CORPORATE CRIMINAL LIABILITY AND SECTION 17A OF THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT

Considerable attention was drawn to the scourge of corruption as details of the 1Malaysia Development Berhad (1MDB) saga surfaced, enhancing awareness of the significant resource misallocation that greatly hampers the efficiency of businesses, the costs of which are ultimately borne by the society. Partly in response, s 17A of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) was enacted to introduce the concept of corporate criminal liability with the imposition of liability on commercial organisations and their associated persons for the failure to prevent bribery. By focusing on why it is important to do the "right thing", this article examines the scope and constitutionality of s 17A, highlights how companies may implement adequate measures to comply before concluding with an identification of some of its deficiencies as well as a proposal to introduce a deferred prosecution agreement regime to augment the existing framework which legislative objectives are grounded upon the prevention of bribery.

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I. Introduction

1 Passed in April 2018 and enforced from 1 June 2020, s 17A of the Malaysian Anti-Corruption Commission Act 2009[1] ("MACC Act") will introduce the concept of corporate criminal liability with the imposition of liability on commercial organisations and their associated persons for the failure to prevent bribery. Two clear themes arise. First, the only business enterprise that does not fall within the scope of s 17A is the sole proprietorship. Secondly, its potentially wide-reaching provisions have

1 Act 694.

resulted in significant concerns being raised within corporate Malaysia – especially amongst small and medium-sized enterprises – as to how they can avoid falling foul of the sanctions that are imposed.

2 This article seeks to address some of the latter concerns in the following manner: Part II[2] commences with an overview of the legislative intent and the scope of s 17A of the MACC Act before proceeding to highlight the *Guidelines on Adequate Procedures* which discuss the elements of the statutory defence. The "identification" or "attribution" principle which stands as a key cornerstone for the imposition of corporate criminal liability is discussed in Part III[3] while Part IV[4] draws upon the judicial pronouncements on the ambit of s 7 of the Bribery Act 2010[5] ("Bribery Act") in the UK – upon which s 17A is based – to provide an insight as to how the latter may be enforced in Malaysia. Part V[6] examines the relevant sections of the Report of the House of Lords' Select Committee on the Bribery Act, together with the responses by the Government thereto. Part VI[7] highlights some possible benchmarking models to assist with the drawing up and implementation of "adequate procedures". Part VII[8] discusses the constitutionality of s 17A while a proposal for the enactment of a "Deferred Prosecution Agreement" is advanced in Part VIII[9] before concluding with Part IX.[10]

II. Overview of s 17A of the Malaysian Anti-Corruption Commission Act

3 Published in the *Gazette* on 4 May 2018 – in similar lines to the relevant provisions of the Bribery Act and the US Foreign Corrupt Practices Act 1977 – the Malaysian Anti-Corruption (Amendment) Act 2018[11] introduced, *inter alia*, s 17A, the objective of which was to address and curtail the problem of bribery by commercial organisations and their associated persons.

2 See paras 3–14 below.
3 See paras 15–34 below.
4 See paras 35–60 below.
5 c 23 (UK).
6 See paras 61–72 below.
7 See paras 73–85 below.
8 See paras 86–101 below.
9 See paras 102–119 below.
10 See paras 120–127 below.
11 Act A1567.

4 By doing so, Malaysia fulfilled its obligations under Art 26 of the United Nations Convention against Corruption[12] which it ratified in 2008. Taking cognisance of the seriousness of problems and threats posed by corruption to the stability and security of societies, which undermines the institutions and values of democracy, ethical values and the rule of law, the said article required member countries to "adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in connection with this Convention".

5 The enactment also recognised concerns with the steady decline in the annual Corruption Perceptions Index published by Transparency International which ranked Malaysia – with its score of 47 out of 100 in 62nd place amongst 180 countries – behind its East Asian neighbours Singapore, Hong Kong, Japan, Taiwan and South Korea – in 2017.[13] Significantly, more than two-thirds of the countries surveyed scored below 50 – with the average being just 43 – as the data revealed a link between corruption and the health of democracies. With its score of 47, Malaysia fell within the classification of a "flawed democracy" which average score was 49.[14]

6 Section 17A(1) of the MACC Act deems a commercial organisation to have committed an offence if a person associated with it corruptly gives, agrees to give, promises or offers any person any gratification *with intent to* obtain or retain business or advantage for the organisation. A "commercial organisation" is defined extensively in s 17A(8) to include either a company or a partnership formed in Malaysia which carries on a business in Malaysia or elsewhere; or a company or a partnership formed outside of Malaysia which carries on a business or part of a business in Malaysia. It is thus evident that s 17A is intended to have extraterritorial effect with the principal objective of preventing bribery.

7 Under that provision a person is associated with the commercial organisation if he or she is a director, partner, an employee or someone

12 2349 UNTS 41 (31 October 2003; entry into force 14 December 2005). Malaysia ratified the Convention on 24 September 2008.

13 Transparency International Corruption Perceptions Index 2017. Since then, with a score of 53, Malaysia ranked 51st out of 198 countries an improvement of ten places from a year earlier when it ranked 61st with a score of 47 out of 100: see https://www.transparency.org/en/cpi/2019/results/mys (accessed 20 February 2020). The present scoring and ranking schemes were introduced in 2012 although the Index started with the ranking of just 41 countries in 1995.

14 Coralie Pring & Jon Vrushi, "Tackling the Crisis of Democracy, Promoting Rule of Law and Fighting Corruption" *Transparency International* (29 January 2019).

who performs services for or on its behalf.[15] Substance matters over form with regard to the question of whether a person performs services for or on behalf of the commercial organisation as this relationship shall be "determined by reference to all the relevant circumstances".[16] However, as the MACC Act does not define what these "relevant circumstances" are, a wide range of individuals and/or entities are potentially at risk of – possibly inadvertently – breaching s 17A(1) and consequently being charged with a corrupt act.

8 Significantly, due to a rather odd and inexplicable omission, this group of individuals and/or entities – together with the employees of the commercial organisation – do not appear to have any defence which s 17A(3) restricts to a director, controller, officer, partner or a person who is concerned in the management of its affairs. The latter group may be absolved of liability if it can be shown that the offence was committed without his or her consent or connivance *and* that he or she had exercised all reasonable due diligence to prevent the commission of the same.

9 Thus, while highly anomalous, it does appear that employees of the commercial organisation and/or any person who performs services for or on its behalf can only escape liability if the commercial organisation absolves itself by proving that it had in place adequate procedures to prevent persons associated with it from undertaking such conduct.[17]

10 The foregoing is significant as there are substantial penalties that can be imposed upon conviction under s 17A(2), namely, either a fine of not less than ten times the sum or value of the gratification subject to a minimum of RM1m and/or a term of imprisonment not exceeding 20 years.

11 The *Guidelines on Adequate Procedures* ("MACC Guidelines") which were published on 4 December 2018 pursuant to s 17A(5) are not intended to be prescriptive and it should not be assumed that "one size fits all" since these must take into account the specific scale, nature, industry, risk and complexity of the organisation.[18] Thus, the key determinants must include applicability, relevance and practicality, taking into consideration the factors as outlined above, and it shall ultimately be "for the courts to decide whether the commercial organisation truly

15 Malaysian Anti-Corruption Commission Act 2009 (Act 694) s 17A(6).
16 Malaysian Anti-Corruption Commission Act 2009 (Act 694) s 17A(7).
17 Malaysian Anti-Corruption Commission Act 2009 (Act 694) s 17A(4).
18 Prime Minister's Department, *Guidelines on Adequate Procedures* (hereinafter "MACC Guidelines) at para 3.4.

established the necessary safeguards which should have prevented the offence from happening".[19]

12 The underlying principles for the adequate procedures as set out in the MACC Guidelines have the acronym "T.R.U.S.T." which stands for:

(a) **T**op Level Commitment – which imposes upon the top management the primary responsibility of "setting the tone" by ensuring that appropriate policies are put in place with the objective of achieving and maintaining "zero tolerance" for corruption;[20]

(b) **R**isk Assessment – which should be sufficiently robust to establish appropriate processes, systems and controls approved by top level management to mitigate the specific corruption risks that the business is exposed to;[21]

(c) **U**ndertake Control Measures – to address any corruption risks arising from weaknesses in the organisation's governance framework, processes and procedures which should include robustness of due diligence and reporting channels;[22]

(d) **S**ystematic Review, Monitoring and Enforcement – conducted regularly to assess the performance, efficiency and effectiveness of the anti-corruption programme and to ensure that this is properly and adequately enforced;[23] and

(e) **T**raining and Communication – to develop and disseminate internal and external training and communication relevant to its anti-corruption management system, in proportion to its operation, covering policy, training, reporting channel and consequences of non-compliance.[24]

13 The MACC Guidelines are not meant to be static or "cast in stone" as top management is expected to review them for robustness and relevance at regular intervals taking cognisance of the changing and evolving environment within which the specific business of the commercial organisation operates. Accordingly, the "five principles may be used as reference points for any anti-corruption policies, procedures

19 MACC Guidelines para 3.5.
20 MACC Guidelines para 4.1 generally.
21 MACC Guidelines para 4.2 generally.
22 MACC Guidelines para 4.3 generally.
23 MACC Guidelines para 4.4 generally.
24 MACC Guidelines para 4.5 generally.

and controls the organisation may choose to implement towards the goal of having adequate procedures"[25] as required under s 17A.[26]

14 In addition to the foregoing MACC Guidelines, commercial organisations may refer to and apprise themselves of the case studies which are posted on the website of the Governance, Integrity and Anti-Corruption Centre to further assist them with the implementation of adequate and bespoke procedures as are appropriate for their businesses.[27]

III. Identification or attribution principle

15 A company acts through its agents and, where these agents have actual or apparent authority, those actions within the scope of their authority bind the company.[28] However, in some situations, the law must interpret the state of mind of the company especially where these relate to the liability of the company for a criminal offence. Whilst a company – a separate legal entity recognised by law[29] but which has no physical existence as a "person" – may be fined, it cannot be imprisoned. How then does one establish the necessary *mens rea* or criminal resolve of a company?

16 The courts recognise that the organs of a company – its board of directors and its members in general meeting – are more than mere agents. When they act within the ambit of powers conferred on them by the articles of association, they are treated as being the company itself – thus the "organic theory" of corporate personality. The acts of the organs are the acts of the company and their state of mind is the state of mind of the company. The organ is regarded as the directing mind and will of the company: its *alter ego*.[30]

25 MACC Guidelines para 1 Objective.

26 Recognising the dynamics of businesses, para 5 of the MACC Guidelines states that the "Minister may amend any of these guidelines from time to time as may be deemed necessary".

27 The Corporate Anti-Corruption Compliance Centre under the Malaysian Anti-Corruption Academy also provides training for both public and private organisations: see http://giacc.jpm.gov.my/.

28 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

29 *Salomon v Salomon & Co Ltd* [1897] AC 22.

30 This is referred to as the "identification principle" or the "attribution principle" where a company may be held liable for the criminal acts by those who are deemed to be its directing mind and will.

17 The expression "directing mind and will of the company" stems from the judgment of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*[31] where his Lordship opined that:[32]

> … a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.

