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### POSSIBLE END TO REGIONAL AUTONOMY IN ENERGY, MINING AND OIL & GAS – HAS THE BEAST BEEN FINALLY TAMED?<sup>12345</sup>

#### INTRODUCTION

In late September, the Indonesian House of Representatives (“DPR”) passed the Provincial Administration or “Pemda” Law (“PA Law”) which appears to make major changes to the division of authority among the Central Government, the Provincial Governments and the Regional Governments in a variety of areas including in respect of energy, mining and oil & gas. More particularly, taken at face value, the PA Law seems to leave little, if any, continuing role for the Regional Governments in the primary licensing of energy, mining and oil & gas projects. The elimination of any continuing primary licensing role for the Regional Governments is most stark in the case of mining projects and regardless of whether such mining projects involve foreign capital investment or domestic capital investment.

Although the previous President, in the final days of his term of office, issued a government regulation in lieu of a law in an endeavor to protect and preserve certain aspects of Regional Government authority from the full effects of the PA Law, this government regulation in lieu of a law (i) requires approval from the DPR to be effective, (ii) only purports to revoke the authority of the Provincial DPRDs to appoint the Governor and of the Regional DPRDs to appoint the Regent and (iii) does **not** seek to preserve Regional Government primary licensing authority in respect of energy, mining and oil & gas projects.

The ultimate fate of the PA Law remains uncertain and there will almost certainly be a Constitutional Court challenge to the validity of the same. Nevertheless, the PA Law unquestionably represents the “high water mark” in the long running efforts by the Central Government to wrest control of primary licensing authority, with regard to energy, mining and oil & gas projects, away from the Regional Governments.

The PA Law follows closely “on the heels” of Minister of Energy & Mineral Resources (“MoEMR”) Regulation No. 2 of 2014 re Delegation of Certain Duties to Governors for 2014 (“MoEMRR 2/2014”) which provided for the assignment or delegation by MoEMR of certain of his administrative functions, in respect of mining matters, to Governors of Provinces in the expectation or, at least, the hope that the Governors would have more success than has MoEMR in ensuring the orderly and proper conduct of mining activities at the Regency level. As such, it is understandable that many people see

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the PA Law as substantially heralding the end, altogether, of regional autonomy in respect of energy, mining and oil & gas projects or, at least, with regard to primary licensing for energy, mining and oil & gas projects

The writer believes, however, that a much more cautious view of the likely implications of the PA Law is warranted given the many uncertainties that remain as to validity of the PA Law itself as well as to how the PA Law will be applied, implemented and interpreted with regard to the respective future roles of the Central Government, the Provincial Governments and the Regional Governments in licensing matters related to energy, mining and oil & gas projects. The fact that the PA Law provisions relating to the primary licensing of mining projects are quite inconsistent, in numerous respects, with the 2009 Mining Law only serves to make the writer more cautious about making any definitive assessment, at this stage, of the PA Law and its likely impact on the local mining industry.

It is simply too early to conclude that the “beast has been finally tamed”.

## **BACKGROUND**

The PA Law is not to be confused with the even more controversial Regional Elections or “Pilkada” Law that was passed by the DPR on the same day as the PA Law and which purports to scrap the direct election of Governors as heads of Provincial Governments and of Regents as the heads of the Regional Governments (“**RE Law**”).

The PA Law, and its apparent removal of all primary licensing authority, in respect of energy, mining and oil & gas projects from the Regional Governments, has been a long time coming.

The general dissatisfaction, at least among some domestic and most foreign investors, with how regional autonomy has played out in respect of mining projects in particular, as well as the history of past attempts to limit and control the exercise of primary licensing authority by the Regional Governments with regard to mining projects, including MoEMRR 2/2014, is extensively discussed in the writer’s earlier article, “*Delegation of MoEMR Supervisory Authority to Governors - Trying to Tame the Beast*”, which article appeared in the September – October 2014 issue of Coal Asia Magazine.

