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# The art and science of company minutes\*

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What occurred, and what can be proven to have occurred, are not always the same thing. This is often the case where, like here, meetings and calls allegedly took place for which there was no record... Purported discussions of key matters during Board meetings were not recorded in the minutes. Some aspects of what occurred remain obscure.

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Lee J, *Australian Securities and Investments Commission v Bekier (Star)*\*

\**Australian Securities and Investments Commission v Bekier (Liability Judgment)* [2026] FCA 196.



# 1 Introduction

Board minutes were once regarded as little more than a routine corporate record. In modern governance practice they perform a far more consequential role. Minutes are not just a record of what was said, but a record of how the board discharged its function. In organisations characterised by complex structures, extensive board materials and increasing regulatory scrutiny, minutes often become the most important contemporaneous record of how a board discharged its responsibilities.

Board governance processes are increasingly mediated through digital board portals such as Diligent, BoardPro and OnBoard, which alter both the way board materials are distributed and the documentary record available in regulatory investigations and litigation.

The recent decision of *Star* regarding the failures of governance at The Star Entertainment Group has reinforced this evidentiary function in striking terms. Justice Michael Lee observed that “what occurred, and what can be proven to have occurred, are not always the same thing.”<sup>1</sup>

When a court is required years later to reconstruct what occurred in boardrooms and committee meetings, board papers, minutes and related internal documents may be the only reliable guide to the actions of directors and officers. Modern governance litigation often turns not simply on what decisions were made, but on what these records reveal about the processes through which those decisions were reached.

Courts routinely examine the contemporaneous documentary record to determine:

- what information was placed before directors;
- what questions were asked;
- how the board engaged with the matters under consideration;
- the extent to which boards interrogated management’s recommendations; and
- whether directors took reasonable steps to inform themselves about the matters before them.

Here, minutes often become the principal evidence that these processes occurred. At the same time, the governance environment in which minutes are produced has changed significantly.

Today, boards operate within complex information ecosystems in which management reports, external advice and regulatory requirements generate substantial volumes of material. The preparation of board packs has become increasingly elaborate and the volume of material placed before directors can be considerable. As Lee J observed in *Star*, no rational person can realistically evaluate every page of extensive board materials before each meeting.<sup>2</sup> Directors inevitably prioritise, focusing on the matters that appear central and trusting that material risks will be signalled clearly.

Another development is the growing use of digital tools and artificial intelligence (AI) in the preparation and review of board materials. Technology may assist the synthesis and organisation of complex information, including in the preparation of draft minutes. But as the courts and governance bodies have emphasised, technology cannot displace the exercise of informed human judgment that the law requires of directors.

Against this background, the role of board minutes deserves renewed attention. Minutes are not transcripts of meetings, nor are they intended to capture every detail of boardroom debate. Properly prepared, however, they should provide a clear contemporaneous record of the board’s process: the information considered, the issues raised, the decisions taken and the actions required, so that the record demonstrates how the board engaged with the matters before it rather than merely what it decided. In doing so they form a central element of the governance framework through which boards demonstrate that they have exercised their responsibilities with requisite care and diligence. The practical test is whether the minutes demonstrate engagement with the material issues without attempting to reproduce the detail of boardroom debate.

<sup>1</sup> *Star*, [1948].

<sup>2</sup> *Star*, [385].

## 2 Minutes in governance litigation

The evidentiary significance of board minutes has been repeatedly emphasised in governance litigation. Courts examining alleged breaches of directors' duties do not simply ask whether a particular decision proved correct. Instead, the inquiry usually focuses on whether directors approached the issue with the degree of care and diligence required by law and placed themselves in a position to guide and monitor the management of the company.

Accordingly, board papers, internal memoranda and minutes frequently become the principal materials through which courts reconstruct what occurred in the boardroom. The minutes of a meeting are not conclusive evidence of what transpired, but they are ordinarily treated as the official corporate record of the proceedings and therefore carry significant evidentiary weight, particularly where they are contemporaneous and formally approved.

