

A photograph showing a man in a dark suit and white shirt. He is holding a fan of US dollar bills in his right hand, which is held out towards the camera. His left hand is raised with the palm facing forward, as if he is saying 'stop' or refusing something. The background is dark and out of focus.

## MACC's Section 17A: How This New Anti-Corruption Amendment Affects You

By Lee Kok Wai

In any company, gaining the trust of clients or customers is crucial for sustainability. From the humblest nasi lemak stall owner to the biggest multinational Fortune 500 Company, trust is essential for a business to flourish.

In order to build trust, a good reputation is essential. One has to

be seen as honest, transparent and trustworthy. No one is keen to do business with a company that is mired in scandal.

It has less to do with sentimentalism and morality, and more to do with protecting vested interests. Basically, investors want their money to be safe, and customers want good

products or services that are worth what they paid for. This is why maintaining a good reputation is paramount to a company's success and survival. It's not just income that can be lost. If scandal hits the company, it can spell trouble for individuals linked to the company too.

Corruption is endemic to many companies all over the world. It's not that different here in Malaysia. Corruption, if left unchecked, can become part of an organisation's culture.

### Corporate Corruption Scandals in the World

The corporate world is definitely not short of bribery scandals, mainly involving large companies such as multinationals giving bribes to corrupt government officials to secure mega contracts. These included companies, which are leaders in their respective industries, and bribes are generally given to government officials of developing or third world countries. These bribery scandals date back several decades. They have been brought to light with successful prosecutions under laws imposed to prevent them such as the Foreign Corrupt Practices Act

(FCPA), implemented in 1977 in the US to prohibit bribery, and the OECD Anti-Bribery Convention, implemented in 1999. Our MACC Act is modelled after such laws.

### Section 17A: Making Corporations Liable For Corruption Too

The history of corporate failures serves as a reminder that there IS a price to pay for corruption. It is not a sustainable business practice, and there will be a day of reckoning when these irregularities are unravelled.

The practice of widespread international bribery does not just affect internal employees and staff. It leaves a trail of disappointed and angry competitors in its wake; competitors who could have provided better prices or products for the government projects.

Additionally, corruptions caused governments to overspend for projects that could have cost less. Overspending on the government's end also means that ordinary citizens would have to pay more for these services in the end.

In Malaysia, The Malaysian Anti-Corruption Commission or MACC is the body responsible for enforcing anti-corruption regulations. As such, they have their own set of laws known as the MACC Act to help them regulate companies, government agencies, NGOs and individuals.

### The 2018 MACC Act Amendment

The MACC Act consists of 11 parts. Prior to 2018, most of the sections dealt with offences relating to gratifications received by individuals. These individuals are referred to as 'agents' and offences include offering and receiving gratification, intention to deceive a principal, bribes during tender procurements, and so on.

Thus, the MACC's authority only extended to individual persons giving or receiving bribes.

However, in 2018, the MACC Act

underwent an amendment process, whereby an additional section was added. This section is known as Section 17A.

### What is Section 17A?

Section 17A is a new addition to the MACC Act introduced in May 2018. In essence, it extends the Act to cover corruption offences conducted by commercial organisations.

Where previously only individual employees or directors could be prosecuted for bribery, this new Act allows the entire company to be prosecuted.

Section 17A states that a commercial organisation is liable if any person associated with the organisation corruptly gives, agrees to give, promises or offers to any person any gratification with the intent to obtain or retain business.

Under Section 17A, the definition of a **commercial organisation** is as follows:

- A company incorporated under the Companies Act 2016 and carries on a business in Malaysia and elsewhere;
- A company wherever incorporated and carries on a business or part of a business in Malaysia;
- A partnership under the Partnership Act 1961 or a limited liability partnership under the Limited Liability

Partnerships Act 2012 and which carries on a business in Malaysia or elsewhere; or

- A partnership wherever formed and carries on a business in Malaysia or elsewhere.

Under the same section, a person is perceived to be associated with the commercial organisation if:

- He is the commercial organisation's Director, Partner, Employee or Agent of the commercial organisation; or
- He performs services for or on behalf of the commercial organisation.

