KING IV ON DIRECTOR INDEPENDENCE

Category: Commercial Law
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All directors are required to always act in the best interests of the company, and this can only be achieved if directors set aside their personal interests. In order to ensure that no one individual, or group of individuals yield unfettered power on the Board, King IV proposes the appointment of independent non-executive directors.

King IV defines independence as *"the exercise of objective, unfettered judgement. When used as the measure by which to judge the appearance of independence, or to categorise a non-executive member of the governing body or its committees as independent, it means the absence of an interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making."*

Taking the above into consideration, the composition of the Board should ensure not only a balance of power, but also to ensure the inclusion of a diverse group of directors. As such, King IV points out that a balance can only be created if the composition of the Board accounts for a balance of required skills, experience, diversity, independence and knowledge of the company and industry.[1] All directors, including the independent directors should have a comprehensive understanding of the industry as well as the business of the companies that they serve.

However, the appointment of independent directors does not mean that major shareholders relinquish ultimate control of the Board. A majority vote of shareholders can appoint or remove any director at any time. Major shareholders can ensure that they only approve the appointment of independent directors that share their vision for the company – the involvement of outstanding independent directors can then only enhance boardroom capabilities and the likely success of the enterprise.

When determining independence, one must consider whether the director and/or the Board "*exercises objective judgement and there is no interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision-making*".[2] King IV rejects a tick-box approach for the independence assessment; however, it does provide a list of factors/criteria which may be considered during the independence inquiry, including whether or not a particular director:

- is a significant provider of financial capital, or ongoing funding to the organisation; or is an

officer, employee or a representative of such provider of financial capital or funding;
- if the organisation is a company, participates in a share-based incentive scheme offered by the company;
- if the organisation is a company, owns securities in the company the value of which is material to the personal wealth of the director;
- has been in the employ of the organisation as an executive manager during the preceding three financial years, or is a related party to such executive manager;
- has been the designated external auditor responsible for performing the statutory audit for the organisation, or a key member of the audit team of the external audit firm, during the preceding three financial years;
- is a significant or ongoing professional adviser to the organisation, other than as a member of the governing body;
- is a member of the governing body or the executive management of a significant customer of, or supplier to, the organisation;
- is a member of the governing body or the executive management of another organisation which is a related party; or
- is entitled to remuneration contingent on the performance of the organisation.

If you would like to know more about this, contact us for good, clear, precise advice.

[1] Principle 7 of King IV

[2] Recommended Practice 29