Joint Opinion

Minutes of directors' meetings

Dominique Hogan-Doran SC

Douglas Gration

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Minutes of directors' meetings

1. In 2019, we were briefed by the Australian Institute of Company Directors and the Governance Institute of Australia to give an opinion on the following questions concerning the law relating to minutes of directors' meetings:

   (a) What is required to be included in board minutes to satisfy a company's legal obligations and what is the purpose of board minutes?

   (b) What other matters should be included in board minutes? Should reasons for decisions be minuted? What should be included in minutes to assist directors in taking advantage of, for example, the business judgment rule?

   (c) What obligations do a company and its officers have to retain draft minutes and handwritten or other notes of board meetings? What is the evidentiary status of such documents if retained?

   (d) How should a company record amendments to draft minutes or to minutes that have been entered in the minute book before they have been considered and approved by the following meeting of the board?

   (e) How should minutes record challenges to management by a board or dissent between directors on a board?

   (f) To what extent can minutes refer to and not repeat the contents of board papers and other supporting documents?

   (g) What steps should be taken to protect legal professional privilege when preparing minutes?

2. In 2025, we were asked to update our original opinion to reflect developments in the law since 2019. We have also been asked to advise on issues with respect to minutes arising out of:

   (a) the adoption by many companies of virtual or hybrid (in person and virtual attendance) board meetings; and

   (b) the use of artificial intelligence (AI) technology in the preparation of board minutes.

3. Throughout this opinion, references to board minutes should be taken to include board committee minutes.

Legal requirements of the Corporations Act with respect to minutes

4. Section 251A(1) of the *Corporations Act 2001* (Cth) provides that a company must keep minute books in which it records within one month:

   (a) proceedings and resolutions of meetings of the company's members;

   (b) proceedings and resolutions of directors' meetings (including meetings of a committee of directors);

   (c) resolutions passed by members without a meeting;

   (d) resolutions passed by directors without a meeting; and

   (e) if the company is a proprietary company with only one director — the making of declarations by the director.

5. Section 251A(2) further provides that the company must ensure that minutes of a meeting are signed within a reasonable time after the meeting by one of the following:

   (a) the chair of the meeting; or

   (b) the chair of the next meeting.

6. The minute books must be kept at either the company's registered office, its principal place of business (provided it is within Australia), or at any other place (within Australia) as approved by ASIC: section 251A(5).

7. The following key observations can be made about the operation and effect of these statutory obligations.

8. Breach of any of the obligations in section 251A is an offence of strict liability: section 251A(5A). For strict liability, the prosecution is not required to prove fault, but there is a defence of reasonable mistake available. Fault liability (involving the proof of 'mens rea') is one of the most fundamental protections of criminal law. To exclude this protection is a serious matter, but strict liability can be regarded as appropriate where it is necessary to ensure the integrity of a regulatory regime.

9. Section 251A does not mandate that final minutes be prepared *and* signed within one month. Rather, whilst a record of the proceedings and resolutions must be prepared and retained by the company within the statutory period, the signing need not occur within that period. It can take place outside the statutory period, provided it occurs within a reasonable time of the meeting, thus allowing for a company whose board meets every two months, or for those that do not meet in January, and so on. What is a 'reasonable' time after a meeting will be a question of fact to be determined in the circumstances of the company.

10. Section 251A(6) is an evidentiary provision which facilitates the proof of facts in issue in a proceeding. It provides that a minute so recorded and signed is evidence of the proceeding or resolution to which it relates, unless the contrary is proved. If the threshold is met (ie, the minute is kept within one month, and signed within a reasonable time), this evidentiary presumption operates to shift the onus on to the company (and its directors) to prove that the contents of the document are not accurate.

11. Taken together, section 251A and a series of other provisions make clear that company records, including board minutes, may be used in regulatory investigations or in Court, and can be crucial to any finding that a company, its directors and/or other officers, have breached or complied with their legal obligations.

12. Books required to be kept by the Corporations Act may be kept in hard copy or electronically, so long as they are capable of being reproduced in written form. Companies must take all reasonable precautions for guarding against damage, destruction or falsification of, and for discovery of falsification of, any book or part of a book required to be kept.

13. Section 253S of the Corporations Act, which came into effect in 2021, specifically provides that minutes may be recorded in electronic form if it is reasonable to expect that the minutes will be readily accessible for subsequent reference and the method of generating the electronic record provided a reliable means of assuring the maintenance of the integrity of the minutes. There are no reported cases considering the operation of section 253S to date.

