Origin of Section 17A of MACC Act: Lessons from the UK Experience

The implementation of Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) on 1 June 2020 should come as no surprise by now, as the effective date draws near. The day Section 17A should come into force, however, is under scrutiny by the Malaysian Anti-Corruption Commission (MACC) for a likely suspension called for by companies which are yet to have an appropriate anti-corruption plan, and are weathering the impact of COVID-19 pandemic[1].

Until we hear from the government an official suspension, we should be prepared and, at the very least, take a glimpse into Section 17A. In our first article of the series, we discuss the origin of Section 17A and highlight some recent real-life cases on the implication of corporate liabilities arising from corruption.

Origin of Section 17A

Notably, Section 17A is a new provision which imposes corporate liabilities for corruption on the commercial organisations; the directors, controllers, officers, partners or persons who are concerned in the management of its affairs will also be subject to parallel personal liabilities.

The introduction of Section 17A is indeed a commendable step in fulfilling Malaysia's obligation under the United Nation Convention against Corruption (UNCAC). On 9 December 2003 (International Anti-Corruption Day), Malaysia became a signatory of the UNCAC, and ratified the UNCAC on 24 September 2008. The new statutory provision aims to foster the growth of a healthy business environment free of corruption which would create a level playing field amongst all the players.

Section 17A primarily takes a leaf out of section 7 of the UK Bribery Act 2010 (UKBA). Being also a signatory to the UNCAC, the UK enacted the UKBA which came into force on 1 July 2011. Under the UKBA, a commercial organisation could be liable for bribery, if a person associated with the organisation bribes another person intending to obtain a business advantage for the organisation.

A person is associated with the organisation, if this person performs services for or on behalf of the organisation. However, the organisation is able to salvage the situation if it had adequate procedures in place to prevent bribery. In another word, the UKBA affords a full defence to an organisation which fails to prevent bribery notwithstanding having had implemented adequate prevention regime. What constitutes as adequate will depend on the bribery risks having regard to the nature, size and complexity of the business. That said, the bottom line would be to have an anti-bribery policy which is appropriate to the level of risk the business faces.

[1] For more info, read "**MACC studying proposal to put Section 17A on hold**" <https://www.bernama.com/en/general/news.php?id=1838677 >

The Ministry of Justice in the United Kingdom ("UK") has issued a guidance comprising of the following 6 principles about procedures which commercial organisations can put in place to prevent bribery:

1. Proportionality
2. Top level commitment
3. Risk assessment
4. Due diligence
5. Communication
6. Monitoring and Review

Recent Cases

Since the UKBA came into effect, the first conviction and sentence under section 7 of the UKBA landed on a UK-based construction and professional services company - Sweett Group PLC ("**Sweett**"). Sweett pleaded guilty to a charge of failing to prevent an act of bribery, which occurred between 1 December 2012 and 1 December 2015, intended to secure and retain a contract with Al Ain Ahlia Insurance Company for the building of the Rotana Hotel in Abu Dhabi. Sweett was ordered to pay £2.25 million as a result of the conviction.

Another conviction under section 7 of the UKBA, after a contested trial, concerned a refurbishment contractor - Skansen Interiors Limited ("**Skansen**"). Notwithstanding that Skansen self-reported the bribery to win the tenders for two office refurbishment contracts to the City of London Police, it was charged and convicted as it failed to show that it had adequate procedures in place to prevent bribery.

A more recent well-known case involved the investigation of the UK's Serious Fraud Office (SFO) into allegations of Airbus SE's bribery and corruption. The chapter was eventually closed with SFO entering into a Deferred Prosecution Agreement (DPA) with the global aerospace company, under the terms of which Airbus SE agreed to pay a fine and costs totalling €991m in the UK and in total, €3.6bn as part, for the world's largest global resolution for bribery offences, involving authorities in France and the United States. In light of the DPA, the indictment covering five counts of failure to prevent bribery, contrary to section 7 of the UKBA, was suspended.

It shall be noted that the conduct contemplated by the DPA took place in five jurisdictions, namely, Sri Lanka, Malaysia, Indonesia, Taiwan and Ghana for the period between 2011 and 2015.

Key Takeway

The real-life bribery cases in the UK could serve as a guidance to determine what amounts to adequate procedure; as these cases are likely to be referred to in Malaysian courts as persuasive precedents given that our Section 17A predominantly mirrors the UK's section 7 on corporate liability for corruption. As the saying goes, prevention of bribery is better than cure and an organisation should embark on that appreciating that adequate preventative procedures would absolve it of all liabilities.

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