CORRS IN BRIEF

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THE ART AND SCIENCE OF COMPANY MINUTES

By **Andrew Lumsden**

[A]ccurate minutes should be kept of general meetings and committee meetings in organisations of all kinds. They include businesses; educational and medical institutions; social and sporting clubs; cultural and religious groups; professional and trade associations; trade unions; community bodies and political parties. The members of these organisations, humble as they often are, see it as important that minutes accurately record what took place. How much greater is the importance of accurate minutes in the case of directors running a large wealthy multinational public company, listed on stock exchanges, in which thousands of people had invested on the faith of a belief that its affairs were efficiently conducted?

Heydon J in *ASIC v Hellicar (and other related proceedings)* [2012] HCA 17 (3 May 2012)

One of the key lessons from the **James Hardie** decision is that minutes can assume critical importance if there is a challenge to the board of directors' decision making process. Because directors often bear the initial burden of establishing the reasonableness of their actions, minutes that demonstrate a thoughtful, deliberative process will be an indispensible asset for directors looking to establish that they have met their statutory obligations.

The lessons from the *James Hardie* decisions and other recent cases (see for example Centro and Fortescue Metals) exploring board conduct can be summarised as:

- **Contemporaneous**: the minutes should form a contemporaneous record and ought to be available to the directors in a timeframe that allows them to properly consider whether or not they accurately reflect the resolutions and ancillary matters that took place at the meeting.
- **Complete**: the minutes should be a relatively complete account of the meeting, although they should not be a transcript.
- **Committees**: boards need to carefully consider what matters are being delegated and the circumstances of any delegation.
- **Culture**: companies should consider putting in place processes that promote a culture that leads to better decision-making and a recognition of the importance of demonstrating the work that the board does to come to its decisions.

CONTEMPORANEOUS

The *Corporations Act* requires that a company keep minute books in which it records, within one month, the proceedings of members, directors and committee meetings and of any resolutions passed, either at meetings or otherwise. However, the legislation does not address the form or content of the minutes. Indeed, there are very few reported cases that exhaustively define what should go into company minutes.

The general rule is that minutes need not say anything beyond recording board actions usually in the form of resolutions evidencing a decision of the board. However the *James Hardie* decisions are a stark reminder of the dangers of not keeping proper minutes of a directors meeting. What is needed is a balance between recording enough for the purposes of internal management and external certification, but not so much as to inhibit frank and open discussion.

How the minutes of a board meeting are taken can either help directors or create risks – the model attached to this note provides some ideas about how it can be done better. It is a developing piece of work based as much on our "feel" for the law as on a strict reading of the cases. Clearly the High Court in the *Hardie Case* and the courts below including the sentencing decision of Barrett J (discussed below) and the decision of the Court of Appeal, placed great weight on the contents of minutes and the processes for their creation and approval.

Well taken minutes record decisions; highlight directors' dissents; reduce misunderstandings as to the board's intent; and show compliance with the company and the directors' legal duties and obligations. Directors and minute takers need to realise that minutes are prima facie the best evidence of

director conduct and need to be "crafted" to meet all of these different objectives.

What is important is that the minutes are a contemporaneous record of the process. It is also critical that they are prepared so that they are able to be provided to the directors within a sufficiently short period of time, that the directors have a reasonable opportunity to review and confirm them and that a timetable is in place for their adoption to ensure that they are signed within one month of the relevant meeting.

Consistent with the discussion about how memory works later in this paper, in the Hardie decision at first instance, Gzell J found:

> One thing that has emerged clearly in this case is that recollection is fallible. If a minute is to be given evidentiary value, it ought to be a contemporaneous document, for then it is more likely to be an accurate reflection of the proceedings of the meeting rather than a reconstruction of them.

