

The Transboundary Haze Pollution Bill
2014 - A multi-layered legal
commentary

by

Prof Jeffrey Pinsler

* Jurisdiction

- Section 6(4)
 - A cause of action for any actionable conduct referred to in s 6(3) shall be actionable in Singapore
 - Whether or not actionable in foreign jurisdiction.
- Jurisdiction may be separately founded on Order 11 rule 1(1)(f)(ii):
 - the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore *caused by a tortious act or omission wherever occurring*

* Plaintiff(s)

- Any person can sue if conditions in s 6(1)-(3) are satisfied.
 - Actionable conduct [s 6(1),(2)]
 - Personal injury, disease, incapacity, death, damage to property, economic loss (incl. profits) [s 6(3)]
- Single plaintiff
- Several plaintiffs (joinder: Order 15 rule 4)
 - common question of law or fact + rights to relief arise from same transaction/transactions
- Class/representative action (Order 15 rule 12)
 - “numerous persons” have the “same interest”

* Notification of claim

- Part II: Liability for Transboundary Haze Pollution.
- Entity: s. 2
- Entity out of the jurisdiction
- Leave necessary to serve writ of summons out of jurisdiction.

* Notification of claim

- **Mode of service (Order 11 rule 4(2))**
 - (a) through the government of that country, where that government is willing to effect service;
 - (b) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country; or
 - (c) by a method of service authorised by the law of that country for service of any originating process issued by that country.
- **Service by Civil Procedure Convention**
 - Austria, Italy, Germany, PRC.

* Defendant

- Does not enter appearance: default judgment
- Enters appearance and litigates
- Enters appearance and contends that Singapore is not a convenient forum. Eg, that he can only rebut presumptions and prove defences on basis of evidence in Indonesia.
 - Eg, s 8(2): Entity presumed to engage in conduct or to have authorised conduct which caused or contributed to haze. To rebut presumption, Entity wishes to call witnesses who are unwilling to come to Singapore.

* Remedies

- Section 6(3): actionable conduct.
- No limitation on remedies.
 - Damages, loss of profits, injunction.
 - In case of death, estate claims.
 - Assessment of damages/loss of profits
- Enforcement
 - If no assets in Singapore, may be able to register judgment in foreign country if RECJA or REFJA applies.
 - If no reciprocal arrangements with foreign country, common law action would be necessary.
 - Pre-emptive interlocutory relief. Eg, Mareva.

* Acquiring evidence

- Normal discovery procedures would apply.
- Director-General (D-G) has extensive powers to obtain evidence in relation to an offence (ss 10 and 11)
 - May this information be used for purpose of civil proceedings?
 - If D-G unwilling to make information available, plaintiff may be able to obtain third party discovery from him.
- Witnesses who are unwilling to come to Singapore may be deposed abroad.

The Transboundary Haze Pollution Bill

Seminar – 14 March 2014, Law Faculty, NUS

- ▶ Singapore's National Laws on Air Pollution & Environmental Management

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Air Pollution Laws in S'pore

Industrial revolution

Public health issue

I. Common Law actions in Tort

- ▶ Nuisance
- ▶ Negligence
- ▶ Trespass
- ▶ Rule in Rylands v Fletcher

International efforts

- ▶ *Trail Smelter* case (US v Canada) transboundary pollution
- ▶ Arbitration 1928 – 1941 –
- ▶ Decision: a state is liable for polluting the air of its neighbour
- ▶ Compensation awarded to plaintiffs
- ▶ Polluter Pays principle
- ▶ Cooperation to prevent harm and reduce risk

1972 – Conference on the Human Environment, Stockholm
– Stockholm Declaration

1992 – Conference on the Environment & Development, Rio
– Rio Declaration

Conference on the Human Environment Stockholm, 1972

- ▶ **Stockholm Declaration**
- ▶ **Principle 21**
- ▶ States have, in accordance with the Charter of the United Nations and the principles of international law, the **sovereign right to exploit their own resources** pursuant to their own environmental policies, and the **responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.**
- ▶ **Principle 22**
- ▶ **States shall cooperate** to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

