THE NEW SECTION 17A OF THE MACC ACT 2009 – NO LONGER ‘BUSINESS AS USUAL’ FOR COMMERCIAL ORGANISATIONS

The new Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (“Section 17A”) came into force on 1st June 2020, after a 2-year enforcement moratorium for commercial organisations to prepare themselves adequately.

The introduction of Section 17A marks a paradigm shift in Malaysia’s anti-corruption laws. It is intended to directly impose corporate liability on commercial organisations for corruption and dishonest commercial misconduct.

1. What does Section 17A say?

Section 17A(1) provides that a commercial organisation commits an offence if an associated person promises, gives or offers gratification to any person with an intent “to obtain or retain business for the commercial organisation” or “obtain or retain an advantage in the conduct of business for the commercial organisation”, either to benefit the person the gratification is being offered to, or another person.

2. What is considered a ‘commercial organisation’?

Section 17A(8) provides that “commercial organisation” includes the following:

(a) a company incorporated under the Companies Act 2016 and carries on a business in Malaysia or elsewhere;
(b) a company wherever incorporated and carries on a business or part of a business in Malaysia;
(c) a partnership registered under the Partnership Act 1961 and carries on a business in Malaysia or elsewhere;
(d) a partnership registered under the Limited Liability Partnerships Act 2012 and carries on a business in Malaysia or elsewhere; or
(e) a partnership wherever formed and carries on a business or part of a business in Malaysia.
3. Is this different from the existing anti-corruption laws in Malaysia?

Yes.

The key difference is that it provides for the direct prosecution of directors and members of senior management of a company for the corrupt activities of the organisation.

*Section 17A* has also reversed the burden of proof from the prosecution to the defence. Those accused of the offence are now presumed guilty of the offence unless they prove that adequate measures and/or due diligence had been performed to prevent the commission of the offence.

4. Who is an ‘associated person’?

For the offence to be proven, the gratification must be carried out by a "person associated" with the commercial organisation, namely, a director, partner or an employee of the commercial organisation, or a person who performs services for and on behalf of the commercial organisation, which will be decided based on relevant circumstances. [see *Section 17A(6)*]

5. What are ‘relevant circumstances’?

Regrettably, the Act does not define what these ‘relevant circumstances’ and there is a paucity in case law.

This raises a problem as potentially a wide range of individuals – from the director of a company to its clerical staff – may be at risk of breach of *Section 17A*. 
Thus, a commercial organisation will not only be liable for gratification by its director or partner, but also its employee (regardless of his/her status or functions within the commercial organisation). It could also be liable for gratification by its agents or distributors and possibly, joint-venture partners.

6. **Who else is liable?**

If the commercial organisation is found to have committed the offence, the following person(s), meaning the senior management of the commercial organisation, are also deemed to have committed the offence alongside the commercial organisation:

(a) a director, controller, officer or partner; or

(b) one who is concerned in the management of the commercial organisation’s affairs. [see *Section 17A(3)*]

As such, liability may arise inadvertently, for example, in the case of employees who are unsure of what consequences their actions may bring and do not clarify the same.

7. **Are all types of directors, controllers, officers or partners liable?**

Potentially.

A reading of *Section 17A(3)* does not appear to distinguish between the different types of directors (i.e. executive directors and non-executive directors).

Similarly, no such distinction is drawn between the different forms of partners in a commercial organisation, for example, active partners, junior partners, sleeping partners and nominal partners.

8. **Who is to benefit from the gratification for the offence to apply?**

An essential element of the new *Section 17A* offence is that the gratification must be for the benefit of the commercial organisation. Therefore, the benefit derived from the
corrupt act need not necessarily accrue to the associated person for Section 17A to apply.

9. **What is considered corruption?**

Corruption is the act of giving or receiving of any gratification or reward in the form of cash or in-kind of high value for performing a task in relation to his/her job description. For example, a contractor gives a gift in the form of an expensive watch to a Government official for awarding a project to the company belonging to the contractor.