18 By attributing the directing mind and will of individuals to companies, the courts are in effect lifting the corporate veil to determine who is behind or in control of the company. In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*,[33] Denning LJ drew an analogy between a company and the organs of a human body as follows:[34]

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such … Whether [the] intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and other relevant facts and circumstances of the case.

19 Whether a particular person represents the directing mind and will of a company depends on the circumstances of the case. In *Tesco Supermarkets Ltd v Nattrass*,[35] the House of Lords indicated that the directing mind and will can be employees of the company to whom

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31 [1915] AC 705.

32 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at [713], *per* Viscount Haldane LC. However, some courts have recently declined to adopt this approach in the interests of justice where its strict application would have allowed the actual perpetrators of the criminal offence to be insulated from liability by simply delegating their functions to others: see, for example, *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 and *Bank of Credit and Commerce International SA (No 15)* [2005] EWCA 693; [2005] 2 BCLC 328.

33 [1957] 1 QB 159.

34 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at [172].

35 [1972] AC 153.

managerial powers have been delegated. However, their Lordships opined that only those managers who are entrusted with a significant degree of freedom from supervision of higher authority can be so regarded.

20 In that case, the court had to decide whether the store manager was "another person" within the Trade Descriptions Act 1968[36] which provided a defence if the defendant could show that the commission of the offence was due to the act or default of another person, and that the defendant had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or any person under his control.

21 The House of Lords held that the store manager did not have the necessary responsibility or control of the company's operations to be identified as its controlling mind and will. Lord Reid held that:[37]

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the *persona* of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent.

22 The House of Lords further examined the purpose of s 24(1) in providing the absolute statutory defence and opined that it was intended to give effect to "a policy of consumer protection which does have a rational and moral justification".[38] In the opinion of Lord Diplock:[39]

> It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer's duty to exercise all due diligence; it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and upon whom he

36 c 29 (UK).
37 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170.
38 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 194–195.
39 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 203.

> could reasonably rely to carry them out, would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it.

23 This principle was broadened in *Meridian Global Funds Management Asia Ltd v Securities Commission*[40] as the Judicial Committee of the Privy Council held that the test for attributing mental intent should depend on the purpose of the provision creating the relevant offence. In that case, a group of people sought to gain control of ENC, a cash-rich publicly listed company in New Zealand in 1990, and had devised a scheme whereby the acquisition would ultimately be funded out of the assets of the company itself. To facilitate this, bridging financing was provided through funds managed by Meridian with the participation of its chief investment officer as well as a senior portfolio manager. The scheme failed as the independent directors of ENC imposed conditions on the use of the company's funds, and being unable to comply, the predators sought to unwind their positions as best they could.

24 Sections 20(3) and 20(4) of the New Zealand Securities Amendment Act 1988 required the notification by substantial shareholders of companies to both the company as well as the stock exchange as soon as the person knows or ought to have known.[41] The finding that Meridian was in breach was incorporated in a declaration by the trial judge at the request of Meridian so that it would have an order against which to appeal. In its defence, while admitting that the purchases and sales in the shares of ENC were openly recorded in its books, Meridian contended that its managing director was not specifically informed of the transactions until after the departure of the chief investment officer. The latter thus could not be the "directing mind and will" as this should either be its board of directors or possibly its managing director.[42]

25 To set the context, Lord Hoffmann who delivered the judgment of their Lordships alluded initially to a number of rules including the following:[43]

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40 [1995] 2 AC 500.

41 Section 5 of the New Zealand Securities Amendment Act 1988 (1988 No 234) defines a substantial shareholder as a person who has a "relevant interest" in 5% or more of the voting securities in the public issuer.

42 The board of Meridian only met once a year for the formal business before its annual general meeting. Its chief investment officer used to be the managing director of Meridian until 1 August 1990 and was in theory supposed to have reported to the latter.

43 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506–507.

> A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and to have certain powers, rights and duties of a natural person … It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company … called 'the rules of attribution'.
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> The company's primary rules of attribution will generally be found in its constitution, typically the articles of association …
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> … This is ***always a matter of interpretation***: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.
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> … the rule of attribution is a matter of interpretation or construction of the relevant substantive rule …
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> [emphasis in bold italics added; emphasis in italics in original]

26 His Lordship proceeded to hold that:[44]

> The policy of section 20 of the Securities Amendment Act 1998 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers … Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial shareholder when it is known to the person who had authority to do the deal … The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.
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> … It is *a question of construction in each case* as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company … Each is an example of an *attribution rule for a particular purpose*, tailored as it always must be to the terms and policies of the substantive rule.
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> [emphasis added]

27 The attribution principle was more recently examined by the Court of Final Appeal in Hong Kong, albeit from the more limited context of whether the fraudulent knowledge of directors can be attributed to the company. The facts in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue*[45] were briefly thus: Principally to allow the group to continue trading despite its dire financial state, the former directors of

44 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 511–512.

45 [2014] 3 HKC 323.

the company had fraudulently inflated its profits which resulted in the payment of inflated profits tax to the Inland Revenue. Upon its winding up, the liquidators of the company sought a refund of the taxes paid on the basis that the company had not made any taxable profits in the relevant years of assessment. The key issue for the court was whether the company should be attributed with the former directors' knowledge of the fraudulent profits when it filed the tax returns, or whether the fraud exception applies to exclude such attribution.

28 In delivering the majority judgment of the court, Lord Walker of Gestingthorpe NPJ restated the law of attribution and the limits of the fraud exception by reference to a recent decision of the English Court of Appeal in *Bilta (UK) Ltd v Nazir*[46] in the following terms:[47]

> (1) Questions of attribution are always sensitive to the factual situation in which they arise, and the language and legislative purpose of any relevant statutory provisions: *Tesco* at pp 169–170, 194–195, 203; *Meridian* at pp 507, 511–512; *Tesco No 2* at pp 1042–1043; *PCW* at p 1145; *Group Josi* at p 1169; *Duke* at para 615; *McNicholas* at paras 48–50; *Morris* at paras 116–124; *Safeway* at paras 29, 44–46; *Bilta* at paras 33–35, 45.
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> (2) The 'directing mind and will' concept in *Lennard,* although still often referred to in judgments, has been greatly attenuated by recognition of the importance of the factual and legislative context: *El Ajou* at pp 151, 154, 159; *Meridian* at pp 507–509 and 511; and numerous later cases. It might be better if it were to fade away as a general concept.
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> (3) In some cases acts of directors and employees will be attributed to the corporate employer without their state of mind being so attributed: *Duke* at para 625, 641; *MAN* at para 154, illustrated by eg *Belmont No 2* at p 398 in juxtaposition with *Belmont* at pp 261–262.
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> (4) The underlying rationale of the fraud exception is to avoid the injustice and absurdity of directors or employees relying on their own awareness of their own wrongdoing as a defence to a claim against them by their own corporate employer: *Gluckstein v Barnes* at pp 247 and 249; *Houghton* at pp 14 and 19; *Belmont* at pp 261–262; *Beach* at para 22.30; *Duke* at paras 619 to 622; *McNicholas* at para 56; *Morris* at para 114; *Bilta* at paras 36 to 45.
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> (5) The exception applies even if the wrongdoing consists of a transaction formally approved by the whole board of directors, and completed under the company seal: *Belmont No 2* at p 398. In other words the exception can apply even when the primary rules of attribution are in play.
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> (6) But the exception does not apply to protect a company where the issue is whether the company is liable to a third party for the dishonest conduct

46 [2014] 1 All ER 168.

47 *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] 3 HKC 323 at [106].

of a director or employee: *El Ajou* at p 702 (see para 75 above); *Meridian* at p 511 (see para 79 above); *Duke* at para 629; *Morris* at para 114; *Bilta* at para 34.

(7) The supposed distinction between primary and secondary victims, although sometimes a useful analytical tool, is ultimately much less important than the distinction between third party claims against a company for loss to the third party caused by the misconduct of a director or employee, and claims by a company against its director or employee (or an accomplice) for loss to the company caused by the misconduct of that director or employee: *Bilta* at paras 45 and 77.

(8) In cases concerned with insurance the terms of the policy are likely to be decisive, especially where a company has obtained cover against the risk of breach of duty, including fraud, by directors or employees: *Arab Bank* at p 283, and the comments on that case in *Morris* at paras 122–124. Internal fraud was the 'very thing' from which the insurance cover was intended to protect the company.

(9) The fraud exception does not appear to have been even raised as a defence, still less successfully relied on, in a claim by a company against its auditors for failure to detect internal fraud (as in *Duke* and *MAN*) with the sole exception of the extreme 'one-man' company case of *Stone & Rolls* (see that case at paras 175 and 176). Again, internal fraud was the 'very thing' from which the auditors had a duty to protect the company.

(10) Criminal law cases are of little assistance in determining issues of attribution in civil law cases, because of the reluctance of the court, especially in the earlier cases, to treat offences as carrying strict liability: *Odyssey* at p 64; *Tesco* is an example, but *Tesco No 2* and *Safeway* show the more modern approach.

29 His Lordship opined that context is crucial in determining the fraud exception since questions of attribution must always be sensitive to the factual and statutory background as well as the nature of the proceedings in which they arise. In particular, his Lordship opined that:[48]

> The gradual accretion of learning about primary and secondary victims, with or without additional refinements such as 'targeting' or 'vehicle of fraud', can be seen as having missed the point. The crucial distinction depends on the nature of the proceedings in which the issue of attribution arises. On one side there are what Patten LJ (in *Bilta*, para 34) called the *liability cases*, such as *El Ajou, Meridian, McNicholas* and *Morris*. In them a company is being sued by a third party (which may be an official body) because the company is responsible for dishonest conduct on the part of one or more of its directors or employees. Here the fraud exception does not apply, even if the company is in some sense a victim. On the other side are what may be called the *redress cases*, such as *Gluckstein v Barnes, Belmont, Beach* and *Bilta* itself. In cases of this sort a company is seeking to make its own delinquent director or employee

48 *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] 3 HKC 323 at [131].

> (probably by then an ex-director or ex-employee), or an accomplice of such a person, accountable for the loss that the company has suffered. That is the situation in which the fraud exception applies, because it would be absurd and unjust to permit a fraudulent director or employee to be able to use his own serious breach of duty to his corporate employer as a defence. [emphasis added]

30 In finding that the directors "must be taken as having known that its returns were false … a deliberate lie",[49] the court – by a majority – held that their actions should be attributed to the company.[50] Equally significant is the amplification of the limits of the fraud exception, namely, that it serves as a bar to unmeritorious defence in claims by corporate employers against dishonest directors or accomplices who have conspired with them.

31 It is evident that s 17A is intended to be a strict liability offence with the principal objective of preventing bribery, which jurisdictional reach may be extended extraterritorially. It represents a significant legislative policy shift as liability is imposed upon the company for its failure to prevent offences from being committed by "associated persons" unless the company can prove that it has adequate and reasonable procedures or processes in place to prevent such offences from occurring.

