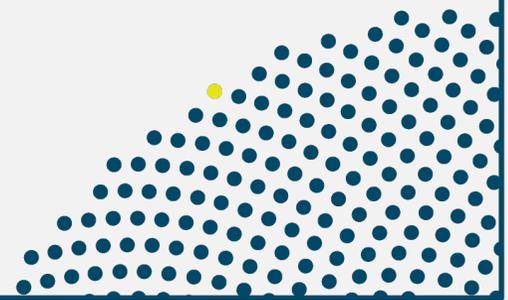


Section 17A MACC Act 2009: **What in-house counsels must know**

Malaysia

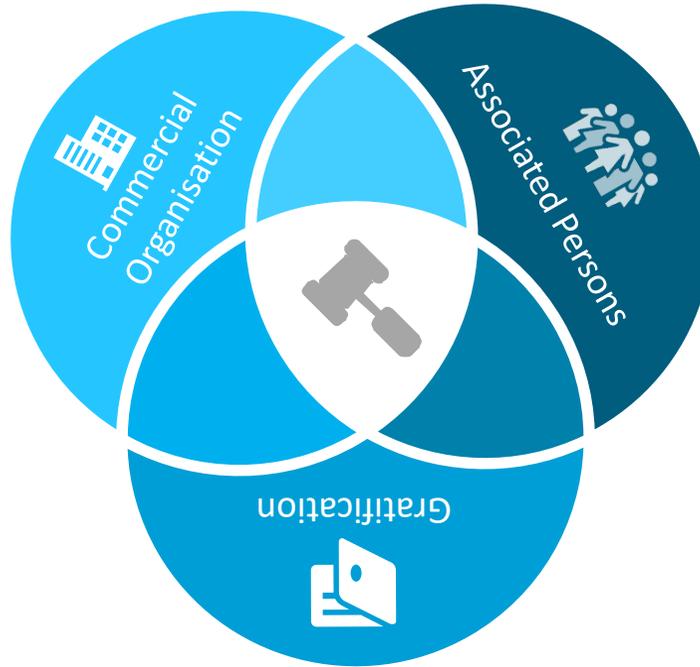


● Corporate Liability



Commercial benefit

Intent to obtain/retain business or business advantage



Management



Service providers

Penalty

\$ 10x graft value or RM1million
whichever is higher

and/or

👤 Up to 20 years in jail

● Corporate Liability



When a person associated with the commercial organization commits a corruption offence, 2 things will follow:

1. The commercial organisation **deemed** liable unless can prove “adequate procedures to prevent” the conduct.
2. A director, controller, officer, partner or a person concerned with the management of its affairs is **deemed** liable, unless he can prove the statutory defence.

Penalties: 10 times the sum of the gratification or 1 million ringgit, whichever is the higher; or to imprisonment for 20 years, or both

● Directors and Senior Management



Directors and Senior Management TAKE NOTE!

If company liable, you will be deemed liable!

Only defence – **YOU** must prove:

- (1) Offence committed without your consent or connivance AND
- (2) You had exercised due diligence to prevent the offence.

Unlike “Adequate Procedures” guidelines, there is NO guideline for (1) and (2).

TAKE-AWAY: Ensure company implements “Adequate Procedures”.