Therefore, the company can be prosecuted if any of their employees, partners, directors or even contractors are involved in bribery.

Upon conviction, the company will be **liable to pay a fine** of 10 times the amount of bribes paid, or RM1 million, whichever is higher. Also, the officers representing the company will be liable for jail time not exceeding 20 years.

The Act comes into effect on **June 1st 2020**.

The pertinent question here is, of course, who are the company officers liable under this Act. While the payment of a fine is straightforward enough, companies will, of course, wonder who should take the fall in these cases.

It is impossible to jail the entire company's workforce. Therefore, these are the individuals liable to serve jail time in the case of a corruption conviction:

- The company directors;
- Controllers;
- Officers;
- Partner(s);
- Individuals involved with the management of an organisation's affairs.

These liable person(s) do not have to be directly involved in the bribery. This means they do not have to be giving or receiving gratification themselves. All that is required under Section 17A is that they are in a position of power and responsibility over the company involved in the bribery.

Some may think this to be highly unfair since top-level management persons do not and cannot control what their employees do on a day-to-day basis.

The good news is that Section 17A provides clauses to help top management protect themselves from prosecution.

#### **Adequate Procedures: How Due Diligence Can Protect the Top Management**

When a bribery offence has been committed, individuals in the top management are liable for prosecution and will have to prove the following in their defence. This includes:

- the fact that the offence was committed without their knowledge or approval, and
- they have taken all the steps and performed due diligence to prevent corruption offences via internal regulations, to the best of their ability under the nature of their function and circumstances.

These steps, as laid down in the **Guidelines for Adequate Procedures** (GAP), are divided into five principles, known collectively as the T.R.U.S.T principles. They are as follows:

#### **1. Top-Level Commitment**

The board of directors themselves have to ensure a company culture that is corruption-free. This aligns with the 'Tone at The Top' principle, which supports open reporting channels, whistleblower protection, compliance programs, ethics standards and more.

#### **2. Risk Assessment**

Internal assessments to be conducted at least once every three years to identify weak spots and loopholes within the company whereby corruption can happen.

#### **3. Undertake Control Measures**

Adopting open reporting channels, comprehensive policies and adequate controls to prevent the possibility of offences being committed.

#### **4. Systematic Reviews, Monitoring and Enforcement**

Carrying out audits, either internally or via external

auditors, on the efficacy of the anti-corruption programs, policies and standards to assess whether they are effective or otherwise.

##### 5. Training and Communication

The company has to ensure that every employee is aware of the programs and regulations put in place. This should be done regularly through all communication channels, as well as regular training programs.

### The Role of Auditors

The auditors should review and assess if a company has put in place adequate procedures to protect the company from prosecution under Section 17A. The absence of such procedures will expose the company and its board of directors to the risk of prosecution under Section 17A. The auditors generally report such shortcoming to the audit committee as a material weakness in the company's internal controls.

When a company is investigated for possible corruption by MACC under Section 17A, the auditors need to consider the following: -

1. Whether the company has sufficient information of the investigation. This is common, especially during the early stage of the investigation when information may not be available about the exact nature of the investigation. Under such a situation, the company may seek legal advice, whether an

announcement to the public should be made.

2. In making such decision, the company should also consider Bursa Malaysia's Listing Requirements para 9.05(1) "Withholding of Material Information" which allows a company, in exceptional circumstances, to temporarily refrain from disclosing material information provided that complete confidentiality is maintained. One example of exceptional circumstances is when the facts are in a state of flux, and a more appropriate moment for disclosure is imminent. This may be the case when the investigation is ongoing, and the company may be cleared of any wrongdoing. In such a case, waiting for more information before making any public disclosure may be more appropriate.
3. Under the above circumstances, the auditors will need to assess if a non-disclosure is appropriate and comply with accounting and auditing standards in addition to Bursa Malaysia's Listing Requirements.
4. The situation is more straightforward when there is sufficient information of the investigation, and the potential financial effect can be ascertained. The company, in such a situation, is expected to make full disclosure of the investigation with the estimated financial effect disclosed either as a contingent liability or provided for in the financial statements. Where the matter

is significant in terms of its impact to the company's financial statements or if the investigation may hinder the company's operations significantly, the auditor may highlight such investigation in its auditors' report under Key Audit Matters as well.

