

Issues to consider when recording and circulating minutes of directors' meetings

Management and oversight

Under s 251A of the Corporations Act 2001, a company must keep minute books in which it records, within one month, the proceedings and resolutions of directors' meetings (including meetings of a committee of directors). The company must also ensure that the minutes of a directors' meeting are signed by the chair of the meeting (or the chair of the next meeting) within a reasonable time. If minutes are recorded and signed in this way, they are evidence of the proceedings and resolutions passed, unless the contrary is proved.

Recording minutes of directors' meetings

Importantly, minutes are a record of the meeting, not a report or transcript of the discussion or debate during the meeting or a record of an individual director's contribution. This level of detail is not required by law, would be inconsistent with the established practice of minute taking and may stifle healthy boardroom debate. The purpose of minutes is to accurately record the proceedings and resolutions of the meeting. The way in which they are prepared may also assist to establish that directors turned their minds sufficiently to the matters under consideration in the discharge of their duties, which are individual duties.

The Corporations Act (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.

Directors (but not officers) are personally liable for insolvent trading. They have a statutory duty to take action in a timely manner to prevent the company trading while it is insolvent or where there are reasonable grounds for suspecting that the company is insolvent or will become insolvent if the company incurs a particular debt (s 588G).

Section 588GA of the Corporations Act provides for a 'safe harbour' for directors from personal liability for insolvent trading if the company is undertaking a restructure outside formal insolvency. A director wishing to rely on the 'safe harbour' bears an evidential burden regarding certain matters including that as soon as they suspected that the company may become or is insolvent they developed one or more courses of action reasonably likely to lead to a better outcome for the company.

Similar requirements can be assumed under common law in other sectors or may be specified in regulation (for example, the governance standards applying to the responsible entities — directors — of charities registered with the Australian Charities and Not-for-Profits Commission (ACNC)).

Section 111L of the Corporation Act specifies the sections that have been 'switched off' for directors/responsible entities of ACNC registered charities and replaced by the ACNC Governance Standards.

It is important that the minutes of board meetings are drafted in such a way as to demonstrate that directors have undertaken adequate due diligence in the discharge of their duties by having turned their minds sufficiently to the matters under consideration. Board minutes should also include details of measures taken under the 'safe harbour' provisions of the Corporations Act to assist directors wishing to satisfy the evidential burden contained in s 588GA. This is particularly relevant during a period of crisis or other unusual circumstances.

However, board minutes record the resolutions of the board as a whole. The board acts as a collective, not as a group of individuals. For this reason, the minutes should not record the votes of individual directors. Each director, however, retains the right to have their dissent or abstention recorded in the minutes, should they wish to include such disclosure in the minutes. This may assist a director in relying on the business judgment

rule or other matters that give rise to a defence to explain and or justify at law why they either dissented or abstained on voting.

Abstaining will not necessarily be sufficient in a particular case for a director to discharge their duties.

A 'happy medium' between pure minutes of resolution and minutes of narration is appropriate for contemporary corporate practice: see *Good Governance Guide: Board minutes: what to record, the business judgment rule*.

In drafting minutes, the aim is to be clear and succinct, and to use plain English, with a view to capturing the board's decisions and material reasons for those decisions concisely and accurately and to record what actually happened at the meeting. Minutes should be written in such a way that someone who was not present at the meeting can follow the reasons supporting the decisions that were made.

Many company secretaries take handwritten notes of the meeting. While some company secretaries may type notes as the meeting progresses, this requires very efficient typing skills to ensure that they remain aware of the matters taking place at the meeting. The sound of typing may prove a distraction for board members and would usually require the consent of the chair.

Making audio or video recordings of board meetings is not recommended and may undermine free flowing discussion during the meeting. If such recordings are made, they should be destroyed following approval of the minutes.

Articulating the essence of the discussion takes time and experience. On average, a company secretary should allow approximately twice as long as the meeting time to draft the minutes. For example, in a large company where the meeting takes a day or more it can take more than two full days to draft the minutes. Taking into account a company secretary's other day-to-day responsibilities, minutes can take more than a week to prepare before they are ready to be circulated for review in accordance with the relevant review process. To have minutes for a large company ready in a week will require blocking out time to complete them.

