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NEW PENALTIES FOR DMO NONCOMPLIANCE – GOVT UPS THE ANTE AGAIN[1][2][3][4][5]

INTRODUCTION

In an endeavour to prevent a repeat of last December's domestic coal supply crisis, the Government has introduced new and more onerous penalties for non-compliance with the domestic market obligation.

The objective of the new and more onerous penalties, which now include suspension of mining operations and cancellation of mining business licenses, is clearly to make the potential cost of non-compliance with the domestic market obligation too great for Indonesia's coal producers to be willing to risk. It remains to be seen, however, whether or not that proves to be the case.

The new and more onerous penalties may also be seen as being intended to provide a stronger legal basis for the President's recent threat to cancel the mining business licenses of coal producers/suppliers which do not comply with the domestic market obligation. This legal basis, though, is likely to be challenged in the courts as the decree setting out the new and more onerous penalties purports to rely for its authority on, among other things, the 2020 Job Creation Law which has now been declared to be "conditionally unconstitutional".

This article will review the decree setting out the new and more onerous penalties for non-compliance with the domestic market obligation before turning to the issue of whether or not this decree is likely to survive a challenge in the courts.

BACKGROUND

In late December 2021, the Government announced a ban on all Indonesian coal exports, effective immediately and until the end of January 2022 in the first instance ("**January 2022 Temporary Export Ban**").

The reason for the sudden imposition of the January 2022 Temporary Export Ban was a looming electricity crisis brought on by a serious run-down in the coal stockpiles of the State electricity company ("**PLN**") and numerous independent power producers ("**IPPs**"). According to the Government, the run-down in coal stockpiles was attributable to the failure of local coal producers to fulfill their so-called domestic market obligation that requires coal

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[5] An earlier version of this article appeared in the February - March 2022 edition of Coal Asia Magazine.

producers to prioritize the supply of coal to the domestic market ("**DM Obligation**") by imposing (i) annual DM Obligation quotas on certain coal producers ("**DMO Quotas**") and (ii) a ceiling price on the sale of coal to PLN/IPPs. The DMO Quota for 2022 is currently 25% while the ceiling price for coal, with certain specifications, sold to PLN/IPPs is currently US$70 per tonne ("**PLN/IPP Concessional Coal Price**").

The DMO Quotas are used to satisfy domestic coal needs in respect of (i) the supply of electricity for public and private purposes and (ii) raw material/fuel required by industry (together, "**Domestic Coal Needs**").

The January 2022 Temporary Export Ban applied to (i) holders of Coal Contracts of Work ("**CCoWs**"), coal production operation special mining business licenses being continuations of former CCoWs ("**Coal Continuation POIUPKs**"), coal production operation special mining business licenses ("**Coal POIUPKs**") and coal production operation mining business licenses ("**Coal POIUPs**") (together, "**Relevant Coal Producers**") and (ii) holders of coal transportation and sales permits ("**Coal T&S Permits**").

In making holders of Coal T&S Permits part of the January 2022 Temporary Export Ban, the Government sought to rely, at least in part, on Minister of Energy & Mineral Resources ("**MoEMR**") Decree No. 139 of 2021, dated 4 August 2021, re Fulfilment of Domestic Coal Needs ("**MoEMR Decree 139/2021**"). MoEMR Decree 139/2021 provides (among other things) that, in the event Domestic Coal Needs are not satisfied for whatever reason, the Director General of Minerals & Coal ("**DGoMC**") may appoint/require one or more Relevant Coal Producers, as well as any holder of a Coal S&T Permit, to meet/fulfil the unsatisfied Domestic Coal Needs. Where DGoMC makes holders of Coal S&T Permits responsible for meeting/fulfilling unsatisfied Domestic Coal Needs, this effectively makes the relevant holders of Coal S&T Permits subject to the DM Obligation.