UN Conference on Environment & Development, Rio, 1992

Rio Declaration

- ▶ *Principle 2* – states have “**sovereign right to exploit their own resources** pursuant to their own environmental & developmental policies...” c/f Stockholm P. 21
- ▶ *Principle 11* – states should enact effective environmental law
- ▶ *Principle 13* – States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Rio Declaration 1992

- ▶ **Principle 15** – Precautionary principle to be applied
- ▶ **Principle 19** – States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Post-Stockholm : Singapore's new laws

- ▶ **1972 Clean Air Act** – focussed on emissions from industrial/trade premises; emission standards prescribed
- ▶ *Clean Air (Prohibition on the Use of Open Fires Order) 1973*
 - Prohibits open fires in industrial or trade premises unless used for fire fighting practice, or disposal of tail gases from industrial plants
- ▶ Act repealed in 1999 with passing of Environmental Pollution Control Act (EPCA), now renamed Environmental Protection & Management Act (EPMA)

Environmental Public Health Act (EPHA) 1987

Part IV – Public Nuisances

S. 44 – Nuisances can be dealt with summarily i.e. DG can serve a Nuisance Order (s. 45) on the person requiring abatement of the nuisance, execution of works or things to be done to prevent recurrence of the nuisance; may require that work be stopped meantime.

S 44 lists (a) to (n) what nuisances can be dealt with summarily

- ▶ “(d) any dust, effluvium, accumulation or deposit which is a nuisance or injurious or dangerous to health;
- ▶ (e) the issue of any fumes, vapours, gases, heat, radiation or smells in any premises which is a nuisance or injurious or dangerous to health...”
- ▶ Q – burning of garden wastes?

EPHA

- ▶ **Nuisance order**

- ▶ **45.—(1)** On receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the Director-General may, if satisfied of the existence of a nuisance, serve a nuisance order on the person by whose act, default or sufferance the nuisance arises or continues, or if the person cannot be found, on the owner or occupier of the premises on which the nuisance arises. [\[4/2002\]](#)
- ▶ (2) A nuisance order may —
- ▶ (a) require works to be executed or things to be done that are necessary to abate the nuisance;
- ▶ (b) require works to be executed or things to be done that are necessary to prevent the recurrence of the nuisance notwithstanding that the nuisance has for the time being been abated;
- ▶ (c) require the stoppage of any work either indefinitely or until such time as the steps which may be specified in the order have been taken to abate or prevent the recurrence of the nuisance; or
- ▶ (d) prohibit a dwelling-house from being used for human habitation.

Powers of the DG of Public Health

- ▶ Power to enter upon lands for purposes of Act
- ▶ **81.—(1)** The Director–General or any authorised officer may, for the purposes of this Act, enter between the hours of 6 a.m. and 6 p.m. into and upon any premises in order to make any survey, inspection or search or to execute any work authorised by this Act without being liable to any legal proceedings or molestation on account of such entry or of anything done in any part of those premises.[\[4/2002\]](#)
- ▶ (2) Must give at least 3 hours previous notice
- ▶ (3) DG or authorised officers may enter outside the said hours if urgent, by giving at least 6 hours previous notice to the owner or occupier of the premises thereof.

Environmental Protection and Management Act (EPMA) 1999

- ▶ Air pollution control here is confined to industrial premises and their emissions
- ▶ EPM (Air Impurities) Regulations 2001
 - prohibits emission of dark smoke & sets emission standards, listed in the Schedule
 - Schedule : standards of concentration of air impurities “in the conduct of any trade, industry or process or the operation of any fuel burning equipment or industrial plant”

Reversal of standard of proof – EPMA – Water pollution

- ▶ **S. 17 – Penalties for discharging toxic substances or hazardous substances into inland waters**
- ▶ (5) For the purposes of this section —(a) a person shall be deemed to have discharged a toxic substance or hazardous substance into any inland water if he places the substance or causes it to be placed in a position where it is liable to fall or descend or be washed or to percolate or be blown into the water;
- ▶ (b) the discharge of a toxic substance or hazardous substance shall be deemed to cause pollution of the environment if the substance has been discharged or placed in such a manner or in such quantity (whether by itself or with any other substance) as to subject persons or animals to a material risk of death, injury or impairment of health or as to threaten to pollute (whether on the surface or underground) any inland water;