The High Court's decision in *ASIC v Hellicar (James Hardie)*<sup>3</sup> provides one of the clearest statements of the role that minutes can play in this context. Although the directors challenged the accuracy of the minutes, the High Court emphasised that properly approved minutes constitute important evidence of what occurred at a meeting and cannot easily be displaced by later recollections.<sup>4</sup> As the Court recognised, once minutes are approved, they become the official corporate record of the meeting and are prima facie evidence of the proceedings recorded in them.<sup>5</sup> The case also illustrates a practical governance lesson: directors should review draft minutes carefully before approving them, because once adopted the minutes may become the primary record through which their conduct is later assessed. Although they may be displaced by contrary evidence, they form a central part of the evidentiary framework through which board conduct is assessed.

Earlier litigation concerning the James Hardie group illustrates the same point from another angle. At first instance, Gzell J emphasised the importance of contemporaneity, observing that recollection is fallible and minutes prepared promptly after a meeting are more likely to provide an accurate record than later reconstructions of events.<sup>6</sup> In complex corporate disputes that may arise years after the relevant meeting, minutes may therefore become the most reliable evidence of the board's deliberations.

The *Star* proceedings arose out of serious failures in the governance of The Star Entertainment Group and required the Court to examine, in detail, the information available to senior executives and the non-executive directors during the relevant period. In analysing the evidence, Lee J noted that the absence of records concerning certain discussions and meetings created real evidentiary constraints.

The case illustrates that courts frequently examine the minutes which record the information considered, the issues raised and the steps taken by directors to inform themselves, to assess whether directors engaged meaningfully with the matters placed before them. Conversely, where minutes disclose little evidence of scrutiny or deliberation in the face of obvious risk, the absence of recorded engagement may itself become part of the evidentiary narrative.

In *Star*, Lee J noted that the absence of reliable written records created significant evidentiary limitations for the Court. In the absence of evidence from many officers involved in the relevant events, the Court observed that "the only other guides I have as to the actions of directors is what emerges from the minutes of meetings and other contemporaneous documents including emails."<sup>7</sup>

3 *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345.

4 The Full Court in *Weeden v Rambaldi* (2013) 92 ACSR 661 at [95] held that *James Hardie* "does not preclude, but rather requires, in a case such as the present, the qualitative weighing up of all the evidence, including that in conflict with the minutes". Section 251A(6) of the Corporations Act does not create a statutory presumption; rather, it requires "a weighing up of the evidence for and against the happening of the events recorded in a minute". There is no shift in the onus of proof to the party asserting that the event did not happen: *ASIC v Macdonald* (No 11) (2009) 256 ALR 199 (*Macdonald*) at [78], approved in *Advanced Holdings v Commissioner of Taxation* [2021] FCAFC 135 at [167].

5 See also *ASIC v Australian Property Custodian Holdings Limited (No 3)* [2013] FCA 1342 "where Murphy J referred to the High Court's treatment" at [386], of minutes that had been prepared before the meeting and contained various inaccuracies. His Honour noted that the High Court held, at [118]–[119], that: ... the fact that some parts of the minutes were inaccurate does not necessarily imply that other parts of the minutes ... were inaccurate. And similarly, the fact that the minutes were drafted before the meeting does not necessarily imply that they did not accurately record what happened at the meeting ...

6 *Macdonald* (Gzell J).

7 *Star*, [1949].

