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Amendment to the Mining Law – Providing some certainty in uncertain times

More than a decade after “Mineral and Coal Mining Law No. 4 of 2009” was promulgated the House of Representatives (*Dewan Perwakilan Rakyat*) approved the first amendments to this law on 12 May 2020. The Amended Mining Law is now awaiting the signature of the President before passage into law. Many have been surprised with the uncharacteristic speed of the DPR’s approval of this law – hopefully this bodes well for swift issuance of the upcoming implementing regulations.

Initial investor reaction has generally been positive with the amendments demonstrating the Government’s desire to address some long-standing industry concerns. These include:

- a) the regulatory certainty over the issuance and extension of mining business licences;
- b) dealing with the continuation of operations by Contract of Work (“CoW”) and Coal Contract of Work (“CcoW”) holders;
- c) dealing with overlapping mining areas;
- d) improving coordination between the Central and Regional Governments;
- e) promoting investment in exploration activities; and
- f) dealing with illegal mining.

However, uncertainties continue in areas such as:

- a) the general divestment requirements; and
- b) the new state revenue imposts particularly for CoW/CcCoW conversions into Special Mining Business Licences (or “IUPK”).

A number of implementing regulations are still to issue and hopefully these matters will be addressed more fully.

The key provisions of interest to investors are discussed below.

Consolidation of Central Government Control

Under the Amended Mining Law management of mineral and coal mining will be substantially under the control of the Central Government. For instance, the Central Government will have the sole authority to issue “mining business licences” (see below) albeit with authority to delegate certain functions to Provincial Governments.

Mayors of Regencies can no longer issue mining business licences while Governors can only issue mining business licences pursuant to delegation from the Central Government.

The Provincial and District/City Governments have thereby lost much of their authority in regard to:

- a) the issuance of mining business licences;
- b) the making of regional mining laws and regulations; and
- c) conducting surveys, research and exploration.

As a transitional measure, the authority of Provincial Governments for management of certain aspects of the mining sector (other than issuing new mining licences) will remain for six months from the enactment of the Amended Mining Law.

This transitional period may be less than six months if the Central Government issues implementing regulations for the Amended Mining Law within that period.

Having the Central Government assume greater control over the supervision of the mining sector should help in dealing with overlapping mining claims and resolve some of the coordination issues between the Central and Regional governments which have caused some investor concern in the past.

Licensing

Amendments in this area include:

- a) that a company wishing to engage in a mining business is now required to obtain a set of Business Licences (“*Perizinan Berusaha*”), as granted by the Central Government, which consist of:
 - i) a Business Identification Number (*Nomor Induk Berusaha*);
 - ii) a Standard Certification (“*Sertifikasi Standar*”), and/or Licences (“*Izin*”);
 - iii) an applicable new mining business licence being:
 - A. a Rock Mining Licence (“*Surat Izin Penambangan Batuan*”);
 - B. an Assignment Licence (“*Izin Penugasan*”) for the exploitation of any radioactive minerals in the nuclear sector; and
 - C. a Special Mining Business Licence (“IUPK”) for the continuation of operations of a CoW/CCoW holder.
- b) A licence from the MoEMR for a “non-integrated” (as opposed to a fully integrated) refining and processing business is no longer required. This addresses confusion over whether such companies must have an IUP-OP for Processing and/or Refining (issued by the MoEMR) or an Industrial Business Licence (*Izin Usaha Industri* or “IUI” issued by the Minister of Industry) or both.

Existing IUP-OPs for Processing and/or Refining will also be adjusted to an IUI within one year of the enactment of the Amended Mining Law.

Conversion of CoWs/CCoWs to IUPKs

The status of extensions for soon to expire CoWs and CCoWs (including the first generation CCoWs which represent around 35% of Indonesia’s coal production) has long been an issue.

The Amended Mining Law now confirms that extensions will be granted, which can be seen as demonstrating the Government’s commitment to stabilising production of coal and minerals and providing certainty for investors in these CoWs/CCoWs, allowing them to continue to invest with the expectation of generating a commensurate return on their investment.

A CoW/CCoW holder will now be guaranteed an extension as an “IUPK” under the following conditions:

- a) for a CoW/CCoW not previously extended: a guaranteed extension for two x 10-year terms; and
- b) for a CoW/CCoW previously extended: a guaranteed second extension for a maximum of 10 years.

To obtain extensions the holder must apply to the MoEMR between five years and one year before the CoW/CCoW expires.

Extensions will be granted subject to any required increase in “state revenue” and pursuant to a “rearrangement” of tax and non-tax state revenue. It is not clear how these rearrangements of tax and non-tax state revenue will be carried out but this could involve applying tax and royalty rates greater than those set out in the current general tax regulations (given these tax rates are generally lower than the rates borne by first generation CCoW holders in particular).

Holders with “integrated coal developments” and/or domestic coal utilisation will then be eligible for an extension of 10 years each time the IUPK expires. It is not clear whether there is a limit on the number of extensions that can be provided.

The concession area (or WIUPK) will be as approved by the MoEMR meaning that CoW/CCoW holders can apply for area outside of the current contract area, and that the Minister therefore has discretion to determine that the mining area of new IUPKs need not be limited to that for producing mines under the existing mining regulations (currently 25,000 ha for a mineral IUP and 15,000 ha for a coal IUP). This may be to allow CoWs/CCoWs with large operations to continue with minimal disruption to Indonesia’s coal and mineral production.