President Joko Widodo subsequently proceeded to "double down" on the January 2022 Temporary Export Ban by threatening, during a virtual press conference on 3 January 2022, to revoke the mining business licenses of parties that did not comply with the January 2022 Temporary Export Ban or continued to violate their DM Obligations. However, at the time the President spoke, the legal authority of the Government to revoke the mining business licenses of Relevant Coal Producers and holders of Coal S&T Permits was questionable. Fortunately perhaps for the Government, the January 2022 Temporary Export Ban was **temporarily** successful in overcoming the domestic coal supply problems of PLN and IPPs such that the Government did not ultimately need to try to implement the President's threat and move to revoke the mining business licenses of any Relevant Coal Producers or holders of Coal S&T Permits.

The January 2022 Temporary Export Ban had been substantially lifted by the end of January 2022.

Readers interested in knowing more about the January 2022 Temporary Export Ban and the lead up to the same are referred to the writer's earlier article "*On/Off Coal Export Bans – Not Solving the Problem*" which appeared in the January-February 2022 edition of Coal Asia Magazine published by Petromindo.

The Government is clearly determined to ensure that, going forward, it is in a stronger legal position to deal with any Relevant Coal Producers and holders of Coal S&T Permits, which

do not fulfil their DM Obligation in the future, than it was prior to the announcement of the January 2022 Temporary Export Ban. To this end, the Minister of Energy & Mineral Resources ("**MoEMR**") has now issued Decree No. 13 of 2022, dated 19 January 2022, re Guidelines for the Imposition of Administrative Sanctions, Prohibition of Overseas Coal Sales and Imposition of Fines as well as Compensation Funds Requirement for Non-fulfilment of Domestic Coal Requirements ("**MoEMR Decree 13/2022**").

ANALYSIS AND DISCUSSION

1. Overview of MoEMR Decree 13/2022

The stated purpose of MoEMR Decree 13/2022 is to provide "guidelines" in respect of the imposition of administrative sanctions for non-compliance with the DM Obligation and, more particularly, for failure to deliver/supply coal in satisfaction of Domestic Coal Needs as contemplated by MoEMR Decree 139/2021.

MoEMR Decree 13/2022 is expressed to have been issued in reliance upon and having regard to various existing laws, regulations and decrees, including (i) Law No. 4 of 2009 re Mineral & Coal Mining ("**Mining Law**") **as amended several times, most recently by Law No. 11 of 2020 re Job Creation** ("**Job Creation Law**") and (ii) MoEMR Decree 139/2021.

MoEMR Decree 13/2022 needs to be read in conjunction with MoEMR Decree 139/2021 as it is MoEMR Decree 139/2021 which makes clear that (i) it is the "unconditional" obligation of each Relevant Coal Producer to supply coal in accordance with its DMO Quota if any, and (ii) in the event of there being unsatisfied Domestic Coal Needs in any year, DGoMC has the authority to appoint/require another Relevant Coal Producer or a holder of a Coal S&T Permit to meet/fulfil the unsatisfied Domestic Coal Needs in that year.

MoEMR Decree 13/2022 is **not** expressed to be an amendment of MoEMR Decree 139/2021 but it, in fact, greatly increases the existing sanctions provided for in MoEMR Decree 139/2021 as well as varies the calculation of those existing sanctions amounts that are in the form of fines and compensation fund payments. As such, MoEMR Decree 13/2022 actually does far more than merely set out the procedures for implementing the sanctions already provided for in MoEMR Decree 139/2021. In this regard, both the title and the stated purpose of MoEMR Decree 13/2022 are quite misleading.

MoEMR Decree 13/2022 came into force on 13 January 2022, being well after the January 2022 Temporary Export Ban was announced by the Government.

2. MoEMR Decree 13/2022 in Detail

2.1 **Relevant Coal Producers - Sanctions and Penalties for Non-fulfilment of DM Obligation**: Relevant Coal Producers which do **not** meet their DM Obligation are subject to administrative sanctions in the form of:

(a) (i) **suspension** of all production operation activities for a maximum of 60 days ("**Suspension Sanction**"); and

(ii) **revocation** of their CCoWs/Coal Continuation POIUPKs/Coal POIUPKs/Coal POIUPs ("**Revocation Sanction**") (First Stipulation of MoEMR Decree 13/2022);

(b) (i) **prohibition** on making further coal export sales until such time as they fulfil their DM Obligation ("**OSP Sanction**");

