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CONFLICTS OF INTEREST

A CONFLICT of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest.

Organisations have in place processes and procedures to address conflict of interests. Some standard processes are the requirement to declare the conflict of interest to the relevant body or person and to recuse oneself when the subject matter of the conflict is being deliberated.

Recusal not only means not participating in the discussion but also leaving the meeting during the discussion. We do not want a conflicted person sitting at the meeting stating that though he is there, he will not utter anything or take part in the meeting. This is not the spirit of recusal.

An interesting question is whether someone should accept a position when he knows that position will place him in a conflict-of-interest situation. Alternatively, should the appointer nominate someone to a position that is a conflict of interest on the premise that there are processes and procedures to manage conflicts of interest anyway?

The better approach would be to consider the conflict-of-interest processes and procedures as being there to address conflicted

situations that arise during the course of a person's tenure.

The approach should not be to consider the existence of these processes and procedures as a basis to justify an appointment that will be likely to incur conflict-of-interest situations. Why walk into a conflict-of-interest situation — it is better to avoid it regardless of the checks and balances.

We do not choose to fall sick just because there is medicine available. Medicine should not be a justification for us to fall ill willingly.

So, as the chief executive officer of Minority Shareholders Watch Group (MSWG), whose function is to raise pertinent probing questions at general meetings of public-listed companies (PLCs), it is unfathomable that I should accept a position as a director of a PLC, regardless of the processes and procedures to manage the obvious conflict.

It is better to err on the side of caution and walk away from such an appointment.

It is better to avoid conflicts of interest than to address them if we have a choice.

Three-way conflict

While we talk about conflict as being that between a primary and secondary interest, a recent Federal Court decision alluded to a three-way conflict of interest.

The Federal Court, in an unan-

imous decision, quashed an appeal by the Kuala Lumpur City Hall to reinstate the proposed Taman Rimba Kiara development project. In the judgment read by Datuk Nallini Pathmanathan, she said, "The mayor, therefore, wore three hats in three capacities: the mayor was part of the entity that approved the subject land's alienation, the mayor was part of the applicant for planning permission, i.e. Yayasan Wilayah Persekutuan, as it was a member of the board of trustees, and the mayor was also the entity that granted the impugned development order".

This is an example of an acute situation of conflict of interest — akin to one being judge, jury and executioner.

Separating the roles of the attorney-general and public prosecutor

And we all know that one should not be a judge, jury and executioner, as that is a conflict of interest. If someone is said to be the judge, jury and executioner, it means they are involved in every decision made. They also have the power to be rid of whomever they choose. At the governmental level, the legislature, the executive and the judiciary are distinct, and they act as checks and balances.

For simplicity, the legislature makes laws, the executive imple-

ments laws and the judiciary ensures that justice is done and the constitution adhered to.

An obvious conflict arises when the attorney-general (A-G) is also the public prosecutor, as in Malaysia. The two roles are incompatible with upholding the rule of law. The roles are of a conflicting nature. The A-G is the legal adviser of the government of the day. The public prosecutor, on the other hand, is the principal prosecuting authority in the country, acting as an independent lawyer in criminal cases.

Separating the roles brings greater clarity, comfort and confidence. The independent A-G can then serve the government effectively, ensuring they act within the law. The independent public prosecutor will be able to prosecute criminals without fear or favour.

An obvious example of a conflict is when the person prosecuted is a powerful figure in government. An independent A-G and public prosecutor would ensure that justice is not only done but also seen to be done.

Sometimes, we do not choose to be conflicted, it just arises. Conflicts of interest happen to the best of us. All that is left then is how we handle these conflicts.

The writer is chief executive officer of Minority Shareholders Watch Group

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