



## 9 TIPS FOR BOARD MINUTES

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Minutes of directors' meetings are critical in protecting the directors and managers of a company from claims that they have not properly discharged their duties. There can be serious reputational damage and fines if the minutes are wrong. Litigation & Insolvency Partner, Sarah Davies, has 9 tips for ensuring board minutes serve their purpose.

### 1. PREPARE MINUTES PROMPTLY

Ensure the minutes are prepared as soon as possible after the meeting. The Courts have taken the view that if a minute is to be given evidentiary value, it ought to be a contemporaneous document, for then it is more likely to be an accurate reflection of the proceedings of the meeting than a reconstruction of them.

### 2. INCLUDE ENOUGH DETAIL, BUT NOT TOO MUCH

There is plenty of debate about the amount of information that should be included in the minutes. Some narrative form minutes will contain details of the issues under consideration and the deliberations of the directors in arriving at a decision. The rationale is that the minutes will be useful in proving that proper consideration was given to the issues if the directors need to rely on the business judgment rule.

On the other hand, many directors will be concerned that the minutes might be read by a regulator (ASIC, APRA or the ATO) or that they might need to be disclosed to another party in litigation. In those circumstances, the more detail contained in the minutes, the more scope for cross examination of the directors. It is a matter for each board to determine how much detail is appropriate.

Whatever approach is adopted, it is desirable that the minutes omit extraneous material and that they do not record every aspect of the discussion in relation to a matter. For example, they should not record the individual comments of the directors or provide a transcript of what was said about an issue.

From a practical point of view, the minutes should record:

- The names of the directors in attendance at the meeting;
- other attendees at the meeting and the capacity in which they attended;
- the time each person joined and left the meeting if they are not there for the whole meeting; and
- the apologies received for the meeting

### 3. MAKE SURE THEY ARE EASY TO FOLLOW

Some of the techniques for making the minutes easier to follow are:

- . the minutes should reflect the order of the agenda and the board papers;
- . record important events as they occur at the meeting (such as people coming and going from the meeting);
- . consider noting the amount of time spent on each agenda item;
- . use the past tense and the active voice;
- . make sure action points and resolutions are given prominence in the document with bold headings, shading or tables; and
- . ensure action points, agenda items, resolutions and pages are sequentially numbered, as this not only aids the reader, but makes it more difficult to tamper with the minutes.

### 4. DOCUMENTS

Any documents tabled at the meeting on an agenda item should be identified in the minutes. This will ensure there is an accurate record of the material considered, but which did not form part of the board papers circulated to directors.

A complete copy of the board papers and documents tabled at the meeting should be kept with the minutes in the company's records or in electronic form in a centralised site.

### 5. CONFLICTS

At the start of the meeting, directors should be asked to declare any conflict they have in relation to agenda items, so that appropriate consideration can be given to the way in which the conflict is managed and whether or not the director ought to be allowed to vote. Any conflicts should be recorded in the minutes.

No matter whether the company is public or private, directors need to make disclosure of any material personal interest in accordance with section 191 of the Corporations Act.

### 6. RECORDING DISSENT AND ABSTENTIONS

There is a line of thought that, as decisions are made collectively by the Board, only the outcome of the vote on a resolution is recorded, not the individual votes of the directors. However, directors should be aware of the comments made by the Court in the James Hardie to the following effect:

- . Where the company's governance rules provide for decision by majority, the passing of a resolution depends on each of the directors casting a vote.
- . The procedures actually adopted must be such that each director who is entitled to vote and wishes to do so may communicate his or her vote and have it taken into account.
- . Value is often attached to collegiate conduct leading to consensual decision-making, with a chair saying, after discussion of a particular proposal. 'I think we are all agreed on that', intending thereby to indicate that the proposal has been approved by the votes of all present. Such practices are dangerous unless supplemented by appropriate formality, such as a show of hands to record the actual votes for and against a resolution.
- . The aim is for directors to consult together so that individual views can be expressed. However, the culmination of the process must be such that it's possible to record that each director, by a process of voting, either supports or opposes the resolution, or refrains from doing either.
- . It is the responsibility of each director to ensure that his or her opinion and vote is properly taken into account. Consents, dissents and abstentions should all be recorded in the minutes.
- . An abstention might be straight forward, for example where the director has a declared conflict, or it might require some explanation, such as where a director expresses the view that he or she does not have sufficient information to make an informed decision about the resolution.

## 7. ACTION ITEMS

A list of action items allows the Board to keep on top of the work arising out of the meeting and who has been delegated to perform that work.

Generally the items on the action list from the previous meeting are reviewed at the beginning of the next meeting, so that the minutes can record which items were completed and which items need to be carried over. The minutes should record what progress has been made in relation to any partly-completed action item, particularly if the Board has further discussion in relation to the item.

The action list will be an important checklist for management and directors in relation to work that needs to be completed for the next meeting.

## 8. REVIEW THE MINUTES

Best practice suggests that the minutes should be reviewed by each of the directors present at the meeting, before they are signed by the chairman and entered into the minute book.

If it is not possible to get each of the directors to review the minutes prior to them being signed, then their approval of the minutes should be sought at the next directors' meeting and any comments can be recorded, particularly if they believe the minutes are inaccurate.

The Court in the James Hardie case emphasized the importance of each director

reading the minutes properly before approving them.

## 9. SIGNING THE MINUTES

The Corporations Act requires minutes to be signed within a reasonable time after the meeting. It also requires resolutions to be recorded in the company's minute book within 1 month. In practical terms, the minutes should be signed at the same time as the resolutions are recorded.

Once the minutes are signed and recorded in the minute book, they are evidence of what happened at the directors' meeting unless someone can prove otherwise. That evidence can be important if questions are raised about what took place at a meeting or the directors need to defend their position.

A company has a duty under the Corporations Act to take reasonable precautions to prevent damage to or falsification of the minute book. The Board should ensure that any hard or soft copy of the minute book is adequately secured.

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