

## LEGAL UPDATES

November 2021

### Corrupt Practices: Your Employees and Representatives' Liability Are Also YOUR Corporate Liability

All organizations established in Malaysia, or conducting or planning to conduct business in Malaysia, should be aware of Section 17A of the Malaysian Anti-Corruption Commission (“**MACC**”) Act 2009 (“**MACCA**”). Section 17A of the MACCA has been in force since June 2020, and the risks and penalties arising from the Section are significant, and organisations must therefore look to managing and mitigating their potential exposure through proper implementation of adequate procedures and controls.

#### Overview of Section 17A

Briefly, Section 17A states that a “commercial organization”<sup>1</sup> (“**CO**”) will be deemed to have committed an offence if:

- (a) a “person associated”<sup>2</sup> corruptly gives, agrees to give, promises or offers to any person any gratification<sup>3</sup> whether for the benefit of that person or another person (“**misconduct**”); and
- (b) such misconduct was with the intent to obtain business or an advantage for the CO.

In short, your CO is at risk of corruption charges for the misconduct of your employees and representatives, if such misconduct is for the CO's benefit.

This offence carries a very severe penalty — a fine at least 10 times the sum of the gratification or RM 1 million (whichever is higher), or imprisonment for a term not exceeding 20 years, or both.

But that is not all. Where such offence is committed by the CO, its senior management (specifically, the directors, controllers, officers, partners, and any other person concerned in the management of the CO's affairs) at the time of the commission of the offence will also be deemed to have committed that offence and subjected to the same penalties, if convicted.

Considering the penalties, it is crucial to understand how the CO and senior management can mitigate the risks and defend themselves in such an event.

#### Mitigating the risks faced by the CO

Section 17A provides that the implementation of “**adequate procedures**” by a CO to prevent persons associated from undertaking misconduct, would constitute a defence for the CO against a corporate liability charge.

<sup>1</sup> Defined in the MACCA as (a) any company incorporated under the Companies Act 2016 of Malaysia and carries on 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 established under the Partnership Act 1961 or Limited Liability Partnerships Act 2012 of Malaysia; or (d) a partnership wherever formed carrying on a business in Malaysia.

<sup>2</sup> Defined in the MACCA as a director, partner or an employee of the CO, or a person who performs services for or on behalf of the CO.

<sup>3</sup> Defined in the MACCA as, amongst others, any money, property, financial benefit and similar advantages; any office, employment, agreement to render services; discharge of any obligation or liability; any valuable consideration of any kind; any forbearance to demand money or valuable thing; service of any description in favour of another person; any offers of gratification; and others.

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In connection with that, Malaysia's Governance, Integrity and Anti-Corruption Centre ("GIACC"), had published the Guidelines on Adequate Procedures ("GAP") in December 2018. The GAP seeks to assist COs in understanding what procedures are required in order to adequately prevent the occurrence of corrupt practices.

The GAP advocates the "TRUST" principles, which are five principles recommended as reference points for any anti-corruption policies, procedures, and controls that a CO may choose to implement. As an overview, the TRUST principles are:

(a) **T – Top Level Management Commitment**

The top-level management of the CO assumes primary responsibility for the culture and direction of the CO. It must, amongst others, ensure that the CO implements a zero-tolerance policy with regards to corruption, and practices the highest levels of integrity and ethics, to comply with applicable laws and regulatory requirements, and effectively manages the risks of the CO. This includes being directly involved in ensuring proper personnel are in place and tasked with the responsibility of overseeing the anti-corruption compliance of the CO.

(b) **R – Risk Assessment**

The CO must periodically perform proper risk assessment exercises, based on established processes, systems, controls, and other anti-corruption efforts. This is especially so where there is a change in the law or circumstances of the business that will necessitate a re-assessment of the risks faced by the CO.

(c) **U – Undertake Control Measures**

The CO must put in place the appropriate control and contingency measures which are reasonable and proportionate to the CO's size and nature in order to address corruption risks arising from the weaknesses in the CO's governance framework, processes and procedures. This would include conducting due diligence on relevant parties or personnel, which would include board members, employees, agents, vendors, contractors and suppliers prior to entering into a formalised relationship. The CO should also establish reporting (or whistleblowing) channels for internal or external parties to raise concerns about suspected corrupt incidents involving the CO. Further, the CO should also publish policies and procedures regarding anti-corruption, conflicts of interest, and other issues, for the use of its employees and representatives.

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

The top-level management of the CO must ensure regular reviews are conducted to assess the effectiveness and efficiency of the CO's anti-corruption framework, monitor the performance and compliance of its personnel with such framework, and ensure that the framework is being enforced through disciplinary proceedings against personnel found to be non-compliant.

(e) **T – Training and Communication**

The CO should develop and disseminate information about its anti-corruption policy, trainings, reporting channel, and the consequences of non-compliance to its employees and representatives. The CO's anti-

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corruption policy should be made publicly available and appropriately communicated to all relevant personnel and business associates.

COs are advised to study the TRUST principles and where necessary, obtain assistance from relevant 3<sup>rd</sup> parties, in order to develop or improve their anti-corruption framework so as to discourage and prevent misconduct.

### **Mitigating the risks faced by the senior management**

In order for senior management<sup>4</sup> to be able to raise a defence against a corporate liability charge, they must prove:

- (a) that the misconduct was committed without their consent or connivance; and
- (b) that due diligence or control measures, having regard to the nature of the senior management's function and capacity, as well as the circumstances of the misconduct, had been exercised to prevent the misconduct.

The CO and senior management should therefore look carefully at any existing procedures and processes to consider whether it will be in a position to avail itself of a defence in the event of the occurrence of a corrupt incident.

### **Recent applications of the Section**

In force since 1 June 2020, the MACCA had recently brought its first action against an offshore vessel support company, where the company and its former director were charged with bribery. The act of bribery was allegedly committed to secure a subcontract from a major company in the oil and gas industry. The company and the former director have claimed trial to the charge, and all eyes will be on the judicial findings of the case as it unfolds.

It is clear that the MACC is stepping up its efforts to fight corruption, and we expect it to be a precursor to other like cases in the future.

If your organization has already put certain processes or procedures in place to deal with corruption, it may be useful to review those processes or procedures to ensure that it is up-to-date and compliant with Section 17A of the MACCA. If however your organization has yet to put in place processes and procedures to deal with corruption, it would be prudent to consider implementing a system accordingly.

We would be pleased to speak on any of the above in more detail, should you have any queries.

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<sup>4</sup> *i.e. directors, controllers, officers, partners, and any other person concerned in the management of the CO's affairs.*