The new distribution of authority among the Central Government, the Provincial Governments and the Regional Governments, in respect of energy, mining and oil & gas projects only and as envisaged by the PA Law, is set out in the following table which is substantially taken from Appendix 1.CC to the PA Law (“**Appendix 1.CC**”):

**DISTRIBUTION OF GOVERNMENT AUTHORITY OVER ENERGY, MINERALS AND OIL  
& GAS PROJECTS**

| No | Category          | Central Government  | Provincial Government  | Regional/City Government |
|----|-------------------|---|--|--------------------------|
| 1  | Geology           | <p>a. Determination of groundwater basins.</p> <p>b. Determination of groundwater conservation zones re groundwater basins in areas that fall partly within 1 Province and partly in another Province or are directly adjacent to another country.</p> <p>c. Determination of geology protection and geo-heritage areas.</p> <p>d. Determination of status and early warning of volcanic disasters.</p> <p>e. Early warnings for potential landslides or ground movements.</p> <p>f. Determination of the balance between national resources and reserves of minerals and energy.</p> <p>g. Determination of geological disaster prone areas.</p> | <p>a. Determination of groundwater conservation zones re groundwater basins in areas that fall in 1 Province only.</p> <p>b. Issuance of drilling licenses, excavation licenses and licenses to utilize groundwater in 1 Province only.</p> <p>c. Determination of compensation for obtaining ground water in 1 Province only.</p> |                          |
| 2  | Minerals and Coal | <p>a. Determination of mining areas (“<b>WPs</b>”) as part of national spatial planning, which consist of (i) mining business areas (“<b>WUPs</b>”), (ii) community mining areas (“<b>WPRs</b>”) and (iii)</p>  | <p>a. Determination of mining business license areas (“<b>WIUPs</b>”) for non-metal minerals and rocks located in 1 Province only or offshore and up to 12 miles from the</p>  |                          |

| No | Category | Central Government   | Provincial Government  | Regional/City Government |
|----|----------|--|--|--------------------------|
|    |          | <p>state reservation areas (“<b>WPNs</b>”) along with (iv) special mining business areas (“<b>WIUPKs</b>”).</p> <p>b. Determination of WIUPs for metal minerals and coal and WIUPKs.</p> <p>c. Determination of WIUPs for non metal minerals and rocks that fall partly within 1 Province and partly within another Province or are offshore and greater than 12 miles from the shoreline.</p> <p>d. Issuance of IUPs for metal minerals, coal, non metal minerals and rocks over:</p> <p>(1) WIUPs that fall partly within 1 Province and partly within another Province;</p> <p>(2) WIUPs that are directly adjacent to another country; and</p> <p>(3) offshore areas greater than 12 miles from the shoreline;</p> <p>e. Issuance of IUPs in respect of foreign capital investment.</p> <p>f. Granting of IUPKs for minerals and coal.</p> | <p>shoreline.</p> <p>b. Issuance of mining business licenses (“<b>IUPs</b>”) for metal minerals and coal in respect of domestic capital investment and over regional WIUPs that are located in 1 Province only including offshore and up to 12 miles from the shoreline.</p> <p>c. Issuance of IUPs for non metal minerals and rocks in respect of domestic capital investment over WIUPs that are located in 1 Province only including offshore and up to 12 miles from the shoreline.</p> <p>d. Issuance of community mining licenses (“<b>IPRs</b>”) for metal minerals, coal, non metal minerals and rocks in community mining areas.</p> <p>e. Issuance of Special OP PR IUPs in respect of domestic capital investment and for mineral commodities produced in the same province as that where the relevant processing and refining facilities are located.</p> <p>f. Issuance of mining</p> |                          |

