

# ***CR 2006/101 - Income tax: BHP Billiton Limited - Employee Long Term Incentive Plan***



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## Class Ruling

### Income tax: BHP Billiton Limited – Employee Long Term Incentive Plan

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 139B of the *Income Tax Assessment Act 1936* (ITAA 1936);
- section 139C of the ITAA 1936; and
- section 139G of the ITAA 1936.

All legislative references in this Ruling are to the ITAA 1936 unless otherwise indicated.

### Class of entities

3. The class of entities to which this Ruling applies is all persons who are employees of BHP Billiton Limited (BHP) and who accept an invitation to participate in the Long Term Incentive Plan (the Plan). In this Ruling, a person belonging to this class of entities is referred to as a 'participating employee'.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 13 to 23 of this Ruling.
6. This Ruling does not address the consequences of the happening of an uncontrollable event as described in paragraph 21 of this Ruling.
7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
  - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
  - this Ruling may be withdrawn or modified.
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## Date of effect

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9. This Ruling applies from 1 July 2004. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling. Furthermore, the Ruling only applies to the extent that:
  - it is not later withdrawn by notice in the *Gazette*; or
  - the relevant provisions are not amended.
10. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

11. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

12. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

## Scheme

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13. The scheme that is the subject of this Ruling is described below and is based on the documents listed below. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the scheme are:

- the request for Class Ruling from BHP Billiton Limited dated 7 July 2006;
- Annexure A – Long Term Incentive Plan (LTIP) Class Ruling; and
- Annexure B – LTIP Class Ruling.

**Note:** certain information received from the applicant has been provided on a commercial-in-confidence basis and will not be disclosed or released by the Tax Office under the freedom of information legislation.

14. The operation of the Plan is governed by the Plan rules (Rules). Amendments have recently been made to the Rules which will apply to grants under the Plan made in the year ended 30 June 2007 and subsequent income years subject to further amendment. The amendments introduce deemed acceptance of the invitation to participate in the Plan. Employees who do not want to participate complete a non-participation form (under the original Rules acceptance of an invitation was by way of completing an acceptance form).

15. As set out in the Rules, the Plan is aimed at creating a stronger link between performance and reward. Under the Rules, eligible employees who accept an invitation to participate in the Plan are granted options to acquire fully paid ordinary shares (Shares) in the capital of BHP or conditional rights to acquire Shares (collectively referred to as 'Rights'). The number of Rights granted in respect of a performance year to a participating employee is determined by the Remuneration Committee (RemCo) of the board of BHP. The first grant of Rights under the Plan was made in December 2004 in respect of the performance year commencing 1 July 2004.

16. The vesting of Rights granted to participating employees is subject to performance hurdles being met in respect of a 5 year performance period, commencing at the beginning of the performance year to which the Rights relate. The performance hurdles compare the BHP group's total shareholder return (TSR) for the 5 year performance period against a 'median' TSR (weighted average TSR of a comparative group of companies) for the performance period. Performance hurdles are tested after the end of the 5 year performance period.

17. If, at the end of the performance period, the BHP group's TSR is equal to or less than the median TSR, all Rights lapse. Subject to the discretionary powers of RemCo, if the BHP group's TSR exceeds the median TSR by an 'out performance' target, 100% of the Rights vest. Vesting is pro-rated between 0 and 100% if the TSR is between the median TSR and the out performance target.

18. Participating employees are advised whether the performance hurdles for their Rights have been satisfied, on a date (the reporting date) determined by RemCo after the end of the performance period.

19. The Rules gives RemCo an overriding discretion to determine that Rights will not vest notwithstanding that the performance hurdles have otherwise been met. The applicant has advised that this discretion will not be exercised after the reporting date.

20. Rights that become exercisable may be exercised by a participating employee during a 5 year period that commences on the first date (the non-prohibited period date) trading in BHP securities ceases to be restricted (determined by reference to the BHP Securities Dealing Code) after the reporting date. Shares are transferred or issued to participating employees with conditional rights on a date determined by RemCo, such date being on or as soon as practicable after the first non-prohibited period date after the reporting date.

