## INDONESIAN GOVERNMENT AMENDS FORESTRY LAW*

Previous AMPLA updates have highlighted the fact that Law 41 of 1999 regarding Forestry (Law 41/1999) banned open pit mining in "protected forests" in Indonesia. The law had retrospective application to many Contracts of Work that have been granted by the Indonesian Government. The definition of "protected forest" used in Law 41/1999 resulted in large areas of Indonesia, in many cases on which no significant forests existed, being closed to open pit mining.

On 11 March 2004 the Indonesian Government issued a Perpu (*Peraturan Pemerintah Pengganti Undang-Undang* or Government Regulation in lieu of Law) that could allow a number of mining companies impacted by Law 41/1999 to resume mining operations.

Under Indonesian law a Perpu is issued by the President when the Government considers that there is an emergency situation and it would take too long to address the matter through the legislative process. A Perpu will have the same power as a law in Indonesia unless the House of Representatives in a subsequent session disapprove the issuance of the Perpu.

Perpu No. 1 of 2004 (Perpu 1/2004) adds two new articles to Law 41/1999. One of the new articles of Perpu 1/2004 provides that all licenses or agreements in the mining sector that existed before Law 41/1999 became effective will remain effective until the relevant agreements or licenses expires. The other article of Perpu 1/2004 provides that the licenses or agreements to which the above article applies need to be stipulated by a Presidential Decree. Thus as a result of Perpu 1/2004 the prohibition on open pit mining in protected forests will not apply to a mining license or agreement that was issued in a protected forest area before Law 41/1999 became effective and in respect of which a Presidential Decree is promulgated.

Perpu 1/2004 is a significant development for a number of mining companies operating in Indonesia. It has been reported in the press that the following thirteen mining companies will be stipulated in a Presidential Decree to be promulgated and, as a result, will be able to resume mining activities in Indonesia: PT Freeport Indonesia, PT Karimun Granit, PT INCO Tbk, PT Indominco Mandiri, PT Antam Tbk (Halmahera, Buli Island), PT Natarang Mining (Lampung), PT Nusa Halmahera Minerals (Newcrest), PT Pelsart Tambang Pasir, Kalimantan, PT Weda Bay Nickel, PT GAG Nickel, PT Sorikmas Mining, PT Tabalong, and PT Antam Tbk (Bahubulu, South East Sulawesi).

## CONSTITUTIONAL VALIDITY OF FTAAs AND PHILIPPINE MINING LAW

### Background

The decision of the Supreme Court of the Republic of the Philippines (Court) in *La Bugal – B'laan Tribal Association, et al. v Secretary Ramos, et al*[1] promulgated by the Court on 27 January 2004 has significant implications for companies considering investing in mining and oil and gas projects in the Philippines.

The case dealt with a petition for mandamus and prohibition which was lodged before the Supreme Court in 1997 challenging the validity of the *Mining Act of the Republic of the Philippines,*

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1 Decision of the Supreme Court of the Republic of the Philippines, G.R. No. 127882, 27 January 2004.

*Republic Act* No. 7942 (Mining Act), its Implementing Rules and Regulations (IRR) and a Financial and Technical Assistance Agreement entered into between the Government of the Republic of the Philippines and WMC Philippines, Inc. (WMCP FTAA) pursuant to an Executive Order of the President of the Republic of the Philippines No. 279 of 1987, which was signed by the President prior to the Mining Act.

Under Philippine law, a decision of the Court does not come into operation until expiry of the time period for lodging a motion for reconsideration. At the time of writing, the applicable time period for lodging a motion for reconsideration has not yet expired. It is understood that a number of parties have filed motions for reconsideration. As the decision was a split one, with some strong dissenting judgements, and at least one justice abstaining, the review process may result in a different outcome.

The case dealt with a range of matters but of particular significance were the following findings:

**Scope of Philippines Constitution**

Section 2, Article XII of the Philippine Constitution provides as a general rule that the Republic of the Philippines may enter into agreements for the utilisation of natural resources with Filipinos and corporations that are at least 60% owned by Filipinos. As an exception to this general rule, the fourth paragraph of section 2 provides that the President of the Republic of the Philippines may enter into agreements with 100% foreign owned corporations involving either technical or financial assistance for the large scale exploration, development and utilisation of minerals, petroleum and other mineral oils (FTAAs).