14. Section 1305 of the Corporations Act provides that a book kept by a company under a requirement of the Corporations Act is admissible in evidence in legal proceedings and prima facie evidence of any matter stated or recorded in the book. However, minutes which have not been kept and entered strictly in accordance with the requirements of section 251A(6) do not attract the benefit of section 1305.[1]

15. Section 1307 of the Corporations Act provides that conduct resulting in the falsification of books relating to the affairs of the company, which includes minutes of board meetings, is an offence, and sections 1308(2) and 1308(4) provide that it is an offence for a person to make or authorise the making of a statement that they know is false or misleading in a document required to be kept.

The purpose of minutes

16. Minutes record the decisions, or resolutions, made by a board and the process, or proceedings, by which those decisions have been made. We concur with the statement of

[1] See *Mualim v Dzelme* (2021) 157 ACSR 367 at [138] – [142] and the cases there cited

the UK counterpart of Governance Institute that "*[t]he purpose of minutes is to provide an accurate, impartial and balanced internal record of the business transacted at a meeting*".[2]

17. The minutes may be the best, and sometimes only, evidence that directors have complied with their duties in respect of the decisions that they have taken and in their general oversight of the company. As long ago as 1893 in Australia, Hood J observed in *R v Staples* (1893) 19 VLR 47 at 50-51:

> *As directors may wish to rely on the minutes of a meeting to demonstrate the proper fulfilment of their duties, they should seek to ensure that everything they do in their capacity as directors is accurately recorded.*

18. The Courts and the legislature have accorded evidentiary weight to minutes because they are usually prepared soon after the relevant meeting by a person who has no reason to record anything other than what occurred at the meeting.

19. Sackville J said in *Seven Network Ltd v News Ltd* [2007] FCA 1062; [2007] ATPR (Digest) 46-274 at [376]:

> *The minutes of a meeting or an email summarising a recent conversation, particularly where the documents are prepared by someone with no obvious axe to grind, often will provide the 'ounce of intrinsic merit or demerit' that is worth pounds of fallible evidence derived from memories prone to distortion and reconstruction.*

20. To similar effect, the High Court said in *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) 247 CLR 345 (the James Hardie case):

> *[74] Witnesses who gave evidence at trial of what had happened at the meeting described conversations and events that had taken place many years earlier. The record of events at the February board meeting that was made closest to their occurrence was the minutes as they were adopted at the April board meeting. …*
>
> *…*
>
> *[138] … the minutes were more than just one of several pieces of evidence from whose united force ASIC sought to have the tribunal of fact draw an inference. The minutes were a formal and near contemporaneous record (adopted by the board as an accurate record) of the proceedings at the meeting. The minutes were evidence of what they represented. They were more than a foundation for some further inference. Absent evidence to the contrary, ASIC proved its case by tendering the minutes …*

[2] ICSA: The Governance Institute, Guidance Note: Minute Taking, September 2016 at p7

Content of minutes

21. Minutes may be the *only* evidence before a court of what occurred at a meeting, because the directors or others present are not called to give evidence.

22. Certain limitations may arise in that context. Courts may consider the content of the minutes deficient, for example by failing to avert to why a decision was made. For example, in *ING Funds Management v ANZ Nominees Ltd* [2009] NSWSC 243; (2009) FLR 444, Barrett J observed:

> *[90] While there can in some cases be difficulty in discovering the state of mind of a corporation or other body … this case has been presented in such a way that regard can only be had to inferences available from documentary evidence, including the minutes of the relevant meetings. With no witness having been called … to give evidence about relevant matters, those inferences, such as they may be, are all that the court has.*
>
> *…*
>
> *[139] The minutes of the board meeting do not show any basis or rationale for the recorded decision ... There is nothing to show what the directors took into account in making the recorded decision ... Nor is there, on the evidence, any discernible basis on which [the recorded decision] could have been decided ...*

23. Deficiency as to content may also prompt Courts to adopt a degree of scepticism when material events that have not been recorded in the minutes are said to nevertheless have occurred. In *Australian Securities and Investments Commission (ASIC) v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (Controllers appointed) (No 3)* [2013] FCA 1342, Murphy J said in relation to a claim that certain matters were discussed at a board meeting:

