Observations by the Chairman of MABC

AUSTRALIA'S *BEKIER CASE* AND BOARDROOM COMPLIANCE

Bekier is not a direct legal test for section 17A, but it is a useful benchmark for what an inadequate board compliance culture looks like.

The recent Australian Federal Court decision in *ASIC v Bekier & Ors* [2026] FCA 196 handed down on 5th March 2026, has quickly become one of the clearest modern statements of what courts expect from directors and senior executives where serious compliance risks exist in company operations. The case arose out of governance failures at Star Entertainment, where concerns around anti-money laundering, criminal exposure, junket relationships and other impropriety put the boardroom under regulatory scrutiny.

The court ultimately found that Star's former chief executive officer and former chief legal and risk officer had breached their duties, while the claims against the non-executive directors failed on the particular facts. That split outcome also makes the case important under company law. It did not simply punish an entire board because misconduct happened on its watch but showed how director's responsibility depends on role, knowledge, expertise, reliance, risks associated with a business and the handling of warning signs.

At its core, *Bekier* is a case about escalation failure. The court found that senior executives failed in their duty when they did not properly act on or elevate serious risk information to the board. The Court's message: when red flags point to legal, regulatory or reputational danger, directors and officers cannot treat them as background noise. They must identify them, test them, manage them and, where necessary, ensure the board confronts them directly.

Its Relevance to Malaysian Boards

The *Bekier* dicta gives its judgment significance far beyond Australia. In Malaysia, the legal architecture is different, but the underlying governance logic is strikingly familiar. Under section 213 of the Companies Act 2016, directors must exercise their powers for a proper purpose and in good faith in the best interest of the company, and must also exercise reasonable care, skill and diligence. The statutory standard is both objective and personal: it asks what can reasonably be expected from a director in that role, and also what may be expected from that particular director in light of his/her actual knowledge, skill and experience. Section 214 then adds a business judgment rule, but only where the director is properly informed, acts in good faith, has no material personal interest, and rationally believes the decision is in the company's best interests.

Malaysian law already expects directors to be active fiduciaries, not decorative appointees. What *Bekier* adds is a vivid judicial description of what active oversight actually looks like when a business enters a zone of heightened compliance risk. The case says, in effect, that directors cannot be content with systems that appear respectable on paper if the flow of information is weak, the reporting lines are compromised, or the board is insulated from the true seriousness of the problem.

Executive Directors and NEDs

One of the most important lessons from the case concerns the difference between executive and non-executive roles. The court did not hold that every director is equally blameworthy whenever something goes wrong. Instead, it paid close attention to function. Senior executives with day-to-day knowledge of risks, especially those responsible for legal and risk management, were expected to do more because they knew more and were positioned to act. That reasoning is highly relevant in Malaysia, where section 213 expressly calibrates the standard of care by reference to both responsibility and actual expertise.

The failure of ASIC's claim against the non-executive directors shows that Australian courts still care about the realities of decision-making by taking into account, what red flags were visible, how clearly they were presented, whether management downplayed them, and what a reasonable director in that position could have been expected to infer. That does not mean passive boards are safe. In fact, the court stressed that boards cannot merely accept management papers without question, particularly where management inundate boards with information without highlighting criticalities. Non-executive directors must still challenge information, spot inconsistencies and control the volume and usefulness of what they are given. The lesson is not that non-executive directors are off the hook, but that liability mirrors circumstance and the factual matrix.

Lessons for Section 17A Observers

This is where *Bekier* becomes particularly relevant to the Malaysian anti-corruption landscape under section 17A of the Malaysian Anti-Corruption Commission Act 2009. Section 17A creates corporate liability for a commercial organisation where a person associated with it commits corruption for its benefit, with directors assuming parallel criminal liability. The statutory escape route is the "adequate procedures" defence, and the government's guidance frames those procedures through the five T.R.U.S.T. principles: Top-Level Commitment, Risk Assessment, Undertake Control Measures, Systematic Review, Monitoring and Enforcement, and Training and Communication.

The Malaysian guidance expects boards and senior management to set the tone from the top, establish clear policies and create proper reporting channels. *Bekier* stresses that the tone from the top is not measured by mission statements. It is measured by whether leadership takes difficult risk information seriously, insists on candour and acts when uncomfortable truths emerge. A board that approves an anti-bribery policy but never probes how it is working would look vulnerable under both *Bekier*-style reasoning and the section 17A framework.

The T.R.U.S.T. guidance expects periodic assessment of corruption risks, tailored to the business and updated as circumstances change. In *Bekier*, the problem was not the absence of any risk indicators. It was the failure to respond adequately once serious indicators appeared. That is exactly the kind of failure that could undermine a Malaysian company's adequate-procedures defence. A risk register that identifies third-party agents, government-facing intermediaries or high-risk jurisdictions is not much use if the assessment does not trigger closer scrutiny, revised controls or escalation to the board when warning signs intensify.

Both Australian Malaysian approaches are remarkably similar to the UK position under the Bribery Act 2010. In the landmark *SFO v. Standard Bank* (a deferred prosecution case), the court endorsed the requirement that Board-level policies cannot merely exist on paper. Boards must ensure compliance measures are actively monitored, properly audited, and translate into an ingrained anti-bribery culture on the ground.

Conclusion

For Malaysian directors, the broader implication is clear. Whether the issue is general fiduciary responsibility under the Companies Act or anti-corruption exposure under section 17A, courts are likely to focus less on slogans and more on behaviour. Did the board receive the right information? Did management obscure or sanitize it? Did specialists use their expertise? Did warning signs change decisions? Those are the questions that animated *Bekier*, and they are the same questions that increasingly define good governance in Malaysia.

LOONG CAESAR, Chairman MABC

[We welcome your feedback. Please contact the secretariat at mabc@mabc.org.my]

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