



**bhpbilliton**

**Combating bribery of  
foreign public officials  
and enforcement options  
for serious corporate  
crime**

**Submission to the  
Attorney-General's  
Department**

**10 May 2017**

# Introduction

## About BHP Billiton

BHP Billiton Limited (BHP Billiton) is a leading producer of major commodities, including iron ore, metallurgical coal, copper and uranium. We also have substantial interests in oil, gas and energy coal.

We extract and process minerals and oil and gas from our production operations located primarily in Australia and the Americas. Our products are sold worldwide, with sales and marketing led through Singapore and Houston. Our global headquarters are in Melbourne. We have a workforce of approximately 65,000 employees and contractors. Three-fifths of our employees are based in Australia, followed by South America (24 per cent), North America (13 per cent), Asia (3 per cent) and Europe (<1 per cent).

## Our approach to compliance

Our anti-corruption compliance program is built on a commitment to our Charter Value<sup>1</sup> of Integrity: *Doing what is right and doing what we say we will do.*

While *Our Charter* values remain the same, our compliance program, which enables us to implement and ensure *Integrity* in our business processes, is in a dynamic state of continuous improvement. We continue to realise the advantages of our commitment to compliance as the maturity and structure of our compliance program, based on shared values that are embedded in business processes, enables us to effectively adapt to evolving operating models and changing risks.

Our Code of Business Conduct (Our Code)<sup>2</sup>, which sets out the standards of behaviour and ethics that we expect from our employees and contractors, represents our commitment to meet or exceed applicable legal requirements. All BHP Billiton employees are expected to understand Our Code and apply it to their work every day.

We are committed to upholding ethical business practices and working with businesses, governments and civil society in partnership to combat serious corporate crime.

## This Submission

We welcome the opportunity to make a submission to the Australian Government Attorney-General's Department (Department) in relation to:

- The exposure draft of amendments to the foreign bribery offence of the *Criminal Code Act 1995*; and
- The proposed model for a Deferred Prosecution Agreement (DPA) scheme in Australia.

We consider the proposed amendments and model DPA as related matters and, accordingly, provide a single submission addressing relevant aspects of the Exposure Draft Amendments and the proposed model DPA Scheme.

We support reforms which would increase international consistency in line with the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption. Greater consistency will help align compliance standards regardless of a company's home jurisdiction and will ultimately assist in the fight against corruption.

Since Australia introduced the foreign bribery offence into the Criminal Code some 18 years ago, compliance practices have evolved and the business community has developed a greater understanding of the value that a strong compliance program can deliver. Global organisations like BHP Billiton are committed to integrity and seek to align with compliance leading practices<sup>3</sup>.

Foreign bribery offences typically arise in complex circumstances. We agree that regulators need a variety of enforcement options in order to respond in a way that reflects the relative gravity of the conduct.

<sup>1</sup> <http://www.bhpbilliton.com/our-approach/our-company/our-charter>

<sup>2</sup> <http://www.bhpbilliton.com/our-approach/our-company/code-of-business-conduct>

<sup>3</sup> <http://www.bhpbilliton.com/our-approach/operating-with-integrity>

## Comments on the proposed reforms

We support the Government's efforts to consider the regulatory framework holistically. Our comments on specific proposed amendments are outlined below.

As previously submitted,<sup>4</sup> we believe that there is also a strong argument in favour of reconsidering the facilitation payment defence. The availability of this defence represents a departure from leading international practice, which recognises that such payments are not permitted by local laws in most countries. Our Code prohibits facilitation payments.

### Combatting bribery of foreign public officials

#### Extending the definition of foreign public official to include candidates for office

We support treating candidates for office in a similar manner to individuals in public office. Pursuant to Our Code, we do not contribute funds to any candidate for public office in any country.

#### Clarifying the offence is about 'improperly influencing' a foreign public official

We support the proposal to adopt a standard of 'improper influence' in place of the current standard of whether benefits are 'legitimately due'.

- This approach increases consistency between Australia and other international jurisdictions, including those referenced in the consultation paper (the United States, United Kingdom, Canada and New Zealand).
- The other potential options canvassed in the consultation paper do not appear to be in line with international approaches.

It seems the amendment is intended to reflect the principle that you should not do indirectly what you cannot do directly. We suggest drawing on the same approach as either the US Foreign Corrupt Practices Act ('direct or indirect')<sup>5</sup> or Section 1(4) of the UK Bribery Act.<sup>6</sup>

#### Creating a new separate foreign bribery offence based on recklessness

The use of a "recklessness" standard is inconsistent with foreign bribery laws in other jurisdictions. As noted above, greater consistency will help align compliance standards regardless of a company's home jurisdiction and will ultimately assist in the fight against corruption.

#### Creating a new corporate offence of failing to prevent foreign bribery

The underlying principles of the proposed offence are likely to promote the adoption of effective compliance programs. We support this objective. However, care is needed to ensure that this new offence is consistent in drafting and application with similar offences in other jurisdictions in order to avoid unintended consequences.

An exposure draft of the guidance on adequate procedures, and broad based consultation, will be integral to the effectiveness of this proposed reform. Both general guidance and targeted industry specific guidance should be considered.

Documents such as the US Attorney's manual 9-28 and guidance memoranda<sup>7</sup>, 'Hallmarks of Effective Compliance Programs' published by the SEC and DOJ<sup>8</sup> and the 'Six Principles' published by the UK Ministry of Justice<sup>9</sup> provide

<sup>4</sup> Our submission to the Senate Inquiry on Foreign Bribery is attached.

<sup>5</sup> <http://www.ca5.uscourts.gov/opinions%5Cpub%5C05/05-20604-CR0.wpd.pdf>

<sup>6</sup> *... it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned;*

<sup>7</sup> Eg. Yates memorandum

<sup>8</sup> Available at: <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>. See also:

- opinion release procedure at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/frgncrpt.pdf>; and

- U.S. Department of Justice Criminal Division Fraud Section's Evaluation of Corporate Compliance Programs - <https://www.justice.gov/criminal-fraud/page/file/937501/download>

<sup>9</sup> Available at: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

helpful guidance in this area. Similar guidance would assist Australian businesses in developing their compliance programs and providing clarity on regulator expectations.

### **Improving enforcement options for serious corporate crime**

BHP Billiton's prior submission on DPAs is attached.

We continue to support a DPA approach for foreign bribery offences. For the scheme to be effective, there must be clear and detailed guidance on important matters including the circumstances in which a DPA is likely to be offered and the degree of confidentiality that should apply to information disclosed in the course of DPA negotiations.

If the government proceeds with its proposal to appoint a retired judge to approve DPAs, care will be needed to ensure that his or her powers are clear so parties to DPA negotiations can act with relative confidence as to the outcome.