> *[276] The minutes contain no record that any of these matters were discussed. … I expect in the circumstances that if these matters were discussed the minutes would contain some note of it. … the upshot of the Directors' testimony that they discussed some of these matters must be that the minutes are deficient. … the Directors in approving [the minutes], were obligated to exercise a high standard of care. The absence of any record of any discussion of these important matters tends to show that they were not, or at best scantly, discussed.*

24. However, there are limits to the conclusions that a Court will draw if detailed records of board discussions are not kept. In *APRA v Kelaher* (2019) 138 ACSR 459 at [142], Jagot J (when her Honour was a judge of the Federal Court of Australia) said that "*minutes are not expected to be complete transcripts of words spoken at the meeting and nor do they need to record arguments for or against resolutions*". Her Honour said that "*it follows that the absence of in the minutes of a detailed record of discussion or consideration about matters*

before the board does not support the conclusion that such discussion or consideration did not occur".

25. There is surprisingly little guidance in case law as to the level of detail of the proceedings of board meetings required to be included in minutes. The most complete and oft cited summary is that of Justice Young in a 1991 case in the Supreme Court of New South Wales, *John J Starr (Real Estate) Pty Ltd v Robert Andrew (Australasia) Pty Ltd* (1991) 6 ACSR 63 at 88:

> *While there is no reported case exhaustively defining what should go into company minutes, the textbooks do give uniform guidance and the following propositions are accurately stated in the various textbooks:*
>
> *1. Minutes must note the nature and type of meeting, the time of commencement and like details.*
>
> *2. Minutes must contain a full and accurate record of all business done including a list of who was present and all resolutions passed at the meeting.*
>
> *3. At least where disqualification follows from non-attendance, the minutes should contain a list of apologies accepted. (The distinction between a tendered apology and an accepted apology may be significant: see Ryan v Heiler (1990) 69 LGRA 307.)*
>
> *4. Minutes must be as concise as circumstances permit. Thus reasons for resolutions etc are seldom recorded.*
>
> *5. Minutes must be phrased in non-emotive language and on the face of them must appear impartial and above suspicion.*
>
> *6. A minute is not a report. Therefore speeches and arguments normally do not appear in minutes.*
>
> *7. Minutes must contain a record of all appointments made and the terms of reference of any committee that is set up.*
>
> *8. Normally failed motions need not be recorded.*
>
> *9. At least in the case of large meetings, there is no necessity to record the name of the mover or seconder or the voting, though the secretary may consider it appropriate to record these matters.*
>
> *10. A person present may insist that his or her vote or abstention be recorded.*
>
> *11. Incidents occurring at the meeting which may be significant should be recorded, but not unrelated incidents. Thus in Colorado Constructions Pty Ltd v Platus [1966] 2 NSWR 598, the minutes should have read "At this point another director knocked Mrs Hermann unconscious and she sank to the floor". However minutes of a conference I*

recently attended which was interrupted by an intrusion of some entertainers, need not have recorded "At this point the meeting was invaded by Santa Claus and some mini-skirted elves!"

12. Reports of committees etc are not summarised in the minutes. A copy should be initialled or otherwise identified by the chairman and copy may be circulated with the minutes and/or attached to the original minutes.

13. The time of closure of the meeting and, unless on a regular day the time and place of the next meeting are noted.

14. Minutes must be prepared within a reasonable time after the meeting: Toms v Cinema Trust [1915] WN 29.

26. In our opinion, the appropriate level of detail to include in minutes is a question for judgment, one which should be determined by, among other things:

    (a) the nature and importance of, and the risk attaching to, the decision and discussion concerned. Routine and procedural decisions will usually warrant significantly less detail than decisions and discussions that have a material effect on the business and direction of the company as a whole;

    (b) the level of detail contained in any supporting board paper. In many instances, the board paper may adequately identify the reason(s) a decision was taken;

    (c) having regard to the regulatory environment that either the company generally or the particular decision is subject to and ensuring that the minutes and documents referred to in them can demonstrate compliance with relevant regulatory requirements. However, minutes should not be drafted primarily with regulatory oversight in mind. Indeed, regulators may be suspicious of minutes which appear to have been written in this way;[3]

    (d) having regard to any perceived self-interest or conflict of interest on the part of management or the board in the decision concerned (for example, decisions about remuneration and executive bonuses). It is desirable that the rationale for and basis of such decisions be carefully and fully recorded.

27. Some legislation puts the burden on directors to show positively that they have complied with their obligations when defending regulatory action. For example, section 220A of the *Superannuation Industry (Supervision) Act 1993* (Cth) presumes that trustees of a superannuation fund have failed to exercise their powers in the best financial interests of beneficiaries unless they adduce evidence to the contrary. Comprehensive board minutes may be the best or only means by which to adduce evidence in this regard.

