CHRISTIAN TEO & PARTNERS
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OMNIBUS BILL – LIKELY BIG CHANGES AHEAD FOR MINING INDUSTRY[1][2][3][4][5]

INTRODUCTION

The Omnibus Bill on Job Creation proposes major changes to the existing regulatory regime for the Indonesian mining industry as well as to the existing regulatory regimes for numerous other industry sectors.

The future, however, of the Omnibus Bill is very uncertain owing to its complexity and the numerous objections that have been raised to different aspects of the same.

In this article, the writer will review the main provisions of the Omnibus Bill that deal with the mining regulatory regime before highlighting some of the associated areas of uncertainty as to what is actually intended by the Government with regard to the mining regulatory regime.

BACKGROUND

As part of its endeavour to encourage more investment in Indonesia and improve the country's rate of economic growth, the Government has proposed at least four so-called "Omnibus Bills" dealing with (i) job creation, (ii) taxation, (iii) the new capital city initiative and (iv) the pharmaceutical industry.

To date, two of the proposed Omnibus Bills, dealing with job creation and taxation, have already been submitted to the House of Representatives ("**DPR**") for its review and consideration.

Despite its title, the Omnibus Bill on Job Creation actually deals with many issues wholly unrelated to job creation or manpower **including mining**.

Notwithstanding that the Omnibus Bill on Job Creation is still very much a "work in progress", the changes the Omnibus Bill on Job Creation would make to the existing mining regulatory regime, if and when it becomes law, are already attracting a lot of interest.

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[5] An earlier version of this article appeared in the March - April 2020 edition of Coal Asia Magazine.

ANALYSIS AND DISCUSSION

1. Overview of Proposed Changes

The proposed changes to the mining regulatory regime are set out in Chapter 3, Part IV, Paragraph 5 ("**Chapter 3**") of the Omnibus Bill on Job Creation.

If and when it becomes law in substantially its current form, the Omnibus Bill on Job Creation will amend or delete altogether numerous articles of the 2009 Minerals & Coal Mining Law.

The mining provisions of the Omnibus Bill particularly benefit Coal Contract of Work ("**CCoW**") holders.

The Omnibus Bill also encourages the integration of metal ore production/coal getting with metal ore processing and refining/coal utilization and development in an endeavor to promote local value-added activity.

Finally, the Omnibus Bill on Job Creation seeks to eliminate existing differences between the licensing of mining businesses/projects and the licensing of other types of businesses/projects.

2. Proposed Changes in Detail

2.1 **General Investigation rather than Survey**: Mining business activities will continue to be broken down into (i) exploration and (ii) production operation.

The first stage of exploration, however, will be restyled as "general investigation" rather than as "survey" while leaving the definition substantially unchanged from that which previously applied to "general survey".

It is unclear to the writer why this proposed change is considered necessary or even desirable. The proposed change does **not** address any of the concerns previously articulated by industry bodies regarding the need to (i) recognize that exploration and mining are completely different activities and (ii) make special provision for encouraging more exploration activity.

2.2 **Business Licenses rather than Mining Licenses**: Mining licenses, whether standard mining business licenses ("**IUPs**"), special mining business licenses ("**IUPKs**") or community mining business licenses ("**IPRs**"), will be replaced with business licenses to be issued through the OSS System in the same manner as the licenses for any other type of business/project.

This proposed change is, presumably, part of the Government's initiative to simplify the business/project licensing process by doing away with the existing separate licensing system for mining businesses/projects.

2.3 **Increased Central Government Control**: The Central Government will be given substantially exclusive control of the minerals and coal mining sector. More particularly, only the Central Government will have the authority/power to issue business licenses for mining.

This proposed change will effectively eliminate the existing residual authority of Provincial Governments to issue business licenses for mining in the case of mining concessions (i) falling wholly within the boundaries of a particular province or regency and (ii) where the applicant is not a PMA Company (**i.e.**, no foreign investors are involved).

The existing residual authority of the Provincial Governments, over certain already issued IUPs, IUPKs and IPRs, will be transferred to the Central Government.

