BHP BILLITON IRON ORE PTY LTD

Re: Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002

30 MARCH 2007

1. **Summary of submission**

BHP Billiton Iron Ore Pty Ltd (BHPBIO) requests the Australian Fair Pay Commission (AFPC) to confirm/clarify that any increases awarded in AFPC Wage-Setting Decision No. 2 *do not apply* to wage rates derived from the Notional Agreement Preserving a State Award (NAPSA) derived from the *Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002* (BHPBIO Award).

At present, it is not certain that the aggregate wages contained in the BHPBIO Award are affected by AFPC Wage-Setting Decisions. To avoid ambiguity, and after having regard to the matters set out in these submissions which demonstrate that an increase in wage rates under the BHPBIO Award is not necessary in any event, BHPBIO submits that it is appropriate that the AFPC specify that its Wage-Setting Decision No. 2 does not apply to the BHPBIO Award.

The reasons that the AFPC should specify that any increases awarded in AFPC Wage-Setting Decision No. 2 *do not apply* to the BHPBIO Award include:

1.1 **The BHPBIO Award is akin to an Enterprise Agreement**

(a) The BHPBIO Award is effectively an award based *Enterprise Agreement*. The BHPBIO Award sets rates of pay on this basis. The wage rates are not award based minimum rates of pay in the sense contemplated by the *Workplace Relations Act 1996* (Cth) (*WR Act*) (including both prior to, and since, the commencement of the *Workplace Relations (Work Choices) Amendment Act 2005* (Cth) (*Work Choices Amendments*)).

(b) Indeed, a significant factor in setting wage rates under the BHPBIO Award was the wage rate of employees performing similar work for BHPBIO employed on individual workplace agreements.

1.2 **Absorption**

(c) Recognising the enterprise specific nature of the BHPBIO Award, the Western Australian Industrial Relations Commission (WAIRC) provided in clause 8 of the BHPBIO Award for the *full absorption* of all arbitrated safety net adjustments of wages and allowances determined by the WAIRC. That is, even prior to the *Work Choices Amendments* the BHPBIO Award was not subject to minimum rate safety net increases.
It is appropriate that the AFPC recognise this matter when making any decision that may bear upon wage rates arising from the BHPBIO Award.

1.3 The BHPBIO Award derived wage rates significantly exceed comparable Federal awards

(e) The BHPBIO Award derived wage rates significantly exceed comparable Federal awards, reflecting the fact that the BHPBIO is not a true minimum rates award.

(f) The lowest wage rates for ordinary time earnings (excluding apprentice and training roles) derived from the BHPBIO Award well exceed the highest wage rates contained in relevant industry awards (eg the Federal Transport Workers Award, the Federal National Building and Construction Industry Award and the Federal Metal, Engineering and Associated Industries Award.) Indeed the lowest wage rates of pay derived from the BHPBIO Award are up to $500 per week above the highest wage rates set in comparable Federal Awards.

(g) The highest wage rates derived from the BHPBIO Award are substantially (ie $300 per week to over $600 per week and in some cases over $1,000 per week) in excess of the highest wage rates contained in relevant industry awards.

1.4 The BHPBIO Award derived rates significantly exceed the Average Weekly Wage

(h) Even the lowest wage rates of ordinary time earnings under the BHPBIO Award (excluding apprentice and training roles) exceed the Australian Bureau of Statistics Average Weekly Full-time adult ordinary time earnings.

(i) The highest wage rates derived from the BHPBIO Award are in the order of $300 per week (though in some cases over $1,000 per week) above the Average Weekly Full-time adult ordinary time earnings.

1.5 The AFPC would not achieve any of the objectives specified in s23 of the WR Act by adjusting the rates arising from the BHPBIO Award

(j) The AFPC is guided by the criteria stated in s23 of the WR Act when making its decisions. It is not necessary for the AFPC to adjust wage rates deriving from the BHPBIO Award (assuming it is able to do so) to promote any of the objectives set out in s23 of the WR Act.

(k) Indeed, were the AFPC to increase wage rates deriving from the BHPBIO Award, it would be contrary to the objective set out at s23(c) of the WR Act of providing a safety net for the low paid.