The Court held that the exception discussed above must be read literally and strictly construed. On this basis, the Court concluded that a form of FTAA or a mining law that allowed anything more than financial and technical assistance or permitted the party to the FTAA to provide any form of management assistance would, in effect, convey beneficial ownership of the Philippines natural resources to a foreign owned corporation and would be in breach of the Constitution and invalid.

The Court considered that a form of FTAA which went beyond the restrictive scope of the exception would constitute a form of "service contract" which, in the Court's opinion, was intended to be abolished by the Constitutional Committee.

**WMCP FTAA**

The Court held that the WMCP FTAA was a service contract that granted the FTAA contractor beneficial ownership over natural resources that properly belong to the Republic of the Philippines and are intended for the benefit of its citizens. Thus the WMCP FTAA was held to be in breach of the Constitution and invalid.

**Mining Act and Implementing Rules and Regulations**

The Court held that those provisions of the Mining Act and IRR that were inconsistent with the Court's decision were invalid. On this basis, the Court listed a number of sections of the Mining Act that were invalid.

Interestingly, the sections that were declared invalid extended to those provisions of the Mining Act allowing 100% foreign owned Philippine companies to hold exploration permits and also mineral processing permits. The latter was an important provision for holders of permits under the other form of title permitted by the Mining Act known as a Mineral Production and Sharing Agreement (which can only be held by 60% Philippine owned companies) because it recognised

the requirement for significant capital investment by foreigners in mineral processing facilities and, as such, for them to have management control over, and greater returns from, those facilities.

**Broader Implications**

One of the main considerations of the Court's decision in finding that the FTAA provisions of the Mining Act and the WMCP FTAA are unconstitutional was the Court's view that while the Mining Act and the WMCP FTAA use the expression "financial and technical agreements" in accordance with the Constitution, the WMCP FTAA and those agreements proposed by the Mining Act are service contracts that grant beneficial ownership to foreign contractors and are therefore contrary to the Constitution.

Given the basis of the Court's decision, there is a perception that the oil and gas sector and the cement industry in the Philippines are likely to be greatly affected. The form of oil and gas service contract used in the Philippines may well be challenged in light of the rulings of the Court. In the case of cement companies, a number of foreign owned companies are believed to operate under mineral processing permits, the form of which was, as noted above, also held to be invalid. Invalidity of such agreements or permits, however, will not be automatic. Specific action against each granted agreement or permit is necessary.

**Conclusion**

In conclusion, if the Court's decision is implemented it will eliminate the possibility of foreign investors owning 100% of a mining project in the Philippines under an FTAA. It will also eliminate the possibility of exploration permits and mineral production processing permits being 100% foreign owned. However, as noted above, the decision is not yet effective and it is understood that a number of parties have filed motions for reconsideration. Should these motions for reconsideration fail and the decision become effective it will have significant impact on foreign investment in the Philippines.

# COMMONWEALTH

## THE MRET REVIEW – PROPOSED REFORMS TO THE RENEWABLE ENERGY LEGISLATION*

**Introduction**

The *Renewable Energy (Electricity) Act 2000* (the Act) has been meeting its objectives according to the recent Report by the Mandatory Renewable Energy Target (MRET) Panel.[1] However, the Panel's Report makes a variety of recommendations and suggested reforms to the MRET scheme. This article briefly outlines some of the key recommendations made by the Panel's Report that could result in significant reforms to Australia's renewable energy regime.

**Background**

The Panel has released its Report, entitled "Renewable Opportunities, A Review of the Operation of the *Renewable Energy (Electricity) Act 2000"*. This Report was commissioned pursuant to section 162 of the Act which required that an independent review of the operation of the Act and the MRET Scheme be undertaken two years after the commencement of the Act.

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1 The Report was tabled in the Commonwealth Parliament on 16 January 2004.