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[3] See ICSA: The Governance Institute, Guidance Note: Minute Taking, September 2016 at pp21-22.

Other matters in minutes

Reasons

28. In point 4 of Young J's summary set out above, his Honour said that reasons for resolutions are seldom recorded. However, we consider that corporate practice has developed since Young J's decision. We concur with the guidance given by the UK counterpart of Governance Institute of Australia that modern minutes should include the key points of discussion at a meeting, the decisions made and, where appropriate, the reasons for them and agreed actions.[4] Failure to do so in a material respect may lead a Court to conclude that the minutes are deficient.

29. Recording the reasons a decision was made may assist in showing that a director has discharged their duty to act with care and diligence (section 180) and exercised their powers in good faith, for a proper purpose and in the best interests of the company as a whole (section 181), having regard to the degree of scepticism with which later claims that matters were taken into account will be treated if they are not recorded in the minutes.

30. Recording reasons may also demonstrate that directors had formed a state of mind necessary to permit the exercise of a power.

31. For example, in *360 Capital Re Ltd v Watts* [2012] VSCA 234; (2012) 36 VR 507 the directors of the responsible entity of a managed investment scheme were required to consider reasonably that changes to the constitution of the managed investment scheme did not adversely affect members' rights if they were to amend the constitution without members' approval.

32. The Victorian Court of Appeal said (at [19]):

> *The judge also held that the minutes of meeting of directors … did not show that the directors undertook the kind of reasonable consideration of the effect of the purported amendments on members' rights that was required … and thus … it was to be inferred that the directors did not reasonably consider that the proposed changes would not adversely affect members' rights.*

The trial judge in the same case, Sifris J, said (*Watts & Watts v 360 Capital Re Ltd* [2012] VSC 320; (2012) 90 ACSR 713 at [61]) (emphasis added):

> *The Minutes do not disclose any relevant or adequate consideration of precisely what the rights were before the proposed modification, how the modification would change those rights and in particular, why such change would not be adverse. … The basis of the decision and rationale are absent. On the evidence, the Board did not reasonably consider that the change would not adversely affect members' rights.*

[4] ICSA: The Governance Institute, Guidance Note: Minute Taking, September 2016 at p7. Reasons for a decision are often identified in the relevant board paper. See paragraph 58 below.

33. A failure to record the reasons a decision has been taken or a resolution has been passed may lead a Court to conclude that there was no legitimate reason for the decision and that directors failed to exercise reasonable care and diligence in making it[5] although Jagot J's decision in *APRA v Kelaher* shows that that there are limits to the adverse inferences that will be drawn from a failure to include in minutes a detailed record of a board's reasons for making a decision.

Business judgment rule

34. The business judgment rule in section 180(2) of the Corporations Act provides that a director will be taken to have satisfied their duty of care and diligence in section 180(1) (and equivalent duties at common law and in equity) in respect of a business judgment, being a decision relevant to the business operations of the company, if the director:

    (a) makes the judgment in good faith and for a proper purpose;

    (b) does not have a material personal interest in the subject matter of the judgment;

    (c) informs themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

    (d) rationally believe that the judgment is in the best interests of the company.

35. If a director wishes to take advantage of the business judgment rule, it is desirable that the director's ability to do so is established in the minutes recording the relevant decision or resolution.

Conflict of interest

36. Division 2 of Part 2D.1 of the Corporations Act deals with the disclosure of, and voting on, matters in which a director has a material personal interest. Section 195 prohibits, subject to limited exceptions, directors of public companies from being present while a matter in which they have a material personal interest is considered by the board and from voting on the matter. As fiduciaries, directors also have duties at general law with respect to the disclosure and management of conflicts of interest.

37. Where relevant, the minutes should show compliance with these duties. However, we do not consider it necessary to record in the minutes the *times* at which a director entered and left the meeting in order to do so, so long as it is apparent from the minutes for which agenda items the director was and was not present.

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[5] See for example *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342 at [590] – [592].

Other provisions

38. There are other provisions in the Corporations Act which provide directors with a degree of protection from liability if they can establish particular matters: eg section 189 – Reliance on information provided by others; section 190 – Responsibility for actions of delegate. Again, it is desirable that the conditions for the protection provided to directors be established and recorded in the minutes of the relevant decision or resolution.

