

AVAILABLE DEFENCES FOR AN OFFENCE UNDER SECTION 17A OF THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009

by Tiara Katrina Fuad

Since the coming into force of Section 17A of the Malaysian Anti-Corruption Commission Act 2009, commercial organisations (“COs”) are now potentially criminally liable for corrupt acts committed by associated persons.

Subsection 17A(3) further stipulates that an offence committed by a CO is deemed to have been committed by its director, controller, officer, partner, or any other person concerned in the management of its affairs at the material time.

There are thus two ways in which this offence creates a form of vicarious criminal liability, namely:

- (i) Vicarious liability on the part of the CO for acts done by associated persons; and
- (ii) Vicarious liability on the part of the CO’s senior management officials for acts done, albeit vicariously, by the CO.

This two-tier importation of liability means that the person who may ultimately be subject to criminal punishment under Section 17A of the MACC Act is twice removed from the act giving rise to that punishment in the first place.

The two statutory defences recognised by Section 17A are aimed at addressing the potential unfairness that may arise from these circumstances. A number of other defences are

also available where the prescribed elements of the offence (whether express or implied) cannot be proved beyond a reasonable doubt. An understanding of the nature, scope, and limitations of these defences is thus crucial for all persons vulnerable to the wide-reaching ambit of this new offence.

Legal Framework of the Criminal Offence

The Predicate Offence

At the outset, it is crucial to understand that Section 17A requires proof of two distinct offences, namely, (i) proof of the corrupt act committed by the person associated with the CO (the predicate offence) and (ii) proof of the CO-related elements of the offence required to import vicarious liability under Section 17A of the MACC Act (the 17A offence).

A question that arises when formulating a defence strategy is whether the Public Prosecutor is required to obtain a conviction for the predicate offence before a conviction for the 17A offence can be successfully secured.

There are, at present, no case laws directly addressing this issue within the context of Section 17A.

Nevertheless, a similar structure exists within the context of money laundering offences, with one crucial distinction.

Before a conviction for an offence under Section 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 (“**AMLA**”) can be successfully sustained, it is trite law that the Public Prosecutor must prove, beyond a reasonable doubt, the commission of the predicate offence or the existence of circumstances leading to the same. However, a conviction on the predicate offence is **not required** to sustain a conviction for the money laundering offence. This position is expressly codified by subsection 4(4) of AMLA. In other words, the Public Prosecutor is not required to obtain a conviction for the predicate offence so long as it is able to prove, to the requisite standard, the base conditions involving the aforesaid predicate offence in the money laundering trial.

No such provision exists with respect to Section 17A of the MACC Act. The approach adopted by the courts on the issue of proof of a prior conviction for the predicate with respect to money laundering offences may thus be distinguished on this basis.

It is then apposite to consider the approach of other jurisdictions with respect to offences involving, by definition, a predicate offence.



Section 201 of the Malaysian Penal Code is *in pari materia* with Section 201 of the Indian Penal Code. This offence, in essence, criminalises causing the disappearance of evidence of an offence or giving false information touching it to screen the offender. As with Section 17A of the MACC, Section 201 of the Penal Code involves the commission of a predicate offence as well as the commission of a subsequent offence.

The Supreme Court of India in *Palvinder Kaur v State of Punjab* AIR 1952 SC acquitted the accused of the offence under Section 201 of the Indian Penal Code on the basis that the Public Prosecutor had failed to factually prove the predicate offence of murder.

The learned authors of *Ratanlal and Dhirajlal’s Indian Penal Code*¹ affirmed the same position when stating that “proof of the commission of an offence (i.e., the predicate offence) is an essential requisite for bringing home the offence under Section 201 of the Indian Penal Code, 1860”.

The legal consequence of adopting this approach is that a charge under Section 17A of the MACC Act must fall if the Public Prosecutor fails to prove, beyond a reasonable doubt, the commission of the predicate offence committed by the associated person. Negating proof of the alleged commission of the predicate offence would therefore constitute an implied defence to the Section 17A offence.

If the alternative approach were to be adopted, namely, that proof of a prior conviction for the predicate is required for the purposes of Section 17A, then the absence of the same would result in an acquittal, and proof of the conviction would be determinative on the question of the commission of the predicate offence.

The Relevant Definitions

Pursuant to subsection 17A(6) of the Act, a person is “associated” with a CO if he is a director, partner, employee of the CO, or someone who performs services for or on behalf of the CO. This latter category is not limited to those under the direct employ of the CO and could include third-party agents.

The question of whether or not a person performs services for or on behalf of the CO shall be determined “by reference to all the relevant circumstances and not merely by

[1] Ratanlal and Dhirajlal’s Indian Penal Code, 34th Edn at pp. 1160-1161

reference to the nature of the relationship between him and the commercial organisation" (see subsection 17A(7) of the MACC Act).

The purpose of the associated person's corrupt act must be to obtain or retain business for, or an advantage in the conduct of, the business of the CO. The word "corrupt" is not defined by the Act but would highly likely include, amongst others, the substantive corruption offences in the MACC Act (i.e., the offences under Sections 16-17, 18-23)."