The minutes are not conclusive evidence of what happened at a directors meeting. They are evidence of the proceeding or resolution, unless "the contrary is proved". Gzell J summarised the law as follows:

> It requires a weighing up of the evidence for and against the happening of the events recorded in a minute entered in a minute book within one month. If that weighing favours the recorded events, the contrary is not proved. If it favours evidence against the happening of the event, the contrary is proved. There is no shift in the onus of proof to the party asserting that the event did not happen.

It is useful to get the process off to a good start by setting the agenda not only for the meeting, but also accounting for the board's decision making process and what might need to be shown in support of it. This should include details of all resolutions intended to be adopted including the resolutions as part of the agenda rather than as draft minutes. It may also avoid the impression that the resolutions are mere legal "boilerplate". It is also strongly advisable to furnish directors with near definitive drafts of any documents in advance of the meeting, even though the lawyers and management should be available to discuss them with the board.

COMPLETENESS

The level of detail included in minutes varies from company to company, but they should not be just a record of board actions or individual speeches or arguments, admissions of liability or transcripts of the meeting. They ought to be an accurate reflection of the overall conduct of the meeting.

In the Disney case the Delaware Court denied motions to dismiss the plaintiff shareholder litigation relating to Michael Ovitz's extreme compensation. They suggested, however, that it might have dismissed the claim if the minutes had been more detailed. In that case the Court concluded that the board's bare-bones minutes, while legally sufficient as minutes, were far less than what best practices would have dictated and were not sufficient (where more detailed ones might have been) to support a motion to strike out the claims against the directors.

The unfortunate truth is that if minutes are consulted at all, they will most likely be consulted later. Unfortunately, the harsh reality is that if they are consulted at all it is most likely that they will be consulted months or even years later. That is why, where they record important matters, minutes should normally be crafted to demonstrate that the board complied with their duties. That is, out of everything that happens, the minutes should capture facts relevant to establishing that the directors had an appropriate process by which they came to the relevant decision. That being the case, it's worth stopping for a moment to consider how memory works.

Modern neuroscience tells us that memories are not recordings. Ed Winslow says that human brains do not store a video of past times, which can be replayed on demand. Instead, what we now know happens is that a few vivid aspects of an experience are stored in the brain and memories are "created" later when those impressions are recalled. In essence our minds fill in the blanks. Memories are shaped by the circumstances in which they are recalled. Every time a memory is recalled, the experience of remembering "overwrites" the original memory so that future recollections in fact call up, not the original experience, but the last recollection of it.

What this means is that in order to trigger useful memories of events minutes of key matters should go beyond the bare legal expectations around recording final actions. Minutes of a meeting should be designed to jog the memory of those present and to demonstrate that the board's processes leading to its final actions met necessary standards of board performance.

It is always difficult to know how to manage privilege when preparing minutes. Generally speaking, the minutes ought to keep to a minimum disclosure of legal advice that is subject to privilege. In any situation involving litigation, the minutes should briefly state that a matter subject to professional privilege was discussed without necessarily going on to detail that advice. However, in the M&A context it may be more important to be able to produce a contemporaneous record than to protect privilege. In such circumstances the minute taker needs to weigh up the benefit of protecting the company's privilege against demonstrating reliance on professional external advice. Courts in the US have placed great weight on the advice from lawyers and other professionals in determining the reasonableness of the board's actions.

The minutes ought to give the reader an understanding of how the board ultimately made its decision about a particular matter.

While the matters discussed may include divergent points of view, the minutes ought to be drafted in neutral terms. Material dissent should be noted and individual dissenting directors should be identified. These are complex issues to balance. Is it appropriate to record the names of individual directors or to identify them with specific statements, opinions, suggestions or positions, if the board ultimately acts as a group and there is no dissent? Identifying who said what may chill frank debate, or otherwise cause individuals to be more focused on their individual contributions rather on the group's decision. In general terms the balance is probably that minutes ought not reflect anything but the most serious of dissent that falls just short of a vote against a resolution.