(ii) in the case only of failure to fulfil the DM Obligation with respect to Domestic Coal Needs relating to the supply of electricity for **public** purposes (**i.e.**, failure to supply coal to PLN/IPPs at the PLN/IPP Concessional Coal Price), a **fine** calculated, in USD/ton, as:

A x V

where:

A = **either** the average actual export selling price for the coal quality specified in the relevant sales contract and sold FOB minus the PLN/IPP Concessional Coal Price **or**, where the actual export selling price is not available, the average coal benchmark price for the export sale of the coal quality specified in the relevant sales contract minus the PLN/IPP Concessional Coal Price; and

V = export coal quantity sold equal to coal quantity not supplied to PLN/IPPs ("**Fine 1 Sanction**");

(iii) in the case only of failure to fulfil the DM Obligation with respect to Domestic Coal Needs **other than** relating to the supply of electricity for public purposes, a **fine** calculated, in USD/ton, as:

A x V

where:

A = **either** the average actual export selling price for the coal quality specified in the relevant export sales contract and sold FOB minus the average coal benchmark price for the coal quality specified in the relevant sales contract **or**, where the actual export selling price is not available, the average coal benchmark price for the export sale of the coal quality specified in the relevant sales contract minus the average coal benchmark price for the sale, to domestic users other than PLN/IPPs, of the coal quality specified in the relevant sales contract; and

V = export coal quantity sold equal to coal quantity not supplied to domestic coal users other than PLN/IPPs ("**Fine 2 Sanction**"); and

(iv) in the case only of (i) failure to enter into sales/supply contracts with domestic coal users (public or private) or (ii) delivery of coal to domestic coal users (public or private), with coal specifications **not** fit for the satisfaction of Domestic Coal Needs, a **compensation fund payment** calculated as:

$$A \times (P - R)$$

where:

A = compensation tariff, in USD/ton, determined in accordance with Appendix 1 to MoEMR Decree 13/2022;

P = DMO Quota, in tons, based on the Government approved production plan of the Relevant Coal Producer; and

R = actual quantity of coal supplied to domestic users of coal by the Relevant Coal Producer ("**CFP Sanction**") (Second, Fifth, Sixth and Seventh Stipulations of MoEMR Decree 13/2022).

2.2 **Holders of Coal S&P Permits - Sanctions and Penalties for Failure to Meet Domestic Coal Needs in accordance with Sales Contracts**: The OSP Sanction and the Fine 1 Sanction/Fine 2 Sanction (together, "**Fine Sanctions**") also apply to holders of Coal S&T Permits which fail to supply coal in satisfaction of Domestic Coal Needs when appointed by DGoMC to do so (Third Stipulation of MoEMR Decree 13/2022).

2.3 **Implementation of OSP Sanction and Fine Sanctions**: The OSP Sanction and the Fine Sanctions are only to be imposed on Relevant Coal Producers and holders of Coal S&T Permits following receipt, by DGoMC, of a report on alleged non-compliance with the DM Obligation, which report is then clarified/confirmed with the Relevant Coal Producer or holder of a Coal S&T Permit.

Where the OSP Sanction is imposed on a Relevant Coal Producer, it applies to both direct export sales by the Relevant Coal Producer as well as to indirect export sales by the Relevant Coal Producer made through the holder of a Coal S&T Permit.

Once the Relevant Coal Producer/holder of a Coal S&T Permit has (i) made up the previous shortfall in the fulfilment of its DM Obligation and paid the relevant Fine Sanctions/CFP Sanction amounts and (ii) provided evidence of (i) to DGoMC, the OSP Sanction will be lifted/revoked by DGoMC (Fourth Stipulation of MoEMR Decree 13/2022).

2.4 **Monthly Reporting of DM Obligation Compliance**: Relevant Coal Producers are obliged to file monthly reports, in a prescribed format and not later than 10 days after the end of each month, on the quantity/quality of coal supplied by them, both directly and indirectly through holders of Coal S&T Permits, in fulfilment of their DM Obligation during the relevant month ("**Monthly Compliance Reports**").

The Monthly Compliance Reports must be accompanied by supporting evidence in the form of (i) bills of lading and (ii) coal sales documents, **including statement letters from domestic coal users confirming receipt of coal from the Relevant Coal Producers** (Eighth, Ninth and Tenth Stipulations of MoEMR Decree 13/2022).