32 However, premised on the authorities as discussed above, especially the limitations of the fraud exception, one may legitimately question if and how s 17A can be effectively applied to "a person who performs services *for and on behalf of* the commercial organisation" [emphasis added], given the difficulties in applying the identification

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49 *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* [2014] 3 HKC 323 at [135].

50 In his dissenting judgment in *Moulin Global Eyecare Trading Ltd v The Commissioner of Inland Revenue* [2014] 3 HKC 323 at [29], Tang PJ expressed the view that:

> In other words, more tax than properly chargeable had been paid. This results in hardship and is unjust. Precisely, the object and purpose of s 70A to relieve. Of course, whether there was an error depends on whether the fraudulent knowledge of MGET's management should be attributed to MGET. In this context I note that if profits had been overstated due to the negligence or ineptitude of its management or its auditors, s 70A would apply.

His Lordship further opined (at [31]) that:

> It is in this very unusual context that the court has to consider the application of the fraud exception. I believe the plain object and purpose of s 70A supply the answer. Has MGET paid more tax than was properly chargeable? If the liquidators could prove that the profits had indeed been inflated, the answer must be yes. Do justice and common sense tell one that they should not have a refund? No, given the purpose of s 70A, I believe justice and common sense require the application of the fraud exception. Subject to the 6 years time limit, the Commissioner has no good policy reason to wish to keep tax paid in excess of what was properly chargeable.

or attribution principle to such a potentially wide group of individuals and/or entities.[51] In fact, similar concerns could also be raised as regards the status of part-time or sessional employees as the term "employee" is not defined in the MACC Act and may in practice be more difficult to ascertain than a "director" or "partner" which terms may be referred to their statutory definition under the Companies Act 2016[52] and the Partnership Act 1961 (Revised 1974)[53] respectively.

33 The foregoing may be a significant issue in the enforcement of s 17A since its principal purpose is to ensure that commercial organisations act to prevent bribery with the intent of obtaining or retaining business or an advantage. This is important as s 17A of the Interpretation Acts 1948 and 1967[54] provides that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

34 The general principle of criminal jurisprudence is that the Prosecution has to prove its case beyond all reasonable doubt and the benefit of every reasonable doubt should go to the accused. The accused would be entitled to an acquittal because the Prosecution has failed to discharge its special burden of eliminating doubts. Even though the accused may have failed to prove his plea he nonetheless is entitled to benefit – whether by way of availing himself of the exception pleaded and/or of doubt on the whole case – because he has succeeded in throwing the existence of an ingredient of the offence into the region of reasonable doubt. In a nutshell, it is always the duty of the Prosecution to prove an accused person's guilt and the accused person need only cast a reasonable doubt over it.[55] The foregoing amplifies the presumption of innocence as a fundamental and cardinal principle in criminal law.[56]

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51 This group potentially includes agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers regardless of domicile.

52 Act 777.

53 Act 135.

54 Act 388.

55 See, *eg, Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393 and *Loo Ting Meng v Public Prosecutor* [2014] 6 MLJ 208.

56 See, *eg, Ramiah v Public Prosecutor* [1986] 1 MLJ 301 and *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1.

IV. Section 7 of the Bribery Act 2010

35 As s 17A is supposedly based on its British counterpart, namely, s 7 of the Bribery Act, it is appropriate to briefly highlight the salient aspects of the latter to assist in the provision of context. In a nutshell, the Bribery Act represented a significant extension of the then existing English laws with respect to bribery and corruption which scope now statutorily encompasses four categories of offence, namely:

(a) a general offence of offering, promising or giving a bribe to another person;

(b) a general offence of requesting, agreeing to receive or receiving a bribe from another person;

(c) a specific offence of bribing a foreign official; and

(d) a strict liability corporate offence of failing to prevent bribery.

36 As with the MACC Act, the Bribery Act does not define what constitutes "the carrying on of a business or part of a business", which has serious implications for any commercial organisation, especially those which businesses extend internationally given that no territorial limits are placed on the location of its formation and/or where the alleged act of bribery actually took place.

37 Section 7 of the Bribery Act is of particular significance in that it is a strict liability offence – since there is no negligence test to establish liability – with the only defence being for the commercial organisation to show that it had "adequate procedures" in place to prevent persons associated with it from committing bribery.[57] Its wording makes it quite specific that such offences can only be committed by a relevant commercial organisation.

38 Significantly, the term "adequate procedures" is not defined in the Bribery Act although there is a 43-page guidance ("Bribery Guidance") issued by the Secretary of State for Justice on 11 March 2011, the principal objective of which is to aid, inform and assist commercial organisations of all forms and sizes to ensure that they take appropriate

57 Section 7(2) of the UK Bribery Act 2010 (c 23) which is similar to s 17A(4) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694). However, on closer examination, the provisions of the former are more restrictive since the offences are separated unlike the latter which merges the criminal liability of the commercial organisation and the persons associated with it.

and adequate precautions against the threat of bribery.[58] Although the Bribery Guidance is not statutory, compliance of the recommendations therein is likely to be a factor that courts would consider in determining whether the persons and/or the entities charged are in breach of the objective of the Bribery Act to prevent bribery.

39 Paragraph 4 of the Bribery Guidance states very clearly that it:[59]

> … is not prescriptive and is not a one-size-fits all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departure from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

40 The Bribery Guidance comprises the following six principles:[60]

> Principle 1 *Proportionate procedures* – to the bribery risks and to the nature, scale and complexity of the activities of the commercial organisation which should be clear, practical, accessible, effectively implemented and enforced.
>
> Principle 2 *Top-level commitment* – to foster a culture within the organisation in which bribery is never acceptable.
>
> Principle 3 *Risk assessment* – to be done periodically in an informed and documented manner to assess the nature and extent of the exposure to potential external and internal risks of bribery.
>
> Principle 4 *Due diligence* – premised upon a proportionate and risk-based approach on persons associated with the

58 Ministry of Justice, *The Bribery Act 2010 – Guidance* (March 2011), which publication was statutorily required of the Secretary under s 9 of the UK Bribery Act 2010 (c 23). The same requirement is made of the Minister under s 17A(5) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) which published the MACC Guidelines on 4 December 2018.

59 Save for the last sentence, the MACC Guidelines adopt a similar approach. That said, the MACC Guidelines appear to advocate a more compliant approach as para 3.5 states that "by implementing these adequate procedures, companies can gain confidence that they have established a suitable defence which can be used to protect both the commercial organisation and top management from the liabilities now arising from MACC Amendment Act 2018".

60 While not having the same wording, the philosophy of the MACC Guidelines is broadly similar as their objectives lie in the prevention of bribery.

commercial organisation in order to mitigate identified bribery risks.

Principle 5 *Communication* – which includes training to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation.

Principle 6 *Monitoring and review* – on a continual basis with appropriate improvements as necessary to prevent bribery by persons associated with it.

41 Appendix A – which is expressly stated as not forming part of the Bribery Guidance issued under s 9 of the Bribery Act – sets out 11 hypothetical case studies to illustrate how the different principles may be applied. By focusing on principles as opposed to rigid rules, the approach taken allows for flexibility given the range of commercial organisations which are regulated by the Bribery Act.

42 Unfortunately, what is lacking is definitive advice on how these entities can assure themselves that they have employed "adequate procedures" to be sure of compliance. This is particularly important given that small to medium-sized enterprises – a large and important segment of the economy which may not have the same resources as larger commercial organisations – should be provided with fair warning over what may constitute their "failure to prevent bribery" so as to be able to respond accordingly to avoid the latter. In this regard three judicial pronouncements are useful in providing some guidance on the ambit and application of s 7 of the Bribery Act.

A. R v Sweett Group plc

43 The first case, *R v Sweett Group plc*,[61] concerned the admission by Sweett Group plc in December 2015 that it had failed to prevent bribery with respect to its activities in the United Arab Emirates following a charge by the Serious Fraud Office ("SFO") that:[62]

61 Southwark Crown Court (19 February 2016). See, *eg*, Allen & Overy, "Lessons from the First s7 UK Bribery Act Case" (14 April 2016) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/lessons-from-the-first-s7-uk-briberyact-case> and Eversheds Sutherland, "Sweett Group Sentenced After First Ever Corporate Conviction for Failing to Prevent Bribery" (23 February 2016) <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Fraud_and_financial_crime/Sweett_group sentenced> (accessed 20 February 2020) for a commentary of the case.

62 As reported by the Serious Fraud Office at <https://www.sfo.gov.uk/cases/sweett-group/> (accessed 20 February 2020).

> Between 1 December 2012 and 1 December 2015 Sweett Group PLC, being a relevant commercial organisation, failed to prevent the bribing of Khaled Al Badie by an associated person, namely Cyril Sweett International Limited, their servants and agents. The bribing was intended to obtain or retain business, and/or an advantage in the conduct of business, for Sweett Group PLC, namely securing and retaining a contract with Al Ain Ahlia Insurance Company for project management and cost consulting services in relation to the building of a hotel in Dubai, contrary to Section 7(1) of the Bribery Act 2010.

44 Although the company had self-reported that it had suspicions regarding the contracts entered into in respect of the hotel project in Dubai, it was ordered by the court to pay a total of £2.25m comprising £1.4m in fines, £851,152.23 in confiscation and the balance as costs to the SFO. While the matter was uncontested, there are nonetheless invaluable insights to be learnt from a *Sidley Update* which highlighted, *inter alia*, that:[63]

> (a) the judge was highly critical of the conduct of the company after the SFO had commenced its investigation. In particular, the judge noted that representatives of the company had tried to mislead the SFO by attempting to secure a letter from the Al Badie Group to the effect that the contract was actually for a legitimate purpose when that clearly was not the case;
>
> (b) the company had failed to act on recommendations made by KPMG in 2011 and 2014 in relation to the group's financial controls;
>
> (c) by failing to act on critical reports, the company failed to apply a proactive approach and a culture within the organisation to encourage anti-bribery compliance and to deal with any such issues promptly and effectively;
>
> (d) the company had exercised great control over its subsidiary both in shareholding as well as in operational matters which made the latter an "associated person"; and
>
> (e) the process used by the judge to establish the size of the fine is the same as used in the Standard Bank case by applying the relevant *Sentencing Council Guidelines*.

63 Sidley Austin LLP, "Sidley Update: The UK's First Conviction under Section 7 of the Bribery Act Offers Further Insight into Anti-Bribery Prosecution" (15 March 2016) <https://www.sidley.com/~/media/update-pdfs/2016/03/20160315--complex-commercial-litigation-update.pdf> (accessed 20 February 2020).

B. R v Skansen Interiors Ltd

45 The first contested prosecution to test the ambit of s 7 of the Bribery Act is *R v Skansen Interiors Ltd*[64] ("*Skansen*") which provides some clarification on a number of important issues pertaining to co-operation, self-reporting and procedures.

46 The facts were briefly thus:[65] As part of a tender process in 2013, Mr Banks, the former managing director of Skansen Interiors Ltd ("Skansen"), paid a bribe to Mr Deakin, a former project manager at DTZ Debenham Tie Leung ("DTZ"), a real estate company, in order to secure office refurbishment contracts worth £6m. Skansen's different anti-bribery policies did not make reference to the Bribery Act but articulated that staff needed to be transparent, honest, have integrity and act ethically. The amount of bribes was to total £39,000 in three payments but the last payment of £29,000 was intercepted before it could be paid. Following an internal investigation, Skansen summarily dismissed Mr Banks and voluntarily co-operated with the police in their investigations since before it became a dormant company in May 2014.

