

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

SEVENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

Anti-corruption enforcement continues to be an increasingly global endeavour and this seventh edition of *The Anti-Bribery and Anti-Corruption Review* is no exception. It presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe, including new chapters covering Canada, Israel and Korea.

Given the exceptionally large penalties levied last year against Odebrecht SA and Braskem SA, as well as those against Rolls-Royce Plc, Telia Company AB, and VimpelCom Limited, the size of the fines in global enforcement actions have declined somewhat year-on-year, but multinational cooperation in global enforcement has remained robust. For example, the September 2018 conclusion in the United States of an US\$853.2 million settlement with Petróleo Brasileiro SA (Petrobras) entailed cooperation between Brazil's Federal Public Ministry (MPF), the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC). Under the non-prosecution agreement with Petrobras, the DOJ and SEC will credit the amount the company pays to the MPF, with Brazil receiving 80 per cent (US\$682,560,000) of the penalty. Likewise, the conclusion of an enforcement action against SBM Offshore NV, a Netherlands-based oil services company, and its US subsidiary entailed the participation of the MPF, the Netherlands Public Prosecution Service and the DOJ, each of which shared a combined worldwide criminal penalty in excess of US\$478 million. Similarly, Keppel Offshore & Marine, Ltd, a Singapore-based shipping services company, and its US subsidiary entered into coordinated settlement agreements with the DOJ, MPF and Singapore's Corrupt Practices Investigation Bureau. In an enforcement action against Paris-based Société Générale SA and its wholly owned subsidiary, the DOJ credited half the penalty assessed in connection with the bribery charges (over US\$292 million) for payments to the French National Financial Prosecutor's Office. In a related enforcement action against Maryland-based Legg Mason, Inc, the DOJ also credited amounts paid to other law enforcement authorities.

Crediting fines in this way is in keeping with the DOJ's policy, announced in May 2018, of discouraging 'piling on', and encouraging coordination with other enforcement agencies in an attempt to avoid multiple penalties for the same conduct. In the FCPA context, the new policy arguably goes further than Article 4 of the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which requires signatory states with shared jurisdiction over a foreign bribery case merely to consult with each other 'with a view to determining the most appropriate jurisdiction for prosecution'. For example, notwithstanding evidence of violations of the US Foreign Corrupt Practices Act, the DOJ closed its investigation of Guralp Systems Ltd, a UK-based manufacturer of broadband seismic instrumentation and

monitoring systems, in part owing to a parallel investigation and subsequent charges brought by the UK Serious Fraud Office (SFO).

Large-scale multinational coordination has also continued in connection with ongoing efforts to prosecute corruption in international football. Since May 2015, approximately 45 individuals have been charged in the United States alone. Likewise, there have been further developments in the worldwide investigations into the misappropriation of more than US\$3.5 billion in funds by senior government officials from state-owned strategic development company 1Malaysia Development Berhad (1MDB), including the arrest of former Malaysian prime minister Najib Razak, who was charged with money laundering and various other offences, and eight former officers of the Malaysian External Intelligence Organisation, including its former chief. Hundreds of millions of dollars in assets have been seized. Following a formal request from the DOJ, Indonesia impounded in Bali and agreed to convey to Malaysia a US\$250 million luxury yacht belonging to Low Taek Jho, the Malaysian financier at the centre of the 1MDB scandal.

At an even more fundamental level, and in concert with the growing trend towards multinational cooperation in global enforcement, this past year, around the world, countries have adopted important enhancements to their anti-corruption laws. Argentina established criminal liability for domestic and foreign companies and imposed strict liability for various offences, including active domestic bribery, transnational bribery and participating in the offence of illicit enrichment of public officials. Canada implemented legislation outlawing 'facilitation payments', which are made to government officials to facilitate routine transactions, such as permits. In China, the Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law that specify the range of prohibited recipients of bribes and expand the definition of prohibited bribery to include bribery for the purpose of obtaining transaction opportunities or competitive advantages. The amendments also impose, with limited exceptions, vicarious liability on employers for bribery committed by employees, and provide for increased penalties. India passed the Prevention of Corruption (Amendment) Act, which criminalises giving an 'undue advantage' to a public official, establishes criminal liability for corporations and creates a specific offence penalising corporate management. Furthermore, Italy announced a new law aimed at strengthening protection for whistle-blowers, while Peru passed a law imposing criminal liability on domestic and foreign corporations.

A significant trend in legislative changes this past year was the widespread introduction of alternative forms of resolution for companies, short of criminal conviction and often referred to as deferred prosecution agreements (DPAs). Argentina, as part of its new law establishing criminal liability for domestic and foreign companies, introduced 'effective collaboration agreements', which allow for non- and deferred-prosecution agreements. Canada created a legal regime for 'remediation agreements' to resolve corporate offences under the Criminal Code and the Corruption of Foreign Public Officials Act. Singapore also introduced similar new legislation. Notably, these new DPA regimes, unlike non-prosecution agreements in the American regime, but in keeping with US DPAs and the regime in the United Kingdom, all require court approval of any proposed agreement. Additionally, in November 2017, France announced its first deferred prosecution agreement under the Sapin II Law with HSBC Private Bank (Suisse) SA, enacted in December 2016.

There have also been a number of significant developments in data protection laws that affect the conduct of international investigations, of which the EU General Data Protection Regulation (GDPR) is the most well known and impactful. In the first court ruling

concerning the application of the GDPR, a German court held that the Internet Corporation for Assigned Names and Numbers could no longer demand from a registrar of domain information data containing, among other things, the contact information for domain name registrants, administrators and technicians. Meanwhile, a number of developments affect the ability of law enforcement authorities to compel production of certain records from outside their national borders. For example, in the United States, Congress passed the Clarifying Lawful Overseas Use of Data Act (or CLOUD Act), which expressly requires email service providers to preserve and disclose to law enforcement electronic data within their possession, custody or control even when that data is located outside the United States. Following two decisions of the Court of Appeal of England and Wales, the SFO can compel production of documents held outside the United Kingdom by companies incorporated outside the United Kingdom, but the protections of ‘litigation privilege’ will still be accorded to documents produced in internal investigations. It will be interesting to see how courts and companies navigate these differing and evolving legal regimes in the year ahead.

The chapters in this book, which contain a wealth of learning about these significant developments around the world, will serve as a useful place to begin. They will help to guide practitioners and their clients when navigating the perils of corruption in the conduct of foreign and transnational business, and of related internal and government investigations. I wish to thank all the contributors for their support in producing this volume and for taking time from their practices to prepare these chapters.

