

BOARD

Directors' meetings

Directors' meetings refer to board meetings or board committee meetings where different viewpoints are considered before deciding on a course of action. Directors must be able to establish that their decisions are made with care and diligence, in good faith and for a proper purpose. Accurate minute taking is essential to keep a record of the process by which directors make decisions on behalf of the company.

What are the legal requirements for directors' meetings?

Directors' meetings are less heavily regulated than general meetings, so boards, to some extent, can set their own internal rules.

For many companies, rules regarding directors' meetings will be contained in their constitution.

There are also some specific legal requirements for directors' meetings set down by the *Corporations Act 2001 (Cth)* (the Act):

- Unless otherwise specified in the company's constitution, directors can pass a resolution without a meeting if all directors sign a document stating that they are in favour of the resolution. The resolution is passed when the last director signs it (s 248A – a replaceable rule; replaceable rules do not apply to proprietary companies where the one person is the sole director and sole member);
- Single director proprietary companies can pass a resolution by recording it and signing the record (s 248B);
- Unless otherwise specified in the company's constitution, any director can call a directors' meeting by giving reasonable notice to every other director (s 248C – a replaceable rule);
- Any technology consented to by all directors may be used to call and hold the meeting (s 248D);
- Unless otherwise specified in the company's constitution, directors may elect a director to chair the meeting and determine their tenure as chair. They must choose someone to act as chair if the previously elected director is unavailable (s 248E – a replaceable rule);
- Unless decided otherwise by the directors, or otherwise specified in the company's constitution, the quorum is two directors (s 248F – a replaceable rule);
- Unless otherwise specified in the company's constitution, directors' resolutions must be passed by a majority of the directors entitled to vote on the resolution. The chair has a casting vote if necessary in addition to their vote as a director (s 248G – a replaceable rule).

For both board and committee meetings, it is also advisable to decide a policy in advance stating:

- The frequency of board and committee meetings;
- The usual meeting place and time;
- Who will attend – some meetings may include management team member/s;
- How many directors constitute a quorum;
- Who will chair the meeting;
- How to communicate, including consent by all directors to use specific technology;
- The process for calling unscheduled meetings and dealing with emergency decision making;
- Under what circumstances does the business of the meeting need to be communicated to regulators.

Unlike general meetings where member attendance is optional, directors have a duty to be present for board and committee meetings as a part of their duties and responsibilities, and to participate in decision making. For public companies, their attendance is documented and reported to members in the annual directors' report. This serves as a reminder that directors are accountable to members, on whose behalf they govern the company.

What should be done to prepare for meetings?

Preparation is key to successful director meetings. The chair works together with the CEO and company secretary to create an agenda that focuses on decision making for significant issues, but also allows time to discuss other items. While there is no legal requirement to detail the business to be covered in the notice of meeting, the inclusion of board papers with the notice will allow directors to prepare adequately – a must if they are to act with the degree of care and diligence required under both common and statutory law (s 180(1) of the Act).

The board meeting agenda is central to the planning process for all board meetings.

A well-designed agenda aids the flow of information and shapes subsequent discussion by the board. Agendas are generally divided into items for decision, discussion, noting and/or information. It is recommended that important items for decision are positioned early in the meeting at a time when everyone is focused.

How should the meeting be run?

The chair can use a running sheet to ensure that the meeting is conducted efficiently and that appropriate time is given to the most important issues. It is the chair's responsibility to ensure that the meeting flows smoothly by involving all directors present and not permitting one or two people to dominate the meeting. However, there needs to be a balance between encouraging participation while not hindering discussion and seeking to keep to time.

Effective board meetings usually rely on some rules or norms around meeting behaviours. For example, boardroom etiquette would require that directors put their mobile phones on silent during the course of the meeting and only take calls in the case of an emergency.

It is essential that directors review the board papers thoroughly in advance of meetings and that they do so far enough in advance that they have time to reflect on the materials in a thoughtful manner. Where directors have had time in advance to consider the board papers, the meeting will be an opportunity for directors to add value to decision making.

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What should be the decision-making process?

As noted above, s 248G of the Act, or the equivalent provision typically found in company constitutions, provides the basic rules for the decision-making process at a directors' meeting.

However, Justice Barrett had made a number of important observations in relation to the process that should be followed (see *Gillfillan & Ors v Australian Securities and Investments Commission* (ASIC) [2012] NSWCA 370).

Justice Barrett's view is that the aim of a board meeting is not for directors to consult together with a view to reaching some consensus; rather, it is for directors to consult together so that individual views may be formed. Accordingly, the procedures adopted at board meetings must be such that each director may communicate his or her vote and have it taken into account. Practices, such as the chair saying, after discussion of a proposal 'I think we are all agreed on that' are 'dangerous unless supplemented by appropriate formality' (*Gillfillan & Ors v ASIC* [2012] NSWCA 370 at 8-9).

