

9 September 2005



The Secretary
Parliamentary Joint Committee on
Corporations and Financial Services
Suite SG.64
Parliament House
CANBERRA ACT 26001

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Dear Sir/Madam,

Inquiry Into Corporate Responsibility

Thank you for the opportunity to provide a submission to your inquiry on Corporate Responsibility and Triple-Bottom Line reporting. We have provided below comments in relation to each element of the Terms of Reference. However, some background to BHP Billiton's own experience and approach to date may provide some useful context.

BHP Billiton's approach to Corporate Social Responsibility ("CSR") and associated public reporting has evolved over time, in step with our own experiences and perceptions of the environment within which we operate, community expectations communicated to BHP Billiton and, in some instances, regulatory requirements. Rather than proving a burden to our businesses, CSR has been viewed throughout BHP Billiton as critical to our long term success. The BHP Billiton Charter states that we will only be successful when our host communities value our citizenship. We publicly report our progress and performance in accordance with our Sustainability Policy.

Our first public environment report was released in 1997. By 1999, this report had evolved into an Environment and Community report. In 2002, we aligned our report with the Global Reporting Initiative ("GRI") Sustainability Reporting Guidelines 2002 and, since then, we have used these guidelines as the basis for our reports. A copy of our 2004 report can be found at <http://hsecreport.bhpbilliton.com/2004/index.asp>.

Although we have been reporting for some time, elements of our CSR approach were in place many years before we commenced any formal reporting on the subject. The CSR agenda is evolving quite rapidly and we expect this rate of change to continue. The dynamic nature of that agenda provides an opportunity for corporate groups such as ours to seek competitive advantage, by exploring new ways of approaching and engaging in relationships with their key stakeholders. The innovation and peer pressure that this voluntary approach has fostered has, in our view, resulted in a dramatic advance in the performance of the extractive industry as a whole.

These positive outcomes are important in considering regulatory approaches to both CSR and to reporting. It is our submission that a regulatory approach that reinforces or mandates activity in CSR, as well as its reporting, most likely will lead to a "lowest common denominator" approach and may diminish or possibly eliminate much of the innovation that has occurred in CSR to date, by providing, in numerous cases, a lower standard than that which appears to have been self imposed by those corporate groups that critically depend on their record in CSR for their continuing licence to operate.

In this regard, it is worth noting that, in July 2005, BHP Billiton's approach to CSR was recognised when it was named company of the year in the 2005 Business in the Community National Awards for Excellence. We were also delighted to have been assessed by the Dow Jones Sustainability Index as the Mining Sector Sustainability Leader for 2006.

Our commitment and approach to CSR is undertaken not because it is mandated, but because it represents good business practice and sense. For our businesses to thrive and survive in the long run, it is essential that our activities are valued by the broader communities within which those businesses exist and operate.

Our specific comments in relation to each element of the Terms of Reference are as follows:

a) The extent to which organisational decision-makers have an existing regard for the interests of stakeholders, and the broader community.

Companies such as BHP Billiton recognise the importance of non-financial performance to the long term viability and success of their businesses. It is well accepted within our organisation that we work in partnership with a wide range of stakeholders and that our success is fundamentally linked to the value they see in those relationships. Our approach is reflected in our Charter (attached) which states that *"To prosper and achieve real growth, we must: ...earn the trust of employees, customers, communities and shareholders by being forthright in our communications and consistently delivering on commitments."* The Charter also lists one of BHP Billiton's six key values as *"Win-Win Relationships – Having relationships which focus on the creation of value for all parties"*.

Working with our key stakeholders and having regard to their interests is critical to our decision-making processes. Our commitment to forthright communications has been a key driver for our Sustainability Reports and to our desire to continually improve the way we communicate, consult and engage with our key stakeholders.

b) The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.

As noted above, the link between environmental and social performance and financial performance is well understood by companies operating in sectors such as the minerals and petroleum industries. Failure to effectively manage these issues in these sectors can result in the closure of operations due to the withdrawal or non renewal of government granted licences, civil unrest, the creation of significant environmental liabilities, or the initiation of prosecutions and the imposition of significant fines, etc. In the extractive industry, we consider it essential that decision makers understand these issues, the risks associated with

the conduct of their businesses and the concerns and aspirations of the stakeholders who may be potentially affected thereby.