Mark F Mendelsohn

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MALAYSIA

*Rosli Dahlan and Arief Hamizan*¹

I INTRODUCTION

The 14th Malaysian general election, held on 9 May 2018, marked a historic moment for Malaysia. The coalition of opposition political parties calling themselves ‘Pakatan Harapan’ (Pact of Hope) created a political tsunami when it swept to victory, dislodging the unbroken hold on government of the incumbent ruling coalition, ‘Barisan Nasional’ (National Front), which had been in power for over six decades since independence in 1957.

A major factor of Pakatan Harapan’s victory – which brought back former Malaysian strongman Dr Mahathir Mohamad as the country’s seventh Prime Minister – was its reformist, anti-corruption agenda, which resonated with a nation shocked by the alleged involvement of the incumbent, Prime Minister Najib Razak, in the multibillion-dollar 1Malaysia Development Berhad (1MDB) corruption scandal.² The Malaysian electorate was enraged by the then government’s dirty tactics to deregister Dr Mahathir’s party, Parti Pribumi Bersatu Malaysia,³ just days before voting day. The High Court has since ruled that the deregistration was illegal.

Since its election victory, the new Malaysian government has continued to aggressively pursue its anti-corruption agenda through the establishment of the Special Cabinet Committee on Anti-Corruption (JKKMAR) and the Governance, Integrity and Anti-Corruption Centre (GIACC); the formulation of the National Anti-Corruption Plan;⁴ and the reopening of

1 Rosli Dahlan is a partner and Arief Hamizan is a pupil in chambers at Lee Hishammuddin Allen & Gledhill.

2 Rahmah Ghazali, ‘Pakatan reveals its anti-corruption manifesto’, *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2017/10/31/pakatan-reveals-its-anticorruption-manifesto/>.

3 Karen Arukesamy, ‘Status quo for PPBM as political party (Updated)’, *The Sun Daily*. Retrieved at <http://www.thesundaily.my/news/2018/04/23/status-quo-ppbm-political-party>; V Anbalagan, ‘PPBM gets go-ahead to challenge RoS order’, *Free Malaysia Today*. Retrieved at <https://www.freemalaysiatoday.com/category/nation/2018/04/23/ppbm-gets-go-ahead-to-challenge-ros-order/>; Ho Kit Yen, ‘RoS affirms PPBM as a valid party after de-registration tussle’, *Free Malaysia Today*. Retrieved at <https://www.freemalaysiatoday.com/category/nation/2018/08/14/ros-affirms-ppbm-as-a-valid-party-after-de-registration-tussle/>.

4 ‘Pakatan fulfilled 21 out of 60 promises in 100 days, says Dr M’, *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2018/08/17/pakatan-fulfilled-21-out-of-60-promises-in-100-days-says-dr-m/>.

investigations into the 1MDB scandal, which have recently led to criminal charges being brought against former Prime Minister Najib Razak.⁵ By 2030, Malaysia aims to be one of the top 10 cleanest nations in the world.⁶

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Legislation on corruption

A number of pieces of legislation in Malaysia deal with corruption:

- a Penal Code (FMS Chapter 45) (Revised in 1997 as Act 574);
- b Prevention of Corruption Ordinance 1950 (repealed);
- c Election Offences Act 1954 (Act 5);
- d Prevention of Corruption Act 1961 (Act 57) (repealed);
- e Customs Act 1967 (Act 235) (Revised 1980);
- f Emergency (Essential Powers Ordinance) 1970;
- g Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613);
- h Anti-Corruption Act 1997 (Act 575) (repealed); and
- i Malaysian Anti-Corruption Commission Act 2009 (Act 694).

The Malaysian Anti-Corruption Commission Act 2009 (the MACC Act 2009), which repealed the Anti-Corruption Act 1997, is the principal legislation dealing with corruption. Malaysia's aspiration to combat corruption can be seen from the succession of anti-corruption laws that were passed prior to and after independence. Over the years, more progressive laws were passed to combat corruption, both in the public and private sectors, to cover extensive corruption in its multiple forms.

ii Malaysian Anti-Corruption Commission Act 2009 (Act 694)

Precedent court cases have described corruption as the provision of corrupt gratification as an inducement or reward for a person to act or forbear to act in a manner contrary to his or her office or position.⁷ The word 'corrupt' was explained by the Malaysian courts as 'doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions' and 'purposely doing an act which the law forbids'.

The courts elaborated that: 'Corrupt is a question of intention. If the circumstances show that what a person has done or has omitted to do was moved by an evil intention or a guilty mind, then he is liable under the section. Thus if the accused used his position to solicit gratification with a guilty mind, he is caught within the ambit of the section. (In that case.) The real point is whether there is soliciting of a political donation with a corrupt intention.'⁸

5 Hazlin Hassan and Nadirah H Rodzi, 'Najib pleads not guilty to corruption charges linked to 1MDB, vows to clear name', *The Straits Times*. Retrieved at <https://www.straitstimes.com/asia/se-asia/malaysias-former-pm-najib-razak-arrives-in-court-to-face-graft-charges-linked-to-1mdb>.

6 See footnote 2.

7 Section 16 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

8 See *Public Prosecutor v. Datuk Haji Harun bin Haji Idris* (No. 2) [1977] 1 MLJ 15.

The MACC Act 2009 has the principal objective of promoting the integrity and accountability of public and private sector administration by constituting an independent and accountable anti-corruption body; and educating the public at large about corruption and its effects.

The MACC Act 2009 has expanded the definition of gratification to cover the following many corrupt acts:

- a* money, donation, gift, loan, fee, reward, valuable security, property or interest in property (being property of any description whether movable or immovable), financial benefit or any other similar advantage;
- b* any office, dignity, employment, contract of employment or services, or agreement to give employment or render services in any capacity;
- c* any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- d* any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- e* any forbearance to demand any money or money's worth or valuable thing;
- f* any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- g* any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f).⁹

Offences

The MACC Act 2009 deals with the offences of corruption in multiple forms that include acceptance of gratification and the following:

- a* Bribery of an officer of a public body: it is an offence to offer to an officer of a public body or for an officer of a public body to solicit or accept any gratification as an inducement or a reward for:
 - any vote at any public body meeting either for or against any measure, resolution or question;
 - performance or non-performance or aiding in procurement or to expedite, delay, hinder or prevent the performance of any official act;
 - procurement or prevention of passing of vote or procurement of any contract or advantage in favour of any person; or
 - granting or forbearing any favour or disfavour.¹⁰It is an offence for officers of a public body to use their office or position for any gratification, whether for themselves, their relatives or associates.¹¹
- b* Corrupt gratification by an agent: it is an offence for an agent to corruptly accept, obtain, agree to accept or attempt to obtain from any person or for any person to give, agree to give or offer any gratification to any agent as an inducement or a reward for:
 - doing, forbearing to do, for having done or for having forborne to do any act in relation to his or her principal's affairs or business; or