2.5 **Yearly Reset of CFP Sanction Tariff Rate**: The applicable tariff rate for calculating the CFP Sanction amount is to be reset/stipulated on a yearly basis (Eleventh Stipulation of MoEMR Decree 13/2022).

2.6 **Discharge of Fine Sanctions/CFP Sanction**: Payments in respect of Fine Sanctions/CFP Sanctions must be made (i) though the online system for non-tax state revenue collection and (ii) not later than 30 days after the date of the relevant Fine Sanctions/CFP Sanction.

Fine Sanctions are to be calculated and paid in the same currency that is specified in the relevant coal sales contract.

Failure to make payments in respect of Fine Sanctions/CFP Sanctions within the prescribed period shall result in (i) the imposition/reimposition of the Suspension Sanction and (ii) if payment is still not made by the end of the Suspension Sanction period of 60 days, the imposition of the Revocation Sanction (Twelfth, Thirteenth and Fourteenth Stipulations of MoEMR Decree 13/2022).

2.7 **Further Procedural Details**: Further procedural details in connection with the imposition of the OSP Sanction, the Fine Sanctions and the CFP Sanction are set out in Appendix III to MoEMR Decree 13/2022 (Fifteenth Stipulation of MoEMR Decree 13/2022).

2.8 **Continuing Liability for 2021 DM Obligation Non-compliance**: Relevant Coal Producers and holders of Coal S&T Permits, which failed to fulfil their DM Obligation in respect of the period 1 January to 31 July 2021, are subject to and obliged to make the required payment in respect of the CFP Sanction in respect of their DM Obligation non-compliance during that 2021 period (Sixteenth Stipulation of MoEMR Decree 13/2022).

3. Assessment & Evaluation of MoEMR Decree 13/2022

3.1 **Suspension Sanction and Revocation Sanction**: The Suspension Sanction and the Revocation Sanction were not previously included in MoEMR Decree 139/2021 as applicable penalties in the case of failure to fulfil the DM Obligation and, therefore, should properly be regarded as being substantially new sanctions. That said, the Mining Law has always included the Suspension Sanction and the Revocation Sanction as penalties for the breach of certain specific obligations.

Although not clear from a literal reading of MoEMR Decree 13/2022 itself, the writer's understanding is that the Revocation Sanction is only to be imposed in the event that the Suspension Sanction does not result in the Relevant Coal Producer fulfilling its outstanding DM Obligation by the end of the validity period of the Suspension Sanction.

The Suspension Sanction and the Revocation Sanction only apply to holders of Coal S&T Permits in the event they fail to make the required payment in respect of a Fine Sanction by the specified deadline. Otherwise, these particular sanctions are primarily a potential risk just for Relevant Coal Producers.

The introduction of the Suspension Sanction and the Revocation Sanction has almost certainly been because, without some specific reference to these sanctions being applicable to non-compliance with the DM Obligation, it is unlikely that the Government would have been able to make good on the President's threat to revoke the mining business licenses of parties that did not comply with the January 2022 Temporary Export Ban or continued to violate their DM Obligation.

It is unquestionably the case that the availability of the Suspension Sanction and the Revocation Sanction greatly increases the **potential** cost/risk to Relevant Coal Producers of non-compliance with the DM Obligation. Given, however, the extremely strong and long-established political connections of most holders of CCoWs/Coal Continuation POIUPKs, it is hard for the writer to envisage a situation where the Revocation Sanction, in particular, would ever be actually imposed on any of these large coal producers. The much more likely outcome is always going to be that the Suspension Sanction and the Revocation Sanction will only be imposed on DM Obligation non-compliant, smaller Coal POIUP holders which lack sufficiently good political connections to ensure they receive the same "special treatment" that is usually enjoyed by holders of CCoWs/Coal Continuation POIUPKs. Nevertheless, the availability of the Suspension Sanction and the Revocation Sanction will, no doubt, still help to improve the Government's position in future discussions/negotiations with all Relevant Coal Producers, including holders of CCoWs/Coal Continuation POIUPKs, re the need to continue to support PLN/IPPs.

