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**15 November 2013**

Mavis Tan
ASX Corporate Governance Council
Exchange Centre
20 Bridge Street
Sydney NSW 2000
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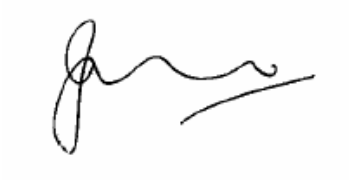
Dear Ms Tan,

I am pleased to enclose a submission from BHP Billiton in relation to the ASX Corporate Governance Council's consultation paper *Review of the Corporate Governance Principles and Recommendations* and the ASX's consultation paper proposing changes to the Listing Rules.

I trust you find this submission to be a useful addition to the debate. If you have any questions, please do not hesitate to contact me.

Yours sincerely,



**Jane McAloon**
President, Governance and Group Company Secretary

**BHP BILLITON SUBMISSION TO ASX CORPORATE GOVERNANCE COUNCIL IN RELATION TO THE CONSULTATION PAPER ON THE CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS AND TO THE ASX ON PROPOSED CHANGES TO THE LISTING RULES**

## Submission Highlights

We welcome the opportunity to participate in this ASX Corporate Governance Council consultation. BHP Billiton has a Dual Listed Company (DLC) structure, combining an Australian company (BHP Billiton Limited) with a UK company (BHP Billiton Plc) as a single economic entity. We are therefore subject to the regulatory regimes of both Australia and the UK, and are able to comment on the consultation paper from this perspective.

There are a number of general points which we would like to make on the consultation paper. While we do not wish to respond on each point, our general comments are followed by responses to some of the questions set out in the paper.

At BHP Billiton, we have a governance framework to which we are held accountable that goes beyond an interest in governance or our need to fulfil regulatory requirements. Our approach is to adopt what we consider to be the highest of the governance standards in Australia, the United Kingdom and the United States. That is because we believe that high-quality governance supports long-term value creation. Simply put, we think good governance is good business.

Governance influences how the objectives of the Company are set and achieved, how risk is monitored and assessed, and how performance is optimised. Therefore, our corporate governance structure encourages the creation of value, while providing accountability and control systems commensurate with risks involved.

We do not see governance as just a matter for the Board. Good governance is also the responsibility of executive management and is embedded throughout the organisation.

## Elevation of commentary to recommendations

We support the approach in the proposed guidelines to elevate a number of practices or disclosures from the commentary to recommendations. BHP Billiton's approach has always been to consider the commentary in the same way as the recommendations. This is part of our commitment to maintaining the highest standards of governance in those countries in which we are listed. Elevating the commentary in this way should make the principles easier to follow, and the continuation of the 'if not, why not' regime allows companies the opportunity to explain appropriate differences that might apply in their case.

## 'If not, why not' regime

The Board of BHP Billiton is strongly supportive of the 'if not, why not' regime. This allows for the greatest level of flexibility for companies to adopt governance structures that are fit-for-purpose recognising that each company is affected by differing circumstances.

It is, therefore, important that the Council, in communicating these changes to external stakeholders including the media, continues to emphasise that these new principles and recommendations are governed under the 'if not, why not' regime. While high levels of adoption are to be expected and encouraged, there is a risk that 'principles and recommendations' can, over time, come to be seen as rules, and this could be damaging both to the corporate sector and the Australian governance regime. In our detailed answers, below, we refer to the UK's Financial Reporting Council which as part of its 2012 update of the UK Corporate Governance Code, included additional guidance on the 'comply-or-explain' regime which was, in part, an attempt to clarify the methodology of the regime and improve its effectiveness. In so doing, it set out some guidance for companies, and shareholders and for engagement between the two groups. The introduction of the updated governance principles and recommendations may offer the ASX Corporate Governance Council an opportunity to issue similar guidance.

A particular example of this is the recommendation that length of tenure might cause doubts as to the independence of a director if the individual has been a director for more than nine years. While we already consider that tenure is an important consideration in relation to independence, and nine years has long been included as a reference-point in the UK Corporate Governance Code, best practice in the US and UK is to move away from formulaic approaches to tenure. We believe that orderly succession and renewal is achieved as a result of careful planning where the appropriate composition, including balance of tenure, of the Board, is continually under review.