47 Despite Skansen being a dormant company, it was nonetheless charged under s 7 of the Bribery Act. The company defended the prosecution by raising the following points to support its argument that it had in place adequate procedures to prevent bribery:

> (a) it was a small business which employed 30 employees operating out of an open-plan office of some 300m^2 that was smaller than the courtroom in which the trial took place;

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64 Case No T20172024 (Southwark Crown Court, 2018).

65 Unless otherwise stated, materials for this section are extracted and/or summarised from client updates of various law firms including – in alphabetical order – Allen & Overy, "Failure to Prevent Bribery: Guilty Verdict in First Contested Case" (27 March 2018) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/lessons-from-the-first-s7-uk-briberyact-case> (accessed 20 February 2020); Ashurst, "Section 7 Failure to Prevent Bribery Offence: Adequate Procedures Defence Finally Tested" (3 April 2018) <https://www.ashurst.com/en/news-and-insights/legal-updates/section-7-failure-to-prevent-bribery-offence-adequate-procedures-defence-finally-tested/> (accessed 20 February 2020); CMS Cameron McKenna Nabarro Olswang LLP, "Failure to Prevent Bribery: First Contested Prosecution" *Thomson Reuters Practical Law* (29 March 2018); Hogan Lovells, "Delusions of Adequacy: The Belated Tale of Adequate Procedures" (10 May 2018) <https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2018/2018_05_10_investigations_white_collar_and_fraud_alert_delusions_of_adequacy_the_belated_tale_of_adequate_procedures.pdf?la=en> (accessed 20 February 2020); and Schindlers, "R v Skansen Interiors Limited, Southwark Crown Court (2018)" (7 August 2018) <http://www.schindlers.co.za/news/r-v-skansen-interiors-limited-southwark-crown-court-2018/> (accessed 20 February 2020).

(b) its business area was very localised and therefore detailed bureaucratic compliance controls were not thought to be required;

(c) the prosecution witnesses had accepted at trial that it was common sense that one should not pay bribes and that staff do not require a detailed, gold-standard policy to tell or to remind them of that;

(d) the company did not require a separate specific bribery policy since it already had in place separate policies that reflected "core company values" which referenced the need to act in an ethical, open and honest manner and that these were proportionate for a business of its size;

(e) there were clauses in the DTZ contracts prohibiting bribery with the provision of the right to terminate in the event that bribery occurred;

(f) its financial control system of checks and balances was designed to ensure the legitimacy of invoices and the fact that the largest of the three payments was stopped indicates that the procedures were both sufficient and effective; and

(g) it had self-reported and had subsequently provided considerable assistance, including the provision of company reports and offering up legally privileged advice. In fact the police might not have known about it if it were not reported.

48 The jury was not persuaded by the arguments as outlined above and returned a guilty verdict. However, as the company was dormant and without assets, the court imposed an absolute discharge which became immediately spent.[66] While the learned judge rightly questioned why the prosecution was being brought by the Crown Prosecution Service against a dormant company against whom it was agreed that no financial penalty could be imposed, she nonetheless added that "had the company been in funds, the situation would have been different and a substantial financial penalty would have been imposed".[67]

49 Although both Mr Banks and Mr Deakin who offered and received the bribes respectively were sanctioned,[68] it does appear that the

66 Rehabilitation of Offenders Act 1974 (c 53) (UK).

67 *Hogan Lovells* Case No T20172024 (Southwark Crown Court, 10 May 2018).

68 Mr Banks was sentenced to 12 months' imprisonment and disqualified as a director for six years. Mr Deakin was sentenced to 20 months' imprisonment and disqualified as a director for seven years. He was also ordered to pay a fine of £10,697, representing the value of the bribes adjusted for inflation.

principal reason for charging Skansen was to send a message that bribery at whatever level will be prosecuted as the learned judge observed that "there is a public utility of the public good in prosecuting cases of this kind to send a message about the necessity for companies to introduce policies and monitor policies which lead to the prevention of bribery and corruption".[69]

50 Although the decision may seem harsh in the circumstances, there are a number of useful takeaways from the decision in *Skansen*. First, it is no longer enough to simply rely on general financial safeguards as commercial organisations should put in place specific anti-bribery and anti-corruption policies to avoid being held liable for their failure to prevent bribery. Secondly, these policies should be "top-down", timely, clearly and properly documented, well publicised and effectively implemented to ensure that these are followed. Within these policies should be a set of appropriate procedures that are tailored specifically to the identification and avoidance of any risk of bribery and corruption. Thirdly, it may be prudent to consider the appointment of a compliance officer at a relatively senior management level who is tasked with the responsibility of ensuring that the applicable anti-bribery controls are embedded and complied with. Fourthly, even small companies with minimal risks should have some form of documented policy, procedures and monitoring in place if a defence of adequate procedures is to succeed. Lastly, self-reporting and co-operation – by and of themselves – will not necessarily result in no action being taken by the authorities and/or a reduced penalty by the court.

51 That said, given the facts of the case, the comments of the learned judge as regards co-operation should – with respect – be taken as an "outlier comment" as it may discourage commercial organisations from self-reporting a wrongdoing where there exists a risk that they may be exposed to prosecution. Furthermore, it appears to be somewhat at odds with the mantra of the SFO which encourages such actions by commercial organisations especially since the inception of deferred prosecution agreements in late 2015.

52 A better approach may be to consider the timeliness of the self-reporting and the level of co-operation thereafter and to factor these into the sanctions imposed. In short, it may be better to consider the application of a "discount" – for the lack of a better term – as tacit recognition of these factors which together with the establishment of proportionate and adequate anti-bribery measures may possibly be a good combination towards attaining the objectives of s 17A of the MACC Act.

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69 *R v Skansen Interiors Ltd* Case No T20172024 (Southwark Crown Court, 2018).

C. The Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd

53 Although not directly related to s 7 of the Bribery Act, it may be useful to briefly highlight the decision of the English Court of Appeal in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*[70] which restores the scope of legal professional privilege in internal investigations as may be recognised under Malaysian law pursuant to s 126 of the Evidence Act 1950[71] and s 46(2) of the MACC Act.

54 Following a whistle-blower report in 2011, Eurasian Natural Resources Corporation Limited ("ENRC") commenced an internal investigation into alleged corruption and fraud in its Kazakhstan and African operations. The SFO opened a criminal investigation into ENRC and requested the company to turn over documents from its internal investigations including notes of fact-finding interviews as well as documents created by its lawyers and accountants. ENRC refused to comply on grounds that these documents were covered either by litigation privilege[72] and/or legal advice privilege.[73]

55 In May 2017, the High Court held that neither of the assertions for privilege were applicable in this case and accordingly the documents had to be turned over to the SFO. Andrews J opined that the documents had been created at too early a stage for criminal proceedings to be reasonably contemplated or for it to be a "dominant purpose", and that in any event only very few of the documents were legally privileged since most were prepared essentially for the purpose of fact finding rather than to obtain legal advice. The decision – which caused a worry that companies would be deterred from dialogue with regulators and/or from conducting thorough internal investigations – was almost entirely overturned by the Court of Appeal which held that the High Court had erred both in law and in its interpretation of the facts of the case.

56 The Court of Appeal affirmed the view that "all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related

70 [2019] 1 WLR 791.

71 Act 56.

72 This applies to communications between lawyers and clients or by either to third parties for the "dominant purpose" of civil or criminal litigation which must be reasonably contemplated or ongoing.

73 This applies to confidential communications between lawyers and clients for the purpose of giving or receiving legal advice.

to the performance by the solicitor of his professional duty as legal adviser of his client".[74] It also held that the interview notes made by the lawyers and the documents prepared by the forensic accountants were indeed produced for the dominant purpose of reasonably contemplated adversarial criminal enforcement and should accordingly be subject to litigation privilege *per* the principles that were laid down in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*.[75]

57 In adopting a pragmatic and commercial approach, the English Court of Appeal recognised that it does not matter if investigations are only at an early stage with matters still requiring exploration if there is a clear, real and serious risk of law enforcement and/or regulatory intervention, including criminal prosecution. The court also unequivocally rejected any distinctions between avoiding, settling, resisting and defending litigation, all being litigation purposes, holding that:[76]

> 109 … Although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also. Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation.
>
> …
>
> 116 … obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered whatever might be agreed (or not agreed) with a prosecuting authority.

58 Commercial organisations would be well advised to pay heed to the foregoing especially when undertaking preliminary investigations to determine whether there has been a failure to prevent bribery and/or whether the procedures as implemented were sufficiently robust to qualify as a defence and/or to evaluate self-reporting and the extent of co-operation with regulators. The assertion of privilege remains highly fact

74 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791 at [65].

75 [2005] 1 AC 610 at [60], *per* Lord Rodger. See also C Hollander, "Three Rivers is No More" *Hong Kong Lawyer* (September 2015).

76 *The Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd* [2019] 1 WLR 791 at [109] and [116].

specific and highlights the need to establish a "client team" within which other professionals such as forensic accountants work within a lawyer-driven structure. It is also essential to be clear as to the purpose of any investigation which should be defined in instructions, engagement letters and in protocols within the client organisation for privilege to apply, with particular caution to be exercised when conducting interviews with employees to establish the facts.

59 The cases as discussed above highlight a number of important issues for anyone in business save possibly for the sole proprietor. First, s 7 of the Bribery Act – from which s 17A of the MACC Act is drawn – applies when the failure to prevent bribery takes place for the advantage of the commercial organisation with the only defence being to demonstrate that adequate procedures were in place to prevent the bribery at the time the bribery took place. Secondly, as the offence applies to "part of its business", it has extraterritorial effect. Thirdly, it is crucial to document both the processes and procedures, and to ensure that these are well communicated as well as effectively implemented, not only within the commercial organisation but also outside thereof, including to and by its suppliers and other third parties.

60 Fourthly, it is noteworthy that *Skansen* was a jury trial. Thus, while it provides some insights as to what will *not* be considered as adequate there is no real guidance as to what would be enough. Lastly, caution should be exercised while undertaking internal investigations to determine whether there are issues to be self-reported and of the co-operation to follow with the relevant authorities should this be necessary to ensure that litigation and/or professional privilege continue to apply.

V. Report of the House of Lords Select Committee

61 The Select Committee on the Bribery Act was established in May 2018 by the House of Lords to conduct post-legislative scrutiny to see whether the Act was achieving its intended objectives. Its report, published on 14 March 2019[77] ("Report"), stated that "the Act is an excellent piece of legislation which creates offences that are clear and all-embracing".[78] As regards the offence of failing to prevent bribery, the Select Committee expressed the opinion that it was "particularly effective, enabling those in a position to influence a company's manner of conducting business

77 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019).

78 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at p 3.

to ensure that it is ethical, and to take steps to remedy matters where it is not".[79] This part highlights some of the pertinent findings and recommendations on s 7 of the Bribery Act together with the applicable responses by the Government.