Drafts and notes

39. Draft minutes and handwritten notes of meetings may be dealt with and disposed of in the same way as other documents (not being financial records) held by a company. Subject to the important caveat below with respect to actual and anticipated legal proceedings, there is no specific obligation to retain drafts and handwritten notes of meetings, and they may be destroyed in accordance with a company's usual policies and practices.

40. However, as with other documents, the position is quite different if legal proceedings have been commenced or are likely to be commenced in which the draft minutes or notes are likely to be required in the proceeding. If that is the case, draft minutes and notes must usually be retained and should not in any circumstances be destroyed without first seeking legal advice. It can be a criminal offence to destroy or conceal a document that is known to be required, or reasonably likely to be required, in a legal proceeding.[6] There are few cases concerning the degree of certainty with which a person is required to know that a document might be required in litigation which has not been commenced. However, a much higher degree of certainty than a mere possibility is necessary.[7]

41. 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.[8] Similarly, they may be required to be produced in answer to a regulator's compulsory notice for production of books.[9]

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[6] See for example section 254 of the *Crimes Act 1958* (Vic).

[7] In *British American Tobacco Australia Services Ltd v Cowell (Representing the Estate of McCabe (decesased))* (2002) 7 VR 524, the Victorian Court of Appeal cited with apparent approval at [169] a United States case in which the judge said "*I am not holding that the good faith disposal of documents pursuant to a bona fide, consistent and reasonable document retention policy cannot be a valid justification for failure to produce documents in discovery*". The Victorian Court of Appeal went on to say at [175] that "*we consider that this court should state plainly that where one party alleges against the other the destruction of documents before the commencement of the proceeding to the prejudice of the party complaining, the criterion for the court's intervention (otherwise than by the drawing of adverse inferences, and particularly if the sanction sought is the striking out of the pleading) is whether that conduct of the other party amounted to an attempt to pervert the course of justice or, if open, contempt of court occurring before the litigation was on foot*".

[8] See for example section 69 of the *Evidence Act 1995* (NSW).

[9] See for example section 30 of the *Australian Securities and Investments Commission Act 2001* (Cth).

42. An example of the use that a court might make of handwritten notes[10] can be seen in *Australian Securities & Investments Commission v Healey* (2011) 278 ALR 618 where Middleton J observed (at [327]):

> *The company secretary … took handwritten notes during the meeting. She was a very diligent note taker, and her notes are comprehensive and detailed. It is apparent from her notes that the following relevant events occurred at this meeting. …*

43. Many companies circulate draft minutes for comment, initially to the chair and chief executive and subsequently to other directors. If that practice is adopted, particular care should be taken since comments received are likely to be discoverable and admissible in evidence as business records.

44. Some companies adopt a policy that directors' notes of board meetings are destroyed after meetings. In *Brady v NULIS* at [599], Markovic J said:

> *"[Counsel for the applicant] relies on evidence given by Ms O'Neal about board policy that individual directors' notes are destroyed after meetings. But, in my view, no inference can be drawn from the board's policy about the notes of individual directors. There is no evidence before me to suggest that the policy that was adopted was unusual or departed in any way from the course undertaken by directors or that NULIS could not rely on the minutes of the relevant board meetings as evidence of what transpired at those meetings.*"

45. We recommend that companies adopt and consistently apply an appropriate document[11] management and retention policy generally, and that the policy explicitly address when drafts and handwritten notes are required to be retained and when they may be destroyed. Legal advice should be sought to ensure that the policy is consistent with obligations to preserve evidence for actual or likely legal proceedings.

Adoption of and amendments to minutes

46. Review and approval of the minutes of the previous meeting is usually one of the first items on the agenda of each board meeting. Directors will be given a final draft of the minutes or, if the minutes have already been entered in the minute books, a copy of the minutes as entered. Once they have been approved, the chair of the previous meeting, or the chair of the meeting at which the minutes are approved, should sign the minutes, as required by section 251A(2).

47. Section 251A of the Corporations Act requires a company to record in its minute books minutes of board meetings within 1 month of the meeting. In many cases, this means the minutes must be entered in the minute books before the following meeting of the board.

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[10] See also *Brady v NULIS Nominees (Australia)* [2024] FCA 1374 where Markovic J made extensive use of handwritten notes taken by an executive at board meetings and board workshops.

[11] In this context, document includes electronic documents such as emails and the contents of board portals.