It is not appropriate to alter minutes to deal with events that arise between the board meeting and the review of the minutes. The minutes are a contemporaneous record of what actually happened at the meeting. Any intervening events can be included as a note in the next board minutes under 'matters arising'. However, if they are facts of sufficient importance that impact on a decision made or the accuracy of the minutes, a note could be included in parenthesis, an addendum or appendix clearly marked as 'post meeting developments' and included in the minutes of the next meeting. See ICSA The Governance Institute *Guidance note: minute taking*.

Directors are subject to the same legal duties irrespective of whether the company is listed or not. While minutes of listed companies will contain resolutions specific to their listing obligations, the practice of drafting minutes should be consistent.

Board matters: When to resolve, ratify or note

It is considered **good governance** for a board charter to document the decisions that are reserved for the board of directors and the circumstances in which decisions must come to the board for ratification. There are certain operational, risk and compliance matters that boards may wish to be aware of or for which boards have oversight responsibilities that come to the board for discussion and information. These matters are noted. The board should have a clear understanding of:

- matters that require a decision by resolution of the board
- decisions that have been made that require ratification by the board
- matters that may require noting or a recommendation by the board.

Resolutions

Resolutions record the decisions that a board formally makes. Minutes should refer to such decisions as the board 'resolving' to take the relevant action, recognising the unitary nature of board decisions, which is why the

word 'resolved' is preferred to 'agreed'. Resolutions may be required by:

- corporations law or other legislation
- ASX requirements or other listing rules
- regulatory requirements
- the company's constitution
- board or committee charters
- other internal policies
- third parties in relation to transactions (for example, bank borrowings, the sale or purchase of a business).

'Wording: It was RESOLVED that Ms X, having consented to act, be appointed a director of the company effective.....

Ratification

It is **good governance** for boards to keep ratification of decisions to a minimum. It is better to plan ahead and seek the necessary delegation of authority to act in between board meetings. It should not be assumed that the board will ratify a decision.

Ratification by the board relates to the validation of *internal* decisions that have already been made which may bind the company *externally* vis a vis third parties, for example, in cases of emergency between board meetings. These decisions are most commonly taken by:

- the chair or another director
- a board committee
- the CEO
- another member of management.

The word ratified is preferred to the word confirmed.

Wording: The execution of the contract [insert details of the contract] by the CEO on [insert date of execution] was ratified.

Notes

Notes are the method used to make a brief statement or record in the minutes to record:

- how matters raised by the board have been addressed

- advice or representations made by management or advisers at a relevant meeting
- a change of arrangements, circumstances, situations or other interests
- any reports included in the board papers or tabled at the meeting
- any other documents tabled at the meeting
- any presentations made to the meeting
- any declarations of conflicts of interest
- any abstention from voting or dissent (if so requested).

Wording: It was noted that the CEO/CFO had certified to the board that all relevant information on the proposal had been presented to the board.

Notes frequently record the board's exercise of business judgment, its reliance on others and the due diligence steps it takes during decision-making.

See also *Good Governance Guide: Board minutes — what to record, the business judgment rule* and *Good Governance Guide: Board committees: reporting to the board*.

Entering the minutes in the minute book

Given the requirements under s 251A, it is **good governance** to develop and implement a process to facilitate the entering of the minutes into the minute book within one month of the meeting, in order to comply with legislative requirements and ensure that a recording of the directors' meeting is made while memory of the meeting is fresh.

It is also important to number the pages of the minutes for easy reference. A decision needs to be taken as to whether the pages will be continually consecutive, which can be useful from an audit perspective, as it ensures there are no duplicated page numbers, or whether they will be numbered consecutively per meeting. It is also good practice for the chair to sign, or initial, each page of the minutes, as well as signing the final page of the minutes (s 251A). Agenda items may also be numbered to assist in cross-referencing board papers; discussion during the board meeting itself and also to reduce the risk of minutes being altered. What is important is that the company can provide comfort that

the version of the minutes entered into the minute book is the correct record that has been signed by the chair without alteration to or deletion of the pages (s 1306(3)).