3.2 **Fine Sanctions and CFP Sanction**: The new/revised formulae, included in MoEMR Decree 13/2022, for calculating the payment amounts due in respect of the Fine Sanctions and the CFP Sanction are noticeably more sophisticated than the previous formulae in MoEMR Decree 139/2021. No doubt, this reflects the past practical problems encountered by DGoMC in applying the Fine Sanctions and the CFP Sanction; particularly, where the actual export selling price of coal could not be readily determined due to a lack of co-operation from DM Obligation non-compliant, Relevant Coal Producers or otherwise.

3.3 **Other Provisions of MoEMR Decree 13/2022**: MoEMR Decree 13/2022 evidences a clear intention on the part of the Government to "police" compliance with the DM Obligation much more strictly in the future. This is, unquestionably, for the purpose of trying to avoid a repeat of the coal stockpile crisis experienced by PLN/IPPs in December 2021. Requiring monthly reports of DM Obligation compliance, together with the submission of supporting documents evidencing that compliance, **should** (at least in theory) make it much easier for DGoMC to monitor fulfilment of Domestic Coal Needs on a regular basis and identify shortfalls in domestic coal supplies before the same become critical. In reality, however, the effectiveness or otherwise of the monthly reporting obligation depends very much on whether or not (i) the information in the monthly reports and the supporting documents is correct, (ii) the monthly reports are reviewed on a timely basis by DGoMC and (iii) in the event of any

evidence of non-compliance with the DM Obligation, DGoMC moves quickly to take decisive action against DM Obligation non-compliant Relevant Coal Producers.

4. Potential Constitutional Court Issues with MoEMR Decree 13/2022

4.1 **Overview of CC Decision 91/2021**: The 2021 decision of the Constitutional Court was that (a) the Job Creation Law is "conditionally unconstitutional" because of various procedural problems with its passage into law as identified by the Constitutional Court ("**CC Ruling 1**"), (b) the Government has two years in which to rectify the identified procedural problems with the Job Creation Law (failing which, those regulatory provisions that were previously revoked or otherwise amended by the Job Creation Law will be deemed to be valid once again) ("**CC Ruling 2**") and (c) the Government must (i) "suspend" any "strategic and broad-impact" policies/measures based on the Job Creation Law until such time as the identified procedural problems with the Job Creation Law have been overcome ("**CC Ruling 3**") and (ii) the Government must not issue any "new implementing regulations" in respect of the Job Creation Law until such time as the identified procedural problems with the Job Creation Law have been overcome ("**CC Ruling 4**") ("**CC Decision 91/2021**").

CC Decision 91/2021 does not, however, provide any elaboration of or guidance as to (i) whether "suspend", in CC Ruling 3, only refers to existing policies/measures or it also means that no additional policies/measures should be issued, (ii) what constitute "strategic and broad-impact" policies/measures as mentioned in CC Ruling 3 or (iii) whether or not the prohibition on issuing "new implementing regulations", as mentioned in CC Ruling 3, also includes decrees, circular letters and other instruments in respect of the Job Creation Law.

In assessing the impact of CC Ruling 3, it is important to note that, technically, decrees and circular letters are (i) **not** considered to be "Laws & Regulations" (which are supposed to set out general provisions that are applicable to the public at large) but, rather, (b) are considered to be "**State Administrative Decrees**" (which are supposed to be "individual, concrete/specific and final" in nature – meaning the same are issued to and meant to be applicable to certain specific parties only and relate to a specific matter only). The categorization of ministerial decrees (including MoEMR Decree 13/2022) as State Administrative Decrees limits the legal avenues for challenging the same. More specifically, State Administrative Decrees can only be challenged (i) by the affected parties (**i.e.**, the parties to which the relevant decree is addressed) and (b) by filing an appeal with the issuing authority in respect of the relevant State Administrative Decree and/or a legal claim with the State Administrative Court – each within a specific timeline.