(l) Similarly, any decision to increase wage rates deriving from the BHPBIO Award would be contrary to the objective of "employment and competitiveness across the economy" in that the AFPC would maintain the already very great differential between the rates applicable to BHPBIO in respect of its iron ore business and the rates of other employers covered by Federal minimum rates awards.
2. **Background**

2.1 The objective of the AFPC in exercising its wage-setting function is to promote the economic prosperity of the people of Australia having regard to:

(a) the capacity for the unemployed and low paid to obtain and remain in employment;

(b) employment and competitiveness across the economy;

(c) providing a safety net for the low paid; and

(d) providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

(s 23 WR Act).

The above criteria guided the AFPC in making its first wage-setting decision - the Wage-Setting Decision No 1 - October 2006.

2.2 BHP Billiton Iron Ore Pty Ltd (BHPBIO) has in place an enterprise specific industrial instrument which applies in respect of its iron ore operations in Western Australia. The instrument is called the *Iron Ore Production & Processing (BHP Billiton Iron Ore Pty Ltd) Award 2002 (BHPBIO Award)*. The BHPBIO Award was made by the WAIRC. Prior to the commencement of the *Work Choices Amendments*, the BHPBIO Award was an award made and regulated under the *Industrial Relations Act 1979 (WA)*.

2.3 As a consequence of the *Work Choices Amendments* the BHPBIO Award became a federal instrument, specifically, a "Notional Agreement Preserving State Awards" (NAPSA). A copy of the current BHPBIO Award is attached to these submissions as Annexure 1. A copy of the decision setting the most recent wage rates set by the WAIRC under the BHPBIO Award is attached to these submissions as Annexure 2.

2.4 The BHPBIO Award extends to and binds BHPBIO and:

(a) the Australian Workers Union, Western Australian Branch, Industrial Union of Workers;

(b) the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers, Western Australian Branch;

(c) the Communications, Electrical, Electronic, Information, Postal, Plumbing & Allied Workers' Union of Australia, Engineering and Electrical Division, WA Branch;

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1 AN160182.

2 A copy of the original gazetted BHPBIO Award may be found at *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch and Others v BHP Iron Ore Limited and Others* (2001) 82 WAIG 2060; The current wage rates under the BHPBIO Award are set out in the order of Wood C of the WAIRC in matter No. 928 of 2005 made on 10 February 2006 which is gazetted at (2006) 86 WAIG 493.
(d) the Construction, Forestry, Mining and Energy Union of Workers;

(c) the Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch; and

(f) all employees employed by BHPBIO in the numerous classifications contained in the BHPBIO Award in respect of its iron ore operations in Western Australia.

2.5 The BHPBIO Award is in effect an arbitrated enterprise agreement.

2.6 There is some uncertainty around the application of the AFPC Decisions to wage rates derived from the BHPBIO Award. We note, in this regard, that the Australian Government's Work Choices Website advises persons that, "the basic wage-related provisions of this version (of the BHPBIO Award) now have effect as an Australian Pay and Classification Scale," "that the rates of pay in (the BHPBIO Award) may no longer be accurate" and to contact the Work Choices Infoline to obtain more information.

2.7 It is not clear from the WR Act whether the wage-related provisions of the BHPBIO Award in fact have effect as an Australian Pay and Classification Scale (APCS) and are subject to adjustment in accordance with the AFPC's Wage-Setting Decisions. However if APCS wage rates arise from the BHPBIO Award, BHPBIO submits that it is not appropriate for those wage rates to be subject to the AFPC's Wage-Setting Decisions.

2.8 For the reasons set out in these submissions BHPBIO submits that the AFPC should confirm/clarify in its Wage-Setting Decision 2007 that the wage rates contained in the BHPBIO Award are not required to be adjusted by reference to the AFPC's Wage-Setting Decision.

