

WHEN THE REGULATORS COME KNOCKING...

Responding to Raids, Investigations &...
How to Avoid the Risk!



04 SEP LUNCH TALK SERIES 2

Posted at 16:42h in Lunch Talk Series by skchambers

When the regulators come knocking...

The regulator may come knocking in variety of ways...the most extreme of which is turning up unannounced with a warrant at your premises. How should you prepare for this? It's something that more and more CEOs, GCs and Compliance Personnel are going to have to deal with as enforcement activity picks up. A wise business would be looking at this now.

Join us for Lunch as two senior investigators share with us their experience in local and global investigations covering Competition laws, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001- and give us key Watchdog Dos and Don'ts.

RSVP at
sk@skchambers.co

02

LUNCH TALK

26th August 2015
12:00 PM - 02:00 PM

Where

**TANZINI RESTAURANT
GTOWER KUALA LUMPUR**
Upperdeck Level 29,
199 Jalan Tun Razak,
50400 Kuala Lumpur

Speakers

Debuk C. Thavarajah
Retired Director of Investigations at the Anti-Corruption Agency and the Former Head of Special Investigations at Bank Negara Malaysia

Geoff Williams

Retired Head of Enforcement Operations at the Australian Competition and Consumer Commission (ACCC), New South Wales, Sydney Australia

Moderator

Shanthi Kandiah
Partner at SK Chambers

MATERIALS

- ! [Slides from Lunch](#)
- * [Dawn Raid Training Programme](#)
- * [Insights: Regulatory Raids – Are you prepared?](#)

Today's presentation sets out key takeaways from a SKC lunch talk with 2 senior investigators from Malaysia & Australia

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Glossary

| Term | Meaning |
|----------------------|---|
| MACC | Malaysia Anti-Corruption Commission |
| MACC Act 2009 | The Malaysia Anti-Corruption Commission Act 2009 |
| MyCC | Malaysia Competition Commission |
| CA 2010 | Competition Act 2010 |
| AMLATFA | Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 |



Agenda

Setting the Scene

Raids

Raid Response Planning

Minimising the risk of Raids



Setting the Scene

THE “COCKROACH” THEORY – by Sundar Pichai (CEO Google)

Reacting vs Responding

Instinctive/
Knee Jerk

Thought through



Setting the Scene

**“So when the regulators come knocking....unannounced,

...the reality is, you cannot come up with a
Response on that day!”**



Setting the Scene

“HAVING A RESPONSE” to investigations and raids requires -

- **Preparedness**
 - Creating systems, processes, templates, delegations
 - Having the right resources at the right place
 - Customised solutions based on risk profile of particular organisation/unit
- **Training**



In major anti-graft raid on Sabah, MACC freezes RM560m in 1,623 accounts

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The large-scale crackdown saw simultaneous raids on 43 locations in Tawau, Sandakan, Keningau, Kota Kinabalu, Labuan and Semporna suspected for illegal activities, including tax evasion. — AFP pic

KUALA LUMPUR, May 15 — The Malaysian Anti-Corruption Commission (MACC) today froze 1,623 bank accounts of companies and individuals involving over RM560 million in the first day of its "Operasi Bersepadu" in Sabah.

The commission's investigation division chief Dapuk Mohamad Jamidan Abdullah said the operations were launched to crack down on corruption, diesel subsidy fraud, smuggling of contraband cigarettes and alcohol in the state.

"Aside from freezing the accounts, the raids also seized jewellery worth more than RM1 million," he said in a statement here.

The large-scale crackdown saw simultaneous raids on 43 locations in Tawau, Sandakan, Keningau, Kota Kinabalu, Labuan and Semporna suspected for illegal activities, including tax evasion.

"We believe that the crimes involved in these illegal activities have collectively cost the state and federal governments billions of ringgit in losses," said Mohamad Jamidan.

Further investigations will be carried out under the MACC Act 2009's Sections 17(a) and 17(b), as well as Section 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001.

Earlier this week, the MACC along with the Sarawak state government and other agencies carried out "Ops Gergaji" to tackle bribery, illegal logging and tax evasion that also cost the government billions of ringgit in losses.

They also raided 49 locations around Sarawak, freezing a total of 1,623 accounts of companies and individuals, including a state assemblyman, with a total worth of RM560 million.

