# ANGLO AMERICAN SOUTH AFRICA LIMITED

## Submission Regarding the Mineral and Petroleum Resources Development Amendment Bill B10-2007

**May 2007**

## INTRODUCTION

Anglo American South Africa Limited welcomes the opportunity to make its submission in respect of the Mineral and Petroleum Resources Development Bill [B10-2007] (the Bill) published on 4 May 2007. We hope that this submission supports and assists Government in ultimately placing on the statute books an Act which, in its final form, balances the interests of the nation and investors and promotes the development of mining and processing of minerals in South Africa in a sustainable manner.

## ANGLO IN CONTEXT

Anglo American plc is one of the world's largest mining and natural resource groups. With its subsidiaries, joint ventures and associates, it is a global leader in platinum group metals, and diamonds, with significant interests in coal, base and ferrous metals, and industrial minerals. The Group is geographically diverse, with operations in Africa, Europe, South and North America, Australia and Asia, some 64 countries in total. More than 42% of the Group's net operating assets are located in South Africa. Just less than half of Anglo American's approved global project pipeline of over US$6bn is for projects in South Africa. Anglo American South Africa Limited (Anglo) is the holding company for Anglo American plc's interests in mining and natural resources in South Africa. Anglo is the largest private sector investor in South Africa. Accordingly, Anglo has taken a direct interest in the Bill's development.

In her speech at the Mining Indaba this February, the Minister of Minerals and Energy, Buyelwa Sonjica, stated that "during 2007, the Mineral and Petroleum Resources Development Act (MPRDA) will be amended to remove all identified obstacles to mining investment". What follows is an evaluation and commentary on certain aspects of the Bill in relation to its impact on mining businesses, as well as some suggestions on how the Bill can be amended to reduce the adverse impact on these businesses without adversely affecting Government's own accepted environmental and other objectives.

## KEY PROVISIONS OF THE SUBMISSION

The submission addresses the following aspects in detail:-

- Anglo welcomes the provisions relating to the extension of the period of extinctive prescription and commends the Department of Minerals and Energy for the leadership it has shown in dealing with this matter.

- Anglo fully supports black economic empowerment and the transfer of productive mining assets to Historically Disadvantaged South Africans (HDSA's), and our track record is very positive in this regard. We are of the view that prospecting right applications regarding "prescribed minerals" should not be rejected purely on the basis that an applicant was unable to find a BEE partner. Due to the highly speculative and hence high risk nature of early exploration, the Minister should retain the discretion to determine whether BEE is necessary for a particular project.

- Anglo supports the concept that operators must provide assurance that the necessary funds to ensure any environmental impairments that remain at the end of the operation are properly provided for. However, we argue that the law should allow for the business to do so in the most cost effective way, taking into account all risks.

- Anglo submits that there should be alignment in the environmental provisions of the Bill with the requirements of the national environmental legislation, and removal of provisions that create further delays in the commencement of authorised activities.

## POLICY AND OBJECTIVES

### Impediments to Mining Investment

Despite the sustained boom in global commodity prices, mining investment in South Africa has continued to lag that of its major mining competitors. There are a number of reasons for this disappointing performance, including the previous strength of the Rand exchange rate. The continued importance of gold mining in South Africa compared with other competitor countries is also significant, given the fact that the gold price did not rise

until quite late in the current commodity price upswing. A final factor that impacted negatively on mining investment in South Africa was delays in the granting of exploration and mining licences that flowed from the changed regulatory regime in this country. It took time for both the industry and regulators to digest, understand and implement the MPRDA properly. It is, therefore, apposite that the Minister has placed great emphasis on the intended removal of all identified obstacles to mining investment in the MPRDA. While the Bill goes some way towards achieving this objective, it is our contention that some aspects of the Bill will in reality place additional obstacles in the way of mining investment in South Africa. This is clearly not the intention of the Bill.