In addition, we believe that particularly in a long-cycle business such as ours, governance is enhanced by having a balance of longer serving Directors. Creating this balance of tenures allows for longer corporate memory to be utilised alongside the views of Directors who have been on the Board for a shorter period of time. Formulaic considerations of tenure should not override the other considerations of independence and the proven ability of Directors to be able to exercise independent judgement and act in the best interests of the Group and shareholders. Therefore, when considering adopting best practice from around the world, the ASX Corporate Governance Council may be better served by encouraging companies to consider the best mix of tenure to appropriately serve the best interests of shareholders, and report to shareholders on those considerations.

**BHP BILLITON SUBMISSION TO ASX CORPORATE GOVERNANCE COUNCIL IN RELATION TO THE DISCUSSION PAPER ON THE CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS AND TO THE ASX ON PROPOSED CHANGES TO THE LISTING RULES**

***Recommendation 1.4: The company secretary of a listed entity should have a direct reporting line to the chair of the board.***

BHP Billiton agrees that the company secretary of a listed entity should have a direct reporting line to the chair of the board. As currently framed under the commentary to recommendation 2.5, the company secretary plays an important role in supporting the effectiveness of the board. It is also important for the functioning of the role that the company secretary should be accountable to the board, through the chair, on all governance matters and that all directors should have access to the company secretary. However, the proposed recommendation 1.4 may benefit from clarification that the reporting line to the Board may be in addition to any management reporting line, as set out in the commentary. We consider that while the two elements need to be balanced, both reporting lines need to function effectively in order for the best possible flow of information to the Board.

***Recommendation 1.5: A listed entity should: (a) have a diversity policy which includes requirements for the board: (1) to set measurable objectives for achieving gender diversity; and (2) to assess annually both the objectives and the entity's progress in achieving them; (b) disclose that policy or a summary of it; and (c) disclose as at the end of each reporting period: (1) the measurable objectives for achieving gender diversity set by the board in accordance with the entity's diversity policy and its progress towards achieving them; (2) either: (A) the respective proportions of men and women on the board, in senior executive positions and across the whole organisation (including how the entity has defined "senior executive" for this purpose); or (B) the entity's "Gender Equality Indicators", as defined in the Workplace Gender Equality Act 2012.***

We note the recommendation to allow those entities which are required to report on the 'Gender Equality Indicators' under the Workplace Gender Equality (WGE) Act 2012 (Cth) to treat the filings with the WGE Agency as meeting the requirements to publish gender diversity statistics under the Principles and Recommendations. This evidence of an holistic approach to reporting is a positive step from the ASX Corporate Governance Council, reducing, as it does, the need for similar but non-over lapping reporting standards and requirements.

***Recommendation 2.1: A listed entity should disclose: (a) the names of the directors considered by the board to be independent directors; (b) if a director has an interest, position, association or relationship of the type described in Box 2.1 but the board is of the opinion that it does not compromise the independence of the director, the nature of the interest, position, association or relationship in question and an explanation of why the board is of that opinion; and (c) the length of service of each director.***

As a general principle we agree with the items noted in Box 2.1, but have a couple specific points to make in relation to the guidance around tenure and family ties, and an overarching comment in support of the 'if not, why not' regime itself.

Tenure as an independence factor – As noted above, while we already consider that tenure is an important consideration in relation to independence, and nine years has long been included as a reference-point in the UK Corporate Governance Code, best practice in the US and UK is to move away from formulaic approaches to tenure. We believe that orderly succession and renewal is achieved as a result of careful planning where the appropriate composition, including balance of tenure, of the Board is continually under review. In addition, we believe that particularly in a long-cycle business such as ours, governance is enhanced by having some longer serving Directors. Creating a balance of tenures allows for longer corporate memory to be utilised alongside the views of Directors who have been on the Board for a shorter period of time. It is therefore important that formulaic considerations of tenure do not override the other considerations of independence and the proven ability of Directors to be able to exercise independent judgement and act in the best interests of the Group and shareholders.