48. It is entirely appropriate for a board to amend or vary the minutes it is provided, whether or not they have been entered in the minute book, if it considers that the minutes do not reflect accurately what occurred at the meeting. Boards should not of course seek to rewrite history. The minutes must accurately record the material occurrences at the meeting.

49. The minutes of the meeting at which the amendments are approved should record what amendments are made. If the amendments are not self-explanatory, for example correcting typographical or grammatical errors, it may be appropriate to record briefly the reason for the approval of the amendment(s).

50. If minutes have already been entered in the minute book in compliance with section 251A(1), the amended minutes, signed by the chair, should be included in the minute book instead of or as well as the earlier minutes. The earlier minutes should be retained in some form to demonstrate compliance with section 251A(1).[12]

Challenge and dissent

51. We have been asked to opine as to how, if at all, minutes should record challenges made by directors to management in a board meeting and dissenting arguments or opinions expressed by directors during a meeting. We have also been asked to opine as to what impact recording these matters might have on individual director liability.

52. There is of course a difference between the board, as a whole, challenging management and dissenting arguments and opinions between the directors themselves. In challenging information and recommendations put to the board by management, the board is discharging its collective duty to oversee the operations of the company and its management. In expressing a dissenting opinion or argument, a director is discharging their individual duty to act with care and diligence. Neither challenges to management nor dissent between directors are undesirable conduct by a board or individual directors.

53. Recording challenges and dissent in minutes assists in showing that the board as a whole, as well as individual directors, are discharging their duties, and may therefore reduce the risk of individual director liability.[13] Of course, if the minutes show that there is a matter

[12] Section 1306(3) requires a company to take all reasonable precautions to prevent the destruction of books that are required by the Corporations Act to be kept or prepared by the company.

[13] The degree of protection from liability provided to individual directors by recording challenge or dissent or an abstention will depend upon the duty said to have been breached and the circumstances of the case. There are few cases that have addressed this question directly, although the position appears to be as accepted by Palmer J in *NRMA Ltd v Scandrett* (2002) 171 FLR 232 at [11] that "*the fundamental principle which guides directors in their office and by which their conduct is to be evaluated ,,, is that a director must act independently in the best interests of the company as a whole. As directors are required to act independently … they must be judged independently – they cannot be judged in a "block*"". In *ASIC v Macdonald (No 11)* (2009) 256 ALR 199 at [337] – [339], Gzell J considered that two directors who attended a board meeting by telephone and who had not been provided with a copy of an ASX announcement breached their duties by not abstaining from voting on a resolution approving the announcement. More generally, section 180 (care and diligence) and section 181 (good faith) of the Corporations Act impose obligations on directors individually with respect to the exercise of their powers and the discharge of their duties. To the extent that in challenging, dissenting or abstaining a director has exercised their

of concern to the board or an individual director which has not subsequently been resolved or followed up, this might expose directors to a greater risk of liability. Boards should take steps to ensure their concerns are resolved and followed up and that promised actions are completed to minimise this risk. The existence of this risk is not a reason not to record challenge or dissent in the minutes of a meeting.

Challenge

54. Challenge is not a term of art. It can be anything from a simple request to management for clarification or further information, through to an outright expression of dissatisfaction with information provided or omitted, or actual or proposed conduct of management. It is not likely (nor necessary) that these instances will be described as "challenges" in minutes, however strongly they might be expressed.

55. While it is a matter for judgement in each case, we are of the view that it is appropriate that the minutes record significant challenges, however they might be described, made to management by directors and the reaction to those challenges (such as the responses received or action promised). It is neither necessary nor desirable to record every question put to management and every response received, let alone the full discussion that takes place. The minutes are a record of proceedings, not a transcript.[14] Ordinarily it will be sufficient and appropriate to record the thrust of significant questions, queries, and discussions in non-emotive and impartial language.[15]

56. As well as allowing promised actions to be recorded in an action list and followed up, recording significant challenges will assist the board in showing that they are exercising oversight of the company and directors in discharging their duty of care and diligence. Moreover, this will assist companies in demonstrating that they have taken the steps to ensure, or avoid, certain outcomes as may be required by particular regulatory regimes.[16]

57. Ordinarily it is not necessary or usual to record which individual director made a challenge or other contribution to a board meeting. Australian law and practice does not require that the contributions of individual directors be recorded to manifest that they are effectively performing their roles.[17] Nevertheless, an individual director may ask that their challenge or other contribution be recorded. Whether it is appropriate to accede to the request will depend upon the circumstances.