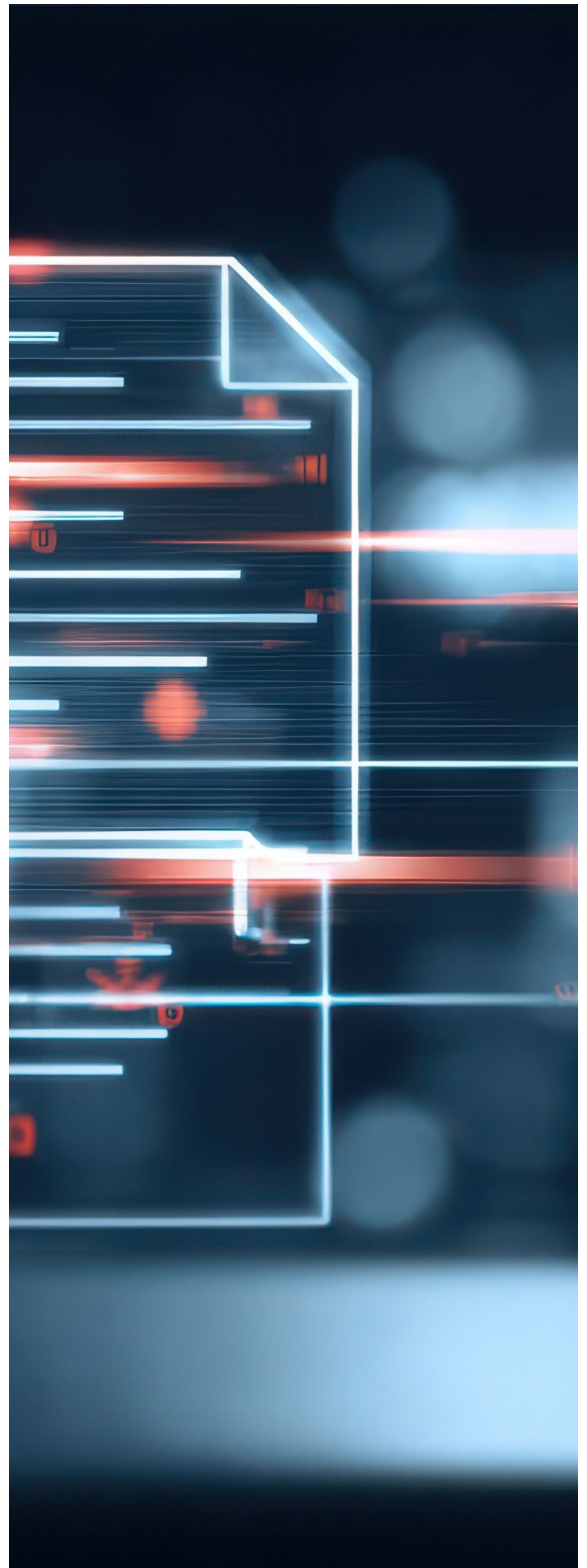
In reviewing the contemporaneous record, his Honour observed:<sup>8</sup>

But one cannot fairly review all that material without a sense of disquiet. It is not a portrait of directors actively pressing management with difficult questions... The contemporaneous minutes disclose little by way of sustained scrutiny or insistence upon explanation in circumstances where risks were obvious.

The decision in *ASIC v Healey*<sup>9</sup> (*Centro*) likewise emphasises the centrality of board materials in assessing directors' conduct. Middleton J rejected the suggestion that the complexity or volume of financial information could excuse directors from understanding the material placed before them.

It follows that the function of board minutes extends beyond recording the outcome of meetings. Properly prepared minutes help demonstrate that the board's processes met the standards of care and diligence expected of directors. They show that the board was informed, that material issues were identified and that decisions were reached through a process of genuine deliberation rather than passive acceptance of management recommendations.

For this reason, the preparation of minutes should be understood as an integral part of a company's governance framework. In modern corporate practice, they are one of the primary ways in which directors demonstrate that they have properly discharged their duties.



<sup>8</sup> *Star*, [1951].

<sup>9</sup> *ASIC v Healey* (2011) 196 FCR 291.

## 3 Minutes do not stand alone

Board minutes are sometimes discussed as though they exist in isolation. In practice they are only one component of a broader system through which information reaches directors and decisions are made. The effectiveness of minutes therefore depends on the quality of the governance processes that surround them - including the design of board agendas, the preparation of board papers and the escalation of issues to the board.

Board papers and minutes are now commonly distributed and stored through secure board portals. While these systems improve governance administration, they also create additional records, including earlier drafts of board papers and document access logs, that may become relevant in litigation or regulatory investigations.

