

# Malaysia sticks to its guns on corrupt corporations and senior personnel

Legal update | July 2020



On 1 June 2020, Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) entered into force. This Section 17A had been inserted into the MACC Act by way of a statutory amendment in May 2018, but did not come into legal force until 1 June 2020.

## Corporate liability for corruption – a new era

As discussed in a [previous article](#), Section 17A establishes a new corporate liability offence for corruption in Malaysia, under which commercial organisations can be found criminally liable for bribery. Section 17A(1) provides that if an associated person gives or offers to give gratification to another person in order to obtain or retain business or an advantage for a commercial organisation, that commercial organisation is liable for an offence.

## Deemed parallel senior personnel liability, unless proven otherwise

What has made Section 17A quite controversial is the deeming provision found at Section 17A(3). If a commercial organisation is found liable under Section 17A(1), Section 17A(3) deems any director, controller, officer, partner or manager of that commercial organisation to also be personally liable for the same offence, unless the relevant individual can prove that the offence was committed without his or her consent, and that he or she had exercised the requisite due diligence to prevent the commission of the offence.

Section 17A(3) has therefore effectively reversed the burden of proof – by deeming senior personnel to be criminally liable unless the accused person can disprove his or her liability. Such a presumption of guilt places an onerous burden on directors and senior management to personally keep track of steps taken and decisions made (or otherwise) on an individual basis so as to subsequently show, if necessary, that any corporate misconduct should not be attributable to the director or senior manager concerned.

## Previous uncertainty regarding timeline for implementation of Section 17A

In the time between the tabling of the bill introducing Section 17A until its entry into force on 1 June 2020, the Federal Government of Malaysia has undergone regime change – twice. This Section 17A was tabled in Parliament by the *Barisan Nasional* administration under then Prime Minister Najib Razak; affirmed by the *Pakatan Harapan* administration under two-time Prime Minister Mahathir Mohamad; and brought into force under the *Perikatan Nasional* administration under present Prime Minister Muhyiddin Yassin (which has been in power since 1 March 2020). Notably, all three administrations had expressly identified anti-corruption initiatives as an important area of focus for their respective administrations.

Remarkably, Malaysia also saw four different Chief Commissioners of the Malaysian Anti-Corruption Commission (MACC) assume the position during the period of time between the tabling of the bill inserting Section 17A into the MACC Act and Section 17A's entry into force on 1 June 2020.

The aforementioned leadership changes in government and within the MACC naturally cast some doubt within the business and compliance community as to whether Section 17A would enter into force on 1 June 2020, as had been announced by then Prime Minister Mahathir Mohamad, in December 2018.

Concerns over entry into force of the new provisions were exacerbated by the crisis brought about by COVID-19, which had caused the Malaysian government to enforce strict Movement Control Orders (MCO) to reduce the transmission rate of the virus within Malaysia. The MCO and fear among the public concerning COVID-19, coupled with a steep fall in oil prices in the first half of 2020, has led to difficult times for Malaysian businesses across most, if not all, sectors. These circumstances led to certain business groups calling on the government to defer implementing Section 17A (with others insisting that the previously announced date should be maintained). As recently as on 5 May 2020, it was reported that the MACC was studying a proposal to suspend the implementation of Section 17A.

On 21 May 2020, the Prime Minister’s Office announced that, having considered the circumstances and the views of all parties, the date of 1 June 2020 for the entry into force of Section 17A would be maintained.

## Ignorance is no longer an excuse

The entry into force of Section 17A marks a watershed moment in the anti-corruption landscape in Malaysia. This is not only because corporate entities may now be found liable for the offence of corruption under a different test, but also that senior personnel of commercial organisations can no longer escape responsibility for corruption done for the benefit of their respective commercial organisations by suggesting that he or she did not know about such corrupt conduct. It is simply no longer an excuse.

## The “chain of command” is now a two-way street

The entry into force of Section 17A has also dramatically changed the dynamic between the leadership or senior personnel of a commercial organisation on one hand, and the commercial organisation’s “associated persons”, including employees, contractors, agents, distributors and service providers (a majority of whom would typically be considered to be subordinates, whether within or outside the organisation), on the other.

Where the usual case is that the decisions of senior personnel in a commercial organisation would give rise to consequences for the individuals in “subordinate” positions, the reverse applies under Section 17A. This is because, in this instance, a decision by an employee, contractor, agent, distributor or service provider to give or offer a bribe to another person for the benefit of the commercial organisation may give rise to severe consequences for the senior personnel of the commercial organisation.

## Adequate procedures provide a defence against liability

The change that Section 17A has made to general principles of corporate liability serves to underscore the need for businesses to take active steps to prevent any associated person in a position to corruptly give or offer gratification to another person for the benefit of the business, from doing so. Section 17A(4) affirms that, if a commercial organisation can prove that it had undertaken adequate procedures to

prevent such corrupt acts, then it will have a defence against the corporate liability offence under Section 17A.

As to what would be considered as “adequate procedures” – the Malaysian Prime Minister’s Department issued the Guidelines on Adequate Procedures (Guidelines) on 4 December 2018. These Guidelines set out the pillars of an acceptable framework of anti-corruption policies and procedures by reference to the acronym, “T.R.U.S.T.”

<b>T</b> op level commitment	Clear and express assurances from top management that the commercial organisation takes its obligation to comply with anti-corruption laws and to operate with integrity and ethics, seriously
<b>R</b> isk assessment	Risk assessments are carried out periodically* and according to circumstances in order to identify and evaluate corruption risks
<b>U</b> ndertake control measures	Appropriate controls and measures are in place to address the corruption risks of the commercial organisation
<b>S</b> ystematic review, monitoring & enforcement	Regular reviews to monitor and ensure effective implementation and enforcement of the commercial organisation’s anti-corruption programme
<b>T</b> raining and communication	The commercial organisation’s anti-corruption policies and procedures should be effectively communicated, both internally and externally

\* *The Guidelines recommend that a comprehensive risk assessment be undertaken every three years in addition to intermittent assessments when necessary,*

## Increased caution warranted during COVID-19 crisis

Section 17A of the MACC Act enters into force during a time of unprecedented economic uncertainty and hardship. Just as a rising tide lifts all boats, the difficult financial environment resulting from the COVID-19 crisis affects both the upright as well as the corrupt.

For those who may be used to committing corruption in order to sustain their lifestyles, such challenging circumstances may occasion greater risk-taking behaviour, as they become increasingly desperate seeing fewer opportunities to enrich themselves through corruption. With Section 17A now in force, this situation also gives rise to greater risks of criminal liability for commercial organisations and for their senior personnel.

Like the bell that is rung at the *Dewan Rakyat* to signal the start of parliamentary proceedings, the entry into force of Section 17A on 1 June 2020 provides a final alarm to directors and senior management of companies with business operations in Malaysia to carefully evaluate if the anti-corruption policies and procedures presently in place are adequate, in both design and implementation, to provide the company with a defence against the new corporate liability offence contained in Section 17A. Other than allowing the commercial organisation to employ the statutory “adequate procedures” defence, such efforts may also be considered as steps taken by the directors and senior management to prevent the commission of bribery by the organisation’s associated persons. The time for pressing the “snooze” button is over.

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