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### DELEGATION OF MoEMR SUPERVISORY AUTHORITY TO GOVERNORS – TRYING TO TAME THE BEAST<sup>12345</sup>

#### INTRODUCTION

Regional autonomy has given rise to seemingly endless problems in respect of mining matters. As the full scale of these problems has become ever more apparent, the Central Government has taken various initiatives in an endeavor to bring some semblance of order to Regency mining activities.

An early 2014 ministerial regulation seeks to enlist the assistance of the Provincial Governments in overseeing a variety of mining related matters in those Regencies within the geographical boundaries of each Province. Minister of Energy & Mineral Resources (“**MoEMR**”) Regulation No. 2 of 2014 re Delegation of Certain Duties to Governors for 2014 (“**MoEMRR 2/2014**”) provides 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 will have more success than has MoEMR in ensuring the orderly and proper conduct of mining activities at the Regency level.

Whether or not MoEMRR 2/2014 is really part of the solution to dealing effectively with chaotic Regency mining activities is presently unclear. It is, however, a telling sign of just how serious the mining related problems have become at the Regency level that the Central Government is willing to allow the Provincial Governments to take over, if only on an interim basis, some of its administrative authorities and powers - this in a country where bureaucratic control and discretion is traditionally seen as being the ultimate source of power, with all that such power implies. Essentially, the Central Government is belatedly trying to bring the “beast”, that is Regional Government involvement in mining activities, under a degree of direct supervision by the Provincial Governments as the “agents” of the Central Government. However, trying to “tame the beast” may prove to be just as ineffective at the Provincial Government level as it has already proved to be at the Central Government level.

In this article, the writer will briefly look at the background to MoEMRR 2/2014 before reviewing the main provisions of MoEMRR 2/2014 and then making an assessment of its likely chances of success in bringing much needed order to Regency mining activities.

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## BACKGROUND

1. **Need to Exercise More Effective Control over Regional Mining Authorities:** No one could seriously doubt the pressing need to exercise more effective control over Regional Governments in respect of mining activities. Perhaps the best evidence of this need is the fact that, more than 5 years after the coming into force of the 2009 Mining Law, the Central Government considers it necessary to maintain the moratorium on the issuance of new Exploration IUPs while it continues to sort out the problems occasioned by the vast number of defective IUPs. Although not exclusively the fault of the Regional Governments, the manifold failures of the IUP issuance process, at the Regional Government level, are unquestionably the major reason that considerably more than 50% of all the existing IUPs are said to be defective. The failure of the Regional Governments to properly manage the IUP issuance process is described, in great detail, in the writer's earlier article "*Overlapping Mining Concessions – A Systemic Problem Not Easily Resolved*" which article appeared in the July – August 2011 issue of Coal Asia Magazine.

In addition to the inherent risks associated with Regional Government involvement in the IUP issuance process, the Regional Government's right to cancel IUPs issued by it has become a matter of huge concern in terms of the threat this poses to security of tenure for mining projects. This wholly justified concern is discussed, at length, in the writer's earlier articles (i) "*The Churchill Mining Debacle – A Wake Up Call For Mine Owners And Potential Investors*" which appeared in the April-May 2011 issue of Coal Asia Magazine, (ii) "*Bima Riot and Requested Revocation of PT Sumber Mineral Nusantara's Mining License – A Case Study in How Not to Handle Mining Disputes*" which article appeared in the January - February 2012 issue of Coal Asia Magazine and (iii) "*Churchill Mining International Arbitration – The Gol Reaction*" which article appeared in the August – September 2012 issue of Coal Asia Magazine.

The reality is that efforts to "tame the beast" have been ongoing for some time. Examples of earlier efforts in the same direction include (i) the moratorium on the issuance of new Exploration IUPs, (ii) the requirements for public tenders in respect of the awarding of new mining business license areas for metal minerals and coal and (iii) the 2012 requirements that all IUPs for PMA Companies be, henceforth, issued by MoEMR on behalf of the Central Government rather than by the Regents on behalf of the relevant Regional Governments and even though the underlying mining concessions are located wholly within the boundaries of particular Regencies. As such, MoEMRR 2/2014 should not be viewed in isolation but, rather, as another step in a continuing process which implicitly recognizes that, whatever the political imperative may have been for regional autonomy, regional autonomy has surely been a major setback for investors and, more particularly, for foreign investors in the Indonesian mining industry. The issue which the Central Government has struggled with, since at least the introduction of the 2009 Mining Law, is how to address the overwhelmingly negative side-effects of regional autonomy for the mining industry while still paying "lip service" to the concept of regional autonomy and thereby avoiding a direct legal confrontation with the Regional Governments – a legal confrontation which the Central Government might well lose given how protective Indonesia's courts have shown themselves to be of the rights of the Regional Governments in respect of mining activities. In this regard, readers are referred to the

writer's earlier article "*Indonesia's Mining Regulatory Regime – The Potent Threat of Judicial Activism*" which article appeared in the December 2012 – January 2013 issue of Coal Asia Magazine.

