

Board minutes

Meeting effectiveness

Board minutes are used to record the decisions of the board. They are used to convey board decisions to the executives who will implement the decisions and serve as reference for the board if it wishes to revisit a decision. They are not a transcript of every word that was said during the meeting or a record of individual directors' contributions. However, they can be used as evidence in legal proceedings, and as such care must be taken with the preparation of the board minutes.

As official company records of directors' meetings, courts place weight on the contents of minutes. Minutes are increasingly being used in court to prove or disprove that directors have fulfilled their fiduciary duties. Well-taken minutes record corporate decisions, highlight director dissent where appropriate, reduce misunderstandings as to the board's intent in a matter and show compliance with legal duties and responsibilities. The James Hardie case was a stark reminder of the dangers of not keeping proper minutes of a directors' meeting (*ASIC v MacDonald (No 11)* (2009) NSWSC 287).

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Who takes the minutes?

In public companies, the company secretary is the usual minute taker. Most proprietary companies also have a company secretary (who is the usual minute taker), although proprietary companies are not required by law to have a company secretary. If a proprietary company does not have a company secretary, then it is common for a person from within the company to be asked to perform the minute taker function at a meeting. This may be a director of the company or may be the person that is generally responsible for maintaining the company registers and notifying ASIC of basic changes when required.

On occasion, an organisation might prefer to use an independent minute taker. The organisation may request that its solicitor or accountant attend the meeting to perform the minute taker function.

It is not advisable for the CEO or chair to take the minutes, as they should be participating in the meeting rather than creating a record of it.

What are the legal requirements for board minutes?

In order to fulfil their obligations under section 248G of the *Corporations Act 2001* (which is a replaceable rule) or an equivalent constitutional provision, directors individually must ensure, by a process of voting, that it is possible to determine whether they support, oppose or abstain from a particular resolution, which requires accurate minutes.

The board minutes should be approved by the directors as a true record of their meeting. This is best done between meetings via email and confirmed at the next meeting when the chair signs the minutes. The minutes are meant to be contemporaneous documents aimed at being a true and accurate reflection of the events occurring at the meeting and the statutory requirements outlined in section 251A of the *Corporations Act 2001* ('Act') are strictly applied by the courts:

(6) A minute that is so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved.

Importantly, in order to comply with the requirements of section 251A of the Act, minutes of all proceedings and resolutions of all board and committee meetings must be:

- Entered in the directors' minute book within one month after the relevant meeting; and
- Signed within a reasonable time after the meeting by the chair of that meeting, or of a succeeding meeting.

Once the minutes are signed, only clerical errors can be amended. To make corrections, directors have to pass a resolution at a future meeting. They can also rescind previous resolutions in a similar way if they no longer believe them to be the best decisions.

With respect to signing the minutes, it should be noted that electronic signatures have been recognised in Australian law under the *Electronic Transactions Act 1999* (Cth) (and similar state and territory legislation) provided certain requirements are met. These provisions do not apply to the Act, as such minutes must be signed in hard copy prior to storage.

After signing, the minutes should be kept as part of the company records. Section 1306 of the Act permits companies to prepare and store their books and registers including minute books in a 'mechanical, electronic and other device'.

However, the matters stored in the device must be able to be reproduced 'at any time' in a written form. Further, companies are required to take reasonable precautions to protect its records against damage and tampering.

Members have the right to inspect the minutes of general meetings, but not those of directors' meetings (s 251B). As such, it is highly recommended that the minutes of general meetings and board meetings be stored separately.

Do minutes have to be in English?

There are no requirements under the Act that board minutes be taken in English. However, as a matter of good practice, recording minutes in English will assist auditors in their work and save on delays if the minutes are requisitioned in a court action. Future directors of the organisation who do not speak the language in question will more readily understand where the organisation has been in the previous years.

Should directors make their own notes of board meetings?

There is no legal obligation on directors to take personal notes. The responsibility for record keeping lies solely with the organisation. It is unlikely that a court would view the absence of a director's notes as a sign that a director has not fulfilled his/her duties.