Recording facts relevant to conflicts of interest is also usually advisable. Those facts are normally objective. That is, they exist independently of management processes. Conflicts of interest that can be proved support attacks on corporate decisions independently of the minutes. Recognising, disclosing and addressing conflicts at the outset demonstrates the board's good faith, heightens the board's awareness of the issue, enables directors to protect themselves and will normally prompt an appropriate resolution of any conflicts. It is also a threshold issue establishing access to the business judgment defence. See generally Andrew Lumsden, *The Business Judgement Defence – Insights from ASIC v. Rich* (2010) (available at http://ssrn.com/abstract=1584652).

One question that often emerges is whether directors ought to take their own notes of the board meeting. While there is no obligation on directors to take personal notes, they do present a difficulty in evidential terms. Like any minutes, directors' notes could be subject to compulsory disclosure as evidence in court or a regulatory investigation and might be helpful to show that a director informed themselves through appropriate questions and with proper care and diligence. However, taking notes can create risks – ambiguous, inconsistent or incomplete records can be used against a director or to undermine the veracity of the minutes and as such are equally as likely to create problems as badly drafted minutes. Notes taken prior to discussion at a board meeting are often uninformed and the views recorded in an individual's notes will often differ to those held after they have had the benefit of discussing those matters at a meeting.

Minutes should provide the best evidence of what was discussed by the board at a meeting. The benefits of taking, and then keeping, personal notes in relation to the meeting, which may be incomplete, ambiguous and made without the benefit of discussion, outweighs any benefit of retaining them. Perhaps the best advice is to keep notes and to review those notes to refresh your memory for the purpose of evaluating the minutes circulated after the meetings. At that time, a director can request additions, clarifications and corrections to the minutes where necessary. However, after the minutes are signed, destroy any annotations or notes for there is no reason to retain them unless the director is aware that the notes may be relevant to a threatened claim. This message applies equally to any soft copy record of notes that may exist.

Similarly, audio or video recordings of meetings should not be kept after minutes have been approved by the board unless they may be relevant to a threatened claim.

COMMITTEES

The committee has become an important part of the organisational dynamic of the modern listed corporation. It is generally regarded as a more efficient mechanism than the full board for focusing attention on particular issues and a convenient way to manage conflicts of interest or to assist the board to oversee the transaction process, including due diligence. But how does the committee structure fit within the context of collective responsibility for board members and what are the limits of that concept? See generally Andrew Lumsden, *The Role and Responsibilities of Directors on Board Sub-Committees* (2004) (available at http://ssrn.com/abstract=990201).

The *Corporations Act* recognises that the directors may delegate their powers to a variety of people including a committee of directors. Once delegated, each director is responsible for the exercise of the power by the committee as if the directors themselves had each exercised the power unless the directors can establish that the committee was reliable and competent in relation to the power delegated.

The board should ensure that they adopt a clear set of rules to clarify exactly what they expect from the committee and the boundaries of the committee's authority.

Minutes of committee meetings should be kept and the considerations applying to the substance and format of board minutes apply to those minutes. Reports and recommendations received from committees should be documented in the minutes of the relevant board meeting.

CULTURE

The directors need to take the time to read and verify the minutes of previous meetings. They should ensure that the company has a process to make certain that minutes are prepared whilst events are fresh in their minds and that they are sufficiently detailed and appropriately recorded.

The directors need to acknowledge that mistakes and misstatements are natural and even desirable in the interests of robust discussion. Mistakes may not be recognised until minutes are prepared. Draft minutes are not final and mistakes can usually be corrected, by convening another

meeting if necessary. Indeed, how different would the issues in the *James Hardie* case have been had the directors convened a meeting to try to rectify the error in the minutes or the announcement?

In *Gillfillan & Ors v Australian Securities & Investments Commission* [2012] NSWCA 370, the NSW Court of Appeal considered the penalty orders relating to the 7 non-executive directors and company Barrett JA said all company directors should make sure their opinions were noted.

"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," he said. "Such practices are dangerous unless supplemented by appropriate formality." In his Honour's view the aim is not to reach consensus, but 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.

