

LEGAL  
ALERT

Malaysia  
3 December 2018

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## Corporate Liability under the Malaysian Anti-Corruption Commission Act 2009

Earlier this year, Parliament passed the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (“[MACCA Amendments](#)”). The MACCA Amendments introduced notable changes to the Malaysian Anti-Corruption Commission Act 2009 (“[MACCA 2009](#)”) including the introduction of section 17A of the MACCA 2009, which imposes liability on a commercial organisation for corruption committed by persons associated with the commercial organisation. This provision is expected to come into force soon.

### [The Corporate Liability Provision – Section 17A of MACCA 2009](#)

Section 17A of MACCA 2009 imposes liability on a commercial organisation if a person associated with that commercial organisation 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 organisation; or
- b. to obtain or retain an advantage in the conduct of business for the commercial organisation.

A “commercial organisation” is defined widely and encompasses all companies registered under the Companies Act 2016 that carry on business in Malaysia or elsewhere. The definition also extends to foreign companies that conduct their business in Malaysia and partnerships and limited liability partnerships registered under the laws of Malaysia or any other laws that conduct business in Malaysia.

A “person associated with a commercial organisation” is defined to include a director, a partner or, an employee or any third-party who provides services on behalf of the commercial organisation.

Where a commercial organisation is found liable, a director, controller, officer, partner, or any person who is concerned with the management of its affairs at the time of the offence, will be held jointly and severally liable with the commercial organisation. Upon conviction, the person can be punished with a fine of not less than 10 times the sum or value of the gratification, if it can be valued, or RM1 million (whichever is higher), or imprisonment for a term not exceeding 20 years, or both.

### [Statutory Defences](#)

#### [Directors, controllers, officers, partners or persons concerned with management](#)

The above mentioned persons may rely on the statutory defence if it can be proved 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.



## Commercial organization

Where a commercial organisation is charged, it may rely on the statutory defence if it can be proved that the commercial organisation had in place adequate procedures designed to prevent persons associated with the commercial organisation from undertaking such conduct. The Minister is expected to issue guidelines relating to what amounts to adequate procedures.

## Anti-corruption practices in other jurisdictions

The corporate liability provisions under the MACCA Amendments are modelled after the UK Bribery Act 2010 (“[BA 2010](#)”). Section 7 of BA 2010 states a commercial organisation is guilty of a corruption offence if a person bribes another intending to get business or to get advantage in the conduct of business for the commercial organisation. The BA 2010 provides for a similar statutory defence for the commercial organisation if it is able to prove that it had in place “adequate procedures” in place to prevent bribery.

In the United States, the Foreign Corrupt Practices Act 1977 (“[FCPA 1977](#)”) covers both domestic and foreign corruption offences. The United States was one of the first countries to introduce corporate liability and extraterritorial corruption offences where companies can be held liable for corruption offences committed abroad while carrying on business in the United States.

Essentially a company will be guilty of the offence if they make corrupt payments to foreign officials intending to obtain business or to get an advantage in the conduct of business for the company. The anti-bribery provision under the FCPA 1977 applies mainly to:

1. “issuers”, which are companies required to file reports with the Securities and Exchange Commission;
2. “domestic concerns”, which are US persons and companies, companies incorporated under US laws, companies having their place of business in the US, companies listed on stock exchanges in the US; and
3. certain foreign persons or entities engaging in any business while in US territory (“territorial jurisdiction”).

## Anti-corruption cases in foreign jurisdictions

In September 2018, Petroleo Brasileiro S.A (“[Petrobras](#)”) agreed to pay USD853.2 million in penalties over the “Lava Jato” bribery scandal. This was one of the largest corruption scandals in Latin America which led to the jail sentence of Brazil’s former president, Luiz Inacio Lula da Silva. The settlement, one of the biggest corruption related settlements entered into between US and the Brazilian authorities, was to resolve the US government’s investigation into violations of the FCPA 1977 in connection with Petrobras’ role in the facilitation of payments of bribes by several former Petrobras executives and board members to Brazilian politicians and political parties.