⁹ Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

¹⁰ Section 21 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

¹¹ Section 23 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

- showing or forbearing to show favour or disfavour to any person in relation to his or her principal's affairs.¹²
- c Deception of principal by an agent: it is an offence to give an agent or for an agent to use any account or document (when he or she has reason to believe the statement contains false or erroneous or defective material or information) to deceive or mislead the principal.¹³
- d Procurement of withdrawal of tender: it is an offence to:
 - offer any gratification to any person who has made a tender for a contract (with intention to obtain from any public body a contract for work or service or supply of any goods) as an inducement or a reward for a withdrawal of a tender; or
 - solicit or accept any gratification as an inducement or a reward for a withdrawal of a tender.¹⁴
- e Attempts, preparations, abetments and criminal conspiracy to commit offences: it is equally an offence for any person to attempt or to do any act preparatory to or in furtherance of the commission of any offence or abet or engage in a criminal conspiracy to commit any offence under the MACC Act 2009.¹⁵
- f Failure to report bribery is an offence: any person who is aware of bribery transactions shall make a report to the Malaysian Anti-Corruption Commission (MACC) or the police. Failure to make a report constitutes an offence punishable by a fine not exceeding 10,000 ringgit or imprisonment not exceeding two years, or both.¹⁶

Statutory presumption of corruption

Once gratification is proved to have been offered or received, it shall be presumed that the gratification is a corrupt gratification as an inducement or a reward for or on account of the matters unless the contrary is proved.¹⁷ The burden then shifts to the accused to show, on the balance of probability, that the gratification was not received or given corruptly.¹⁸

Penalty

Corruption is punishable by imprisonment not exceeding 20 years and a fine of not less than five times the sum or value of the gratification that is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or 10,000 ringgit, whichever is higher.¹⁹

Plea-bargaining

In 2012, the Criminal Procedure Code (Act 593) was amended to allow for plea-bargaining. An accused person may make an application for plea-bargaining in the court in which the

12 Section 17 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

13 Section 18 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

14 Section 20 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

15 Section 28 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

16 Section 25 Malaysian Anti-Corruption Commission Act 2009 (Act 694); See also *Md Ezam Md Daimon v. Amona Building Management Services Sdn Bhd* [2011] 2 ILR 69.

17 Section 50 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

18 See *PP v. Mohd Noor Yusof* [2008] 7 CLJ 504; *Mohd Khirudin Yaakub v. PP* [2009] 10 CLJ 315.

19 Section 24 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

offence is to be tried.²⁰ It is not yet clear whether the Public Prosecutor will accede to any request for plea-bargaining in corruption cases. The process for plea-bargaining will require the accused person to agree on a disposition with the prosecution, and the court shall find the accused guilty on the charge and sentence the accused to not more than half of the maximum punishment of imprisonment provided under the law for the offence for which the accused has been convicted.²¹

Public officer

The express objective of the MACC Act 2009 is to eradicate corruption in the public sector by having a very wide definition of a public officer:

*Public officer or officer of a public body means any person who is a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds.*²²

Previously, the High Court, the Court of Appeal and the Federal Court had ruled that the Prime Minister of Malaysia is not a public officer.²³ This had created widespread public disaffection and suspicion that the courts were complicit in covering up the 1MDB financial scandal, whereas the US Department of Justice (DOJ) court papers had made clear reference to a top-ranking official named 'Malaysian Official 1' as being the former Prime Minister and various other suspects as people associated with him.²⁴ The newly appointed Attorney General is now seeking to review the earlier court decisions in impending prosecutions against the former Prime Minister.²⁵

iii Penal Code (Act 574)

The Malaysian Penal Code makes it an offence for a public servant to obtain any gift from a person involved in any proceeding or business transacted by him or her.²⁶ A public servant commits an offence if he or she accepts any gratification other than his or her legal remuneration in respect of an official act.²⁷ Taking a gratification by corrupt or illegal means to influence a public servant²⁸ or taking gratification for the exercise of personal influence with a public servant²⁹ is also an offence.

20 Section 172C of the Criminal Procedure Code (Revised 1999) Act 593.

21 Section 172D of the Criminal Procedure Code (Revised 1999) Act 593.

22 Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

23 'Dr M, Khairuddin fail to get leave to appeal in suit against PM', *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2018/02/27/dr-m-khairuddin-fail-to-get-leave-to-appeal-in-suit-against-pm/>.

24 Karishma Vaswani, 'Who is 'Malaysian Official 1'? Case closed', BBC News. Retrieved at www.bbc.com/news/business-37234717; 'Najib is Malaysian Official 1 (MO1), says Rahman Dahlan (Updated)', *The Sun Daily*. Retrieved at www.thesundaily.my/news/1957789.

25 'Najib seeks to exclude top four judges from panel hearing review in misfeasance suit', *The Malay Mail*. Retrieved at <https://www.malaymail.com/s/1659603/najib-seeks-to-exclude-top-four-judges-from-panel-hearing-review-in-misfeasance>.

26 Section 165 Penal Code (Act 574).

27 Section 161 Penal Code (Act 574).

28 Section 162 Penal Code (Act 574).

29 Section 163 Penal Code (Act 574).

iv Emergency (Essential Powers) Ordinance No. 22/1970

Provisions for corruption in relation to members of the administration is provided under the Emergency (Essential Powers) Ordinance No. 22/1970, which defines ‘corrupt practice’ as any act done by any member of the administration or any member of Parliament or state legislative assembly member or any public officer who uses his or her public office for his or her pecuniary or other advantage. A member of a state legislative assembly is also forbidden to engage in any trade, business or profession that he or she oversees. He or she also cannot take part in any decision of the state executive council relating to any trade, business or profession he or she is engaged in or take part in any decision likely to affect his or her pecuniary interest therein.³⁰

III ENFORCEMENT: DOMESTIC BRIBERY

A specialised law enforcement body was established in the form of the Anti-Corruption Agency (ACA), which was then upgraded and became the MACC, established under the purview of the MACC Act 2009. The MACC superseded the ACA as the sole body managing cases related to corruption and having the foremost role in anti-corruption initiatives nationwide.

