

# 9 THINGS TO KNOW ABOUT SECTION 17A OF THE MACC 2009

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By  
*LEENALOHANA MALAIKAN*



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## 1. The coming into effect of section 17A of the MACC 2009

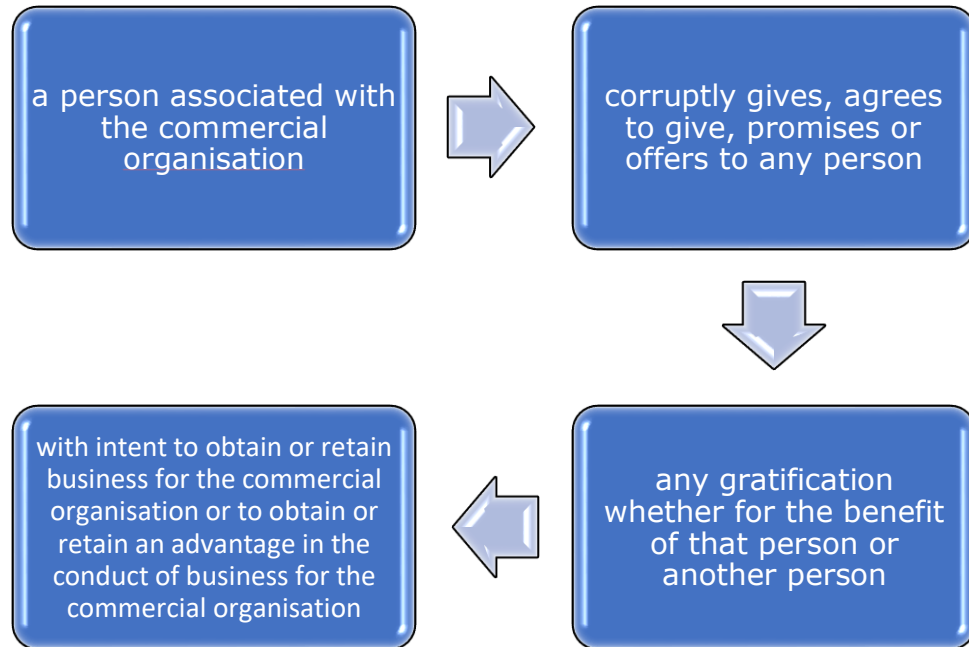
As an effort to combat corruption in the country, a new provision is introduced in the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009), i.e. Section 17A. This Section 17A of the MACC Act 2009 is essentially a corporate liability provision that makes the commercial organisation liable for any corrupt acts committed.

This new provision, among other amendments, was passed by the Parliament in 2018 but it was scheduled to come into force only 2 years later. This period of time gap for its enforcement was to give all commercial organisation sufficient time to prepare and adopt necessary policies and/or procedures to defend itself from any corporate liability.

On 21<sup>st</sup> May 2020, the Prime Minister’s office has released an official statement that section 17A will come into effect from 1<sup>st</sup> June 2020 onwards.

2. What is the relevance of section 17A MACC Act 2009 to companies in Malaysia?

A commercial organisation can be charged and be held liable under section 17A MACC Act 2009 if:-



Prior to the section 17A MACC Act 2009, only the individuals who committed corrupt actions will be charged. Now, section 17A MACC Act 2009 extends the liability to the commercial organisation for not preventing such corrupt actions from happening in the organisation.

3. What amounts to a commercial organisation?

The section 17A MACC 2009 applies to a commercial organisation which includes the following:-

- (i) A company or partnership incorporated under the local Malaysian law and carries business or a part of the business in Malaysia or elsewhere; and
- (ii) A company and or partnership incorporated overseas with business presence in Malaysia.

4. Who comes within the category of an “associated person” with a commercial organisation?

An “associated person” with a commercial organisation includes :-

- i) Director
- ii) Partner
- iii) Employee

A person who performs services for or on behalf of the commercial organisation such as contractors or agents. This is determined by considering all relevant circumstance and not mere reference to the nature of the relationship between the person and the commercial organization

5. How can the commercial organisation defend itself upon facing legal action arising from section 17A?

The statutory defence available for the commercial organisation is to prove that the commercial organisation had in place “adequate procedures” to prevent those relevant persons who are associated with the commercial organisation from carrying out the corrupt act.

6. Who in the commercial organisation ?

When the commercial organisation is charged under section 17A of the MACC 2009, senior personnel of the commercial organisation will also be deemed to have committed that offence. This senior personnel consists of a director, controller, officer, partner and person concerned in the management affairs.

There appears to be an expectation that the senior personnel of the commercial organisation to take responsibility and proactively take actions in ensuring the business is free from corruption.

7. How can these senior personnel commercial organisation who are deemed to have committed the offence to prove their individual innocence?

The affected senior personnel will have to prove the following:

- (i) The offence was committed without their consent; and
- (ii) Due diligence had been exercised to prevent the commission of the offence as expected from the nature of his/her function and the circumstances.

8. What should the commercial organisation do now?

The commercial organisations should take necessary steps to ensure “adequate procedures” as stipulated in the Ministerial Guidelines which was issued by the Prime Minister’s office are put in place. The Ministerial Guidelines outlines five guiding principles in establishing the “adequate procedures”, i.e. T.R.U.S.T:-

- i) Top-level commitment
- ii) Risk assessment
- iii) Undertake control measures
- iv) Systematic review, monitoring and enforcement
- v) Training and communication

If there are no policies or procedures implemented by the commercial organisation addressing any corrupt acts within the organisation, it is strongly advisable for the organisation to adopt such policies or procedures. If there are an existing policies or procedures, then the organisation ought to assess if it meets the guiding principle provided by the Ministry.

Ensuring the “adequate procedures” are in place benefit the commercial organisation for 2 reasons. Firstly, these “adequate procedures” will allow the commercial organisation to have a corruption-free environment as well as effectively address any corrupt acts of employees. Secondly, these “adequate procedures” could be relied on as a defence in the event a section 17A charge is levelled against the commercial organisation.

9. What happens if the commercial organisation is found guilty of the charges against which premises from section 17A?

The commercial organisation will be facing a penalty either in the form of a fine, imprisonment or even both.

The commercial organisation could be liable to a maximum fine of ten times the sum of the gratification involved or RM 1million (whichever is the higher). Alternatively, the commercial organisation could also be facing imprisonment of a term not exceeding 20 years.