It is also important that the Board has a transparent process in place for assessing independence and can justify its conclusions to shareholders. One element of this process that can be useful to shareholders is to publicly disclose an independence policy. This gives some certainty, in advance, of the method of assessment and allows a dialogue to be constructed around items of the policy.

BHP Billiton's Board has a policy that it uses to guide determinations on the independence of its Directors. This determination is carried out upon appointment, annually and at any other time where the circumstances of a Director change such as to warrant reconsideration.

Under the policy, an 'independent' Director is one who is: 'independent of management and any business or other relationship that could materially interfere with the exercise of objective, unfettered or independent judgement by the Director or the Director's ability to act in the best interests of the BHP Billiton Group'.

Where a Director is considered by the Board to be independent, but is affected by circumstances that appear relevant to the Board's assessment of independence, the Board has undertaken to explain the reasons why it reached its conclusion. In applying the independence test, the Board considers relationships with management, major shareholders, subsidiary and associated companies and other parties with whom the Group transacts business against predetermined materiality thresholds, all of which are set out in the policy. These points are set out in the Corporate Governance Statement which is contained in the Annual Report.

Therefore, when considering adopting best practice from around the world, the ASX Corporate Governance Council may be better served by encouraging companies to:

- consider adopting and disclosing a Policy on the Independence of Directors; and
- consider the best mix of tenure to appropriately serve the best interests of shareholders, and report accordingly to shareholders.

Family ties - we agree that all family ties should be taken into account in forming a view on director independence, in the context of the wide range of relevant factors. However, as set out above, the move to formulaic tests of independence, including the extension of the three year look back to family members (as the recommendation is currently drafted), may result in the unintended application of the independence indicators as requirements, rather than 'if not why not' recommendations. We suggest that the items in box 2.1 be redrafted to make it clear that *current* family ties be taken into account.

'If not, why not' guidance

We note that part of the success of disclosure on Recommendation 2.1 is the quality of explanation that companies provide against the criteria. This is an important aspect of the 'if not, why not' regime. It could be considered a failure of disclosure that has led to some stakeholders viewing certain aspects of the independence regime as rules rather than guidelines.

To help counter the potential that items in the box are seen as rules by some stakeholders, it may be useful for the Council to offer guidance on what it considers to be a good explanation. The aim would not be to provide companies with a standard form of language, which risks becoming boilerplate, but to help elaborate the components that an explanation should include.

The UK's Financial Reporting Council has recently undertaken a similar exercise to add weight to its own 'comply or explain' regime. The overarching point is that explanations should be tailored and company specific in order to give the reader comfort that the issue in each case has been properly considered and meets the circumstances of the particular board in question. Detail of the outcome was set out in a newly added section of the UK Corporate Governance Code when it was updated in September 2012 and which considers the responsibilities of both companies and shareholders, as well as a statement in relation to the quality of engagement between the two parties. In particular those revisions state:

Company explanations – 'It is recognised that an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means. A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. In providing an explanation, the company should aim to illustrate how its actual practices are consistent with the principle to which the particular provision relates, and contribute to good governance and promote delivery of business objectives. It should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. The explanation should indicate whether the deviation from the Code's provisions is limited in time and, if so, when the company intends to return to conformity with the Code's provisions.'

Shareholder considerations – 'In their responses to explanations, shareholders should pay due regard to companies' individual circumstances and bear in mind in particular the size and complexity of the company and the nature of the risks and challenges it faces. Whilst shareholders have every right to challenge companies' explanations if they are unconvincing, they should not be evaluated in

a mechanistic way and departures from the Code should not be automatically treated as breaches. Shareholders should be careful to respond to the statements from companies in a manner that supports the "comply or explain" process and bearing in mind the purpose of good corporate governance. They should put their views to the company and both parties should be prepared to discuss the position.'

