

CLIENT ALERT

Malaysia enacts Anti-Fake News Act 2018

Malaysia
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Falsehood, fabrication, rumour-mongering, fake news. Whatever the label, governments around the world acknowledge the harm brought about by misinformation, and the immediate and widespread dissemination of such misinformation. The debate is on how to effectively address the menace of fake news without undermining transparency, freedom of expression and democratic processes.

The European Commission appointed a high-level group of experts (“HLEG”) to advise on policy initiatives to counter fake news and disinformation disseminated online. The HLEG’s report states that the term fake news is inadequate to capture the complex problems of disinformation that also involves content which blends fabricated information with facts. It instead focusses on disinformation online rather than fake news. The report defines disinformation as false, inaccurate, or misleading information designed, presented and promoted for profit or to intentionally cause public harm. The report underlines the need to involve all relevant parties in any possible action, recommending first and foremost a self-regulatory approach, and:

- promoting media literacy to counter disinformation;
- developing tools for empowering users and journalists to tackle disinformation;
- safeguarding the diversity and sustainability of the European news media; and
- continuing research on the impact of disinformation in Europe.

Germany opted for the legislative approach and enacted the Network Enforcement Act (also known as “NetzDG”). The NetzDG prescribes fines of up to €50 million against online platforms if they do not remove “obviously illegal” hate speech and other postings within 24 hours of receiving a notification. A seven-day period is granted for the removal of “illegal” content.

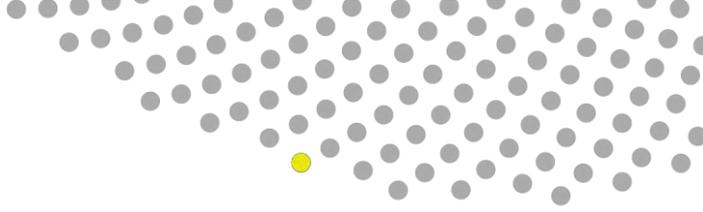
ASEAN countries also concerned about fake news

In the [Philippines](#), libel laws were amended to increase the punishment for publishing false news. In [Singapore](#), a select committee was set up to hold hearings on “deliberate online falsehoods” and had internet giants such as Facebook, Google and Twitter testify before the parliamentary committee on their policies for managing false news. In [Thailand](#), the spread of false information online is punishable as an offence. A closed-door session was held in [Cambodia](#) by its Ministry of Information to discuss ways of curbing false news. In [Vietnam](#), a 10,000-strong cyber-crime team, dubbed Force 47 monitors allegedly “wrong” views expressed online. In [Indonesia](#), threats were made to close down a social media platform over concerns about breach of personal data and false news.

Malaysia’s Anti-Fake News Act 2018

Malaysia’s Anti-Fake News Act 2018 came into force on 11 April 2018. Minister Dato’ Sri Azalina Othman Said, the Minister who introduced the Anti-Fake News Bill 2018 in Parliament, explained that the law is not intended to restrict freedom of speech but to restrict the dissemination of fake news.





What is 'fake news'?

The definition of “fake news” consists of two broad parts:

- First, the subject matter includes news, information, data and reports wholly or partly false. It is not limited to “news” in the ordinary meaning of the word. The Act does not prescribe the criteria or the threshold in determining what is considered to be false, which would be left to judicial interpretation.
- Second, the form in which the subject matter is presented i.e. whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas. The form is media neutral and covers print and online media alike.

It remains to be seen whether the courts will take a narrow interpretation of the definition of “fake news” and accept arguments to differentiate “news, information, data and reports” from other types of content e.g. views, commentary, satire and critiques. A narrow interpretation would be consistent with parliament’s intention that the Act “seeks to safeguard the public against the proliferation of fake news whilst ensuring the right to freedom of speech and expression under the Federal Constitution is respected”, as set out in the Explanatory Statement to the Anti-Fake News Bill 2018.

What is prohibited?

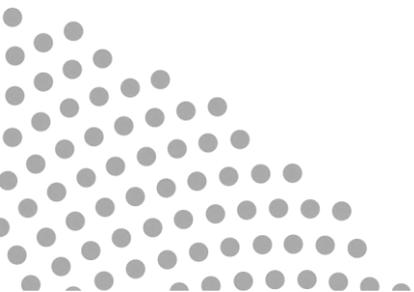
- **Intentional creation, dissemination, etc. (section 4):** Maximum fines of up to MYR500,000 (plus MYR3,000 per day for continuing offence after conviction), or imprisonment of up to 6 years, or both.

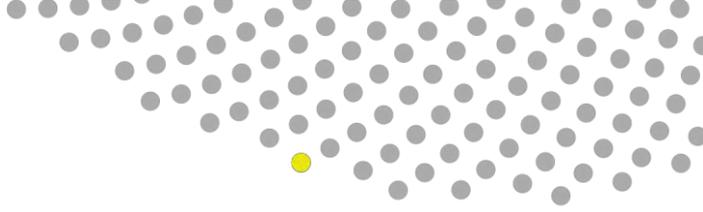
There are two key elements of the offence. First the actus reus or prohibited conduct, the creation and spread of fake news or publication containing fake news. Second the mens rea or requisite mental element, that the conduct must have been done maliciously. The term “maliciously” may cover not only intention to cause harm but also recklessness.

Criminal intention can be inferred from the publication and the surrounding circumstances.