| No | Category              | Central Government   | Provincial Government  | Regional/City Government                           |
|----|-----------------------|--|--|--|
|    |                       | <p>g. Registration of IUPs and determination of the production amounts in every Province for metal minerals and coal.</p> <p>h. Issuance of Special Operation Production IUPs for Processing &amp; Refining (“<b>Special OP PR IUPs</b>”) of mineral commodities (i) produced in a Province other than the Province where the relevant processing and refining facilities are located, (ii) imported or (iii) for the purpose of foreign capital investment.</p> <p>i. Issuance of IUPs and SKTs in respect of domestic capital investment and foreign capital investment where the relevant mining services business activity is to carried on throughout the territory of Indonesia.</p> <p>j. Determination of benchmark prices for metal minerals and coal.</p> <p>k. Management of mining inspectors and mining supervisory officers.</p> | <p>services business licenses (“<b>IUJPs</b>”) and registration letters (“<b>SKTs</b>”) in respect of domestic capital investment where the relevant mining services business activity is to be carried on in 1 Province only.</p> <p>g. Determination of benchmark prices for non metal minerals and rocks.</p> |  |
| 3  | Oil & Gas             | Implementation of oil and gas activities.  |  |  |
| 4  | New Energy Renewables | a. Determination of geothermal working areas.  | a. Issuance of geothermal direct utilization licenses for areas that fall partly   | Issuance of geothermal direct utilization licenses |

| No | Category    | Central Government  | Provincial Government   | Regional/City Government  |
|----|-------------|---|---|---|
|    |             | <ul style="list-style-type: none"> <li>b. Conducting tenders for geothermal working areas.</li> <li>c. Issuing geothermal direct utilization licenses for areas that fall partly within 1 Province and partly within another Province.</li> <li>d. Issuance of geothermal indirect utilization licenses.</li> <li>e. Determination of electricity and/or geothermal steam prices.</li> <li>f. Appointment of business entities as managers of hydropower for power plants.</li> <li>g. Issuance of SKTs for supporting services, which business activity is to be carried on in areas which fall partly within 1 Province and partly within another Province.</li> <li>h. Issuance of trading business licenses for biofuel as an alternative fuel with procurement capacity above 10,000 tons per year.</li> </ul> | <ul style="list-style-type: none"> <li>within 1 Regency and partly within another Regency (as long as both Regencies are in the same Province).</li> <li>b. Issuance of SKTs for supporting services, which business activity is to be carried on in areas located in 1 Province only.</li> <li>c. Issuance of licenses, management and supervision of trading businesses in respect of biofuel as an alternative fuel with procurement capacity up to 10,000 tons per year.</li> </ul> | <ul style="list-style-type: none"> <li>for areas that are located in 1 Regency or City only.</li> </ul> |
| 5  | Electricity | <ul style="list-style-type: none"> <li>a. Determination of business areas for electricity procurement and licenses for sale and purchase of electricity between countries.</li> </ul>   | <ul style="list-style-type: none"> <li>a. Issuance of electricity procurement business licenses for non state owned enterprises (“BUMNs”) and sales of electricity and grid leases for electricity</li> </ul>   |   |

| No | Category | Central Government  | Provincial Government   | Regional/City Government |
|----|----------|---|---|--------------------------|
|    |          | <p>b. Issuance of electricity procurement business licenses for areas that fall partly within 1 Province and partly within another Province, BUMNs and sales of electricity along with grid leases for electricity providers in respect of areas that fall partly within 1 Province and partly within another Province or to BUMNs.</p> <p>c. Issuance of operating permits in respect of installation facilities an areas that fall partly within 1 Province and partly within another Province or are offshore and greater than 12 miles from the shoreline.</p> <p>d. Determination of tariffs for the supply of electricity to consumers and the issuance of licenses for electrical network utilization for telecommunications, multimedia, and information technology purposes to holders determined by the Central Government.</p> <p>e. Approval of electricity selling prices and electricity grid leases, business plans for electricity procurement, and sales of excess electrical power by license</p> | <p>providers located in 1 Province only.</p> <p>b. Issuance of operating permits in respect of installation facilities covering an area located in 1 Province only.</p> <p>c. Determination of tariffs for the supply of electricity to consumers and the issuance of licenses for electrical network utilization for telecommunications, multimedia, and information technology purposes by license holders appointed by the Provincial Government.</p> <p>d. Approval of electricity selling prices, electricity grid leases, business plans for electricity procurement and sales of excess electrical power by license holders determined by the Provincial Government.</p> <p>e. Issuance of business licenses for electricity supporting services activities to be carried on by BUMNs/companies majority owned by domestic investors.</p> <p>f. Funds procurement for underprivileged communities, construction of</p> |                          |