## GENERAL PROVISIONS

### Clause 7(a): Amendment of s11(1) - Change of Interest

The proposed requirement that any change of interest (i.e. not only a "controlling" interest) in a company or close corporation with an interest in a prospecting or mining right requires Ministerial consent is impractical and will add further delays to decision making in the mining industry. The current provision in the MPRDA, making provision for Ministerial consent where there has been a change in a "controlling" interest is more practical and allows legal entities the commercial freedom to increase and decrease their shareholding as part of normal business dealings. Alternatively, the provision could be extended to only require Ministerial consent for any change, or rather, reduction of BEE equity ownership below that which pertained at the time of the grant of the rights in question.

***It is submitted that the current wording of s11(1) should remain. Alternatively, the provision could be extended to include permission for the reduction of BEE equity ownership below that which pertained at the time of the grant of the rights in question.***

### Clause 12(c): New s17(1)(c) – Empowerment at Prospecting Stage

Anglo fully supports black economic empowerment and the transfer of the country's productive mining assets to HDSA's. A consolidated HDSA ownership percentage for the Anglo American Group of 24% exceeds the 2009 Mining Charter target of 15% and

places Anglo American on track to significantly exceeding the 2014 target of 26%. We are of the view that a blanket requirement for empowerment for prospecting applications, for prescribed minerals, not tempered by the discretion of the Minister, should be reconsidered. At present, s17(4) of the MPRDA provides that the Minister may "having regard to the type of mineral concerned *and the extent of the proposed project*" request the applicant for a prospecting right to give effect to the objects set forth in s2(d)". This allows the Minister the discretion to gauge the sustainability or otherwise of the project along with the imperative for empowerment. Early exploration is inherently very risky (only 1 in 500-1000 projects prove successful in base metals exploration), while exploration near existing mining areas might be less. In any event the Minister should retain the discretion, as this is more likely to promote exploration.

***It is submitted that the current wording of s17(4) should remain.***

**Clause 12(d): Amendment of s17(2)(b)(iii)– Concentration of Mineral Rights**

The number of rights granted to an individual is not an inaccurate measure of the extent of mineral resources held by an individual. There is no standard size of either land, resource or ore body per mineral right – rights are arbitrarily assigned following geographic boundaries. In one instance you may require numerous rights to make up a single project and in another you may have one or two mineral rights making up a substantially larger project.

***Another restriction on warehousing and land banking is the expenditure commitment. Individuals and companies must meet their expenditure commitments and too much tenure could make it difficult for them to do so. It is submitted that some more consideration should be given to finding a more appropriate solution.***

**Clause 13(b): New s18(2)(e) – Confirmation by Council of Geoscience**

The proposed additional requirement of a letter of confirmation from the Council of Geoscience for a lodgement of a renewal of a prospecting right is undesirable and can only lead to a further delay in the renewal of the right.

***It is submitted that this additional requirement, of requiring a substantive action from a third party before the renewal of a prospecting right, does not serve to expedite the processing of renewal and the goal of promoting investment and should, therefore, be discarded. It also undermines security of tenure since the exclusive right to progress from a prospecting right to a mining right could be undermined by a third party without any statutory obligation being placed on that party to act in accordance with the principles of the Promotion of Administrative Justice Act.***

**Clause 21(b): New s26(2A) - Promotion of Beneficiation**

Anglo recognises the right of the South African Government to initiate and implement policy directives, but is of the view that measures adopted to implement substantive policy should be the preserve of an Act of Parliament and not subordinate legislation such as regulations. The Precious Metals Act, 2006 provides, inter alia, for "…the … smelting, refining, beneficiation, use and disposal of precious metals; and to provide for matters connected therewith." We trust that the regulation of beneficiation contemplated in this new section will not place additional or conflicting regulatory requirements on the precious metal industry.

**Clause 86: Amendment of Item of Schedule II- Extension of Prescription**

Anglo welcomes the provisions relating to the extension of the period of extinctive prescription. It is essential that the MPRDA be given time to be fully implemented.

