APPEAL COMMITTEE OF THE COUNCIL FOR MEDICAL SCHEMES

In the matter between:

BARLOWORLD MEDICAL SCHEME Appellant

and

REGISTRAR OF MEDICAL SCHEMES Respondent

RULING

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1 This is an appeal against the decision of the Registrar refusing to register certain rule amendments proposed by the appellant.

2 During the hearing the parties' representatives agreed that the only remaining dispute relates to rule 18.3 and the definition of "employer". The former has to do with governance and the latter relates in essence to eligibility for continued membership of the scheme.

3 In its un-amended form, rule 18.3 provides as follows:

> **"The retiring members [of the Board of Trustees] shall be eligible for re-election."**

4 Now the scheme proposes the following amendment:

> **"The retiring members [of the Board of Trustees] shall be eligible for re-election provided that no one can serve more than three consecutive terms and no more than a total of five terms."**

5 The Registrar has rejected the proposed amendment on the ground that it is in breach of good corporate governance principles. He has in its stead "proposed" that Board members be restricted to two consecutive terms and a maximum of three terms in total. According to the parties a term comprises three years.

6 For this proposition counsel for the Registrar invokes the provisions of two documents. The first is a discussion document issued by the Registrar for comment in October 2008 titled "Proposed Corporate Governance Guidelines for Medical Schemes". Paragraph 43 of the discussion document provides that **"a person shall not serve as a trustee for more than a total of six years in any one medical scheme"**. It is alleged that the scheme did not comment.

7 Reliance is also placed on section 21 of the Medical Schemes Amendment Bill, 58 of 2008, which limits a trustee's term of office in any one scheme to

six years. Counsel for the Registrar concedes that the Bill has not yet come into effect.

8 Quite apart from the discussion document and the Bill not being permissible authority for the proposition advanced on behalf of the Registrar because neither has come into effect, the Registrar's powers as regards rule amendments must be rooted firmly in the statute of which his office is a creature. The statute from which the Registrar derives his powers is the Medical Schemes Act, 131 of 1998 ("the MSA"). Section 31(3) thereof requires that the Registrar considers only two factors in deciding whether or not to approve proposed rule amendments. These are (a) whether the rule amendment **"will not be unfair to members"** and (b) whether the rule amendment **"will not render the rules of the medical scheme inconsistent with [the MSA]"**.

9 There is no provision in the MSA requiring the Registrar to have regard to considerations of "good corporate governance" now advanced by counsel for the Registrar. The sole basis for this argument is a pair of documents – a discussion document and a Bill – that have absolutely no legal effect. It is legally impermissible to make decisions that have legal effect on the basis of literature that has the promise of one day becoming law. For now, the Medical Schemes Bill is not yet law. It can thus not lawfully be invoked to determine whether or not the proposed rule amendment is inconsistent with the MSA. Legally speaking, section 21 of the Bill does not exist until the Bill has become an Act of Parliament. It is then up to the legislature to consider

whether or not to make application of the Bill, when it becomes law, retrospective. In that event, there will have to be an express provision in the statute to that effect. Retrospectivity cannot be inferred. This much is trite.

10 But is the proposed amendment likely to be unfair to members? Counsel for the Registrar submits that a term of office that is longer than that proposed by the Registrar would make the scheme's trustees "too entrenched in their positions". She does not say, however, how this will be "unfair to members".

11 The scheme's representative, on the other hand, has given numerous reasons for the scheme's proposal of a longer rather than a shorter term of office. Among these are the following:

11.1 There is an insufficient pool of trustees to draw from;

11.2 Because of experienced trustees the scheme has proved to be well-run (as the balance sheet and solvency ratio shows);

11.3 The scheme has relatively few complaints because of the experience of office-bearers;

11.4 It is impossible for a new Board member to get up to speed within 1 or 2 terms. That is the experience of the scheme;

11.5 It is inappropriate for the Registrar not to apply his mind to the experience of the scheme in this regard;

11.6 The leadership development of new trustees that is recommended in the Registrar's discussion document is more likely to be facilitated by the presence of experienced trustees in the scheme rather than frustrated thereby;

11.7 The Registrar's approach – namely, comply or be damned – goes against that which is recommended in the King Code – comply or explain.

12 Thus, in the absence of any indication that the rule amendment in rule 18.3 will either be unfair to members or will render the rules of the scheme inconsistent with the MSA, the Registrar has no legal basis for refusing the amendment.

