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Date: 25 September 2013

Dear Madam and Sir/s,

WRITTEN REPRESENTATIONS ON BEHALF OF ANGLO AMERICAN, ITS AFFILIATES AND SUBSIDIARIES CONCERNING THE PROPOSED AMENDMENTS TO THE LABOUR RELATIONS ACT 66 OF 1995

A. Introduction

1 The Select Committee on Labour and Public Enterprises has invited interested persons and stakeholders to submit written comments on the following bills:

1.1 The Labour Relations Amendment Bill B16/2012 ("**the LRA Amendment Bill**"); and

1.2 The Basic Conditions of Employment Amendment Bill B16/2012.

2 These submissions are delivered on behalf of the Anglo American group ("**Anglo**"), including its affiliates and subsidiaries. The submissions deal with the amendments to the Labour Relations Act, No 66 of 1995 ("**the LRA**") as set out in the LRA Amendment Bill. The aspects of the LRA Amendment Bill that Anglo contends require reconsideration are sequenced thematically in this submission, and reference is made to certain practical impacts that the amendments would have on Anglo were they to be made.

3 In drafting these submissions it is assumed that the reader is familiar with the contents of the LRA Amendment Bill and its provisions have accordingly not been summarised. Italicised words in this submission indicate a reference to a term defined in the LRA.

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B. <u>The definitions of "*employer*" and "*employee*", and the liability sought to be imposed on *employers*</u>

4 Section 200A of the LRA creates a rebuttable legislative presumption as to who is an employee. The proposed amendments to section 200A would expand the application of this presumption to "any *employment law*".

5 The proposed section 200B seeks to extend the definition of *employer* to include "one or more persons who carry on associated or related activity or business by or through an employer if ... the effect of their doing so is or has been to directly or indirectly defeat the purposes of *this Act* or any other *employment law*." Further, if more than one person is held to be the employer of an *employee* in terms of this proposed section, then all such employer-parties are held jointly and severally liable for any failure to comply with the obligations of an employer in terms of any *employment law*.

6 These proposed amendments should be considered in the following context:

6.1 Anglo has a number of subsidiaries and makes extensive use of independent contractors. These related businesses carry on associated or related activity or business by or through an employer.

6.2 The definition of *employment law* in section 213 of the LRA is broad, and encompasses six named statutes and "any other Act the administration of which has been assigned to *the Minister*". The purposes of the various statutes that fall within this definition are in some instances not defined, and may be difficult to ascertain, or are so broad as to lead to the proposed section 200B having unintended and unwelcome consequences.

6.3 There is no limitation of the impact of section 200B. For instance, if an unintended, indirect effect of two parties carrying on a related activity through an *employer* is to discourage workers from participating in learning programmes,[1] then an innocent party could be held liable for – for instance – compensation payable for an unfair dismissal. This is not only not equitable, but also unreasonable.

6.4 There is often no way that Anglo can be aware of every act or omission of its subcontractors, business partners or affiliates. In many of these relationships, different parties would attend to distinct parts of work, and would attend to these distinct parts of work in independent and autonomous ways. As such it is impossible for Anglo to monitor the conduct of these parties to ensure that these parties are not conducting themselves in a manner that would lead to liability on the part of Anglo in terms of the proposed section 200B. Imposing liability on Anglo in these circumstances is iniquitous and unfair, and could lead to extensive liability for Anglo in circumstances where it is unable to have prevented or controlled the conduct for which it is being held liable.

7 It should be made clear that Anglo does not oppose extending the liability of parties that seek to subvert the intention of the LRA or for that matter any other law. It is reasonable for the Legislature to bring parties that <u>intentionally</u> conduct themselves so as to subvert the purpose of <u>the LRA</u> within the scope of the LRA.

8 However, the proposed amendments, in Anglo's view, go beyond what is reasonable or necessary, and the proposed amendments would not only create uncertainty, and lead to unnecessary disputes, but would also extend liability to extents that could not reasonably be

[1] Section 2(1)(d) of the Skills Development Act, No 97 of 1998, states that one of the purposes of the Skills Development Act is to encourage workers to participate in learning programmes.

