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Executive Remuneration Enquiry
Productivity Commission
Locked Bag 2
Collins Street East
Melbourne Vic 8003

Email: exec_remuneraton@pc.gov.au

Dear Sir/Madam

Please find attached a further submission from BHP Billiton in response to the Productivity Commission's Discussion Draft *Executive Remuneration in Australia* document released on 30 September 2009.

I trust you find our submission of assistance in your final deliberations and would be happy to provide further input if you wish, particularly in relation to the reporting of actual remuneration.

Yours sincerely

D R Argus
Chairman

Attach (1)

SUBMISSION TO THE PRODUCTIVITY COMMISSION IN RELATION TO ITS DISCUSSION DRAFT PAPER ON EXECUTIVE REMUNERATION IN AUSTRALIA

We commend the Commission on its Discussion Draft Report, which we found to be a fact-based and balanced assessment of the state of play in remuneration practice and regulation.

We welcome the general thrust of the Report and note that many of the recommendations are consistent with BHP Billiton's existing practices.

Three recommendations that we would highlight as particularly worthy of support are that section 300A of the Corporations Act should be amended to specify that:

- individual remuneration disclosures be confined to the key management personnel;
- remuneration reports include a plain English summary statement of companies' remuneration policies; and
- remuneration reports include actual levels of remuneration received by executives.

In relation to the disclosure of "actual" levels of remuneration, we believe that for this to be useful it will be necessary for all companies to follow the same format otherwise it will be impossible to compare levels. We therefore encourage the Commission to formulate the basis on which actual levels of remuneration should be disclosed and are happy to provide further input.

Recommendations related to director election

We note that the recommendations made in the Report are focused on bolstering the corporate governance framework relating to remuneration. While we do not disagree with that general approach, there are two recommendations which we believe are worthy of being considered in a broader context:

- the proposed "two strikes" rule; and
- the proposed removal of "no vacancy" clauses (which BHP Billiton does not have in its Constitution).

In essence, we feel:

- the "two strikes" proposal focuses excessive attention on executive remuneration, instead of a broader examination of director accountability to shareholders; and
- any removal of "no vacancy" clauses should be considered in the broader context of how directors may be nominated for election in Australia compared with other key markets such as the United Kingdom and the United States, and also compared with the thresholds for shareholders to place other items on the Notice of Meeting in Australia.

Background

The demands on Australian directors have steadily increased with the globalisation of company operations and the corresponding development of a world-class corporate governance system that promotes transparency and accountability to shareholders and other stakeholders. The recent destabilisation of the global economy has reinforced the demands and expectations on directors, as shareholders look to directors to navigate their companies through this period of economic uncertainty and change.

BHP Billiton's dual listed structure with Stock Exchange listings in Australia, London, New York and Johannesburg, means we participate, as a listed company, in a range of current corporate governance reviews.

In particular we believe that the current broad review of the UK's Combined Code by the Financial Reporting Council (FRC), which released a Progress Report on 28 July this year (FRC Review), is very important and is likely to reach some conclusions which could be of direct relevance to Australian corporate governance practices.

Focus on overall Board and director performance

One of the most crucial determinants of a well governed company which consistently performs highly, is the right Board with the right blend of skills and experience. In practice this means that the Board must agree, on behalf of shareholders, the requisite skills and experience that individual directors must possess as well as the blend of skills and experience across the Board as a whole and its Committees. The Board must be able to debate to a conclusion, challenge management robustly and consistently make the right decisions to create value.

This is not an easy task and the right skills and experience are not easy to come by.

It can no longer be accepted that anyone can discharge duties of a non-executive director and much care needs to be undertaken to ensure a Board is populated with the right skill to be able to "smell the smoke", and engage in outcome thinking.

A properly structured Board with an appropriate mix of skills and experience allows shareholders, when engaging with directors, to focus on the broader question of company performance and strategy.

Once a director joins the Board, the focus on skills and experience cannot diminish. It needs to be complemented by regular reviews of performance of directors and the Board.

The global financial crisis has raised the level of awareness around this issue, with the Walker review of governance in UK banks ranking it amongst its five key themes and the FRC Review specifically considering Board balance and composition. We wholeheartedly agree with this approach. We therefore see the main issue for consideration in Australia not as remuneration, but the right of shareholders to have a say on their representatives on the Board to ensure it is appropriately skilled and structured.

In addition, many institutional shareholders refer to voting for directors as their most fundamental right – which indeed it is. When shareholders vote on re-election of a director they should be placed in a position to formulate their voting decisions based on a holistic assessment of the Board’s overall performance in governing the company and to hold the Board accountable for that performance.

We would therefore suggest that the Commission assess its preliminary proposals on “two strikes” in the light of the broader issue of director and Board accountability. There may be an alternative way forward that enables shareholders to express their view on remuneration – through a vote – but not in such a way that remuneration is elevated above the broader issue of the Board’s overall performance in governing a company.

A broader perspective on director accountability for company performance could enhance our existing corporate governance framework, maintain Australia’s role as a governance leader, and appropriately guide both directors and shareholders in navigating the changing expectations on Australian companies.

At the same time, any removal of “no vacancy” clauses should be considered in the broader context of how directors may be nominated for election in Australia compared with other key markets such as the United Kingdom and the United States and also with the thresholds for placing any item on the Notice of Meeting in Australia. Optimally, there would be a sensible balance between, on the one hand, the ability of shareholders to put forward director-candidates and, on the other hand, the increasingly important role played by Nomination Committees in ensuring that the Board as a whole is made up of a blend of the requisite skills and experience that allows appropriate probing and challenging of management.