

BOARD

Board minutes

Board minutes are a record of board decisions and the process, or proceedings, by which those decisions have been made. 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 evidentiary weight on the contents of minutes. Minutes are increasingly being used in court to help 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).

This director tool offers general practical guidance on the purpose, form and function of board minutes. For a more detailed consideration, the Australian Institute of Company Directors and the Governance Institute of Australia issued a joint statement on board minutes in August 2019.¹ This collaborative statement aims to guide the current debate on this topic and outlines key principles, provides consideration on matters to be included in minutes and considers the approach to board papers and document retention policies.

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 position 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 chair or CEO to take the minutes, as they should be participating in the meeting rather than creating a record of it.

1. Australian Institute of Company Directors and Governance Institute of Australia, 2019, *Joint statement on board minutes*, August, <https://aicd.companydirectors.com.au/-/media/cd2/resources/advocacy/research/2019/pdf/govinst-aicd-minutes-project-july-2019-final-v2.ashx>, (accessed 9 August 2019).

What are the legal requirements for board minutes?

Section 251A of the *Corporations Act 2001* (Cth) (the Act) requires minutes of all proceedings and resolutions of all board and committee meetings to 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.

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 minutes that are recorded and signed in accordance with s 251A are evidence of the proceeding or resolution to which they relate, unless the contrary is proved.

Typically, minutes should not record the votes of individual directors. Each director is, however, required to actively support or oppose a resolution, or expressly abstain from supporting or opposing it and it is advisable for board minutes to include any votes by directors against or abstaining. Minutes should record the reason the majority of directors were in favour of the decision notwithstanding dissenting views.

Once the minutes are signed, only clerical errors can be amended. To make more substantive changes to what was decided, 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. However these provisions do not apply to the Act and, currently, the law is unclear concerning the use of wet versus electronic signatures for minutes. This question is particularly challenging in an environment that has restrictions on gatherings. However, when coupled with the requirement to keep a minute book, a prudent board may take a conservative position and ensure that:

- physical minutes are kept in accordance with the Act;
- the minutes are physically (wet) signed in accordance with the Act;
- the signed physical minute books are kept in accordance with s 251A of the Act; and

- where the next meeting, which affirms the minutes, is held more than one month after the meeting and no processes exist to have the minutes approved and signed within the one month period, the draft minutes are kept in the books until the approved and signed minutes can replace the draft minutes.

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 of the Act). 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. Ideally, minutes should be the sole, permanent record of the meeting proceedings".

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.

Directors 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.

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.

Should digital voice recordings of board meetings be made?

While in special cases there may be practical reasons why digital recordings of board meetings may be made, overall it is not good practice. There are numerous downsides to this practice. Foremost is the impact of having a meeting recorded is that directors and managers will not feel free to express themselves frankly, which will impact decision making. Recording meetings could also result in important discussions among directors taking place 'offline' rather than in the boardroom.

The existence of digital recordings—whether audio or visual—also leaves the board and company open to reputational damage should the recordings be leaked. This is not merely a hypothetical situation, as a video of a heated 2014 board meeting of the collapsed satellite communications company NewSat Limited did become public in 2015.

While a digital recording of a meeting may be produced, the minutes of the meeting are still the formal legal record of that meeting and of any decisions taken. Once the minutes are approved, the board's policy should be that company secretary destroy any notes and digital recordings of the board meeting. The final approved minutes should be the only record of proceedings distributed and kept.

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, e.g. 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;
- Notification of any conflicts of interest
- 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.

It is also advisable to include the key points of discussion and the broad reasons for decisions in the minutes. This may help to establish that directors have exercised their powers and discharged their duties to act with care and diligence and in good faith, for a proper purpose and in the best interests of the company. In many cases, a well written board paper will complement the minutes, and can often demonstrate the reason a decision has been taken with little, if any, further elaboration required in the minutes. It is appropriate for board minutes to refer to, without repeating, the contents of board papers and other supporting documents.

While it is a matter for judgment in each case, minutes should typically record significant issues raised with management by directors and the responses received or action promised. It is neither necessary nor desirable to record every question put and every response received. It will normally be sufficient to record the thrust of significant issues raised in non-emotive and impartial language.

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. It is important to exercise caution and judgment in determining the degree of detail of any 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 be included in an appendix or attachment. Legal advice should be sought where necessary.

It should also be remembered that the board papers for the meeting are part of the record of the meeting. They should be kept in the same manner as the minutes are kept and form part of the record of the meeting.