Bribery does not only take shape in the form of cash – it can be in the form of gifts in-kind, discount offers, votes, services (including personal services), job position/placement, loan and many other forms of payment for payments and purchases. A gift may comprise of cash money, free fares, shares, lottery tickets, travelling facilities, entertainment expenses, services, club membership, any form of commission, hampers, jewellery, decorative items and any item of high value that is given.

10. **What are the consequences of non-compliance?**

The consequences of non-compliance are:

(a) A fine of not less than ten times the sum or value of the gratification or RM1 million, whichever is higher; or

(b) imprisonment for a term not exceeding 20 years; or

(c) both (a fine and imprisonment).

The financial penalty for this new corporate liability offence is much higher than the existing financial penalty for a bribery offence, which is only a fine of not less than five times the value of the gratification or RM10,000, whichever is higher.
11. **Are there any defences available?**

Yes.

There are limited defences available under statute for commercial organisations and the senior management, which will have to be proven to avoid being held liable for corrupt misconduct.

For commercial organisations, a valid defence may be that stipulated under *Section 17A(4)* which provides that if there were “adequate procedures” put in place designed to prevent persons associated with the organisation from undertaking such corrupt conduct.

As for the senior management, under *Section 17A(3)*, they must show that the offence was committed without consent or connivance; and that due diligence was exercised to prevent the commission of the offence, with regard to the nature of their function and circumstances.

12. **What are ‘adequate procedures’?**

There is no express definition found within the ambit of the statute. However, in December 2018, the MACC published Guidelines on Adequate Procedures (“the Guidelines”) based on the TRUST principles pursuant to *Section 17A(5)*.

These are merely principles and are to be incorporated by commercial organisations by taking into account the specific scale, nature, industry, risk and complexity of the organisation.

(a) **Top-Level Commitment**
to ensure the highest level of professional ethics and integrity is practiced within the commercial organisation

- to implement and ensure full legal and regulatory compliance
- to establish, maintain and periodically review an anti-corruption compliance program

(b) **Risk Assessment**

- an appropriate system to be established to mitigate specific corruption risks and/or potential corruption risks that the commercial organisation may be exposed to
- it is recommended that a comprehensive risk assessment is done every 3 years with intermittent assessments conducted when necessary

(c) **Undertake Control Measures**

- appropriate controls and contingency measures that are reasonable to the size and nature of the organisation to be implemented to address corruption risks
- the measures should include due diligence procedures and a secure reporting channels (for confidential whistleblowing and reporting of corruption)

(d) **Systematic Review, Monitoring and Enforcement**

- regular reviews to be conducted to assess performance, efficiency and effectiveness of the anti-corruption programme, and management to ensure active enforcement
- internal and external audits are to be conducted, and used as a basis of improvement for existing anti-corruption controls

(e) **Training and Communication**
• to develop and disseminate internal and external training and communication relevant to its anti-corruption management system – its operation, covering policy, training, reporting channel and consequences of non-compliance

13. **What if a commercial organisation does not have ‘adequate procedures’ in place?**

Under *Section 17A*, a failure to implement adequate procedures will not in itself constitute an offence. However, it will mean that in the event a commercial organisation is found liable for corruption, it will not have an adequate defence for the offence.

As *Section 17A* carries a presumption of liability and the burden to disprove the presumption is on the commercial organisation, it is recommended that commercial organisations implement adequate procedures which fit the size and nature of their entities, so as to provide a possible defence if necessary.

14. **What if an associated person is found receiving or accepting gratification?**

A reading of *Section 17A* does not seem to indicate that receiving gratification would also result in liability on the commercial organisation and its senior management (it seems to only address the giving or offering of gratification).

15. **Aside from implementing the adequate procedures, are there other measures or steps that commercial organisations should take?**

Yes.

