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Ms Sarah De Zoeten
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(your ref: 11/13794)

(by e-mail: humanrights@dfat.gov.au)

19 November 2012

Dear Ms De Zoeten,

United Nations Forum on Business and Human Rights, December 2012

- [1] We set out below some comments of Australian Lawyers for Human Rights (ALHR) which we hope the Australian Government will find helpful in its preparation for the *Forum on Business and Human Rights (the Forum)* to be held in Geneva on 4-5 December 2012.
- [2] ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of nearly 2,500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law and human rights law in Australia.
- [3] ALHR is unable to attend the Forum but a copy of this letter will be available on our website and provided to parties attending the Forum. The key area which ALHR urges for Government attention is the question of transnational operations.
- [4] ALHR thanks the Australian Government for the invitation to provide our views to the Government in its preparation for the Forum.¹ ALHR also acknowledges the Government's support for the progress of the *Guiding Principles on Business and Human Rights (the Guiding Principles)* through the United Nations processes and this Forum. The Guiding Principles are a significant contribution to addressing the impact on human rights by business. We encourage the Australian Government and other states to endorse these through the UN General Assembly.

¹ Letter from Human Rights & Indigenous Issues Section, Department of Foreign Affairs and Trade, 20 October 2012(ref 11/13794).

- [5] On 16 June 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles for implementing the UN “Protect, Respect and Remedy” Framework. This endorsement has provided, for the first time, a global standard for preventing and addressing the risk of adverse impacts on human rights from business activity.²
- [6] The Guiding Principles are the result of many years of hard work by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Entities who conducted extensive consultations worldwide involving governments, companies, civil society, business associations, investors, affected individuals and groups, and others interested parties. Through its attendance at the Forum, the Australian government has a golden opportunity to significantly progress this exciting new global agenda. Page | 2
- [7] It is important, and useful, that the Guiding Principles have a practical grounding to assist business, government, and all parties who may be affected by the activities of business. The Forum will assist in that process. However, it is equally important to note that the Guiding Principles are not the only way in which human rights are relevant to, and need be addressed by, business activities.³ There still remains a significant role for other mechanisms addressing human rights and business.⁴ There remains much potential for development of international laws about the human rights impacts of business activity. ALHR encourages the Australian Government to be actively involved in all these developments.
- [8] The Guiding Principles, alone, are insufficient to adequately address the relationship between business and human rights.
- [9] There are various examples in Australian law where government has acted to protect human rights which would otherwise be adversely affected by actions of businesses. There are examples in employment law, discrimination law, land rights and native title law. These could, in ALHR’s opinion, be usefully emphasised at the Forum as ways in which a nation can act to protect human rights (and provide remedies for human rights breaches) while still allowing business the freedom to act.
- [10] However, there is a significant lack of similar examples in relation to the regulation of Australian business operating outside Australian territory. The Guiding Principles, which Australia endorsed, clearly envisage that States must act in such an area, as indicated by the second principle: ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.’ More needs to be done to ensure this happens.
- [11] The Government needs to consider the various regulatory forms it uses, and adjust these according to the context. What may work within Australia may be counter-productive, elsewhere. The Government places considerable emphasis on voluntary and market initiatives to encourage certain corporate behaviour.⁵ Voluntary and market

² Resolution A/HRC/RES/17/4.

³ Resolution A/HRC/RES/17/4, para [4].

⁴ eg. the OECD *Guidelines for Multinational Enterprises*; the UN *Global Compact*; the multi-stakeholder *Voluntary Principles on Security and Human Rights*; the finance/investment industries’ *Equator Principles and Principles for Responsible Investment Initiative*; the World Bank’s various guidelines and policies on *Environmental, Health, and Safety*; the multi-stakeholder *Kimberley Process Certification Scheme*; the UN Security Council’s resolutions on *Conflict Minerals*.