The MACC has extensive powers to investigate corruption and may order any person to appear before it to be examined. In addition, officers of the MACC are empowered by the MACC Act 2009 to have powers and immunity similar to that afforded to police officers in the performance of their duties; for example, powers of search and seizure of property.

The MACC has also been accorded powers of enforcement pursuant to 25 other pieces of legislation, which include the areas of banking and financial transactions,³¹ company or society dealings and transactions,³² customs and smuggling activities,³³ income tax,³⁴ prison and government supplies³⁵ and election offences.³⁶

The MACC has also been given administrative powers to recommend disciplinary actions against public officials under various government directives and circulars, namely:

- a* Public Officers (Conduct and Discipline) Regulations 1993;
- b* Service Circular No. 12 of 1967 (Anti-Corruption Agency Director’s Investigation Report);
- c* Service Circular No. 17 of 1975 (National Investigation Bureau Investigation Report);
- d* Confidential General Circular No. 1 of 1984 (Investigation of Corruption Cases against Government Departments);
- e* Confidential General Circular No. 1 of 1985 (Integrity Vetting by Anti-Corruption Agency Malaysia); and
- f* other Service Circulars currently enforced.

30 Section 2 Emergency (Essential Powers) Ordinance No. 22/1970.

31 Section 134 Financial Services Act 2013 (Act 758); Section 88 Central Bank of Malaysia Act 2009 (Act 701).

32 Section 537 Companies Act 2016 (Act 777); Section 46 Societies Act 1966 (Act 235).

33 Section 137 Customs Act 1967 (Act 235).

34 Section 118 Income Tax 1967 (Act 53).

35 Section 54 Prison Act 1995 (Act 206).

36 Section 10 Election Offences Act 1954 (Act 5).

Section 7 of the MACC Act 2009 lists the functions of the MACC as follows:

- a* to receive and consider any report of the commission of an offence under this Act and to investigate such reports;
- b* to detect and investigate any suspected offence or attempt or conspiracy to commit any offence under the MACC Act 2009;
- c* to examine the practices, systems and procedures of public bodies to facilitate the discovery of offences under the MACC Act 2009;
- d* to instruct, advise and assist any person on ways in which corruption may be eliminated;
- e* to advise heads of public bodies of any change in practices, systems or procedures to reduce the likelihood of the occurrence of corruption;
- f* to educate the public against corruption; and
- g* to enlist and foster public support against corruption.

Section 30 of the MACC Act 2009 sets out the powers of the MACC to examine persons as follows:

- a* order any person to be interviewed in relation to any matter that may assist in the investigation into the offence;
- b* order any person, to produce any book, document, records, accounts or computerised data, or any certified copy thereof, or any other article that may assist in the investigation into the offence;
- c* order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information as may assist in the investigation into the offence, within the time specified; and
- d* order any person to have his or her handwriting or voice sample taken.

In the case of *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor*, the Federal Court, which is the apex court in Malaysia, ruled that the MACC may issue a notice under Section 30(1)(a) of the MACC Act 2009 to the lawyer representing an accused person and such notices cannot be challenged in court.³⁷ This decision has been criticised as it adversely affects the accused's right to be defended by a lawyer of his or her choice since the lawyer may be called as a witness for the prosecution.

As a counterbalance to prevent any abuse of the wide powers granted to its officers, the MACC Act 2009 prescribes the establishment of five different internal watchdog bodies:

- a* Anti-Corruption Advisory Board;
- b* Special Committee on Corruption;
- c* Complaints Committee;
- d* Operations Review Panel; and
- e* Consultation and Corruption Prevention Panel.

Some of the powers vested in the MACC have been the subject of public criticism. Following the death of a witness while in MACC custody,³⁸ a challenge was mounted against the MACC for interrogating witnesses beyond normal business hours. However, in the case of *Datuk Seri*

37 Tamarai Chelvi, 'Federal Court rules MACC's notice to lawyers cannot be challenged', *The Sun Daily*. Retrieved at www.thesundaily.my/news/2017/08/09/federal-court-rules-maccs-notice-lawyers-cannot-be-challenged.

38 See further details at teohbenghock.org.

Ahmad Said Hamdan v. Tan Boon Wah [2010] 6 CLJ 142, the Court of Appeal held that there is no restriction for the MACC to interrogate witnesses only during office hours. The Court of Appeal went on to hold that the ordinary meaning of the words ‘from day to day’ must be ‘continuously or without interruption from one 24-hour day to another’. There are also concerns about the removal of the right to remain silent, right against self-incrimination or spousal incrimination,³⁹ spousal privileged communication and right of access to legal representation.⁴⁰ These have yet to be subjected to constitutional challenges.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Extraterritorial jurisdiction

The MACC Act 2009 also provides for extraterritorial jurisdiction where offences of corruption committed outside Malaysia by citizens and permanent residents of Malaysia may be dealt with as if these were committed in Malaysia.⁴¹

Any proceedings against any person under Section 66 of the MACC Act 2009 that would be a bar to subsequent proceedings against that person for the same offence if the offence was committed in Malaysia shall be a bar to further proceedings against him or her under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.⁴²

Further, it is also an offence to conceal, deal, use, hold or receive gratification or ill-gotten assets outside Malaysia, which is punishable by a fine not exceeding 50,000 ringgit or imprisonment not exceeding seven years, or both.⁴³

ii Foreign public officials

The MACC Act 2009 provides for corruption in relation to foreign public officials.

A ‘foreign public official’ is defined to include:

- a any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected;
- b any person who exercises a public function for a foreign country, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign country; and
- c any person who is authorised by a public international organisation to act on behalf of that organisation.⁴⁴

It is an offence for any person (by himself or herself or with others) to give, promise, offer, agree to give or offer to any foreign public official or for a foreign public official to solicit, accept, obtain, agree to accept or attempt to obtain any gratification as an inducement or a reward for, or otherwise on account of, the foreign public official for:

- a using his or her position to influence any act or decision of the foreign state or public international organisation;

39 Section 30(3)(b) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

40 *ibid.*

41 Section 66 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

42 Section 66(2) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

43 Section 26 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

44 Section 3 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

- b performing, having done, having forborne to do, abstaining from performing, aiding in procuring, expediting, delaying, hindering or preventing the performance of any of his or her official duties; or
- c aiding in procuring or preventing the granting of any contract for the benefit of any person.⁴⁵

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

The provisions under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) (AMLATFPUA) commonly provides for the tracing of corruption proceeds and ill-gotten money for other criminal activities.