21. Under the Plan unvested Rights held by participants vest on the happening of certain prescribed 'uncontrollable events' including death or disability, regardless of whether performance hurdles have been satisfied.

22. The Rules give RemCo an overriding discretion to remove a participating employee from the Plan even though they may be deemed to have accepted an invitation to participate under the Plan. The applicant advised that this discretion will not be exercised after the reporting date or after the happening of an uncontrollable event.

23. The Rules provide that discretions available to RemCo must be exercised reasonably and in good faith.

## **Ruling**

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24. A participating employee will not acquire a right under an employee share scheme for the purposes of Division 13A of Part III (Division 13A) on the grant of a Right.

25. A participating employee will acquire a right under an employee share scheme for the purposes of Division 13A on the reporting date.

26. The discount given in relation to the right acquired for the purposes of Division 13A on the reporting date, is included in the assessable income of the participating employee pursuant to section 139B.

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**Commissioner of Taxation**

11 October 2006

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## Appendix 1 – Explanation

**❗** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

27. An employee will acquire a right under an employee share scheme for the purposes of Division 13A where that right is:

- a right for the purposes of Division 13A;
- acquired within the meaning of section 139G;
- acquired in respect of employment (subsection 139C(1); and
- acquired for less than market value (subsection 139C(3)).

28. The expression 'right' as used in Division 13A is not defined, but as 'right' and 'right to acquire a share' are used interchangeably throughout Division 13A, the Commissioner considers that a right should be taken to mean a 'right to acquire a share'.

29. Where at the time a right is granted to an employee:

- the employee has a right to acquire a share on the exercise or operation of the right; and
- for the purposes of subsection 139B(2), the amount of the discount in respect of such a right can reasonably be determined,

the Commissioner considers the right to be a right for the purposes of Division 13A.

30. As described in paragraphs 16 to 18 of this Ruling, vesting of Rights granted to a participating employee are subject to performance hurdles being met in respect of a 5 year performance period, commencing at the beginning of the performance year to which the Rights relate. The Rules give RemCo an overriding discretion to determine that Rights will not vest notwithstanding that the performance hurdles have been satisfied and the Rights would otherwise vest. The applicant has advised that this discretion will not be exercised after the reporting date.

31. In addition, in paragraph 22 of this Ruling it is stated that the Rules give RemCo an overriding discretion to remove a participating employee from the Plan at any time. The applicant has also advised that this discretion will not be exercised after a reporting date or after the happening of an uncontrollable event.

32. Thus, at the time Rights are granted under the Plan they are both conditional and subject to the exercise of RemCo's absolute discretion. In these circumstances the Commissioner does not consider the participating employee has acquired a right within the meaning of Division 13A.

33. However once a participating employee's right is no longer subject to the exercise of a discretion by RemCo, the right is considered to be a right within the meaning of Division 13A and the participating employee will at that time acquire a right under an employee share scheme within the meaning of Division 13A.

34. Participating employees are advised on the reporting date whether the performance hurdles for their Rights have been satisfied and are considered to have acquired a right under an employee share scheme within the meaning of Division 13A on, but not before, the reporting date as it is at that time that BHP creates a right in the participating employee for the purposes of section 139G.



## **Appendix 2 – Detailed contents list**

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35. The following is a detailed contents list for this Ruling:

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## References

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- employee share scheme

*Legislative references:*

- ITAA 1936 Pt III Div 13A

- ITAA 1936 139B

- ITAA 1936 139B(2)

- ITAA 1936 139C

- ITAA 1936 139C(1)

- ITAA 1936 139C(3)

- ITAA 1936 139G

- TAA 1953

- TAA 1953 Sch 1 357-75(1)

- Copyright Act 1968

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*ATO references*

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