

## **The Appointment of Directors under the 2008 Companies Act** **By Ian Cox**

With the exception of subscribers who are automatically the first directors of a company by virtue of section 66(7), a person taking up office as a director:

1. must be appointed or elected to that office; and
2. must deliver to the company a consent to serve as a director.

It is only then that a non-subscriber becomes entitled to serve on the board of directors of a company.

Under the 1973 Companies Act non-subscribers could either be elected to the board of directors or appointed by the board in order to fill a casual vacancy. The consent of the appointee was not a prerequisite for appointment and although shareholders agreements that conferred a right of appointment were enforceable, such agreements only bound shareholders to vote for the appointee. A shareholder could not appoint a director.

The 2008 Companies Act permits the appointment of a director to the board without the need for an election by the shareholders in three circumstances:

1. At the instance of a person (any person) named in the Memorandum of Incorporation (MOI) if the MOI so allows.
2. Ex officio on account of a person holding an office which the MOI states is one that carries with it appointment to the board of directors.
3. If the MOI allows the board of directors to fill a casual vacancy in any of the above.

The power to appoint a director under the 2008 Companies Act is, in the case of profit companies that are not state-owned, subject to the proviso that not less than half of the directors and alternate directors must be elected by the shareholders. Thus, with the exception of an appointment to fill a casual vacancy amongst the elected directors, the power to appoint is limited to 50% of the board of directors of those companies.

Interestingly the 2008 Companies Act does not prevent shareholders from agreeing to vote for each other's so-called appointees. Our courts have held that these contracts are enforceable under the 1973 Companies Act. As there is nothing in the 2008 Act that prohibits shareholders from agreeing how they will vote it seems that such agreements will still be enforceable.

### **Appointment**

The MOI of any company may give a person the power to appoint one or more directors. That person need not be a shareholder or even have any connection to the company. Section 66(4) allows the MOI to gift the power to make an appointment to any person. Person is defined widely to include a juristic person. It does not seem that the person entitled to exercise this power owes a fiduciary

duty to the company under the 2008 Companies Act. Nor does there seem to be any provision in the 2008 Companies Act that prohibits vesting this power in a person who is disqualified from serving on the board of directors of a company. The position of an officer as it was understood under the 1973 Companies Act no longer exists. Gone, too, is the very wide interpretation of that term to include so-called “shadow directors”. Persons entitled to a right of appointment under the MOI are not prescribed officers even though they may control up to 50% of the board of a company or, in the case of a state-owned company, the entire board. This is because the definition of a prescribed officer limits its application to those who within the company exercise general executive control over the whole or a significant portion of its business. Persons entitled to a right of appointment under the MOI do not exercise this power within the company. This was probably done deliberately. It is unlikely that any minister empowered to appoint the board of a state-owned company would want to take on the fiduciary duties that could accompany the overzealous exercise of that power. The unfortunate consequence is that it is again possible to appoint what are really sham directors, enabling the real power to direct the company to hide behind what, on the face of it, is the legitimate veil created by the statutory right of appointment.

#### **Ex Officio Directors**

The concept of an ex officio director is one of the more interesting innovations of the 2008 Companies Act. Section 66(4) states that a company’s MOI may provide for a person to be an ex officio director of the company as a consequence of that person holding some other office, title, designation or similar status. The MOI may, for example, state that the CEO shall be a member of the board of directors of the company. The office does not have to be one of employment. Any office is sufficient. It may be the general secretary of a trade union, the head of a political party or even a member of a family. The person holding that office or enjoying that status automatically becomes a director on assuming the designated position provided of course that he or she delivers his or her written consent referred to in section 66(7). Likewise the appointment of an ex officio director terminates when he or she ceases to hold that position.

What makes these appointments unusual are the provisions of section 66(5)(b), which state that an ex officio director:

*has all the—*

- (i) powers and functions of any other director of the company, except to the extent that the company’s Memorandum of Incorporation restricts the powers, functions or duties of an ex officio director; and*
- (ii) duties, and is subject to all of the liabilities, of any other director of the company.*

It is thus possible, at least on the face of it, to deny ex officio directors a right to vote, leaving them with a consultative rather than a directory role on the board. This will significantly reduce the exposure of such directors to the liability that ordinarily reposes in directors of the board in respect of the matters referred to in section 77(3)(e). Such restrictions cannot however operate to reduce an ex officio director's appointment to a sham.

An ex officio director is a director properly so called and as such owes a fiduciary duty to the company. The refuge ordinarily available to an employee of following lawful instructions is not available to an ex officio director appointed on account of an office of employment. The fiduciary duty to act in the best interests of the company is paramount with the result that such a director is legally bound to refuse any instruction that would involve a breach of his or her fiduciary duties.

#### **Alternate Directors**

The standard articles of association under the 1973 Companies Act permitted a director to appoint his or her alternate with the approval of the board of directors. Shareholders could however provide for the election of alternate directors if they wished or dispense with them altogether. This regime has been carried over to the 2008 Companies Act where section 64(4) states that the MOI may provide for the appointment or election of alternate directors. The proviso, in the case of profit companies that are not state-owned, that at least 50% of the directors must be elected by the shareholders applies equally to alternate directors.

#### **Casual Vacancies**

The issue of casual vacancies under the old Act was dealt with in section 212 and the company's articles. Section 212 gave the company the right to determine how casual vacancies were to be dealt with. The standard articles authorised directors to fill a casual vacancy but the articles could be amended to provide otherwise. Such appointments normally lasted until the next shareholders meeting. Companies were obliged to hold an annual general meeting at least every 15 months.

In terms of the 2008 Companies Act a casual vacancy in the office of:

1. an elected director can only be filled by a new election. This election must take place at the next annual general meeting of the company or if its MOI does not provide for such a meeting within 6 months at a meeting of shareholders or by way of a poll of the shareholders conducted by way of a round-robin resolution in terms of section 60(3);
2. an appointed director can only be filled by a new appointment; and
3. an ex officio director by the appointment of a successor to that office.

However unless the MOI provides otherwise the board of directors may appoint a person to fill a vacancy on a temporary basis pending an election.