What this means is that the minutes need to reflect that each member is engaged in the process. This means that it must be clear to see whether a director actively supported, actively opposed, or refrained from both support and opposition of the proposition in question.

For a meeting of directors to be "held" by using telecommunication technology requires that each participating director can, for the duration of the meeting, hear and be heard. If directors are participating by phone or video they must request copies of all documents being discussed and be familiar with them – or seek the Chair's consent to abstain from the relevant matter. Other aspects of a particular meeting's agenda may, in the same way, dictate attributes of permissible technology. Directors need to remember that silence at a meeting may be taken to amount to approval of proposals adopted at that meeting.

The Chair and the directors need to instil a culture from the CEO down in which management expect the board to probe, ask difficult questions and disturb timetables. Questions are a valuable part of the deliberation process and need to be respected.

The directors ought to consider, if the circumstances warrant such a step, the advantage of advice from independent advisers (not otherwise employed by the company or employed in the transaction).

In summary, it is recommended that companies adopt protocols for management dealing with the board to ensure that:

- the board is kept informed of material developments in a timely way;
- matters are put on board agendas and papers are circulated in advance wherever possible (as the general rule), and that the material includes a concise summary of the proposal, the business case, key risks and all the important financial data for the project;
- it is clear why material is being provided (ie for information or to inform a decision); and
- management personally scrutinise what goes up to the board and makes sure there are clear signposts to assumptions, qualifications, limitations or risks.

Remember that what we've learnt from science as opposed to the law is that minutes, especially board minutes, serve as a "common fund", the basis for everyone's memories long after any specific recollection has passed. As primary evidence they also frame, shape and condition what will be remembered about the process. Little will be recalled that is not within the minutes. Most of what is omitted will be gone forever.

In that sense the minutes need to be more than a record of the board's actions. As discussed, what is needed is a balance between recording enough for internal management and external evidential purposes, but not so much as to inhibit frank and open discussion.

MODEL BOARD MINUTES REFLECTING THE AGREEMENT TO PROCEED WITH AN M&A PROPOSAL

Project Dingo

The Managing Director tabled the Board Paper (12-02C1) on Project Dingo, which he noted included a summary document of just less than two pages setting out the important information associated with Project. The Managing Director advised the board that the summary contained a fair summary of the value proposition of the proposal, the business case, key risks and all the important financial data for the Project as required by the board policy for a transaction of this type. The Managing Director confirmed that the Chair and several other directors had been briefed on the transaction and the Board Papers reflected those discussions and comments.

> **Annotation**: The board papers are an important part of the board process and an important part of the record that will be reflected in the minutes. Normally, such materials would be filed with the minutes. The material should be informative and designed to facilitate the board's ability to review key issues. However, it should not be so voluminous that the directors are swamped in information they cannot possibly absorb. There ought to be a standing requirement that management produce succinct summaries designed to assist the directors to understand the context of the transaction.
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> Materials delivered to board members for review in advance of a meeting should be identified together with the fact that the directors received them in advance (and so, had time to review them) and any questioning that went outside of the board meeting.

Mr Bader raised a question of whether the board had sufficient time to consider the proposed transaction given the meeting had been arranged with less than two days' notice. He expressed a view that he had been travelling and had not had time to properly consider the matter given the size of the proposed transaction.

Mr Bader sought and obtained the Chair's consent to abstain from voting on the proposed transaction.

> **Annotation**: The minutes should disclose any abstentions and the reasons why. The James Hardie decision suggests that a director who is not across the material ought to abstain from voting. Directors should be aware that, if they are present at a meeting and their dissenting votes are not recorded, then they will be taken to have approved actions taken by the board.

Ms Hurricane noted that she had been involved in numerous matters with Spitfire and had a material personal holding in that company and excused herself from all further discussion concerning the proposed transaction and left the meeting.

