## Australian Government, Attorney-General's Department

BHP Billiton welcomes the opportunity to respond to the invitation from the Attorney-General's Department to comment on the Public Consultation Paper, 'Consideration of a Deferred Prosecution Agreements Scheme in Australia' (Consultation Paper).

**Introduction**

***Our operations***

BHP Billiton is a leading global resources company, among the world's top producers of major commodities, including iron ore, metallurgical coal and copper, and we have substantial interests in conventional and unconventional oil and gas and energy coal. Our workforce currently comprises approximately 80,000 employees and contractors, working in a number of countries around the world.

***Our approach to compliance***

A culture of compliance begins with a commitment to ethical conduct on the part of all employees. This is embodied in our Charter, introduced in 1999, and our Code of Business Conduct (Code), introduced in 1997.[1]

The Code, which sets out the standards of behaviour and ethics that BHP Billiton expects from its employees and contractors, represents our commitment to meet or exceed applicable legal requirements. All BHP Billiton employees are expected to understand the Code and apply it to their work every day.

We constantly seek out ways in which we can improve how we do our work. BHP Billiton's approach to ethical conduct and regulatory compliance is no different. We continually review and test our compliance program to ensure best practice. Building on a strong framework established over time with a focus on continuous improvement, we have what we consider to be a world-class compliance program.

***Lessons from US and Australian investigations***

Our anti-corruption compliance program has evolved over time in response to external and internal developments and learnings.

Recently, we were involved in investigations by the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC), and there is an ongoing investigation by the Australian Federal Police (AFP). After an extensive, almost six year investigation, the DOJ took no action and BHP Billiton reached a civil settlement with the SEC.[2]

The US investigations and ongoing AFP investigation have provided significant lessons, and our anti-corruption compliance program and culture have been enhanced and are stronger as a result. The SEC noted, at the conclusion of its investigation: *'The settlement, in which the company neither admits nor denies the SEC's findings, reflects BHP Billiton's remedial efforts and cooperation with the SEC's*

[1] Our Charter and our Code are available on our website at http://www.bhpbilliton.com/aboutus/ourcompany/codeofbusconduct.

[2] Reflected in the SEC's order instituting a settled administrative proceeding: https://www.sec.gov/litigation/admin/2015/34-74998.pdf . The settlement was not a DPA as contemplated in the proposed DPA scheme in the Consultation Paper.

*investigation and requires the company to report to the SEC on the operation of its FCPA and anti-corruption compliance program for a one-year period.*[3]

Our comments in response to the matters raised in the Consultation Paper are informed by this experience.

## Response to Consultation Paper

### *Introduction*

BHP Billiton supports reforms in Australia that will increase international consistency which helps to align compliance standards regardless of a company's home jurisdiction and will ultimately assist in the fight against corporate crime, including by levelling the playing field and safeguarding the ability of ethical companies to compete.

As noted in the Consultation Paper, Deferred Prosecution Agreements (DPAs) are used in both the US and UK. Some of the key benefits of a DPA scheme which might be expected if it were introduced in Australia are summarised below.

- The Consultation Paper states that under current arrangements, there is little incentive for companies to self-report misconduct.[4] A DPA scheme may **encourage companies to co-operate** with authorities, particularly where the company's co-operation is taken into account as factors relevant to a penalty and other appropriate action to be taken;

- A DPA typically includes elements aimed at avoiding the recurrence of an offence in a direct and targeted way (over and above the general deterrence of punishment) by imposing conditions to **address the risk of future offending conduct**. For example, it is common for DPAs in the US to require a company to cooperate with investigators on an on-going basis and implement changes to its compliance program. Requiring defendants to address deficiencies in their compliance programs places a welcome emphasis on future prevention of improper conduct.
  The 'lessons learned' from DPAs also help raise awareness of compliance risks and failures among other organisations. When applied to multiple companies in multiple industries, these measures can collectively make a meaningful contribution to the global fight against serious corporate crime;

- A DPA scheme and associated penalty guidelines can encourage good governance and the prevention of corporate crime by providing **clear incentives** for companies who implement effective compliance programs;

- A DPA scheme may also facilitate the completion of investigations in a more **efficient and cost-effective** manner with more certainty as to the potential outcome. Investigating and prosecuting allegations of economic crime is expensive and time-consuming for both the investigating authority and the relevant company. An effective DPA scheme creates an incentive for companies to report potential misconduct and cooperate with an investigation, instead of opposing it. This, in turn, should reduce the time spent and costs incurred in investigating and prosecuting serious corporate offences. All parties would be spared a potentially lengthy period of investigation, court processes (and appeals), adverse publicity and collateral damage to employees, shareholders and other stakeholders. A DPA scheme would also improve public perceptions in relation to corporate crimes by allowing resolution to be achieved more quickly than would otherwise be the case;

- The consequences of breach of the DPA conditions are a **genuine disincentive to re-offending** - a criminal prosecution may be enlivened and an egregious breach of a DPA could warrant a more onerous penalty in the event of a successful prosecution; and

[3] https://www.sec.gov/news/pressrelease/2015-93.html
[4] Consultation Paper, Executive Summary, p.3; Challenges, p.6.

