



# **Engage. Learn. Succeed.**

Corporate Governance  
Forum 2017





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THE PRACTICE OF MINUTES  
DOMINIQUE HOGAN-DORAN SC

What is the purpose of minutes?

- Board's record?
- Chair's record?
- Legal purpose?

# Legal requirements & implications

- Section 251A Corporations Act: keeping minute books and timeframes
  - ✓ practicalities of how this actually works
  - ✓ how to meet the requirements without having a signed set of minutes

## Section 251A

1) A company must keep minute books in which it records within 1 month:

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

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

(c) resolutions passed by members without a meeting; and

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

(e) if the company is a proprietary company with only 1 director--the making of declarations by the director.

(2) The company must ensure that minutes of a meeting are signed within a reasonable time after the meeting by 1 of the following:

(a) the chair of the meeting;

(b) the chair of the next meeting.

(3) The company must ensure that minutes of the passing of a resolution without a meeting are signed by a director within a reasonable time after the resolution is passed.

(4) The director of a proprietary company with only 1 director must sign the minutes of the making of a declaration by the director within a reasonable time after the declaration is made.

(5) A company must keep its minute books at:

(a) its registered office; or

(b) its principal place of business in this jurisdiction; or

(c) another place in this jurisdiction approved by ASIC.

(5A) An offence based on subsection (1), (2), (3), (4) or (5) is an offence of strict liability.

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

# Use of minute books in evidence

- Section 1305 Corporations Act – admissibility of books in evidence
  - (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.
  - (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).
- Section 1306 Corporations Act – form and evidentiary value of books
- Section 1307 Corporations Act – falsification of books

## Lessons from case law

### *ASIC v Hellicar* (2012) 247 CLR 345

- ASIC tendered signed minutes of board meeting approving draft ASX announcement
- Draft February minutes approved at April meeting; s 251A(6) not engaged
- At trial, directors disputed approval; called evidence to raise inference minutes inaccurate
- ASIC did not call corporation's solicitor who prepared draft minutes; HCA held: no duty to call
- Evidence of another witness that he had taken that version of draft ASX announcement to the board meeting + 2 sets of minutes = proof of facts in issue, claim did not rely on inference



## Lessons from case law

***Seven Network v News Ltd*** [2007] FCA 1062 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.”

***Bartolo v Doutta Galla Aged Services Ltd*** [2014] FCCA 1517

- Board appointed lawyers investigated, made fact findings and recommendations; privileged minutes waived when state of mind of board acting on recommendation put in issue.

## Content of minutes: best practice tips

- ✓ Preliminary matters: attendance recording/quorum
- ✓ Recording declarations of conflicts of interest (s 191 CA)/related party transactions
- ✓ Sensitive information/legal professional privilege
- ✓ Level of detail - (how) concise? Action items, key points, verbatim?
- ✓ Pro forma minutes – use of templates and structured board papers
- ✓ Circulation and finalisation of minutes
- ✓ Amendment of minutes – pre & post approval recirculate for approval or note at next meeting?

# Keeping of minute books

- Electronic minute books?
- Bound/loose leaf folders?
- Document retention management: policies & processes
- Access to minutes: how to manage third party access

# Looking into the future

- Comments from the *ICSA Guidance Note*
- Use of technology
  - Board portals
  - Voice recording meetings



# Comments/Questions?

[dhogan@barnet.com.au](mailto:dhogan@barnet.com.au) | [@DHoganDoranSC](#) | [www.dhdsc.com.au](http://www.dhdsc.com.au)

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