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Committee Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

email: economics.sen@aph.gov.au

Dear Sir

Please find attached a submission from BHP Billiton to the Senate Standing Committee on Economics in relation to your current inquiry into the Corporation Amendment (Improving Accountability on Termination Payments) Bill 2009.

I trust you find our submission of assistance in your deliberations.

Yours sincerely

Jane McAloon
Group Company Secretary

SUBMISSION TO THE SENATE STANDING COMMITTEE ON ECONOMICS IN RELATION TO
THE SENATE'S INQUIRY INTO THE CORPORATIONS AMENDMENT (IMPROVING ACCOUNTABILITY ON TERMINATION PAYMENTS) BILL 2009

We have a small number of comments on this bill, but each comment is one about which we feel strongly. Our comments stem from our belief that Australia's regulatory framework for director and executive remuneration is robust and not in need of significant change.

1. The timing of this initiative

We note that the Productivity Commission is undertaking an in-depth and wide-ranging inquiry into director and executive remuneration, and is still several months away from reporting. The termination payments bill deals with a very narrow – and complex – issue. It is not clear to us why the bill is being taken through the Parliament before the Productivity Commission has had the opportunity to consider termination payments in a holistic fashion, as part of its much broader exercise.

2. The right decision making body

We acknowledge that the existing termination benefit provisions in the Corporations Act allow for extremely high pay-outs; up to 7 times total remuneration.

We are also supportive of the general policy behind provisions of this nature – that at a particular level, shareholders should have a say in order to provide reassurance that arrangements struck by a Board are reasonable from the shareholders' perspective.

However, the threshold set out in the bill – 12 months' base salary – represents an extreme adjustment in the other direction. It entails a very substantial shift from Boards' exercise of business judgement to shareholder decision-making.

We believe the shift is too extreme.

We believe the absence of a similarly low threshold in major economies such as the United Kingdom and the United States is worthy of note. (While the regulatory arrangements for director and executive pay in those jurisdictions are under close scrutiny, there has not been a consensus that the "balance of decision-making power" between Boards and shareholders in relation to termination pay is in need of reform.)

Termination arrangements are not dealt with in isolation. Remuneration Committees and Boards typically deal with these in the context of an entire remuneration package. The greater access to relevant company-specific (and often confidential) contextual information that Directors have, relative to shareholders, indicates that – subject to a safety net limit – Remuneration Committees and Boards are typically better placed than shareholders to assess the reasonableness of a particular arrangement within the context of a particular company.

In summary, while we agree that the current threshold of 7 times total remuneration does not strike an appropriate balance, we also believe that 12 months' base salary represents an excessive shift of decision-making from Remuneration Committees and Boards to shareholders.

3. Incentive awards subject to ongoing performance conditions

We note that the bill leaves the definition of "base salary" to be defined by regulations, and that regulations will also specify certain items to be a "benefit" and certain items not to be a "benefit".

The Explanatory Memorandum includes the following:

> 2.33 The draft regulations will also prescribe, for the avoidance of doubt, a non-exhaustive list of specific examples of payments that will not require shareholder approval, which could include, for example, deferred bonuses; and payments from a defined benefits superannuation scheme that was in existence before the regulations commenced.
>
> 2.34 In addition, the draft regulations will prescribe circumstances in which a benefit is given in connection with a person's retirement from an office or position. This could include for example, the automatic or accelerated vesting of options and payments in lieu of notice.

We support the reference to "deferred bonuses" in para 2.33 because it reflects the "good governance" characteristics of deferring awards. The reference to accelerated vesting of options in para 2.34 (as something likely to be explictly included as a termination benefit) similarly reflects widely accepted notions of good corporate governance.

However, these paragraphs do not deal expressly with what we believe is a very shareholder-friendly feature of our (and a growing number of other companies') long term incentive plans: a provision that allows for unvested LTI awards to remain on foot after the executive has left the company, subject to the original performance conditions. This provides a measure of assurance that decisions made in the period leading up to departure are appropriately long term in nature. Under this type of arrangement, the executive is (ultimately) rewarded only if the original hurdle(s) is satisfied; there remains the risk of the instrument lapsing without value if the hurdle is not satisfied. It is therefore deserving of express inclusion in the items prescribed as not requiring shareholder approval.

4. Entitlements under plans approved by shareholders

There is a broader issue than that raised in point 3. Where a company's incentive plans have themselves been approved by shareholders, awards made under those plans should, we believe, be carved out of the definition of "benefit". When shareholders vote on the plan, they are voting on the plan in its entirety – which includes clauses stipulating how awards will be dealt with in the event of an executive leaving the company. That initial approval should be regarded as sufficient.