Malay Mail Online

Simultaneous raids on 43 locations by approx 420 officers from various agencies

Concurrent investigations under AMLATFA

Illegal activities not just corruption but tax evasion, diesel subsidy fraud, smuggling cigarettes and alcohol

Frozen accounts

Sealed Premises – Warehouse etc

Seized documents, computers and even jewellery

Setting the Scene

Key Risks - Raids

- Inability to bring together a response team that has been trained on how to act and behave, and who to call. Key roles for –
 - Receptionist
 - Senior most executive at location (who can make decisions) and
 - Specialist staff (Legal, IT)
- Excessive removal of information/documents unrelated to the investigation
- Seized info/docs may lead to prosecution under other written laws



Setting the Scene

Key Risks (cont.)

- Claims for legal professional privilege (“LPP”) not made or waived
- Criminal penalties for obstructing an investigation, tipping off, concealing/destroying documents
- Inadequate communication with employees on their obligation to cooperate and maintain confidentiality – warnings should be issued against posting pictures/information about the raid



Raids

Key Risks (cont.)

- Damage to reputation – poor handling may compromise corporate reputation with investors, customers and suppliers.
 - Competitors may exploit your status of ‘being investigated’ to gain more customers
 - Regulators may seek media mileage by publicising a raid, at company expense
 - Social media risk



Agenda

Setting the Scene

Raids

Raid Response Planning

Minimising the risk Raids



Raids

A) Background

A) Powers of Raid Officials

A) How To Respond Effectively



Raids

A) Background

i) Purpose

- Search and Seizure – The authorities are given the power to search premises and seize material without your consent
- They are counting on the element of surprise to retrieve as much info as possible and to minimise the potential for destruction of evidence
- At what stage of investigations is a raid conducted? Fairly advanced stage of investigations. Usually preceded by extensive surveillance/espionage



Raids

A) Background (cont.)

ii) Do you have to cooperate? YES!!!

- Obstruction of a raid – an imprisonable criminal offence (unreasonable delays, withholding passwords, shredding, tampering)

iii) Can you verify identity of raid officials?

- Obligation to identify
- ID (Can you take copies?)
- Call to authenticate? Not obstruction of justice



Raids

A) Background (cont.)

iv) How to determine the scope of the search?

- Relevant documentation- Search Warrant/ No Warrant
- Look at search warrant for right name and right address
- Obligation to serve a copy of search warrant? No.
- Is there an obligation to explain the purpose of the raid?No



Raids

FORM 8

[Section 54]

WARRANT TO SEARCH AFTER INFORMATION OF A
PARTICULAR OFFENCE

To the Chief Police Officer of the State of _____, and other Police Officers
(to be designated by name).

Whereas information has been laid [or complaint has been made] before me
of the commission [or suspected commission] of the offence of
and it has been made to appear to me that the production of the articles specified
in the Schedule below is essential to the enquiry now being made [or about to
be made] into the said offence [or suspected offence]:

This is to authorize and require you within the space of _____ days from
the date hereof to search for the said articles specified in the Schedule below
in the (*describe the house or place, or part thereof, to which the search is to
be confined*), and, if found, to produce the same immediately before the Magistrate's
Court; returning this warrant, with an indorsement certifying what you have
done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 20____.

(Seal)

Magistrate



Raids

A) Background

A) Powers of Raid Officials

A) How To Respond Effectively



Raids

B) Powers of Raid Officials

| Search & Seizure Powers | MyCC | MACC | AMLATFA |
|--|------|------|---------|
| To conduct search with or without warrant | ✓ | ✓ | ✓* |
| To enter the premise by force | ✓ | ✓ | ✓ |
| Search and seizure of any record, book, account, document, computerized data | ✓ | ✓ | ✓ |
| To inspect, make copies of or take extracts from any document or information | ✓ | ✓ | ✓ |
| To search any person and detain any thing found on that person | ✓ | ✓ | ✓ |
| To detain any person until the search is complete | ✓ | ✓ | ✓ |
| To break open, examine and search any article, container or receptacle | ✓ | ✓ | ✓ |
| To seal items in the premise | ✓ | ✓ | ✓ |
| To access computerised data | ✓ | ✓ | ✓ |
| To take away computers/ to image hard drive | ✓ | ✓ | ✓ |
| Right to have copies of items seized? | X | X | X |
| Right to have a list of items siezed | ✓ | ✓ | ✓ |
| Power to interview persons during a raid about investigation | X | X | X |



Raids

B) Powers (cont.)

Expansive powers to take information

- Today the most important source of information is the company's IT systems
- Authorities can search a company's entire IT environment
 - remove computers and hard drives
 - image hard drives and servers
 - run search words on site (limiting seized docs to those that trigger results from search words)
- A raid –protocol-trained IT assistant –a valuable asset. They can give authorities what they are looking for while minimising the removal of expensive IT equipment



Raids

B) Powers (cont.)