A. **Bursa Malaysia’s amendments to its Main and ACE Market Listing Requirements**

In December 2019, Bursa Malaysia announced Anti-Corruption Amendments which require listed issuers to establish and implement policies and procedures
to prevent corrupt practices. This is to thereby provide commercial organisations with a measure of assurance and a defence against corporate liability for corruption, in line with Section 17A.

The Anti-Corruption Amendments include the following:

(a) Requiring a listed issuer and its board of directors to ensure that:

(i) the policies and procedures on anti-corruption and whistle-blowing are established and maintained for the listed issuer and its subsidiaries (“group”);

(ii) such policies and procedures are reviewed periodically to assess their effectiveness, and in any event, at least once every 3 years; and

(iii) corruption risk is included in the annual risk assessment of the group;

(b) Requiring a listed issuer to publish anti-corruption policy as well as whistle-blowing policy and procedures on its website.

B. Amendments to the Licensing Handbook for Licensed Intermediaries and Registered Persons by Securities Commission Malaysia

Following suit with the amendments and obligations to commercial organisations brought by Section 17A, the Licensing Handbook has been amended to provide that licensed intermediaries and registered persons are now expected to have policies and procedures on anti-corruption and whistleblowing in place.

16. Are there similar provisions in other jurisdictions?

The new Section 17A is modelled after the United Kingdom’s Section 7 Bribery Act 2010. Under the UK’s Bribery Act, organisations may be strictly liable for failing to prevent bribery. However, the UK statute provides for two distinctive and separate
statutory offences. First, for the failure of commercial organisations to prevent bribery and second, the personal criminal liability of senior personnel.

This is distinct from the legislative scheme in Malaysia. **Section 17A** has a further reach and fuses both the offences by creating the presumption of guilt on the commercial organisation and its senior management.

**Skansen Interiors Limited** provides an illustration of the application of the UK’s **Bribery Act** and the defence of adequate procedures. In the case, a corporation relied on its relatively small business and limited geographical reach to argue that it did not need sophisticated procedures in place to comply with the statute.

However, the defence was rejected and liability was found against the company. **Skansen Interiors Limited** makes clear that businesses must take practical steps if they are to successfully argue compliance with the **Bribery Act**, including:

a) a person within the senior management of the organisation to be responsible for compliance matters;

b) make certain that all staff are aware and trained on the workings and implementation of the anti-corruption policy;

c) establishing reliable and secure reporting lines that ensure staff feel comfortable and safe to report concerns;

d) keep up with the latest legal developments; and

e) maintain a clear and updated record of actions taken to comply with the anti-corruption policy. In the event of a challenge, proof of steps taken will be essential to establish that the measures taken were adequate.

In Singapore, companies face general criminal liability under the Singaporean Penal Code and other statutes. Unlike Malaysia, Singapore does not have a specific provision covering corporate liability for corruption. This is because the definition of a “person” under both the **Penal Code** and **Interpretation Act 1965** includes “any company or
association or body of persons, whether incorporated or not”. This definition is applied to criminal offences in the **Penal Code** and in other statutes, such as bribery and corruption under the **Prevention of Corruption Act 1960**.

**References**

1. Section 17A MACC Act 2009
2. Malaysian Anti-Corruption Commission (MACC) website [here](#)
3. Prime Minister’s Department’s Guidelines On Adequate Procedures [here](#)
5. Transparency International UK [here](#)
6. Corporate Crime (A Global Perspective) by Freshfields Bruckhaus Deringer LLP [here](#)
7. Corporate Criminal Liability (Perspectives from the US, UK and France) by Bryan Cave Leighton Paisner LLP [here](#)
8. Insight into *R v Skansen Interiors Limited [2018] Southwark Crown Court unreported (Case Number: T20170224)* by Brodies LLP [here](#)
9. Bursa Malaysia Berhad’s announcement on Amendments to the Main and Ace Market Listing Requirements to Anti-Corruption Measures [here](#)
10. Bursa Malaysia Berhad’s announcement on Summary of Amendments to the Licensing Handbook [here](#)