### Corruption Perception Index and Section 17A

For quite some time now, Malaysia has been falling behind in terms of economic competitiveness. In the 1990s, our annual GDP growth was as high as 9% to 10% annually. From about 2011 onwards, it has fallen to about 4.2% to 6.0% annually.

Although many would argue differently, the perception of corruption levels in Malaysia definitely plays a role in determining how attractive we are as a potential investment destination. Thus far, Malaysia has initiated several incentives to attract foreign investors, including introducing various tax incentives, easing work visa applications for expatriates and improving infrastructure.

However, these alone are not enough. There have to be steps taken to improve our corruption perception index (CPI) too. This is where Section 17A of the MACC Act plays a major role.

### The CPI and How It Affects Economic Growth

One global measure of corruption for countries around the world is the

Corruption Perception Index or CPI by Transparency International (TI). TI's main purpose is to eliminate corruption worldwide, and they release reports on the level of perceived corruption for 180 countries every year.

Although the CPI does not measure the actual numerical level of corruption in the country and only the perception of corruption levels among locals, it is an index that is respected worldwide. The CPI is often taken into account when investors are making decisions on whether to invest in a certain country or start-up operations there.

In 2008, Malaysia had a CPI score of 51/100 and ranked 47 out of 180 countries. In 2018 Malaysia's CPI score was 47/100, and we ranked 61 out of 180 countries. This sharp drop in rankings can probably be attributed to the mega-money laundering scandals that have been exposed in recent years. The CPI indirectly influences our economic growth too. Malaysia's per-capita GDP has largely remained stagnant or underwent a slight drop in the last 10 years or so. In 2010, 2 years after the 2008 financial crisis, Malaysia's per capita GDP growth was 5.6% whereas in 2018, it was 3.3% and this has been the average for the past five years or so.

Generally, countries with strong economies also have very high CPI scores, proving that they are well trusted for corruption control and regulation. These countries include

Denmark, New Zealand, Switzerland and our neighbour, Singapore. While there are many reasons for such a correlation, it is generally accepted that a country with less corruption promotes transparency and has a more efficient and effective economy.

## In Conclusion, Why Are We Doing All These?

In recent years, we have seen how governments without strong anti-corruption laws and enforcement have had their economies crushed. One good example is Venezuela, whose GDP growth has been on a negative trend since 2014 and has lost almost all their currency value overnight. It is not surprising that it is ranked 168 out of 180 countries in the CPI.

In the case of corporate scandals, which came to light, anti-corruption laws such as the Foreign Corrupt Practices Act (FCPA), and the OECD Anti-Bribery Convention were crucial to expose these practices and to ensure that companies, which condone such practices, are brought to justice.

In the same way, Section 17A could be the legislation that will root out Malaysian companies with corrupt practices.

Once Section 17A comes into effect, both regulators and market players will have to work together to create a new bribery-free culture in Malaysia. There will be challenges

to implement and enforce the new law, but experience and precedents can be drawn from countries, which have implemented similar laws such as the United Kingdom and the US.

However, just as some countries have managed to rise and strengthen their economies after rooting out corruption, so can Malaysia, if we are willing to change. The way forward for a more sustainable Malaysian marketplace is, therefore, to embrace Section 17A at both an organisational and individual level. Only then can we hope to be back on track as a rapidly developing nation.

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*Lee Kok Wai currently heads the Audit and Assurance department as a Partner at Crowe Malaysia PLT. He is directly responsible for the audits of the firm's major clients, which include public-listed companies, multinationals and large SMEs. He has conducted public speaking assignments on Financial Reporting Standards and participated in the review of financial statements issued by companies listed on Bursa Malaysia, organised by the MIA to assess financial statements compliance with Financial Reporting Standards. In addition, he also leads initial public offering engagements for the flotation of companies on the Main and ACE Market of Bursa Malaysia. For more information, you may contact him at [kokwai.lee@crowe.my](mailto:kokwai.lee@crowe.my).*

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