Company Secretariat

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Mr Geoff Miller
General Manager
Corporations and Financial Markets Division
The Treasury
Langton Crescent
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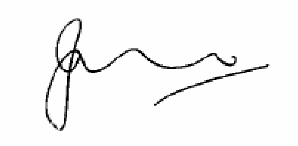
Email: executiveremuneration@treasury.gov.au

Dear Mr Miller

Please find attached a submission from BHP Billiton in response to the Exposure Draft of the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011.

I trust you find our submission of assistance in your deliberations and would be happy to provide further input if you wish.

Yours sincerely,



Jane McAloon
Group Company Secretary

Attach (1)

Submission from BHP Billiton Limited (BHP Billiton) to The Treasury in relation to Exposure Draft – Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011

BHP Billiton is supportive of the Bill's aims, namely to ensure:

- shareholders are empowered to hold directors accountable for their decisions relating to executive remuneration;
- there are no conflicts of interest in the remuneration setting process; and
- there is transparency and accountability in remuneration matters.

We do, however, have concerns with some of the ways in which it is proposed to translate these aims into new legal requirements.

This submission conveys our concerns using the ordering and chapter headings used in the Explanatory Memorandum to the Bill.

Chapter 1 – Strengthening the non-binding vote – the 'two strikes' test

We continue to have significant concerns about elements of the reforms, particularly the "two strikes approach" which is aimed at enhancing shareholder accountability. We are concerned that it significantly diminishes the emphasis on the fundamental obligation of the Board to be accountable for the performance of the company by placing more importance on executive remuneration. That is, a Board is held more accountable for its decisions on executive remuneration than it is for the overall governance and management of a company – because it is subject to a "Board spill vote" if only 25% of shareholders do not agree with the remuneration policies and practices.

This approach runs counter to the approach being adopted in other jurisdictions, like the United Kingdom, where the focus has been on meaningfully enhancing overall Board accountability, effectiveness and transparency. For example, the latest version of the UK Corporate Governance Code stipulates annual election of directors (rather than three-yearly election) as a new benchmark standard for UK listed companies.

The accountabilities of a director extend to consideration of many critical matters – not just remuneration. This "two strikes" test implies that remuneration is the single most important matter for the Board and that there is a weakness in the Corporations Act on holding directors to account on this issue – neither of which we believe to be the case.

We also note that the original Productivity Commission proposal for a 'two strikes' mechanism did not receive broad support. Companies, institutional shareholder organisations and governance advisers to institutional investors all expressed concerns about the concept.

In addition to our concern that it results in elevation of executive remuneration as a matter of greater importance than the effective governance and performance of the company, we continue to believe that a two-strikes mechanism is unnecessary – given the power that shareholders in Australian companies already have under the Corporations Act to remove directors from the board for any reason.

Chapter 2 – Improving accountability on the use of remuneration consultants

We are supportive of the concept of greater disclosure around the use of remuneration consultants, and of the Remuneration Committee using an adviser who works for it rather than for management. This has been the practice of BHP Billiton for many years.

However, we have significant concerns about using legislation as the vehicle for introducing reforms in this area. We note that the Productivity Commission had recommended a mix of ASX listing rules and ASX Corporate Governance Council 'comply or explain' standards to introduce reforms in this area. In addition, the approach in the United Kingdom – the first jurisdiction to address this issue – has been to promote a change in practice through the UK's comply or explain regime (the UK Corporate Governance Code). We believe that use of listing rules and / or ASX Corporate Governance Council 'comply or explain' standards is far preferable to legislation for these reforms.

While a Remuneration Committee can have its own independent adviser – as is now very common in the UK – there is in practice a need for that adviser to interact from time to time with members of the company's management (for example, Human Resources personnel in relation to the details of share plans, internal management information that relates to Key Performance Metrics for incentive plans, and many other issues; and Company Secretariat personnel in relation to papers for a Remuneration Committee meeting and in relation to engagement with the company's institutional shareholders on remuneration-related issues).

A Remuneration Committee's terms of reference will usually be limited to senior executive remuneration (KMP and perhaps others). It is important that there is consistency between the remuneration structures for those people and the rest of the organisation. For that reason the adviser must consult with management to understand the corporate structure and the issues that affect the business at all levels if we are to avoid a bifurcated remuneration structure that may drive different – or worse, inconsistent – outcomes. None of this prevents the Committee from engaging directly with the adviser or from the Committee members meeting with the adviser without management.