2. **Authority to Supervise Mining Activities:** MoEMRR 2/2014, and its delegation to the Governors of certain administrative authorities with regard to mining activities, has a respectable legal basis.

Indonesia's non-renewable natural resources constitute national assets, the development and exploitation of which are to be controlled by the State for the benefit of the people (Article 33 of the 1945 Constitution). This overriding requirement, as it relates to minerals and coal mining, is reflected in Article 4 of the 2009 Mining Law which provides for the function of the State, in controlling minerals and coal mining, to be shared among the Central Government, the Provincial Governments and the Regional Governments as contemplated by the 1998 Regional Autonomy Law.

Chapter IV of the 2009 Mining Law sets out, in very broad brush terms, the respective areas of authority and power of each of the Central Government, the Provincial Governments and the Regional Governments with regard to minerals and coal mining. Notably, Article 6(p) of the 2009 Mining Law gives the Central Government the authority to:

*“foster and supervise mineral and coal mining management by the Regional Governments”*

The overall supervisory role of the Central Government, in mining matters, is expanded upon in Article 140(1) of the 2009 Mining Law which provides that:

*“The Minister shall supervise the management of mining business executed by Provincial Governments and Regional/Municipal Governments by virtue of the authority thereof.”*

Very importantly, for the purposes of MoEMRR 2/2014, MoEMR is expressly given the right to delegate his supervisory authority over mining matters to the Governors by 140(2) of the 2009 Mining Law which provides that:

*“The Minister may delegate the authority to supervise the management of mining business...which is executed by Regional/Municipal Governments to the Governors.”*

Article 141(1) of the 2009 Mining Law goes on to detail 15 specific areas of mineral and coal mining management by the Regional Governments which may be the subject of Ministerial supervision including (i) minerals and coal data processing, (ii) conservation of mineral and coal resources, (iii) environmental management, reclamation and post mining, (iv) other activities in the mining sector which are related to the public interest and (v) management of IUPs and IUPKs.

Having regard to the foregoing, it is tolerably clear that it is within MoEMR's legal powers to delegate to the Governors part of his supervisory authority in respect of mining matters as contemplated by MoEMRR 2/2014. Accordingly, MoEMRR 2/2014 seems relatively safe from the risk of successful legal challenge.

## COMMENTARY

### 1. Overview

MoEMRR 2/2014 provides for the delegation by MoEMR to the Governors of MoEMR's supervisory duties, powers and responsibilities with regard to certain minerals and coal mining functions of the Regional Governments in respect of (i) mining area determination, licensing and compliance, (ii) minerals and coal business activities, (iii) environmental, technical and work health & safety matters and (iv) utilization of energy sector related funds at the village level ("**Delegated EMR Duties**").

The Delegated EMR Duties are to be carried out (i) in the form of a so-called "MoEMR Management Support & Other Technical Implementation Program", (ii) by way of cooperation between MoEMR and the Provincial Governments, (iii) through the medium of a Provincial-level working unit ("**SKPD**"), (iv) on the basis of an annual national planning document ("**RKP**") and (iv) with the SKPD's operations, in accordance with the RKP, funded by a so-called "**De-concentration Fund**" provided by the Central Government to each of the Provincial Governments from the State Revenue & Expenditure Budget.

The delegation of and the process of carrying out the Delegated EMR Duties is referred to as "**De-concentration**".

It is important to note that the Delegated EMR Duties are supervisory duties, powers and responsibilities only and do not involve the SKPDs, on behalf of the Provincial Governments, actually carrying out any minerals and coal mining related functions previously carried out by the Regional Governments. In other words, the SKPDs will merely endeavor to exercise a degree of oversight with regard to what the Regional Governments do and do not do in terms of carrying out their minerals and coal mining related functions without, in any way, taking over from the Regional Governments actual responsibility for the carrying out of these minerals and coal mining related functions.

De-concentration is, initially, for 2014 only but the present expectation is said to be that De-concentration will, thereafter, be extended or renewed on an annual basis indefinitely.

