The Transboundary Haze Pollution Act 2014: Impact and Consequences

Scope of Coverage

The Transboundary Haze Pollution Act 2014 (the “Act”) was passed on 5 August 2014. Broadly, the Act imposes criminal and civil liability on entities directly and/or indirectly contributing to haze pollution in Singapore. Under section 2(2) of the Act, parties may be liable under both criminal and civil grounds when the haze level passes a threshold of Pollutant Standards Index (“PSI”) of 101 or higher, lasting for a continuous period of 24 hours or longer. This update briefly discusses the key provisions of the Act and its impacts and consequences.

Criminal Liability

An entity will be criminally liable if it does the following:

- It engages in conduct, or condones conduct by another entity, which causes or contributes to haze pollution in Singapore.
- It manages another entity which owns or occupies land overseas, if that other entity engages in conduct, or condones the conduct of another, which causes or contributes to haze pollution in Singapore.

In this regard, even foreign companies without any assets in Singapore may be liable under the Act.

According to the Parliamentary Debates, companies directly or indirectly engaged in industrial scale deforestation operations are most likely to be the target of criminal investigations and prosecutions. Financial institutions may also be liable for indirect links to haze pollution through potential lender liability concerns, and will thus have to apply stringent standards on loan approval or investments.

On investigative powers to enable identifying defaulters, the National Environmental Agency (“NEA”) has extensive powers under the Act, including entering any building in Singapore and seizing documents. It can also take preventive measures, including issuing a notice to require the entity to control the forest fire or deploy fire fighting personnel. The entity may be fined up to S$50,000 for each day of non-compliance. While this measure is laudable, the extent to which it is effective remains to be seen. This will ultimately turn on how much control the Singapore entity has over the conduct/operations in land overseas, where the fire originated.

If the entity is ultimately found criminally liable, it may be fined up to S$100,000 for each day that the PSI threshold is crossed, up to an aggregate fine of S$2 million.

Civil Liability

In its aim to combat haze pollution, it would appear there has been recognition that criminal sanctions would be insufficient. In an unusual move, the Act establishes a cause of action for a breach of statutory duty. The duties include:

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- Duty not to engage in conduct, or condone conduct by another entity or individual, which causes or contributes to any haze pollution in Singapore. The conduct covered under the duty applies both within and outside Singapore.

- Duty not to participate in management of another entity that owns or occupies land outside Singapore, if that other entity engages in conduct, or condones the conduct of another, which causes or contributes to haze pollution in Singapore.

A cause of action would be established where breach of the above statutory duty results in personal injury or disease, mental or physical incapacity, damage to property or economic loss, including loss of profits. There is no cap on the quantum of damages awarded under the civil claim. According to Parliamentary Debates, the exact amount awarded will be based on the extent of harm, loss or damage actually suffered by the plaintiff(s).

Notably, Singapore does not have class action suits. Instead, Minister for the Environment and Water Resources Vivian Balakrishnan opined that individual plaintiffs can opt for “representative action” to save cost, as any one or more persons can represent the other people who have the same interest in the proceedings. It may be pertinent to note that the Court of Appeal recently in Koh Chong Chiaw and others v Treasure Resort Pte Ltd [2013] SGCA 52 pronounced that “same interest” is not merely confined to identical interest but extends to shared interest. This particular case involved seven members of a club representing 202 other members in an action for misrepresentation and breach of contract by the club. Whilst this was not in the context of the Act, the Court’s broad and flexible manner in allowing representative actions may potentially enlarge the number of litigants who decide to sue under the Act.

Extraterritorial Application

The Act covers conduct occurring within and outside Singapore. This extra-territorial reach is crucial in tackling the transboundary nature of the problem. Many Singaporean, Malaysian and Indonesian companies in Singapore will undoubtedly have to re-examine their direct and indirect links to entities causing forest fires contributing to the haze pollution in Singapore lest they come within the Act’s purview.

Extra-territorial application still has its limits in practice as, for example, Singapore cannot compel officers who are in Indonesia to attend court proceedings in Singapore even after issuing a valid warrant. Foreign entities without sufficient connection to Singapore may ultimately choose not to fight the criminal prosecution, since they cannot recover costs and expenses that will be incurred in defending the prosecution. Nevertheless, as long as the companies have any business or officers in or linked to Singapore, they will inevitably be subject to the Act.

Comparatively, other transboundary pollution related agreements currently do not target individual companies and/or their officers but work on a state-to-state level. A regional agreement between states in this region does exist, namely the 2002 ASEAN Agreement on Transboundary Haze Pollution. However, this treaty has limited efficacy until Indonesia decides to ratify the treaty.

Presumptions to Establish Liability

For an entity to be found liable, there must be a causal nexus between the entity and the transboundary haze in Singapore. Due to the evidential difficulty of establishing a causal nexus, the Act provides for four legal presumptions as follows:

(a) where it is proved that there is haze pollution in Singapore at the same time as a forest fire on land situated outside Singapore, and the resulting smoke is proved to move in the direction of Singapore, it shall be presumed that any haze pollution in Singapore resulted from the fire in that land;

(b) where it is proved (or presumed) that haze pollution in Singapore involves smoke resulting from land outside Singapore, the entity which owns or occupies that land shall be presumed
to have engaged in conduct, or condoned conduct, that caused or contributed to that haze pollution in Singapore;

(c) where it is proved that an entity manages another entity which engaged in conduct, or condoned conduct of another entity, which caused or contributed to haze pollution in Singapore, the managing entity will itself be presumed to have engaged in conduct, or condoned conduct, that caused or contributed to that haze pollution in Singapore; and

(d) an entity is presumed to own or occupy land if it is shown on any of the stated maps under section 8(4).

Once the conditions for the presumptions are satisfied, it is for the accused/defendant to rebut the presumptions.

The definition of “owner” used in the presumptions is extremely broad, and includes any person who holds a valid lease, licence, permit, concession, etc., as well as those with an agreement or arrangement with another person who owns or operates the land.

Defences

An entity can raise defences against both criminal prosecutions and civil claims. For example, an entity will not be liable if the conduct causing or contributing to the haze in Singapore was by another person acting without its knowledge or consent, or without knowledge or consent of the entity it manages. However, this exception does not apply to an employee, agent, contractor, or anyone the entity had an agreement with to carry out farming or forestry operations.

Additionally, the entity can raise as a defence the fact that it took all measures that were reasonable at the time to prevent conduct amounting to a breach of the Act by another entity. The level of due diligence for the entity to have taken “all measures that were reasonable” is as yet undecided and remains to be seen. At this juncture, what is clear is that inserting a few clauses into a contract will definitely not be sufficient.

Conclusion

The Act signals a very strict stance taken by the Singapore government against perpetrators of the haze. Even though the legislature stated that a cautious approach will be taken in prosecution under the Act, this will be an impetus and opportunity for firms to evaluate their activities and supply chains and implement anti-air pollution measures.

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2014 AUGUST

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