

Lee Hishammuddin Allen & Gledhill

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia

T +603 6208 5888
F +603 6201 0122/0136
E enquiry@lh-ag.com
W www.lh-ag.com

18 JANUARY 2019

Taking the Fight against Corruption to Commercial Organisation

Last Thursday, Prime Minister Tun Dr Mahathir Mohamad announced that the law^[1] would be amended to empower the MACC^[2] to identify and reveal proxies, nominees and beneficial owners behind commercial organisations being investigated for corruption.^[3]

The announcement comes in the wake of a pivotal change in anti-corruption law in Malaysia introduced last year,^[4] which will render commercial organisations, including foreign companies and partnerships conducting their business here, liable for failure to prevent corruption. The law also extends to acts of corruption committed beyond the shores of Malaysia and is “extraterritorial” in a similar fashion to other jurisdictions.^[5]

Corporate liability

This new law which is expected to come into force next year imposes criminal liability on a commercial organisation if a person associated with that organisation corruptly gives, offers or promises a gratification to any person with an intent to obtain or retain business or a business advantage for the commercial organisation.^[6]

A person associated with the commercial organisation is widely defined — essentially resulting in a commercial organisation being held liable for an offence under the Act for graft, bribery or corruption carried out by any director, partner, employee, agent, distributor, service provider and, potentially, even its joint venture partners and contractors.^[7]

Strict liability

This offence is one of strict liability, in that the commercial organisation would be held liable irrespective of whether its top-level management or representatives had actual knowledge of the corrupt acts of its employees or any associated persons.

The burden of proof is on the commercial organisation to show that it had implemented “adequate procedures” to prevent any associated person from committing the act which constitutes the offence.^[8]

In addition, directors, controllers, officers and partners of the

commercial organisation and persons who are concerned with its management at the time of commission of the offence will be deemed to have also committed that offence unless they can prove that:

“... the corrupt act 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.”^[9]

Penalties

The penalty for a commercial organisation found guilty of an offence of corruption is heavier than that for individuals committing acts of corruption.^[10]

Compliance regime

The new law echoes the trend in modern legislation^[11] which has shifted from one of prohibition to punishments for acts of omission by placing the onus of proof on the commercial organisation to show that its internal policies and procedures have been implemented that will constitute “adequate procedures” to prevent the occurrence of corrupt practices in relation to their business activities.

Early last month, the Prime Minister’s Department issued a set of “[Guidelines on Adequate Procedures](#)” to assist commercial organisations with compliance. The guidelines are couched in terms of five key principles, which will render compliance a wide-ranging exercise.

What is required

Due to similar anti-corruption legislation already in place across the globe, most multinational corporations will have in place compliance regimes that can easily be adapted to include compliance with Malaysian law. However, other organisations may find it prudent to consider setting up a compliance regime in anticipation of the new law coming into force.

How the law will be amended to address proxies, nominees and beneficial owners and what they may mean for compliance has yet to be seen.

Annabel Kok Keng Yen (kky@lh-ag.com)

If you have any queries, please contact the author or her team partner [Aaron Gerard Sankar](#) (ags@lh-ag.com).

Published by the Corporate Department

© Lee Hishammuddin Allen & Gledhill. All rights reserved. The views and opinions attributable to the authors or editor of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents of this publication are intended for purposes of general information and are for academic discussion only. It should not be construed as legal advice or legal opinion on any fact or circumstance.

[1] Malaysian Anti-Corruption Commission Act 2009 [Act 694]

[2] Malaysian Anti-Corruption Commission

[3] "PM: MACC Act to have provision to show real beneficial owners in companies" *EdgeProp.my* (10 January 2019) <<https://www.edgeprop.my/content/1461043/pm-macc-act-have-provision-show-real-beneficial-owners-companies>>

[4] Malaysian Anti-Corruption Commission (Amendment) Act 2018 [Act A1567]

[5] See, for instance, the Bribery Act 2010 [UK]

[6] *Supra* n 1, s 17A(1)

[7] *Ibid*, s 17A(6)

[8] *Ibid*, s 17A(4)

[9] *Ibid*, s 17A(3)

[10] *Ibid*, s 17A(2). The penalty for a commercial organisation is:
(a) a fine of not less than 10 times the sum or value of the gratification or RM1 million, whichever is the higher;
(b) imprisonment for a term not exceeding 20 years; or
(c) both.

[11] See, for instance, s 24(2) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613] and ss 129(3)(f) and 133(1)(b)(ii) of the Personal Data Protection Act 2010 [Act 709].