- **Direct or indirect funding (section 5):** Maximum fines of up to MYR500,000, or imprisonment of up to 6 years, or both.
This provision covers direct or indirect financial assistance, intending, knowing or having reasonable grounds to believe (mens rea) that it will be used for the offence in section 4. The word “indirectly” infers a wide connotation and may cover financial assistance provided through placing of advertisements in a publication, crowdsourcing or fundraising.
- **Failure to remove (section 6):** Maximum fines of up to MYR100,000 and a further fine of up to MYR3,000 for every day during which the offence continues after conviction.

The Act imposes a statutory duty on those having possession, custody or control of any publication containing fake news to immediately remove such publication after knowing or having reasonable grounds to believe (mens rea) that such publication contains fake news. There are several points to note:

- First, the threshold on criminal intention in section 6 is lower. The prosecution will only need to prove that the person knew or had reasonable grounds to believe, whereas under section 4, the prosecution must prove malice. This means that the offence in section 6 would be easier to establish as compared to section 4.
 - Second, unlike in section 4 where the legislature has provided illustrations of prohibited conduct, no illustrations have been provided as to when the duty is triggered under section 6, leaving the question to judicial interpretation.
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- Third, the extra-territorial application of the Act means that fake news outside of Malaysia may still amount to an offence in Malaysia.

This provision raises the risk exposure for businesses such as intermediaries, content aggregators, social media platforms, publishers, broadcasters, news portals, etc.

The Communications and Multimedia Act 1998 (“CMA”) provides a defence (subject to certain conditions) for innocent carriers of content with no notice that the content is unlawful. Section 98(2) of the CMA implies that the defence is available to any person complying with the Communications and Multimedia Content Code. However, this defence may not be available once the platform or intermediary is put on notice of the allegedly unlawful content. The question is whether an innocent carrier will be able to rely on this defence in the CMA in a prosecution under section 6 of the Anti-Fake News Act 2018.

Court ordered content take-down

To quickly quell the adverse effects of the spread of misinformation, the Act provides for court-sanctioned pre-emptive measures to restrict the dissemination of fake news. The Act empowers the Sessions Court, on an ex-parte application, to order the take-down of fake news. This expedited procedure is useful to quickly stop fake news from going viral.

Interestingly, the order can be served electronically, including to a person’s email or social media account.

The ex-parte order can be set aside within 14 days from service in all circumstances except where the order is obtained by the Government on fake news prejudicial to public order or national security. Such orders cannot be set aside, but can be appealed to the High Court.

Liability of directors and officers

Individuals responsible for the management of a company, such as directors, CEOs, managers, secretaries or other similar officers, can be held liable for the offences jointly with the company. The individual can be relieved of liability if he can prove that the offence was committed without his knowledge, consent or connivance and that he had taken all reasonable precautions and exercised due diligence.

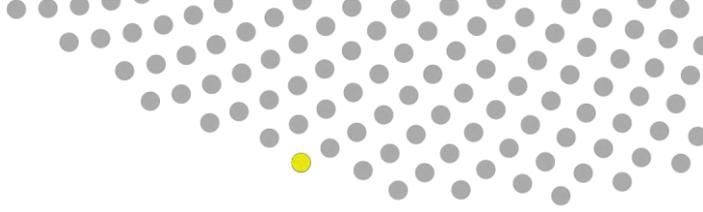
Heightened enforcement

Barely 2 months since the Act came into force, we have already seen several high profile cases investigated under the Act:

- Fake news that a political figure in Sabah, Datuk Abdul Hajan Gurimbang, died in an accident with cash found in the wrecked car, is being investigated by the police. The accident did happen and claimed the life of Datuk Abdul Hajan’s wife. Certain irresponsible parties had used the tragedy to sensationalise and spread accusations against Datuk Abdul Hajan on social media.
- Fake news that the Johor Crown Prince would be visiting a supermarket in Johor and pay for everyone’s groceries caused chaos at the supermarket.
- A Danish national was the first to be convicted under the Act, over a YouTube video he had posted regarding the shooting of a Palestinian national and allegations of slow response by the police and ambulance services.

With the upcoming 14th General Elections expected to be hotly contested, complaints on fake news are expected to increase substantially, and with that, increased enforcement.





Sword and shield

The jury is still out on the Anti-Fake News Act 2018. On the one hand, it is hailed as an effective deterrent against irresponsible dissemination of fake news which can cause irreparable harm. On the other hand, there are concerns that the law can be abused to stifle freedom of expression and freedom of press.

From multinationals in the business of content, to any individual who gets excited about gossips in chat groups, the Act makes it everyone's responsibility to combat fake news. There needs to be awareness of the criminal consequences, and for corporations, probably an introduction or review of the corporate communications and social media policies.

Corporations in the content business should be more vigilant and implement adequate safeguards to fact-check content and implement effective content take-down tools upon receipt of credible complaints on the veracity of content in any media. In the shaping of the take-down policy, there is an entire spectrum of risk tolerance – some will require strong proof that the content is false, others may take down automatically once notified of a complaint.

Beyond politics, the Act can be a useful remedy for defamation and trade libel, as it allows ex-parte applications to the court for content take-down. This may be pursued by corporations to curb the spread of fake news against their businesses.

If you have any questions or require any additional information, you may contact [Sharon Tan](#), [Nadarashnaraj Sargunraj](#) or the ZICO Law partner you usually deal with.

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