

## Board minutes: what to record, the business judgment rule

### Board structure

*The Corporations Act 2001* (ss 180 to 184) legislates the general duties of directors (and other officers) in relation to care and diligence, good faith, use of position, use of information and recklessness or intentional dishonesty.

The statutory business judgment rule (s 180 (2)) provides that directors and officers who make business judgments are taken to meet their statutory duty of care and diligence, if they:

- make the judgment in good faith for a proper purpose
- do not have a material personal interest in the subject matter of the judgment
- inform themselves about the subject matter of the judgment to the extent that they reasonably believe to be appropriate
- rationally believe that the judgment is in the best interests of the corporation.

It is considered **good governance** to have robust processes and procedures in place to:

- ensure that business judgments of directors and officers are made with full knowledge and understanding, and
- the minutes of directors' meetings adequately record the process followed in coming to that business decision, whether it be to take or not to take certain action.

The business judgment rule is intended to be a 'safe harbour' for directors. Directors' minutes must record that the resolution has been passed as the collective will of the board. The board acts as a collective, not as a group of individuals. It is good practice for the company secretary to educate directors about the importance of the minutes and how the business judgment rule operates in directors being able to rely on it.

This Guide sets out the issues to consider when developing the processes and procedures in drafting minutes in relation to the business judgment rule.

It is common practice for extraneous material such as discussion, lost amendments, unseconded motions and procedural motions not to be included in the minutes. For the benefit of the business judgment rule to be available, among other things, the minutes need to reflect that the directors have acted in good faith, for a proper purpose and in the absence of a material personal interest, and came to a rational decision which was reasonable for each of them to reach, in light of their own skills and experience and in light of circumstances known to the company at the time. It is an objective test. The minutes are the record of who was at the meeting, the matters under discussion, the decisions made and the material that was relied on to make decisions.

A 'happy medium' between pure minutes of resolution and minutes of narration is appropriate for contemporary corporate practice. Too much information can be as unhelpful as too little information. The information included in the minutes should be guided by the need for clarity.

Boards will ultimately make the decision as to their preferred mode of recording minutes and the extent to which additional information regarding board discussions is contained within them.

Set out below are the types of information that a company secretary may wish to consider for inclusion in the minutes to assist in demonstrating that directors have satisfied, and can rely upon, s 180(2). The types of information that may be included in the minutes depend on the circumstances and decision.

The minutes should rely on the board papers and not seek to repeat or paraphrase them. This principle will assist in ensuring the minutes are appropriately concise.

### Advice

- Noting any advice received from management in addition to that in the board paper.
- A record of any independent advice which is received on any aspects of the board's discussion under s 189 of the Corporations Act. Note: If there is a concern that legal professional privilege not be waived in relation to legal advice given to the board, legal advice should be sought in advance of the meeting and also in advance of the preparation of the minutes. The way the minutes are drafted needs to note any legal privilege that attaches to advice given to the board. It is unlikely the minutes themselves will be privileged.
- Any request for additional information or advice, before a decision is made (only applicable if a decision is deferred).

### Other information and issues

- Significant issues raised by the directors and how they were resolved.
- Significant aspects that were taken into consideration in relation to a matter.
- The alternatives considered, if any, and the reason why they were rejected.
- The impacts of a proposal.
- That appropriate questioning of management by the directors occurred.
- The reports included in the board papers or tabled at the meeting.
- Other documents tabled at or presentations made to the meeting, including whether any directors did not have access to the tabled document, and a note that a paper was circulated at short notice or a tabled document and/or presentation that was not included in the papers circulated to directors in advance of the meeting in the ordinary course.

### Formal matters and decision

- A declaration of any interests of a director or officer and whether it is a material personal interest and how the issue has been addressed — see also *Good Governance Guide: Issues to consider when developing a policy on disclosure of and voting on matters involving a director's material personal interests*.

- Any member of management and/or external adviser present at the meeting and the agenda items for which they were present.
- A resolution that describes the decision of the board, including any conditions of any approval and a clear statement as to how the board will be satisfied that conditions have been met.
- A record of any director's dissent or abstention from a resolution (if so requested).
- A record of any delegation of authority the board makes (see s 198D and s 190 Corporations Act).
- The actions decided — it is **good governance** that actions record what is to be done, by whom and by when. A separate action list is compiled and maintained that tracks the status and completion of actions — see also *Best practice action items list*.
- A reference to any paper or discussion on any carried-forward items, matters arising or outstanding issues.

When delegating authority or placing reliance on advice received by others, directors should consider the common law and statutory requirements and the limits on the extent to which a director may delegate authority or may rely upon the information obtained from an adviser (ss 189 and 190 of the Corporations Act).

### Board committees

It is **good governance** to ensure that the principles applying to the minutes of board meetings also apply to the minutes of meetings of board committees.

Further material and guidance on minute taking is available at:

- *Good Governance Guide – Issues to consider when recording and circulating minutes of directors' meetings*
- *Sample minutes*
- *Survey on the practice of minutes: report on results*
- ICSA The Governance Institute *Guidance note: Minute taking*
- *Joint statement on board minutes*