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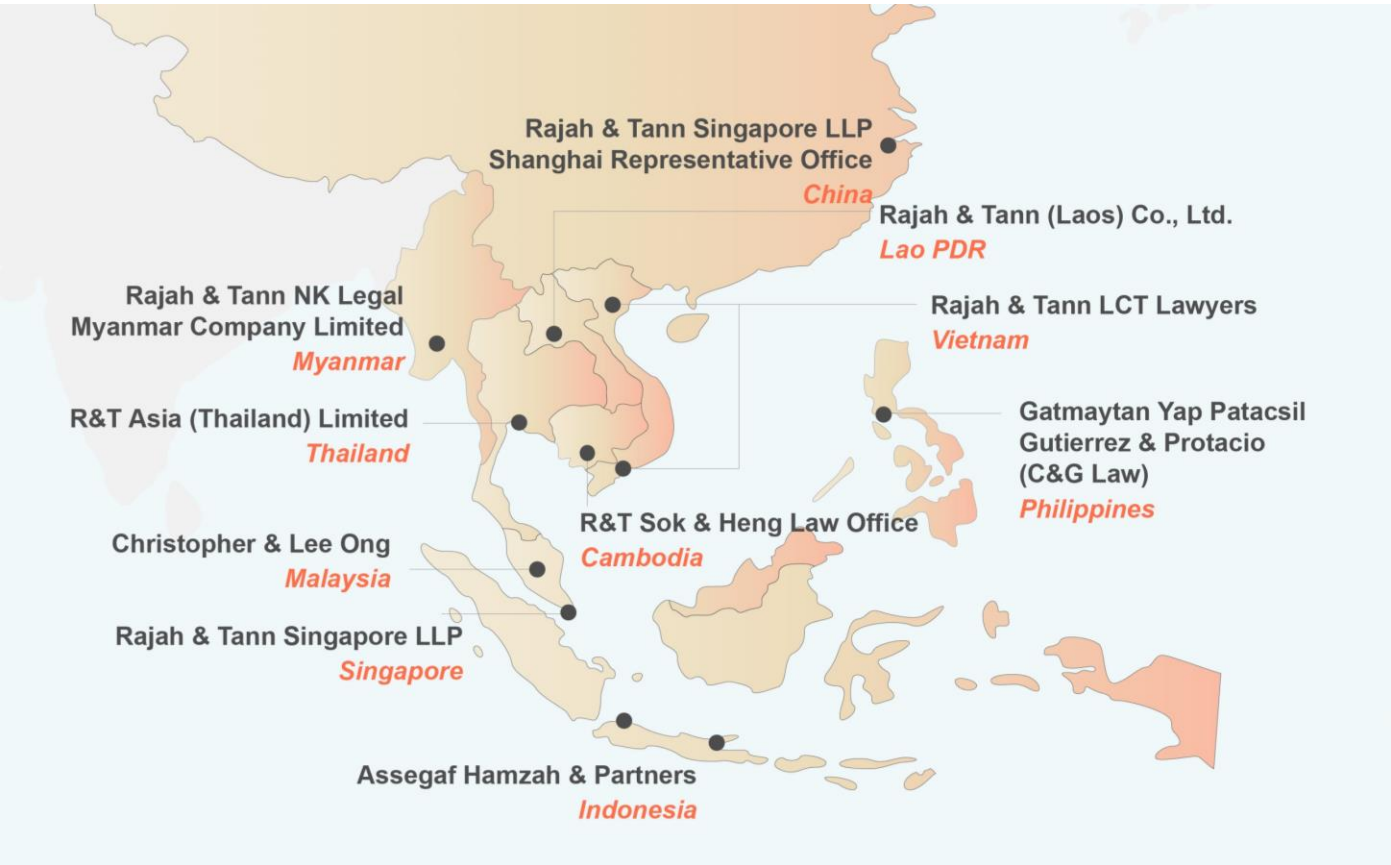
Issue: January 2019 – June 2019



In this Issue

Message from the Editorial Team

Our third edition of encyCLOpedia covers a spectrum of legal developments and greater insight on existing laws.

In light of Grab's acquisition of Uber's business across the Southeast Asia region, Competition Commissions across the region took action to limit the potential uncompetitive impact of the acquisition. In Malaysia however, MyCC's limited powers in the realm of merger controls has resulted in a lack of concrete action against Grab. MyCC has nevertheless alluded to the introduction of an economy-wide merger control regime under the Competition Act since then, and this article seeks to discuss the features of a merger control regime.

Next up, we discuss on the Federal Court's findings in the recent land scam case of Rajamani. The apex court in the ground-breaking decision held that a replacement title in continuation that was issued in the name of the original owner of the land is not void ab initio (from the beginning) notwithstanding that the land registry had been duped into issuing it – and such replacement title in continuation remains valid and capable of passing the title to the land to a subsequent purchaser in good faith and for valuable consideration. The next article sets out the main tenets for homebuyers and property investors in Malaysia to take note of. Specifically, we share an overview of the types of land ownership, foreign investment restrictions in real property and the applicable real property taxes in Malaysia.

On combating fake news, the Malaysian Parliament enacted the rather controversial Anti-Fake News Act 2018 ("**AFNA**") just ahead of the 2018 general elections. The hasty timing and broad nature of the AFNA generated public outcry, and the public's dissatisfactions are not unfounded. As it stands, it is unclear whether editorial errors, political satire or critical social commentary would be considered as fake news. Against this backdrop, Anissa, our partner specialising in Media and Entertainment, shares a critical analysis of the legislative development of the AFNA, the risks of fake news to organisations, and wraps up with thought-provoking ramifications of fake news and the need to create an effective risk management strategy.

To conclude this issue, we provide a 101 on the key rights and benefits of employees protected under the Employment Act 1955. This is relevant for employers when formulating business budgets as the cost of hiring an employee frequently costs more than the basic salary paid out each month!

We hope you find these articles useful. Do share your feedback with us by emailing to clo-info@christopherleeong.com .

Warm wishes,

Editorial Team

MERGER CONTROLS (ALREADY!) IN MALAYSIA

When Uber announced the divestment of its South East Asian e-hailing business to Grab in March 2018, this resulted in a flurry of action from competition regulators in the region.

In Singapore, its competition regulator, the Competition and Consumer Commission of Singapore ("CCCS") took firm action against the parties by issuing directives to lessen the competitive impact of the transaction on drivers and riders, and to provide a level the playing field for new players. The CCCS ultimately found that the Grab/Uber transaction had led to a substantial lessening of competition in the ride-hailing platform market in Singapore and imposed financial penalties on Grab and Uber to the tune of SGD13 million.

In Philippines, its competition regulator, Philippine Competition Commission ("PCC") also took action to subject Grab's acquisition of Uber to service quality and pricing standards, holding Grab to a standard as if Uber were still present in the market. The PCC subsequently cleared the transaction.

In Vietnam, its competition regulator, Vietnam Competition Authority launched a probe into the deal and preliminary results suggested that Grab's acquisition of Uber's Southeast Asia business showed signs of violations of Vietnamese competition laws. The investigation in Vietnam is still ongoing.

No merger controls in the Competition Act 2010

Here at home, the Malaysia Competition Commission ("MyCC") however has limited powers within its arsenal. While MyCC has powers to request for information under the Competition Act 2010 ("Competition Act") and could regulate cartels and abuse of dominance conduct, MyCC has no merger control powers.

Merger controls in the Competition Act 2010 soon!