13 It should be mentioned that the Registrar is concerned, rightly, that individuals should not create for themselves power bases by entrenching themselves in the boards of medical schemes. That is partly why he circulated the discussion document for comment by industry players. That is also why there are plans afoot to amend the MSA to limit the terms of trustees' office to a maximum term of 9 years. But until that limitation has

been legislated, the appeals committee is unable in law to dismiss the scheme's appeal on the basis of a Bill and a discussion document.

14 Finally, in response to the charge that the registrar has no power unilaterally to amend the rules of a medical scheme, counsel for the Registrar points to section 31(4)(a) of the MSA as authority for a contrary proposition. I think she misconstrues the provision. The section does not confer on the Registrar the power unilaterally to amend rules. It simply permits him to order the scheme to amend its rules in accordance with his guidance or indication. That is a far cry from conferring a power unilaterally to amend rules. Only medical schemes can amend rules. The Registrar approves the amendment by registering the rule.

15 As regards the proposed amendment for the definition of "employee", the Registrar has rejected it on two grounds. The one is that the untrammelled discretion it confers on the scheme "may work to the disadvantage of members". The other is that the proposed amendment threatens the status of the scheme as a "restricted medical scheme". While it has not been demonstrated how the amendment will disadvantage members, there is much merit in the Registrar's objection founded on the second ground.

16 In its un-amended form, "employer" is defined as:

> **"the Company and any associated or affiliated company or organisation which has been admitted to participation in the Scheme in terms of rule 6.1"**

17 The Company is Barloworld Limited. Rule 6.1 makes it clear that the scheme is restricted to employees and former employees for whom membership is or was compulsory. This is very important in the determination of this leg of the appeal.

18 The scheme proposes that the definition be amended to read as follows:

> **"the Company or any subsidiary, associated or affiliated company, organisation or division which has been admitted to participation in the Scheme, including any such employer which the Board permits to continue to participate in the Scheme after it ceases to be so related to the Company for any reason (whether such relationship ceases, without limiting the generality of the following, from a change in shareholding or a disposal of assets or of the whole or part of a division or business) provided that the discretion of the Board to allow continued participation must be exercised at or about the time of and in respect of the relevant event."**
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> (underlining supplied)

19 It is the underlined excerpt that appears to have given rise to the Registrar's discomfort. It is not difficult to see why. The scheme here in issue is clearly a restricted membership scheme within the meaning of section 1 of the MSA. The restriction of eligibility for membership of this scheme is clearly by reference to paragraph (b) of the definition of "restricted membership scheme". The full definition reads:

"'restricted membership scheme' means a medical scheme, the rules of which restrict the eligibility for membership by reference to-

- **(a) employment or former employment or both employment or former employment in a profession, trade, industry or calling;**
- **(b) employment or former employment or both employment or former employment by a particular employer, or by an employer included in a particular class of employers;**
- **(c) membership or former membership or both membership or former membership of a particular profession, professional association or union; or**
- **(d) any other prescribed matter"**

20 While there is no reference to rule 6.1 in the proposed amendment, that rule has not been consequentially amended. What that means is that the eligibility criteria for membership will remain the same after amendment of the definition of "employer" as they were before. That in turn means this remains a restricted membership scheme. It is a restricted membership scheme by reference to employees and former employees. In other words, persons who are neither employees nor former employees are not eligible for membership.

21 But the effect of the proposed amendment of "employer" will be to affect the status of the scheme as a restricted membership scheme with reference to employment. According to the example made by Mr [redacted] at the hearing, new employees of a company that has been unbundled from the Barloworld Limited group would be eligible for membership of the scheme even though they are neither active members nor former members (or continuing members) of the scheme, on the one hand, nor employees or former

employees in any of the Barloworld group of companies. That is clearly at odds with rule 6.1 read together the definition of "restricted membership scheme" in section 1 of the MSA.

22 For that reason, the Registrar rightly rejected the proposed rule amendment of the definition of "employer".

23 The proposed rule 30A is also consequentially affected by this finding in as much as it is by its provisions inextricably linked to the proposed new definition.

24 The ruling of the committee is thus as follows:

24.1 As regards the proposed amendment in relation to rule 18.3 the appeal succeeds.

24.2 As regards the proposed amendment in relation to the definition of "employer", read together with the proposed rule 30A, the appeal is dismissed.

VUYANI NGALWANA for Appeal Committee

For the Appellant: [redacted]
Instructed by: *Bowman Gilfillan Inc*

For the Respondent: [redacted]
Instructed by: *Maponya Inc*

Date of hearing: *21 May 2009*
Date of Ruling: *04 June 2009*