4.2 **Why CC Decision 91/2021 may be Relevant to MoEMR Decree 13/2022**: Readers should be aware that the Job Creation Law is a so-called "omnibus law" that purports to make substantial changes to numerous laws in addition to the laws dealing with manpower and related issues, including the Mining Law. For this reason, and notwithstanding its somewhat misleading name, the status of the Job Creation Law and CC Decision 91/2021 are actually very relevant to the 2020 amendments to the Mining Law and any actions that the Ministry of Energy & Mineral Resources ("**ESDM**") or MoEMR takes in connection with those 2020 amendments to the

Mining Law as these amendments are included in the Job Creation Law.

MoEMR has issued at least two decrees subsequent to CC Decision 91/2021 being (i) MoEMR Decree No. 221 of 2021 re Guidelines for Transferring Mining Business Licenses and Transfer of Mining Business License Areas for Business Activities in the Mineral and Coal Mining Sector ("**MoEMR Decree 221/2021**") and (ii) MoEMR Decree 13/2022.

Each of MoEMR Decree 221/2021 and MoEMR 13/2022 expressly refers to the Job Creation Law as being one of the existing laws and regulations that it has been issued in reliance upon.

4.3 **Prospects for Legal Challenges to MoEMR Decree 13/2022**: Given the likely opposition to the Suspension Sanction and the Revocation Sanction in particular, as introduced by MoEMR Decree 13/2022, it is almost inevitable that there will be legal challenges to the validity of MoEMR Decree 13/2022.

CC Decision 91/2021 offers a seemingly promising basis for such legal challenges, although the ultimate outcome of any such challenges remains quite uncertain.

Parties challenging the validity of MoEMR Decree 13/2022 will surely argue that (i) the additional sanctions and the variation of previously existing sanctions for non-compliance with the DM Obligation, as introduced by MoEMR Decree 13/2022, amount to a "strategic and broad-impact" policy/measure based on the amendments to the Mining Law contained in the Job Creation Law and, therefore, MoEMR Decree 13/2022 contravenes CC Ruling 3 and (ii) MoEMR Decree 13/2022 amounts to a *de facto* "implementing regulation", which expression should be broadly interpreted as including all decrees, letters and other instruments issued in respect of the amendments to the Mining Law contained in the Job Creation Law and, therefore, MoEMR Decree 13/2022 contravenes CC Ruling 4.

The Government, however, may be expected to argue that (i) MoEMR Decree 13/2022 was not in existence at the time CC Decision 91/2021 was handed down and the word "suspend" in CC Ruling 3 indicates that this particular ruling only applies to existing policies/measures, (ii) a ministerial decree is not a "policy/measure" at all as referred to in CC Ruling 3 and (iii) the reference to "implementing regulations" in CC Ruling 4 should be strictly interpreted as only referring to government regulations or, at most, government regulations, presidential regulations and ministerial regulations but not to mere decrees, letters and other instruments regarded as being State Administrative Decrees issued in respect of those amendments to the Mining Law contained in the Job Creation Law. It is very likely that ESDM carefully and deliberately prepared MoEMR Decree 13/2022 (as well as MoEMR Decree 221/2021) as decrees rather than as regulations so as to (i) take advantage of the ambiguity in CC Ruling 4 as to just what the Constitutional Court meant by an "implementing regulation" in respect of the Job Creation Law and (ii) ensure that only the limited avenues for challenging State Administrative Decrees (as described in 4.1 above) can be used by disaffected parties.

More interestingly, the Government might be tempted to argue that CC Decision 91/2021 is not binding on the Government at all and, therefore, it is irrelevant what

CC Ruling 3 and CC Ruling 4 say or don't say. While readers might find this a very surprising argument, the writer is aware of a number of Government officials who seem to be actively promoting the idea that Constitutional Court decisions are no longer binding on the Government and, therefore, the Government has a high degree of discretion as to what, if any action, it takes in respect of a Constitutional Court decision that a particular law or regulation is unconstitutional. This surely incorrect and hugely dangerous idea may have its origins in (i) a mistaken understanding of the significance of a 2020 amendment to Article 59 of Law No. 24 of 2003 re the Constitutional Court ("**Constitutional Court Law**") ("**CC Article 59(2)**") and (ii) the failure to appreciate that the Constitutional Court Law ranks below the 1945 Constitution in Indonesia's hierarchy of laws, such that the Constitutional Court Law can never change anything in the 1945 Constitution.