Like minutes, directors' notes can be requisitioned as evidence in court. This might be helpful if the notes show that the director has adequately informed him/herself, questioned appropriately and used proper care and diligence. However, taking notes can create risk – ambiguous, inconsistent or incomplete records can be used against a director.

Boards have a responsibility to properly evaluate the minutes circulated after meetings. Directors may want to take notes during the meeting to refresh their memory when the minutes are circulated. They should request additions, clarifications or corrections where necessary. After the minutes are signed, there is no real reason to retain any notes.

What goes into minutes?

The level of detail included in the minutes will vary from company to company.

General inclusions would be:

- Name of the company
- Nature and type of meeting, for example, directors' meetings, committee meeting etc.
- Place, date and starting time
- Name of the chair
- Attendees, either physically or by remote access. Invited guests should be separated from usual attendees
- Apologies accepted
- Presence of a quorum
- Minutes of the previous meeting
- Materials distributed before and during the meeting
- Proceedings of the meeting and resolutions made. To make cross referencing easier, resolutions should be numbered. Note that listed companies have additional requirements relating to proxy voting (s 251AA)
- When attendees leave and re-enter the room
- Abstentions from voting, for example, due to conflicts of interest
- Closing time
- Signature of the chair.

With the focus on accountability in the current regulatory and corporate governance environment, some commentators suggest as advisable the inclusion of broad reasons for decisions in the minutes. A brief outline of factors material to the decision, any dissenting views and the amount of time spent on discussion may help to establish that directors have exercised proper care and diligence in their decision making. Recording the length of time spent on a discussion can denote the relative importance of a matter to a board meeting, reinforcing that directors have given it due consideration.

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Minutes can be used for a director's defence in court. However, poorly taken minutes may also be used against a director by regulators or the opposing party.

Matters which should not be included in the minutes are:

- individual speeches or arguments;
- admissions of liability.

Keep to a minimum disclosure of legal advice, which is generally subject to legal professional privilege. Minutes can briefly state that a matter subject to professional privilege was discussed but not go into detail.

A set of sample minutes for a fictitious company is provided on page 5.

Should there be minutes of ‘in camera’ meetings?

Sometimes boards may want to meet without management present. Perhaps one or more directors may need to absent themselves from discussion of a matter due to conflicts of interest or duty. In these examples, the meetings could be said to be held in camera.

Whether there should be minutes of an in camera meeting is up to the individual board. Some organisations allow their minutes to say that an in camera meeting took place but don’t share any further information. Other organisations may be fuller in their descriptions.

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Whether the minute taker should be present will depend on the individual organisation and the situation. If the board wants to meet without management and the company secretary is a board appointee, which is typical in Australia, then they can probably stay. The chair will be instrumental in this decision.

Points to consider

- The constitution may specify items and processes that should be recorded in minutes, such as proposers and seconders for motions.
- Each decision made by the board should be clear to anyone reading the minutes, including those who did not attend the meeting.
- Ensure that the key points of the board’s discussion have been recorded so that these can be reviewed quickly if the topic is revisited.
- Ensure that any items requiring implementation or more information are easy to identify. Some companies highlight them in bold type while others create a separate table of actions or ‘matters arising’ from each meeting (see sample action list).
- If there are many items for ‘noting’ or ‘information’, it may be more convenient and efficient to group these together and list them as ‘noted’ or ‘taken as read’ in the minutes.
- The board should receive progress reports on the implementation of decisions.
- The minutes should record who was present and, if anyone was present for only part of the meeting, either the time of their entry and exit or the agenda items that were discussed when they were in the room.
- Any conflicts of interest should be noted with a record of how they were handled.
 - Was the level of discussion appropriate to the seriousness of each item under consideration? This can be shown either by noting the start time for each agenda item or by using phrases such as ‘debated at length’ or ‘discussed in depth’.
- Some issues may require discussion at more than one meeting. Items that will be revisited by the board should be clearly identified and include a time for subsequent discussions.
- Remember that, in the worst case scenario, board minutes may be used in court to indicate what board members knew and authorised.