Eliminating altogether the authority of Provincial Governments, to issue and administer business licenses for mining, may be seen as the logical conclusion of a process, that started some years ago, to re-centralize the process of licensing for mining business/projects. The impetus for re-centralized licensing for mining business/projects has its origins in the abject failure of regional autonomy to deliver transparent and corruption-free licensing for mining projects. The resulting legal uncertainty created enormous problems for investors generally in the local mining industry and especially for foreign investors.

2.4 **Life of Mine for Integrated Mining Projects**: The standard production operation license term for metal minerals and coal, of a maximum of 20 years plus the possibility of two extensions of 10 years each, will be varied to become "life of mine" in the case of metal mineral and coal mining projects where:

(a) metal ore mining activities are "integrated" with processing and refining activities; or

(b) coal getting activities are "integrated" with "coal development and utilization activities".

Where (a) or (b) above applies, the initial production operation license term will be a maximum of 30 years plus the possibility of successive extensions, of 10 years each, up to the end of the commercial life of the relevant mine.

Unfortunately, the Omnibus Bill on Job Creation does **not** make clear just (i) what is an "integrated" activity or (ii) what is "coal development and utilization".

With regard to "integrated" activities, does this mean that (i) the same company must carry on both the metal ore mining activities/coal getting activities and the processing and refining activities/coal development and utilization activities ("**Alternative 1**") or (ii) is it sufficient if one company carries on the metal ore mining activities/coal getting activities while an affiliated or related company (**i.e.**, a subsidiary or other company in the same group of companies) carries out the processing and refining activities/coal development and utilization activities ("**Alternative 2**")?

Some indication that "integrated" refers to Alternative 1, **not** Alternative 2, may be found elsewhere in the Omnibus Bill on Job Creation where it is provided that holders of business licenses for metal mineral production operation activities/coal production operation activities may "collaborate" **with other parties** for the purpose of carrying out processing and refining activities/coal development and utilization activities and thereby satisfy their local value added obligations. "Collaboration" is apparently **not** the same thing as "integration". Accordingly, if "collaboration" necessarily involves two separate parties, there would seem to be a strong argument the Government intends that "integration" necessarily involves one party only.

Which of Alternative 1 or Alternative 2 is correct has very important implications for foreign-owned mining companies (**i.e.**, PMA Companies). This is because, if Alternative 1 is correct, it means that, in order to obtain the benefit of the life of mine license term, foreign-owned mining companies will have to accept that the widely abhorred 51% divestiture obligation applies to **both** their metal ore mining activities/coal getting activities **and** their processing and refining activities/coal development and utilization activities. At the moment, this unfavorable outcome is easily avoided by ensuring that the company which carries on the processing and refining activities/coal development and utilization activities is **not** the same as the company which carries on the metal ore mining activities/coal getting activities.

Assuming Alternative 1 is correct, it remains to be seen whether PMA Companies will regard the possibility of a life of mine license term as being sufficiently attractive to justify giving up majority ownership of the metal ore processing and refining activities/coal development and utilization activities **as well as** majority ownership of the metal ore mining activities/coal getting activities.

In the case of "coal development and utilization", does this expression only include coal gasification or does it also include the supply/utilization of coal for coal fired power plants owned/operated by the company carrying on coal getting activities or by an affiliate or related party of that company? If the supply/utilization of coal, for coal fired power plants owned/operated by companies carrying on coal getting activities, is sufficient to constitute "coal development and utilization", this will make it very easy for many coal producers to establish that their coal getting activities and their coal development and utilization activities are, indeed, "integrated". After all, it is common for large and even medium-sized coal producers to have mine mouth power plants utilizing the coal produced from their coal mining concessions.