- DPA scheme could result in an **earlier resolution of compensation claims by victims**– whether because compensation is a term of the DPA or because the investigation is resolved more promptly, paving the way for victims to pursue resolution of their compensation claims.

***In relation to which offences should a Commonwealth DPA scheme be available?***

As noted in the Consultation Paper, DPAs are available for a wide range of crimes in the US. In contrast in the UK, the availability of DPAs is relatively confined.

The Consultation Paper suggests the government is considering the use of DPAs for 'serious corporate crime' (fraud, bribery and money laundering) in response to difficulties with detecting, investigating and prosecuting these offences.

We think this approach is appropriate, although DPAs are not likely to be appropriate for all corporate criminal prosecutions. Criminal liability has a critical public role to play in expressing condemnation of illegal conduct, and acts as a strong deterrent. If a corporate entity commits a serious foreign bribery offence, it is essential that a just and transparent punishment is imposed on the entity, so that the public interest is served.

Given the particular issue that the Australian DPA scheme hopes to address, it may be appropriate to confine the availability of DPAs, at least in the first instance. Further consideration could then be given to an expansion of the availability of DPAs to other offences once the efficacy of the DPA scheme for serious corporate crime in Australia has been established.

***Judicial involvement in an Australian DPA scheme***

We agree that judicial involvement in the process is likely to foster confidence in a DPA scheme.[5][6]

A lack of certainty as to outcome, however, arising from prospect of a Court not approving a DPA may be a disincentive to self-reporting and thereby reduce the effectiveness of a DPA scheme. We therefore consider that it will be critically important that careful drafting strikes an appropriate balance between judicial oversight and certainty in the system. The basis upon which courts can reject a DPA would need to be clearly defined and able to be assessed against objective benchmarks – for example, it may be appropriate if judicial approval of a DPA could only be withheld where the DPA was clearly not in (or contrary to) the interests of justice (which could require consideration of similar factors to those considered in the US and UK, identified in the Consultation Paper[7]).

***Measures to enhance certainty for companies invited to enter into a DPA***

The Consultation Paper notes that UK and US authorities have discretion whether to offer a DPA and may invite a company to negotiate terms. BHP Billiton considers a similar approach is suitable in Australia.

We also believe that the effectiveness of a DPA scheme will be considerably improved by the publication of clear guidance on the matters relevant to the CDPP's assessment of the appropriateness of a particular matter for a DPA. Consideration could also be given to a directive which sets threshold requirements mandating consideration of the appropriateness of DPAs by authorities.[8]

Companies will also need assurance that cooperation with prosecuting authorities will ultimately prove to be in the best interests of the company and its shareholders (ie, that a DPA potentially offers a better and more certain outcome than taking the risk of an expensive and drawn out trial). DPA guidance would also be improved by identifying the kind of terms which might be part of a DPA (including a non-exhaustive list of those terms). The likely fine and/or compensation that could be levied in particular

[5] Consultation Paper, p.16.
[6] *Barbaro v The Queen* [2014] HCA 2.
[7] Consultation Paper, p.18.
[8] For example the UK model DPA Code of Practice for Prosecutors contains criteria for eligibility of a particular proceeding for a DPA and principles relevant to a decision to proceed with a DPA.

circumstances, and the likelihood of an agreed DPA being overturned or adjusted by the courts, are further matters which could be addressed in guidance from authorities to enhance certainty. For example, in the UK, financial penalties are calculated in a transparent manner in accordance with sentencing guidelines which include concessions in recognition of an organisation's cooperation. Published DPA guidance would also improve public confidence that matters are being dealt with in a consistent and transparent fashion.

The ACCC's immunity for companies that self-report cartel involvement is an effective regulatory tool which assists in identification and enforcement of cartel conduct. The way the ACCC uses this tool in the enforcement context (including by publishing a detailed policy in relation to that tool, similar to the SFO's DPA Code of Practice for Prosecutors) provides some certainty to companies looking to avail themselves of it.

It would also be helpful if DPA guidance addressed other important issues for companies who are aware of potential misconduct and considering their next steps. For example, organisations are likely to be concerned about how disclosures made during DPA negotiations could prejudice the company in future proceedings. Guidance could provide upfront assurance on the use that can be made of this information so that there is a degree of confidence that negotiations will remain confidential (as noted below, we agree that it is generally in the public interest for DPAs to be open and transparent, once agreed).

***Should a DPA be made public?***

BHP Billiton considers that the default position should be that the terms of concluded DPAs will be made public, given the clear public interest in addressing serious corporate crime. The dissemination of the contents of DPAs will also be relevant to deterrence, particularly where the DPA requires improvements to company compliance programs – disseminating best practice information. As noted above, our experience with the US investigations and ongoing AFP investigation have provided significant lessons, and our compliance program and culture have been enhanced and are stronger as a result.

As noted in the Consultation Paper, making DPAs public is consistent with the important goal of ensuring public confidence in the scheme, both that it is an appropriate response to offences by organisations and to address any concerns about how misconduct by prosecuting agencies. It would also be consistent with the common practice in other jurisdictions, such as the US and UK, and the approach to enforceable undertakings with ASIC and the ACCC.