The Grab-Uber case however, appears to have propelled MyCC into decisive action. Although MyCC has, since the implementation of the Competition Act in January 2012, made statements through its various representatives that merger controls could be implemented, none appeared as concrete as the announcement in late 2018, by the then recently appointed Chairman of MyCC, Dato' Seri Mohd Hishamudin Md Yunus, about MyCC's commitment to introduce an economy-wide merger control regime in Malaysia, and that MyCC expected to present draft legislation for merger controls sometime during the course of 2019.

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Merger controls already in Malaysia: The Aviation and Communications Sectors

It should be note that the Competition Act does not apply to certain sectors such as the aviation, communications and energy sectors, each of which are regulated by separate legislation and regulators.

The first piece of legislation which introduced competition law into Malaysia was not the Competition Act but was in fact the Communications and Multimedia Act 1998 ("CMA"), whose sectoral regulator is the Malaysian Communications and Multimedia Commission ("MCMC").

It is a fallacy therefore to say that there are no merger controls in Malaysia. Within the communications sector, merger controls have in fact been in existence since 1999 as the CMA prohibits licensees from engaging in any conduct – including mergers or acquisitions – with the purpose or effect of substantially lessening competition in the communications market. A "lessening" of competition in a market involves a reduction of the competitive constraints in that market. However, not all conduct that lessens competition is prohibited. It is only prohibited when the conduct "substantially" lessens competition in the communications markets.

The Malaysian Aviation Commission Act 2015 ("Aviation Commission Act") prohibits mergers which have resulted, or can be expected to result in a substantial lessening of competition in any aviation service market. The Malaysian Aviation Commission ("MAVCOM"), pursuant to its powers under the Aviation Commission Act, had – on or around April 2018 – issued 2 sets of Guidelines:

- The Guidelines on Substantive Assessment of Mergers; and
- The Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger;

both of which provided much needed clarification on MAVCOM's approach in handling mergers within the aviation sector in Malaysia.

MCMC has only very recently, in May 2019, released its Guidelines on Mergers and Acquisitions and Guidelines on Authorisation of Conduct. These set out the approach MCMC would take when assessing mergers and acquisitions as well as the authorisation of conduct by companies licensed under the CMA. These Guidelines were very timely as they were released 2 weeks after the announcement of one of the country's largest proposed mergers in the telecommunications sector – the proposed merger between the government-linked company, Axiata Group Berhad and the Norwegian telco, Telenor ASA.

MyCC in considering the introduction of an economy-wide merger control regime under the Competition Act, may now conduct a comparison of the differing merger control regimes in jurisdictions such as the European Union, the United Kingdom and our ASEAN neighbours and take into account MAVCOM's and MCMC's substantive merger control rules and guidelines.

Key features of merger controls

We set out below some of the key features of a merger control regime with reference to the aviation and communications sectors' regimes as well as those from foreign jurisdictions.

(A) Notification System: Pre-transaction v Post-transaction; Voluntary v Mandatory

The notification system of a merger control regime may be a pre-notification system and/or a post-notification system. Pre-notification system occurs when notification to the competition regulator is required before closing or completing the transaction whereas post-notification system occurs when notification to the competition regulator is only required after closing.

A merger control regime may also be a mandatory or voluntary notification system or a mix of both systems.

A regime is mandatory if notification is compulsory when the stipulated notification thresholds are crossed (e.g. European Union, Vietnam, Philippines).

A regime is voluntary if merging parties are not obliged to file a notification and may elect to file a notification only if they wish to, although these regimes often vest the powers to investigate merger transactions with the competition regulators (e.g. United Kingdom, Australia, Singapore).

There can also be a mix of both the mandatory and voluntary regime, for example in Indonesia, where a pre-merger notification is voluntary and a post-merger notification is mandatory. The voluntary pre-merger notification in Indonesia occurs when a merger can be voluntarily notified to the Indonesian competition regulator, the Business Competition Supervisory Commission ("KPPU") before it is completed. The mandatory post-merger notification, on the other hand, takes place when the merger, having met the requisite merger threshold and criteria, is required to be notified within the stipulated timeframe after the transaction is completed. This post-merger notification is mandatory despite the fact that the merging parties have previously provided pre-merger notification. If the KPPU finds that the merger substantially lessens competition, the KPPU can request the relevant undertakings by the parties to submit a proposal of remedies. The KPPU will then assess whether to accept the proposal and issue a stipulation.

Malaysian Aviation Sector

In Malaysia, the merger control regime enforced by MAVCOM is voluntary, but MAVCOM, in its Guidelines on Substantive Assessment of Mergers, suggests that a notification should be made if the anticipated merger or merger results in or is expected to result in a substantial lessening of competition within any aviation service market in Malaysia. MAVCOM is empowered to accept notifications of both anticipated as well as completed transactions. If MAVCOM decides thata merger or an anticipated merger infringes the Aviation Commission Act, it shall require the infringement to cease immediately and may impose a financial penalty or give other direction it deems appropriate, e.g. requiring a merger to be dissolved or modified, requiring a merger party to enter into agreements designed to prevent or lessen the anti-competitive effects arising from the merger, etc.

Malaysian Communications Sector

As regards the merger control regime enforced by MCMC, notification is voluntary.

(B) Notification Thresholds

Another key feature of a merger regime is the notification threshold. A clear notification threshold is a key element of a merger control regime so as to permit parties to readily determine whether a transaction is notifiable.

Typically, these are expressed in terms of the following:

(a) turnover (e.g. European Union, United Kingdom, China, Philippines, Indonesia, Vietnam);

(b) assets value (e.g. Indonesia, Philippines, Vietnam);

(c) value of transaction (e.g. Philippines, Vietnam); and/or

(d) market share (e.g. Singapore, Vietnam).

Malaysian Aviation Sector

The notification threshold enforced by MAVCOM is based on turnover.

MAVCOM has indicated in its Guidelines on Notification and Application Procedure for an Anticipated Merger or A Merger, that it is more likely to enquire or initiate an investigation into an anticipated merger or a merger if:

(a) the combined turnover of the merger parties in Malaysia in the financial year preceding the merger or the anticipated merger is at least MYR50 million (approx. USD12.4 million); or

(b) the combined worldwide turnover of the merger parties in the financial year preceding the merger or the anticipated merger is at least MYR500 million (approx. USD123.9 million).

In any case where the turnover thresholds above are not met, MAVCOM still has the power to investigate a merger or an anticipated merger where there is reason to suspect that it has resulted in, or may be expected to result in, a substantial lessening of competition in any aviation service market.

Malaysian Communications Sector

The notification threshold enforced by MCMC is based on market share.

MCMC starts off by assessing if the transaction has been publicly announced (or is made known to the public generally) and if there is a bona fide intention to proceed.

If this is affirmative, MCMC then determines if the transaction is a horizontal transaction or a non-horizontal transaction.

(a) For a proposed horizontal transaction (essentially an agreement between competitors), the threshold is such that at least one of the parties to the transaction has to be a licensee in a dominant position, or if this is not applicable, the transaction would result in the proposed merged or acquired firm obtaining a dominant position.

(b) For a proposed non-horizontal transaction, the threshold is such that at least one of the parties to the transaction is a licensee in a dominant position.

(c) For a completed horizontal transaction as well as a completed non-horizontal transaction, the threshold is the merged or acquired entity is a licensee in a dominant position.

A market share of 40% or more for the proposed merged or acquired entity would be indicative of dominance in a communications market.