By virtue of subsection 17A(8) of the Act, a "commercial organisation" refers to the following:

- (a) A company incorporated under the Companies Act 2016 that carries on business in Malaysia or elsewhere;
- (b) A company, wherever incorporated, that carries on a business or part of a business in Malaysia;
- (c) A partnership:
 - (i) Under the Partnership Act 1961 that carries on a business in Malaysia or elsewhere; or
 - (ii) Which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 and carries on a business in Malaysia or elsewhere; or
- (d) A partnership, wherever formed, that carries on a business or part of a business in Malaysia.

Given that these definitions constitute elements of the offence, an acquittal on a charge under Section 17A ought to follow where the Public

Prosecutor fails to prove beyond a reasonable doubt that:

- (a) The suspected associated person is not a director, partner, or employee of the CO; and
- (b) The suspected associated person does not perform services for or on behalf of the CO; or
- (c) The impugned entity is not a "commercial organisation" within the meaning of subsection 17A(8) of the MACC Act.

The Statutory Defences

There are two statutory defences expressly made available by Section 17A of the MACC Act. These are where it is proved that:

- (a) The predicate offence was committed without the consent or connivance of the person facing the charge, and he had exercise due diligence to prevent the commission of the offence; and

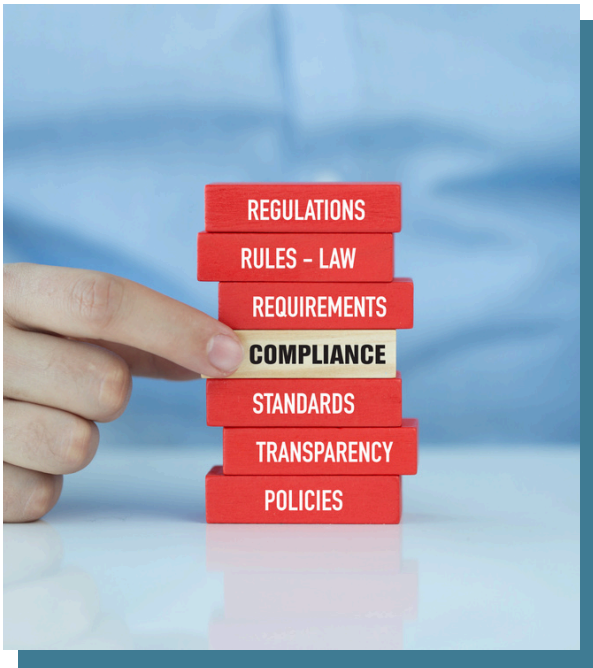
(see subsection 17A(3) of the MACC Act)

- (b) The CO had in place "adequate procedures" to prevent associated persons from committing the predicate offence.

(see subsection 17A(4) of the MACC Act)

It is highlighted that subsections 17A(3) and (4) of the MACC Act expressly places the burden of proof on the person facing the charge and/or the CO (as the case may be) to prove he and/or it falls within the ambit of the statutory defence. Given the trend of local jurisprudence on reverse onus clauses of a similar nature, it is highly likely that the standard of proof imposed will be





on a balance of probabilities.

The Federal Court case of *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 is authoritative on this issue. Here, the apex court was tasked with determining, inter alia, whether Section 122(1) of the Securities Industry Act 1983 (“**SI Act**”) violated the presumption of innocence under Article 5 of the Federal Constitution insofar as it contained a reverse onus clause shifting the burden of proof on an accused person.

Section 122(1) of the SI Act creates a statutory presumption that any offence committed by a body corporate is committed by a person who was a senior management official of the same, unless it can be proved that the offence was committed “without his consent or connivance” (which bears similarities to subsection 17A(3) of the MACC Act). The Federal Court held that this provision was constitutional and that the burden lay with the accused to prove he fell within the ambit of the statutory defence on a balance of probabilities.

An example of a successful defence under subsection 17A(3) of the MACC Act would be where it can be proved to the applicable standard that the corrupt act was actively and successfully concealed from the person facing the charge.

With respect to the statutory defence under subsection 17A(4) of the MACC Act, the Prime Minister’s Department published in 2018 the “Adequate Procedures Best Practice Handbook”, with a view to assisting COs to fulfill the requirements under this provision.

The Handbook identifies five guiding principles when establishing adequate procedures, otherwise known as the TRUST principles, which are:

- (a) Top Level Commitment;
- (b) Risk Assessment;
- (c) Undertake Control Measures;
- (d) Systematic Review, Monitoring and Enforcement; and
- (e) Training and Communication.

In March 2021, the National Centre for Governance, Integrity and Anti-Corruption also published the “Adequate Procedure Best Practice Handbook”, expanding on the five TRUST principles.

Compliance with the recommendations in these handbooks, though not conclusive, would stand as strong evidence that adequate procedures have been put in place for the purposes of Section 17A.

It is important to highlight, however, that these handbooks are not meant to be a one-size-fits-all answer to subsection 17A(4) of the MACC Act. Regard must be had to the factual matrix of the case, which includes, but is not limited to, the nature of the business of the impugned entity as well as the relevant business relationships.

It is recommended that legal advice be obtained in order to ensure any procedures put in place adequately satisfy the criminal standard required to exclude liability.

Conclusion

Section 17A of the MACC Act therefore offers a wider range of defences other than those expressly made available by subsections 17A(3) and (4). Entities vulnerable to criminal liability under the same provision would benefit from adopting a holistic strategy when formulating a defence for this offence.

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