

Malaysia Introduces Corporate Liability for Corruption

Kwan Will Sen explains a significant development in anti-corruption laws in Malaysia

It has been at least four years since the idea of introducing corporate liability in Malaysia for bribery and corruption was mooted. This may soon be a reality with the proposed amendments to the Malaysian Anti-Corruption Commission Act 2009 (“Principal Act”).

The Malaysian Anti-Corruption Commission (Amendment) Bill 2018 (“Bill”) was passed by the Dewan Rakyat and the Dewan Negara on 4 and 5 April 2018 respectively. The Bill will come into operation on a date to be appointed by the Minister after it has received Royal Assent and been gazetted.

The Bill, *inter alia*, introduces a new section 17A (“section 17A”) which provides for corporate liability *vis-à-vis* bribery and corruption under the Principal Act. This article explains the salient features of section 17A.

What constitutes the offence?

Section 17A states that a commercial organisation commits an offence if a person associated with the 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 to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of business for the commercial organisation.

From the foregoing, it can be seen that an essential element of the offence is that the gratification must be for the benefit of the commercial organisation. Gratification for the benefit of the associated person or other person will not come within the ambit of section 17A.

Commercial organisation

A “commercial organisation” refers to any of the following bodies so long as it carries on business, or part of its business, in Malaysia – (a) a company incorporated under the Companies Act 2016; (b) a company wherever incorporated; (c) a partnership under the Partnership Act 1961 or the Limited Liability Partnerships Act 2012; or (d) a partnership wherever formed.

By adopting a purposive interpretation, a company incorporated under the repealed Companies Act 1965 would come within the ambit of item (a) of the preceding paragraph, notwithstanding that the Companies Act 2016 stipulates that a company incorporated under the repealed Act is deemed registered, rather than incorporated, under the latter Act.

Companies incorporated under the Labuan Companies Act 1990, and limited partnerships and limited liability partnerships registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010, would come within the ambit of items (b) and (d) respectively above.

Person associated

To constitute an offence, the gratification must be carried out by a “person associated” with the commercial organisation, namely, a director, partner or an employee of the commercial organisation or a person who performs services for and on behalf of the commercial organisation.

Thus, a commercial organisation will not only be liable for gratification by its director or partner, but also its employee (regardless of his status or functions within the organisation). It could also be liable for gratification by its agents or distributors and possibly, joint-venture partners.

Sanctions

A commercial organisation which commits an offence is liable to a fine of not less than 10 times the sum or value of the gratification which is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or RM1.0 million, whichever is the higher, or to a term of imprisonment not exceeding 20 years, or to both.

Who else is liable?

When a commercial organisation is convicted of an offence under section 17A, a director, controller, officer, partner or member of the management of the organisation is also **deemed** to have committed the offence unless he proves that the offence had been committed without his consent or connivance, and that he had exercised due diligence to prevent the commission of the offence, having regard to the nature of his function and to the circumstances.

In *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12, the constitutionality of a similar type of deeming provision in section 122 (“section 122”) of the Securities Industry Act 1983 was challenged on grounds that it presumes guilt and abrogates from the prosecution’s duty to prove beyond reasonable doubt that an offence had been committed.

The Federal Court upheld the constitutionality of section 122 and ruled that there was no displacement of the burden or standard of proof. According to the Court, it was first necessary for the prosecution to prove beyond reasonable doubt that the offence had been committed by the body corporate before the presumption could be triggered to deem the offence to be committed by the directors and officers of the body corporate.

The Court further explained that the “*unless proviso*” in section 122 (i.e. that the offence had been committed without consent or connivance of the person and that he had exercised due diligence) was a statutory defence that provided the opportunity for the accused to rebut the deeming provision. According to the Court, it is only fair that the absence of consent and connivance should be proved by the accused as these are matters within his knowledge.

It is likely that the deeming provision in section 17A will be interpreted by the courts in the same manner as in *Gan Boon Aun*.

Anti-corruption procedures

A commercial organisation that is charged for an offence under section 17A may successfully defend the charge if it is able to satisfy the court that it has in place adequate procedures to prevent persons associated with the organisation from committing bribery or corruption. The Minister will be issuing guidelines to assist commercial organisations in establishing these procedures.

Comments

Section 17A will no doubt be a game-changer when the Bill becomes law and comes into force.

Directors, controllers, officers, partners and management personnel of commercial organisations will no longer be shielded from bribery and corruption carried out through their organisations. Neither can they turn a blind eye to such practices by their colleagues.

To mitigate the risk of criminal liability to a commercial organisation and its directors, controllers, officers, partners and management, it is imperative for an organisation that carries on business in Malaysia to adopt adequate procedures to prevent persons associated with the organisation from giving gratification for its benefit.

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