Engagement – 'Satisfactory engagement between company boards and investors is crucial to the health of the UK's corporate governance regime. Companies and shareholders both have responsibility for ensuring that "comply or explain" remains an effective alternative to a rules-based system. There are practical and administrative obstacles to improved interaction between boards and shareholders. But certainly there is also scope for an increase in trust which could generate a virtuous upward spiral in attitudes to the Code and in its constructive use.'

***Recommendation 6.1: A listed entity should provide information about itself and its governance to investors via its website.***

We note the Council's proposal to allow entities greater flexibility to make their corporate governance disclosures on their website rather than in the annual report. While we agree with the added flexibility this would provide companies, our exposure to UK provisions will mean that we are unlikely to be able to take advantage of the proposal.

***Recommendation 7.4: A listed entity should disclose whether, and if so how, it has regard to economic, environmental and social sustainability risks.***

We note that the proposed new recommendation seeks to address, in a measured and non-prescriptive manner, the increasing attention being given by the investment community to environmental and social issues and the investment risks they raise. We agree that it is, rightly, an important area of focus for institutional and retail investors.

As set out in our Sustainability Report, BHP Billiton is a registered Organisational Stakeholder of the Global Reporting Initiative (GRI). Our reporting is prepared in accordance with the GRI G3 Sustainability Reporting Guidelines, including the Mining and Metals Sector Supplement. The GRI guidelines encourage companies to report on practices and performance that relate to sustainability in a manner that is transparent and uses a globally shared framework of indicators.

However, we support the position of the Council that it would be premature to expect listed entities in Australia to adopt integrated reporting until the international framework for such reporting is much better developed than it is currently. We also agree with the Council's position about the factors such a framework needs to adequately address including relevance, materiality, time-frame, exclusion of commercially sensitive information, compliance burden and assurance.

It is also important for the Council to reduce as far as possible the risk of creating overlapping legislation by waiting until the international framework is in place before adopting a recommendation in this area. Alternatively, the Council could recommend that each company should adopt one of the pre-existing reporting standards that are already recognized around the globe. This would not only

allow Australian companies to select the reporting standard that best fits their business model, but also follow the progress of that standard over time. This is likely to deliver a better cost-benefit outcome that a situation where the Australian regulatory regime attempted to construct an entirely new reporting regime. Without the adoption of such an approach, there is a possibility that inserting new recommendation 7.4 as it stands may encourage companies to address the issues with a standard piece of 'boilerplate' text that adds value to neither the companies that are producing the text nor the investors who read it.

***Recommendation 8.3: A listed entity should: (a) have a "clawback" policy which sets out the circumstances in which the entity may claw back performance-based remuneration from its senior executives; (b) disclose that policy or a summary of it; and (c) disclose as at the end of each reporting period: (1) whether any performance-based remuneration has been clawed back in accordance with the policy during the reporting period; and (2) where performance-based remuneration should have been clawed back in accordance with the policy during the reporting period but was not, the reasons for this.***

BHP Billiton agrees with the principle that the remuneration committee should have the discretion to determine that remuneration should be capable of being reduced or repaid. Circumstances where this might take place include where an individual acts fraudulently or dishonestly; is in material breach of his or her obligations to the Group; where the Company becomes aware of a material misstatement or omission in the financial statements; or any circumstances that occur that the Remuneration Committee determines to have resulted in an unfair benefit to the Participant. We also consider that the best place to capture this principle is within the 'if not, why not' regime under the ASX Corporate Governance Council recommendations, rather than in mandatory legislation.

We consider, however, that the wording of this recommendation is unclear. There has been significant debate in the UK and Europe, following the financial crisis, about the concepts of malus and clawback. Malus refers to the committee's ability to deny vesting of unvested equity instruments (even those that have no further performance conditions, and are time-limited only), while clawback refers to the return of awards or a part of awards, or the proceeds of awards, that have already vested. In the UK malus provisions are far more common than clawback provisions, as defined here, although the generic term 'clawback' is sometimes used to refer to both. To avoid confusion, however, it would be helpful for recommendation 8.3 to articulate exactly what is intended: malus, or clawback, or both.