| No | Category | Central Government   | Provincial Government  | Regional/City Government |
|----|----------|--|--|--------------------------|
|    |          | <p>holders determined by the Central Government.</p> <p>f. Issuance of business licenses for electricity supporting services activities to be carried on by BUMNs or foreign investors/companies majority owned by foreign investors.</p> <p>g. Funds procurement for underprivileged communities, construction of electricity procurement facilities for undeveloped areas, isolated areas and rural areas.</p> | <p>electricity procurement facilities for undeveloped areas, isolated areas and rural areas.</p> |                          |

Contemporaneously with the PA Law and the RE Law being passed by the DPR, the so-called “Red & White Coalition”, comprising the opposition to the newly installed government of Indonesia and its so-called “Great Indonesia Coalition”, was quoted in the 4 October edition of The Jakarta Post as being very dissatisfied with the 2009 Mining Law, as well as with various other laws, on the basis that they were:

*“too liberal or leaning [too much] towards foreign interests”*

The Chairman of Red & White Coalition member, Golkar, was subsequently quoted, in the same edition of The Jakarta Post, as saying that the 2009 Mining Law:

*“[contradicted] the spirit of democracy in the country’s Pancasila ideology and would be among the first laws to be amended”*

Having regard to the foregoing comments, the PA Law could well be followed by amendments to the 2009 Mining Law which go considerably beyond merely bringing the 2009 Mining Law into line with the PA Law and could be very unfavorable to foreign investors. The perceived need, at least on the part of the Red & White Coalition, for more far reaching amendments to the 2009 Mining Law may well explain why the DPR chose not to amend the 2009 Mining Law simultaneously with passing the PA Law.

## COMMENTARY

### 1. **Preliminary Remarks**

Although the opposition to Regional Government involvement in the licensing of energy and oil & gas projects has also been considerable, it has paled into relative insignificance compared to that in respect of Regional Government involvement in the primary licensing of mining projects. This, no doubt, has a lot to do with the much greater role played by the Central Government, through the medium of SKKMigas and PLN, in the case of energy and oil & gas projects compared to the emasculated role played by the Central Government, in the case of mining projects, following the 2009 Mining Law. Nevertheless, the DPR clearly decided that the PA Law represented too good an opportunity to miss in terms of reducing the primary licensing authority of the Regional Governments across the entire spectrum of energy, mining and oil & gas projects.

Notwithstanding that the PA Law also has potentially important implications for energy and oil & gas projects, the writer shall largely confine the rest of this commentary to the possible implications of the PA Law for mining projects.

### 2. **Division of Authority**

#### 2.1 **Determination of Mining Areas, Mining Business Areas and Mining Business License**

**Areas:** The PA Law purports to reserve to the Central Government exclusive authority over the determination of (a) all WPs, (b) all WUPs, (c) all WIUPKs, (d) all WPNs, (e) all WIUPs for metal minerals and coal and (vi) those WIUPs for non metal minerals and rocks that fall partly within 1 Province and partly within another Province or are offshore and greater than 12 miles from the shoreline. Meanwhile, the PA Law gives the Provincial Governments exclusive authority to determine WIUPs only for non metal minerals and rocks located wholly within a particular Province or offshore and not more than 12 miles from the shoreline. The PA Law thereby leaves the Regional Governments with no apparent authority whatsoever over WPs, WUPs, WIUPKs, WPNs or WIUPs regardless of mineral category.