In most companies, the minutes of the previous board meeting are formally approved at the subsequent board meeting. However, in many companies, the board does not meet each month, but may meet less frequently or at other periods. These companies need to ensure that they have a process in place to satisfy the demands of the legislation when the next scheduled meeting is not within one month of the board meeting.

Circulating draft minutes of directors' meetings

The chair should agree with the board members, CEO and company secretary upon a procedure for circulating the draft minutes. Companies need to decide the approach most suitable to the requirements of the organisation.

It is **good governance** for the draft minutes to be circulated within a reasonable time of the meeting, as this will assist in meeting the one-month deadline for entering the minutes in the minute book.

At a minimum the draft minutes should be reviewed by the chair. Prior to the draft minutes being submitted to the chair for review, when relevant, advice of technical experts within management (such as in-house general counsel, CFO, chief risk officer, appointed actuary [as appropriate]) may be sought to ensure that the draft minutes appropriately capture relevant technical points and issues discussed at the meeting. The CEO may also review the minutes prior to them being submitted to the chair. If there are different views as to how the minutes record a particular matter, the company secretary should take these views to the chair for decision.

Once in receipt of the draft minutes, the chair should review them and note any amendments that may be required and communicate them to the company secretary within the time period agreed in the procedure. At this point the minutes become 'chair approved' minutes.

The process for circulating the draft minutes of the directors' meeting may include the following approaches:

- The draft minutes are circulated to all directors by email.
- An email is sent to directors to inform them that the draft minutes are available on the board portal for review and comment.
- The chair-approved minutes are circulated to all directors, and if approved by them they are entered in the minute book. If any changes of significance are suggested by one or more directors, a teleconference of directors may be convened to discuss the changes or, subject to chair approval of the suggested changes, the revised minutes are circulated to all directors.
- The draft minutes go to the chair for review, but not to all directors, and the chair-approved minutes are included in the board pack for finalisation and approval at the next meeting of directors. The chair approved minutes are entered in the minute book within one month. The minutes are generally formally approved at the next board meeting and any amendments to the minutes that have been entered into the minute book are resolved by resolution and this is noted in the minutes of the next board meeting. Once the minutes have been approved by the board, the final form in the minute book can be signed by the chair.
- If the next meeting is not within one month of the board meeting, the minutes as approved by the chair should be entered in the minute book.
- The minutes should always be approved at the next meeting if they have not previously been formally approved by the board.
- If the minutes are amended at the next board meeting, this should be reflected in the minutes of that meeting.
- Minutes may be stored electronically but must be capable of being reproduced in written form (s 1306(2)).
- The original minutes with the amendments noted should be retained to demonstrate compliance with s 251A and to avoid any suggestion of destruction of company records in contravention of ss 1306 or 1307 of the Corporations Act. The chair may strike through and initial minor amendments (such as names or dates) or the amendments may be recorded by resolution of the board. Any amendments should be dated.

When agreeing upon the procedure for circulating the minutes, consideration needs to be given to the fact that each draft of the minutes and comments on those minutes may be discoverable.

Where meetings of directors are held frequently (for example, where a company is in a takeover or defence situation), particular care should be taken to follow the protocol in relation to the recording and circulation of minutes and entering them in the minute book to deal with issues such as reliance on the business judgment rule or directors' and officers' indemnity insurance.

Signing minutes

Minutes are documents that are required to be kept and signed under the Corporations Act and may be kept and signed electronically in the same way as other documents under the Act. They are not required to be signed with a 'wet signature'.

To demonstrate compliance with section 251A (2), which requires minutes of meetings to be signed, the company should retain proof of the authorisation of the individual who signs the minutes to the affixing of their signature. While the authorisation could be oral, it is preferable that there is a written record of this, for example through an email from the chair authorising the affixing of their electronic signature to put the matter beyond doubt.

It may, as a matter of good governance, also be appropriate to ask the directors to pass a resolution noting and agreeing that the minutes will be (or have been) signed electronically. Consideration could be given to adopting this as a standing resolution.