62 Interestingly, the Report noted that the Law Commission "had never intended that the new offence should be one of strict liability" concluding that "a company should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness, if it can show that it had robust management systems in place to prevent bribery from taking place".[80] The first statement is somewhat peculiar since strict liability offences are often used to make a company liable for criminal or tortious acts, usually with a corresponding absolute defence if certain elements can be established. The Bribery Act follows this approach through the creation of an offence of failure by a commercial organisation to prevent bribery and then affords it a defence if it satisfies the requirements of effectively implementing "adequate procedures".

63 The Report noted that while s 7 of the Bribery Act was used as a model for the offences of failure to prevent facilitation of UK and foreign tax evasion under ss 45(1) and 46(1) of the Criminal Finances Act 2017[81] respectively, the latter nonetheless did not use the term "adequate procedures", referring instead to procedures that are "reasonable in all the circumstances".[82] Although the HM Revenue & Customs' guidance[83] ("HMRC Guidance") begins with the usual caveat that "ultimately only the courts can determine whether a relevant body has *reasonable prevention procedures* in place to prevent the facilitation of tax evasion in the context of a particular case" [emphasis in original],[84] it makes specific references to small and medium-sized enterprises ("SMEs"), unlike the Bribery Guidance.

64 In particular, the Select Committee noted that the HMRC Guidance expressly states that "[b]urdensome procedures designed to

79 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at p 3.

80 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at paras 172 and 173.

81 c 22 (UK).

82 Criminal Finance Act 2017 (c 22) (UK) ss 45(2)(a) and 46(3)(a).

83 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017).

84 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017) at p 6.

perfectly address every conceivable risk, no matter how remote, are *not* required" [emphasis in original].[85] It proceeds to state that:[86]

> Procedures need only be reasonable given the risks posed in the circumstances. It is expected that a relevant body will therefore first undertake an assessment of the risks that those who act on its behalf may criminally facilitate tax evasion.

65 It is also worth noting that in some limited circumstances it may be unreasonable to expect a relevant body to have prevention procedures in place. For example, where a relevant body has fully assessed all the risks and they are considered to be extremely low and the costs of implementing any prevention procedures are disproportionate or cost-prohibitive in relation to the negligible risks faced. However, it will rarely be reasonable to have not even conducted a risk assessment.[87]

66 In plain English, the HMRC Guidance highlights some risk factors that may be considered in evaluating the proportionality of reasonable prevention procedures:[88]

(a) Opportunity – could someone facilitate tax evasion?

(b) Motive – why could it happen?

(c) Means – how could it be done?

67 The Report thus recommended that the Bribery Guidance be expanded "to give more examples and to suggest procedures which, if adopted by SMEs, are likely to provide a good defence".[89] In response, the Government stated that it did not agree with the recommendation, reiterating that the Bribery Guidance "is rather an outline guide as to how businesses should go about the task of determining what is required for them in the way of bribery prevention procedures" as this is "the only practical way of offering guidance of general application given the

85 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017) at p 21.

86 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017) at p 21.

87 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017) at p 24.

88 HM Revenue & Customs, *Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion* (1 September 2017) at p 22.

89 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at para 193.

enormous variation in circumstances in which businesses operate".[90] Furthermore, it would not "be right for government or the prosecution agencies to give more examples or to suggest procedures that would be likely to provide a good defence".[91]

68 Another concern raised in the Report was whether there were two different standards for the defence to establish although the Bribery Act 2010 and the Criminal Finances Act 2017 were in essence based upon the same model of corporate criminality. The former uses the phrase "adequate procedures" while the latter "procedures … reasonable in all the circumstances", which ambit have yet to be judicially determined. The Bribery Guidance makes it clear that "in accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities".[92]

69 In essence, this means that it is for the entity to show that it is more likely than not that it had procedures in place designed to prevent persons associated with it from engaging with bribery. The Select Committee thus recommended that the Bribery Guidance be amended "to make clear that 'adequate' does not mean, and is not intended to mean, anything more stringent than 'reasonable in all circumstances'".[93]

70 In response, the Government opined that it was:[94]

> … very unlikely that a company which had in place anti-bribery procedures which were reasonable in all circumstances but did not prevent bribery taking place on a specified occasion, would be unable to use the section 7 defence. As the Committee itself remarked, this is a distinction without a difference.

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90 United Kingdom, Ministry of Justice, *Government Response to the House of Lords Select Committee on the Bribery Act 2010* (May 2019) at para 49.

91 United Kingdom, Ministry of Justice, *Government Response to the House of Lords Select Committee on the Bribery Act 2010* (May 2019) at para 50. However, the Government stated at (para 51) that it would "seek to explore opportunities for improving general awareness of the [Bribery] Guidance with business representative bodies, particularly in respect of SMEs".

92 United Kingdom, Ministry of Justice, *The Bribery Act 2010 – Guidance* (March 2011) at para 33. Section 7(2) of the UK Bribery Act 2010 (c 23) is similar to s 17A(4) of the Malaysian Anti-Corruption Commission Act 2009 (Act 694). However, on closer examination, the provisions of the former are more restrictive since the offences are separated unlike the latter which merges the criminal liability of the commercial organisation and the persons associated with it.

93 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at para 211.

94 United Kingdom, Ministry of Justice, *Government Response to the House of Lords Select Committee on the Bribery Act 2010* (May 2019) at para 53.

This view was reinforced by the concurrence of the Government to another recommendation by the Select Committee, namely, that the "due diligence defence" in any future legislation on other forms of economic crime should use the phrase "reasonable in all circumstances" rather than "adequate procedures" as it provides for more clarity as to the intended meaning as well as there being no actual or material difference between them.[95]

71 Another area of agreement was whether companies should be allowed to ask the SFO for an opinion as to whether the practices and procedures they propose to adopt are "adequate" for the purposes of the s 7 defence.[96] Both the Select Committee and the Government agreed that "[g]overnment departments and agencies can and do issue general guidance, but it is not their task to give advice on individual cases"[97] as "more bespoke and tailored advice is available from other sources".[98]

72 It is clear from the foregoing that while there is a general consensus that the Bribery Act is working towards its intended purpose, there is still a need to enhance awareness amongst key public stakeholders and that more guidance may be required for SMEs to better understand how their businesses can be operated in a manner that is compliant. Significantly, it has been acknowledged that "adequate" does not mean anything more stringent than "reasonable in all circumstances" with the burden of proof being that of on the balance of probabilities.

VI. Possible benchmarking models

73 A visible effect of s 17A of the MACC Act is that it is facilitating the growth of an industry seeking to advise commercial organisations on the necessary steps that they should take to ensure that they have "adequate procedures" in place. The MACC Guidelines highlight two matters that these entities should direct their minds to. First, there is an emphasis on *proportionality* in that what matters to a larger commercial organisation

95 United Kingdom, Ministry of Justice, *Government Response to the House of Lords Select Committee on the Bribery Act 2010* (May 2019) at para 56; United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at para 232.

96 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at para 213.

97 United Kingdom, House of Lords, Select Committee on the Bribery Act 2010, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 14 March 2019) at para 217.

98 United Kingdom, Ministry of Justice, *Government Response to the House of Lords Select Committee on the Bribery Act 2010* (May 2019) at para 54.

may not necessarily matter to a smaller one. Secondly – and following on from the first – there is a need to have a *bespoke policy* that takes into account and addresses the specific risks that the business is exposed to. Thus generic "off the shelf" solutions may not work as these have to be adapted for the specific needs of the organisation taking into account the principal purpose of preventing bribery.

74 It is a given that under the MACC Act commercial organisations have to ensure that they have in place adequate bribery prevention procedures that are proportionate to their identified risks. There is no one-size-fits-all approach as the requirements of what constitutes "adequate procedures" must turn on a critical and clear understanding of the nature, scale and complexities of their activities with periodic reviews on a timely basis to ensure that the measures remain proportionate as the business evolves.

75 As a detailed analysis of the procedures is outside of the scope of this article, this part seeks only to provide a cursory summary of the salient features from a desk survey of possible benchmarking models with the primary purpose of highlighting options that are available for consideration by commercial organisations as they prepare to implement their own bespoke "adequate procedures" under s 17A(4).

A. ISO 37001: 2016

76 The International Organization for Standardization ("ISO") is a worldwide federation of national standards bodies (ISO member bodies). Recognising that the law is not enough to combat the issue of bribery, ISO 37001: 2016[99] has been proactively set up as an anti-bribery management system to establish a culture of integrity, transparency, openness and compliance, accepting that:[100]

> A well-managed organization is expected to have a compliance policy supported by appropriate management systems to assist it in complying with its legal obligations and commitment to integrity. An anti-bribery policy is a component of an overall compliance policy. The anti-bribery policy and supporting management system helps an organization to avoid or mitigate the costs, risks and damage of involvement in bribery, to promote trust and confidence in business dealings and to enhance its reputation.

99 ISO 37001:2016, "Anti-Bribery Management Systems – Requirements with Guidance for Use" https://www.iso.org/standard/65034.html (accessed 20 February 2020).

100 Introduction to ISO 37001: 2016 https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en (accessed 20 February 2020).

77 The document recognises that good international practice can be applied to different types of business organisations across industries and jurisdictions by taking into account the specific bribery risks that are faced by these organisations to ensure that the policies, procedures and controls that are implemented are commensurate with and proportional to the same. Given the complexities and recognising that one size cannot fit all, the underlying stated caveat is that:[101]

> Conformity with this document cannot provide assurance that no bribery has occurred or will occur in relation to the organization, as it is not possible to completely eliminate the risk of bribery. However, this document can help the organization implement reasonable and proportionate measures designed to prevent, detect and respond to bribery.

B. COSO ERM Framework 2017

78 The Committee of Sponsoring Organizations of the Treadway Commission ("COSO") is dedicated to providing thought leadership through the development of comprehensive frameworks and guidance on internal control, enterprise risk management, and fraud deterrence designed to improve organisational performance and oversight and to reduce the extent of fraud in organisations. As a private sector initiative based in the US, COSO is jointly sponsored and funded by the American Accounting Association, the American Institute of Certified Public Accountants, the Financial Executives International, the Institute of Management Accountants and The Institute of Internal Auditors.[102]

79 Published in June 2017, the COSO *Enterprise Risk Management – Integrating with Strategy and Performance* ("COSO ERM") seeks to highlight the "importance of considering risk in both the strategy-setting process and in driving performance".[103] Comprising two parts, it commences by offering a perspective on current and evolving concepts and applications of enterprise risk management before setting out a "Framework" designed to enhance strategies and decision-making.

80 The Framework itself is a set of principles organised into five interrelated components, namely, "Governance and Culture", "Strategy and Objective-Setting", "Performance", "Review and Revision"

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101 Introduction to ISO 37001: 2016 https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en (accessed 20 February 2020).

102 See Committee of Sponsoring Organizations of the Treadway Commission, "About Us" https://www.coso.org/Pages/aboutus.aspx (accessed 20 February 2020).