⁵ eg. ‘The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary. ...The need for ... a shift ... away from voluntary adherence has not been demonstrated. ... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging awareness of societal values and concerns through voluntary initiatives.’: Australian Permanent Mission to the UN, *Comments by Australia in respect of the report requested from the Office of the High Commissioner for Human Rights by the Commission on Human Rights in its decision 2004/116 of 20 April 2004 on existing initiatives and standards relating to the*

initiatives do have some place in guiding corporate behaviour. However, complete reliance on voluntary responses and market initiatives is likely to lead to significant examples of failure:

- (a) In Australia there are strict laws about misleading conduct, well-resourced bodies regulating corporate reporting and the stock exchange, detailed controls on environmental protection and management, right to information obligations, and procedural guarantees of participation in government decision-making. Accordingly, some regulatory forms can be used which are not 'prescriptive/proscriptive' (ie. simply specifying what must be done or avoided) but which rely on corporate and broader public involvement.⁶
- (b) However in contexts without the same legal infrastructure and institutions as Australia, the same regulatory forms can lead to unintended results.⁷ The 'market' context which supports corporate social responsibility and voluntary initiatives, which the Government so encourages, is often not present in many countries.⁸ Therefore, if corporate social responsibility and voluntary initiatives are the only regulatory approaches existent, they will not provide adequate control over corporate conduct.

- [12] Accordingly, in various contexts, Australian law requires a different approach to operations of Australian companies overseas. What approach to take may be gleaned from the Guiding Principles, themselves.
- [13] The Guiding Principles identify three clear responsibilities for business. However, there needs to be further action in developing policy guidance by Australia for the benefits of the Guiding Principles to be realised. There is also likely to be a need for some of that guidance to be provided by enforceable regulation. The three obligations imposed on each business entity by the Guiding Principles are:
- (a) adopt a human rights policy;⁹
 - (b) conduct due diligence;¹⁰ and
 - (c) have remediation processes to address any impacts.¹¹
- [14] ALHR has recently initiated a review of large Australian businesses in relation to the Guiding Principles. From our research so far, it is clear that, while some businesses are engaging with human rights in ways envisaged by the Guiding Principles, there is no reference to, nor specific use of, the Guiding Principles. Also, most businesses do not identify themselves as meeting the three identified areas (ie. having a human rights policy, conducting human rights due diligence, or have processes for remedies where human rights impacts occur). Clearly, there is considerable need for development in these areas.
- [15] It is unlikely to occur without action by the Australian government.

responsibility of transnational corporations and related business enterprises with regard to human rights, Note No 52/04, 8 Sep 2004, p1.

⁶ For example, regulation can take the form of 'command and control' regulation; performance-based; process-based; co-regulation; information/education programs; or economic instruments: see Organisation for Economic Co-operation & Development, 'Regulatory Alternatives', Annex II in *Reviews of Regulatory Reform: Regulatory Policies in OECD Countries, From Interventionism to Regulatory Governance*, 14 Oct 2002. Paris: OECD Publishing.

⁷ Van Rooij, B, 2007. *Development Regulation: Greening Industry without Enforcement?* Paper presented to 'Annual meeting of The Law and Society Association', Berlin, 25 Jul 2007, pp6-8 & 15.

⁸ Southalan, J, 2008. *CSR, the environment, and false advertising laws*. Paper presented to 'CSR and Our Planet session: Annual IBA Conference' (International Bar Association), Buenos Aires, 15 Oct 2008, pp5-8.

⁹ Guiding Principles, [16].

¹⁰ Guiding Principles, [17].

¹¹ Guiding Principles, [22].

- [16] One simple and straightforward way in which government could assist the greater application of the Guiding Principles is by requiring companies to report on their progress in complying with the Guiding Principles and the obligations they impose (ie. human rights policy, due diligence and remediation processes). Such reporting could take the following forms:
- (a) for public companies, part of their disclosure requirements for stock exchange listing and,
 - (b) for private companies, part of their regular reporting arrangements.
- [17] Further, the Australian Securities and Exchange Commission and like agencies, could be empowered to compel such disclosure from corporate entities in Australia including specific reporting on the conduct of their businesses offshore. At this early stage of responding to the Guiding Principles, soft incentives (such as reporting requirements) may be preferable. ALHR submits, however, that the government should expressly keep alive the option of using regulation to enforce some level of compliance in this area. The reasons for this are twofold:
- (a) The conduct of Australian companies overseas directly affects Australia's image, politically and economically;
 - (b) The Forum represents a golden opportunity for the Australian Government to take the lead on global standards by endorsing and implementing the Guiding Principles.
- [18] The Guiding Principles are already a mandatory requirement in many areas, eg. through the *Equator Principles*¹² (which most private financiers insist on before lending¹³) and the *OECD Guidelines on Multinational Enterprises*¹⁴ (which all OECD Governments have agreed apply to companies operating from their jurisdiction). Australia would not be departing from the mainstream, therefore, to create domestic legal obligations matching those in the Guidelines. It would be a natural policy progression to do so. The Australian Government should note that that the European Commission is already considering this¹⁵ and a detailed report on due diligence reporting is forthcoming from the International Corporate Accountability Roundtable.¹⁶ Therefore, there is a clear opportunity here for the Australian government to be a world leader in endorsing and implementing the Guiding Principles including for transnational corporations based in Australia.
- [19] There are already many transnational laws addressing corporate conduct. Therefore, for domestic law to address human rights impacts transnationally will create no radical departure from the current norm. There are increasing controls of business operations across borders such as anti-bribery treaties and domestic laws with extra-territorial reach, controls in relation to conflict minerals and stock exchange listing requirements. The *OECD Guidelines for Multinational Enterprises* and the work of Australia's Contact Point¹⁷ are commendable. These initiatives should continue. Each of these examples provides a precedent for Australia to exercise greater control over the human rights impacts of Australian businesses.