#### 2.2 **Issuance of Mining Business Licenses:** The PA Law purports to reserve to the Central Government exclusive authority over the issuance of (a) all IUPs in respect of “foreign capital investment” (**i.e.**, IUPs issued to Indonesian, limited liability foreign investment companies, the issued shares of which are partly owned by foreigners (“**PMA Companies**”)), (b) all IUPKs and (c) those IUPs, in respect of domestic capital investment (**i.e.**, IUPs issued to Non PMA Companies and Indonesian nationals) for metal minerals, non metal minerals, coal and rocks in respect of WIUPs that (i) fall partly within 1 Province and partly within another Province, (ii) are adjacent to another country or (iii) are offshore and greater than 12 miles from the shoreline. Meanwhile, the PA Law gives the Provincial Governments exclusive authority over the issuance of (a) IUPs, in respect of domestic capital investment, for metal minerals, non metal minerals, coal and rocks in respect of WIUPs that (i) fall wholly within 1 Province, (ii) are not adjacent to another country and/or (iii) are offshore and not more than 12 miles from the shoreline and (b) all IPRs for metal minerals, non metal minerals, coal and rocks. The PA Law

thereby leaves the Regional Governments with no apparent authority whatsoever over IUPs, IUPKs or IPRs.

Article 407 of the PA Law (“**PAL 407**”) provides that, as of the date of enactment of the PA Law, all other laws and regulations, which relate to the authority of the Regional Governments, must be brought into conformity with the PA Law. Based on informal discussions with various officials of the Directorate General of Minerals & Coal (“**DGoMC**”), DGoMC interprets PAL Article 407 to mean that primary licensing authority for mining projects has already shifted from the Regional Governments to the Central Government and the Provincial Governments without there being the need for any further action to implement the PA Law.

- 2.3 **Issuance of Business Licenses for Processing & Refining:** The PA Law purports to reserve to the Central Government exclusive authority over the issuance of (a) all Special OP PR IUPs in respect of foreign capital investment (**i.e.**, Special OP PR IUPs issued to PMA Companies) and (b) those Special OP PR IUPs in respect of domestic capital investment (**i.e.**, Special OP PR IUPs issued to Non PMA Companies and Indonesian nationals) where (i) the minerals to be processed and refined are located in a Province different from the Province where the relevant processing and refining facilities are located or (ii) the minerals to be processed and refined will be imported. Meanwhile, the PA Law gives the Provincial Governments exclusive authority over the issuance of all Special OP PR IUPs in respect of domestic capital investment (**i.e.**, Special OP PR IUPs issued to Non PMA Companies and Indonesian nationals) where the minerals to be processed and refined are located in the same Province as the Province where the relevant processing and refining facilities are located. The PA Law thereby leaves the Regional Governments with no apparent authority whatsoever over Special OP PR IUPs.
- 2.4 **Issuance of Mining Services Business Licenses and Mining Services Business Registrations:** The PA Law purports to reserve to the Central Government exclusive authority over the issuance of all IUJPs and all SKTs in respect of (a) foreign capital investment (**i.e.**, IUJPs and SKTs issued to PMA Companies) and (b) domestic capital investment where the IUJPs and SKTs are issued to Non PMA Companies and Indonesian nationals carrying on their mining service business activities throughout Indonesia. Meanwhile, the PA Law gives the Provincial Governments exclusive authority over the issuance of those IUJPs and SKTs in respect of domestic capital investment where the IUJPs and SKTs are issued to Non PMA Companies and Indonesian nationals carrying on their mining service business activities wholly within a particular Province only. The PA Law thereby leaves the Regional Governments with no apparent authority whatsoever over IUJPs and SKTs.
- 2.5 **Determination of Production Quotas:** The PA Law purports to reserve to the Central Government exclusive authority over the determination of production quotas for metal minerals and coal. Meanwhile, the PA Law is strangely silent on the question of authority over the determination of production quotas for non metal minerals and rocks although it seems probable the intention is that this authority should belong to the Provincial Governments. The PA Law thereby, most likely, leaves the Regional Governments with no apparent authority whatsoever over the determination of production quotas.

