

Corporate Liability - The Paradigm Shift of Section 17A of the MACC Act

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Overview

In 2018, PricewaterhouseCoopers Malaysia released the report, Global Economic and Fraud Survey 2018: Malaysia Report, where the survey reveals that 41% of Malaysian companies reported experiencing economic crime in the last two years, a significant increase from 28% in 2016. This places Malaysia only at a slightly lower tier than the distressing global level of 49%. Another alarming statistic is that as much as US\$1 million of losses were reported by 22% of corporates who experienced fraud or economic crime between 2016-2018. Malaysia signed and ratified the United Nations Convention Against Corruption (“**UNCAC**”) to establish a provision for liability of legal persons in the domestic anti-corruption framework – as a consequence of which such requirements became legally binding on Malaysia. This, together with global headline-worthy events involving 1MDB corruption scandal, has prompted the amendment of the Malaysian Anti-Corruption Commission (MACC) Act to incorporate corporate liability for corruption offences (“**MACC Provisions**”). This amendment has since come into force on 1st June 2020.

Section 17A of the MACC Act – At a Glance

Offence	: If any person associated with a commercial organisation commits a corrupt act in order to obtain / retain business or advantage for the commercial organisation, the commercial organisation commits an offence.
Penalty	: A maximum fine of 10 times the sum of gratification involved, or RM1 million whichever is higher or a maximum jail term of 20 years, or both.
Defence Available	: The commercial organisation must demonstrate that it has “ adequate procedures ” in place to prevent such associated persons from carrying out the corrupt conduct.
Adequate Procedures^[1]	: <ol style="list-style-type: none">1. Top Level Commitment2. Risk Assessment3. Undertake Control Measures4. Systematic Review, Monitoring and Enforcement5. Training and Communication>
Date of Effect	: 1 st June 2020

Paradigm Shift in Corporate Governance

Section 17A of the MACC Act has imposed a giant leap in culpability as the previously unamended MACC Act only

focuses on the prosecution of the persons involved in the corrupt acts. Under this new provision, directors and senior management will be liable for the actions of **any person** in the commercial organisation if that person is involved in corrupt acts unless it can be shown and proven that the commercial organisation has successfully implemented “adequate procedures” to prevent such corrupt acts from occurring. This change exhibits a paradigm shift considering that previously in Malaysia, with the exception of a few legislations such as the Environmental Quality Act 1974 and the Employees Provident Fund Act 1991, senior executives cannot be held accountable for criminal acts committed by their employees or persons related to the corporation. This is a wake-up call to commercial organisations who have so far been indifferent and lackadaisical or who use third parties, agents and consultants as conduits to carry out these unsavoury actions. Any commercial organisation should have already by June 1 2020 put in place within its respective organisation adequate anti-bribery and corruption procedures and policies.

A Global Movement

There has been a global upward trend for drastic actions taken against the rampant corporate corruption and bribery. It is surprising to track how many established multinational companies had in recent years earned the limelight for all the wrong reasons.

- **Siemens AG**

In 2008, Siemens AG was penalised with a record US\$1.6 billion in fines in the US and Germany, for allegations that the firm was regularly utilising bribes and slush funds for the securing of public work contracts globally. Siemens had also paid bribes and kickbacks to foreign officials to secure government projects such as a mass transit work in Venezuela and a nationwide mobile network in Bangladesh.

- **Rolls Royce PLC**

In 2017, Rolls Royce PLC was found to have entered into various illegal transactions to secure contracts with the use of “middlemen” – by thwarting investigations into corruption by falsifying their accounts. Investigations led by UK’s Serious Fraud Office revealed that there was an extensive use of such “middlemen”, along with payments amounting to £38.25 million to secure contracts in multiple countries such as Indonesia and Thailand. Five of the twelve counts involved a corporate offence under Section 7 of the UK Bribery Act 2010, similar to Malaysia’s corporate liability provision, for failure to prevent corrupt acts by their employees. As a result, Rolls Royce entered into a £671 million settlement to avoid further prosecution.

- **Airbus SE**

More recently in January 2020, Airbus SE has entered into a settlement with the UK’s Serious Fraud Office to pay a record £3 billion in fines in penalties after admitting it had paid huge bribes to land contracts in 20 countries. The charges were made pursuant to the corporate liability provision under Section 7 of the UK Bribery Act 2010. The settlement between Airbus SE and the UK’s Serious Fraud Office also revealed that the saga which hit closer to home when Malaysia’s AirAsia Berhad and its executives – prompted the Securities Commission of Malaysia and the MACC to begin investigation and enquiries into the matter in February 2020. That being said, the new corporate liability provision are unlikely to be applied retrospectively but any future corrupt practice would be prosecuted under the new section 17A.

There has been a noticeable recent trend of serious efforts in Indonesia on its anti-corruption agenda

- **PT Garuda Indonesia**

In May 2020, The Jakarta Corruption Court sentenced the former president director of Garuda, Emirsyah Satar to

eight years in prison after finding him guilty of accepting bribes and laundering money related to procurement of planes and engines from Airbus and Rolls-Royce.