MCMC however recognises that the use of dominance thresholds is for indicative purposes only and is not capable of identifying all transactions which may be suitable for notification and assessment. As such, in addition to the factors recognised in the dominance threshold, MCMC considers a transaction may be suitable for notification and submission to MCMC for assessment if:

(a) one or both parties to a transaction is a licensee which is subject to an ongoing investigation by MCMC in respect of any conduct that is prohibited under the CMA; or

(b) there is significant cross shareholding between the parties to a transaction of 40% or more.

(C) Assessment Framework

Competition authorities generally rely on one of two tests to assess whether a merger has anti-competitive effects, namely:

- a dominance test i.e. whether the merger creates or strengthens a dominant position; and
- a substantial lessening of competition test i.e. whether a merger is likely to substantially lessen competition on the market.

Some jurisdictions opt for a hybrid test that combines elements of both i.e. whether the merger significantly impedes effective competition in the market, in particular, through the creation, or strengthening of a dominant position.

Malaysian Communications Sector

An example of a hybrid test is the merger control regime enforced by MCMC where dominance and substantial lessening of competition are both assessed.

Malaysian Aviation Sector

As regards the merger control regime enforced by MAVCOM, assessment is carried out based on the substantial lessening of competition test.

(D) Key Phases of Formal Review

The timetable for clearance is also an important feature in a merger control regime. In most jurisdictions (e.g. Singapore, Philippines, European Union), the review process is divided into 2 phases:

- an initial Phase 1 review for mergers that are unlikely to raise competition concerns; and
- a subsequent Phase 2 review for mergers which raise significant competition concerns.

Malaysian Aviation Sector

In this respect, the regime enforced by MAVCOM has a 2-phase review process where:

- during the Phase 1 assessment, MAVCOM will evaluate the possible competitive effects of a merger or an anticipated merger; and
- in the event MAVCOM, during the Phase 1 assessment, finds that there are competition concerns, MAVCOM will proceed to the Phase 2 assessment.

Malaysian Communications Sector

The regime enforced by MCMC also has 2 phases but before the 2-phase review process starts, MCMC first conducts a preliminary review during which MCMC determines whether the transaction is of a notifiable type, and whether the thresholds are met. If the criteria are met, MCMC will proceed with:

- the Phase 1 assessment where it undertakes an assessment to determine if it is able to clear the transaction without objection, or if it requires further information;
- if further information is required, the Phase 2 assessment will be initiated.

Conclusion

Merger controls are critical for the preservation of competitive structures in markets. It is one of the basic pillars of competition laws, along with the prohibitions on anti-competitive agreements and abuse of dominance.

When the Competition Act first came into force in Malaysia in year 2012, MyCC adopted transitional legislation by postponing the entry of an economy-wide merger control regime.

Almost 7 years have passed since then.

MyCC, as a youthful regulator, has now sharpened its skills and increased its resources since its inception. It is an opportune time now for MyCC to match the competition authorities in other jurisdictions by having an economy-wide merger control regime in place.

THE RISE AND FALL OF THE CONCEPT OF TITLE IN CONTINUATION VOID *AB INITIO*

In Peninsular Malaysia, the law governing land matters is embodied in the National Land Code 1965 ("NLC"). The NLC provides for the Torrens system of title by registration – it is the act of registration that confers title to or interest in land.

According to the NLC (see section 170 thereof in respect of final title; section 186 thereof in respect of qualified title), title in continuation is a title issued by the land office / land registry (as the case may be) in the name of the person or body last registered as proprietor in the subsisting register document of title. Register document of title, in layman's term, means the records of the land office / land registry.

To illustrate, if Mr. XYZ is the current registered owner of a piece of land (i.e. the person last registered as proprietor as appearing in the records of the land office) and in the circumstances permitted under the NLC, the land office issues a new title / replacement title in the name of Mr. XYZ – this new title / replacement title is a title in continuation (of the original title).

The Rise of the Concept of Title in Continuation Void *Ab Initio*

The concept of title in continuation void *ab initio* was propounded by the Court of Appeal in *Rajamani a/p Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 3 MLJ 660 ("the Rajamani case"). The material facts of this case can be summarised as follows.

The plaintiff (Rajamani) was the original registered proprietor of the land. Without the plaintiff's knowledge, an imposter (the bogus Rajamani) effected a transfer of the plaintiff's land to the second defendant pursuant to a crafty scheme – by forging the signature of the plaintiff and applying for the issuance of a replacement title on the ground that the original title was lost, and thus, at the time of presentation for the registration of the transfer, the production of the original title was dispensed with by the land registry.

After having been registered as a (new) registered proprietor of the land, the second defendant sold the land to the first defendant. The first defendant (being the subsequent purchaser) was then the new registered proprietor of the land – this was so at the time of the plaintiff's discovery of the deprivation of her land. The plaintiff thereupon filed a legal action in the High Court to recover the land.

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The Rajamani Case

High Court's Decision (reported in [2015] MLJU 148)

The High Court dismissed the plaintiff's claim for recovery of the land on the grounds that the first defendant's title (as the current registered proprietor of the land) was indefeasible, as the first defendant was a subsequent purchaser in good faith

and for valuable consideration and thus, protected by the proviso to section 340(3) of the NLC.

According to the High Court, the plaintiff's remedies were confined to damages against the fraudster. The High Court held that the first defendant's title remained indefeasible despite the fact that the title of the second defendant (i.e. the seller) was defeasible due to fraud and forgery. The High Court also held that the replacement title / duplicate title issued by the land registry and used for the transfer of the land (effected by the bogus Rajamani) from the plaintiff to the second defendant was not invalid or void *ab initio* – and hence, this transfer and the subsequent transfer of the land from the second defendant to the first defendant were not nullities. The High Court took the view that the land title would be void *ab initio*, if and only if, the land registry had issued the land title in the name of a third party / stranger (i.e. not the original owner); and that the title would not however be void *ab initio* if the land registry had been duped into issuing a replacement title in continuation (i.e. in the name of the original owner).

Court of Appeal's Decision (reported in [2016] 3 MLJ 660)

Upon an appeal by the plaintiff, the Court of Appeal allowed the plaintiff's appeal and set aside the High Court's decision.

The Court of Appeal held that the plaintiff's title (as the original registered proprietor of the land) was indefeasible and could only be defeated but had never been rendered defeasible under section 340(2) of the NLC and thus, remained indefeasible. Therefore, the issuance and registration of any other title in respect of the same land including the first defendant's title, was void *ab initio*.

Upon arriving at this decision, the Court of Appeal held that the first defendant (as the subsequent purchaser) could not claim protection under the proviso to section 340(3) of the NLC (even if the first defendant was a subsequent purchaser in good faith and for valuable consideration). The Court of Appeal took the view that in a contest for title between an innocent original landowner and an equally innocent subsequent purchaser in good faith and for valuable consideration, the scales of justice must tilt in favour of the innocent original landowner [see page 678 of the law report].

The Fall of the Concept of Title in Continuation Void *Ab Initio*

Federal Court's Decision (reported in [2019] 2 MLJ 553)

On appeal by the first defendant, the Federal Court allowed the first defendant's appeal and set aside the Court of Appeal's decision. In short, the plaintiff (i.e. the original registered proprietor of the land) was the unfortunate loser.