Modern governance guidance increasingly treats these various elements as part of a single governance architecture, in which agendas, papers and minutes operate together as the board's formal information environment. The board is responsible for ensuring that the organisation's reporting structures enable it to guide and monitor management effectively, which necessarily extends to the form, quality and timing of the information provided to directors.

In *Star* and earlier in *Centro*, the Court encountered numerous examples of board packs extending to hundreds of pages, containing executive summaries, supporting memoranda, annexures and technical appendices. In *Star*, mindful of the comments of Middleton J in *Centro*, Lee J observed that directors faced with such materials inevitably prioritise the information that appears most significant: focusing on what appears central, scanning other material and trusting that significant risks will be clearly identified.

None of this is surprising. Large organisations operate through layered reporting structures, specialised risk and compliance functions and increasingly detailed regulatory frameworks. Information is filtered, summarised and presented through internal reporting processes and the board's ability to discharge its oversight responsibilities therefore depends on the effectiveness of those processes. While directors are not expected to read every page of every document placed before them, they must ensure that the information provided to them is structured in a way that supports effective oversight and that their review and consideration of these materials is properly recorded.

### 3.1 Agendas

Board agendas play an important role in this architecture. A well-designed board agenda identifies the matters requiring substantive deliberation and allocates time accordingly. It distinguishes between items for decision, items for discussion and items provided for information. In doing so it helps ensure that the board's time is directed to the issues that most clearly engage its oversight responsibilities. The directors' attention can then be similarly focused on the items that are likely to be the most significant.

### 3.2 Board papers

Board papers perform a complementary function and when properly prepared, provide directors with the background information, analysis and recommendations necessary to consider a particular matter. Where appropriate, they also identify the advice of external advisers and the principal assumptions underlying the proposal. Minutes should record how the board engaged with the relevant materials, rather than reproduce the contents of board papers, including, where appropriate, that the materials were circulated in advance of the meeting and considered by the board. Board minutes should record in neutral terms how the paper was considered, the issues raised during discussion, the questions directed to management and the decision reached by the board.

In this way, minutes provide the final link in the board's information chain. Together with the agenda and board papers, they form the contemporaneous record through which the board's oversight of the organisation can later be understood and evaluated.

Where this system breaks down is when the sheer volume of information placed before boards makes it too voluminous to be properly considered. Board packs frequently extend to hundreds of pages and may include executive summaries, reports, annexures, technical memoranda and external advice. The growth of regulatory compliance functions, risk management systems and specialised reporting requirements has contributed to an environment in which directors are expected to digest increasingly complex material before each meeting. The cynical observer might question who most benefits from these packs, the compiler or the reader.<sup>10</sup>

<sup>10</sup> *Star*, [384].

Since *Centro*, courts have emphasised that boards must exercise control over the information they receive, both qualitatively and quantitatively.<sup>11</sup> Lee J described the *Star* board papers as “heroically vast,” containing multiple layers of summaries, detailed papers and extensive appendices.

The practical reality that directors cannot read every page of extensive board materials does not diminish their legal responsibilities. They cannot rely uncritically on management, AI tools or third party advisers. The obligation remains to apply an enquiring mind to material issues and to seek clarification where necessary. That said, in the hands of a regulator or the plaintiff shareholder bar, these enormous piles of “evidence” can be made to stand for matters far beyond their reasonable scope.