> **Annotation**: The minutes should disclose any conflicts of interest and the actions taken to address them such as a director's decision to excuse the abstention. Directors' independence and how conflicts of interest are handled are fundamental to the application of the business judgment defence and other standards of corporate decision-making.

The Chair confirmed to the meeting that he was aware and had been apprised of management negotiations and discussion with Spitfire on the proposed transaction. The Chair advised the meeting that given the nature, size and importance of the transaction he was anxious to ensure confidentiality was maintained until a deal could be finalised for presentation to the board for approval. On that basis, he and the Managing Director, on advice from the General Counsel, determined there was no need to make an ASX announcement.

The Managing Director proceeded to brief the board on the contents of the Project Dingo board papers and outlined the key elements of the proposed transaction with Spitfire including the experience of management and the Company's key advisers and credentials in similar transactions.

> **Annotation**: Any documents provided to the directors in connection with the meeting should be clearly identified in the minutes. An unmarked copy of the material ought to be kept with the minutes. The minutes may be the only means of capturing the substance of external opinions and reports. Contrary to discussions among board members, oral comments of expert advisors, corporate officers, board committees and other consultants (if they go beyond the

contents of written reports and exhibits) may need to be recorded in detail, so that they are not lost and are available later to defend the board's decision. Such minutes may also focus the consultants on exactly what they are willing to stand behind.

MegaBank presented to the board on various aspects of the transaction. The powerpoint presentation was considered, discussed and the final form is attached to these minutes.

Annotation: If possible presentations should be included in the board papers. Often, however, they will not be available until shortly before the meeting. Unfortunately, sometimes these presentations are packed with material and are not as clear as they could be. Nonetheless, a clean copy of the material should be retained by the company secretary with the board materials from that meeting so that they provide evidence of the information that the directors were provided with as part of their deliberations.

The board raised with the Managing Director and the representatives of MegaBank various questions on the benefits, risks, and key terms of the proposed transaction with Spitfire including:

- the key assumptions underpinning Project Dingo including how fast and how well the assets can be integrated and what unique benefit the Company will gain;
- whether the Company was provided with all of the information and explanations they required;
- whether management needed any technical expertise to assist on this transaction;
- whether they were comfortable with the approach taken to materiality thresholds in the course of the due diligence;
- whether there were any related party or conflict of interest issues;
- the potential reputational risks for the Company associated with the transaction;
- the positions the Company has taken on compliance with ASX Listing Rules, Panel and ASIC Guidance and the Corporations Act and other legislation that the Company ought to be considering;
- whether the transaction documents could be improved;
- the timeline of the merger integration, showing key milestones and expected problems;
- experiences with past acquisitions that could bear on the transaction;
- how this transaction fitted in with a previously agreed overall non-organic growth strategy;
- whether there had been a top-down and bottom-up review of the transaction (ie comparing where the board wanted to go with acquisitions (top-down) and what the management wanted to achieve) and whether they had examined priorities and the unique benefits of the transaction; and
- whether there were particular reasons for urgency of this transaction.

The questions were answered by the Managing Director, MegaBank and the Company's legal advisers. The Managing Director advised the board of the nature of the roles undertaken by senior management in connection with the project.

Annotation: Subject to the privilege issues as to whether to document advice received from advisers, having such advice may assist directors to establish reliance on expert advice and including the advice in the minutes may demonstrate that such reliance was reasonable.

The model adopted here is to indicate that the board had asked questions without necessarily listing the answers to all questions raised. In this sense the minutes serve to jog the memory and to demonstrate that the board's processes leading to its final actions met necessary standards of board performance.

The board ought to be appraised of the roles undertaken by senior management and the other advisers.

Mr Churchill spoke strongly against the proposal and asked that his dissent be noted; he felt that the proposed transaction especially the proposed asset sale and purchase did not accord with the overall non-organic growth strategy. However on balance Mr Churchill indicated he was prepared to support the proposed resolutions.

Annotation: Material dissent should be noted and individual dissenting directors should be identified.