2.6 **Determination of Benchmark Prices:** The PA Law purports to reserve to the Central Government exclusive authority over the determination of benchmark prices for metal minerals and coal. Meanwhile, the PA Law gives the Provincial Governments exclusive authority over the determination of benchmark prices for non metal minerals and rocks. The PA Law thereby leaves the Regional Governments with no apparent authority whatsoever over the determination of benchmark prices.

2.7 **Management of Mining Inspectors and Mining Supervisors:** The PA Law purports to reserve to the Central Government exclusive authority over the management of Mining Inspectors and Mining Supervisors without regard to their area of operation. The PA Law thereby leaves neither the Provincial Governments nor the Regional Governments with any apparent authority whatsoever over the management of Mining Inspectors and Mining Supervisors.

### 3. Assessment

3.1 **Overview:** Appendix 1.CC indicates that the most significant changes, made by the PA Law, to the distribution of authority, with regard to mining projects and as between the Central Government, the Provincial Governments and the Regional Governments, are in respect of (a) mining area determination and (b) mining business license issuance. Although Appendix 1.CC purports to set out the new distribution of authority, with regard to numerous aspects of the control, licensing and regulation of mining projects as summarized in 2 above, the changes made to that distribution of authority, compared to the position prior to the passage of the PA Law, are not particularly significant with regard to (c) Issuance of Business Licenses for Processing & Refining, (d) Issuance of Mining Services Business Licenses and Mining Services Business Registrations, (e) Determination of Production Quotas, (f) Determination of Benchmark Prices and (g) Management of Mining Inspectors and Mining Supervisors. Indeed, in the case of these matters, the distribution of authority, post the PA Law, remains substantially unchanged. Nevertheless, Appendix 1.CC is helpful in that it brings together, in the 1 table, the intended future distribution of authority across all key dimensions of the control, licensing and regulation of mining projects.

3.2 **Determination of Mining Areas, Mining Business Areas, Mining Business License Areas and Community Mining Areas:** To the extent that the PA Law is really intended to (a) reserve to the Central Government exclusive authority over the determination of (i) all WPs, (ii) all WUPs, (iii) all WPRs, (iv) all WPNs, (v) all WIUPKs and (vi) all WIUPs for metal minerals and coal and (vi) those WIUPs for non metal minerals and rocks that fall partly within 1 Province and partly within another Province or are offshore and greater than 12 miles from the shoreline and (b) leave no role whatsoever for the Regional Governments in such determination, the PA Law is clearly inconsistent with 2009 Mining Law which envisages, as a minimum, “co-ordination” between the Central Government and the Regional Governments in determining WPs (ML Articles 6(1)(e), 9(2) and 11), WUPs (ML Article 14), WIUPs (ML Article 17) and WPRs (ML Article 21). Likewise, to the extent that the PA Law is really intended to (a) reserve to the Provincial Governments exclusive authority over the determination of WIUPs for non metal minerals and rocks falling wholly within 1 Province

only (including wholly within 1 Regency) or offshore and not more than 12 miles from the shoreline and (b) leave no role whatsoever for the Regional Governments in such determination, the PA Law is clearly inconsistent with the 2009 Mining Law which envisages that WIUPs wholly within 1 Regency will be determined, as a minimum with regard to size and borders, by “co-ordination” between the Central Government and the relevant Regional Government (ML Article 17).