For this reason, a number of governance bodies now recommend that boards adopt a clear policy governing the preparation of board papers. Such policies typically require that board materials identify the decision or issue requiring board consideration, summarise the relevant background and analysis, highlight material risks and present management’s recommendation in a concise and structured form. The purpose is not to reduce the information available to directors but to ensure that the information provided is curated and presented in a manner that supports effective oversight. In this sense, discipline over the volume and structure of board papers is itself part of the board’s governance function: directors must ensure that the organisation’s reporting processes clearly highlight material issues rather than overwhelming the board with undifferentiated information.<sup>12</sup>

Timing is also a critical factor in this process. Board papers that are circulated shortly before meetings, sometimes only hours beforehand, significantly constrain the ability of directors to review and understand the material placed before them. Late circulation of papers may therefore undermine the deliberative process that board meetings are intended to facilitate.<sup>13</sup> Where this occurs, minutes may record that the board noted the late circulation of papers, considered whether it had sufficient information to decide the matter or requested additional analysis before reaching a decision. Such records do not constitute defensive drafting. Rather, they provide an accurate account of the manner in which the board exercised judgment in the face of complex and sometimes imperfect information.<sup>14</sup>

Effective, timely and well-structured board papers should be insisted on by the board. These materials should clearly identify the issue requiring board attention, explain the relevant background and analysis, highlight the principal risks and clearly state the recommendation being made to the board. They should enable directors to focus their attention on the matters most relevant to the board’s oversight and decision-making responsibilities.

In summary, minutes serve not only as a record of decisions but also as evidence of how directors navigated the information environment in which those decisions were made. They demonstrate that the board actively engaged with the matters before it and that its decisions were reached through a process of considered deliberation rather than passive acceptance of management recommendations.

- 11 In *Centro*, Middleton J directly addressed this point, stating at [229]:  
“A board can control the information it receives. If there was an information overload, it could have been prevented. If there was a huge amount of information, then more time may need to be taken to read and understand it. The complexity and volume of information cannot be an excuse for failing to properly read and understand the financial statements.”
- 12 Governance Institute of Australia, ‘Guidance on Board Papers’ (Guidance, 2021) <[https://www.governanceinstitute.com.au/app/uploads/2023/11/govinst\\_guidance-board\\_papers\\_2021.pdf](https://www.governanceinstitute.com.au/app/uploads/2023/11/govinst_guidance-board_papers_2021.pdf)>; Jennifer Tunny, ‘How to get more from your board papers’, *Effective Governance* (online) <<https://www.effectivegovernance.com.au/page/knowledge-centre/news-articles/how-to-get-more-from-your-board-papers>>.
- 13 In *Star* at [387], Lee J commented that “At least on one occasion, important board papers were made available to the directors only moments before the day’s meetings commenced.”
- 14 Governance Institute of Australia, ‘Guidance on Board Papers’ (Guidance, 2021) <[https://www.governanceinstitute.com.au/app/uploads/2023/11/govinst\\_guidance-board\\_papers\\_2021.pdf](https://www.governanceinstitute.com.au/app/uploads/2023/11/govinst_guidance-board_papers_2021.pdf)>.

## 4 The content of effective minutes

While the law requires companies to keep minutes of meetings of directors and committees, it provides little guidance on their form or level of detail. Over time, governance practice has developed a number of principles intended to ensure that minutes perform their dual function: supporting the effective administration of the company while also providing a reliable contemporaneous record of the board's deliberations.

Well-prepared minutes provide a concise but intelligible record of the board's decision-making process. They demonstrate that the board considered the relevant material, identified the key issues and exercised judgment in reaching its conclusions. Several elements are typically central to this process.

### 4.1 Contemporaneity

Minutes should be prepared promptly after the meeting and circulated to directors for review within a timeframe that allows them to confirm that the record accurately reflects the proceedings.

Contemporaneous preparation is critical because it reduces the risk that the minutes become a reconstruction of events rather than a reliable record of them. As courts have repeatedly observed, recollection is fallible and disputes about board processes often arise years after the relevant meeting. Minutes prepared promptly are therefore more likely to carry evidentiary weight if later examined in litigation or regulatory proceedings.<sup>15</sup>

The author of minutes needs to keep in mind that psychological research consistently shows that memory is reconstructive rather than photographic: recollections of past events are shaped by subsequent information, suggestion and inference. Contemporaneous records therefore often provide a more reliable account of events than the later recollections of participants but the minutes should also serve as a strong foundation for any later reconstruction of the meeting that is less prone to error and distortion.<sup>16</sup>

### 4.2 Completeness without transcription

The level of detail contained in minutes must strike an appropriate balance. Minutes should not become transcripts of board discussions or record every statement made by individual directors. At the same time, minutes that record only the formal resolutions adopted by the board may fail to capture the substance of the board's deliberations.

