

# Newsletter

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## MINING CONCESSIONS UNDER THE NEW MINING LAW

### Introduction

Law No. 4 of 2009 on Mineral and Coal Mining (“**New Mining Law**”) was passed into law on 12 January 2009. The New Mining Law revokes Law No. 11 of 1967 on the Basic Provisions of Mining. All implementing regulations of the previous mining law remains valid provided that it does not contravene the provisions of the New Mining Law.

The New Mining Law requires the Government to issue implementing regulations in the form of Government Regulation within one year after the New Mining Law came into effect. To date, no implementing regulations have been passed and no drafts are currently available for public review.

We would like to discuss some of the policy changes on mining that is brought by this new law particularly in relation to the status of mining concessions issued prior to the enactment of the New Mining Law. In preparing this Client Alert we have reviewed the New Mining Law and consulted with the legal department of the Ministry of Energy and Mineral Resources (“**MEMR**”). Some provisions of the law remain unclear and it is hoped that all issues will be resolved by the implementing regulations to be issued by the Government.

### Classification of Mined Minerals

The Mining Law currently only provides a broad classification of minerals. In Article 34, mining activities is classified into mineral mining and coal mining. Mineral mining is further divided into 4 categories, namely radioactive, metal, non-metal, and stone minerals. Further

classification will be regulated in a Government Regulation which thus far has not been enacted. The classification of minerals pursuant to the New Mining Law will determine the type and length of the term of the IUP. There is currently a Government Regulation no. 27 of 1980 on the Classification of Mined Materials which classifies minerals as classes A, B, and C. Although this Government Regulation may still be considered valid, it is difficult to relate the classifications contained therein to the classification as stipulated under the New Mining Law. Therefore we may not be able to use it as reference and we will still have to wait until new Government Regulation regarding this matter is issued.

### Licensing

Based on the New Mining Law, the Government (central and local) no longer grants a ‘mining authorization’ (or Kuasa Pertambangan – “**KP**”), issues Regional Mining License (Surat Izin Penambangan Daerah – “**SIPD**”) for certain types of minerals, or enters into a contract of work (“**COW**”) with private parties to undertake the mining activities in a certain concession area. Instead, the Government shall now issue mining licenses (Izin Usaha Pertambangan - “**IUP**”) for all types of minerals.

The IUP itself is classified into certain categories, which type and length of term shall depend on the mining area and the mineral being mined. The procedure for obtaining an IUP also depends on the mineral to be mined. An IUP for metal mining and coal mining is offered by way of auction and granted to the auction winner. An IUP for non-metal mineral mining and stone mining may be obtained by applying for the same to the relevant licensor.

Please note that ‘licensor’ refers to the government official with the authority to issue

the IUP. According to Article 37 of the Mining Law, IUP is issued:

- by the Regent/Mayor, if the mining area lies within one regency/city;
- by the Governor based on the recommendations of the relevant Mayor/Regent, if the mining area lies within more than one regency or city which are part of one province.
- By the Minister of Energy and Mineral Resources based on the recommendations from the relevant Governor, if the mining area lies within more than one province.

Specific procedures on the auction process and the application for IUP shall be further regulated in a Government Regulation, which to date has not been enacted by the Government.

### Foreign Investment

Based on the New Mining Law, a foreign investor may establish a PMA company and apply for IUP or acquire an existing PMA company or local company which holds an IUP license. Please note that a local company which is acquired by a foreign party must be converted into a PMA company. Since the Mining Law does not provide a limit of foreign shareholding in a mining company, then foreign ownership in such PMA Company may theoretically be up to 100%.

Please note, however, that the above has not been tested and will be subject to the following:

- No IUP would be issued until implementing regulations of the Mining Law are enacted. The government has 1 year to prepare and enact such implementing regulations.
- Foreign investment is subject to BKPM approval. There is a possibility that BKPM has a different view in relation to foreign ownership in a mining company at the time we apply for its approval. It will not come as a surprise if BKPM does not give any approval until the matter relating to foreign ownership is clarified by Government Regulation or the MEMR.

### Adjustments To Existing Concessions

The Mining Law is quite clear in setting out the adjustments that need to be made for existing

COWs, but there is no provision on the policy on existing KPs or SIPDs

### 1COW

All COWs shall remain valid until its expiration date. The provisions of the COWs are to be amended so that they are consistent with the New Mining Law. The parties to the COWs have one year to make such amendment but the New Mining Law does not prescribe any punishment or sanction for failure to fulfill this requirement.