### 2. MoEMRR 2/2014 in Detail

2.1 **Delegated EMR Duties (Articles 3 and 4):** The more important items only in each of the 4 categories of Delegated EMR Duties are as follows:

- (a) Supervision of Regional Government mining area determination, licensing and compliance functions including with regard to:

- (i) determination of WPRs (**i.e.**, community mining areas);
  - (ii) determination and granting of WIUPs (**i.e.**, mining business license areas) for (A) metal minerals and coal and (B) non-metal minerals and rocks;
  - (iii) issuance of IUPs for (A) metal minerals and coal and (B) non-metal minerals and rocks;
  - (iv) implementation of obligations attaching to IUPs for (A) metal minerals and coal and (B) non-metal minerals and rocks;
  - (v) compiling data of IUP problematic areas and reclamation areas;
  - (vi) issuance of IUJPs (**i.e.**, mining business services licenses); and
  - (vii) implementation of obligations attaching to IUJPs.
- (b) **Supervision** of Regional Government coal and mineral business functions including with regard to:
- (i) marketing, finance and investment;
  - (ii) coal and mineral data management;
  - (iii) utilization of domestic goods and services;
  - (iv) mining manpower technical development;
  - (v) local community development and empowerment;
  - (vi) other activities in the mining business sector which relate to public interest;
  - (vii) IUP management;
  - (viii) mining business products – amount, type and quality;
  - (ix) foreign manpower;
  - (x) production, sales and transportation;
  - (xi) domestic market needs;
  - (xii) recommendations and statistics;
  - (xiii) construction of processing and refining facilities; and

- (xiv) implementation of mining activities on the basis of IUPs or IPRs.
- (c) **Supervision** of Regional Government environmental, technical and work health & safety functions including with regard to:
  - (i) mining techniques/technology;
  - (ii) conservation of mineral and coal resources;
  - (iii) mine worker health and safety;
  - (iv) mining operational security;
  - (v) conservation, environmental, reclamation and post-mining management;
  - (vi) approval of AMDAL or UPL/UKL;
  - (vii) commissioning;
  - (viii) RKTTL;
  - (ix) disbursement of reclamation activities guarantee funds and post-mining activities guarantee funds;
  - (x) mining services business; and
  - (xi) standardization.
- (d) **Supervision** of Regional Government utilization of energy sector related funds at the village level functions including with regard to:
  - (i) technical guidance for the utilization of allocated funds in the energy sector; and
  - (ii) monitoring and evaluation in respect of utilization of allocated funds.

2.2 **Implementation of De-concentration (Articles 5 to 8):** The Governor of each Province is made responsible for ensuring:

- (a) establishment of SKPD;
- (b) appointment, as SKPD Head and supporting staff, of persons with suitable competence to carry out De-concentration;
- (c) effective and efficient implementation of De-concentration by SKPD; and

- (d) co-ordination with MoEMR in carrying out De-concentration activities.

The Head of SKPD is, in turn, made “personally and financially” responsible for the day to day management of De-concentration.

- 2.3 **Funding of De-concentration (Article 9):** Disbursement of the De-concentration Fund is to be managed through the General State Treasury and the Provincial State Account.

Any income generated by De-concentration activities is to be regarded as State income which must be remitted by the SKPD Head to the General State Account.

- 2.4 **Reporting (Articles 10 to 12):** The SKPD Head must prepare and submit quarterly and annual reports of De-concentration activities to the Governor and to MoEMR.

The Governor must, in turn, ensure that copies of the SKPD Head’s quarterly and annual reports of De-concentration activities are submitted to the Minister of Internal Affairs, the Minister of Finance and the Minister of National Planning & Development.

An accountability report, in respect of De-concentration activities during the previous financial year, must also be prepared and sent to the Provincial DPR as an attachment to the Provincial Revenue & Expenditure Budget.

- 2.5 **Revocation of Delegated EMR Duties (Article 13):** MoEMR has the right to revoke part or all of the delegation of the Delegated EMR Duties if:

- (a) there is a change of Central Government policy;
- (b) the Delegated EMR Duties are not being exercised in accordance with the prevailing laws and regulations;
- (c) a Governor requests revocation; or
- (d) a Governor is unable to carry out the Delegated EMR Duties.

- 2.6 **Sanctions (Article 46):** The only sanction specifically provided for is in respect of the failure to submit the required reports on De-concentration activities, something which may result in:

- (a) postponement of further disbursement of De-concentration Funds for 3 months; or
- (b) termination of the allocation of any Disbursement Funds to the relevant SKPD for the next financial year.