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intended by the Legislature. There may even be unintended limitations placed on liability, for instance when one considers section 35 of COIDA,[2] which provides as follows:

> "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

9 The proposed amendments have the potential to impact on every conceivable labour dispute. This will lead to increased litigation for businesses, as aggrieved employees seek to include parties with "deep pockets" as respondents in disputes in which compensation is claimed, and will also lead to labour disputes becoming more time consuming and costly to resolve, as evidence is led and arguments advanced to try to hold more parties liable under the proposed section 200B(2). These costs will not only be borne by businesses, with negative effects on the economy, but also by Government, which has to fund bodies like the CCMA out of public money.

10 This expanded definition can also have potentially devastating effects in the collective bargaining arena.

10.1 Should the proposed amendment be given effect to, it could be argued by trade unions who recruit employees of sub-contractors as members that these trade unions now are entitled to secure organisational rights and/or bargain wages directly with the principal of the sub-contractor, where there is some economic dependency between the principal and the sub-contractor. To require Anglo to bargain with unions in situations where its relationship is structured in a proper commercial way and not with any intent to circumvent or undermine labour legislation is too broad, and unnecessary.

10.2 Further, if one has regard to the present disputes as to organisational rights in the platinum mining sector, the impact of the uncertainty as to the extent of union membership is likely to lead to difficulties in resolving disputes, and upsurges in the violence and instability that has bedevilled the mining sector and undermined the South African economy in recent times.

11 It is Anglo's submission that section 200B should be amended to read as follows:

> "**200B.** (1) For the purposes of *this Act* and any other *employment law*, "employer" includes one or more persons who carry on associated or related activity or business by or through an employer if the intent of their doing so is or has been to defeat the purposes of this Act or any other *employment law*.
>
> (2) If more than one person is held to be the employer of an *employee* in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of the *employment law* that such parties are held to have sought to defeat the purpose of."

12 In this way, liability could properly be attracted where the law permits liability to be attracted because it is impermissible for parties to simulate a relationship to avoid the legal effect of a statute.

13 It will unnecessarily and unjustifiably restrain parties from engaging in perfectly permissible relationships, with valid commercial rationales, where ordinary commercial requirements do

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[2] Act 130 of 1993.

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not permit direct employment, such as where Anglo and its subsidiaries make use of subcontractors. The use of subcontractors in these circumstances also assists in expanding economic participation in the economy, and provides opportunities for new entrants into the mining sector. The proposed amendments to section 200A and 200B will unnecessarily constrain and discourage these opportunities.

14 The potential economic cost of over-zealous judicial intervention into the employment relationship is immeasurable given the amount and extent to which Anglo uses sub-contractors.

C. <u>The amendments with respect to labour brokers/temporary employment services</u>

15 The current amendments are structured in such a way that it will only be permissible for a person to be employed through a temporary employment service ("**TES**") for a period of three months, after which that person is deemed to be an *employee* of both the TES and the client, unless one of the exceptions apply.

16 The exceptions are limited to situations where a sectorial determination, the Minister or a collective agreement permits the use of a TES for a period in excess of the prescribed three months. There is no indication in the proposed amendments as to the basis on which the Minister would exercise discretion to permit the use of a TES for a longer period, and there is no indication that sectoral determinations or collective agreements would permit this to take place in the mining industry.

17 Presently, Anglo makes use of workers who are employed through various TES. Most of the workers employed through one or other TES, which Anglo currently makes use of, earn below the threshold of R193 805.00 per annum ("**the Threshold**") referenced in section 6(3) of the Basic Conditions of Employment Act ("**BCEA**"). Should Anglo be deemed to be the employer of these workers, there would be no rational reason to continue using any TES, and those TES that rely on business from Anglo or similarly placed parties would soon be out of business.

18 This should not be misconstrued as meaning that Anglo will simply increase its workforce to include those workers previously employed through TES. Instead it is likely that Anglo will reduce its operations so as to reduce its labour requirements, rather than accept the onerous burden of further employees.