● Directors and Senior Management

Policy holder



Malaysian companies



LLPs, Partnerships, Directors

Defence cost



Acquitted, discontinued

Penalties

Section 289 Companies Act 2016 Prohibition



Convicted



Fines

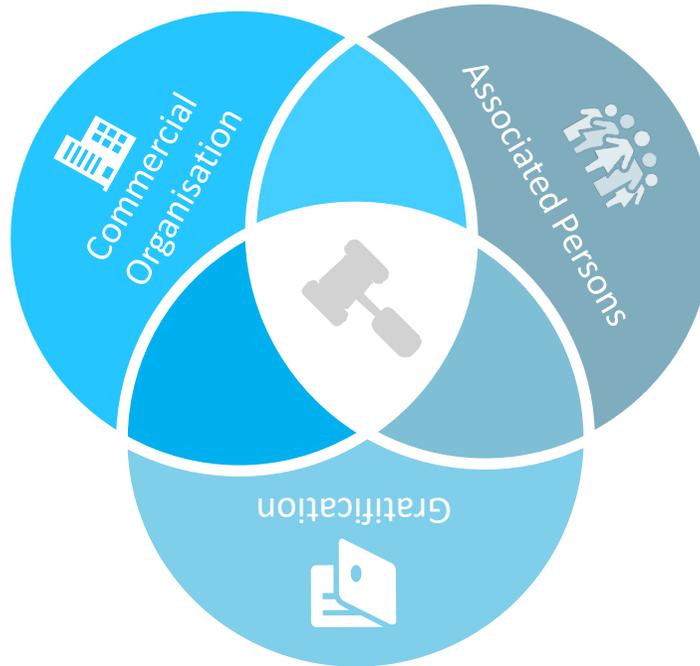
Section 213
Reasonable care, skill and diligence

● Directors and Senior Management



Commercial benefit

Intent to obtain/retain business or business advantage **directly for parent or for group as whole**



Management



Service providers

Penalty

\$ 10x graft value or RM1million
whichever is higher

and/or

 Up to 20 years in jail

● Defences – Adequate Procedures

Skansen's case

Defence arguments

1. SME with a low-risk local client base, limited Anti-Bribery and Corruption efforts were not enough for the 'adequate' procedure defence.
2. No specific ABC policy. Skansen had several policies on dealing with third parties in an ethical and honest manner. Common sense that one should not pay bribes. Do not need a detailed policy for that.
3. Financial controls which required multiple levels of approval before invoices could be paid.
4. The contracts in question contained clauses prohibiting bribery.

Prosecution

- a) Limited records of Skansen's risk management efforts. Compliance must be documented and reviewed.
- b) Skansen had several policies but no evidence of training or active communication.
- c) No designated individual with responsibility for ABC compliance. SMEs without resource for a specialist ABC advisor should ensure that there is still someone at a senior level who knows ABC compliance.

● Defences – Adequate Procedures



Rolls Royce's case:

The UK Serious Fraud Office reached a record-breaking GBP497.2 million deferred prosecution agreement with Rolls Royce, in one of the biggest corruption cases in British corporate history.

For more than 25 years, Rolls Royce was involved in systematic bribery, paying millions of pounds across three continents to help secure major contracts. Using “intermediaries”, large payments were made to people with influence on contracts.

The allegations surfaced in 2006, when a former Rolls-Royce executive turned whistleblower.

- Rolls-Royce had a number of different anti-bribery policies and SOPs.
- In practice bribery was a longstanding issue over a 24-year period.
- Bribery had occurred for a number of years and senior management and Board members knew that bribes were being paid.

This was a case whereby the senior management/board members was actively involved with the bribery in order to secure contracts. Therefore, all the anti bribery policies that were in place became redundant when the enforces/supervisors themselves were involved with corrupt practices.

● Defences – Adequate Procedures

Airbus' case:

There has not been any definitive ruling on the standard/threshold of “adequate procedures” provided in the guidance issued by the UK Ministry of Justice even after *Skansen Interiors Limited* (Eoin O’ Shea, Partner, Reed Smith LLP, 169 NLJ 7837, 26 April 2019).

Nevertheless, the recent Airbus corruption scandal could potentially galvanise judicial determination and analysis on the standard of “adequate procedures”.

