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Commercial Organisations Beware: The First Criminal Charge under S17A MACC Act 2009

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The Malaysian Anti-Corruption Commission (MACC) has brought its first criminal charge under Section 17A of the MACC Act 2009 (S17A Offence) against an offshore vessel support company (the Company), which was represented by one of its directors (the Case). This constitutes the first charge in respect of S17A Offence in Malaysia since such provision came into force on 1 June 2020.

S17A Offence

In essence, Section 17A of the MACC Act 2009 introduces the concept of strict corporate liability of a commercial organisation if a “person associated” with the commercial organisation for its director, partner or employee corruptly gives, promises or offers to any person any gratification with intent to retain business or an advantage in the conduct of business for the commercial organisation.

To read more about the S17A Offence, see our previous [article](#), where we analysed the law on corporate liability relating to S17A Offence and set out key practical recommendations for business and firms of all sizes and sectors to adopt in order to comply with the legal requirements.

Background Of The Case

It was alleged that a former director of the Company (the said Former Director) has offered a bribe amounting to RM321,350 to another company to secure a subcontract for the Company.

The S17A Offence was allegedly committed between 29 June 2020 and 14 October 2020 in respect of a project with an estimated cost of more than RM 1 billion.

As a director, the said Former Director is a “person associated” with the Company at the time of the alleged

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commission of the S17A Offence.¹ If MACC is successful in proving that the said Former Director had corruptly given gratification to another person by giving a bribe with intent to obtain the subcontract for the Company, by virtue of Section 17A(1) of the MACC Act 2009, the burden of proof then shifts to the Company to prove that it had in place “adequate procedures” to prevent the said Former Director from offering the bribe and committing a S17A Offence – failing which, the Company will face:

- (a) a fine of not less than 10 times the sum or value of the gratification or RM 1 million, whichever is higher;
- (b) imprisonment for a term not exceeding 20 years; or
- (c) both (a fine and imprisonment).²

Given the facts of the Case, upon conviction, the Company would be liable to a fine of not less than RM3,213,500.

Liability Of The Director Of The Company

If the Company fails to satisfy the “adequate procedure” defence and is consequently found to be guilty of S17A Offence, the director, controller, officer or partner of any person who is concerned in the management of the affairs of the Company will also be deemed to have committed the offence.

The burden lies on such aforementioned person(s) to prove that:

- (a) the offence was committed without his consent or connivance; and
- (b) he has 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 – failing which, such person will be held personally liable for the S17A Offence.

¹ Section 17A(6) of the MACC Act 2009.

² Section 17A(2) of the MACC Act 2009.

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“Adequate Procedures”

On 18 March 2020, the Company's current director, Datuk Abdul Kamal Mohd Mydeen appeared in court on behalf of the Company and pleaded not guilty.

As such, in order to raise a defence against the charge of S17A Offence, the Company will be required to introduce evidence during the trial to prove that it had in place “adequate procedures” to prevent the said Former Director from committing the corrupt act. It is anticipated that the court's judgement in this regard will provide much needed clarity and guidance to all business owners on the extent and level of “adequate procedures” required to be put in place to successfully raise a defence against such corporate liability under S17A.

Conclusion

This case being the first enforcement action by the MACC pursuant to the S17A Offence provision will raise alarm bells for the business community and organisations which are still lacking in their implementation of robust internal anti-corruption control measures and processes.

With our vast experience in preparing, reviewing and advising on various internal policies and procedures adopted by commercial organisations, including code of conduct, anti-corruption and whistleblowing policies for compliance with the MACC Act 2009 and other applicable laws, regulations and guidelines, our team of lawyers are ready to assist you in your endeavours to put in place the requisite anti-corruption policies and procedures or improving your existing internal policies and compliance framework.

Authored by Annabel Kok, Senior Associate and Shera Chuah, Pupil-in-Chambers with the firm's Corporate and Real Estate Transactions practice.

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