The Malaysian business community recently became aware of the disconcerting fact that the Second Schedule of the AMLATFPUA allows the Act to be used in respect of offences under 44 other statutes, including goods and services tax, tax, Inland Revenue cases and also offences under the Companies Act, Malaysian Palm Oil Board Act and Trade Description Act.⁴⁶ There was public controversy when the bank accounts of numerous business tycoons were frozen or seized by the Inland Revenue Board.⁴⁷ There was widespread criticism that the AMLATFPUA had been abused, especially when the tycoons caught in the dragnet were said to be close to the opposition parties.

The AMLATFPUA is extraterritorial as it applies to any property, whether it is situated in or outside Malaysia.⁴⁸

Money laundering is the act of engaging in a transaction involving proceeds of an unlawful activity; acquiring or disguising proceeds of any unlawful activity; impeding the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity, where the person knows that the property is the proceed from any unlawful activity; or the person without reasonable excuse fails to take reasonable steps to ascertain whether the property is the proceed from any unlawful activity.⁴⁹

The 'proceeds of unlawful activity' are defined as any property obtained by any person as a result of any unlawful activity, and unlawful activity means any activity that is related to any serious offence or any foreign serious offence.⁵⁰ A list of serious offences is provided in the Second Schedule of the AMLATFPUA.

45 Section 22 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

46 Second Schedule Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

47 'IRB goes after big defaulters', *The Star*. Retrieved at www.thestar.com.my/news/nation/2017/05/11/irb-goes-after-big-defaulters-tan-sris-and-datuks-ordered-to-settle-tax-arrears-running-into-million/; 'Lee Kim Yew's tax battle message goes viral', *The Star*. Retrieved at www.thestar.com.my/business/business-news/2017/05/12/lee-kim-yews-tax-battle-message-goes-viral/.

48 Section 2(2) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

49 Section 3 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

50 *ibid.*

Furthermore, 'property' is defined to include corporeal or incorporeal, movable or immovable, tangible or intangible assets, however acquired, or electronic or digital legal documents or instruments in any form, including bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.⁵¹

The offence of money laundering is punishable by a fine not exceeding 5 million ringgit or imprisonment not exceeding five years, or both.⁵²

A person may still be convicted for money laundering regardless of whether there is a conviction of the principal serious offence or foreign serious offence.⁵³

i Reporting institution

The central bank of Malaysia, the Bank Negara Malaysia (BNM), has also issued several guidelines to facilitate the tracing and combating of money laundering and financing of terrorism activities:

- a* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Banking and Deposit-Taking Institutions (Sector 1);
- b* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Insurance and Takaful (Sector 2);
- c* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3);
- d* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Electronic Money and Non-Bank Affiliated Charge and Credit Card (Sector 4);
- e* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Designated Non-Financial Businesses and Professions (DNFBPs) and Other Non-Financial Sectors (Sector 5); and
- f* Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6).⁵⁴

To facilitate the tracing of proceeds of unlawful activities, various parties are deemed as 'reporting institutions'; these include individuals, corporations, their branches and subsidiaries outside Malaysia, money lenders, pawnbrokers, trust companies and professionals such as accountants, advocates and solicitors, valuers, appraisers and estate agents.⁵⁵

The reporting institution is required to promptly submit a suspicious-transaction report to the Financial Intelligence and Enforcement Department of BNM when the reporting institution suspects or has reason to suspect that a transaction appears unusual, has no clear

51 Ibid.

52 Section 4 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

53 Section 4(2) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

54 All the Guidelines can be downloaded at <http://amlcft.bnm.gov.my/AMLCFT07.html>.

55 First Schedule, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

economic purpose, appears illegal, involves proceeds from an unlawful activity, or indicates that the customer is involved in money laundering or terrorism financing.⁵⁶ Non-compliance with the reporting obligations attract civil and criminal penalties.⁵⁷

Reporting institutions that fail or refuse to comply with the guidelines or directions by and agreements with BNM shall be liable to a fine not exceeding 100,000 ringgit.⁵⁸

Failure to ensure compliance with the reporting obligations to implement any action plan will attract a fine not exceeding 100,000 ringgit or imprisonment not exceeding six months, or both. A continuing offence will attract a further fine not exceeding 1,000 ringgit for each day during which the offence continues after conviction.⁵⁹

To encourage submission of suspicious-transaction reports, the AMLATFPUA affords protection and immunity from civil, criminal or disciplinary action to any person who makes such a report.⁶⁰

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

According to the MACC Annual Report 2016, in relation to foreign bribery, the MACC has worked closely with foreign anti-corruption enforcement agencies such as the Anti-Corruption Bureau of Brunei Darussalam, the Corrupt Practices Investigation Bureau of Singapore, the National Anti-Corruption Commission of Thailand, the Government Inspectorate of Vietnam, the Anti-Corruption Directorate with the Prosecutor General of the Republic of Azerbaijan, and the Fiji Independent Commission Against Corruption.⁶¹

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Malaysia became a signatory of the United Nations Convention against Corruption on 9 December 2003 and successfully ratified it on 24 September 2008.⁶²

In addition to its obligation under the UN Convention, Malaysia is a member of:
a the Asian Development Bank/Organisation for Economic Co-operation and Development Anti-Corruption Action Plan for Asia and the Pacific;⁶³

56 Sections 14 and 5(2) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613). See also Paragraph 24.1.1 Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3). The suspicious-transaction report forms can be downloaded at <http://amlcft.bnm.gov.my/AMLCFT05a.html>.

57 Paragraph 26.1, Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3).

58 Section 66E(5) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

59 Section 22 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

60 Section 24(1) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613).

61 Annual Report 2016, The Malaysian Anti-Corruption Commission.

62 'United Nations Convention against Corruption Signature and Ratification Status as of 21 September 2016', United Nations Office on Drugs and Crime. Retrieved at www.unodc.org/unodc/en/treaties/CAC/signatories.html.

63 'Member countries and economies', ADB/OECD Anti-Corruption Initiative for Asia-Pacific. Retrieved at www.oecd.org/site/adboecdanti-corruptioninitiative/theinitiativesmembercountriesandeconomies.htm.

- b* the Asia/Pacific Group on Money Laundering;⁶⁴ and
- c* the International Anti-Corruption Agency based in Laxenburg, Austria.⁶⁵

VIII LEGISLATIVE DEVELOPMENTS

On 7 August 2017, the Court of Appeal declared unconstitutional the provisions of Section 62 of the MACC Act 2009, which require accused persons to disclose their defence statements to the prosecution before the beginning of the trial, as this impedes the accused's rights to a fair trial.⁶⁶

i Malaysian Anti-Corruption Commission (Amendment) Act 2018 (Act A1567)

On 4 May 2018, the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (the MACC Amendment Act 2018) was published in the Gazette. However, at the time of writing, it has not yet come into force.