Part of the allegations includes the lack of adequate procedures to prevent bribery and corruption (**Director of the Serious Fraud Office v Airbus SE [2020] Lexis Citation 56**):

“5. The criminality involved was grave. The SFO's investigation demonstrated that in order to increase sales, persons who performed services for and on behalf of Airbus offered, promised or gave financial advantages to others intending to obtain or retain business, or an advantage in the conduct of business, for Airbus SE. *It is alleged that those financial advantages were intended to induce those others to improperly perform a relevant function or activity or were intended to reward such improper performance and that Airbus did not prevent, or have in place at the material times adequate procedures designed to prevent those persons associated with Airbus from carrying out such conduct.*”

● Defences – Adequate Procedures

Airbus' case:

Steps taken by Airbus as part of their anti-bribery compliance program:

- Commissioning of a private company to review its compliance programme and being awarded an Anti-Corruption compliance certificate for the design of its anti-**bribery** compliance program.
- Written policies governing payments and contractual relationships with third parties. These included policies applying to the committees and its employees specifically aimed at ensuring that third parties were used appropriately and only after sufficient due diligence had been undertaken.
- For example the Business Ethics Policy and Rules set out fundamental ethical principles for all employees; and detailed the due diligence process to be undertaken in relation to the appointment of BPs, noting that it was very important to be aware of 'red flags' listing examples of the same.

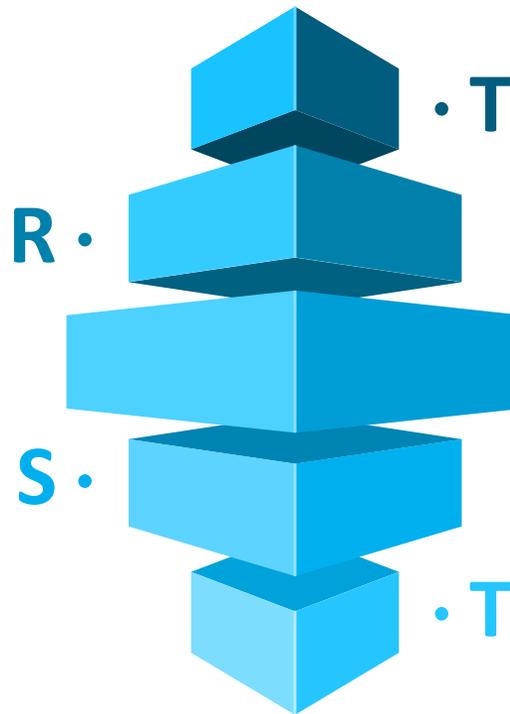
However the court stated that “Notwithstanding such policies and compliance review, it later emerged that there were serious weaknesses within Airbus' compliance and oversight structure.”

The case is currently in the DPA stage (Deferred Prosecution Agreement) whereby Airbus is charged with 5 counts of indictment (Malaysia being the first count) but the prosecution is deferred for 3 years in the interest of justice.



Adequate Procedures

Guidelines from the Prime Minister's office



Top-level commitment



Undertake control measures



Training and communication



● Contracts to commit bribery vs contracts procured by bribery



Honeywell's case:

A distinction must be drawn between the enforcement of contracts to commit fraud or bribery and contracts which are procured by bribery.

Whilst contracts to commit fraud or bribery are contrary to public policy and will not be enforced, contracts which have been procured by bribery would be rendered **voidable** at English law.

This distinction is clearly spelled out in *Honeywell International Middle East Ltd v Meydan Group LLC (formerly known as Meydan LLC)*, [2014] 154 ConLR 113 (HC):

[182] ... English public policy will refuse to enforce a contract which is tainted by illegality, in the sense that it is illegal in performance, such as a contract to commit fraud or bribery: see *Chitty on Contracts* (31st edn, 2012) at 16–007 and *Buckley on Illegality and Public Policy* (3rd edn, 2013) at 7.25.

...

[184] This shows that where a contract has been induced by bribery it is not contrary to English public policy for the contract to be enforced but it gives the innocent party the opportunity to avoid the contract, at its election, provided counter-restitution can be made.