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powers or discharged their duties differently to other directors, that director may have a different, and possibly reduced, liability to that of the other directors. A director might also seek to rely on challenge, dissent or abstention in seeking relief from liability under section 1317S or 1318 of the Corporations Act.

[14] See Justice Young's point 6 above

[15] See Justice Young's point 5 above.

[16] See for example Division 2 of Part 3 of the *Occupational Health and Safety Act 2004 (Vic).*

[17] ICSA: The Governance Institute, Guidance Note: Minute Taking, September 2016 at p17 suggests the position may be different in the United Kingdom.

Dissent and abstention

58. Boards usually make collegiate decisions for which they take collegiate responsibility. Nevertheless, from time to time, an individual director may dissent or abstain from a particular decision and ask that the fact that this conduct be recorded in the minutes.

59. Further, the law imposes individual duties on directors and expects the individual discharge of those duties to be recorded.

60. For example, in *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (Receivers and Managers appointed) (in liquidation) (Controllers appointed) (No 3)* [2013] FCA 1342, Murphy J observed (at [496]):

> *Importantly, the minutes do not record that any Director abstained from voting on the resolution, that is, the minutes do not support the contentions of [certain directors] that they abstained. Each of the Directors was required to either actively support the resolution, actively oppose it or expressly abstain from supporting or opposing it, and it was his responsibility to ensure that his will was expressed and recorded in one of those ways ….*

61. Murphy J cited Barrett JA's judgment in *Gilfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460,[18] where his Honour said:

> *[7] … the required method of decision-making is the passing of a resolution of the body of persons; and the passing of a resolution depends on the casting of individual votes. It follows that procedures actually adopted must be such that each member of the body who is entitled to vote and wishes to do so may communicate his or her vote and have it taken into account.*
>
> *[8] 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.*
>
> *[9] Such practices are dangerous unless supplemented by appropriate formality.*
>
> *[10] The aim is not to consult together with a view to reaching some consensus, although it may well be, as a practical matter, that such consultation facilitates the making of the decision that is ultimately required. The aim is rather that the members of the board should consult together so that individual views may be formed and the individual will of each member may be made known in a clearly communicated way.*

[18] It is of note that in his career before his appointment to the bench, Barrett JA had been company secretary of Westpac Banking Corporation. His Honour was not expressing an opinion without the benefit of first-hand knowledge of the practicalities of board decision making.

> *[11] The culmination of the process must be such that it possible to see (and to record) that each member, by a process of voting, actively supports the proposition before the meeting or actively opposes that proposition; or that the member refrains from both support and opposition. And it is the responsibility of an individual member to take steps to ensure that his or her will is expressed in one of those ways.*

62. Directors who dissent or abstain from a decision of the board should take steps to ensure that fact is recorded in the minutes. If they do not, they may receive little sympathy for later claims of dissent or abstention. Also, the minutes should record the reason the majority of directors were in favour of the decision notwithstanding dissenting views.

Board papers and supporting documents

63. It is entirely appropriate for board minutes to refer to, without repeating, the contents of board papers and other supporting documents. A well written board paper will often identify the reason(s) for a decision or resolution with little, if any, further elaboration required in the minutes. If board papers and supporting documents are to routinely fulfil this function, appropriate care should be taken in relation to their preparation. To the extent board papers and other documents are necessary to understand the minutes, they should be retained for as long as, and in the same way and place as, the minutes.

Legal professional privilege

64. Confidential communications between lawyers and their clients for the purpose of providing or obtaining legal advice and confidential communications between lawyers and their clients and third parties for the purposes of actual or anticipated litigation are privileged. They are normally not admissible in evidence and documents containing those communications are not ordinarily discoverable in legal proceedings.

65. Boards necessarily and appropriately receive the company's legal advice. In many cases, it may be enough simply to note in the minutes that the board considered relevant legal advice when making a decision. However, privilege will not ordinarily be lost by recording the advice received in the minutes. Nevertheless, caution and judgment should be exercised in determining the degree of detail of any privileged information that is necessary to include in the minutes.

66. One of the ways in which privilege can be lost is if the communication or advice, or part of it, ceases to be confidential to its intended recipients. In particular, if the gist or conclusion of legal advice is disclosed beyond the board and other intended recipients, privilege over the entire advice may be lost.