The MACC Amendment Act 2018 introduces Section 17A, which provides that a commercial organisation is deemed to commit an offence if any person associated with the commercial organisation corruptly gives, agrees to give, promises or offers to any person any gratification to obtain or retain business or advantage for the organisation. Under this amendment, corporations and commercial firms' shareholders, boards of directors or management may be held responsible for an offence committed by the company.

A commercial organisation that commits an offence under Section 17A shall on conviction be liable to a fine of not less than 10 times the sum or value of the gratification that is the subject matter of the offence, where the gratification is capable of being valued or is of a pecuniary nature, or a fine of 1 million ringgit, whichever is higher, or imprisonment for a term not exceeding 20 years, or both.

Section 17A of the MACC Amendment Act 2018 also introduces statutory defences for the MACC Act 2009 for the first time:

- a* under Section 17A(3), where an offence is committed by a commercial organisation, a person who is its director, controller, officer or partner or who is concerned in the management of its affairs can escape liability if he or she is able to prove that the offence was committed without his or her consent or connivance and that he or she exercised due diligence to prevent the commission of the offence; and
- b* under Section 17A(4), if charged with an offence under Section 17A(1), a commercial organisation may, as a defence, prove that it had in place adequate procedures designed to prevent persons associated with the organisation from undertaking the conduct that is the subject of the offence.

Section 30 of the MACC Amendment Act 2018 has been amended with the deletion of Subsection (7). Following this deletion, a person who discloses any information or

64 'Members and observers', Asia/Pacific Group. Retrieved at www.apgml.org/members-and-observers/members/details.aspx?m=b1b0ea02-b04a-4b44-bb78-4d98fec54862.

65 'Parties and Signatories', International Anti-Corruption Agency. Retrieved at <https://www.iaca.int/constituency/parties-signatories.html>.

66 'Court of Appeal: Section 62 of MACC Act unconstitutional', *The Star*. Retrieved at www.thestar.com.my/news/nation/2017/08/07/court-of-appeal-rules-section-62-of-macc-act-unconstitutional/#iffZ7A1hvGCd7VVg.99.

produces any book, document, record, account, computerised data or article pursuant to Subsections 30(1), (2) and (3) of the MACC Act 2009 is no longer immune from any prosecution, proceedings or claims.

The MACC Amendment Act 2018 also introduces Section 41A, which enables any document or copy of the document obtained by the MACC to be admissible as evidence in any proceedings under the MACC Act 2009.

In addition, the MACC Act 2009 is amended to substitute the word 'bank' with 'financial institution'. This amendment effectively updates and widens the scope of the MACC Act 2009 to include all the institutions under the relevant laws. Prior to the amendment, the definition of a financial institution was confined to a person carrying on any banking or finance company business as defined in the Banking and Financial Institutions Act 1989, which has been repealed by the Financial Services Act 2013.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

i Disclosure and privilege

Pursuant to Section 126 of the Evidence Act 1950, Malaysian law recognises the concept of legal professional privilege, which protects confidential communications between an advocate and solicitor and his or her client. No advocate is permitted, unless with the client's express consent, to disclose any communication made to him or her in the course and for the purpose of his or her employment by or on behalf of a client, or to state the contents or condition of any document with which he or she has become acquainted in the course and for the purpose of professional employment, or to disclose any advice given to the client in the course and for the purpose of that employment.⁶⁷

However, this privilege and protection is overridden by the MACC Act 2009, which provides that, notwithstanding any other written law, an order from a judge of the High Court can compel an advocate and solicitor to disclose information available to him or her in respect of any transaction or dealing relating to any property that is liable to seizure under the MACC Act 2009.⁶⁸ However, an advocate or solicitor is not required to comply with any such order to the extent that compliance would disclose any privileged information or communication that came into his or her knowledge for the purpose of any pending proceedings.⁶⁹

ii Whistle-blowing

Malaysian law gives due regard to the protection of whistle-blowers against any retaliatory action because of disclosure. It must be noted, however, that the whistle-blower is only protected from the act of disclosure of improper conduct.⁷⁰ The whistle-blower cannot rely on the protection afforded to escape liability if the whistle-blower is involved in the improper conduct⁷¹ (i.e., the bribery transaction).

67 Section 126 Evidence Act 1950 (Act 56).

68 Section 46(1) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

69 Section 46(2) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

70 Section 10 Whistleblower Protection Act 2010 (Act 711).

71 Section 11 Whistleblower Protection Act 2010 (Act 711).

Under the Whistleblower Protection Act 2010, any detrimental action taken against the whistle-blower in reprisal is an offence, and the penalty could be up to 100,000 ringgit or a jail term of up to 15 years, or both.⁷²

This protection is further strengthened by Section 65 of the MACC Act 2009, which provides that the identity of informants or the place in which the information was given by the informant to the MACC cannot be revealed or disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.

iii Witness protection

The Witness Protection Act 2009 provides protection to witnesses, including those involved in corruption cases. The Act accommodates a protection programme⁷³ for witnesses who fear for their safety and security during an investigation and prosecution of a corruption case.

iv Data privacy

The Personal Data Protection Act 2010 (PDPA) is Malaysia's comprehensive data protection framework and it imposes broad obligations on those who process personal data in connection with commercial transactions.⁷⁴ Under the PDPA, there is a general prohibition on the disclosure of personal data without a data subject's consent.⁷⁵ However, there are certain exceptions to this prohibition and these include situations where the disclosure is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations, or as required or authorised by or under any law, or by the order of a court, or where the disclosure is justified as being in the public interest in circumstances as determined by the minister.⁷⁶

In furtherance to the power to process personal data without the data subject's consent, the MACC Act 2009 provides the MACC with wide investigative powers, including the power to:

- a* request an affirmation or statement in writing on oath of any person under investigation of an offence under the MACC Act 2009 or any relative of that person or any other person who the authorities believe can help the investigation;⁷⁷
- b* require any bank or financial institution to furnish copies of all accounts, documents and records in relation to any person under investigation of an offence;⁷⁸
- c* intercept any communication that may contain any information that is relevant for the purpose of any investigation into an offence under the MACC Act 2009, including to detain and open any postal article, intercept any message transmitted or received by any telecommunication, and to intercept, listen to and record any conversation by any telecommunication;⁷⁹ and
- d* subject to the limitations in the MACC Act 2009, require any person to give any information on any subject.⁸⁰

72 Section 10(6) Whistleblower Protection Act 2010 (Act 711).

73 Preamble of Witness Protection Act 2009 (Act 696).

74 Preamble Personal Data Protection Act 2010 (Act 709).

75 Section 8 Personal Data Protection Act 2010 (Act 709).

76 Section 39 Personal Data Protection Act 2010 (Act 709).

77 Section 36(1)(a), (b) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

78 Section 36(1)(c) Malaysian Anti-Corruption Commission Act 2009 (Act 694).

79 Section 43 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

80 Section 47 Malaysian Anti-Corruption Commission Act 2009 (Act 694).

X COMPLIANCE

The MACC Act 2009 did not previously provide for the defence of having adequate compliance procedures. However, when the MACC Amendment Act 2018 enters into force, Section 17A(4) will provide a commercial organisation with the defence of having had in place adequate compliance procedures when charged with an offence under Section 17A(1) of the MACC Act 2009.