The Federal Court reinstated the order of the High Court, i.e. the plaintiff's claim for recovery of the land was dismissed on the ground that the first defendant's title (as the current registered proprietor of the land) was indefeasible, as the first defendant was a subsequent purchaser in good faith and for valuable consideration and thus, protected by the proviso to section 340(3) of the NLC. In this regard, the Federal Court held that:

(a) a replacement title in continuation (i.e. issued in the name of the original owner of the land) is not void *ab initio* (i.e. from the beginning) even if the land registry had been duped into issuing it [see para 141 at page 598 of the law report];

(b) this replacement title in continuation generated by the land registry, when the original issue document of title was, at all material times, in the possession of the original owner, is valid and capable of validly passing title to the subject land to a subsequent purchaser in good faith and for valuable consideration within the meaning of the proviso to section 340(3) of the NLC [see para 166 at page 607 of the law report];

(c) the land title would be void *ab initio* if and only if the land registry had issued the title in the name of a third party / stranger (i.e. not the original owner) [see para 134 at page 596 of the law report]. This is known as 'a case of

clash of titles', as held by the Court in the cases of *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713 and *Shayo (M) Sdn Bhd v. Nurlieda bt Sidek & Ors* [2013] 7 MLJ 755. Therefore, if it is not a case of 'clash of titles', a subsequent purchaser in good faith and for valuable consideration can claim protection under the proviso to section 340(3) of the NLC.

In acknowledging that the Torrens system of land registration (as applied in Peninsular Malaysia) is predominantly a purchaser's system, the former Chief Justice of Malaysia Tan Sri Richard Malanjum (who was then the Chief Judge of Sabah and Sarawak sitting in the Federal Court in the Rajamani case) emphasised that the law favours the subsequent purchaser in good faith and for valuable consideration, as in all other countries applying the Torrens system [see paras 6 and 7 at page 566; para 11 at page 567 of the law report].

For that reason, the Federal Court held that as between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land – indefeasibility (i.e. a statutory protection) is conferred on the current registered proprietor, and not a former registered proprietor [see para 150 at page 602 of the law report]. According to the Federal Court, a registered title / interest of a subsequent purchaser can only be liable to be set aside if it was not acquired in good faith [see para 150 at page 602 of the law report].

It is noted that the Federal Court criticised the Court of Appeal's reasoning as going against the conventional understanding of the law of indefeasibility of title under the NLC. The Federal Court reminded the judges to decide a dispute for title based on the principle of deferred indefeasibility as provided in section 340 of the NLC, rather than the judge's individual preference as to which side the scales of justice tilts. [see para 153 at page 603 of the law report]

Conclusion

Howsoever attractive the concept of title in continuation void *ab initio* may be, it is for Parliament to change the law – until that is done, it is the duty of the Courts to apply the law as it stands.

Whether the law is harsh or unjust is to be debated in Parliament. Knowing the inadequacy of the law, it is for Parliament to remedy it.

As the law now stands, there is a significant lacuna in the NLC – the NLC provides absolutely no remedy to innocent parties who are deprived of their lands due to fraud or forgery. In the Rajamani case, the former Chief Justice of Malaysia Tan Sri Richard Malanjum, when delivering his concurring judgment, strongly urged that the NLC should be amended so as to establish an effective assurance fund to mitigate the losses suffered by registered owners due to fraud or forgery – as done in other countries applying the Torrens system, such as Australia (the home country of the Torrens system) and Canada.

INVESTING IN
REAL PROPERTY IN MALAYSIA

Malaysia is strategically located in the heart of South East Asia and remains a favourite location for real estate investors within Asia because of competitive property prices. The country's real estate market is typically stable making it appealing for buyers and renters alike. As may be anticipated, prices are higher in the cities, especially the capital, Kuala Lumpur and substantially lower in the outskirts.

In May 2018 at the 14th General Election ("**GE14**"), Malaysia saw its first ever change in government since independence in 1957 as the Barisan National coalition was removed from power by the opposition coalition party, Pakatan Harapan. The GE14 marked the start of a new Pakatan Harapan led government.

The first federal budget that was tabled by the Pakatan Harapan government, Budget 2019, introduced several changes affecting homebuyers and property investors in Malaysia. The changes introduced, amongst others, include:

- the revision in the real property gains tax rates;
- the increase in stamp duty for properties above MYR1,000,000;
- stamp duty exemption for first-time homebuyers and for purchase of property under the National Home Ownership Campaign 2019.

These will be elaborated in greater depth in the sections below.

System of Registration

The land registration system in Malaysia is the Torrens system which is based on the concept of indefeasibility of title. Under the Torrens system, it is the act of registration that confers title to or interest in land. Once the title or interest is registered, the title or interest cannot be challenged or set aside unless provided otherwise under section 340(2) of the National Land Code ("NLC"), for instance in the case of fraud, misrepresentation, forgery or where title or interest was unlawfully acquired.

Applicable Law

The main land law in Peninsular Malaysia is the NLC. Sabah and Sarawak have their own set of land laws, namely the Sarawak Land Code and the Sabah Land Ordinance. Other relevant laws include Housing Development (Control and Licensing) Act 1966 ("HDA"), Strata Titles Act 1985, Strata Management Act 2013, Real Property Gains Tax Act 1976, Stamp Act 1949, Land Acquisition Act 1960 ("LAA"), Town and Country Planning Act 1976 ("TCPA") and Local Government Act 1976 ("LGA").

This article will only focus on real estate laws and transactions in Peninsular Malaysia.

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Tenure and Ownership

The NLC recognises two types of land ownership – land held in perpetuity (freehold land); and land held for a term of years (leasehold land).

Freehold land may be held indefinitely by a proprietor. However, this right is not absolute as the State Authority can still acquire the land under the LAA subject to compensation. Leasehold land is land owned by the State Authority. A person who has acquired leasehold land may occupy it for the leasehold period stated on the land title, which is generally for a maximum term of 99 years. Upon expiry of the lease, the land shall revert to the State Authority, unless it is renewed.

The State Authority is responsible for the planning of the development and use of all lands and buildings within the area of every local authority in the State. The State Authority is empowered under the NLC to impose such conditions (both express and implied) and restrictions in interest (e.g. the land cannot be sold, transferred, charged or leased without the written consent of the relevant State Authority) as it deems fit in respect of an alienated land.

Express conditions are those specifically endorsed or expressed on the land title while implied conditions refer to the category of use endorsed on the land title, i.e. whether for building, agriculture or industrial. Breach of any of these conditions, if not remedied in time, can result in forfeiture.

Types of Property

(i) Residential

Residential property includes residential houses, condominiums, service apartments, apartments and townhouses.

(ii) Commercial

Commercial properties include shop offices, shop houses, office buildings, retail stores and shopping centres.

(iii) Industrial

Industrial properties are typically buildings for manufacturing or warehousing purposes, and include factories, workshops and industrial buildings.

Foreign Investment in Real Property in Malaysia

A foreign interest is allowed to purchase all types of properties in Malaysia except:

(i) properties valued less than MYR1,000,000 per unit,

(ii) residential units under the category of low and low-medium cost,

(iii) properties built on Malay reserved land; and

(iv) properties allocated to Bumiputera interest in any property development project as determined by the State Authority.

The acquisition by a foreign interest of a residential unit valued at MYR1,000,000 and above does not require the approval of the Economic Planning Unit of the Prime Minister's Department ("EPU") but would fall within the purview of the State Authority and hence be subjected to the approval of the relevant State Authority.

The EPU Guideline exempts certain transactions from the requirement of EPU approval. These transactions include:

- the acquisition of residential unit under the "Malaysia My Second Home" Programme;
- acquisition of industrial land by manufacturing companies; and
- acquisition of properties by a company that has obtained the endorsement from the Secretariat of the Malaysian International Islamic Centre.

Notwitstanding that the acquisition of industrial land by manufacturing companies is exempted from EPU approval, a foreign interest would still be required to obtain the approval from the State Authority prior to acquiring such industrial land.