We think it unlikely that the publication of DPAs would deter self-reporting, given the greater benefits of certainty and efficiency offered by a DPA scheme. Further, the publication of DPAs will increase certainty and confidence in the DPA scheme. A company is more likely to make a voluntary disclosure of similar conduct if an earlier DPA will provide a clear indication as to the likely consequences which that company can expect (cf. the uncertainty inherent in a public prosecution).

There may be exceptional circumstances where a concluded DPA should not be made public – for example, temporary suppression may be required where disclosure could prejudice a related investigation or prosecution. However, to ensure confidence in the DPA scheme is not undermined, judicial scrutiny and approval of any decision to suppress publication is essential.

***Conduct of negotiations***

It is important that the CDPP and the relevant investigating agency (such as the AFP) are involved in negotiations and party to any DPA (otherwise, a DPA agreed solely with the agency could be overruled by the CDPP, as the CDPP would retain the power to take over and conduct a prosecution which the AFP had commenced).

We agree that negotiations should be conducted in private in order to encourage candour between the parties. The degree of cooperation from a company during the negotiations, and the quality of companies' internal investigation are matters which should be relevant to the terms of the DPA. These matters are likely to be meaningful incentives to improve the quality of self-reporting and investigation, and the level of cooperation.

In the US, companies often undertake internal investigations and provide investigating agencies with the evidence they have obtained from these reviews.

As noted above, BHP Billiton was recently the subject of an investigation by the DOJ and SEC into possible violations of the FCPA. At the SEC's request, and consistent with the usual practice for investigations of this type in the US, BHP Billiton decided to investigate the issues at its own expense using external counsel, and to report the factual findings of that investigation to the SEC. The company's level of cooperation is taken into account by the US regulators as they consider an appropriate disposition of the matter.

We think perceived concerns that there is a risk the agency may proceed on the basis of a flawed investigation[9] can be managed by clear guidelines and careful oversight of the company's investigation. In our experience, the role of external counsel as an independent investigator was to present a true and accurate description of relevant findings to the SEC and DOJ, even if those facts could be detrimental to the company. The scope of matters under review was driven by both external counsel and by the SEC and DOJ. External counsel reported periodically to the DOJ and SEC on the findings of their investigation, and the scope of the ongoing investigation was shaped by the SEC and DOJ regulators following these updates.

As noted in the Consultation Paper, the permitted uses of information obtained by a prosecutor during the DPA negotiation period are very broad in the US and UK.[10] It would presumably be open to a prosecutor in Australia to use evidence or information obtained from enquiries made as a result of unsuccessful negotiations. An alternative approach would put Australia out of lockstep with other key jurisdictions.

Companies negotiating DPAs may disclose a body of confidential information to authorities and the quality of investigations is bound to be enhanced by measures which will encourage fulsome, transparent disclosure of relevant material. This will only be possible where sufficient, appropriate protection is available to disclosing companies, particularly when a DPA is not concluded.

***DPA Terms***

A DPA should address the matters identified at page 20 of the Consultation Paper (to the extent appropriate for the matter).

Most importantly, as noted above, conditions typically included in the US and UK are designed to avoid the recurrence of an offence – eg, by requiring the company to cooperate with ongoing investigations or to implement improvements to its compliance program. While we do not consider it is likely to be required in all cases, there will be instances where companies may also be assisted by the involvement of independent monitors to examine compliance with the terms of DPAs and help the company improve its compliance program. However, in order to maximise the likelihood that this approach is successful, it will be important that the company has a 'voice' in connection with the selection of the independent monitor and the terms of the monitor's appointment.

***Other matters***

The Consultation Paper also refers to proposals to strengthen private sector whistle-blower protections and to introduce a *False Claims Act* scheme, as further measures to encourage reporting of corporate misconduct.

Whistle-blowers play a key role in highlighting unethical or illegal behaviour – BHP Billiton supports the enhancement of legislative protections for private sector whistle-blowers. Any change which would increase the incidence of legitimate whistleblowing must, in principle, be a welcome development. A further potential benefit is that awareness of whistleblowing mechanisms and protections may also be raised as a result of public debate or press coverage of developments in whistle-blower incentives.

[9] Consultation Paper, p.19.
[10] Consultation Paper, p.19.

Consideration could also be given by the Department to the introduction of a Non-Prosecution Agreement (NPA) scheme – NPAs are similar in substance to the enforceable undertakings that ASIC and the ACCC are currently able to accept.

In the US, various government agencies including the DOJ and SEC can enter into a contractual agreement with a company under which the agency agrees not to pursue enforcement action so long as the company meets certain conditions. Like a DPA, an NPA generally requires a company to meet certain conditions, including for example waiving the statute of limitations, agreeing to ongoing cooperation, meeting compliance and remediation obligations and paying a penalty. An NPA may also include agreement to some form of corporate monitoring or self-reporting. Unlike a DPA, however, an NPA is not filed with the Court and does not involve the laying of any criminal charge.