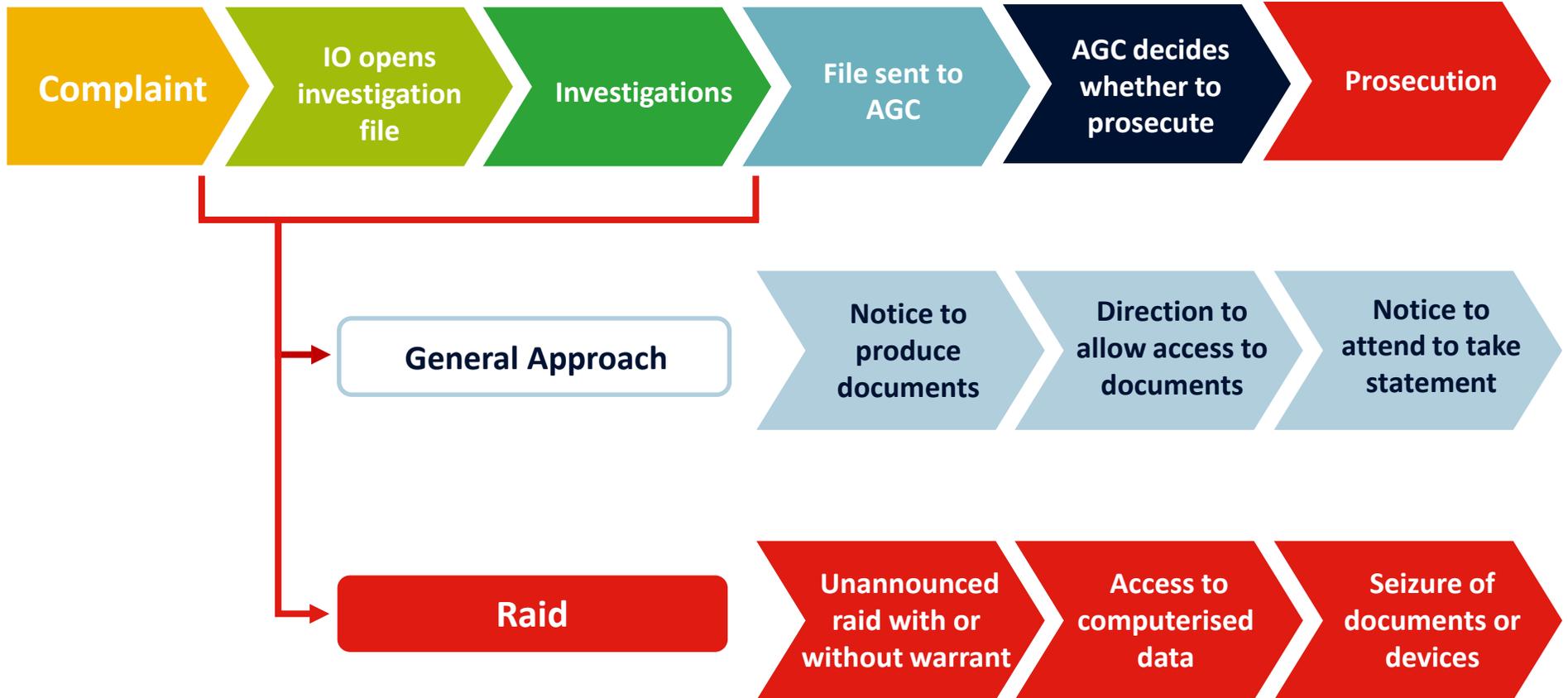
[185] It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable.

● Raids and Investigations



SEARCH	<ul style="list-style-type: none">• Carry out search with or without warrant
SEIZE	<ul style="list-style-type: none">• Access and power to seize records, books, accounts, computerized data
STATEMENT	<ul style="list-style-type: none">• Recording statement from suspect or witness• Require provision of information
SEAL	<ul style="list-style-type: none">• Power to seal any premise or any part of it
ARREST	<ul style="list-style-type: none">• Power to detain suspect for further investigations

● Investigation Process Flow (General)



● Privileged Communication



Solicitor- client privilege applies to:

- ✓ Communication between an advocate by or on behalf of his client
- ✓ Any advice given by an advocate to his client in the course and for the purpose of such employment

● Gratification

Gift & Hospitality

Corporate gifts and lavish dinners/functions.