67. For example, in one case[19] a board paper was disclosed in discovery to the opposing party. The board paper contained a statement that "*Our legal advice is that the risk of damages being awarded ... is low*". Sackville J held that by disclosing the conclusion of the legal

[19] *Seven Network Limited v News Limited (No 12)* (2006) 230 ALR 544; [2006] FCA 348

advice to the opposing party, privilege had been waived in the entire legal advice which was therefore also required to be discovered. The waiver came about because of the voluntary disclosure of the gist or conclusion of the legal advice.

68. It is good practice to identify clearly any privileged information in the minutes and preferably to include privileged information in an appendix or attachment rather than in the main body of the minutes. This will assist in identifying privileged information in any later discovery process and mitigate the risk of disclosing privileged information in a way that might waive privilege. Minutes containing privileged information should not be disclosed to third parties without first taking legal advice to ensure that privilege in the information is not inadvertently lost.

Virtual meetings

69. For many years, companies have conducted board meetings using technology so that directors do not all need to be in the one physical location. At the time of our 2019 opinion, a directors meeting could be held using any technology consented to by all directors. As a result of amendments made in response to the Covid-19 pandemic, the consent of all directors is no longer required to the use of technology. Board meetings may now be held using any technology that is reasonable. The law with respect to minutes is the same whether a meeting is held in person or using technology or a combination of both.

Artificial intelligence (AI)

70. Since our 2019 opinion, there has been an explosion in the availability and use of AI software tools which allow for recording, transcribing and summarising proceeding and resolutions at meetings.[20]

71. Directors need to consider safeguards for issues associated with use of AI tools, including:

    (a) the appropriateness of using AI tools in light of the nature and burden of any applicable regulatory obligations on company operations;

    (b) the storage, security, and discoverability of a recording or transcript of a meeting; and

    (c) the disclosure of confidential, privileged, or sensitive personal information to third-party AI providers which might jeopardise claims of legal professional privilege in respect of the minutes.

72. Some companies adopt a practice of using virtual platforms to record meetings, with the records usually stored in the cloud and able to be downloaded. In our view, the making of such a recording does not fulfil the requirement to keep a record of a meeting in a minute book because the obligation for a chair to sign a minute indicates that a written record is necessary.

73. AI tools used to record board meetings and produce a transcript may be useful in the preparation of the formal board minutes, provided all participants consent to its use. While there is no prohibition on a company using *generative* AI (Gen AI) tools in the preparation

[20] See Governance Institute of Australia, *Artificial Intelligence (AI) and board minutes – Issues paper* (July 2024).

of minutes, directors should be aware of the limits, risks, and shortcomings of any particular Gen AI program used, principally:

(a) the risk of inaccuracies, including the scope for biased or "hallucinated" output, that is, the generation of apparently plausible, authoritative and coherent responses but which are in fact inaccurate, one-sided, or fictitious;

(b) the risk that Gen AI tools can introduce vulnerabilities, making it easier for cyber-attacks to occur;

(c) the risk that Gen AI tools might misinterpret discussions leading to inaccurate records.

74. Directors should remain mindful of the critical role of evaluative judgment in the preparation of minutes, including in capturing sufficient detail to demonstrate compliance with applicable duties, and using language that appropriately reflects the depth and scope of the board's deliberations. A related consideration is the regulatory obligations imposed on company operations more generally. For example, for companies in the not-for-profit or SME sectors, AI and Gen AI tools in preparing minutes of meetings of boards and committees could deliver attractive efficiencies. By contrast, the risks of using Gen AI in preparing board minutes are likely heightened in the case of listed and highly regulated companies, particularly should board minutes be subject to regular regulator scrutiny (e.g. ASIC and APRA).

75. Should a board elect to use Gen AI in the preparation of board minutes, taking into account the relevant risks, directors and their company secretaries should take the following mitigation actions:

(a) establishing clear policies on the use of AI to generate minutes, including accountability and ownership of content;

(b) implementing robust data security measures, including encryption and regular audits;

(c) ensuring that AI generated minutes are reviewed by the directors and experienced professionals to catch errors and provide context;

(d) regularly reviewing AI processes used to generate minutes to ensure they comply with relevant laws and regulations; and

(e) addressing transcript retention, as any stored transcript would likely be admissible as evidence in proceedings and may conflict with the formal board minutes. It is recommended that any transcript produced to assist with the preparation of board minutes is dealt with in accordance with the board's document/note retention protocols.

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D Hogan-Doran SC
5 Wentworth Chambers, Sydney

D Gration
Scottish House, Melbourne

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