

**Public Comments:**

**Proposed Amendments to Memo and  
Articles**

**Submission by MIKE LAWRIE**

Email of 20 January 2008

**COMMENTS ON THE PROPOSED ARTICLES OF ASSOCIATION OF THE ZA DOMAIN NAME  
AUTHORITY**

These comments are a follow-up to those posted by Calvin Browne on 18 Jan. The references to "item N" refer to the numbering in those comments, and the quotations are taken from the column "Reasons for Change" as authored by the ZADNA.

Herewith my comments and observations:-

**1) Item 8. (Termination of Membership - "inactive")**

I support the comments made by Uniforum.

An important principle that was agreed by all parties during the discussion of the ECT Bill was that there needs to be widespread inclusivity regarding the country's domain name. Thus the ZADNA should find ways to make it easy for persons who reside in physically remote areas of the country to participate. Such persons may well not find it easy, financially or otherwise, to attend meetings. The principle contained in the proposed amendment will effectively exclude such persons from becoming, or remaining, members of the Company. If nothing else, this violates the concepts of RFC1591.

With regard to the specific wording under the heading "Reasons for Change", there are some problems of logic, viz

1.1) "As required by the Companies Act, the articles of association of the company oblige the company to have minimum quorums for general meetings, to send notices in a variety of ways to members on a number of issues, and to send copies of the annual financial statements of the company to all members. If the company has a large membership, complying with these provisions is very expensive."

1.1) "[sending notices ... copies of the annual financial statements ... to all members]. If the company has a large membership, complying with these provisions is very expensive."

Given the nature of the ZADNA and its business, members very likely have access to the Internet. I submit that it is hardly more expensive to email statements to, say, 50,000 persons than to a single person, given that the mailing list is being maintained anyway as a routine part of the ZADNA administration process. It would surely be quite acceptable were there provisions that notices etc may be delivered by email. It is not very difficult to

get a free mailbox, nor to access it at an Internet Cafe, for those persons who don't have a more sophisticated setup.

1.2) "If there is a significant body of members who no longer comply with the criteria stipulated in the ECT Act, or who are no longer interested in participating in the affairs of the company...."

This implies that non-attendance at General Meetings should be interpreted as "no longer interested in participating...". That is not a valid assumption because there could be several valid and compelling reasons for non-attendance, so this reasoning falls away.

1.3) "It is therefore imperative, for the efficient and cost-effective functioning of the company, for the articles to stipulate that the membership of people who no longer actively participate in the affairs of the company, or who no longer show any interest in its affairs, is automatically terminated."

I have shares in a few companies. I do not attend any of their meetings. That does not mean that because I do not "actively participate in the affairs of the company" that I do not have "any interest in its affairs", and it most certainly does not give any of those companies the right to terminate my membership. I submit that the thinking behind the quotation in (1.3) is illogical.

A far better way to deal with members who appear to be dropping out is to make a prescribed number of periodic attempts to contact them by email, and if that is unsuccessful then to put their names on an "at risk" list on the ZADNA web pages, so that a friend might possibly alert them. Such a process can readily be automated, and would require very little administration. Only after such a process is unsuccessful may (and should) membership be terminated.

## **2) Item 9. (Termination of Membership - "disruption")**

I support the comments made by Uniforum. If indeed there is a member who is disrupting the operation of the Company, then such a member has to be dealt with. However, I don't believe that the motivation given is anywhere near acceptable. It is all too easy for the Directors to fall into a mode of mis-interpreting "concerned" with the terms "disruption" and "obstruction". The Company is NOT there to serve its Directors. If their job is difficult, so be it, but part of their job is to address the concerns that "apparently disruptive" members raise, in whatever manner they raise them. If, in their considered opinion, a member should be ejected from the Company, then the reasons will be so compelling and clear that it will be little trouble to convince the general membership about the issue.

This is also true for a so-called "disruptive" Director.

So, I submit that para 2.5 of the AoA should be modified to have a requirement that such a proposed termination require the two-thirds majority approval of a General Meeting before it comes into effect.

## **3) Item 14. (Quorum)**

I agree that Uniforum make a good point. I also realise that the General Meetings are not well attended. However, if the quorum is seven, and certain resolutions can be passed by a two-thirds majority of those present, then as few as five persons can pass a resolution that may well have a profound affect on the Company. I submit that that is Not A Good Idea.

In practical terms, the ZADNA should surely be able to arrange for remote participation in meetings by setting up videoconference facilities in major centres, like CTown, Durban, PE, Bloemfontein and similar, sub-chaired/co-ordinated by a Director so that remote participation by

members is relatively easy. I submit that not that many distant members will readily incur the expense, both in money and time, to attend a General Meeting of the Company, but they might well attend if there was a nearby venue.

In that way, a larger quorum would suffice.