¹² See *Draft of Updated Equator Principles* (EP III) released Monday 13 August 2012, p4 <www.equator-principles.com/resources/EPIII_PACKAGE.pdf>.

¹³ Bonnitca, J, 2012. The UN Guiding Principles on Business and Human Rights: The Implications for Enterprises and their Lawyers. *Business & Human Rights Review*, 1, 14 at pp15-16.

¹⁴ See Statement by L Wendland (Office of the UN High Commissioner for Human Rights) to *OECD Roundtable On Corporate Responsibility*, 29 June 2011, p2 <www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48365284.pdf>.

¹⁵ Bonnitca 2012 (n13 above) at 15.

¹⁶ Taylor, M, 2012. *Human Rights Due Diligence: Do we need mandatory standards for due diligence?* Paper presented to 'Expert Conference on Business and Human rights – Principles to Practice' (Danish Presidency of the Council of the European Union), Copenhagen, 7 May 2012. <<http://accountabilityroundtable.org/analysis-and-updates/1-human-rights-due-diligence-do-we-need-mandatory-standards-for-due-diligence/>>.

¹⁷ The Contact Point's work is available at <www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>.

- [20] ALHR recommends that Australia consider introducing controls in this area even in the absence of strict human rights international law obligations on its part. Such action is a proper action of States committed to responsible democratic principles. Such action will also enhance Australia's international image as a responsible democracy.
- [21] There is one other area of the agenda which ALHR wishes to address: policy coherence and investment contracts (which will arise in topics to be discussed on the second day).
- [22] The Australian Government should ensure that the initiatives and support it adopts for developing the rule of law and legal capacity in other countries is not undone by investment contracts involving Australia or Australian companies which exclude that legal system by resort to international arbitration. The Australian Productivity Commission commented on this in its 2010 report:
- "The Commission notes that, if perceptions of problems with a foreign country's legal system are sufficient to discourage investment in that country, a bilateral arrangement with Australia to provide a 'preferential legal system' for Australian investors is unlikely to generate the same benefits for that country than if its legal system was developed on a domestic non-preferential basis. To the extent that secure legal systems facilitate investment in a similar way that customs and port procedures facilitate goods trade, there may be a role for developed nations to assist through legal capacity building to develop stable and transparent legal and judicial frameworks. While not an immediate solution, over time such capacity building goes towards addressing the underlying problem, and provides benefits not only for foreign investors (including Australian investors), but all participants in the domestic economy."¹⁸
- [23] In conclusion, it is ALHR's submission that the implementation and endorsement of the Guiding Principles by the Australian government is directly in the national interest. Such action will promote and enhance the image of Australia and Australian companies on the international stage and within the international marketplace. We will be seen as responsible and moral agents who conduct business in a socially responsible and sustainable manner.
- [24] ALHR believes that the Forum provides an excellent occasion for Australia to lead in promoting and progressing standards worldwide. This is likely to also encourage and maintain social harmony in developing countries. This, in turn, promotes regional stability and fertile conditions for sustained economic growth and prosperity. The legacy of some BHP and Rio Tinto operations in Papua New Guinea and Bougainville reminds us all of the regrettable alternative.
- [25] If you have any questions regarding this submission, please contact John Southalan or Benedict Coyne who are members of ALHR's National Committee:

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Best regards,



Stephen Keim-SC
President
Australian Lawyers for Human Rights

copy: Juana Kweitel (Conectas and co-facilitator of the judicial remedies session)
 Aidan Davey (ICMM and facilitator of the session: business affecting Indigenous peoples)

¹⁸ Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report, Nov 2010.
 <www.pc.gov.au/projects/study/trade-agreements/report>.