A sample of board minutes

Item	Action
Minutes of a Meeting of the Board of Company X	
Date and time	
Location	
<p>Present: A Director, Chair</p> <ul style="list-style-type: none"> B Director, Non-executive Director C Director, Non-executive Director D Participant, CEO E Participant, Chief Financial Officer F Participant, Company Secretary G Participant, Safety Auditor (Safety Audit Presentation only) 	
Apologies: H Director, Non-executive Director (overseas)	
<p>Opening and Attendance</p> <p>A quorum was present and the meeting opened at 10.05am.</p> <p>An apology was noted from H Director.</p>	
<p>Declaration of Interests</p> <p><i>Conflicts of interest:</i> A Director informed the board that B Director had called him upon receipt of the board papers because G Participant was the brother of his son-in-law. The board discussed the potential conflict and resolved that, as B Director had not been involved in the hiring decision and as the safety audit was now complete, B Director would be invited to participate in the discussion of item 6 but not in any decisions arising from it.</p>	
<p>Minutes of Previous Meeting</p> <p>Resolved: That the minutes of the previous meeting, previously circulated by email, be signed as a true record of that meeting.</p>	
<p>Matters Arising</p> <p>The board noted that all matters arising were either complete, not yet due or covered in the meeting agenda. The board noted the use of external contractors to undertake many of the items and requested a report on projected contracting spend and the possible lack of intellectual property within the company on safety standards and auditing.</p>	<p>Action: HR Manager/Company Secretary to draft report on IP and contracting.</p> <p>Due: One week before the July meeting for inclusion in the board papers.</p>
<p>Matters for Decision</p> <p>There were no matters for decision.</p>	

Item	Action
<p>CEO Report</p> <p>The CEO reported that the company was still LTI [Lost Time Injuries Frequency Rate] free and that there were plans to celebrate this with supervisors next month as we have now reached a two year milestone. All staff will get a ‘two safe years’ commemorative mug.</p> <p>The new HR Manager is settling well into her role and has started a review of employee retention practices as well as the development of a recruitment strategy.</p> <p>The rest of the report was taken as read. The board noted the excellent result in customer satisfaction rating and the changes proposed to the intellectual property clauses of contracts to safeguard ownership of IP. The board requested that the engineering manager provide a report and presentation to the board on the recent drop in tender responses.</p>	<p>Action: Engineering Manager to provide report and presentation to board on tender responses</p> <p>Due: One week before the August meeting for inclusion in the board papers.</p>
<p>Finance Report</p> <p>The board noted the impact of urgent repairs and asbestos removal from head office on the expected profit at year end. The effect of this on the allocation of resources to the growth projects was discussed in depth. The CFO was congratulated on the drop in working capital which has been achieved through better credit controls and a targeted plan of personal attention to overdue debtors with cash on delivery requested for recalcitrant cases.</p>	
<p>Safety Audit Presentation</p> <p>G Participant joined the meeting. The board discussed the results of the safety audit. It was resolved to conduct an additional review of the safety culture in six months’ time and to authorise unbudgeted expenditure on the recommended training programs. G Participant left the meeting.</p>	
<p>General Business</p> <p>There were no items of general business.</p>	
<p>Next Meeting</p> <p>The next meeting of the Company X Board of Directors will be held on [date] at [time] at [address].</p>	
<p>Close</p> <p>The meeting closed at 13.10pm.</p>	

A sample action list

Matters arising from a meeting of the board of Company X

Date and time

Location

Reference	Item/Action	Person Responsible	Due Date
2016-5-27-3	HR Manager and Company Secretary draft report on IP and contracting	HR Manager and Company Secretary	15-7-16
2016-5-27-4	Engineering Manager to provide report and presentation to the board on tender responses	Engineering Manager	16-8-16
2016-5-27-6	Commission a safety culture survey	Company Secretary	15-8-16

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