### 3. Assessment

More effective supervision of how the Regional Governments carry out their functions with regard to minerals and coal mining is unquestionably a good thing. Accordingly, to the extent MoEMRR 2/2014 makes even incremental progress towards the achievement of this more effective supervision, MoEMRR 2/2014 is to be welcomed.

At a certain level, De-concentration makes some sense. This is because it should, of course, be much easier for each Provincial Government to keep itself informed of what is actually happening in terms of mining related activities in the limited number of Regencies forming part of the geographical area of that Province only than it is for the Central Government to keep itself informed of what is actually happening in terms of mining related activities in all 414 Regencies of all 34 Provinces. As such, **in theory**, the Provincial Governments are likely to be better placed than is the Central Government to effectively supervise how the Regional Governments carry out their functions with regard to minerals and coal mining and to otherwise ensure that the Regional Governments do, in fact, carry out their functions with regard to minerals and coal mining.

Notwithstanding the foregoing, however, there are some very obvious limitations on what MoEMRR 2/2014 can, realistically, be expected to achieve in practice.

First, the fact that individual Provincial Governments may well be much better informed, than is the Central Government, as to mining activities in the relevant Regencies, is definitely not the same thing as each of the Provincial Governments having the ability **and the willingness** to effectively supervise how the Regional Governments in that Province carry out their mineral and coal mining related functions. This will only be the case if the individual Provincial Governments have the necessary incentives to align their priorities, in terms of mining activities, with the priorities of the Central Government as opposed to with the priorities of the Regional Governments. The writer is not at all convinced that this is the case. Indeed, it is hard for the writer to see what incentives the individual Provincial Governments really have to align their priorities, in terms of mining activities, with the priorities of the Central Government as opposed to with the priorities of the Regional Governments. To the extent that some Regional Governments derive substantial economic benefits from **not** exercising their functions properly with regard to minerals and coal mining activities, there may actually be far greater incentive for the relevant Provincial Governments to “turn a blind eye” to wrongdoing at the Regional Government level in return for a share of the economic benefits derived from that wrongdoing. There is, of course, a risk that this may become apparent to the Central Government and, as a consequence, the Central Government revokes the Delegated EMR Duties, thereby bringing to an end the De-concentration Funds flowing to the relevant Provincial Governments. However, such risk is not likely to provide a sufficient incentive unless the amount of the De-concentration Funds substantially exceeds the relevant Provincial Government’s expected share of the illicit economic benefits derived from Regional Government wrongdoing in carrying out its functions with regard to minerals and coal mining activities. Even then, continuing access to the De-concentration Funds is a questionable incentive for genuine cooperation with the Central Government given that the use made of the De-concentration Funds has to be accounted for by the Provincial Governments and, therefore, the De-concentration Funds are not really “free” cash flow as far as the Provincial Governments are concerned. Further, to the extent that, in a particular Province, the relevant Governor and Regents are from the same political party, party loyalty is likely to outweigh loyalty to the Central Government and

to the objectives of De-concentration.

Second, interposing the Provincial Governments between the Central Government and the Regional Governments, in terms of supervising the carrying out of Regional Government functions with regard to minerals and coal mining, may actually result in less transparency as to what is really happening with regard to mining related matters in the Regencies. Essentially, De-concentration means that the Central Government is relying on the Provincial Governments to properly supervise the carrying out of Regional Government functions with regard to minerals and coal mining rather than the Central Government doing so itself. Accordingly, in future, the Central Government is going to be even more dependent, than is currently the case, upon the Provincial Governments providing it with accurate information about mining activities in the Regencies and whether or not the Regional Governments are properly carrying out their functions with regard to minerals and coal mining. Based on the widely reported **non**-performance, to date, of some Provincial Governments and Governors it is, frankly, hard to believe the Provincial Governments are going to be a uniformly reliable source of accurate information for the Central Government.

Third, as previously pointed out, the Delegated EMR Duties are **supervisory** duties, powers and responsibilities only and do **not** involve the SKPDs, on behalf of the Provincial Governments, actually carrying out any minerals and coal mining related functions previously carried out by the Regional Governments. Accordingly if, despite the SKPDs exercising the contemplated oversight of what the Regional Governments do and do not do in terms of carrying out their minerals and coal mining related functions, the Regional Governments still do not properly discharge their minerals and coal mining related functions, there is nothing the Provincial Governments can actually do to compel the Regional Governments to properly discharge their minerals and coal mining related functions. More particularly, in these circumstances, the Provincial Governments cannot take over, from the Regional Governments, the actual carrying out of these minerals and coal mining related functions. The most that the SKPDs can do, on behalf of the Provincial Governments, is report to the Central Government the continuing failure of certain Regional Governments to properly discharge their minerals and coal mining related functions. This then leaves the Central Government in exactly the same position it was prior to De-concentration; namely, with its only clearly mandated course of action being that in Article 142(2) of the 2009 Mining Law which helpfully provides:

*“The Government may **remind** Regional Governments in the case of the authority [of Regional Governments with regard to minerals and coal mining] not being exercised in accordance with the provisions of this law and other legislation.”*

It seems inherently unlikely, to the writer at least, that a “**reminder**” (polite or impolite) from the Central Government to those Regional Governments, not properly discharging their minerals and coal mining related functions, is going to have any impact at all on recalcitrant Regional Governments.

Fourth, having each of the Provincial Governments build the expertise, within its own SKPD, needed to be able to properly supervise the minerals and coal mining related functions of the Regional Governments in that Province seems likely to result in a huge duplication, if not wastage, of scarce resources. Instead of having 1 well resourced unit at the Central Government level with the required technical skills and experience, there are now going to be up to 44 SKPDs at the Provincial Government level competing for the required technical skills and experience. Is this realistic or

efficient?

Fifth, keeping track of how each of the up to 44 SKPDs spends its De-concentration Funds and determining whether or not De-concentration Fund expenditure has really been for supervising the minerals and coal mining related functions of the Regional Governments in that Province is likely to be a major administrative exercise in its own right. Given the regular reports, in the popular press, of the leakage of funds at the Provincial Government level, the merits of giving the Provincial Governments control over yet more funds must be regarded as somewhat questionable.

Sixth, MoEMRR 2/2014 is noticeably weak in terms of the penalties or sanctions which may be imposed for non-compliance. It is particularly interesting that MoEMRR 2/2014 does not make any provision at all for the imposition of penalties or sanctions on Governors who (i) abuse the Delegated EMR Duties or (ii) misuse the De-concentration Fund. It may, however, be that (i) abuse of the Delegated EMR Duties is thought to be sufficiently dealt with by MoEMR's right to revoke the delegation of part or all of the Delegated EMR Duties in certain situations while (ii) misuse of the De-concentration Fund is a criminal matter and, so, not appropriately dealt with in MoEMRR 2/2014. That said, MoEMRR 2/2014 is hardly an onerous burden for the Regional Governments as it only seems to be the SKPD Head and not the Governor who runs the risk of incurring some personal, financial responsibility for failure to carry out De-concentration.

## **SUMMARY AND CONCLUSIONS**

The thinking behind MoEMRR 2/2014 is easy to understand. It must, of course, be much easier for each Provincial Government to keep itself informed of what is actually happening in terms of mining related activities in the limited number of Regencies forming part of the geographical area of that Province only than it is for the Central Government to keep itself informed of what is actually happening in terms of mining related activities in all 414 Regencies of all 34 Provinces. Unfortunately, however, this information advantage does not mean the Provincial Governments will be any more effective than has been the Central Government in supervising the carrying out of Regional Government functions with regard to minerals and coal mining. That information advantage has to be coupled with appropriate incentives before the Provincial Governments can, realistically, be expected to effectively supervise the carrying out of Regional Government functions with regard to minerals and coal mining. The required incentives are substantially absent from MoEMRR 2/2014.

The fundamental weakness of MoEMRR 2/2014 could well be that it just does not go far enough. Ideally, Regional Governments should no longer be involved in mining business area determination or the issuance (and revocation) of mining business licenses (“IUPs”) at all. Unfortunately, however, this is something which it is presently beyond the Central Government's power to achieve.

In fairness to the Central Government, regional autonomy and the 2009 Mining Law have left it in a very weak position with regard to being able to compel the Regional Governments to properly carry out their functions with regard to minerals and coal mining. This being the case, it should hardly be surprising to anyone if simply shifting responsibility for supervision, from the Central Government to the Provincial Governments, does not produce any noticeable improvement in Regional Government performance with regard to carrying out their minerals and coal mining related functions. Self-

evidently, the Central Government cannot delegate to the Provincial Governments any greater authority and power, with regard to mining activities in the Regencies, than the Central Government has itself.

Although it would be a great thing if De-concentration, as envisaged by MoEMRR 2/2014, succeeds, properly “taming the beast” still seems like a long way off. In these circumstances, it is perhaps entirely understandable that the Central Government has decided to limit its potential exposure by making De-concentration a year by year initiative only. It will be interesting to see what the consensus is regarding the success or otherwise of 2014 De-concentration.

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