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CONFLICTED DIRECTORS

IT IS A fundamental principle of common law that company directors must act in the best interests of the company, avoiding conflicts of interest. Section 75 of the Companies Act, 2008 (“the Act”) places a positive obligation on directors (and prescribed officers, and board committee members) to disclose “personal financial interests” in matters to be considered at upcoming board meetings or which affect the company’s material interests.

WHAT MUST BE DISCLOSED

A personal financial interest is a direct material interest of a financial nature or which has a monetary value. The section applies equally to the personal financial interests of any person “related” to a director. The scope of potential disclosure is extremely wide.

HOW TO MAKE DISCLOSURE

When a person obliged to make disclosure is aware of a fact which will trigger a conflict of interest, this should be disclosed up front in writing. Personal financial interests, in matters coming before the board, should be disclosed verbally at the start of the board meeting. Once disclosure has been made and any questions raised by other board members have been answered, the director making disclosure must leave, not take part in the consideration of the matter and not execute any document relating to the matter on behalf of the company, unless expressly directed to do so by the remainder of the board.

If, over the course of time, a director acquires a personal financial

interest in a matter which affects the material interests of the company, disclosure must be made promptly to the board, in whichever way is most efficient. Given these onerous requirements, Section 75 should be considered when selecting members of the board to ensure that directors are able to participate in and vote on important matters.

CONSEQUENCES OF NON-DISCLOSURE

If an action is taken without the required disclosure of a personal financial interest, the action is open to being set aside. The cure is to have the action ratified by ordinary resolution of the shareholders once the personal financial interest has been disclosed to them.

In more difficult circumstances, it’s shareholders and third parties.

PRACTICAL APPLICATION

The following actions are recommended to ensure compliance with Section 75:

- 1** Directors should regularly update themselves on the financial interests of persons related to them.
- 2** Disclosure of personal financial interests should be a recurring first item on the agenda for board meetings.
- 3** Directors should immediately request shareholders to ratify any non-compliance with the requirements of Section 75.
- 4** As a belts and braces approach, notwithstanding compliance with the disclosure requirements, the board could request the shareholders to approve the relevant transaction by resolution.

Jenna Padoa and Keren Watson are both partners at Cox Yeats Attorneys and practise in the commercial and natural resources law team. Jenna specialises in corporate law, competition law and environmental law. Her expertise includes mergers and acquisitions, merger notifications, corporate finance and re-organisation, general company law and black economic empowerment transactions. She also advises on commercial transactions and contracts. Jenna has co-authored significant publications for LexisNexis, including a ‘Practical Guide to Mergers and Acquisitions and Corporate Governance’. Keren’s experience and focus lies in commercial agreements and memoranda of incorporation, consumer protection law, company law and general business law. She is the author of the LexisNexis publications ‘A Practical Guide to the Companies Act’ and ‘Butterworths’ Forms and Precedents: Companies Volumes 1 and 2’. She is co-author of ‘Butterworths’ Forms and Precedents: Companies Volume 3’ and of the LexisNexis online product ‘Practical Guidance: Corporate Governance’.

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