In short, as land matters fall within the jurisdiction of the respective state governments, investors should note that notwithstanding exemptions under the

EPU Guideline, the approvals from the State Authority in respect of the acquisition of real property by a foreign interest in terms of the minimum threshold applicable for the purchase of certain types of property, the applicable levy or fees imposed for such approval and any other conditions of approval imposed by the State Authority must be complied with.

Structuring Investment

Investments in real property may take various forms, the most common being the purchase of real property directly from the developer or the seller. Investors typically enter into prescribed sale and purchase agreements or private sale and purchase agreements with the developer or seller to purchase the real property at the contracted price.

Alternatively, where the real property is substantial such as an entire building or a large development, the investors may consider acquiring the shares in the company that owns the identified real property.

The stamp duty payable in respect of the instrument of transfer of shares is 0.3% of the higher of (i) the consideration paid in respect of the sale of the shares, or (ii) the value of shares as at the date of the transfer. Such stamp duty can be significantly lower than the stamp duty payable in respect of a direct transfer of real property to the investor.

Previously, under the Goods and Service Tax ("GST") regime, commercial properties were subject to 6% GST. However, this has since been abolished with the re-introduction of Sales and Service Tax ("SST"). Notwithstanding the above, investors should be aware of the other taxes which may be applicable to them when investing in real property in Malaysia. A brief overview of these notable taxes is set out in the following sections below.

Tax

(i) Stamp Duty

Stamp duty is payable by the purchaser in respect of the acquisition of all real property in Malaysia and such stamp duty is payable on the instrument to effect a transfer of land. The government had recently introduced the following revised stamp duty rates in respect of the purchase of real property:

Stamp duty scale from 1st January 2019 – 30 June 2019

Consideration or adjudicated Value	**Scale of fees**
First MYR 100,000	1%
Next MYR 400,000	2%
On any amount in excess of MYR 500,000	3%

Stamp duty scale from 1st July 2019

Consideration or adjudicated Value	**Scale of fees**
First MYR 100,000	1%
Next MYR 400,000	2%
Next MYR 500,000	3%
On any amount in excess of MYR 1,000,000	4%

For first-time homebuyers who are Malaysian citizens, all instrument of transfer executed in relation to the purchase of only one unit of residential property, the value of which is more than MYR300,000 but not more than MYR1,000,000, shall be exempted from stamp duty.

The exemption from stamp duty shall only be granted if:

(a) the sale and purchase agreement for the purchase of the residential property is executed on or after 1 January 2019 but not later than 30 June 2019;

(b) the individual has never owned any residential property including a residential property which is obtained by way of inheritance or gift, which is held either individually or jointly, and the sale and purchase agreement for the purchase of the residential property is

between the individual and a property developer; and

(c) the individual has never owned any residential property including a residential property which is obtained by way of inheritance or gift, which is held either individually or jointly.

In addition, pursuant to the National Home Ownership Campaign 2019 ("NHOC"), all instruments of transfer for the purchase of residential property under the NHOC, the value of which is more than MYR300,000 but not more than MYR2,500,000, executed by an individual, shall be exempted from stamp duty where the value of the residential property is MYR1,000,000 or less.

Additionally, any loan agreement to finance the purchase of residential property under the NHOC, the value of which is more than MYR300,000 but not more than MYR2,500,000, executed between an individual named in the sale and purchase agreement and institutions such as a licensed bank under the Financial Services Act 2013 and a licensed bank Islamic bank under the Islamic Financial Services Act 2013, shall also be exempted from stamp duty.

The exemption above shall only be granted if:

(a) the sale and purchase agreement for the purchase of the residential property is executed on or after 1 January 2019 but not later than 30 June 2019, and is stamped at any branch of the Inland Revenue Board Malaysia;

(b) the sale and purchase agreement for the purchase of the residential property is between an individual and a property developer; and

(c) the purchase price in the sale and purchase agreement is the price after a discount of 10% by the property developer, except for a residential property which is subject to controlled pricing.

(ii) Real Property Gains Tax

RPGT is a capital gains tax chargeable on profits made from the disposal of real property (defined as any land situated in Malaysia and any interest or other right over such land) or disposal of shares in a real property company.

A real property company is a controlled company holding real property or shares in another real property company or both of which the defined value is not less than 75% of the value of the company's total tangible assets.

With effect from 1 January 2019, the RPGT rates are as follows:

Categories of Disposal	RPGT Rates		
	Companies	Individual (Citizen & Permanent Resident)	Individual (Non-citizen & Non-Permanent Resident)
Disposal within 3 years	30%	30%	30%
Disposal in the 4th year	20%	20%	30%
Disposal in the 5th year	15%	15%	30%
Disposal in the 6th year thereafter	10%	5%	10%

Conclusion

The value-driven real estate market with continuable growth potential has made Malaysia an attractive property investment destination and option for investors. However, investors should take cognisance of the various changes introduced or to be introduced by the government from time to time in respect to the real estate industry in Malaysia.

FAKING THE TRUTH, DEFINING LIES:

THE STATE OF FAKE NEWS LEGISLATION IN MALAYSIA

Fake news is a fast-growing problem with global ramifications. Advances in technology, data harvesting methods and an increase in worldwide internet penetration have created a situation where fake news has become extremely sophisticated so much so that it has the capability to influence elections, sway stock markets and tarnish the reputations of well-known individuals and multinationals.

For instance, in 2013, a tweet was posted on Associated Press' official Twitter feed by hackers that Barack Obama had been injured in explosions in the White House. This fake tweet caused immediate market alarm, resulting in a 0.9% decline in the S&P 500 and a momentary loss in stock value of more than $130 billion. In 2016, the then CEO of PepsiCo was misquoted as having supposedly told Trump supporters to "take their business elsewhere". Widely circulated on social media, this fake news resulted in calls to boycott PepsiCo's products.

Another example is the rampant use of fake news during the run-up to the US presidential elections. While the effect of fake news in influencing the outcome of the elections cannot be quantified, the incident signifies the dangers of the spread of misinformation and its political implications.

Given the impact that fake news has the world over, it was surprising to note that Malaysia was one of the first countries in the world to legislate against fake news specifically, albeit against the backdrop of political changes.

This article will explore the legislative developments concerning the spread of fake news in Malaysia; it will then briefly identify the risks of fake news to organisations and finally, it will discuss what the state of fake news legislation will likely be in Malaysia moving forward.

The Anti-Fake News Act 2018

The Anti-Fake News Act 2018 (the "AFNA") was passed in Parliament on 2 April 2018 to safeguard the public against the dissemination of fake news. In general, the AFNA prohibits the malicious creation, publication and circulation of fake news, and the term *"fake news"* is prescribed to include *"any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas"*.

The passing of the AFNA just ahead of the 2018 general elections ("GE14") raised vehement protests from critics who saw the AFNA as a tool that could be used by the previous government to curtail freedom of speech and any accusations of corruption and bribery ahead of the elections.

Specifically, the broad nature of the AFNA was seen as an attempt to curb the already conditional freedom of speech enshrined in the Federal Constitution. Further, the somewhat hasty passing of the AFNA raised a major concern about the definition of *"fake news"* itself, as it was seen by some commentators to be too broad.

This broad definition has the potential effect of including all forms of information without providing a clear distinction as to what is meant by *"wholly or partly false"*. Furthermore, it is unclear as to whether editorial errors, political satire or critical social commentary would be considered as fake news.