Kickbacks and Rebates

Kickbacks for tender awards.



Facilitation Payments

Payments made with the purpose of expediting or facilitating the performance by a public official of a routine governmental action.

Travel & Entertainment

Travelling to inspect facilities or attending conferences and training.

Question: How does prosecution prove corrupt intent?

- **Undeclared source of income:** Cash payments, no receipts
- **Pattern - approval of tender, projects**
- **Threats and reprisals**
- **“On-book” fraud and “off-book” fraud**
- **Covering-up:** Shredding documents, deleting emails
- **Procurement Fraud:** When a contract is awarded to a firm in which such employee or their families have an undisclosed financial interest.
- **Fraudulent Accounting:**
 1. Billing Schemes – shell company, overstated expense, fictitious expenses, forged endorsement, false refunds.
 2. Payroll Schemes – Ghost employees, commission schemes, falsified wages.

● Defences – Adequate Procedures



- **Ministerial Guidelines on “Adequate Procedures”**: launched by PM on 10 December 2018, based on five principles of T.R.U.S.T:
 1. Top level commitment
 2. Risk assessment
 3. Undertake control measures
 4. Systematic review, monitoring and enforcement
 5. Training and communication.
- **Risk based regime** with a focus on practical compliance.
- **Burden of proof** on the commercial organization.

● Do you know your ABCs? Anti-Bribery Compliance

'Atas' Governance Framework	<ul style="list-style-type: none">• Tone from the Top• Code of Conduct/Policies• Independent Audit• Limits of authority
'Bawah' Governance Framework	<ul style="list-style-type: none">• Background checks/Due diligence• Gifts and Hospitality• Business Partners• Dealings with public officials
Champions	<ul style="list-style-type: none">• Legal and Compliance• Internal Audit• HR• Finance
Staff Communication	<ul style="list-style-type: none">• Awareness Trainings• Whistleblower Facilities• Compliance Engagement

● Section 17A



(1) A commercial organization commits an offence if a person associated with the commercial organization corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent—

- (a) to obtain or retain business for the commercial organization; or
- (b) to obtain or retain an advantage in the conduct of business for the commercial organization.

(2) Any commercial organization who commits an offence under this section shall on conviction be liable to a fine of not less than ten times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of pecuniary nature, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding twenty years or to both.

(3) Where an offence is committed by a commercial organization, a person—

- (a) who is its director, controller, officer or partner; or
- (b) who is concerned in the management of its affairs,

at the time of the commission of the offence, is deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.

(4) If a commercial organization is charged for the offence referred to in subsection (1), it is a defence for the commercial organization to prove that the commercial organization had in place adequate procedures to prevent persons associated with the commercial organization from undertaking such conduct.

(5) The Minister shall issue guidelines relating to the procedures mentioned in subsection (4).

(6) For the purposes of this section, a person is associated with a commercial organization if he is a director, partner or an employee of the commercial organization or he is a person who performs services for or on behalf of the commercial organization.

(7) The question whether or not a person performs services for or on behalf of the commercial organization shall be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between him and the commercial organization.

(8) For the purposes of this section, “commercial organization” means—

- (a) a company incorporated under the Companies Act 2016 [Act 777] and carries on a 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—
 - (i) under the Partnership Act 1961 [Act 135] and carries on a business in Malaysia or elsewhere; or
 - (ii) which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 [Act 743] and carries on a business in Malaysia or elsewhere; or
- (d) a partnership wherever formed and carries on a business or part of a business in Malaysia.