It should be noted however that, just as there are risks associated with poor management of CSR issues, there are also many opportunities in "getting it right". Gaining and maintaining a reputation for effective management of CSR issues and constructive engagement with key stakeholders can enhance access to new project development opportunities (eg exploration acreage), improve recruitment opportunities (the best and brightest employees want to work for companies they can be proud of) and potentially provide better access to capital (equity or other) and insurance/bonding costs. The potential for competitive advantages that can flow from innovation in the CSR area has resulted in the rapid advance in our industries' approach to CSR and reporting.

BHP Billiton's approach to CSR reflects our belief that strong performance in these areas can generate real value for our host communities and for our shareholders. For example we set a target in 2001 to spend one per cent of our pre-tax profit (3 year rolling average) on community development programs. We have consistently met or exceeded this target. Last year, BHP Billiton spent US\$57.4 million on community programs throughout the world.

Some businesses clearly have greater exposure to CSR issues than others and, therefore, the risk and opportunity profile will differ markedly between such businesses, depending on the nature of the activities and industry sectors within which they operate. We recognise, for example that, as a resources sector company, we have greater exposure to environmental and social issues than some other businesses eg. in the software industry. In our submission, there is no one level of engagement that will be applicable for all and, therefore, the only logical approach is for individual companies to undertake risk assessments to determine the level of exposure and appropriate level of engagement that they believe ought to be applicable to their industry and their operations. To a significant degree, the latter will also be dictated by the level of interest shown by stakeholders to their respective businesses.

Overall, BHP Billiton views good CSR performance as an important contributor to our licence to operate and grow our businesses. Companies with a poor track record in these areas will find it increasingly hard to gain regulatory approvals and community support for new developments. Setting and meeting performance benchmarks provides a degree of assurance to external parties that we are serious about our commitment to CSR and have effectively put our policy commitments into practice.

Good CSR performance is also increasingly viewed as a good proxy for overall management competency, providing an insight for investors into how well we are managing general risk and governance issues.

c) The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests of stakeholders other than shareholders, and the broader community.

Company directors and officers have fiduciary duties to act in the best interests of the company. This includes its shareholders, who are the owners of the company. This would also suggest that the interests of shareholders generally override the interests of other stakeholders. However, to effectively act in the best interests of the company, directors and officers must be aware of and understand the risks

and opportunities facing the company. Companies should therefore be aware of the environmental and social impacts, both actual and potential, of their business activities and incorporate these into decision making processes, as appropriate. Failure to do so, could potentially amount to a failure by directors and officers to meet their existing duties.

Under Section 181 of the Corporations Act, directors and officers must exercise their powers and duties in good faith, in the best interests of the corporation and for a proper purpose.

The existing legal framework does not discourage or preclude directors or officers from having regard to the interests of non-shareholder stakeholders and the broader community. Many companies, such as BHP Billiton, already regard these interests as critical to their decision-making processes. Not only is it good business practice to do so, but it may be tantamount to a breach of existing duties to disregard those interests in certain circumstances.

It has long been contended by many legal commentators that it is appropriate for directors and officers to regard the interest of a broader stakeholder group, where it is felt that the actions of directors and officers are reasonably identifiable with establishing or maintaining a corporation's licence to operate, building the corporation's brand and/or reputation, and engaging the support of communities where the corporation's activities may be occurring, even if there is no direct nexus between that activity and an immediately visible financial return such as one might expect from a direct investment in an asset. However, it must also be recognised that just as there are those who believe (correctly, in our submission) that it is appropriate for corporations, in given circumstances, to have regard for a broader group of stakeholder interests (beyond the exclusive interests of shareholders), there are others who believe that this is not appropriate and who support the notion that the principal (and arguably only) obligation of corporations is to maximise total shareholder return for their shareholders and not to divert funds that could otherwise be available to shareholders in pursuing a CSR or other agenda.

Some of the latter views have started to surface in other jurisdictions. For example, many large corporations have made donations to political parties. Yet, in the United Kingdom legislation was enacted (see the Political Parties Elections and Referendums Act 2000, which received Royal Assent in November 2000) the effect of which is to preclude publicly listed corporations from making political donations unless prior approval has been obtained from shareholders in general meeting. The inclusion of these types of provisions would seem to suggest that, at least in some jurisdictions, greater focus is being brought to bear on how and for what purpose corporations may seek to expend funds, particularly if there can be room for disagreement on the question of whether or not such expenditure is core to the corporation's activities.