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The consequences of falling within the ambit of the AFNA are relatively heavy as offenders charged with disseminating fake news may be subject to a 6-year prison sentence or to a fine not exceeding RM500,000 or to both. The AFNA also applies extra-territorially and extends liability to the officers of offending corporate entities.

This would mean that a person outside Malaysia could be charged under the AFNA for spreading fake news that concerns Malaysia or one or more Malaysian citizens, and individuals responsible for or was assisting in the management of an offending company at the time of the AFNA related offence, such as directors, CEOs or managers, could be charged severally or jointly with the body corporate.

The AFNA also prescribes penalties for those who provide financial assistance for the dissemination of fake news.

Further, an *ex-parte* application can be made to court for the removal of a publication containing fake news. An application to challenge an ex-parte order can be made subject to the order firstly not having been obtained by the Government, and secondly, whether the order is prejudicial or likely to be prejudicial to public order or national security.

Section 6 of the AFNA prescribes a duty on any person to immediately remove any publication in his possession or control after *"knowing or having reasonable grounds to believe that such publication contains fake news"*.

This clause may have the impact of including so-called *"innocent disseminators"* and content platforms that do not necessarily have the tools to detect fake news published by them.

By virtue of Section 6, if publishers and content platforms have previously taken a passive approach, this would now need to be replaced with an active commitment to curb fake news through clear policies and the adoption of tools which will allow for the efficient detection of fake news. Guidance on appropriate online conduct needs to feature on online platforms, which includes the consequences for breaches as well as respective take-down policies.

In other jurisdictions, some organisations and platforms have already adopted such steps. For example, Facebook has simplified its processes for reporting fake news stories and has established partnerships with third party fact-checkers. Further, Google has introduced Fact Check Tools to assist the work of researchers, journalists and fact checkers. It however remains unclear as to what extent Malaysian organisations and platforms have implemented measures similar to this, despite the provisions of section 6.

Developments in the "Fake News" legislative landscape

Prior to GE14, Pakatan Harapan (the current Federal Government) had promised to repeal the AFNA should it win the general election. Staying true to its word, the Anti-Fake News (Repeal) Bill 2018 ("Bill") was introduced and approved by the Dewan Rakyat (House of Representatives) by a majority vote.

However, the Dewan Negara (the Senate) rejected the tabled Bill on 12 September 2018. Statements made in the Dewan Negara instead suggested that the government re-examine the AFNA in its present state and make amendments to improve the AFNA rather than to repeal it entirely. A point was raised that perhaps a repeal would only benefit the Pakatan

Harapan government as it would avoid any action from being brought against them pursuant to the AFNA.

While the Prime Minister Tun Dr Mahathir Mohamad has reaffirmed the Federal Government's commitment to repeal the AFNA, it is important to keep in mind that the AFNA is still in force, although the government has refrained from enforcing it as of late. Another possibility that needs to be weighed is that the government will keep the AFNA on its books subject to a couple of amendments as suggested by the Dewan Negara.

Future of the AFNA in Malaysia

Whatever the future of the AFNA in Malaysia, the issue of fake news needs to be dealt with. With this in mind, let us briefly explore two scenarios to illustrate the possible future of the AFNA and any potential alternative legislation in Malaysia in addressing the issue of fake news and misinformation.

Scenario 1:

If the AFNA is repealed, do our existing laws provide sufficient protection against the dissemination of fake news?

While the AFNA is a recent piece of legislation, there is other legislation in existence that may arguably address the issues that the AFNA is attempting to resolve. For example:

- Section 124H of the Penal Code prohibits the dissemination of information that incites violence, or counsels violent disobedience to the law or to any lawful order by word of mouth or in writing or by any other means including electronic means.
- Section 4 of the Sedition Act 1948 makes it an offence to distribute or reproduce any seditious publication, *inter alia*, to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State or to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia.
- Section 8A of the Printing Presses and Publications Act 1984 prohibits the malicious publishing of any false news.

It is arguable that these Acts, in one way or another, can be used to prevent and control the dissemination of fake news which could be prejudicial to public interest and racial harmony.

Other existing legislation that could also be used in this context include:

- the Communications and Multimedia Act 1998 ("CMA") where sections 211 and 233 essentially restrict any person from publishing or providing content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person. As such, the provisions within the CMA can also be used to prevent and control social media abuse that spread fake news.
- the Defamation Act 1957 which is one of the oldest pieces of legislation in Malaysia and is an Act that relates to *"the law of libel and slander and other malicious falsehoods"*. This Act has been purposed to protect individuals and organisations from falsified news that is defamatory. In tandem with the provisions for criminal defamation under the Penal Code, the laws addressing defamation in Malaysia are arguably able to play a role in combating fake news.

There is therefore a case to support the notion that the AFNA is not needed as there are existing laws that can be used to address the harm that can be caused by the proliferation of fake news in Malaysia.

Rather than just being used as a fulfilment of the current ruling coalition's political manifesto by the repeal of the AFNA, perhaps what is needed at this juncture is for relevant parties to take a long hard look at all of the legislative measures in hand (AFNA as well as existing legislation) to decide what would work best to tackle a problem that potentially has severe implications for individuals and organisations alike.

Should the AFNA be repealed and the Malaysian Parliament be of the view that existing non-AFNA legislation is insufficient to tackle the offence of spreading fake news, an alternative measure would be to make amendments to the existing non-AFNA legislation.

The Communications and Multimedia Minister Gobind Singh Deo confirmed that *"the government is still studying the possibility and making amendments to the existing law so that it will be more effective in addressing issues of racism, religious hate crime and offensive messages on the monarchy."* New or amendments to existing legislation that will address the abuse of social media is expected to be tabled latest by July this year. As the Sedition Act 1948 and the Printing Presses and Publications Act 1984 are currently being reviewed as part of Pakatan Harapan's manifesto to abolish the said Acts, a further review of existing laws as well engagement with stakeholders and members of the public needs to be conducted to provide for appropriate amendments, if any.

Scenario 2:

If the AFNA is not repealed, what amendments would be required? And what about new legislation?

It is interesting to note that while Malaysia is in the process of repealing the AFNA, Singapore has recently passed their Protection from Online Falsehoods and Manipulation Bill ("POFMA") on 8 May 2019. A comparison of the AFNA and the POFMA appears to expose some of the gaps in the AFNA, which may lead to future AFNA amendments.

Under the POFMA which was read for the first time on 1 April 2019, an action can be taken if the *communication of false statements of fact in Singapore"* is likely to threaten Singapore's public health, safety, security, race relations and the like – a *"public interest"* catalyst which was absent in the AFNA. A company which contravenes the POFMA will be liable to a fine not exceeding $500,000 and if an inauthentic online account or bot is used, to a fine not exceeding $1 million.

Unlike the AFNA, ministers in Singapore are empowered to make prescribed directions if it is in the public interest. The directions range from the placement of a correction notice by the person who communicated the false news to removing the offending statement.

Non-compliance with the directions may result in a fine not exceeding $500,000 for organisations and possibly an order to the internet access service provider to block access to the infringing online location. The justification provided by the Communications and Information Minister of Singapore Mr S Iswaran, for the provision for such ministerial powers is threefold - (1) rapid action against online falsehoods is required considering their "virality and potential to cause harm"; (2) ministers have "the requisite domain expertise to make an assessment and act quickly to stem the potential harm arising from an online falsehood"; and (3) the availability of judicial oversight and the fact that the Minister is answerable to Parliament ensures accountability of these powers.

