

Client Alert

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Latest on Corporate Liability for Failure to Prevent Corruption

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As highlighted in our earlier client alerts in [April](#) and [October 2018](#), the Malaysian Anti-Corruption Commission (Amendment) Bill 2018 was passed, which would amend our current Malaysian Anti-Corruption Act (MACCA) 2009. One of the key amendments is the insertion of S.17A into the MACCA 2009, which generally imposes a new corporate liability on commercial organisations for their failure to prevent corruption.

When will it take effect?

Our Prime Minister Tun Dr Mahathir Mohamad recently announced that the corporate liability provisions are **expected to take effect early 2020 or latest by 1 June 2020**. Hence, all commercial organisations in Malaysia would have approximately one year to comply with this new regime of corporate liability in relation to corruption.

What is the offence under S.17A?

S.17A imposes a criminal liability on the commercial organisation if a person associated to it corruptly gives any gratification with the intent to obtain or retain business or an advantage for the commercial organisation.

What is the scope?

A "person associated to the commercial organisation" includes directors and employees, and could extend to third party service providers as well.

A "commercial organisation", on the other hand, generally refers to any company or partnership that is either (i) incorporated in Malaysia or (ii) carries on business or part of its business in Malaysia.

Who bears liability?

Where the offence under S.17A is made out, the commercial organisation faces a **strict criminal liability**. This means that the commercial organisation would be held liable regardless of whether it has actual knowledge of the corrupt act of its associated persons.

Additionally, the senior personnel of the commercial organisation, which includes its directors or any person who is concerned in the management of the affair, is presumed guilty of the same offence unless proven otherwise. Hence, individuals in **top level management also face personal liability** under this section.



What is the penalty?

Where found guilty, S.17A imposes a heavy penalty of (i) **a fine not less than 10 times the value of the bribe or MYR 1 million, whichever is higher**, (ii) **imprisonment of term not exceeding 20 years**, or (iii) **a combination of both**.

As a point of reference, the US Foreign Corrupt Practices Act (FCPA) have imposed a fine of as high as USD 3.5 billion in global penalties for corporate liability for corruption, although it was subsequently reduced due to the company's inability to pay. Similarly in the UK, penalties as high as approximately GBP 500 million have been imposed for corporate liability in relation to corruption.

What is the defense available?

The sole defense available for a S.17A offence is that commercial organisation must prove there are in place adequate procedures designed to prevent persons associated with the commercial organisation from committing the corrupt acts.

The Prime Minister's Department has [recently published a set of Guidelines](#) to provide guidance on the adequate procedures to be put in place to assist commercial organisations to prepare for this new regime.

The Guidelines on Adequate Procedures

Briefly, the Guidelines lay down five key principles:

1. **Top-level Commitment** - Directors, partners or anyone concerned in the management of the organisation's affairs ought to be directly involved to ensure the organisation complies with the applicable anti-corruption laws and regulations.
2. **Risk Assessment** - Risk assessments ought to be conducted at regular intervals to identify evolving risks of corruption. The findings of these assessment should be documented and regularly reviewed.
3. **Undertaking Control Measures** - Appropriate contingency measures, which includes due diligence and stringent financial controls, to address corruption risks identified ought to be in place.
4. **Systemic Review, Monitoring and Enforcement** - The effectiveness and efficiency of the organisation's anti-corruption policies ought to be regularly reviewed and assessed.
5. **Training and Communication** - The organisation's anti-corruption policies not only ought to be disseminated both internally and externally, but regular and relevant trainings ought to be provided to the organisation's members and external stakeholders.

Conclusion

It is now indeed timely and prudent for commercial organisations to take immediate steps to review its policies and to implement robust compliance programmes in anticipation of this new corporate liability regime. This is especially so in light of the short compliance timeframe, the risk of personal liability of senior personnel and the heavy penalty imposed.

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