**ENVIRONMENTAL PROVISIONS**

**Clause 34: New s41A - Trust Funds for Financial Provision**

Operating mines within the Anglo stable, as well as many other operators, have made financial provision for the environmental costs of final closure through the mechanism of trust funds whereby money is provided annually under the control of the trustees of the fund, for eventual use when necessary. Such an instrument was recognised by previous legislation as well as by the Income Tax Act and provides an effective way to ensure the

actual funds are in place when the final closure work is required to be undertaken. The quantum is determined through a formula calculation that uses the final closure cost and the life of the mine to fix this annually.

Since the coming into operation of the MPRDA, further provision to cover this cost should a mine close prematurely, has been required in the form of bank guarantees. As these guarantees need to be secured from banks they impact operators both from a cost perspective (in that a fee is payable to the bank annually whilst these remain in place) as well as from the point of view that they reduce the perceived creditworthiness of the operator. Some operators are, therefore, making financial provision through a trust fund as well as a guarantee and the current regulations of the MPRDA do not adequately cater for this situation.

The new requirement in clause 34 of the Bill further complicates this by seeking to specify requirements related to the trust fund which would require it to hold funds sufficient for rehabilitation and managing the full extent of environmental impacts. This potentially conflicts with the conceived building up of funds over the mine's life and the object of such trust funds under the Income Tax Act in terms of which the sole object of the trust is to apply its property solely for rehabilitation upon premature closure, decommissioning and final closure. The proposed section also repeats much of what is already provided for in the Income Tax Act in terms of how these funds are to be managed.

***It is submitted that the existing wording of the definition of financial provision and the current wording of s41 be retained to allow for flexibility in the possible vehicles to provide assurance. However, s41 must be amended to cater for operators using more than one financial instrument.***

***It is further submitted that s41A be reworded so as to align it both in meaning and effect with the trust fund provisions in the relevant sections of the Income Tax Act. For this harmonisation to be achieved, we would suggest it be done in conjunction with National Treasury.***

**Clause 31: Amendment of s39: s39(4)(a) - New Requirements for Environmental Authorisations**

Anglo welcomes the inclusion of provisions through clause 31 of the Bill that serve to reconcile the provisions of the MPRDA with the environmental legislation namely the National Environmental Management Act, especially with regard to authorising the environmental aspects of activities. These amendments are welcomed particularly because there was a need for alignment in the process whereby mining and petroleum exploration operations and their related activities, were authorised environmentally, with the manner in which environmental authorisation processes are applied for in other impacting activities. Confusion has existed as to the entry point for such authorisation applications and the process to be followed for projects. The introduction of an environmental authorisation step in the process of considering environmental aspects of mining, exploration and associated activities, is a positive one.

Where, however, this alignment has not been achieved, it will present to potential operators the problem of having uncertain and apparent duplicating environmental authorisation processes that need to be satisfied before a project can commence.

Harmonisation has not been achieved with regard to the entry point for obtaining environmental authorisations for such projects, and their related activities when read with the provisions of NEMA and its EIA Regulations. On the one hand the Bill contemplates a process whereby the application is submitted through the Department of Minerals and Energy and on the other hand NEMA contemplates an application being submitted through the environmental competent authority.

Both these Acts then contemplate such an application culminating in an environmental authorisation. Thus the decision making authority for environmental authorisations is in the one case, the Minister of Minerals and Energy and in the other, the environmental competent authority.

***It is submitted that the Departments of Minerals and Energy and Environment Affairs must conclusively agree on the lead agency for environmental authorisation***

***for mining and exploration activities and their related activities, then provide in law for that lead agent's decision making role to prevail.***

***It is submitted that this can be achieved by providing in the Bill that the environmental authorisation process as outlined in NEMA and its regulations from time to time be followed, but that the application be made to Minister of Minerals and Energy who is empowered to issue the environmental authorisation. In turn this will require either the delisting of the items in the NEMA EIA Regulations or the inclusion of a deeming provision to the effect that an environmental authorisation issued by the Minister of Minerals and Energy is deemed to be an environmental authorisation for the purposes of NEMA.***

**Clause 31: Amendment of s39 (1) and (2) - "Right to Conducted Related Activities"**

The new section 39(2) by referring to "related activity", introduces the concept of an applicant for the right to conduct a related activity. No clarification is provided on what "related activity" means nor does the MPRDA provide for such a right.