S. 17, EPMA (contd)

- ▶ (c) the fact that the toxic substance or hazardous substance is placed in containers shall not of itself be taken to exclude any pollution of the environment which might be expected to be caused if the substance were not in containers; and
- ▶ (d) where the toxic substance or hazardous substance has been discharged from any premises into any inland water, it shall be presumed, until the contrary is proved, that the occupier of the premises, other than a principal contractor to which [section 35](#) applies, had discharged or caused or permitted to be discharged the toxic substance or hazardous substance in contravention of [subsection \(1\)](#).
- ▶ (6) No prosecution shall be instituted under this section without the written consent of the Public Prosecutor.

Liability of Officers of the Corporation

EPMA

- ▶ **Offences by bodies corporate, etc.**
- ▶ **71.—(1)** Where an offence under this Act committed by a body corporate is proved —
 - ▶ (a) to have been committed with the consent or connivance of an officer; or
 - ▶ (b) to be attributable to any act or default on his part,
- ▶ the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly. [[12/2011 wef 01/09/2011](#)]
- ▶ (2) Where the affairs of a body corporate are managed by its members, [subsection \(1\)](#) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- ▶ Ditto with partnerships, limited partnerships and unincorporated associations

Liability of Officers of the Corporation

Hazardous Waste (Control of Export, Import and Transit) Act

- ▶ **Offences by body corporate**
- ▶ **42.—(1)** Where an offence under this Act has been committed by a body corporate, any person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer thereof, or who was purporting to act in any such capacity, shall also be guilty of that offence and shall be liable to be proceeded against and punished accordingly unless he proves that —(a) the offence was committed without his knowledge, consent or connivance; and (b) he had exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Without limiting the generality of subsection (1), in determining whether a person has exercised all such diligence to prevent the commission of the offence under subsection (1), a court shall have regard to whether the person took any action directed towards ensuring the following (to the extent that the action is relevant to the contravention):

(a) that the body arranges regular professional assessments of the body's compliance with this Act;

(b) that the body implements any appropriate recommendations arising from such an assessment;

(c) that the body implements an effective system of hazardous or other waste management, where the system is consistent with the environmentally sound management of the waste;

(d) that the body has contingency procedures for dealing with an emergency involving hazardous or other waste, where the procedures are directed towards —

(i) reducing the risk of injury or damage to human beings or the environment; and

(ii) mitigating any such injury or damage;

(e) that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements of this Act, in so far as those requirements affect the employees, agents or contractors concerned.

Q – establishing ‘due diligence’

- ▶ Significance of ISO 14001 certification ?
- ▶ In the context of the haze:–
 - Certification under the **Forest Stewardship Council** (“the world's most respected forest certification scheme”)
 - (i) Forest management certification
 - (ii) Chain of custody certification
 - independent auditors, certificates valid for 5 years
 - special programs for smallholders

Directed at sustainable timber trade

Q how does it apply to oil palm plantations?

After the event?

Roundtable on Sustainable Palm Oil – established in 2004, based in Switzerland

- ▶ – members Code of Conduct 2006
- ▶ – 2007 RSPO certification scheme adopted
- ▶ RSPO Principles and Criteria for Sustainable Palm Oil Production (Including Indicators and Guidance; revised April 2013)
- ▶ All members “have a policy across all their operations that strictly prohibit open burning and have standard operating procedures to manage fire risks as per the requirement of the RSPO’s Principles & Criteria.”
- ▶ Producers are certified through strict verification of the production process, to the stringent RSPO P&C, by accredited certifying agencies and may be withdrawn at any time on infringement of the rules and standards.
- ▶ The certified sustainable palm oil (RSPO Oil) is traceable through the supply chain by certification of each facility along the supply chain that processes or uses the certified oil.