2.5 **Removal of Certain Area Limits on WIUPKs**: The (i) existing 25,000Ha limitation on special mining business license areas ("**WIUPKs**") for metal mineral production operation activities and (ii) existing 15,000Ha limitation on WIUPKs for coal production operation activities will be dropped. Instead, the WIUPKs for **both** metal mineral production operation activities **and** coal production operation activities will now be determined by the Central Government on a case by case basis and having regard to:

> *"… the results of the Central Government's evaluation of the work plan for the entire area proposed by the special mining business.*"

The Government has artfully sought to "muddy the waters" as to the real objective of this proposed change by purporting to treat both metal mineral producers and coal producers equally when it comes to the allowed WIUPKs for production operation activities. Astute readers will recall, however, that the existing 15,000Ha limitation on WIUPKs for coal production operation activities provided the legal basis for the claim by the former Minister of State Owned Enterprises ("**SOEs**") that when CCoW holders converted their CCoWs into IUPKs, (i) they were only entitled to WIUPKs with a maximum area of 15,000Ha and (ii) SOEs had a priority right to all former coal contract areas in excess of 15,000Ha ("**SOE Priority Right**"). CCoW holders bitterly and vociferously opposed the SOE Priority Right. It would be singularly naïve to be under any doubt that the real objective of this proposed change is anything other than to (i) eliminate the claimed legal basis for the SOE Priority Right and (ii) thereby make it possible for CCoW holders, subsequently converting their CCoWs into business licenses, to receive WIUPKs of the same size as their previous contract areas.

Simultaneously removing the previous 25,000Ha limitation on WIUPKs for metal mineral production operation activities is really just a "smoke-screen" and largely irrelevant except, possibly, in the case of future extensions of IUPKs now held by former, metal mineral Contract of Work ("**CoW**") holders. This is because, **unlike the CCoW holders**, all the former CoW holders have **already** converted their CoWs into IUPKs. As such, it is **only** CCoW holders that really stand to benefit, at least in the near term, from this proposed change.

The reference to determining WIUPKs having regard to evaluation of the "*work plan for the entire area proposed by the special mining business*" effectively leaves it up to former CCoW holders to submit work plans covering the entirety of their former contract areas now that the previous 15,000Ha limitation is to be removed. It remains to be seen how diligently or otherwise the Central Government reviews both (i) the feasibility/viability of work plans submitted by CCoW holders and (ii) how the actual work carried out during production operation compares with the proposed work set out in the work plans of former CCoW holders. It will only be if there are material adverse consequences for those former CCoW holders, **not** carrying out production operation activities in the entirety of the area proposed in their work plans, that the Government's proposed reliance on work plans, for the purpose of determining WIUPKs, will amount to any sort of effective limitation on the size of WIUPKs received by former CCoW holders.

2.6 **Promotion of Local Value-Added Activity**: The existing requirement for coal producers (as well as metal mineral producers) to carry out local value-added activity is to be strengthened by specifying that coal producers must carry out "coal development and utilization". Likewise, it is proposed to make clear (for the first time) that producers of non-metal minerals and rocks must also carry out local value-added activity.

As already pointed out in 2.4 above, however, the Omnibus Bill on Job Creation does **not** make clear (i) just what is "coal development and utilization" and (ii) more particularly, whether or not "coal development and utilization" includes coal gasification only or both coal gasification and the supply/utilization of coal for coal fired power plants owned/operated by companies carrying on coal getting activities or

by affiliates or related parties of those companies.

In another potential "win" for the coal industry, it is proposed that coal producers carrying out "coal development and utilization" (whatever exactly this may mean) will **no** longer be subject to the so-called Domestic Market Obligation ("**DMO**"). The DMO has become a major financial burden for large coal producers given that it can involve supplying coal to the State Electricity Company ("**PLN**") at below market price and thereby, indirectly, subsidizing PLN's loss-making electricity supply activities.

It is also proposed that companies carrying out local value-added activity (whether in respect of coal, metal minerals, non-metal minerals or rocks) may be given financial benefits/incentives/rewards in the form of "*certain treatment with regard to the state revenue obligation*". Just what this means, however, is unclear.

Interestingly, **in the case of coal producers only,** carrying out local value-added activity, the applicable coal production royalty may be reduced to "0%". The question might reasonably be asked as to why such generous treatment is not also to be offered to producers of metal minerals, non-metal minerals and rocks which carry out local value-added activity?