The traditional focus in Indonesia has been on the prosecution of individuals – not corporates but the Indonesian Corruption Eradication Commission (“KPK”) has recently been conducting investigations on a number of corporations for corruption offences.⁵

- **PT Nusa Konstruksi Enjiniring**

In 2019, the Jakarta Corruption Court publicly declared a listed company, PT Nusa Konstruksi Enjiniring (NKE) guilty in the corruption of a number of government construction projects. NKE is the first case in Indonesia where a corporation has been found guilty of corruption. The KPK had successfully implemented corporate criminal liability in this case and paved the way for subsequent indictments of corporations for corruption.

Case Study – Have I done enough?

In the UK, the Sweett Group PLC (“**Sweett**”) was the first company to be convicted under similar provisions of the UK Act. A subsidiary of Sweett was found to have made corrupt payments to secure a contract for the construction of the Rotana Hotel in Abu Dhabi. It is important to note that similar to the UK Act, the new MACC provisions also have an extra-territorial reach.

The UK’s Serious Fraud Office found that there were several risk factors that allowed the bribery to occur:

- relaxed corporate control and decentralised operations
- inadequate internal systems to deal with a global business with widespread operations
- lack of transparent process for procuring contracts
- red-flags identified in transactions that were not efficiently responded to
- inadequate audit trail of money flows
- personnel involved in procurement that were not properly monitored or managed for competence or integrity.

Some level of culpability may have been reduced if Sweett had undertaken some practical measures:

- appointing third-party independent consultants to provide an independent review of their anti-bribery and corruption policies
- establishing a dedicated governance team to oversee the Sweett Group’s governance procedures and ensure compliance with all relevant anti-corruption legislation
- continuous review and improvement of the said governance programme.

Key Takeaways

There are some practical pointers that Malaysian commercial organisations can take note of:

- Commercial organisations must establish and regularly review its anti-corruption compliance programme which should include clear policies that sufficiently addresses corruption risks.
- Employees and personnel that are acting on behalf of organisations must be trained/be made aware of the organisation’s anti-corruption and anti-bribery statement and code of conduct and of their relevant obligations and

procedures.

- The commercial organisation's stance should also be effectively communicated in public documents (i.e. tenders) and provide for contractual safeguards regarding unlawful activity or other bribery prevention measures of counterparties/employees.
- Where organisations have an extraterritorial reach, it is pertinent that such measures are effectively communicated and all personnel are trained in the implementation of the organisation's anti-corruption codes and policies.
- Commercial organisations are advised to also be pro-active in implementing appropriate financial and non-financial limits (i.e. in the authorisation of payments and/or due diligence on potential business partners).

Do not overlook the importance of record keeping

All commercial organizations ought to have already completed compliance work and put in place the appropriate anti-corruption policies and procedures to combat corruption before the implementation of section 17A MACC Act on 1st June 2020. Senior management would have heaved a sigh of relief, satisfied that all measures have been put in place and employees are all diligently carrying out their duties.

However, in litigation matters, the strength of one's case also depends on the evidence adduced to support the case. In such an instance, companies may find themselves exposed to liability if they are unable to support the defense of adequate procedure with evidence even in situations where they have taken all due measures to prevent corrupt practices within their organization. As such, it is vital that all measures, reviews, communications, trainings, audits, due diligence, corrective actions and improvements undertaken are documented and kept by the company to be made available when necessary.

In a recent UK case, a top executive of a company was indicted for corruption when its defense of adequate procedure failed as the defendant could not visibly demonstrate compliance. This same case also demonstrates that placing reliance on a general policy without adequate practical follow up will not suffice.

Organizations would do well to note that beyond establishing the right framework, it is essential for purposes of mounting an adequate defence that the organizations' anti bribery and corruption policy should be truly "lived" and embraced as a fundamental corporate culture.

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1. *Global Economic Crime and Fraud Survey 2018 (Malaysia Report)* by PwC Consulting Associates (M) Sdn. Bhd.
 2. *Global Economic Crime and Fraud Survey 2018 (Malaysia Report)* by PwC Consulting Associates (M) Sdn. Bhd.
 3. **Commercial Organisation includes companies incorporated under the Companies Act 2016, partnerships formed under the Partnership Act 1961, limited liability partnerships registered under the Limited Liability Partnership Act 2012.**
 4. **See Guideline on Adequate Procedures pursuant to Section 17A(5) MACC Act, as released by the Prime Minister's Department.**
 5. <https://www.thejakartapost.com/news/2017/03/01/kpk-eyes-3-firms-for-corporate-corruption.html>

Your Key Contacts



Salwah Abdul Shukor

Senior Partner, Kuala

Lumpur

D +603 2698 6255

salwah.shukor@zain.com.my