Good board practice is for the draft resolution for each item on the agenda to be included in the board paper on that item. In this way directors know what will be entered into the minutes as the resolution should they agree with the recommendation of the paper writer. It also assists both the chair and the company secretary in the conduct of the meeting.

An example set of board minutes is provided below.

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.

If formal actions come out of this meeting, then it would be advisable to document them so that outcomes can be tracked in subsequent meetings.

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. Generally, unless required by the constitution or company policies, movers and seconders are not required.
- 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 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.
- There is a prima facie presumption that the minutes accurately record what happened at the meeting. Directors have a responsibility to properly evaluate the draft minutes circulated after meetings and should request additions, clarifications or corrections where necessary. It is critical that each director actively review the minutes, and that the process of finalising and approving the minutes is managed rigorously by the chair. If the minutes are silent on an issue, a court may adopt a degree of scepticism as to whether the matter was indeed considered by the board.

AN EXAMPLE SET OF BOARD MINUTES

Minutes of a Meeting of the Board of Company X

Date and time:

Location:

Present:

- A Director, Chair
- 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 (item 6 only)

Apologies: H Director, Non-executive Director (overseas)

1. Opening and Attendance

A quorum was present and the meeting opened at 10.05 am. An apology was noted from H Director.

2. Declaration of Interests

2a) **Conflicts of interest:** 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.

3. Minutes of Previous Meeting

Resolution: The board resolved that the minutes of the previous meeting, previously circulated by email and contained in the board papers, be signed as a true record of that meeting

4. Matters Arising

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.

Action: HR Manager/Company Secretary to draft report on IP and contracting

Due: One week before the July meeting for inclusion in the board papers

AN EXAMPLE SET OF BOARD MINUTES *continued***5. Matters for Decision**

The board discussed the proposal to acquire a new laser punch from the Italian XYZ Corporation. The board noted the paper put forward from the CEO in relation to this purchase. In addition to the points set out in the paper board members raised issues concerning:

- The financing of the purchase.
- The provision of FX hedging for the purchase.
- The future demand for the components produced by the machine.
- The warranty and service requirements for the new equipment.
- The training requirements for machine operators.
- The WHS risks inherent in the machine design and how these risks have been treated.
- The impact of the disruption while the equipment is being installed.

After extensive discussion the board made the following resolution.

Resolution: The board resolved to approve the purchase of the Model SD 271-9 Laser Punch from XYZ SpA in accordance with the terms and conditions set out in the board paper on this decision. The board further resolved that the currency risk of the acquisition be hedged.

Action: An update concerning progress with the purchase and installation be included in the August board papers.

6. CEO Report

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.

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.

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.

Resolution: The board noted the CEO's report

Action: Engineering Manager to provide report and presentation to board on tender responses

Due: One week before the August meeting for inclusion in the board papers

7. Finance Report

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.

Resolution: The board noted the CFO's report

AN EXAMPLE SET OF BOARD MINUTES *continued***8. Safety Audit Presentation**

G Participant joined the meeting. A paper on the safety audit had been included in the board papers. The board discussed the results of the safety audit. B Director asked whether the additional training programs identified in the safety audit were industry best practice. G Participant advised that they were fully certified by the regulator. 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.

Resolution: The board noted the safety audit report. The board authorised the expenditure of \$x on the recommended training programs in the safety report.

Action: An additional review of the safety culture be reported at the September meeting of the board.

Due: One week before the September meeting for inclusion in the board papers

9. General Business

There were no items of general business.

10. CEO Report

The next meeting of the Company X Board of Directors will be held on [date] at [time] at [address].

11. Close

The meeting closed at 13.10 pm.

AN EXAMPLE ACTION LIST

Matters arising from a meeting of the board of Company X

Date and time:

Location:

REFERENCE	ITEM/ACTION	PERSON RESPONSIBLE	DUE DATE
2019-5-27-3	HR Manager and Company Secretary draft report on IP and contracting	HR Manager and Company Secretary	15-7-19
2019-5-27-4	Engineering Manager to provide report and presentation to the board on tender responses	Engineering Manager	16-8-19
2019-5-27-5	A report on the acquisition and installation of the laser punch be included in the August board papers	Engineering Manager	16-8-19
2019-5-27-6	Commission a safety culture survey	Company Secretary	15-9-19

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For more information **t:** 1300 739 119 **w:** aicd.com.au

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