3. Enterprise agreement nature of BHPBIO Award

3.1 The BHPBIO Award is not like any Federal award. Effectively it is an award which has been arbitrated in the nature of an enterprise agreement. The WAIRC has said as much:

"The evidence before us shows that the safety net award prescribes the rates of wage actually paid by BHPB. The terms and conditions of employment it prescribes are those actually received by the employees (together with such other applicable BHPB policies or benefits). In the present circumstances the safety net award is effectively an enterprise award. The award may thus be distinguished from the common rule Metal Trades (General) Award or the award applicable

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generally to employees in the nickel or gold mining industries to which BHPBIO took us.” (our emphasis)

3.2 The BHPBIO Award was made by the WAIRC with effect from 19 July 2002 between BHPBIO and several industrial organisations (referred to above), whose members are employed at BHPBIO’s operations in Western Australia.

3.3 The history to the making of the BHPBIO Award is contained in a series of decisions of the WAIRC.

3.4 In its original decision establishing the current BHPBIO Award, the WAIRC noted that the process of setting award rates for the BHPBIO Award involved assessing the value of work having regard to efficiency and productivity outcomes under an EBA. The WAIRC stated:

"[109] The wage fixing principles now recognises the particular nature of an enterprise specific award. Where agreement can be reached between the parties the award can be varied under Principle 10 without recourse to the Commission in Court Session. In effect the award can be the EBA.

[110] With the restoration of the primacy of the enterprise award at BHPBIO, wage rates must reflect the worth of work in a structurally efficient environment free from restrictive work practice. In the enterprise award it must effectively identify what would otherwise have been specified as the commitments to efficiency and productivity outcomes under an EBA. In this respect the wage rate must be commensurate with the scope and benefits the employer can achieve in managing the structurally efficient workplace.

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[114] The worth of work has to a significant extent been established on what was offered to award employees to take up WPAs [ie WA legislated individual workplace agreements as they then were]."

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3.5 In setting wages the WAIRC had particular regard to the wages paid to workers who had entered individual workplace agreements with BHPBIO. In setting wages under the initial award, the WAIRC stated:

"[127] ...(f)... We consider the significance of the changes which are to occur will lead to an improvement in productivity of a magnitude which amply justifies an increase of this size. We reach this conclusion with the assistance of the evidence of the increase in productivity which is stated to have occurred as a result of the change to work practices of the 50% of the workforce which moved to WPA's [i.e WA legislated individual workplace agreements as they then were]. The significant reduction of differences in work practices which currently exists between the WPA's and EBA's as a matter of equity must lead correspondingly to a significant reduction in the differences in remuneration. ... The evidence of the substantial improvement in remuneration paid to employees who no longer work in accordance with the Award and EBA regime is of itself significant."

3.6 Similarly, in a subsequent decision the WAIRC said:

"[120] The size of any increase to be awarded is necessarily a matter for judgement according to s.26 and the objects of the Act. It is in the context of looking at a number of factors that we also take into consideration the value of the similar work performed by AWA and WPA employees. The greater the difference between the remuneration of award employees and AWA employees for performing similar work the greater the potential for industrial relations issues to arise. The Commission is to take into account the need to prevent, as well as settle, industrial disputes before they arise.

... [122] We are satisfied from the evidence, and find accordingly, that the current difference in remuneration is approximately 16.5% of which approximately 8.5% can be attributed to the structural differences between employment under the award and employment under an AWA or expired WPA. ... We consider that a differential greater than approximately 8% is likely, on the evidence before us, not to fairly remunerate award employees for the contribution they make and will continue to make to increased productivity across the operations of BHPB. ... We conclude... that a wage increase of 8% ought to be awarded..."

3.7 In conclusion, the WAIRC set actual rates of pay for employees having regard to enterprise specific factors, and, in particular, a comparison of the value of work performed by award and AWA employees. The wage rates thus set were "paid rates" (not underlying minimum industry rates) equivalent to wage rates which one could expect to achieve as an outcome for productivity improvements negotiated by way of enterprise bargaining. That is, they

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1 Ibid 127(f).
are rates more properly comparable with rates one could expect to find in a workplace agreement, and not a minimum rates award.