### 1KPs

The New Mining Law created some confusion since it does not mention the policy toward existing **KPs**. In an effort to address such concern, the MEMR issued Circular No. 03.#/31/DJB/2009 on Licensing for Mineral and Coal Mining Subsequent to the Enactment of the Government Regulations Pursuant to the New Mining Law dated 30 January 2009 ("**Circular**").

Based on the Circular, all existing KPs prior to the enactment of the New Mining Law shall remain valid until its expiration date, but must be converted into IUP by 12 January 2010. The Circular instructs licensors (governors, mayors and regents) to refrain from issuing any new IUP until the relevant Government Regulation is issued and declares all KPs issued after 12 January 2009 void.

Please note that the process to convert KP to IUP remains unclear. We have consulted with the MEMR and we note that there seems to be conflicting views within the MEMR as to the process. One view said that KP will be automatically changed into IUP and the other view said that KP holder may obtain IUP by first relinquishing their KP to the licensor, and then apply for or participate in an auction to obtain an IUP. If the latter is the case, then there is a risk of losing the concession as the IUP would be considered as a 'new' license (i.e. not a continuation of the KP that was originally granted to that party) which may be granted to any other party. We don't think there will be clarity on this issue until the government regulation is enacted.

## SIPD

The New Mining Law also does not have any provisions on SIPD, but there is a mention of SIPD in the Circular which says that all pending applications for SIPD which are submitted prior to the date of the New Mining Law shall be processed and be granted an IUP.

However, the policy toward existing SIPDs is still unclear as it is not addressed in the New Mining Law or the Circular. From our discussion with the MEMR, we have received verbal clarification that all existing SIPDs shall remain valid until the expiration date, but must be converted into IUP within 1 year after the enactment of the New Mining Law. The process of such conversion shall be provided in a Government Regulation.

## Mining Services

There is no obligation to use a mining services company and the IUP holders may do the mining services themselves. However, if the IUP holder appoints a party to conduct mining service, according to Article 124, then it must engage local and/or national mining services company which is not affiliated with the IUP holder.

It is not clear whether the term 'local company' pursuant to Article 124 also includes PMA company. The MEMR acknowledges that the article is not clear, but said that the intention of the article was to exclude PMA companies which provide mining service, and that this will be further addressed in a Government Regulation

Article 124 of the New Mining Law states that 'mining service business' includes:

- a) Consultancy, planning, implementation, and equipment testing for (i) general survey, (ii) exploration, (iii) feasibility study, (iv) mining construction, (v) transportation, (vi) environment, (vii) post-mining and reclamation, and/or (viii) work health and safety.
- b) Consultancy, planning, and equipment testing in (i) mine works and (ii) processing and refinery.

From the above, we note that the 'implementation of mine works' is excluded from the types of services that can be provided

by a third party mining service contractor. While there is no express prohibition for a mining service contractor to conduct mine works for an IUP-holder, the MEMR has clarified that the intention of Article 124 is to require IUP-holders to conduct its own mining activities, and that IUP-holders cannot appoint any third party to do the same. Since this is just verbal clarification, there is a possibility that the Government can change its mind on this issue which will be reflected in the Government Regulation. As such, we do not think there will be any clarity on this issue until the relevant Government Regulation is issued.

The MEMR has informed us that four Government Regulations are currently being prepared and the drafts will be published for review in April 2009. Since a lot of issues under the New Mining Law are still wide open, it is hoped that the Government Regulations can adequately address them. We will pay close attention how these issues develop and provide you with update.

### The Lawyer Mission

- a. The improvement s of the community awareness of the importance of Legal protections.
- b. Active involvement in increasing public awareness, e.g. articles, seminars
- c. Participation in public discussions with government authorities and private sector.
- d. The increase in motivation and dedication of legal practices/ lawyers in providing advise on legal the protection, both local and foreign.
- e. The provision of a quality legal service to society.

This publication is intended to provided a summary of the relevant issue covered or an overview of selected Indonesian laws and regulations. It does not to be comprehensive or to render legal opinion or particular advise. Clients should seek advice of qualified Indonesian legal practitioners with respect to the precise effect of the laws and regulations.