Further, and perhaps more importantly, excluding the Regional Governments from any apparent future role, in respect of the determination of WPs, WUPs, WUPKs, WPRs, WPNs and WIUPs, seems to be seriously at odds with the Constitutional Court’s decision of 22 November 2012 (“**CC Mining Area Decision**”). The Constitutional Court ruled that it was actually the Regional Governments, not the Central Government, which had the authority to initially determine WPs, WUPs and WIUPs and that the role of the Regional Governments in this process was not properly to be limited to “co-ordination” or “consultation” with the Central Government. The CC Mining Area Decision may, on 1 interpretation, mean that the Central Government is merely charged with the task of formally declaring or publishing those WPs, WUPs and WIUPs that have been previously determined by the Regional Governments. Although the Central Government has always placed a much narrower interpretation on the CC Mining Area Decision, which narrower interpretation still leaves the Central Government free, as part of a further “verification” process, to adjust or change WPs, WPUPs and WIUPs that have been previously determined by the Regional Governments and if the Central Government does not agree that the determinations made by the Regional Governments are “suitable”, this narrower interpretation does not seem consistent with a literal reading of the CC Mining Area Decision. At the very least, the CC Mining Area Decision reflects a concern on the part of the Constitutional Court to uphold the mining area determination rights of the Regional Governments under regional autonomy, which concern is, apparently, wholly ignored by the PA Law’s recasting of the division of mining area determination authority, as between the Central Government, the Provincial Governments and the Regional Governments, in a way that seems to eliminate any role at all for the Regional Governments in this regard. Although there have been various changes in the composition of the Constitutional Court since 2012 and precedent is of much less importance in civil law countries like Indonesia than it is in common law countries, it would be understandable if the Constitutional Court felt a certain reluctance to completely overturn a decision of its own, handed down just a couple of years ago.

- 3.3 **Issuance of Mining Business Licenses:** To the extent that the PA Law is really intended to leave the Regional Governments with no role in the issuance of IUPs, the PA Law is clearly inconsistent with the 2009 Mining Law which envisages that, in respect of mining concessions falling wholly within the boundaries of a particular Regency, IUPs will be issued by the relevant Regional Government (ML Article 37(a)). Likewise, to the extent that the PA Law is really intended to (a) reserve to the Provincial Governments exclusive authority over the issuance of IPRs and (b) leave no role whatsoever for the Regional Governments in such issuance, the PA Law is clearly inconsistent with 2009 Mining Law which envisages that IPRs will be issued by the Regional Governments (ML Article 67(1)).

The apparent exclusion of the Regional Governments from any future role in the issuance of IUPs, and whether in respect of domestic capital investment or foreign capital investment, may be seen by some observers as just the continuation of a process that started back in 2012 with the promulgation of Government Regulation No. 24 of 2012 re Mining Enterprise Activities Amendment (“**GR 24/2012**”) and, more particularly, with Article 1.1 of GR 24/2012 that provides all IUPs for PMA Companies shall, henceforth, be issued by MoEMR. It seems inherently unlikely, however, to the writer that the Regional Governments will take a similarly benign view of the PA Law. First, IUPs issued for domestic capital investment (i.e., to Non PMA Companies and to Indonesian nationals) represent the great majority of IUPs. Second, while an argument can perhaps be made that the primary licensing of mining projects involving foreign capital investment only is more properly the responsibility of the Central Government than of the Regional Governments, having regard to the residual powers retained by the Central Government under regional autonomy, no such argument can be made in respect of the primary licensing of mining projects involving domestic capital investment only, far less in the case of the primary licensing of small scale community mining projects. Third, even after the promulgation of GR 24/2012, the Regional Governments retained a limited role in the primary licensing of mining projects involving foreign capital investment by virtue of the insistence of DGoMC on PMA Companies obtaining “recommendations” from the relevant Regional Governments in support of PMA Companies’ applications for the issuance or renewal of IUPs (“**Recommendation Requirement**”). Fourth, GR 24/2012 has never been the subject of review by the Constitutional Court.

It is possible, of course, that the Central Government intends, even after the passage of the PA Law, to create or find a continuing residual role for the Regional Government by extending the Recommendation Requirement, that previously only applied to IUPs for PMA Companies, to all IUP applications and whether by PMA Companies, Non PMA Companies or Indonesian nationals. This, however, is not apparent from a reading of Appendix 1.CC or the PA Law as a whole. That said, there was nothing in GR 24/2012 which indicated DGoMC was going to impose the Recommendation Requirement on PMA Companies seeking new or renewed IUPs.