Further, the Guidelines for Giving and Receiving Gifts in the Public Service (No. 3 of 1998) permit those in public service to accept gifts:

- a if the gift is declared and documented; and
- b if, where the value of the gift is more than 500 ringgit, it is declared and handed over to the head of department, and the head of department decides whether to award the gift to the staff or department, or to return it to the giver.

XI OUTLOOK AND CONCLUSIONS

The electoral victory that returned Dr Mahathir Mohamad to power has enabled the Malaysian public to talk freely about the 1MDB financial scandal. The new government has publicly admitted that the whole system of government had failed⁸¹ and that Malaysia was in dire need of institutional and societal reform. This serious commitment can be seen in the formation of the Council of Eminent Persons,⁸² the 1MDB Special Task Force,⁸³ the Institutional Reform Committee,⁸⁴ the Special Committee on the Malaysia Agreement 1963,⁸⁵ the JKKMAR, the GIACC and the National Anti-Corruption Plan.⁸⁶

The dawn of a new Malaysia brought about a realisation that the appearance of laws and institutions may just be hallowed symbols of democratic grandeur if there is no real will of the people to enforce their true purpose. Malaysia has seen the destruction brought about by a single corrupt leader who, in less than a decade, had dismantled the country's laws and systems of government and suborned its officeholders to remove completely the substance of the checks and balances these institutions were created to provide.

While Najib Razak was in power, the Auditor General's report, which is usually published, was classified as a secret document under the Malaysian Official Secrets Act

81 'I inherited a government riddled with corruption, Dr M tells CNN' *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2018/07/26/dr-m-i-inherited-a-government-riddled-with-corruption/>.

82 Eileen Ng, 'PM Mahathir names three ministers, to set up council of "eminent persons"', Today. Retrieved at <https://www.todayonline.com/malaysian-ge/dr-mahathir-announces-his-new-cabinet-line>.

83 'Azam: Investigation into 1MDB fund is 60% complete', *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2018/08/31/azam-investigation-into-1mdb-fund-is-60-complete/>.

84 Haikal Jalil, 'Government forms Committee on Institutional Reforms (Updated)', *The Sun Daily*. Retrieved at <http://www.thesundaily.my/news/2018/05/15/government-forms-committee-institutional-reforms-updated>.

85 Sharon Ling, 'Special committee to study Malaysia Agreement 1963', *The Star*. Retrieved at <https://www.thestar.com.my/metro/metro-news/2018/07/21/special-committee-to-study-malaysia-agreement-1963-experts-tasked-with-producing-detailed-report-wit/>.

86 'Dr M's full speech: "The 100 days of the Pakatan Harapan Government"', *The Star*. Retrieved at <https://www.thestar.com.my/news/nation/2018/08/17/drm-full-speech-the-100-days-of-the-pakatan-harapan-govt/>; see footnote 4.

1972 (Act 88) to prevent public disclosure of its findings.⁸⁷ He removed the director of the Special Branch and the deputy director of the Royal Malaysian Police,⁸⁸ disbanded the Public Accounts Committee,⁸⁹ sacked the Deputy Prime Minister and four other senior ministers,⁹⁰ forced the retirement of the governor of BNM,⁹¹ and replaced the Attorney General,⁹² the Chief Commissioner of the MACC and his deputies⁹³ with proxies who cleared him of any wrongdoing.⁹⁴

After Najib Razak's removal from power, Malaysians and the world were shocked by the sheer volume of luxury items seized from the residence and premises connected to him – 576 handbags, 423 watches, 12,000 pieces of jewellery and cash amounting to 116.7 million ringgit. The total haul was valued by the police at 1.1 billion ringgit.⁹⁵ In August 2018, Malaysian police seized the superyacht 'Equanimity', worth 1 billion ringgit and allegedly bought with embezzled funds from 1MDB.⁹⁶ In June 2017, the DOJ filed several lawsuits, to seize, among other things, artwork by Pablo Picasso, Jean-Michel Basquiat and Diane Arbus, along with a 1927 *Metropolis* film poster by German artist Heinz Schulz-Neudamm, bought for a total of US\$14.42 million; property including a Madison Park condominium in New York bought for US\$4.5 million, and a penthouse, flat and offices in Mayfair bought for a total of £119 million; diamond jewellery bought for Australian model Miranda Kerr and Jho Low's mother, Evelyn Goh, for a total of US\$8.46 million; rights to the movie *Dumb and Dumber* and *Daddy's Home*; and various shares and companies bought for a total of US\$155 million.⁹⁷ The magnitude of the looting in the 1MDB scandal was

87 Shamim Adam and Niluksi Koswanage, 'Malaysia Sets Strict Limits to View State Fund Audit Report', Bloomberg. Retrieved at www.bloomberg.com/news/articles/2016-03-04/malaysia-lawmakers-have-strict-limits-to-view-state-fund-report.

88 'Removal of special branch top duo is red flag for ex-IGP', MalaysiaKini. Retrieved at www.malaysiakini.com/news/309809.

89 'PAC should disband itself if press statements can explain everything', MalaysiaKini. Retrieved at www.malaysiakini.com/news/329907.

90 Trinna Leong, Yantoultra Ngui and Al-Zaquan Amer Hamzah, with Emily Chow and Praveen Menon, 'Malaysian PM reshuffles cabinet, dumps deputy after 1MDB criticism', Reuters. Retrieved at uk.reuters.com/article/uk-malaysia-politics-idUKKCN0Q206V20150728.

91 Rachel Middleton, 'Malaysia's central bank chief Zeti Akhtar Aziz to step down in April as 1MDB scandal gathers pace', International Business Times. Retrieved at www.ibtimes.co.uk/malaysias-central-bank-chief-zeti-akhtar-aziz-step-down-april-amidst-1mdb-scandal-1544753.