By adoption of minutes, policies or otherwise, boards should be clear about whether the identities of dissenters will be recorded without a special request and the consent of the Chair.

Duration of discussion

The discussion and review took approximately 90 minutes.

Annotation: The time spent on a particular matter should be clearly indicated. If the exact time is not recorded then at a minimum there should be reference to the time spent. For example, "the board engaged in a lengthy discussion concerning..."

Proposed Transaction

The Chair noted that it is proposed that the Company and relevant subsidiaries (Company) enter into a transaction with Spitfire Group plc and relevant subsidiaries (Spitfire) to facilitate the joint development of the proposed aircraft development project (Proposed Transaction).

It was noted that the main elements of the Proposed Transaction are proposed as follows: Spitfire subscribes for 9.9% of the shares in the Company at $11.06 per share. The funds received are to be applied by the Company in the ordinary course of business, but must not be applied to provide an immediate benefit to shareholders.

Subscription Agreement

The Chair noted that in connection with the Proposed Transaction, it was proposed the Company enter into a Subscription Agreement with Spitfire (Subscription Agreement).

Annotation: It is also strongly advisable to furnish directors with a near definitive draft of any documents in advance of the meeting even though the lawyers and management should be available to discuss them with the board.

Asset Sale and Purchase Agreement

The Chair noted that in connection with the Proposed Transaction, it was proposed that the Company enter into the Asset Sale and Purchase Agreement with Spitfire (SPA).

Approved Documents

The Chair tabled drafts of the Subscription Agreement and the SPA and the related transaction documents (together the Approved Documents) and noted that whilst the substantial terms of the documents had been agreed, the final form of the Approved Documents had not yet been agreed.

The Chair noted the proposed resolution (as outlined below) before the board and put the resolution to a vote. Mr Bader abstained from voting on the resolution. Ms Hurricane was absent from the discussion. All other directors voted in favour of the resolution.

Annotation: The agenda should include details of all resolutions intended to be adopted.

RESOLVED that:

1. The Managing Director of the Company, in consultation with the Chair, be authorised to approve and issue on behalf of the Company:
   - the final form of the Approved Documents;

- any notices, announcements or similar to ASX, ASIC or other government authority; and
- any other document that in his opinion is necessary or desirable for the Company to enter into and to execute in connection with the Proposed Transaction or that is incidental or related to the Approved Documents (Incidental Documents).

2. Subject to the approval of the final form of the Approved Documents in accordance with Resolution 1, any two directors or a director and secretary of the Company be authorised to execute and deliver each of the Approved Documents.
3. To the extent that the final form of an Incidental Document has been approved in accordance with Resolution 1 and requires execution by the Company to become effective, any director or secretary of the Company or any number of them be authorised to execute and deliver such Incidental Documents.
4. Any director or secretary of the Company or any number of them be authorised to:
   - do anything and to execute any document that they consider necessary, advisable or incidental in connection with:

     (i) the preceding resolutions;

     (ii) any Approved Document or Incidental Document; or

     (iii)the Company's involvement in the Proposed Transaction; and
   - perform or cause to be performed the Company's obligations under the Approved Documents and Incidental Documents.

KEY CONTACTS

Andrew Lumsden
Partner, Sydney
Tel +61 2 9210 6385
andrew.lumsden@corrs.com.au

Sandy Mak
Partner, Sydney
Tel +61 2 9210 6171
sandy.mak@corrs.com.au

Stephanie Daveson
Partner, Brisbane
Tel +61 7 3228 9493
stephanie.daveson@corrs.com.au

Jonathan Farrer
Partner, Melbourne
Tel +61 3 9672 3383
jonathan.farrer@corrs.com.au

SYDNEY
Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE
Bourke Place
600 Bourke Street
Melbourne VIC 3000
Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE
Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH
Woodside Plaza
240 St George's Terrace
Perth WA 6000
Tel +61 8 9460 1666
Fax +61 8 9460 1667