Self-evidently, the Omnibus Bill on Job Creation makes clear the Central Government's intention to encourage and prioritize local value-added activity. This may well reflect the Central Government dissatisfaction with what has been achieved to date, in terms of local value-added activity, in other than the case of certain metal minerals such as nickel.

2.7 **Expansion of Investigating Officials' Powers**: It is proposed to expand the powers of so-called "Certain Civil Servant Investigation Officials" in connection with the conduct of criminal investigations into alleged wrongdoing in the mining industry.

The Certain Civil Servant Investigation Officials are now to be given additional power to among other things:

(a) arrest and detain persons suspected of committing criminal offences in the mining industry; and

(b) take people's fingerprints.

It is also proposed to make clear that the Certain Civil Servant Investigation Officials are subject to co-ordination and supervision by the Police.

The further "blurring of the lines" between the Certain Civil Servant Investigation Officials and the Police will surely be a source of concern for many mining industry participants understandably worried by the increased potential for administrative "overreach" on the part of opportunistic government officials.

2.8 **Conversion of CCoWs**: The Omnibus Bill on Job Creation proposes some particularly significant changes in respect of the conversion of CCoWs.

It is proposed that:

(a) CCoWs holders, which have **not** obtained any extension of their CCoWs ("**Category 1**"), may have the CCoWs extended to become first extension Special Business Licenses (*Perizinan Berusaha Pertambangan Khusus* or "**PBPKs**") (i) as a continuation of their existing operations, (ii) without auction, (iii) after the expiration of the relevant CCoWs and (iv) **taking into account the need for an "increase in state revenue**"; while

(b) CCoWs holders, which have already obtained first extensions of their CCoWs ("**Category 2**"), may obtain further extensions of their PBPKs to become second extension PBPKs (i) as a continuation of their existing operations, (ii) without auction, (iii) after the expiration of the relevant first extension CCoWs and (iv) **taking into account the need for an "increase in state revenue**".

All CCoW holders currently fall into Category 1.

Category 2 will, however, become very relevant once CCoW holders receive PBPKs. Category 2 is closely linked to the life of mine concept in the case of CCoW holders/former CCoW holders which carry out "integrated" coal getting/coal development and utilization – see 2.4 above.

The conversion/extension of CCoWs into PBPKs and the subsequent extension of PBPKs are to be tied, in some **not very clear** way, to the "need for an increase in state revenue".

The Omnibus Bill on Job Creation provides that the "increase in state revenue" is to be/may be carried out by way of:

(a) readjustment of the existing tax and non-tax state revenue arrangement;

(b) **granting of WIUPKs to PBPK holders in accordance with the production operation areas that have already been approved by the Central Government prior to the Omnibus Bill becoming law**; and/or

(c) imposition of an obligation to increase the added value of coal.

It is far from clear what is the intended meaning of:

> "*granting of WIUPKs to PBPK holders in accordance with the production operation areas that have already been approved by the central Government prior to the Omnibus Bill becoming law*".

The writer strongly suspects, however, that this somewhat oblique wording is intended to facilitate the granting to former CCoW holders of WIUPKs covering the entirety of their former contract areas. This is something that will have been made possible by the Omnibus Bill on Job Creation's proposed removal of the existing

15,000Ha limitation on the maximum WIUPK for production operation activities in respect of coal – see 2.5 above.

Assuming that the possible intention outlined in the previous paragraph is correct, it is also far from clear (at least to the writer) just what is the connection between the need to increase state revenue and the granting to former CCoW holders of WIUPKs covering the entirety of their former contract areas. The only explanation the writer can readily think of is that the Central Government wishes to imply existing CCoW holders are such efficient coal producers that state revenue collection will be imperiled if the existing CCoW holders are not allowed to keep, as WIUPKs, the entirety of their former contract areas once they convert their CCoWs to become PBPKs. This explanation would also seem to necessarily imply that SOEs cannot realistically be expected to operate coal mines as efficiently as former CCoW holders with the result that there would be an inevitable decline in state revenue from coal mining if the existing 15,000Ha limitation on the maximum WIUPK for production operation activities in respect of coal was retained and all former CCoW areas in excess of 15,000Ha were given to SOEs in recognition of the SOE Priority Right as claimed by the former SOE Minister.