In our view the use of remuneration advisers should be approached in the same way as auditors. No auditor could do his or her work effectively without working closely with management but ultimately sign off is to the Audit Committee and shareholders independently.

Using a legislative rule – with criminal sanctions – to achieve the policy goal that the Remuneration Committee's adviser must give advice exclusively to the Committee and never to a member of management, places a heavy onus on getting the statutory drafting absolutely precise, so as to avoid unintended consequences. For example, so that the term "advice" is not interpreted as extending to forms of interaction and engagement (between the consultant and management) that are, from a policy perspective, not of concern. In our view this type of issue is better addressed through the listing rules and / or ASX Corporate Governance Council 'comply or explain' standards.

Further, draft section 206K – which stipulates that a contract for the provision of advice relating to KMP remuneration must be executed by a non-executive director – is inconsistent with corporate practice in Australia and many other developed countries, whereby individual non-executive directors do not sign contracts on the company's behalf. We believe the objective in question can be achieved if the Remuneration Committee (or the Committee's Chair) discusses contractual engagement with a potential adviser, leaving the formal signing of the written agreement to be carried out by a duly authorised full-time employee of the company – consistent with the company's approach to the execution of all other contracts.

Chapter 3 – Prohibiting KMP from voting on remuneration matters

Under draft section 250R(4), KMP and their closely related parties are prohibited from voting their own shares on, and undirected proxies held by KMP are prohibited from being applied to, the non-binding resolution on the Remuneration Report. While we do not disagree with the policy behind prohibiting KMP from voting their own shares on remuneration-related resolutions, we feel it is important to think through what an undirected proxy amounts to.

An undirected proxy is a conscious choice by a shareholder to appoint someone else to be their proxy at the meeting, and to vote that shareholder's shares as the proxy thinks fit.

To the extent that it applies to undirected proxies, therefore, draft section 250R(4) entails a diminution of the existing rights of shareholders. This is not consistent with the stated aim of the reforms: 'giving more power to shareholders'.

Chapter 4 – Prohibiting hedging of incentive remuneration

Consistent with our existing practice we are generally supportive of the prohibition of hedging transactions connected with KMP unvested equity based incentive awards. The prohibition on such hedging is intended to provide for direct, long-term, alignment of a KMP's personal wealth accumulation with that of long-term shareholders. It naturally follows that the hedging of such awards would amount to a conflict of interests undermining the primary objective of KMP to create sustainable value for shareholders.

Draft section 206J(1) limits the scope of prohibition to an element of a KMP member's remuneration that depends on the satisfaction of a performance condition. As "performance condition" is a non-defined term the potential arises that awards containing simply a market or service condition (as in the case of many share option or deferred share awards) would not be subject to the rule. However, awards such as those typically found in a Long-Term Incentive Plan would be captured. The limitation on hedging transactions could be simplified by targeting the prohibition at unvested equity based awards, rather than "an element of the member's remuneration that depends on the satisfaction of a performance condition". We note that unvested equity based awards were the focus of the Productivity Commission's report, where it examined the use of hedging. As the Remuneration Committee maintains governance of executive remuneration any change in award 'vehicle' to mitigate the effect of a hedging prohibition (e.g. changing from equity to cash long-term incentives) would be unlikely and immediately transparent.

Shareholders should be entitled to measure a KMP's exposure to the company – in vested shares as well as unvested. To that end we believe any hedge arrangement on vested shares should be disclosed in the Remuneration Report.

The extension of the section to cover the potential hedging of other, non-equity based, forms of incentive is considered unnecessary. It appears unlikely that other, non-equity, forms of incentive (such as cash annual bonus) could in practice be hedged through a market based transaction or product. It is considered unlikely that non-market risk would be hedged through contracts for difference, 'spread-positions' or insurance products on terms to hedge performance factors as such terms would effectively be internal to the company for which the KMP work, rendering product pricing and structuring exceptionally difficult for the broker.

Chapter 5 – No vacancy rule

BHP Billiton's Constitution does not provide scope for a 'no vacancy' declaration to be made and therefore the proposed new rules in this area are not relevant to the Company. However, we note that draft section 201Q requires disclosure of the intentions and reasoning of individual directors. Similar to our comment above in relation to corporate contracting, this runs counter to long-standing commercial practice in Australia (and many other developed countries) – where Board decisions are collective decisions.

Chapter 6 – Cherry Picking

The proposed amendment to section 250A(4), to require every proxy to vote on a poll and to vote as directed, does not appear to cater for a proxy who has unavoidably been unable to attend the meeting.