103 Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management – Integrating with Strategy and Performance – Executive Summary* (June 2017) "Foreword" at p iii.

and "Information, Communication and Reporting".[104] Rather than mere risk listing or providing a check list for internal controls, the COSO ERM should be viewed as "a set of principles on which processes can be built or integrated for a particular organization, and it is a system of monitoring, learning, and improving performance".[105]

C. Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance

81 Comprising a group of international banks, the Wolfsberg Group updated its publication, *Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance* ("Wolfsberg Guidance"), in 2017 to provide guidance to the broader financial services industry on how to develop, implement and maintain an effective ABC compliance programme, with the overall objective of promoting a culture of ethical business practices and compliance with ABC legal and regulatory requirements. Significantly, the Wolfsberg Guidance – developed in collaboration with the Basel Institute on Governance and with input from Transparency International – is specifically focused on corruption in the form of bribery, which is commonly described as involving the offer, promise, request, acceptance or transfer of anything of value either directly or indirectly to or by an individual, in order to improperly induce, influence, or reward the performance of a function or an activity.[106]

82 The Wolfsberg Guidance is based on a risk-based approach designed to detect and prevent acts of corruption. The mitigation of bribery and corruption risks is achieved through the implementation of a matrix built upon the following key constructs:[107]

(a) governance;

(b) firm-wide written policy;

(c) establishment of a control environment;

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104 Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management: Integrating with Strategy and Performance – Executive Summary* (June 2017) at p 6.

105 Committee of Sponsoring Organizations of the Treadway Commission, *Enterprise Risk Management: Integrating with Strategy and Performance – Executive Summary* (June 2017) ("COSO ERM") at p 3. For a discussion of the details of the COSO ERM, see L J Trautman & J Kimbell, "Bribery and Corruption: The COSO Framework, FCPA, and the UK Bribery Act" (2018) 30 Fla J Int'l L 191.

106 The Wolfsberg Group, *Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance* (2017) at pp 1–2.

107 The Wolfsberg Group, *Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance* (2017) at pp 3–4.

(d) risk assessment;

(e) training and awareness;

(f) monitoring for compliance with controls; and

(g) customer-related corruption risks.

83 As the Wolfsberg Guidance is directed primarily at financial institutions, there is also a specific reference to the laundering of proceeds from bribery, which risks:[108]

> … may be appropriately addressed through the measures put in place to detect and prevent money laundering. For example, adequate customer due diligence procedures, including EDD for politically exposed persons (PEPs), support the mitigation of money laundering risk by customers in this context. In addition, measures implemented by FIs to ensure that wire payments contain complete and accurate information also assist in the prevention and detection of the proceeds of corruption.

84 Lacking the expertise of the professionals and aspiring to keep things simple to understand within the realm of the layperson, while recognising that the nature, scale and complexity of business activities differ between different commercial organisations, a few common and universal themes appear from an evaluation of the foregoing, namely, that entities should *at a minimum*:

> (a) candidly and robustly identify the risks that are faced by the different businesses and set up appropriate courses of action to adequately address all material risks that are likely to arise and ensure that these are incorporated into the compliance manuals;
>
> (b) ensure that there is an "audit trail" of written records to document all of its compliance and training history;
>
> (c) have a timely, clear and robust anti-bribery and corruption ("ABC") policy which is adequately communicated and disseminated to – and understood by – their employees;
>
> (d) designate a senior-level employee whose task it shall be to ensure the organisaton's strict compliance with its stated ABC measures as well as to update these where relevant and required; and
>
> (e) establish clear reporting and whistle-blowing mechanisms which can bypass senior management so that junior

108 The Wolfsberg Group, *Wolfsberg Anti-Bribery and Corruption (ABC) Compliance Programme Guidance* (2017) at p 15. The acronyms "EDD" and "FI" refer to "Enhanced Due Diligence" and "Financial Institutions" respectively.

employees can report any suspicious activities at any level within the organisation.

85 While the foregoing will not necessarily prevent bribery from occurring, they are nonetheless measures which the court will likely view favourably when assessing whether these are reasonable in the circumstances for the purpose of meeting the "adequate procedures" requirements of s 17A(4) of the MACC Act.[109]

VII. Is s 17A of the Malaysian Anti-Corruption Commission Act constitutional?

86 Without any doubt, a key question that will eventually arise is whether the criminalisation of the failure to prevent bribery is even constitutional.

87 *Dicta* by the Federal Court from *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[110] affirmed the "basic structure doctrine" with the continued vesting of a distinct and independent judicial power in the Judiciary as a co-equal branch of the Government.[111] In that case, the Federal Court declared as unconstitutional an amendment to the Land Acquisition Act 1960[112] which purported to require High Court judges to be bound by the determinations of lay assessors in matters of contested land acquisitions.

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109 Solely and strictly for illustrative purposes, reference may be made to policies posted by the Hospital Authority in Hong Kong (see "Sample Code of Conduct" https://www.ha.org.hk/haho/ho/bssd/SampleCodeofConductPrivateSector.pdf (accessed 20 February 2020)) and Parexel International, a global provider of biopharmaceutical services and the second largest clinical research organisation in the world, headquartered in the U (see "Anti-Bribery Guidelines" https://www.parexel.com/company/trust-and-privacy/corporate-conduct/anti-bribery-guidelines (accessed 20 February 2020)).

110 [2017] 3 MLJ 561.

111 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 at [74]–[76]. The "basic structure doctrine" encapsulates the idea that the "basic structure" of the constitution with its three co-equal branches of government, namely, the Executive, the Legislature and the Judiciary, cannot be amended by the Legislature even if this complies with the procedures for the amendment thereof. The genesis of this implied limitation which is imposed by the courts on the amending powers of the Legislature can be traced to jurisprudence developed by the Indian Supreme Court in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 which was subsequently further articulated in *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 and in *IR Coelho v State of Tamil Nadu* (1999) 2 Supp SCR 394.

112 Act 486.

88 This decision was subsequently reaffirmed by a rare full nine-member bench of the Federal Court in *Alma Nudo Atenza v Public Prosecutor*[113] (heard together with *Orathai Prommatat v Public Prosecutor*) in which Richard Malanjum CJ – writing the judgment for the court – expressly recognised that "the principle of the separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct" holding that "courts can prevent Parliament from destroying the 'basic structure' of the [Federal Constitution]" and that "the role of the judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide".[114]

89 Of more relevance to the issue at hand is the decision of the Federal Court in *Public Prosecutor v Gan Boon Aun*[115] ("*Gan Boon Aun*") as a constitutional question posed for determination by the court was:[116]

> … whether s 122(1) of the [Securities Industry Act 1983] violates art 121 of the Federal Constitution and the doctrine of the separation of powers on the basis that it usurps the judicial powers of the court by deeming that a director, chief executive officer or representative of the body corporate has committed an offence where an offence has been committed by the body corporate.

90 Section 122(1) of the Securities Industry Act 1983[117] ("SIA") is similar in scope to s 17A of the MACC Act as it provided that:

> Where an offence against this Act or any regulation made thereunder has been committed by a body corporate, any person who at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity, is deemed to have committed that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

91 In his written judgment for the unanimous decision of the court, Jeffrey Tan FCJ summarised that the section created:[118]

> (a) a presumption that an offence against this Act or any regulation made thereunder committed by a body corporate is committed by any person who

113 [2019] 4 MLJ 1.
114 *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 at [72]–[74].
115 [2017] 3 MLJ 12.
116 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [1]. The Securities Industry Act 1983 (Act 280) has been repealed and replaced by the Capital Markets and Services Act 2007 (Act 671) which came into force on 28 September 2007.
117 Act 280.
118 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [7].

> at the time of the commission of the offence was a director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity; and (b) a reverse onus clause which imposed on that person the onus to prove that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

92 Tan FCJ cited with approval the statements by Lord Steyn in *R v Lambert*[119] that "limited inroads on the presumption of innocence may be justified" but these "must not be greater than necessary" emphasising the principle of proportionality and holding that the provision "would be unconstitutional only if it lacked overall unfairness".[120] In the present case, the latter would require an assessment of whether the provision had unjustifiably infringed upon the presumption of innocence with due consideration to be given to the aims of the SIA. Thus, if the deeming provision was fair and necessary to promote and attain the legislative intent and objectives – while not imposing an unduly unfair or onerous burden on the defendant – then its constitutionality should be upheld in accordance with the principle of proportionality.

93 Tan FCJ opined that the "evident aim of the SIA was to regulate the industry, to promote public confidence in the integrity of the stock market, and to punish violators with criminal and civil liability",[121] adding that:[122]

> 48 … a corporate is a legal fiction. In reality, all activities of a corporate are managed by its directors and/or officers. Crimes and offences of a corporate could not come about without the acts and/or defaults of its directors and officers … *Actual violators must be deterred to promote public confidence in the integrity of the stock market*. And actual violators would not be deterred if they had not personal liability … To achieve the aim of the SIA, the offence of the corporate must be attributed, only rightly so, to its human operatives, namely to its directors and/or officers. That presumption was not only fair but also *absolutely necessary* to protect the stock market … The real concern should be whether the presumption and reverse onus clause in s 122(1) made any unreasonable inroad on the presumption of innocence.
>
> 49 … Yes, s 122(1) provided that directors and/or officers of the corporate shall be deemed to have committed the corporate offence. But there was *no let-up in the burden or standard of proof*. It remained that the prosecution had to prove the offence beyond all reasonable doubt before the deeming provision

119 [2001] UKHL 37.
120 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [47].
121 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [48].
122 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [48]–[50].

> could be triggered. There was no displacement of the presumption of innocence as contended.
>
> 50 … the deeming provision was *fair and necessary*. …
>
> [emphasis added]

94 Tan FCJ also emphasised that:[123]

> [T]he substance and effect of the presumption was reasonable and was not greater than was necessary. The rights of the defence were maintained. The statutory defence provided the opportunity to an accused to rebut the presumption. It was only right that an accused should prove the matters set out in the statutory defence. Fairly said, there was *balance between the general interest of the community and the protection of fundamental rights*. There is no basis to hold that s 122(1) was unconstitutional. [emphasis added]

95 The question is thus: Does s 17A of the MACC Act fall within the same boundaries as eloquently set by Tan FCJ in *Gan Boon Aun*? In the opinion of the authors, the answer must be in the affirmative given that the provision is *in pari materia* with s 122(1) of the SIA in a number of areas:

(a) There is a presumption of a strict liability offence with a reverse onus of proof.

(b) The legislative objective is to impose criminal liability on the company and persons associated with it.

(c) Actual violators are deterred from committing the corrupt act of bribery.

(d) There is no let-up in the burden and standard of proof on prosecutors.

(e) The right of the defendant to rebut the presumption is maintained.

(f) The deeming provision is fair and reasonable in all the circumstances.

(g) There is an appropriate balance between the general interest of the community and the protection of fundamental rights of the defendant.

96 Bribery and corruption are symptoms of wider governance dynamics that thrive within an environment where weak accountability exists in tandem with unscrupulous people having too much discretion in the absence of transparency. It breeds a lack of trust which eventually

123 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [52].

reduces the legitimacy of – while increasing the lack of confidence in – the institutions upon which the rule of law is built. Thus, it must be expressly recognised as the cancer that it is and dealt with accordingly in the interest of the wider community. In the circumstances – under the principle of proportionality – the fundamental rights of a defendant in being presumed innocent cannot be absolute but must be relative, provided always that there are sufficiently sound legal safeguards to make such encroachments fair and reasonable.