It should go without saying that the above explanation does **not** rest easily with the already much-expanded role of SOEs in the metal ore mining sector. After all, if the entirely realistic and understandable concerns about SOE operational efficiency make it imprudent for the Central Government to allow SOEs to have an expanded role in coal mining, how can it be prudent for the Central Government to have already allowed SOEs to have a much-expanded role in metal ore mining? Is it in the least bit likely that SOEs will be more efficient metal ore producers than they would be coal producers?

The net effect of the proposed changes to the rights and obligations of CCoW holders may be summarized as follows:

(a) each CCoW holder can, at the time of conversion, expect to receive a PBPK that **at a minimum**:

  (i) is in respect of a WIUPK that may cover as much as all of its former contract area depending upon the work plan of the relevant CCoW holder and the Central Government's approval of the same;

  (ii) has an initial term of **20** years; and

  (iii) can be renewed **twice** for **10** years each time; but

(b) if a CCoW holder carries out "integrated coal getting/development and utilization of coal" (whatever exactly this may mean), then that CCoW holder can, at the time of conversion, expect to receive a PBPK that:

  (i) is in respect of a WIUPK that may cover as much as all of its former contract area depending upon the work plan of the relevant CCoW holder and the Central Government's approval of the same;

(ii) has an initial term of **30** years; and

(iii) can be renewed for **successive** periods of **10** years each **until such time as the coal mining potential of its WIUPK is fully exhausted** (**i.e.**, a "life of mine" term).

2.9 **Resolution of Land Rights Issues**: It is proposed that the Central Government will have exclusive authority to resolve land rights/land use issues affecting mining business activities.

Where the land rights/land use issue relates to "overlaps" involving (i) mining and forestry areas, (ii) spatial planning, (iii) business licensing/approvals and/or (iv) land rights, the overlaps will be dealt with in a Presidential Regulation.

This proposal would do away with the existing unsatisfactory system for resolving "overlaps" whereby the overlap is (i) first, sought to be resolved by negotiations under the auspices of the relevant Regional Government, (ii) second, sought to be resolved by negotiations under the auspices of the relevant Provincial Government and (iii) finally, sought to be resolved by negotiations under the auspices of the Central Government.

3. Residual Uncertainties

3.1 **Further Government Regulations**: Chapter 3 of the Omnibus Bill on Job Creation is very much lacking in detail when it comes to the proposed changes to the mining regulatory regime. Important proposed changes are only outlined in quite "broad brush" terms in Chapter 3 of the Omnibus Bill on Job Creation. The intention is that the details of the proposed changes will be set out in subsequent Government Regulations.

Chapter 3 of the Omnibus Bill on Job Creation, in fact, contains not less than **seven** references to the need for **subsequent Government Regulations to explain the details of various proposed changes to the mining regulatory regime**.

Just when these subsequent Government Regulations will be issued is anyone's guess. Presumably, however, the drafting of the various Government Regulations, needed to explain the detail of the proposed mining regime changes, will not even begin until such time as the Omnibus Bill on Job Creation becomes law.

While entirely consistent with normal Indonesian legislative practice, the reliance on subsequent Government Regulations, to explain the details of the proposed changes to the mining regulatory regime, is a huge limitation on what can be reasonably be expected to be achieved, in the near term, by Chapter 3 of the Omnibus Bill on Job Creation. More particularly, to the extent the Omnibus Bill on Job Creation in general and Chapter 3 in particular is intended by the Central Government to be a catalyst for substantial new investment in the local mining industry, that new investment is not likely to materialize any time soon and even assuming that the proposed changes to the mining regulatory regime are, on balance, viewed by the investment community as being very positive. It is inevitable that many potential investors in the local mining

industry will simply choose to wait until the contemplated Government Regulations are issued before making a decision whether or not to proceed with new or additional investments. This is, of course, entirely understandable given the unfortunate "track record" of the Central Government in issuing inadequately considered and poorly drafted regulations that only serve to confuse investors as to what is the Central Government's real intention.