The POFMA also places an obligation on prescribed digital advertising or internet intermediaries to carry out the necessary due diligence on paid content that may give rise to false news communication in Singapore. Further, the POFMA allows for the introduction of codes of practice for one or more of the following purposes:

(1) to detect, control and safeguard against coordinated inauthentic behaviour and any other misuse of online accounts;

(2) to give prominence to credible sources of information; and

(3) to not give prominence to declared online locations which disseminate falsehoods.

Technology and digital advertising organisations will also have to ensure they are compliant with any record-keeping and reporting requirements.

It is clear that the ambit of the POFMA is narrower and more focused than the AFNA, which would

increase the likelihood of the POFMA successfully combatting fake news. We believe that these measures should be considered by the Malaysian government especially in the event the AFNA remains on the legislative books.

Mitigating the effects of fake news

As the Malaysian legislature seems to be stymied in relation to the AFNA, organisations need to realise the implications and consequences that fake news can have on their businesses. A clear understanding of the risk of fake news will help organisations to devise effective mitigation strategies to minimise the impact of fake news. We will now briefly touch on some of the strategies that may be implemented in order to mitigate the effects of fake news.

Fake news can cause reputational and brand risk. Such risks can arise where organisations discover fake news regarding influential individuals associated with the company such as patently false news being spread regarding a CEO's supposed involvement in a bribery scandal or videos of a CFO allegedly spouting hate speech.

There has been recent furore over "deep fake" videos, which have the ability to synthesize speech and manipulate the appearance of real individuals using artificial intelligence to spread misinformation. A recent example of this is where deep fake technology was used to falsely depict Mark Zuckerberg (the CEO of Facebook) as saying the following in a video; *"Imagine this for a second: One man, with total control of billions of people's stolen data, all their secrets, their lives, their futures."*

The video, which was created to be used in an art installation in the UK depicts how technology can be easily used to manipulate data. If the video was released maliciously and people believed it to be true, it would have caused Facebook considerable reputational damage. If such falsified news is circulated, organisations need to be able to detect and deal with any fake news before members of the public and their competitors get wind of the same. If the organisation in question is a public listed company, there may also be queries from regulators and compliance breaches that arise as a result of the spread of fake news. Organisations need to ensure that such misinformation is corrected immediately or as soon as possible through legal statements and formal complaints to mitigate any reputational risk. That being said, this requires continuous monitoring, and not treatment of the incident in a reactionary manner.

In order to create an effective risk management strategy, it is crucial to understand how fake news is perpetuated. New technologies have emerged to speed the dissemination of fake news. For example, the role of automated bots in the meddling of the US elections has received a lot of traction. The issue of legal liability of the creator of the bot, the owner of the company who created the bot and/or the person who subscribes to such services, remains a grey area.

Rapid responses and communication strategies involving the relevant internal teams (for example from Legal, Corporate Communications and/or Group Strategy) are key to fake news crisis management and this must be coupled with adequate training, education and exposure to the issues at hand.

Conclusion

It is interesting to note that notwithstanding the AFNA, certain regulated sectors such as banking and insurance already require organisations to report incidents involving fake news to their regulators.

For example, the Bank Negara Malaysia Policy Document on Operational Risk Integrated Online Network (ORION) provides that licensed banks shall be required to report certain non-financial related operational risk events, which caused reputational damage. Coupled with the existence of other non-AFNA legislation in Malaysia that can be used to address the issues relating to fake news, there is a case to be made for the repeal of the AFNA, which although still subsisting, is arguably in a state of limbo for now. Other jurisdictions, for example Singapore, have taken a hard stance in combating fake news with the passing of detailed and focused legislation, which may be more effective but may also have an effect on curtailing the freedom of expression.

Some organisations like Facebook, albeit as a result of intense global public pressure, are taking steps to change their policies and tools in order to make the identification of fake news more transparent. While this will certainly help, it will not be a complete remedy to the issue of fake news. The law will play a role too in determining what is fake news and penalising those who create and spread fake news and misinformation.

In Malaysia, while there are more questions than answers at this stage regarding the legislation that will be used to combat fake news, the pervasiveness of fake news and the potential implications it could cause to individuals and organisations, as set out above require legal, compliance and commercial attention from the outset. Until a satisfactory outcome is reached by the powers-that-be, it is clear that everyone needs to increase their awareness of what is read, believed and disseminated.

MORE THAN JUST SALARY:
THE HIDDEN COSTS OF AN EMPLOYEE

Who is an Employee?

Employees are subject to the express terms of the employment contract and/or the provisions under the Employment Act 1955 ("Act") and its regulations thereunder, depending on whether the employees fall within the scope of the definition of "employee" under section 2 of the Act.

Section 2 of the Act essentially defines an employee as

(1) any person, irrespective of his occupation, earning not more than RM2000 a month; or

(2) any person, irrespective of the amount of wages he earns in a month, who is:

  (a) is engaged in manual labour;

  (b) is engaged in the operation or maintenance of any mechanically propelled vehicle for commercial purposes;

  (c) supervises other employees engaged in manual labour employed by the same employer;

  (d) is engaged in any capacity in any vessel registered in Malaysia;

  (e) is engaged as a domestic servant; *or*

(3) any person or class of persons whom the Minister makes an order under subsection (3) of the Act to be employed, engaged or contracted with to carry out work in any occupation in any agricultural or industrial undertaking, constructional work, statutory body, local government authority, trade, business or place of work.

On the other hand, a part-time employee is defined under Section 2(1) of the Act as a person whose average hours of work per week as agreed between him and his employer are more than 30% but do not exceed 70% of the normal hours of work per week of a full-time employee employed in a similar capacity in the same enterprise.

A more detailed exposition of the provisions relating to part-time employees is found in the Employment (Part-Time Employees) Regulations 2010 ("Regulations").

For employees who do not fall within the category described above, the benefits are governed by the terms and conditions of their respective employment contract.

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Hours of Work

Normal working hours

Generally, as provided under Section 60A(1) of the Act, an employee shall not be required to work:

(a) For more than 5 consecutive hours without a period of leisure;

(b) For more than 8 hours in one day;

(c) For more than 48 hours in one week; or

(d) In excess of a spread over a period of 10 hours in one day.

However, there are 3 exceptions to such normal working hours in the following circumstances:

(i) if there is any break of less than 30 minutes in the 5 consecutive hours, it will not break the continuity of that 5 consecutive hours;

(ii) if an employee is engaged in work which must be carried on continuously, he may be required to work for 8 consecutive hours inclusive of a period of at least 45 minutes in the aggregate during which he shall have the opportunity to have a meal; or

(iii) where by agreement under the contract of service, the number of hours of work on one or more days of the week is less than 8, the limit of 8 hours may be exceeded on the remaining days of the week, but no employee shall be required to work for more than 9 hours in one day or 48 hours in one week.

There are other special circumstances where an employee may be required to exceed the limit of hours above and to work on a rest day, such as when there is an accident in his place of work, or I performance of work which is essential to the life of community or for the defence or security of Malaysia and etc.

Working Hours for Part-Time Employees

Because they are not full-time employees, their normal hours of work can be by way of agreement under the contract of service, or it could be as provided under Regulation 4 of the Regulations. Where the normal hours of work of a full-time employee cannot be ascertained or there is no full-time employee employed in a similar capacity in the same enterprise, the normal hours of work in such situation would be deemed as 8 hours a day or 48 hours in one week.

Working hours for Shift Work

Employees who are engaged in shift work may, in contrast, be required by his employer to work more than 8 hours in a day or more than 48 hours in a

week, but the average number of hours worked over any period of 3 weeks, or over any period exceeding 3 weeks must not exceed 48 hours per week. They shall also not be required to work for more than 12 hours in any one day.