19 It is also Anglo's view that the proposed amendments are unconstitutional.

19.1 The proposed amendments will in effect put an end to the use of TES for the services of persons employed below the Threshold. In this respect, if the interpretation placed upon the amendments is correct, namely that its effect is ultimately to put an end to the use of TES, then a constitutional challenge may be brought against the amendments. This constitutional challenge would be akin to the position that formed the subject matter of the decision of the Namibian Supreme Court of Appeal in **Africa Personnel (Pty) Ltd v The Government of the Republic of Namibia and Others**.[3]

19.2 In this case the Namibian Supreme Court unanimously struck down Section 128 of the Labour Act 2000 and held that the prohibition of labour hire is unconstitutional. The Namibian Supreme Court in a comprehensive, thought-provoking and scholarly judgment found the prohibition to be unconstitutional on the grounds that it diminished the freedom of trade and freedom of contract[4]. The Court held as follows:

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[3] [2011] 1 BLLR 15 (NmS).

[4] The Namibian Bill of Rights contains protections similar to those in the Constitution of the Republic of South Africa, 1996.

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> "*The blanket prohibition of agency work by S128 of the Act substantially overshoots permissible restrictions which, in terms of that sub-article, may be placed on the exercise of the freedom to carry on any trade or business protected under Article 21(1)(j) of the constitution.*"

19.3 Under the Constitution of the Republic of South Africa, 1996 ("**the CRSA**") every person has the right to freedom of trade and to economic activity. If the interpretation placed upon the proposed amendments, in effect, amounts to a restriction of the freedom of trade and contract, which Anglo submits it does, then the proposed amendments would be unconstitutional. Further in this regard:

19.4 The three month period is arbitrary and has no rational basis;

19.5 There are less restrictive means to combat abuse of employees that may take place in the TES environment. These less restrictive means have been captured in numerous judgments of the Labour Court, for example, **Nape v INTCS Corporate Solutions (Pty) Ltd**.[5] The Labour Courts have already, in a string of judgments, curbed abuses in the TES relationship. The Labour Courts have held, for example, that it is not permissible for a client of a TES, at whim or for an arbitrary reason, to request a TES to remove an employee from his or her premises. This is one of the substantial protections that have already been developed through judicial oversight of TES arrangements.

19.6 It is in the circumstances not necessary to prohibit the use of TES, or to effectively prohibit the use of TES, as is done under the proposed amendments, because there have been sufficient developments in the case law and sufficient safeguards created through judicial intervention to protect the security of employment of TES employees. The restrictions are accordingly not reasonable or necessary, nor are they the least restrictive means of achieving the assumed objectives of this proposed amendment.

19.7 To the extent that the concern that is sought to be addressed in the proposed amendments is that in the TES environment employees are often not paid what they could be paid as permanent employees, wage rates are determined by market forces, i.e. supply and demand. Prohibiting TES arrangements will reduce employment opportunities, while increasing the number of employees seeking the limited positions available, theoretically driving wages down. In any event, sufficient protections exist under the BCEA for minimum wage legislation to be passed in appropriate sectors where appropriate.

D. Part-time and fixed term employees

20 Currently, Anglo and its subsidiaries make use of both part-time employees and fixed term contract employees.

21 There is a substantial cost attaching should Anglo and its subsidiaries have to equalise these employees' benefits to the benefits of permanent employees. Should Anglo be compelled to do so, it would make economic sense for Anglo to curtail its operations and employ fewer people. Indeed it may become an economic imperative for Anglo and other miners to close some of their operations, should their labour costs increase.

22 The mining sector is different to, for instance, manufacturing or retail sectors. Whereas a manufacturing or retail business can pass on an increased cost to its customers (so called "price makers"), the mining industry is a "price taking" industry. What that means is that

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[5] (2010) 8 BLLR 85 (LC).

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prices for commodities, for instance platinum or iron ore, are determined by prevailing global markets, and not by the cost of production.

22.1 So, for instance, if iron ore mines around the world are producing more iron ore than steel mills, globally, require, then the price of iron ore will drop. This is because supply and demand would then place the power in the hands of the iron ore consumer.