Transboundary Haze and the Pollution of Criminal Law



Prof Michael Hor

The Offences



- Primary offence of “entity”, fine \$300K, (c5(1))
 - Engages in conduct, or authorises or condones conduct, which causes or contributes to haze pollution in Singapore
 - And there is haze pollution at or about the time

- Secondary offence of “entity”, fine \$300K (c5(2))
 - Participates in management of “second entity” (c3)
 - Actually participates in management or operational affairs of other entity, (and/or?)
 - Exercises decision-making control to burn vegetation on land owned or occupied by other entity, or
 - Assumes or manifests responsibility for overall management of other entity’s day to day decision making to burn vegetation OR for overall or substantially all operational functions (as distinguished from financial or administrative functions) of other entity
 - Other entity engages in, authorises or condones offending conduct

- Enhanced fine (c5(3)):
 - failing to comply with DG’s request. Fine \$450 000.

- Officer, member, partner guilty, “punished accordingly” (c16)
 - Consent, connivance or neglect

- [Contrary signals: massive distortion of normal rules of evidence vs fine of \$300 to \$400K?

- Creative mens rea: authorise vs condone, consent vs connivance vs neglect]



The Defences

- A defence to primary offence if accused proves on a balance of probabilities (c7(1))
 - that haze was caused solely
 - by a grave natural disaster or phenomenon (*ie* of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight) (c2)
 - an act of war, OR
 - that the conduct which caused or contributed to haze
 - was that of a person other than the accused or an employee or agent of the accused, AND
 - Was not authorised or condoned by the accused

- A defence to “second entity” offence if accused proves on balance of probabilities that the conduct which caused or contributed to the haze (c7(2))
 - Similar defence, except that for “accused”, read “accused or the second entity”

- [Content of defence
 - Why so many words for what is essentially a due diligence defence?
 - Absolute/Strict Liability for act of employee or agent?

- Where is the burden of proof?
 - An “affirmative defence” where accused must prove on balance of probabilities, or defence which ipso facto engage an element of the prosecution’s case
 - *Eg* defence of accident to a charge of murder - defence to prove accident, or does reasonable of accident automatically cast doubt on essential element of offence]

The Presumptions

GUILTY⁴
UNTIL
PROVEN
INNOCENT

- Presumption of causation (c8(1))
 - Trigger: i) Continuous haze for 24 hours, ii) at or about the time, fire on any land outside Singapore, iii) based on satellite/meteorological information, smoke from that fire is moving in the direction of Singapore
 - Presumed that that fire/smoke is involved with haze pollution in Singapore
- Presumption of offending conduct (c8(2))
 - Trigger: i) entity owns or occupies land, and ii) proved or presumed that smoke from fire on the land is involved with haze in Singapore
 - Presumed that entity has engaged in conduct or authorised or condoned conduct which caused or contributed to haze
- Presumption of offending conduct in “second entity” offence (c8(3))
 - Trigger: i) participates in management of second entity, ii) proved or presumed that second entity has engaged in offending conduct
 - Presumed that first entity failed to ensure that second entity did not engage in offending conduct
- [Second entity presumption - failing to ensure that second entity did not engage in offending conduct - how rebutted in civil claim? No criminal equivalent?
- Why does shifting the burden of production not suffice?
- Evidential problems of extraterritoriality - why borne by the accused?]

Even More Presumptuous

- Presumption of cartological accuracy (c8(4))
 - Map issued by, inter alia, foreign power or Government showing who owns or occupies land
 - Presumed to be accurate
- Presumption of Director-General infallibility (c15)
 - Contents of any document prepared, issued or served by the Agency, DG or authorised officer under or for the purpose of the Act shall be presumed to be correct
- [Why casting a burden of production insufficient?]
- Eg contradictory maps, why accused to bear risk of non-persuasion?]



A Bad Precedent

- Engaging the criminal law
 - Really no other means?
- Half-hearted
 - Piddling fine
- Distorting the process
 - Haze of presumptions