- 3.4 **Issuance of Miscellaneous Permits:** It is important to bear in mind that the PA Law seems to be only concerned with the “primary” licensing of mining projects and minerals processing & refining projects; that is, with the issuance of the basic IUP, IPR, IUPK or Special OP PR IUP required to carry on a mining project or a minerals processing & refining project. There are, though, a large number of other miscellaneous approvals, licenses and permits required to actually construct, develop and operate a mining project or a minerals processing & refining project such as location permits, construction permits, water use permits and nuisance permits (“**Miscellaneous Permits**”). As the PA Law says nothing about authority over the issuance of Miscellaneous Permits, it should be assumed that Miscellaneous Permits will continue to be issued by the same level of government that had this authority prior to the PA Law. Given that it is primarily the Regional Governments that have issued Miscellaneous Permits up to now, it seems likely that there is no change in the future authority, as envisaged by the PA Law, of the Regional Governments to continue issuing Miscellaneous Permits. In light of the fact that the obtaining, in appropriate cases, of these Miscellaneous Permits is a precondition to the right to actually proceed with the construction, development and operation of a particular mining project or a particular minerals processing & refining project, the Regional Governments have

not been deprived of all their opportunities to indirectly, at least, have some say in whether or not a particular mining project or a particular minerals processing & refining project actually proceeds beyond the stage of obtaining the primary license.

- 3.5 **Other Observations:** It may prove to have been a tactical error for the DPR to pass the PA Law **and** the RE Law in the same session. This is because the opposition to the RE Law is, seemingly, so strong and so widespread that the PA Law may be fatally compromised by being too closely associated with the RE Law if only in terms of the circumstances in which it was passed and the timing of its passage by the DPR. If the RE Law does not survive for good and obvious reasons then, even if there are no corresponding good and obvious reasons, the PA Law may also not survive.

## SUMMARY AND CONCLUSIONS

Many participants in and observers of the Indonesian mining industry, including the writer, have long argued that regional autonomy has been a disaster for the mining industry and called for greatly reducing the role of the Regional Governments in the mining project licensing process. Accordingly, assuming it was with good intentions that the DPR passed the PA Law then, to the extent the PA Law is concerned with mining related matters only, the PA Law is to be lauded as an important step in the right direction.

Unfortunately, however, the way in which the DPR has gone about passing the PA Law, while leaving the 2009 Mining Law unamended, is to be very much regretted. Even if it is ultimately intended to amend the 2009 Mining Law, leaving the PA Law and the 2009 Mining Law to somehow coexist for the foreseeable future will, inevitably, create much confusion. The inconsistencies and, indeed, outright contradictions between the PA Law and the 2009 Mining Law, with regard to authority over mining area determination and the issuance of IUPs, whether for foreign capital investment or domestic capital investment, are likely to give rise to endless disputes over the validity of IUPs issued or renewed after the date of the PA Law and before the 2009 Mining Law is amended.

As the PA Law poses a very immediate and direct threat to the authority of the Regional Governments in respect of mining projects and given the existence of the 2012 CC Mining Area Decision, a protracted Constitutional Court challenge to the PA Law also seems very likely. Unless and until the Constitutional Court hands down its decision on any such challenge, the threat of such a challenge and its uncertain outcome will also contribute to the inevitable confusion surrounding the PA Law and how it relates to the 2009 Mining Law. Foreign investors will be particularly concerned given the greater difficulties they generally face, compared to domestic investors, in adjusting to and operating in an opaque Indonesian regulatory environment. While so long as the PA Law and the 2009 Mining Law continue to uneasily coexist, the new government of Indonesia will, undoubtedly, have to work overtime to convince foreign investors that Indonesia offers an acceptably certain regulatory environment for new and increased foreign investment in the local mining industry.

Of course, if the Red & White Coalition has its way, foreign investors may not have to wait too long for the amendment of the 2009 Mining Law. Unfortunately, though, this may just make the situation worse, not better, as the Red & White Coalition seems to favor amendments that will actually make the

2009 Mining Law even less conducive to foreign investment than it is already.

Even if the “beast has been finally tamed”, something which it is too early to say, the associated cost, in terms of the future of the 2009 Mining Law, may prove to be very high.

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