Therefore, in order to fulfil their obligations under s 248G of the Act, or an equivalent constitutional provision, directors individually must ensure, by a process of voting, that it is possible to determine whether they support, oppose or abstain from a particular resolution, which requires accurate minutes.

Good practice is for the draft resolution which will appear in the minutes if the matter is passed to be included as part of the board paper on the matter. In doing so, directors are aware of exactly what is proposed and what will be recorded in the minutes if the proposition is approved without change. In addition, the task of the chair and company secretary during the meeting is easier as the draft resolution is already drafted.

Can directors use video or other technology to be part of a meeting?

Directors can use video or other technology to be take part in a meeting even if they are physically somewhere else as long as all directors consent to this (s 248D, *Corporations Act 2001*). However, directors who do this should ensure that they have all the necessary documents available to them to allow them to be properly informed to take part in the decision making. In the James Hardie case (*ASIC v MacDonald (No 11)* (2009) NSWSC 287), two directors attended a board meeting in relation to a draft ASX announcement by telephone and video. They had not seen the draft announcement. The court held that these directors:

... were in breach of s. 180 (1) in failing to request that they be provided with a copy of the draft ASX Announcement, in failing to familiarise themselves with its terms, or in failing to abstain from voting in favour of the above resolutions as a reasonable person in their shoes with their responsibilities would have done.

In one of the James Hardie appeal cases (*Gillfillan & Ors v ASIC* [2012] NSWCA 370 at 15), which concerned two non-executive directors who attended a meeting by telephone from the United States, Justice Barrett observed that 'as a bare minimum', each participating director must hear and be heard by every other participating director for the duration of the meeting. Where a document is tabled, or the directors discuss a document's content, in the course of the meeting, and that document is not already in the possession of every director, the technology by which the meeting is held 'must enable each participating director to see the document's content at the relevant point during the meeting'.

Further, under s 248D of the Act, participation in board meetings by telephone or video link must be consented to by all the directors (the consent may be a standing one, which is refreshed whenever a new director is appointed) (*Gillfillan & Ors v ASIC* [2012] NSWCA 370). As such, companies and directors must ensure that all newly appointed or elected directors individually consent to the use of technology to hold directors' meetings.

What should be done at the end of the meeting?

As a part of its meeting finalisation, it is useful for the board to review the major decisions made during the meeting. By asking the company secretary to summarise the major decisions at this time, directors can ensure that all major decisions and actions have been captured, review the wording of the item and ensure that a responsibility for implementation has been recorded and, if appropriate, the time for completion noted.

In some circumstances, information from the board meeting may need to be communicated to stakeholders such as ASIC or, in the case of listed companies who have continuous disclosure obligations, the ASX. Consideration should be given to any applicable disclosure requirements at the conclusion of the meeting.

The chair may also wish to thank individual directors for their contributions or give other feedback. Indeed, asking directors to reflect on the effectiveness of the meeting and give their feedback to the chair can be of great benefit in improving meeting processes and board dynamics.



Board minutes are not a report or transcript of the discussion or debate during the meeting, or a record of an individual director's contribution. Too much information can be as unhelpful as too little and can cause a lack of clarity.

What should be done after the meeting?

Compilation and circulation of minutes is the prime duty following the meeting. The company secretary is responsible for keeping the minutes safely and securely. Section 251A (1) of the *Corporations Act 2001* provides that a company must keep minute books in which it records within one month the proceedings and resolutions of directors' meetings (including meetings of a committee of directors). The company must ensure that the minutes are signed 'within a reasonable time' after the meeting by the chair of the meeting or the chair of the next meeting. A minute so recorded and signed is evidence of the proceeding to which it relates, unless the contrary is proved. Contravention of ss 251A (1) or (2) is a criminal offence of strict liability for the company (s 251A (5A)).

As noted above, a minute that is properly signed and recorded will be evidence of the proceeding, resolution or declaration to which it relates unless the contrary is proven. For this presumption to apply, there must be strict compliance with the one-month limit. However, the High Court in the James Hardie case (*ASIC v Hellicar* (2012) HCA 17) emphasised that, even where this formal presumption does not apply, the minutes can still be important evidence, because they will be a near contemporaneous record of events. Justice Heydon in that case concluded that the minutes were 'immensely powerful evidentiary support for ASIC's case' (*ASIC v Hellicar* (2012) HCA 17 at 216).

Board minutes are not a report or transcript of the discussion or debate during the meeting, or a record of an individual director's contribution. This level of detail is not required by law, would be inconsistent with the established practice of minute-taking, and may stifle healthy boardroom debate. Too much information can be as unhelpful as too little and can cause a lack of clarity.

It is 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. It is also advisable to consider the principles of the business judgment rule when preparing and approving minutes. If judgment is required and directors are balancing a number of competing risks and considerations in their decision making, it is prudent to actively consider whether the minutes capture them adequately but succinctly.

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.

For a more detailed consideration of board minutes, 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.

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).

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