The relevant 2020 amendment to the Constitutional Court Law **removed** CC Article 59(2) of the Constitutional Court Law, which previously read as follows:

> "*If any change to the reviewed Law is required, DPR or President shall **immediately** follow up the relevant Constitutional Court decision as referred to in paragraph (1) in accordance with the laws and regulations.*"

The removal of CC Article 59(2) may have contributed to the misconception that, because the House of Representatives ("**DPR**") or the President is no longer **expressly** required to "***immediately***" make changes to the reviewed law as per the relevant Constitutional Court decision, this means (by extension) that Constitutional Court decisions are not actually "binding" on the Government at all. As highlighted in the following paragraphs, however, it is quite clear that the 2020 amendment to the Constitutional Court Law does **not** and **cannot** in any way affect the final and binding nature of Constitutional Court decisions.

First, CC Article 59(2) only became part of the Constitutional Court Law in 2011 following the passage, by the DPR, of Law No. 8 of 2011 re Amendment of the Constitutional Court Law whereas the Constitutional Court Law itself dates back to 2003. The writer's staff have not been able to find evidence, prior to the 2011 amendments to the Constitutional Court Law, of any suggestion or view that the coming into force of the Constitutional Court Law, in 2003, cast doubt on the final and binding status of Constitutional Court decisions. Accordingly, a 2011 amendment to the Constitutional Court Law, which amendment was subsequently removed in 2020, could not possibly have changed the position.

Second, for more than 75 years it has been recognized that decisions of the Constitutional Court are, in fact, binding on the executive, the legislature and the judiciary as well as on the Indonesian people as a whole. This is something that is expressly acknowledged by the elucidation of Article 10(1) of the Constitutional Court Law ("**CC Article 10(1)**") which provides, **without any exceptions**, **qualifications or reservations**, that:

> "*Constitutional Court decisions are final, namely any Constitutional Court Decisions acquire immediately final and **binding** status upon being rendered and no legal remedy can be undertaken.*"

It is notable that the elucidation to CC Article 10(1) does **not** say "final and binding **except in the case of the Government**". The wording of CC Article 10(1) and its elucidation were **not** affected by either the 2011 amendments or the 2020 amendments to the Constitutional Court Law. The elucidation of CC Article 10(1), in fact, merely reflects the long established and accepted interpretation of Article 24C(1) of the 1945 Constitution.

Third and finally, Article 37 of the 1945 Constitution makes clear that it is only the People's Consultative Assembly ("**MPR**"), **not** the DPR, which can amend the 1945 Constitution. Accordingly and as the Constitutional Court Law, as well as its 2011 and 2020 amendments, were enacted/passed by the DPR, rather than by the MPR, it is **not** legally possible for the 2020 amendments to the Constitutional Court Law to have changed, in any way, Article 24C(1) of the 1945 Constitution as reflected and restated in CC Article 10(1) and its elucidation.

4.4 **Assessment and Evaluation**: Regardless of whether or not there is any legal challenge to MoEMR Decree 13/2022, the reference to the Job Creation Law in MoEMR Decree 13/2022 at the very least creates uncertainty as to the validity of MoEMR Decree 13/2022. This uncertainty may cause ESDM to be reluctant, in practice, to take any action in reliance upon MoEMR Decree 13/2022 until such time as this uncertainty is resolved. That, of course, may not be a bad thing at all as far as Relevant Coal Producers and holders of Coal S&T Permits are concerned!!!

SUMMARY & CONCLUSIONS

With the issuance of MoEMR Decree 13/2022, the Government has greatly increased the potential sanctions for Relevant Coal Producers and holders of Coal S&T Permits which do not comply with the DM Obligation. The new Revocation Sanction is a particularly serious threat to the business continuity of non-compliant Relevant Coal Producers and holders of Coal S&T Permits.

In so materially "upping the ante" for non-compliance with the DM Obligation, the Government has, however, also greatly increased the likelihood of interested parties actively looking for ways to have MoEMR Decree 13/2022 declared to be invalid. MoEMR Decree 13/2022's clearly stated reliance upon the Job Creation Law means that CC Decision 91/2021 is very relevant to the validity or otherwise of MoEMR Decree 13/2022 and provides a number of potential grounds for challenging that validity.

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