92 Associated Press, 'Facing corruption scandal, Malaysian PM fires officials investigating him', Aljazeera America. Retrieved at <http://america.aljazeera.com/articles/2015/7/28/malaysias-najib-razak-sacks-attorney-general.html>.

93 Sumisha Naidu, 'Malaysia's anti-graft body loses top 3 men amid 1MDB scandal', Channel NewsAsia. Retrieved at www.channelnewsasia.com/news/asiapacific/malaysia-s-anti-graft/2997180.html.

94 '(Full statement) AG Apani Ali on Swiss probe concerning 1MDB', *New Straits Times* online. Retrieved at www.nst.com.my/news/2016/01/124888/full-statement-ag-apani-ali-swiss-probe-concerning-1mdb.

95 'What Malaysian police seized from premises linked to ex-PM', Reuters. Retrieved at <https://www.reuters.com/article/us-malaysia-politics-police-factbox/what-malaysian-police-seized-from-premises-linked-to-ex-pm-idUSKBN1JN0IN>.

96 Leslie Lopez, 'Indonesia to hand over Jho Low's luxury yacht, allegedly bought with 1MDB funds, to Malaysia', *The Straits Times*. Retrieved at <https://www.straitstimes.com/asia/se-asia/indonesia-to-hand-over-luxury-yacht-allegedly-bought-with-1mdb-funds-to-malaysia>.

97 '1MDB Update: Latest list of assets bought with 1MDB money that the US DOJ wants to seize from Jho Low and associates', The Edge. Retrieved at <http://www.theedgemarkets.com/article/1mdb-update-latest-list-assets-bought-1mdb-money-us-doj-wants-seize-jho-low-and-associates>.

the subject of the bestseller book by *Wall Street Journal* journalists Tom Wright and Bradley Hope, *Billion Dollar Whale: The Man Who Fooled Wall Street, Hollywood, and the World*. US Attorney General Jeff Sessions summed up the 1MDB scandal as ‘kleptocracy at its worst’.⁹⁸

The following words of Noah Webster are particularly pertinent:

*[I]f the citizens neglect their Duty and place unprincipled men in office, the government will soon be corrupted; laws will be made, not for the public good so much as for selfish or local purposes; corrupt or incompetent men will be appointed to execute the Laws; the public revenues will be squandered on unworthy men; and the rights of the citizen will be violated or disregarded.*⁹⁹

98 ‘Jeff Sessions calls Malaysia’s 1MDB scandal “kleptocracy at its worst”’, Reuters. Retrieved at <https://www.reuters.com/article/us-malaysia-scandal-doj/jeff-sessions-calls-malysias-1mdb-scandal-kleptocracy-at-its-worst-idUSKBN1DZ0MX>; ‘U.S. Seeks to Recover \$1 Billion in Largest Kleptocracy Case to Date’, FBI. Retrieved at www.fbi.gov/news/stories/us-seeks-to-recover-1-billion-in-largest-kleptocracy-case-to-date; Randeep Ramesh, ‘1MDB: The inside story of the world’s biggest financial scandal’, *The Guardian*. Retrieved at www.theguardian.com/world/2016/jul/28/1mdb-inside-story-worlds-biggest-financial-scandal-malaysia.

99 Noah Webster, *Instructive and Entertaining Lessons for Youth: With Rules for Reading With Propriety, Illustrated by Examples : Designed for Use in Schools and Families* (S Babcock and Durrie & Peck, 1835).

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Rosli Dahlan heads the corporate and commercial disputes practice group at Lee Hishammuddin Allen & Gledhill. He has a broad civil and commercial practice. Conversant in both civil and shariah law, he is much sought after for his in-depth knowledge of conflict of laws. His wide network has enabled him to resolve contentious cross-border issues internationally and in the Asian region. He is highly regarded by Middle Eastern clients and his counterparts in the region.

Rosli's portfolio of corporate litigation work includes shareholder disputes, restructuring, recovery, land disputes and regulatory compliance work. He has been the lead adviser to several foreign companies, among others, on the application of the US Foreign Corrupt Practices Act 1977. In recent years, Rosli has been prominent in public interest and civil rights litigation, winning landmark cases that made constitutional inroads against the religious authorities and government agencies: *Berjaya Books Sdn Bhd & Ors v. Department of Federal Territories Islamic Affairs & Ors* [2014] 1 MLJ 138, HC; *Department of Federal Territories Islamic Affairs & Ors v. Berjaya Books Sdn Bhd & Ors* [2015] 3 MLJ 65, CA; *Kassim @ Osman bin Ahmad v. Dato' Seri Jamil Khir bin Baharom Minister in the Prime Minister's Department (Islamic Affairs) & Ors* [2016] 7 MLJ 669, HC; *Kassim @ Osman bin Ahmad v. Dato' Seri Jamil Khir bin Baharom Minister in the Prime Minister's Department (Islamic Affairs) & Ors* [2016] 5 MLJ 258, CA; and *United Allied Empire Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Ors* [2017] 8 CLJ, CA.

Rosli had personal brushes with the Malaysian Anti-Corruption Commission (MACC) when he launched several lawsuits against various mainstream newspapers, the Anti-Corruption Agency and its successor, the MACC, for defamation, and also against the Attorney General, the Chief Commissioner of the MACC, the Inspector-General of Police, the Director of Legal and Prosecution Division of the MACC and several other senior officers of the MACC for the tort of conspiracy to injure him, false and malicious investigations, abuse of power, abuse of prosecutorial discretion, malicious prosecution, prosecutorial misconduct and public misfeasance.

Rosli won all his lawsuits. The newspapers settled, paid undisclosed damages and published public apologies. The MACC was also held liable for defamation and ordered to pay damages of 300,000 ringgit.

In his lawsuit against the Attorney General, the Chief Commissioner of the MACC, the Inspector-General of Police, the Director of Legal and Prosecution Division of the MACC

and several other senior officers of the MACC, the government of Malaysia and the MACC settled, paid an undisclosed compensation and the MACC read out a public apology in open court. All these are widely reported in the Malaysian press.

In *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] 11 MLJ 481, Rosli succeeded in obtaining an unprecedented ruling that the notion of the Attorney General's absolute prosecutorial immunity is anathema to the rule of law.

ARIEF HAMIZAN

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Arief Hamizan is a graduate of the International Islamic University Malaysia. He is currently a pupil in chambers of Rosli Dahlan in the corporate and commercial disputes practice group at Lee Hishammuddin & Allen Gledhill.

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