**4) Item 17. (Removal of Directors)**

The comment by Uniforum has my STRONG support. Paras 14.5.1, 14.5.2.2 and 14.5.3 in the proposed AoA should be removed.

**5) Item 19. (Procedures and Criteria for SLDs)**

Uniforum makes an important comment, in that they propose a two-thirds majority over a simple one for changes to be of effect. Given that stability of the domain is of overriding importance, it follows that changes to the SLD structure should be few and far between, and should not follow a "flavour of the month" nor a rushed approach. Put another way, proposals for changes need to be very convincing, and if they indeed are then obtaining a two-thirds majority will be very easy, and vice versa.

So I support Uniforum's comment.

**6) Item 24. (Powers of the Board)**

In light of Uniforum's comment, would it not be appropriate to spell out the "part-time and non-executive" role of Directors in, say, para 16.1?

**Mike Lawrie**  
**20 January 2008**  
<ends>

## Emails of 08 January 2008

### **I have a problem with para 2.3 of the the proposed Articles, which reads**

"2.3 The Board will be entitled to co-opt and appoint any natural or juristic person as a Member of the Company, or create a new class of Members, if the Board believes that person or class will assist the Company in achieving its Main Object"

I don't think that the Board should have the powers to "create a new class of Members". IMHO, this should be something that the Members have the sole right to do. This does not prevent the Board, or any other appropriate group, from proposing a new class of Members.

### **Paras 25.1.5 and 25.2.3 of the proposed Articles read**

"25.1 A notice may be given by the Company to any Member :

...

25.1.5 By publishing it on the Company's website."

"25.2 Any notice :

...

25.2.3 Published on the Company's website will be deemed to have been received by all Members Five (5) days after publication."

Neither of these two paras are acceptable as being a SUFFICIENT way to serve a notice on any Member of the company. These clauses need to be reworded so that these paras specify a REQUIREMENT.

IMHO, it is SUFFICIENT to use email as a means of notification, given that the Member being notified has explicitly agreed to accept email as a method of notification, and has an easy way (eg web interface) of notifying the Company of any change (either of email address or of method of notification).

We went through this argument at an earlier AGM (the one held at IS's Offices), and I am quite disappointed that the spirit of that outcome appears to have been lost.

### **Para 14.3.6 of the proposed Articles reads**

"14.3.6 The Board must, at least Sixty (60) days before the compulsory retirement of the chairperson or any Director :

o Notify the Minister in writing of the impending retirement; and  
o Simultaneously request the Minister to appoint a replacement"

In practical terms, sixty days is not enough for the appointment process. Once notification has arrived at the DoC, there is still the process of calling for nominations and the work of the selection panel, with the possibility of the Minister rejecting the panel's recommendations, thereby possibly requiring the cycle to run in full again.

Won't it be better to set a window for the date of the AGM (eg it must be in say Sep/Oct of each year), and then the notification to the Minister to be done say in February of each year with a request/understanding that the panel's work be completed by the end of June? Can this type of schedule be written into Articles of a company?

### **Para 3.3 of the proposed Articles reads:-**

"Membership of the Company will terminate :

...

3.3 On the occurrence of any event disqualifying a Member, under the Companies Act, from being the director of a company;"

Is it indeed intended that a MEMBER has to be qualified to be a DIRECTOR, even though that member is not a director and may well have no desire to become a director?

Surely 3.3 applies to DIRECTORSHIP of the Company, no MEMBERSHIP?

**Para 14.5.3 of the proposed Articles reads**

"14.5 Removal of Directors

...

14.5.3 If the Minister is of the opinion that this is in the interests of the Company, the Minister may, by notice in writing, remove any person from the office of Director"

I CANNOT EXPRESS MY OPPOSITION TO THIS PROPOSED PARA STRONGLY ENOUGH!!!!

If the Minister has, or acquires, the legal/lawful powers to act in this manner, then so be it, and there is then no need to have such a provision in the Articles.

I'm NOT going to go along with such powers being given voluntarily by the Members.

**Para 19.3 of the proposed Articles reads**

"19.3 At all Board meetings the quorum necessary for the transaction of business will be Five (5) Directors"

In terms of practicalities, and to encourage a wider geographic spread of nominations for the position of Directors, can this para be extended to allow explicitly for meetings to be held by remote interactive means, such as videoconferencing facilities? This will put far less demand on the time of Directors, whose time is surely in demand and precious to them and/or their employer. I understand that such mechanisms are quite effective, and that there is less absenteeism at meetings as a result.

Para 19.9 goes some way in this regard, but it does not allow that formal meetings be held this way, it allows only for discussions with subsequent ratification.

**Para 14.3.7 of the proposed Articles reads**

"14.3.7 Despite anything to the contrary contained in these articles, no Director or chairperson will be obliged to retire compulsorily in terms of the preceding provisions of this article 14.3, unless the Minister has, prior to the AGM in question, appointed a replacement in the manner stipulated in the ECT Act. Accordingly, if the Minister has not appointed a replacement, a vacancy (as contemplated in article 14.2) due to retirement will arise at the relevant AGM only if a Director retires voluntarily."