***It is submitted that reference to a right to conduct a related activity be deleted and replaced by reference to the environmental authorisation covering all environmental aspects of the relevant prospecting/mining/exploration/production right as well as the environmental aspects of all identified related activities.***

**Clause 31: Amendment of s39(1) - Renewals of rights/permits require environmental authorisation**

The renewal of an existing right is unlikely to have environmental impacts that have not already been considered in the initial authorisation process associated with the original grant of rights. Therefore, renewals of rights ought not to automatically trigger a new environmental authorisation process. In this regard the need for renewal of a right to be subject to another environmental authorisation process is questioned as being unnecessary**.**

***It is submitted that reference to renewals in s39 should be deleted.***

**Clause 4: Amendment of s5(4) - Notification required after the Approval Process**

The need to give 21 days notice to the owner or occupant will have the unintended consequence of delaying the coming on stream and ongoing operating of projects notwithstanding the environmental issues have been properly covered.

***It is submitted that reference to the 21 day notice period be deleted.***

**Unchanged s38(2)**

Alignment of the MPRDA with the environmental provisions of NEMA should also have required a revisiting of the provisions of s38(2). This deals with director's liability for environmental harm. It is accepted that failure to properly manage the environment as provided for by legislation resulting in harm to the environment, should hold consequences for the operator and possibly its directors and officers insofar as such failures constitute an offence. Nevertheless, in drafting such provisions, regard must be had to the legal principle that those that are responsible must be held accountable. The current version of s38(2) deviates from this principle. It should be aligned with corresponding provisions in NEMA that would hold directors and officers liable where offences by the operating company give rise to personal liability for those that control it.

***It is submitted that s 38(2) be amended by referring to directors or members at the time that the company or close corporation caused the environmental damage, pollution or environmental degradation referred to in section 38(1)(e), and who intentionally or negligently failed to take reasonably practicable steps to prevent the company or the close corporation from so causing, being jointly and severally liable with the company or the close corporation for such environmental damage, pollution or ecological degradation; provided, however, that if more than such director or member is so liable, such liability shall be apportioned among the persons concerned according to the degree to which each was responsible for the harm to the environment resulting from their respective failures to prevent the company or close corporation from so causing*.**

**Clause 32: Amendment of s40 - Regional Mining Development and Environmental Committee**

Dispute resolution provisions which have been introduced to deal with objections raised by other State departments when it comes to approving an environmental authorisation, are welcomed, but the effectiveness of the Regional Mining Development and Environmental Committee in being able to deal with and resolve issues is questioned. This would be of particular concern in the context of closure where a closure certificate requires consensus by all relevant State departments.

***It is submitted that the section rather cross refer to the requirements of NEMA Chapter 4 concerning intra-governmental dispute resolution.***

**Clause 37 (f): Amendment of s43 - Mine Closure**

The requirements in the closure provisions of s43 relating to cumulative impacts in areas would seem to place serious burdens on operators to take account of cumulative impacts in a retrospective manner. In the NEMA process the cumulative impacts that multiple operations may have on the environment need to be considered upfront as part of the environmental impact assessment.

***It is submitted that it is not appropriate to refer to cumulative impacts here and that this reference be removed from this section and included in s39 to be considered in the decision-making on the environmental authorisation.***

**Clause 83(b): Amendment of Item 7(2)(b) - additional requirement of documentary proof in conversion application**

The present requirement for conversion is that the person who lodges an old order mining right for conversion must also lodge an undertaking, and the manner in which the holder of the old order right will give effect to the object referred to in the sections 2(d) and 2(f) of the Act. This provision is aligned with the Mining Charter which requires mining companies to sell 26% of their mining assets to HDSAs by 2014. Conversions of old order mining rights need to be lodged by no later than April 2009. The new requirement of documentary proof of the

manner in which the objects of the Act will be complied with, in effect accelerates the 26% requirement under the Mining Charter from 2014 to 2009. We propose that this runs contrary to the undertakings in terms of the Mining Charter.

***It is proposed that the current wording of item 7(2)(k) be retained.***