We acknowledge that the debate about CSR has many dimensions and there will be many views expressed both in support and in opposition of recognising broader stakeholder interests. In the end, it is always open for affected shareholders or other aggrieved stakeholders, who may believe that a corporation has expended monies or other resources in areas that are not core to the interests of that corporation, to seek to restrain those activities in the appropriate fora that may be available to them to seek such redress. On balance, it is our submission that each corporation must determine for itself what it believes to be appropriate in terms of the CSR agenda. There is no one formula

that will apply universally to all corporations, nor is it appropriate to seek to devise one by regulation. The respective agendas of corporations will (and should) ultimately be determined by the needs of their businesses, as perceived from time to time by their respective directors and officers, in the proper discharge of their fiduciary obligations. We believe that that is the appropriate way for these matters to be addressed.

d) Whether revisions to the legal framework, particularly to the Corporations Act, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the Corporations Act.

It is interesting to note that this inquiry is about *corporate* responsibility. It is worth reflecting on the fact that corporate responsibility, as opposed to business responsibility has been selected as the focus for this inquiry. Corporations are but one means by which businesses are organised – many large and successful businesses are structured as sole traders, partnerships, joint ventures, incorporated associations, public and statutory corporations and a range of different trust structures.

Although corporations may represent the most commonly used structure for the conduct of businesses in general, one needs to find the rationale as to why the obligations that may be sought to be imposed by some on corporations should not equally apply to all business organisations and, indeed, to statutory corporations and other organs of government, as well. There seems to us to be no compelling reason why one form of business structure should be singled out and treated differently from the rest.

The debate around regulating CSR should not be confused with the debate around corporate governance, which is already well regulated. The latter is concerned with ensuring that the management and decision making processes that occur within corporations are undertaken without bias, for proper purposes, without conflicts of interest, honestly and without undue or excessive enrichment for those who are in a position to exercise effective day to day management and control of those corporations. These obligations and restrictions reflect the reality that the controllers of companies are effectively the custodians of shareholders' funds and therefore owe obligations to those shareholders – obligations which in turn are overseen by the Boards of the relevant corporations.

If one views corporations and corporate governance in the foregoing way, there is no immediately apparent or compelling reason why a greater level of social obligations should be imposed on a corporation than on any other form of business organisation – in the end, they all seek to achieve the same or similar outcomes – that is, to maximise the financial benefits to their owners. The mere fact that some corporations may be larger in size than other forms of business organisations, does not of itself create a compelling argument that merely because of their size, they have greater social responsibilities than smaller less organised businesses.

In our submission, the level and extent of CSR activity, including any broader obligations to the community which a corporation will undertake must be dictated by the perception that its controllers and shareholders have about the relevance of that agenda and those activities to the business or that corporation. That would be so, absent any specific legislation that would mandate different behaviour. It

seems difficult to justify legislation of the latter kind that merely targets corporations and not every other form of business enterprise or organisation.

As we have noted above, those corporations that have identified CSR and other community activities as being valuable or essential to their business operations are already extensively engaged in this agenda and, in our submission, lead by example. They have already taken their activities beyond what might otherwise be in the contemplation of regulators.

Our view therefore is that revisions to the law in the CSR area are not required. The Corporations Act provides adequate protection to the interests of shareholders and other legislation provides protection for other stakeholders. The flexibility afforded by the current approach gives corporations the opportunity to innovate and explore opportunities for competitive advantage that may otherwise be stifled by a regulatory approach. It is also not clear how effective a regulatory approach to CSR would be, given that a corporation's culture will largely drive its engagement policies and practices.

As noted above, we are also concerned that a regulated approach may eliminate much of the potential for innovation that has advanced industry so dramatically in recent years. Without the potential for competitive advantage, efforts that might have been pursued in the CSR area may well be diverted elsewhere.

We support voluntary reporting of a corporation's approach to CSR, and of its performance in that area, both good and bad. However, we do not support amendments to the Corporations Act to expressly require directors to act in the best interests of other (non-shareholder) stakeholders. Directors are already obliged to act in the best interests of the company as a whole and we consider this obligation to be appropriate and sufficient in all the circumstances.

e) Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.