3.2 **Interaction between Omnibus Bill and New Mining Law**: It has been widely reported that the Central Government and the DPR are in the advanced stages of planning for a new Mining Law in 2020 or 2021. It has even been suggested that the DPR's consideration of a draft of the proposed new Mining Law is actually more advanced than is the DPR's consideration of Chapter 3 of the Omnibus Bill on Job Creation. Assuming this is correct, the intended interaction between Chapter 3 of the Omnibus Bill on Job Creation and the proposed new Mining Law is potentially confusing to say the least. If there is to be a new Mining Law in the near future, why is Chapter 3 of the Omnibus Bill on Job Creation necessary or even desirable at all? Would it not have been better to deal with **all** the changes deemed to be necessary or desirable to the mining regulatory regime in a **single** legislative initiative rather than making some changes in Chapter 3 of the Omnibus Bill on Job Creation **and** then making additional changes in a subsequent new Mining Law?

The most likely explanation for the apparent two-step approach outlined in the previous paragraph seems to be that the Central Government has succumbed to pressure from Indonesia's major coal producers for a "quick fix" to the legal certainty problem currently surrounding the continuing right of CCoW holders to operate once their CCoWs expire. This explanation is very much consistent with the obvious focus of much of Chapter 3 of the Omnibus Bill on Job Creation on the position of CCoW holders and, more particularly, on giving CCoW holders the right to convert/extend their CCoWs into PBPKs (i) with long terms and renewal options as well as (ii) covering WIUPKs that may, if certain conditions are satisfied, be substantially the same as their existing contract areas.

3.4 **Future of Omnibus Bill**: The President initially indicated that he expected the Omnibus Bill on Job Creation to be passed by the DPR within one hundred days or by about May 2020. In light, however, of the widespread opposition to various provisions of the Omnibus Bill on Job Creation, this ambitious timetable appears to stand no chance of being realized. Late 2020 at the earliest would seem a more realistic projection.

There is also no guarantee that, even if the DPR eventually passes the Omnibus Bill on Job Creation in some form, it will not exercise its prerogative to make substantial changes to the Omnibus Bill on Job Creation as originally submitted by the Government. Indeed, material changes seem highly likely given the number of objections that have already been raised by different parties to one or more provisions of the Omnibus Bill on Job Creation.

Finally, it may prove to have been a serious strategic mistake, on the Central Government's part, to include so many different and unrelated issues in the Omnibus Bill on Job Creation. The large number of issues increases the likelihood of almost every DPR member finding some aspect of the Omnibus Bill on Job Creation to

which he objects. No doubt, the Central Government's intention was to "crash through" the "roadblock" of multiple issues holding back investment in Indonesia by dealing with them all in a single piece of legislation. Unfortunately, however, the alternative to "crashing through" is simply to "crash" without making any progress at all.

SUMMARY AND CONCLUSIONS

Chapter 3 of the Omnibus Bill on Job Creation proposes important changes to the mining industry regulatory regime.

The most important proposed changes are to the rights of CCoW holders which currently face major legal certainty issues regarding their long-term operating rights.

CCoW holders will, unquestionably, be the "big winners' if and when the Omnibus Bill on Job Creation becomes law in its current form.

It may be a long time, however, before the Omnibus Bill on Job Creation becomes law. It will surely be an even much longer time that we have the multiple supporting Government Regulations that are intended to provide the details of how the proposed changes to the mining regulatory regime will be implemented.

The Government should not be surprised if existing and potential investors in the local mining industry adopt a "wait and see" approach, preferring to have available all of the contemplated supporting Government Regulations before making any investment decisions on the basis of Chapter 3 of the Omnibus Bill on Job Creation alone once it becomes law.

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