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SUBMISSION TO TREASURY'S EVALUATION OF 2021 FOREIGN INVESTMENT REFORMS

I am an international law academic at the Graduate School of Business and Law, RMIT University. My research and teaching fields include international humanitarian law and human rights law with a focus on responsible business practices in conflict-affected areas and business' respect for human rights. I also serve as Peace and Conflict Theme Leader at RMIT's Business and Human Rights Centre.

I welcome the opportunity to make a submission on Australia's foreign investment regime, in the context of Treasury's evaluation of recent reforms. The 2020 foreign investment reforms added a 'national security test' alongside the pre-existing and long-standing 'national interest test' into the reviews of foreign investments. While that new test may well be a focus of the evaluation, the purpose of this submission is to draw attention to the need to refine and reform the national interest test, to better reflect Australia's interest in advancing respect for human rights, including amongst the business sector.

In particular, I recommend that the national interest test include an assessment of the international human rights and humanitarian law track-records of potential foreign investors, and an assessment of the foreseeable potential human rights impacts of the proposed investment.

Furthermore, I recommend that these human rights considerations should be explicitly noted in appropriate regulatory instruments and guidance documents as factors the Foreign Investment Review Board and Treasurer will take into account in application of the national interest test.

Promoting business respect for human rights is in Australia's national interest

For decades, Australian interests and values have been synonymous with the international rule of law and securing of fundamental freedoms for all humankind. By including human rights and humanitarian law assessments of foreign investors, the Government will demonstrate commitment to these enduring Australian values.



Australia has a proud history of supporting the development of international human rights law. A founding member of the United Nations in 1945, Australia was a key player in the drafting of the seminal *Universal Declaration of Human Rights*, and it was Australia's Doc Evatt who, as President of the UN General Assembly, oversaw the adoption of the *Declaration* in 1948. Today, Australia is a state party to seven major international human rights treaties, and also committed to implement the *United Nations Guiding Principles on Business and Human Rights (2011)*.

While the relevant legislation and regulations do not provide a precise definition of 'the national interest' and allow for deliberation on a case-by-case basis, it is understood that, in practice, the national interest test already includes consideration of the '[character](#)' of the foreign entity. This is reflected in the language of [Guidance Note 11: Protecting the National Interest: Guiding Principles for Developing Conditions](#).

An explicit statement that such an assessment includes an examination of the entity's human rights track record will provide greater regulatory clarity, send an important signal to the market and go some way to fulfil Australia's commitment to protect and respect human rights, including by foreign corporate actors operating in Australia.

As Prime Minister Scott Morrison observed when asked about reforms to foreign investment rules (on 15 May 2020):

'We respect their lines, as we expect our lines to be respected, whether it's on our foreign investment rules, or our rules around technology, our rules regarding human rights and things of that nature. I don't think any Australian would want us to compromise on those important things, and those things are not to be traded, ever.'

The [Australian Values Statement](#) – published by the Department of Home Affairs – acknowledges the significant synchronicity between human rights and Australian values. Individuals seeking to join our Australian community must commit to these values as part of their visa application. Companies wishing to invest in Australian assets or businesses should also be committed to our shared values of respect for human rights.

Implementing Australia's international commitments, including to *United Nations' Guiding Principles on Business and Human Rights*

By considering the human rights and humanitarian law track-record of potential foreign investors, and the human rights impact of the proposed investment, the Australian Government would further their commitment to protect human rights and promote greater respect for human rights amongst companies wishing to do business in Australia. Indeed, Australia has committed to do just that – being a state party to several international human rights conventions and a vocal supporter of the *United Nations' Guiding Principles on Business and Human Rights*.

Moreover, Australia has committed to the OECD [Declaration on International Investment and Multinational Enterprises](#) which expressly states that the government will recommend to companies investing in Australia to 'respect the internationally recognised human rights of those affected by their activities' (Annex I, 2).

As the Department of Foreign Affairs [proudly states](#):

The Australian Government believes that business and respect for human rights go hand in hand. Businesses must comply with all Australian laws. In addition, under international law, the government is obliged to ensure that non-state actors, including businesses, respect human rights.

Aligned with broader government policies on human rights' responsibilities of businesses

Embedding a human rights and humanitarian law assessment of prospective foreign investors would be consistent with the general shift towards embedding sustainability and ethical principles into Australian government procurement of goods and services. Similarly, it would be consistent with the Australian Government's compliance with the *Modern Slavery Act 2018 (Cth)* and its requirement to issue identify and address the risks of modern slavery in its operations and supply chains. These laws and policies represent Australian national values – a respect for human rights.

In a similar fashion, respect for human rights and humanitarian law should be a fundamental consideration in the exercise of the Government's important foreign investment screening functions.

Yours sincerely,



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