement**

This Submission was prepared by the Law Council's International Law Section. The Law Council is the peak national representative body of the Australian legal profession – it represents some 60,000 legal practitioners nationwide. **Attachment A** provides a profile of the Law Council. **Attachment B** provides a profile of the International Law Section.

## Attachment A: Profile of the Law Council of Australia

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Attachment B: Profile of the International Law Section

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The International Law Section (ILS) provides a focal point for judges, barristers, solicitors, government lawyers, academic lawyers, corporate lawyers and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues.

The ILS runs conferences and seminars, establishes and maintains close links with overseas legal bodies such as the International Bar Association, the Commonwealth Lawyers' Association and LAWASIA, and provides expert advice to the Law Council and its constituent bodies and also to government through its Committees.

Members of the 2013-14 ILS Executive are:

- Dr Gordon Hughes, Section Chair
- Dr Wolfgang Babeck, Deputy Chair
- Ms Anne O'Donoghue, Treasurer
- Mr Fred Chilton, Executive Member
- Mr John Corcoran, Executive Member
- Mr Glenn Ferguson, Executive Member
- Ms Maria Jockel, Executive Member
- Mr Andrew Percival, Executive Member
- Dr Brett Williams, Executive Member.

The ILS Committees are:

- The Alternative Dispute Resolution Committee (Ms Mary Walker, Chair)
- The Comparative Law Committee (Dr Wolfgang Babeck and Mr Thomas John, Co-Chairs).
- The Human Rights Committee (Dr Wolfgang Babeck and Mr Glenn Ferguson, Co-Chairs)
- The Migration Law Committee (Mr Erskine Rodan, Chair and Ms Katie Malyon Vice-Chair)
- The Trade & Business Law Committee (Mr Andrew Percival, Chair)