97 The adverse effects of corruption are highly evident with one of the most egregious cases being that of 1Malaysia Development Berhad ("1MDB"), a state-owned investment fund that was established in 2009 by Najib Razak, the then prime minister cum finance minister of Malaysia, ostensibly as a vehicle to attract foreign investments. Under the articles of association of 1MDB, despite his not being on the board of directors, Najib Razak chaired its advisory board and had to be informed of – as well as whose approval was required for – all major matters undertaken by the company.[124]

98 1MDB has been publicly decried as "kleptocracy at its worst" by Jeff Sessions the then US Attorney-General.[125] The US Department of Justice – under its *Kleptocracy Asset Recovery Initiative* – announced on 15 June 2017 that:[126]

> Today's complaints reveal another chapter of this multi-year, multi-billion-dollar fraud scheme, bringing the total identified stolen proceeds to US$4.5 billion. This money financed the lavish lifestyles of the alleged co-conspirators at the expense and detriment of the Malaysian people. We are unwavering in our commitment to ensure the United States is not a safe haven for corrupt individuals and kleptocrats to hide their ill-gotten wealth or money, and that recovered assets be returned to the victims from which they were taken … The misappropriation of 1MDB funds was accomplished with an extravagant web of lies and bogus transactions that were brought to light by the dedicated attorneys and law enforcement agents who continue to work on this matter. We simply will not allow the United States to be a place where corrupt individuals

124 For an overview of the issues, see, *eg*, C4, "Understanding Cross Border Corruption and Money Laundering: The 1MDB Chronicles Exposed" https://c4center.org/sites/default/files/1MDB%20Report%20-%20FINAL.pdf (accessed 20 February 2020). See also S Adam & L Arnold, "A Guide to the Worldwide Probe of Malaysia's 1MDB Fund" *Bloomberg* (8 March 2018).

125 See Jeff Sessions, US Attorney General, speech at the Global Forum on Asset Recovery (4 December 2017) <https://www.youtube.com/watch?v=ipySWOpAd88> (accessed 20 February 2020).

126 See US Department of Justice, Office of Public Affairs, "U.S. Seeks to Recover Approximately $540 Million Obtained from Corruption Involving Malaysian Sovereign Wealth Fund" (15 June 2017).

> can expect to hide assets and lavishly spend money that should be used for the benefit of citizens of other nations.

99 Despite the foregoing, the authors believe that the extensive scope of s 17(6) which provides that liability may be imposed upon "an employee or someone who performs services for or on its behalf" – the latter being reference to the commercial organisation – may be problematic. Simply put, if you do not know the crime, how do you do the time?

100 Section 122(1) of the SIA was more specific, referring as it did to a "director, a chief executive officer, an officer or a representative of the body corporate or was purporting to act in such capacity" – all of which connotes a management role – to which the identification or attribution principle as discussed in Part III[127] above is more easily applied. However, the same cannot be said of s 17A(6), especially in view of there being no specific statutory definition of either an "employee" or "someone who performs services for or on its behalf". To compound matters, this group is not afforded the statutory defence as set out in s 17A(3) and could ironically be liable even if directors, controllers, officers, partners and/or those who are concerned with the management of the entity escape liability.

101 The authors aver that as there is neither fair warning nor fair defence, the latter part of s 17A(6) may not pass the test of proportionality as set out in *Gan Boon Aun* since the fundamental rights of the defendant may not be adequately protected. While it is arguable that the right of the defendant to rebut the presumption is maintained, there are nonetheless significant shortfalls with at least two other tests under the principle of proportionality, namely, whether such a deeming provision is fair and reasonable in all the circumstances and whether this would lead to a let-up in the burden and standard of proof on prosecutors. Naturally these are important issues for a court to adjudicate upon going forward but shall in the interim remain an unresolved source of uncertainty.

VIII. Deferred prosecution agreements

102 While the legislative objectives of preventing bribery are well stated and generally understood, it is averred that these goals may be better and more effectively achieved with the introduction of a complementary system of deferred prosecution agreements ("DPAs") in the MACC Act. At the risk of over-simplification, a DPA is essentially a court-sanctioned agreement reached between a prosecutor and a defendant to resolve

127 See paras 15–34 above.

a matter that could otherwise be prosecuted. Thus, it is – in essence and context for the present purposes – a means of ensuring that companies which were engaged in criminal activities are appropriately rehabilitated, observed as regards their conduct as well as financially punished with a commensurate degree of judicial monitoring and approval.

103 As a voluntary, negotiated settlement between a prosecutor and the company to defer prosecutions, a DPA typically entails:

(a) co-operation by the company in any investigation;

(b) its admission of agreed facts;

(c) its payment of a financial penalty;

(d) its implementation of a programme to improve future compliance; and

(e) the fulfilment of the obligations by the company under the agreement.

104 DPAs were introduced on 24 February 2014 in England and Wales under the provisions of Schedule 17 to the Crime and Courts Act 2013[128] and supplemented by *A Code of Practice for Prosecutors*, and are available to the Crown Prosecution Service ("CPS") as well as the SFO. The DPA is an agreement reached between the prosecutor and an entity[129] that could have been prosecuted for an economic crime – including theft, fraud, forgery, money laundering, bribery and fraudulent evasion of value added tax – but for which criminal proceedings would be automatically suspended if the agreement were approved of by the Crown Court.[130]

105 The latter requires the judge to be convinced that the DPA is "in the interests of justice" and on terms that are "fair, reasonable and proportionate".[131] There have been four DPAs since it was introduced, the most recent and with the largest fines of which was *Serious Fraud Office v Rolls-Royce plc*,[132] to which this article now turns to provide some insights and perspective.

128 c 22 (UK).

129 This definition includes a body corporate, a partnership or an unincorporated association. Individuals are not included under Schedule 17 to the UK Crimes and Courts Act 2013 (c 22).

130 Crimes and Courts Act 2013 (c 22) (UK) Pt 2.

131 Crimes and Courts Act 2013 (c 22) (UK) s 45 and Schedule 17.

132 Approved judgment of Sir Brian Leveson P in *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017).

A. Rolls-Royce plc – A case study

106 Founded in 1904 by Charles Stewart Rolls and Frederick Henry Royce, Rolls-Royce plc ("Rolls-Royce") evolved into a globally recognised British industrial powerhouse driven primarily by its engineering prowess which produced superior engines for both vehicles and aircrafts, as well as providing highly-efficient integrated power and propulsion solutions.[133]

107 Things began to unravel following allegations by Dick Taylor – a Rolls-Royce veteran and chief service representative – of systemic corruption through bribery to secure business for its civil aviation aircraft engines in Indonesia from 2006.[134] Following a four-year investigation that the SFO commenced in 2012 to cover the conduct of the company and its subsidiary, Rolls-Royce Energy Systems Inc – spanning over 24 years across seven countries[135] at a cost of more than £13m – a total of 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery were laid against the company including:

> (a) agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;
>
> (b) concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;
>
> (c) an agreement to make a corrupt payment in 2006/2007 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;
>
> (d) an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;
>
> (e) failing to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between the commencement of the Bribery Act 2010 and May 2013 and July 2013 respectively, with similar failures in relation to its civil business in Indonesia; and

133 P Pugh, *The Magic of a Name – The Rolls-Royce Story* (London: Icon Books, 2001).

134 C Hoyos, *Rolls-Royce Bribery Claims Date to 2006 Financial Times* (10 December 2012).

135 The countries are China, India, Malaysia and Thailand for conduct by Rolls-Royce alone and Indonesia, Nigeria and Russia together with its subsidiary.

> (f) failure to prevent the provision by Rolls-Royce employees of inducements which constitutes bribery in its civil business in China and Malaysia between the commencement of the Bribery Act 2010 and December 2013.[136]

108 Rolls-Royce made gross profits amounting to some £258m from these transactions which facts "should reveal the most serious breaches of criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company)".[137] In addition, "the conduct involved senior (on the face of it, very senior) Rolls-Royce employees"[138] and "that the investigations into the conduct of individuals continues and nothing in this agreement in any way affects the prospects of criminal prosecutions being initiated if the full code test for prosecution is met".[139]

109 Sir Brian Leveson P had previously made it abundantly clear that:[140]

> 25 … the more serious the offence, the more likely that it is that prosecution is required in the public interest and the less likely it is that a DPA will be in the interest of justice. …

and:[141]

> 69 … Individuals who are involved in wholesale corporate corruption and bribery can expect severe punishment and, absent exceptional circumstances such as obtain in this case, corporations set up or operated in that way are unlikely to survive. Analysis of the guideline underlines the likely approach of the court when prosecutions follow with punishment and deterrence being at the forefront of the sentencing decision.

136 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [4].
137 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [4].
138 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [35].
139 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [24].
140 Approved preliminary judgment of Sir Brian Leveson P in *Serious Fraud Office v Standard Bank plc* Case No U20150854 (Southwark Crown Court, 30 November 2015) at [25].
141 Approved preliminary judgment of Sir Brian Leveson P in *Serious Fraud Office v XYZ Ltd* Case No U20150856 (Southwark Crown Court, 8 July 2016) at [69].

110 As regards Rolls-Royce, his Lordship was of the opinion that:[142]

> My reaction when first considering these papers was that if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades, involving countries around the world, making truly vast corrupt payments and, consequently, even greater profits, then it was difficult to see when any company would be prosecuted.

111 However, despite his observations as set out above, his Lordship agreed to the DPA for which Rolls-Royce would pay a total of £510,213,399 comprising disgorged profits, financial penalties less discounts as well as costs.[143] His Lordship expressed that he was "satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime",[144] having reviewed factors including the level of co-operation by Rolls-Royce; the robust enhancement of its corporate compliance with the engagement of an external expert; a change in the corporate culture and of personnel; and the substantial impact that prosecution may have not only upon the company but also on third parties.[145]

112 However, as regards the last point, his Lordship took great pains to emphasise that:[146]

> None of these factors is determinative of my decision in relation to this DPA; indeed, the national economic interest is irrelevant. Neither is my decision founded on the proposition that a company in the position of Rolls-Royce is immune from prosecution: it is not.

113 His Lordship was, however, persuaded that the DPA would "avoid the significant expenditure of time and money which would be inherent in any prosecution of Rolls-Royce"[147] and observed that "the same point can be made about the resources available to the court",[148] stressing that:[149]

142 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [61].
143 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at Appendix B, details of which are set out in Appendix A.
144 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [139].
145 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [33]–[57].
146 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (Southwark Crown Court, 17 January 2017) at [57].
147 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at [58].
148 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at [59].
149 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at [60], [63] and [141].