Rest Days

Pursuant to Section 59(1) of the Act, every full-time employee shall be allowed in each week, a rest day of one whole day, as may be determined from time to time by the employer. The said rest day is not fixed and may vary depending on the operational needs of the employer.

This is as held in the case of *Nestle Food (M) Sdn. Bhd v. Kesatuan Pekerja-Pekerja Perkilangan Perusahaan Makanan*, where the Industrial Court, in forming the collective agreement, allowed the company's submission that by not fixing Sunday as the rest day, the company can maximise its productivity.

As the work days of a part-time employee are irregular, Regulation 9 of the Regulations provides that a part-time employee will be entitled to a rest day in each week if he works five days or more with a total working hour of not less than 20 hours a week.

Public Holidays

Every employee is entitled to paid public holiday in accordance with Section 60D(1) of the Act, at his ordinary rate of pay on the following days in any one calendar year on 11 of the gazetted public holidays, on any day appointed as a public holiday for that particular year, which if falls on a rest day or any other public holiday, the working day following immediately shall be a paid holiday in substitution of the first mentioned public holiday.

Notwithstanding the above, the employer can still require the employee to work despite the entitlement to public holiday as long as the employee is paid for that working day. In the case of *Oriental Star,* the Industrial Court held that an employer can require his employees to work on a public holiday without the employees' consent in sequel to Section 60D of the Act. However, the employer is required to pay the employee concerned.

The entitlement of paid public holidays of a part-time employee is generally the same, except the entitlement is for 7 public holidays instead of 11. In accordance with Regulation 6 of the Regulations, the employer must exhibit conspicuously at the place of employment, before the commencement of each calendar year, a notice specifying the remaining gazetted public holidays provided for in respect of which his part-time employee will be entitled to paid holidays.

Regulation 6 further provides that an employer and a part-time employee may agree for any other day or several days to be substituted for one or more of the remaining three of the gazetted public holidays and that the employer may grant the part-time employee any other day as a paid public holiday in substitution of any of the public holidays.

Sick Leave

An employee is also entitled to sick leave at the expense of the employer under Section 60F(1) of the Act. The number of sick leave any employee is entitled varies depending on whether hospitalisation is necessary and the length of employment.

The maximum is 60 days in aggregate in each calendar year if hospitalisation is necessary. Where hospitalisation is not necessary, the sick leave entitlement is as summarised in the table below:

Period of Employment	Sick Leave Entitlement
Less than 2 years	12
More than 2 years, less than 5 years	18
5 years or more	22

Whereas, the sick leave entitlement for a part-time employee differs as provided in Regulation 8 of the Regulations, as summarised in the table below:

Period of Employment	Sick Leave Entitlement
Less than 2 years	10

More than 2 years, less than 5 years	13
5 years or more	15

Annual Leave

The entitlement of annual leave varies based on the length of service by the employee as provided in Section 60E of the Act as follows:

Period of Employment	**Annual Leave Entitlement (for every 12 months of continuous service for the same employer)**
Less than 1 year	Direct proportion to the number of completed months of service
Less than 2 years	8
More than 2 years, less than 5 years	12
5 years or more	16

The annual leave entitlement for a part-time employee differs as provided in Regulation 7 of the Regulations as follows:

Period of Employment	**Annual Leave Entitlement (for every 12 months of continuous service for the same employer)**
Less than 1 year	Direct proportion to the number of completed months of service
Less than 2 years	6
More than 2 years, less than 5 years	8
5 years or more	11

Overtime

The definition of overtime is provided in Section 60A(3)(b) of the Act, which is the number of hours of work carried out in excess of the normal hours of work per day. Therefore, if any work is carried out after the spread over period of 10 hours, the whole period beginning from the time that the said spread over period ends up to the time that the employee ceases work for the day shall be deemed to be overtime. Whereas, in situations under paragraph (b), where there is no spread over period of 10 hours, then overtime shall be calculated from when the 8 working hours end or expire.

In *Eng Giap Public Motor Bus Co Ltd v Gan Eng Keng & 36 Ors,* the employees had to work approximately 12 hours a day and their wages were originally inclusive of overtime work. The employees were however requested to work overtime by the employer and hence later claimed for overtime wages after the coming into force of Section 60A(3) of the Employment Ordinance, 1955.

The Federal Court held that Section 7 of the Ordinance provides that no condition of any contract of service shall be contrary to the provisions of the Ordinance and that any such condition shall be void and of no effect. Therefore, the claim for wages for overtime work were allowed.

Maximum Limit of Overtime

Employers are to note that the maximum number of hours which employees can be utilised for under the Employment (Limitation of Overtime Work) (Amendment) Regulations 1991 shall be a total of 104 hours in a month. However, it is to be noted that any work carried out on a rest day, or any of the gazetted public holidays referred to in Section 60D(1) of the Act, or on any paid holiday substituted there shall not be construed as overtime work for this purpose.

Alternatively, provided that an employer or employee made an application in writing, the Director General may, permit an employee, or any group, class, category or description of employees in any particular industry, undertaking or

establishment to work overtime in excess of the limit of hours so prescribed, subject to such conditions that he deem proper to impose.

Payment of Overtime

Generally, any regular wages paid to an employee do not include overtime payment, and therefore, for any overtime work carried out in excess of the normal hours of work, the employee shall be paid at a rate *not less than one and half times* his hourly rate of pay. Section 19(2) provides that payment of overtime is not to be later than the last day of the next wage period.

Regulation 5(1) provides that if a part-time employee is required by his employer to work overtime, then he shall be paid at the following rates:

(a) not less than his hourly rate of pay for each hour or part thereof which exceeds the normal hours of work of the part-time employee but does not exceed the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise; and

(b) not less than 1.5 times the hourly rate of pay of the part-time employee for each hour or part thereof which exceeds the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

Other than overtime on normal working days, the Regulations also provide for payment of overtime on a paid holiday, as seen under Regulation (6). The rate of such extra work shall be as follows:

(a) not less than twice the hourly rate of pay for each hour or part thereof which exceeds the normal hours of work of the part-time employee; and

(b) not less than three times the hourly rate of pay for each hour or part thereof which exceeds the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise.

Holidays

In such event, in addition to the holiday pay, an employee shall be paid two days' wages at the ordinary rate of pay, irrespective of how many hours he works on that holiday. If the employee goes further to work in excess of the normal hours of work on these paid public holidays, he is also entitled to such overtime payment. The rate of payment for overtime on these public holidays shall not be less than three times his hourly rate of pay.

Penalties for Non-Compliance

It is especially pertinent for employers to note that that failure to pay to overtime wages as provided under the Act or any subsidiary legislation would be deemed to be an offence, and any amount of overtime wages so ordered by the court shall be recoverable as if it were a fine imposed by such court. This applies similarly to part-time employees.

Foreign Workers

Employers should note that the Act also covers foreign workers as long as they satisfy the criteria of an "employee" laid out in Section 2 of the Act, and therefore, their entitlement to the hours of work, rest days and overtime would apply similarly.

Conclusion

All in all, employers should always be mindful of whether the employees fall within the definition of "employee" under the Act to be subject to the protection and benefits that the Act provide.

If they do, then there is a need to pay attention to the different governing provisions for full-time employee and part-time employee. On the other hand, employees who fall outside of the scope of the Act would be subject to the terms of the employment and the employers are only responsible to the extent that the contract provides.