CONFIDENTIAL AND LEGALLY PRIVILEGED INFO

- Confidential company information – some regulators are bound by law to observe confidentiality
- Protocols for legally privileged documents? Practical difficulty in separating privileged information from others. Unless privileged communication is clearly identifiable, authorities may not agree to being denied access to such information.



Raids

B) Powers (cont.)

POWER TO FREEZE ACCOUNTS

- Order served on bank
- The power to freeze accounts no longer confined to money laundering and corruption offences
- Options when accounts frozen?



Raids

B) Powers (cont.)

- **POWER TO FREEZE ACCOUNTS**
- 'Serious Offence' under AMLATFA include specific offences under the following statutory Acts

| Name of Statutory Acts | |
|---|---|
| Capital Markets and Services Act 2007 | Direct Sales and Anti-Pyramid Scheme Act 1993 |
| Companies Act 1965 | Financial Services Act 2013 |
| Control of Supplies Regulation 1974 | Income Tax Act 1967 |
| Copyright Act 1987 | Islamic Financial Services Act 2013 |
| Development Financial Institutions Act 2002 | Money Services Business Act 2011 |
| Penal Code | Trade Description Act 2011 |
| Immigration Act 1959/63 | Child Act 2001 |



Raids

A) Background

A) Powers of Raid Officials

A) How To Respond Effectively



Raids

C) How To Respond Effectively

i) What to do in the first hour of a raid?

- Raid response team assembled comprising staff trained in relation to raids - receptionist, team of shadowers, Legal, Senior Management staff, IT Personnel
- Ensure that officials are who they claim to be & study the search warrant to ensure that it states the right address and to determine its scope



Raids

C) How To Respond Effectively

i) What to do in the first hour of a raid? (cont.)

- Find out what the raid is about and keeping the board/management apprised of developments – Shadowing investigators
- Keep records, take notes of everything that is looked at, taken, said and done
- Focus on strategies to minimize seizure/freezing of unrelated material – computers/servers/documents



Raids

C) How To Respond Effectively (cont.)

i) What to do in the first hour of a raid? (cont.)

- Internal Memo/email to staff – important to remind them of obligation to cooperate and keep raid confidential. Obligation to cooperate may extend to personal devices
- External Monitoring/Messaging – consider low key press statement to preempt any press speculation. Inform relevant authorities such as Bursa. Should actively monitor for any press release by the regulator



Raids

C) How To Respond Effectively (cont.)

i) What to do in the first hour of a raid? (cont.)

Role of Board/Board delegate – Key matters for Boards

- Assign Board delegate and Board liaison
- Take stock of scope of the raid (is it only the company, or individuals within company) Determine whether raids are done concurrently at other locations
- Identify key steps to protect company interest (e.g. separate legal representation), communication with customers, suppliers, employees, other relevant authorities, investors



Raids

C) How To Respond Effectively (cont.)

ii) Internal Review/Investigation

- Conduct an internal review of raid with staff to determine possible offences/ infringements – *(to be done by external legal advisers to maintain LPP and to advise the company as to liability & future steps that may need to be undertaken)*
- Board Instruction – Legal representative to open communication channels with the regulator as to co-operation in any ongoing investigation with a view to resolving the issues of concern to the regulator
- Have an appropriate media strategy to deal with reputational issues



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Raid Response Strategy

What steps can you take to prepare for a raid?

- A Raid is a risk like any other risk that a company is exposed to
- Goal of response strategy should be:
 - to minimise disruption so organisations can resume business quickly
 - to contain any fall-out from the status of having been raided



Raids

Preparation and Training is a key component of Raid Response strategy

- Develop internal systems, processes, templates to respond to unexpected raids
 - Create raid team
 - Conduct Periodic staff training to test preparedness including mock raids
- Proper Filing/Labeling system. You should know what documents are in your system and ensure regular



Raid Response Strategy

Training

- Explanation and analysis of search warrant
- The powers of authorities/obligations of employees
- Key actions in the first hour of raid
- What to do or say in response to questions and requests by authorities
- Importance of preserving evidence
- What to do about legally privileged material
- Proactively handling media and other external communications



Agenda

Setting the Scene

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Ultimately “Prevention” is the best strategy