> 60 … a DPA will likely incentivise the exposure and self-reporting of wrong doing by organisations in similar situations to Rolls-Royce … Furthermore, the effect of the DPA is to require the company concerned to become a flagship of good practice and an example to others demonstrating what can be done to ensure good ethical practice in the business world.
>
> …
>
> 63 The question becomes whether it is necessary to inflict the undeniably adverse consequences on Rolls-Royce that would flow from prosecution because of the gravity of its offending even though it may now be considered a dramatically changed organisation. …
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> …
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> 141 … Although the criminal behaviour which has been outlined in this case must rightly be condemned, its conduct since 2013 must be commended; its willingness to unearth and then accept what it has done, to learn and start to build again will … better serve shareholders, customers, employees and those with whom it deals.

114 Sir Brian Leveson P, who presided over all four DPAs up to that juncture, also observed in his judgment that:[150]

> 6 … a DPA is potentially available for certain economic or financial offences to a body corporate, a partnership or an unincorporated association in respect of whom the only criminal sanction is financial: it does not cover (nor does it protect from prosecution) any individual. …
>
> 7 … the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is 'likely' to be in the interests of justice and its proposed terms are fair, reasonable and proportionate … the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.
>
> …
>
> 9 … even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate.
> …
>
> 11 … The entire process, including the engagement of the parties with the court then becomes open to public scrutiny, consistent with the principles of open justice. Thus the DPA … must be published along with the declarations … and, in each case the reasons provided by the court for doing so. The only exception is where publication is prevented by statute or must be postponed to

150 *Serious Fraud Office v Rolls-Royce plc* Case No: U20170036 (17 January 2017) at [6], [7], [9], [11], [138], [139], [141] and [142].

> avoid a substantial risk of serious prejudice to the administration of justice in any other legal proceedings.
>
> …
>
> 138 … it is important to underline that the court has not acted merely to provide formal agreement of that agreement … it has been important to stand back and assess, from an overall perspective, whether the terms of the DPA are both in the interests of justice and fair, reasonable and proportionate.
>
> 139 … there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest … the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime.
>
> …
>
> 141 … Although the criminal behaviour which has been outlined in this case must rightly be condemned … its willingness to unearth and then accept what it has done, to learn and to start to build again will … better serve shareholders, customers, employees and those with whom it deals. …
>
> 142 … A responsible company will engage openly in the way that Rolls-Royce and so contribute to an increasing recognition of the vice that bribery and corruption constitutes and provide impetus to preventing businesses from operating in this way.

115 The DPA reached in the Rolls-Royce case is interesting not least because one of the allegations of bribery and corruption involved a Malaysian company in the period following the enactment of the Bribery Act 2010. In brief, there was a failure on the part of Rolls-Royce:[151]

> … to prevent its employees from providing an Air Asia Group ('AAG') executive ('the AAG executive') with credits worth US$3.2 million to be used to pay for the maintenance of a private jet, despite those employees believing that, in consequence, the AAG executive intended to perform a relevant function improperly. This financial advantage was given at the request of the AAG executive, in return for his showing favour towards Rolls-Royce in the purchase of products and services, provided by Rolls-Royce and its subsidiaries, including TCA services to be supplied to Air Asia X ('AAX'), a subsidiary of AAG.

116 The said transaction which began with an enquiry by a senior employee of AAX in respect of a purchase of a private jet in August 2011 eventually led to that person seeking a "cash settlement that is off the record and not visible to the AAX group", which in turn caused the Rolls-Royce employee who was handling the account to express in March 2013

151 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at Appendix A, [147].

that he would "rather not be on the account" as this was "unethical and most likely illegal".[152]

117 As Rolls-Royce had admitted to this liability under the DPA, it would be possible for the company to initiate legal action against its senior employee on the assumption that he or she is a director for breach of director's duties. While an assessment of possible damages is outside of the scope of this article, it is nonetheless useful – to ensure its completeness – to briefly touch upon the issue.

118 In a nutshell, subject to a breach of duty being established, persons who are directors may be liable to damages being awarded against them and/or being called upon to account for any "secret profits" made. As damages are in essence compensation for losses incurred – which in the instant case is the disgorgement of profits of £17,080,000 from Rolls-Royce[153] or about RM92m – this could be considered as the "starting point" from which to compute the amount to be recovered from the director for his or her breach of duty that is owed to the company. Further amounts that the judge may order to be repaid to the company may include remuneration received by the director and/or such other benefits which roots may be traced to the criminal conduct that is the subject of the DPA.

119 Given that the increasing complexity of economic crimes, including bribery, often leads to investigations and prosecutions being disproportionately time-consuming and expensive, the rationale for – and the expediency of – DPAs warrants consideration. Its introduction is justifiable on the grounds that it complements s 17A, especially in view of its in-built safeguards with independent and robust judicial oversight. Working in tandem, the combination could result in the attainment of higher standards of ethical conduct and corporate governance.

IX. Conclusion

120 By seeking to purge the scourge of bribery and corruption which collectively results in resource misallocation that greatly hampers the efficiency of businesses, the enactment of s 17A of the MACC Act is undoubtedly the proper way forward. It is trite that "corruption is

152 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at Appendix A, [155]. The Rolls-Royce employee was subsequently removed from his position for a period of about two months at the request of the senior employee of AAX.

153 *Serious Fraud Office v Rolls-Royce plc* Case No U20170036 (17 January 2017) at Appendix A, [162].

collective rather than simply individual, going beyond private gain to encompass broader interests and benefits within political systems" and that it represents "a symptom of wider governance dynamics and is likely to thrive in conditions where accountability is weak and people have too much discretion".[154] In addition, "the lack of trust, reduced legitimacy and lack of confidence in public institutions can be both a cause and an effect of corruption, which has a negative effect on domestic investment and tax revenues. At the micro level, corruption imposes additional costs on growth for companies, especially in terms of their performance and productivity".[155]

121 In line with the objective of enhancing awareness of the provisions, this article has sought to set out the ambit of s 17A – principally how it is expected to operate and the "adequate procedures" that commercial organisations should direct their minds to effectively implementing. While the scope of the section can only ultimately be determined by the courts, there are nonetheless some unresolved issues that have been highlighted in this article which rectification warrants consideration if only to remove some of the uncertainties.

122 First, as there is neither definition nor guidance on what is meant by "part of a business" or "relevant circumstances", this could – when read in conjunction with ss 17A(3) and 17A(4) – mean that the provisions of s 17A can only be realistically applied to directors and/or partners of commercial organisations thereby defeating a key objective of the legislation which is to prevent the occurrence of bribery by parties engaged in business transactions. Secondly, as *Skansen*[156] was a jury trial, it may not provide any real guidance as to what processes should be undertaken for it to be considered enough to qualify as "adequate procedures". However, it should be clarified that an objective test will apply for what constitutes "adequate procedures" such that the taking of measures that are "reasonable in all circumstances" would suffice as this would expressly recognise that there are no actual or material differences between these standards.

123 Thirdly, while the constitutionality of s 17A should not be in dispute, there may nonetheless be some uncertainty as regards the scope of the legal professional privilege accorded under s 46(2) of the

154 United Kingdom, Department for International Development, *Why Corruption Matters: Understanding Causes, Effects and How to Address Them: Evidence Paper on Corruption* (January 2015) at p 6.

155 United Kingdom, Department for International Development, *Why Corruption Matters: Understanding Causes, Effects and How to Address Them: Evidence Paper on Corruption* (January 2015) at p 7.

156 Discussed at paras 35–60 above.

MACC Act as well as the presumption of innocence. In an unreported decision,[157] the Federal Court upheld the constitutionality of s 62 of the MACC Act which requires the defence to disclose the general nature of the defence with reasons. While a detailed analysis of this conflict is beyond the scope of this article, the authors aver that the principle of proportionality as outlined by Tan FCJ in *Gan Boon Aun*[158] will likely apply thereby necessitating a closer examination of the facts of each case. While one may argue that s 62 is grounded on the objective of expediting cases involving corruption, there are nonetheless very legitimate and compelling legal issues to be considered, including whether such disclosure would prejudice a fair trial and the circumstances under which the law would require a defence to be filed even before the Prosecution proves its case. If taken to its *illogical* conclusion, the authors wonder whether – in a *tongue-in-cheek* manner – the requirements of s 62 could be satisfied by stating that "the general nature of the defence will be to rebut all the allegations in the Charge Sheets as being without merit since the defendant is innocent".[159] This possibility very aptly highlights two competing legal maxims, namely, "justice delayed is justice denied" and "justice hurried is justice buried".

124 Although the general constitutionality of s 17A appears to be on sound footing, there are nonetheless some doubts as regards the latter part of s 17A(6) which seeks to impose liability upon employees and someone who performs services for and on behalf of the commercial organisation. The authors aver that this provision may not meet the proportionality test as set out by the Federal Court in *Gan Boon Aun*[160] as there appears to be an inadequate protection of the fundamental rights of the defendant in such cases. That said – for the avoidance of any doubt – the authors are of the opinion that the rest of s 17A(6) which seeks to impose liability upon directors and partners is legally sound as these parties are more easily identifiable and should therefore be upheld as constitutional.

125 Last but not least, taking cognisance of the benefits of encouraging early self-reporting and complete co-operation thereafter, the Government should also consider the introduction of DPAs to complement s 17A. If properly implemented, DPAs can be an effective means of ensuring that companies which were engaged in criminal

157 Qishin Tariq, "Federal Court: Section 62 of MACC Act is Constitutional" *The Star* (14 December 2017).

158 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [47] as discussed in paras 91 and 92 above.

159 Under the privilege against self-incrimination the defendant in a criminal trial may also choose to remain silent.

160 *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [47] as discussed in paras 91 and 92 above.

activities are appropriately rehabilitated, observed as regards their conduct as well as financially punished with a commensurate degree of judicial monitoring and approval. Admissions by the company can form the basis for legal action to be commenced against its directors for breach of duty – whether by the company itself or by the shareholders through statutory derivative actions – to recover losses incurred and/or any undisclosed "secret profits" made from the transactions.

126 The foregoing illustrates the importance of educating those in business not only of the ambit of s 17A but more important of the reasons and rationale for its implementation, as well as the scope for expansion with a complementary regime for DPAs. In the opinion of the authors, the process should not be focused in its entirety on *what* to do to avoid potential liability but rather emphasis should also be placed on elaborating *why* it is important to do the "right thing". This is of particular significance as the Securities Commission has announced that it would implement an action plan to support the National Anti-Corruption Plan by requiring listed companies to strengthen their standards of corporate governance to prevent corruption, misconduct and fraud.[161]

127 The practice of good governance may perhaps be aptly summarised by the acronym "*iFart*" which component alphabets stand for **I**ntegrity, **F**airness, **A**ccountability, **R**esponsibility and **T**rust. Working effectively together in unison – with a clear "top down" approach that permeates across the entire entity – these principles can achieve far more than what the Legislature aspires to do with legislation, although admittedly having the latter with its range of sanctions as a "stick" can expedite the process.

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161 Securities Commission Malaysia, "SC to Implement Anti-Corruption Action Plan" (22 July 2019) <https://www.sc.com.my/resources/media-releases-and-announcements/sc-to-implement-anti-corruption-action-"plan> (accessed 20 February 2020). The Securities Commission Malaysia reported its survey results that "only 59 percent of listed companies have an anti-corruption policy, and majority of these policies contain gaps when compared to the Guidelines on Adequate Procedures".