See *Statement on electronic storage and execution of documents and electronic meetings*

Legal professional privilege

Boards will often consider a company's legal advice. Privilege is not usually lost by the board receiving the advice. However, it is important to exercise caution and judgment in determining the degree of detail of privileged information (if any) that is necessary to include in the minutes. In many cases, it may be appropriate to simply note that the board considered relevant legal advice when making a decision.

Any privileged information in the minutes should be clearly identified and ideally included in an appendix or attachment.

See *Joint statement on board minutes*.

If there is a concern about legal professional privilege in relation to documents or discussions in a board meeting, legal advice should be sought in advance of the meeting and also in advance of preparation of the minutes. Minutes must be carefully drafted to ensure that privilege is not waived. It is unlikely the minutes themselves will be privileged.

Document management and retention

Minutes should be the sole, permanent record of the meeting proceedings. Retaining notes may undermine the integrity of the minutes as the final record of the meeting. If draft minutes or handwritten notes are retained they will be discoverable in the same way as other documents and may be admissible in evidence as business records to prove the truth of matters recorded in them.

Companies should adopt and consistently apply a document management and retention policy. The policy should address what documents are required to be retained and in what format, and when they may be destroyed and should cover material in any board portal. The policy should address the status of draft minutes and handwritten notes. It should also consider the implications of the digital footprint created when minutes are drafted. It is good practice for the secretary's draft minutes and handwritten notes to be destroyed on a regular basis after the minutes have been approved by the board. Some companies may wish to consider seeking legal advice to ensure that the policy is consistent with obligations to preserve evidence for actual or likely legal proceedings. See *Joint statement on board minutes*.

Board committee minutes

Board committee meetings are also subject to s 251A and as such a company is required to record the minutes of board committee meetings within one month of a meeting. This may create timing issues if board committee meetings are not held every month or are held just prior to a board meeting. There are different

approaches to how board committees can conform to the legislative requirements as follows:

- The board committee meets, the minutes are prepared and draft minutes are circulated to all committee members for review. If the committee does not meet again before the board meeting, the draft minutes are included in the board pack with a memo noting that the chair of the committee is authorised to sign those minutes.
- The committee meets, the minutes are prepared and draft minutes are circulated to all committee members for review. At the next board meeting, the chair of the board committee speaks to the draft minutes, but they are not approved. The draft minutes are presented to the next board committee meeting for approval. The board committee may amend the draft minutes at its next meeting prior to approving them.
- The board committee meets just prior to the board meeting and the company secretary prepares a report of the meeting to present to the board. The board committee chair speaks to the report at the board meeting. The draft minutes are presented to the next board committee meeting for approval. The board committee may amend the draft minutes at its next meeting prior to approving them.

While board committee members are likely to express a preference for a particular approach, it is **good governance** for the protocol for the circulation and approval of board committee minutes to align with the protocol for the circulation and approval of the minutes of directors' meetings.

Access to minutes

Minutes are prepared as a company record. They are confidential and are not available for general inspection subject to any Court order or legal proceedings.

Minutes and documents referred to in them can demonstrate compliance with relevant regulatory requirements. In some regulated sectors, the regulator will request copies of board minutes. Minutes should not be drafted primarily with regulatory oversight in

mind. Regulators may be suspicious of minutes which appear to have been written this way. See ICSA: The Governance Institute, *Guidance Note: Minute Taking*.

Auditors often request to see board minutes as part of their audit inspection. Some companies allow this, others only allow the audit partner to read the minutes, and others will only allow them to see specific minutes or excerpts. It is **good governance** to have a procedure in place that deals with the request of auditors to access minutes that ensures the confidentiality of the minutes.

Where minutes refer to privileged advice, they should not be provided to third parties, without at first taking legal advice, because disclosure of the legal opinion might result in the loss of privilege. See *Joint statement on board minutes*.

Further material and guidance on minute taking is available at:

Good Governance Guide — Board minutes: what to record the business judgment rule

Template — minutes

Survey on the practice of minutes: report on results

ICSA The Governance Institute Guidance note: Minute taking

Joint statement on board minutes

Statement on electronic storage and execution of documents and electronic meetings