Voluntary measures have been very successful in encouraging greater consideration of the interests of stakeholders. Examples of these include The Global Compact, The Global Reporting Initiative, The International Council on Mining and Metals Sustainable Development Framework, and the ISO 14001 Environmental Management Standard. In Australia, the Minerals Council of Australia has been particularly successful in promoting public reporting of environmental and social performance by its members, through the development of the Australian Minerals industry Code (now called Enduring Value).

Measures that could further encourage these voluntary initiatives could include general promotion and awareness of the initiatives through sponsorship of conferences/speakers, development of guidance notes to assist corporations with implementation, and sponsorship of awards programs to recognise excellence.

Active promotion of the Global Reporting Initiative (GRI) is considered particularly appropriate as it has evolved through an extensive multi-stakeholder engagement program.

f) The appropriateness of reporting requirements associated with these issues.

Member companies of the International Council on Mining and Metals and the Minerals Council of Australia have committed to report on their environmental and social performance using the GRI as a base. Signatories to the Global Compact also use the GRI as a base for their reporting.

As mentioned above, the GRI is particularly powerful, as it has been developed through an extensive multi-stakeholder engagement processes. For example, the recently released GRI Minerals Sector Supplement was developed by a working group comprised of 20 individuals representing companies, the financial sector, labour unions, international organisations (eg the World Bank) and social and environmental non-government organisations.

It is also important to note that the GRI is still evolving; the third generation of the core guidelines is in preparation and due for release mid 2006. Again, the GRI initiative is involving a wide range of stakeholders in this process. It is also important to note that the GRI recognises the importance of maintaining a voluntary approach and has not advocated a mandatory or regulated approach. In our view, voluntary reporting under the GRI has significantly surpassed any mandatory reporting requirements of environmental performance.

g) Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

We must caution against regulatory measures that may impose additional costs on corporations without delivering tangibly valuable outcomes. There is already significant public concern at the cost of regulation for corporations with many commentators and industry representatives observing that, in recent years new regulatory provisions have added significant and unacceptably high compliance costs for corporations. A prescriptive, rules-based approach, instead of a "principles-based" approach will in our view prove ineffective in addressing CSR related issues. An approach that encourages transparency and participation in voluntary initiatives that promote the culture and values necessary to foster engagement with key stakeholders is likely to be more effective and beneficial.

Attempts have been made in the United Kingdom to introduce legislation requiring directors to have regard to the interests of wider stakeholders. To date these attempts have proven difficult and, ultimately, unsuccessful. Our view is that, in Australia, we could expect a similar result.

Yours sincerely,



John C. Fast
Chief Legal Counsel &
Head of External Affairs

BHP BILLITON CHARTER

WE ARE BHP BILLITON, A LEADING GLOBAL RESOURCES COMPANY.

Our purpose is to create long-term value through the discovery, development and conversion of natural resources, and the provision of innovative customer and market-focused solutions.

To prosper and achieve real growth, we must:

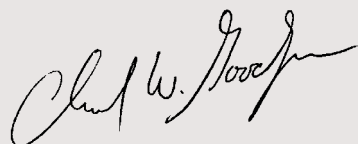
- actively manage and build our portfolio of high quality assets and services,
- continue the drive towards a high performance organisation in which every individual accepts responsibility and is rewarded for results,
- earn the trust of employees, customers, suppliers, communities and shareholders by being forthright in our communications and consistently delivering on commitments.

We value:

- **Safety and the Environment** – An overriding commitment to health, safety, environmental responsibility and sustainable development.
- **Integrity** – Including doing what we say we will do.
- **High Performance** – The excitement and fulfilment of achieving superior business results and stretching our capabilities.
- **Win-Win Relationships** – Having relationships which focus on the creation of value for all parties.
- **The Courage to Lead Change** – Accepting the responsibility to inspire and deliver positive change in the face of adversity.
- **Respect for Each Other** – The embracing of diversity, enriched by openness, sharing, trust, teamwork and involvement.

We are successful in creating value when:

- our shareholders are realising a superior return on their investment.
- our customers and suppliers are benefiting from our business relationships.
- the communities in which we operate value our citizenship.
- every employee starts each day with a sense of purpose and ends each day with a sense of accomplishment.



Chip Goodyear
Chief Executive Officer

October 2004