3.8 The conclusion referred to in 3.7 above is also self evident from clause 8 of the BHPBIO Award (a matter dealt with in section 4 below).

4. Absorption

4.1 It was never intended that the BHPBIO Award be subject to general minimum safety net adjustments.

4.2 Consistent with rates having been set akin to rates under an enterprise bargaining agreement (or workplace agreement) clause 8 of the BHPBIO Award provided that:

"8. ARBITRATED SAFETY NET ADJUSTMENTS
Increases to salaries, wages and allowances arising from arbitrated safety net adjustments determined by the Commission are to be absorbed into the salaries and allowances prescribed by this award."

4.3 This provision reinforces the fact that the wage rates arising from the BHPBIO Award are not conducive to minimum rates adjustments by the AFPC.

5. Comparison of wage rates arising from the BHPBIO Award and other wage rates

5.1 As indicated above, the WAIRC recognised the enterprise specific nature of the BHPBIO Award when determining wage rates of workers covered by the BHPBIO Award. The WAIRC set wage rates by direct reference to employees employed by BHPBIO under the terms of Workplace Agreements (made pursuant to the (now repealed) Workplace Agreement Act 1993 (WA)) and also by reference to wage rates of employees covered by Australian Workplace Agreements.

5.2 The relevant wage rates clauses contained in the BHPBIO Award were clause 7 – Aggregate Wages, Schedule I – Aggregate Wages, and Schedule III – Award Classifications. Clause 8 of the BHPBIO Award provided for increases to salaries, wages and allowances arising from arbitrated safety net adjustments determined by the WAIRC to be absorbed into the salaries and allowances prescribed by the BHPBIO Award.

Comparison of BHPBIO derived wage rates and general industry awards

5.3 The wage rates arising from the BHPBIO Award are all significantly in excess of wage rates arising from general industry awards.

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10 The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers – Western Australian Branch and Others v BHP Iron Ore Limited and Others (2001) 82 WAIG 2033 (at 107 to 127 inclusive), where the Commission in Court Session sets out relevant reasons for issuing the award and the in principle terms of the award to issue (after further negotiation between the parties).

5.4 For the AFPC's reference, set out below is a range of weekly wage rates arising from the BHPBIO Award compared with a range of weekly wage rates from the Metal, Engineering and Associated Industries Award 1998 (AP 789529), the Transport Workers' Award 1998 (AP799474) and the National Building and Construction Industry Award 2000 (AP790741):

BHPBIO Award (Day work (40 hour week))

AWU Level 1 – 4: $1,110.84 - $1,315.62
TWU S1-S3: $1,094.01 - $1,228.59
Production Worker 1-4: $1,110.84 - $1,315.62
CFMEU cranes 1-4: $1,238.06 - $1,322.34

Metal, Engineering and Associated Industries Award:

C14 - C1(b): -$484.40 - $1,031.10

Transport Workers' Award:

Grades 1 – 10: $518.20 - $625.30

National Building and Construction Industry Award:

CW1(c) – CW8: $534.60 - $682.60

5.5 The size of the differential (ie the amount by which the BHPBIO derived wage rates exceed industry award rates) is even greater when one considers that:

(a) Almost all employees covered by the BHPBIO Award are employed in either the highest or second highest job classification in each area of work; and

\[\text{annual wage rate divided by 365.25}\times 7\]

5.4 The BHPBIO Award expresses aggregate wages on an annual basis. For the purposes of this comparison, the annual wage rates contained in Schedule I – Aggregate Wages to the BHPBIO Award have been converted to a weekly rate on the basis of the formula: [(annual wage rate divided by 365.25) multiplied by 7]. The wage rates set out in these submissions are the current published ordinary time minimum classification rate, not inclusive of allowances. These rates may not include adjustment by reference to the AFPC's Wage-Setting Decision October 2006. However, we note that this would not affect this award comparison given any adjustment to rates would apply across the board.