As expected all assets obtained during the contract period will become “state-owned” but are available for the exclusive use of the holder during the licence period.

Incentives in the downstream sector

The Amended Mining Law introduces longer mining business licence periods for:

- a) mineral IUPs/IUPKs with integrated processing and/or refining facilities; and
- b) coal IUPs/IUPKs with integrated coal development and/or utilisation facilities.

These IUP and IUPK holders are granted a 30-year business licence and may be eligible for extensions of 10 years upon each expiration (after fulfilling the requirements of prevailing laws and regulations). As indicated above the Amended Mining Law is silent on how many times extensions can be provided.

This incentive appears targeted at improving the economics of smelters that obviously can require sizable up-front investment.

For mineral and coal IUPs/IUPKs without integrated processing and/or refining/development facilities these holders are granted only a 20-year business licence with a maximum extension of two-times 10 years.

Further relaxation of ban on export of unprocessed minerals

Government Regulation No.1 of 2017 (“GR 1/2017”) and MoEMR Regulation No. 25 of 2018 (“PerMen 25/2018”) allowed exports of semi-processed product and ores for a five-year period from 11 January 2017. This was provided that a refining/smelting facility is constructed (or under construction) and the exporter has met obligations with regard to export duties. Specifically for low-grade nickel ores, the export ban was cut short from 11 January 2022 to 31 December 2019 through the issuance of PerMen 11/2019.

The Amended Mining Law now extends the concession for ore exports past these deadlines to up to three years from the date of enactment of the Amended Mining Law. Similar to GR 1/2017 and PerMen 25/2018, this extension still requires the holders of IUP-OPs, IUPK-OPs and CoWs to construct a refining/smelting facility.

Divestment of foreign shareholdings

Pursuant to GR 1/2017 foreign shareholders are required, after five years of production, to divest down to a maximum 49% shareholding by the tenth year of production. GR 1/2017 provides percentages for divestment for years 6 to 10 of production.

Under the Amended Mining Law foreign shareholders must now divest this 51% interest to (in order of priority):

- a) the Central Government;
- b) Regional Governments;
- c) state-owned enterprises (“SOEs”);
- d) regionally owned business entities (*Badan Usaha Milik Daerah* or “BUMD”); and/or
- e) national private enterprises (*Badan Usaha Swasta Nasional*).

The Central Government (through the MoEMR) together with Regional Governments, SOEs, and/or BUMDs can agree on the divestment arrangement. This may be intended to give the Minister flexibility in arranging the divestment where a number of government-related entities are involved.

If direct divestment cannot be carried out the divestment should be through the Indonesian Stock Exchange.

The amendments effectively adopt the same divestment rules as GR 1/2017 albeit without specifying a timeline.

Further detail of share divestment is to be set out in the implementing regulations.

Transfer of IUPs/IUPKs and Transfer of Shares

The Amended Mining Law indicates that direct transfers of IUP/IUPK interests (which was previously not allowed) can now be carried out with approval from the MoEMR. Holders of IUPs/IUPKs who wish to transfer must:

- a) have completed exploration activities (have resources and reserves data); and
- b) have fulfilled various administrative, technical and financial requirements.

Approval by the MoEMR is required for any such transfer as well as for the transfer of shares in an IUP/IUPK company.

Holders of IUPs/IUPKs are prohibited from granting security over their IUPs/IUPKs including over their mining production.

Further details on the transfer process are to be set out in the implementing regulations.





Exploration Activities

Volatile commodity prices have arguably shifted attention from production per se to the control of expenditure and a focus on “easier-to-mine” deposits. Exploration has unfortunately fallen away particularly in greenfield areas.

To address this trend the Amended Mining Law now requires IUP/IUPK holders to continue performing exploration activities, including through the setting aside of an exploration budget.

Holders of IUP-OPs/IUPK-OPs are also required to set aside a “mineral and coal reserve security fund” (*Dana Ketahanan Cadangan Mineral dan Batubara*) for new reserve discovery activities.

Further details will be provided in the implementing regulations.

Reclamation and Mine Closure

The Amended Mining Law requires the IUP/ IUPK holders to carry out reclamation and post-mining obligations as follows:

- a) for reclamation to ensure a balance between land disturbance and land reclamation; and
- b) to carry out reclamation and post-mining activities to a 100% completion rate prior to relinquishing mining areas (for WIUPs/ WIUPKs).

Officers of IUP/IUPK holders who do not meet these obligations are subject to prison sentences of up to 5 years and fines of up to Rp10 billion. The companies may also face additional cash penalties linked to the funds required to carry out the reclamation and post-mining activities.

The Amended Mining Law stipulates that the implementing regulations will be issued within one year after the enactment.

As noted above, analysts have generally welcomed some of these changes in the Amended Mining Law as providing some much-needed certainty, particularly around expiring CoWs/ CCoWs. The amendments certainly appear to be aimed at encouraging increased exploration, production and development of the onshore processing industry for minerals. There are of course those who are not in favour of some of the changes, and some details require clarification in upcoming implementing regulations. Time will tell whether this is the spur needed for increased investment in the Indonesian mining sector in these uncertain times.

PwC Indonesia will monitor progress. Further analysis on the Indonesian energy, utilities & resources sector can be accessed at www.pwc.com/id or by contacting your usual PwC advisor.

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