The executives and the board members of Petrobras were also found to have concealed the payments from investors and regulators by falsifying their financial statements and accounts. According to Petrobras’ admission, the facilitation of millions of dollars in corrupt payments to politicians in Brazil occurred while the company’s American Depository Shares were trading in the New York Stock Exchange. The FBI’s International Corruption Squad in Washington DC, the Criminal Division’s Fraud Section (responsible for investigating and prosecuting all FCPA matters), and Assistant US Attorney collaborated with the Brazilian law enforcements to investigate the case.

Meanwhile in January 2017, Britain’s leading multinational manufacturer, Rolls Royce, was found to have falsified accounts to hide the use of illegal middlemen, attempting to thwart investigations into corruption and paying to secure orders and deals in Indonesia, Russia and China. To avoid prosecution by anti-corruption investigators, Rolls Royce entered into a GBP671 million settlement. The investigation led by UK’s Serious Fraud Office uncovered a systemic use of middlemen over three decades to clinch contracts in multiple countries.





Rolls Royce admitted in court that it gave GBP2.25 million and a Rolls Royce Silver Spirit to an individual in Indonesia in exchange for a contract. In Thailand, the company paid more than GBP36 million to agents in helping to secure three separate contracts to supply Trent Aero Engines to Thai Airways. Rolls Royce failed to prevent bribery in the extension of a GBP5 million cash credit to China Eastern Airlines in exchange for the purchase of engines for aircraft in 2013. During the investigation, 30 million documents were found by 70 investigators relating to middlemen and more than 200 interviews of former and current Rolls Royce employees were conducted. Despite the settlement agreement, individual executives were still charged for corruption.

### Defence of adequate procedures

While section 17A of MACCA 2009 imposes corporate liability for commercial organisations, it also provides companies with the ability to assert the legal defence of adequate procedures. If the organisation can prove that it had adequate procedures in place to prevent the occurrence of the corrupt act, it will amount to an absolute defence.

Companies must establish adequate anti-bribery measures to prevent, detect or respond in the event of any corrupt act occurring, including:

- a. **Promote whistleblowing** – establishing channels and policies for whistleblowing. Having comprehensive policies and procedures in place will encourage whistleblowing activities and promote reporting of corrupt activities. Companies should encourage employees to report any kind of misconduct happening within their organisation.
- b. **Implementing policies** – establishing policies and regulations and increasing awareness amongst employees on anti-corruption. Having such policies in place without periodic training, may not be sufficient for the company to prove that it has adequate safeguards in place to combat corruption.
- c. **Risk Management** – identifying the regulatory requirements and the risk of corruption involving employees. Having proper controls in place will help tremendously in preventing risks of third parties that are involved in the business such as the suppliers, vendors, distributors, etc. Thus, companies should evaluate from time to time their external parties and monitor their activities at all times. If these third parties are not kept in check, there will be a risk of data breaches or disclosure of company data by these third parties.
- d. **Internal controls and governance** – having internal controls can effectively regulate the employees' performance. These controls may be established by human resources, accounts and other relevant divisions. These controls should govern the employees and instil a sense of accountability for their own jobs. Companies can significantly reduce unethical practices in their own business when internal controls reinforce and upheld anti-corruption policies.
- e. **Board and executive supervision** – the board of directors in any commercial organisation plays an important role to combat corrupt practices, as they are the controlling mind of the company and can make decisions or implement policies that will help the company in the fight against corruption. For instance, the board can study their current anti-corruption policies to see if any loopholes can be identified and to take further action to close those gaps by making the appropriate changes.

While the corporate liability provision under the MACCA Amendments has yet to come into force, it will have a tremendous impact in raising the bar on corporate governance, ethics and compliance. Companies must take a more proactive role in preventing corruption within their organisations.

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

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