Investigatee

- Rights

Authorities

- Question
- Seize
- Search

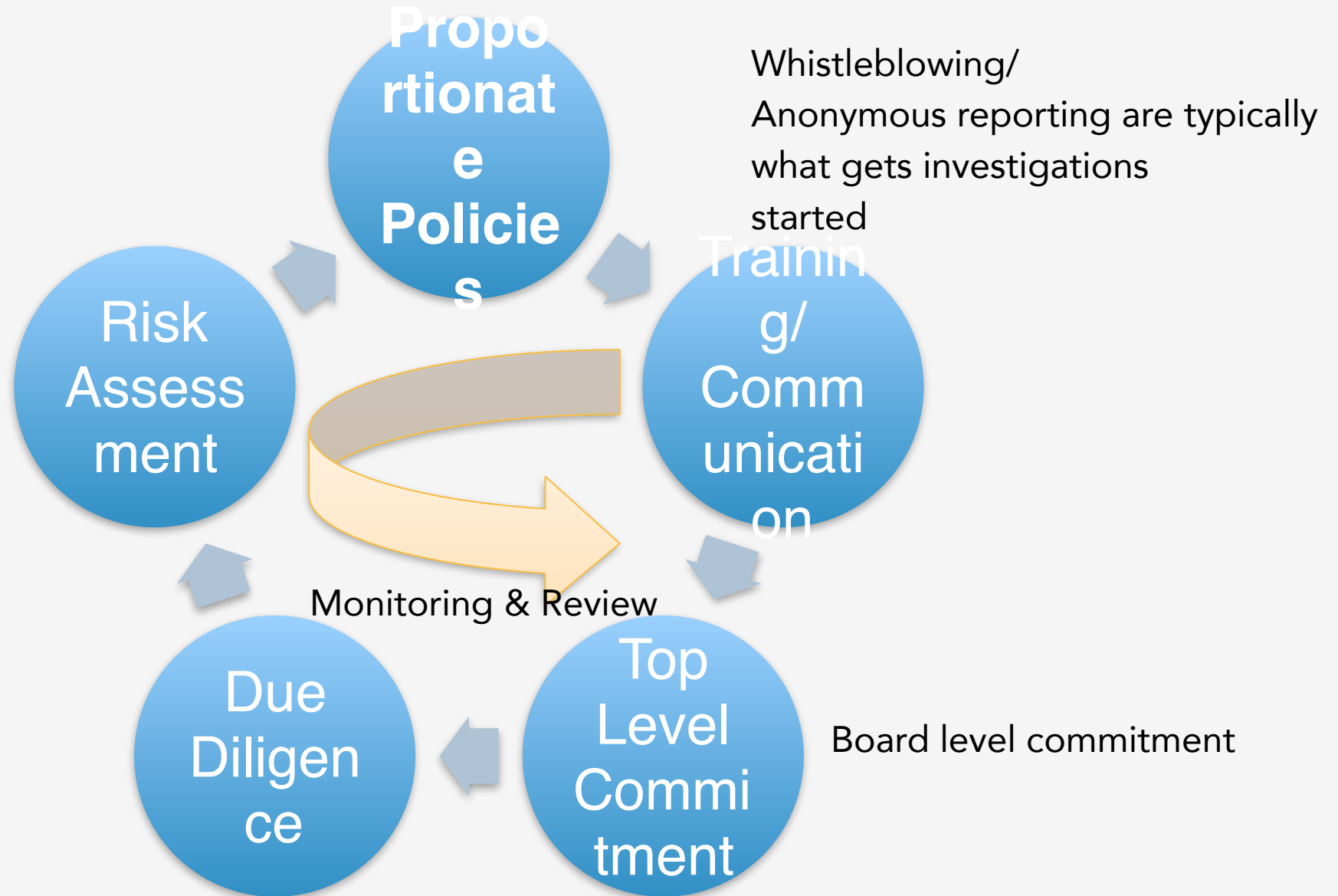
RAIDS & INVESTGATIONS

The **balance of power**

is heavily tipped in favour of the Authorities



Elements of sound compliance strategy



Does it carry brownie points with the authorities?

- Would having a compliance program carry mileage with the regulator?
- When is a compliance programme regarded as being effective?

Does Compliance matter?

Regulators look for incentives within the system for compliance.

“If the messaging from the top, namely the board or senior management, is weak or for example if a frequent infringer is rewarded with large bonuses, these are tell-tale signs that system is not credible. It will not carry any mileage with the authorities.”

How to minimize the risk of being investigated?

Tips on getting it right

- A sound compliance programme should actively detect problems before regulators do!
- **If your compliance system does not throw up issues, then the system needs to be revisited.** Do not assume that everyone is compliant!!
- This should be a Board level direction - Culture of compliance needs to emanate from the top and filter down through the company

Thank you

By: Shanthi Kandiah

For more info: skchambers.co