22.2 Also, if iron ore is being produced in Australia (as it is, in huge volumes), which is closer to the main iron ore market of China, then the logistics savings enjoyed by iron ore mines in Australia will serve to drive down the price of iron ore from South Africa.

22.3 As such, should mines in South Africa be forced to absorb higher labour costs, these increased costs make more expensive mines uneconomical, and the mines will simply close down. Instead of creating better paying, permanent jobs for more workers, amendments such as the proposed amendments limiting fixed term and part-time employees would only serve to make more South African workers unemployed by taking away employment opportunities in South Africa.

E. The obligation to satisfy awards or to provide security before taking awards on review

23 These proposed amendments seek to place an obligation on a party who seeks to review an award to pay in the entire amount of compensation, or where reinstatement is ordered, to pay in the equivalent of two years' remuneration, before an award is taken on review. If that party is unable to do so, to apply to the Labour Court to seek leave and to demonstrate circumstances why it is not able to do so.

24 These proposed amendments should be seen in the following context:

24.1 The Commission for Conciliation, Arbitration and Mediation ("**CCMA**") is not a court of law. The CCMA is an organ of state, and its decisions constitute administrative action which can be subjected to judicial review.

24.2 Under the LRA an employee cannot be ordered to pay compensation or to reinstate anyone, and as such the proposed amendments would only have any impact on an employer.

24.3 The proposed amendments, in placing a financial burden on an employer that seeks to subject a CCMA or bargaining council award to judicial review, is plainly aimed at making it more difficult for such an employer to have access to court for judicial review. In doing so, it can be inferred, the Legislature is also seeking to incentivise employers to accept awards that employers consider unjust or unfair, rather than to proceed to exercise their right to judicial review.

24.4 There is no amendment proposed to compel an employee or a trade union to, for instance, put up security for an employer's legal costs if the employee or trade union wishes to take a matter on review. An employee or trade union gets a free "roll of the dice" if it wishes to take a matter on review, especially in the context of the practice of the Labour Courts to not award costs against unsuccessful litigants.

25 The proposed amendments unjustifiably limit the right of access to courts, the right to administrative justice and the right to equality.

F. The deletion of section 189A(19)

26 In the past, different courts utilised different tests on different occasions to determine whether a retrenchment was substantively fair. Some courts, for instance, held that it was

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not appropriate in a retrenchment for the court to second guess the decision of the employer. Other courts required that the employer demonstrate that the decision to retrench was rational (on a commercial basis), while a further approach has also been adopted, in which a court would second guess the decision of the employer, even though it was rational, if the court was of the view that the court would have exercised a discretion in a different way.

27 This lack of certainty meant that businesses were unable to properly plan their actions. It is also well known that a lack of certainty also discourages investment. Further, where there is greater certainty there is a smaller chance of disputes being taken to courts, as parties are better able to take advice and to act in a considered manner without recourse to courts.

28 By enacting section 189A(19), the Legislature wisely sought to clarify these inconsistencies in mass retrenchments, to standardise the test and provide much needed certainty. It did so in a clear and balanced manner.

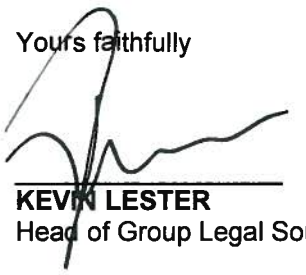
29 Deleting section 189A(19) would be a step backwards, and would cause unnecessary uncertainty in cases involving mass retrenchments.

G. Conclusion

30 Anglo would welcome any further engagement in respect of the contentions set out above.

31 It is in the interests of workers, the State and employers that there should be a fair, sustainable and certain labour regime, which is cognisant of the needs of the country and the economy. Legislation which promotes uncertainty or a proliferation of disputes serves nobody. Anglo, as a significant employer and major economic role-player in South Africa has the best interests of South Africa at heart. After all, South Africa's success translates directly to success for Anglo, which is heavily invested in this country.

Yours faithfully



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