5.4 See Schedule I – Aggregate Wages to the BHPBIO Award.

5.4 See Metal, Engineering and Associated Industries Award 1998 (AP 789529), clause 5.1.1(c), Schedule of Rates of Pay.

5.4 See Transport Workers' Award 1998 (AP 799474), clause 15.1.

5.4 See National Building and Construction Industry Award 2000 (AP 790741), clause 18.1.1, Wage Rates – New Classification Structure.
(b) The highest job classification under the BHPBIO Award may be a lower classification rating than the highest classification in the equivalent industry award (particularly the higher classifications in the *Metal Industry Award*).

5.6 The above comparison clearly demonstrates that the BHPBIO Award is different in nature to minimum safety net awards. The wage rates for the *lowest* classification levels in the BHPBIO Award exceed the wage rates for the *highest* classification levels in each of the three above industry awards. The wage rates for the higher end classifications arising from the BHPBIO Award pay *weekly wages* which are many hundreds of dollars per week higher than the Federal award equivalent classifications.

**Comparison of BHPBIO derived wage rates and Average Weekly Earnings**

5.7 The aggregate wage of a person employed at the lowest classification under the BHPBIO Award is also higher than current full-time average weekly adult ordinary time earnings reported by the Australian Bureau of Statistics.

5.8 The full-time adult ordinary time Average Weekly Earnings as at November 2006 were $1,058.90 (and for private sector earnings - $1,026.30).\(^{17}\)

5.9 The lowest adult ordinary time rate of pay (other than apprentice and training rates) derived from the BHPBIO Award is $1,066.57. The highest rates of pay derived from the BHPBIO Award are in some cases more than $1,000 per week above the Average Weekly Wage.\(^{4}\) Bearing in mind that most award covered employees receive the highest or second highest rate in each classification, it can be appreciated that the BHPBIO Award workforce receives many hundreds of dollars *per week* higher than the Average Weekly Wage.

6. **AFPC objectives and obligations: adjustment of rates derived from the BHPBIO Award are not necessary or appropriate**

6.5 The AFPC "has responsibility only for setting and adjusting minimum wages for employees within its jurisdiction"\(^{19}\).

6.6 It is clear that the BHPBIO Award does not set true award minimum wages for employees. BHPBIO submits, therefore, that there is no correlation between the AFPC's functions (defined by the *WR Act* and referred to above) and adjusting the wage rates contained in the BHPBIO Award. Therefore it is not necessary for the AFPC to adjust rates derived from the BHPBIO Award to perform its functions under the *WR Act*.

6.7 BHPBIO further submits that to adjust the wage rates derived from the BHPBIO Award is not only unnecessary, by reference to the functions of the AFPC, as set out in the *WR Act*, but would also be an exercise of power beyond that contemplated by the *WR Act*.

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\(^{4}\) See eg. BHPBIO Award, Schedule 1 – Aggregate Wages, "CFMEU Loco" Levels 4 and 5.

\(^{19}\) AFPC's Wage-Setting Decision October 2006, Section 1.2, page 61, paragraph 4.
6.8 Were the AFPC to increase wage rates arising from the BHPBIO Award, it would be contrary to the objective set out at s23(c) of the WR Act of providing a safety net for the low paid.

6.9 In addition, BHPBIO submits that if the AFPC's Wage-Setting Decisions were applied to the BHPBIO Award, then BHPBIO would be placed in a position of competitive disadvantage as against other organisations that are subject to minimum rates derived from general industry awards. Any decision to increase wage rates arising from the BHPBIO Award would be contrary to the objective of "employment and competitiveness across the economy" in that the AFPC would maintain the already very great differential between the minimum rates applicable to BHPBIO in respect of its iron ore business and the rates of other employers covered by Federal minimum rates awards.

7. Conclusion

7.5 BHPBIO submits for all the reasons contained in this submission, and particularly, given:

(a) the AFPC's clearly defined functions under the WRA; and

(b) the nature of the particular provisions of the BHPBIO Award,

that the AFPC should confirm/clarify in its Wage-Setting Decision 2007 that the wage rates arising from the BHPBIO Award are not adjusted by the AFPC's decision (or at all).

7.6 BHPBIO is happy to discuss and further explain its submission, or to answer any question, including on the operation of the BHPBIO Award, if required.

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