**BHP Billiton - Malus and clawback**

By way of example, below are the terms that BHP Billiton has included in the LTIP rules which are currently before shareholders for consideration. These extracts come from the rules of the BHP Billiton Limited plan, which explains the references to Plc Group Company. The Plc rules are the corollary. They were published with the Annual Report documents and Notice of Meeting on 25 September 2013 and are available on our website. We have also recently included similar clauses into the rules of our new Short Term Incentive Plan.

Markups in red below are provided to aid understanding.

**Preventing inappropriate benefits**

(a) If, in the opinion of the Remuneration Committee:

(i) an Eligible Employee or Participant acts fraudulently or dishonestly or is in material breach of his or her obligations to any Group Company (or a Plc Group Company);

(ii) the Company becomes aware of a material misstatement or omission in the financial statements in relation to a Group Company (or a Plc Group Company); or

(iii) any circumstances occur that the Remuneration Committee determines in good faith to have resulted in an unfair benefit to the Participant,

then the Remuneration Committee may, in its absolute discretion, determine that:

(iv) some or all the Participant's Performance Shares will lapse; [The reference to 'Performance Shares' is to unvested instruments, so this is a malus provision]

(v) some or all of the Shares that were Allocated under the LTIP which are held by, or on behalf of, the Participant, will be forfeited; [The reference to 'Shares that were Allocated' makes this a genuine clawback provision] and/or

(vi) a Participant be required to reimburse a Group Company all or part of the cash already paid to the Participant under the LTIP or repay all or part of the net proceeds of the sale of any Shares Allocated under the LTIP. [Again, this is genuine clawback]

(b) Without limiting clause 9(a), where a Participant has received or may receive remuneration (whether under the LTIP or otherwise) and the Remuneration Committee determines in good faith that, in order to ensure that no inappropriate benefit is obtained by the Participant:

(i) the remuneration should be reduced by an amount; or

(ii) an amount of the remuneration should be repaid,

the Remuneration Committee may, subject to applicable laws, determine any treatment in relation to one or more of:

(iii) the Participant's Performance Shares;

(iv) Shares Allocated to the Participant under the LTIP; or

(v) cash received by the Participant in connection with the LTIP (including the proceeds of sale of a Share Allocated under the LTIP),

in order to offset the relevant amount. [This clause caters for both malus and clawback; malus if it impacts 'Performance Shares' (as they are unvested instruments); clawback if it impacts 'Shares Allocated to the Participant' or 'cash received by the Participant…']

(c) Nothing in this clause 9 limits the ability of the Remuneration Committee and a Participant to agree to different or additional forfeiture, repayment or offset arrangements.

(d) The Remuneration Committee's decision under this clause 9 will be final and binding.

**Forfeiture**

(a) Where Shares are forfeited in accordance with these Rules and the Shares are held by the Participant, the Participant is deemed to have agreed to dispose of his or her legal and/or beneficial interest (as appropriate) in such Shares for no consideration and the Shares will be transferred into the name of the Company's nominee.

(b) Where Shares are forfeited in accordance with these Rules and the Shares are held by a trustee, the Participant's rights in the Shares will be extinguished for no consideration and the Remuneration Committee may, at any time in the future, direct the trustee to hold the Shares for the benefit of a different or new Participant (and, pending such direction, the Shares shall comprise general trust property).

(c) Where Shares are forfeited pursuant to these Rules, the Company will repay to the Participant any exercise price paid in relation to those Shares by the Participant.

**Listing Rule 3.19B - Disclosure every time securities are purchased on market to satisfy employee awards**

Listing Rule 3.19B will require the disclosure of on-market purchases of securities on behalf of employees or directors or their related parties under an employee incentive scheme. We note that the company will need to disclose to the ASX, within five business days after the purchase: the number of securities purchased; the average price per security; and the name of any director or related party for whom securities were purchased, and the correlative price and number of securities.

We consider that the practical impact of this change could be exchange releases almost every day and it is not clear that the practicality, cost and administrative burden of this has been taken into account in the development of the proposal.