Clearly, this is aimed at dealing with the situation where the appointment process has taken longer than anticipated, which could well happen with the best will in the world. Under such conditions, the selection process would have started, but there might not be any vacancies

because the deadline of the AGM won't have been met and there are no voluntary retirements. So the Minister cannot make an appointment, in terms of the proposed Articles.

This strikes me as either being a usurping of Ministerial powers, or a re-writing of parts of the ECT Act, which surely is not a Good Idea.

There is also the possibility of a complexity arising if the compulsory retirements of two directors (which is now not obligatory due to delays in the appointment process) causes the four year term of 14.3.2 to be extended. Put another way, the Articles could result in a situation that conflicts with the Articles, even if the chances are relatively small. This should be avoided.

**Para 10.7.1 of the proposed Articles seems to somewhat impractical, and severely limiting. It reads**

"10.7 Should any Member wish to propose a resolution for adoption at an AGM or other general meeting of the Company, then :

"10.7.1 In the case of a resolution for an AGM, or a special resolution, that proposed resolution must be delivered in writing to the Office at least Thirty-five (35) days before the date set for the AGM or special general meeting"

In terms of 10.1, the date of the AGM can be notified to members only 21 days before the AGM itself. So, a member who wishes to propose a resolution for adoption at an AGM must anticipate/guess what the AGM date is going to be, or the 35-day condition imposed by 10.7.1 will not be met.

I'm not up on general company practices, and this sort of conflict might well be acceptable in general. However, the ZA DNA is in a what can well be described as a fast-moving field, and it may well have to adapt very quickly to changing conditions. So, I'm not the least bit happy with the deadlines.

Such deadlines might well be different if the ZA DNA had pre- determined dates for AGMs, at least within a known window of dates.

But this is not practical, given the cumbersome way that Directors are appointed.

The deadline of 28 days for the submission of resolutions for a General Meeting seems to me to suffer from the same problem as for a submission for an AGM.

IMHO opinion, what is needed is for a member to have enough time to submit a proposal for consideration at the AGM (and possibly other meetings as well??) within a reasonable time after the date of the AGM being notified to the membership.

**Para 2.4 of the proposed Articles reads**

"2.4 The Members of the Company will be entitled to co-opt and appoint any natural or juristic person as a Member of the Company, or create a new class of Members, if the Members believe that person or class will assist the Company in achieving its Main Object"

This is not consistent with para 2.6, which includes the words "in general meeting".

I would like to see consistency between these two paras, they both deal with membership issues.

**Para 14.3.3 of the proposed Articles reads**

"14.3.3 At every AGM of the Company, Two (2) of the Directors must retire."

The concept is fine, but the reality is quite different. The practicalities relating to the ECT Act is not going to make it easy for this to happen, and we may well end up with the situation as at the 2007 AGM, when the appointment of the Directors was challenged. It may well be that a formal legal challenge might succeed. So, the Articles should be written to minimise the chances of a challenge.

So, surely the appointment process must take into account the realities and practicalities of precisely how directors are appointed? Quite how this is to happen is not clear to me at all. But what is clear is that the Articles and the ECT Act must dovetail, or serious trouble could well arise.

For example, in the appointment of the current Board, it may well have happened that the Minister might have exercised her right to reject the recommendation of the selection panel, in which case the process might well have dragged on for another month or more, with re-advertising, interviewing etc. So, if the appointment has to co- incide with an AGM, then the date of the AGM can be set only once the Minister has accepted the recommendations of the selection panel.

This alone is not a nice complexity, particularly wrt deadline dates for the submissions of resolutions by members.

Additional complications are that the Minister must activate the appointment process every year (ie the selection panel process), there must be some kind of synchronisation with the date of the AGM.

Also, should it not be made clear whether the appointments are to be made effective before/during/after the AGM in question?

**Para 23.3 of the proposed Articles reads**

"23.3 If the CEO is for any reason unable to perform his/her functions (whether because of temporary incapacity, or because his/her employment has terminated, or otherwise), the Board must designate an employee in the service of the Company as acting CEO until the CEO is able to resume or take up office."

This will lead to problems if, say, there is only a CEO and a cleaner on the staff of the ZADNA. When the CEO is out of action, then the cleaner must become the designated CEO. That's not acceptable.

There should be a provision for such a designation to be subject to, say, the approval of the Chair or, if there is one, a staffing committee. There should also be a provision for a temporary appointment of an acting CEO from outside of the Company if there is no one suitable from within the Company. It could well be that there is a lengthy vacancy while, say, a new CEO is being appointed following a resignation or a hit by the proverbial bus, and it won't be in the interests of domain administration in ZA-land for this to happen.

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