In *Pacific Current Group Limited v Fitzpatrick* [2024] FCA 1480, Beach J emphasised the importance of concision in board minutes and cautioned against treating minutes as detailed reports of boardroom discussion.

Modern governance practice therefore favours minutes that summarise, in neutral terms, the substance of the matters considered by the board, the issues that were raised and the basis on which the board reached its decision.

In practice this means identifying the decision before the board, recording any material risks or concerns that were discussed, noting where directors sought clarification or further information and accurately recording the resolution ultimately adopted. Properly prepared minutes therefore provide a structured account of the board's deliberative process while avoiding unnecessary detail that may obscure the central issues considered by the board. In this way the minutes demonstrate that the board engaged with the material issues before it and exercised its judgment on an informed basis, without attempting to reproduce every aspect of the discussion that occurred in the meeting.

The appropriate test is whether the minutes demonstrate that the board identified and engaged with the material issues without attempting to reproduce the detail of the discussion.

15 "Contemporaneous documents assume their importance, in part, from the difficulties associated with witness evidence based upon recollection." *Star*, [210] (Lee J).

16 Modern neuroscience confirms that memories are not recordings. Human brains do not store a video of past events that can be replayed on demand. Instead, a limited number of features of an experience are encoded and memories are reconstructed when recalled. In this sense the mind "fills in the blanks". Memories are shaped by the circumstances in which they are recalled, and each act of remembering can modify the memory itself. Memory can thus be characterized as an adaptive constructive process, which plays a functional role in cognition but produces distortions, errors, or illusions as a consequence of doing so. Schacter, Daniel L, 'Memory: Sins and Virtues' (2013) 1303(1) *Annals of the New York Academy of Sciences*, 56-60. Published version available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12561014>

### 4.3 Recording the decision-making process

Where the board is considering a matter of strategic, regulatory or financial significance, it may also be appropriate for the minutes to reflect aspects of the board's decision-making process. This does not require a detailed account of competing views. Rather, the minutes may record that the board considered the relevant proposal, discussed its principal risks and benefits and determined to proceed in light of the information available.

In appropriate cases, the minutes may also record the key factors or considerations that informed the board's decision. Doing so can help demonstrate that directors informed themselves about the subject matter of the decision and exercised judgment in reaching their conclusion. This can be particularly relevant where directors may later seek to rely on the statutory business judgment rule.

### 4.4 Conflicts of interest and participation

Minutes should clearly record matters relating to directors' conflicts of interest and participation in deliberations. Where a director declares a material personal interest in a matter, the minutes should record the nature of the disclosure and any steps taken by the board in response. This may include noting that the director abstained from voting, withdrew from the meeting during consideration of the item or otherwise did not participate in the decision.

Such matters are typically objective facts and are therefore well suited to precise recording in the minutes. Clear records of conflicts and participation help demonstrate that the board addressed governance requirements appropriately.

### 4.5 Actions and follow-up

Finally, effective minutes should record the actions arising from the board's deliberations. Board decisions often involve further work to be undertaken by management or advisers. Recording these follow-up actions, either within the minutes themselves or through a formal action list, helps ensure accountability and enables the board to track the implementation of its decisions.



## 5 Minutes and the business judgment rule

The evidentiary role of board minutes assumes particular significance where directors seek to rely on the statutory business judgment rule contained in section 180(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**). The rule provides a defence to an alleged breach of the duty of care and diligence where a director can demonstrate that they made a “business judgment” in good faith for a proper purpose, did not have a material personal interest in the subject matter of the judgment, informed themselves about the matter to the extent they reasonably believed to be appropriate and rationally believed that the judgment was in the best interests of the corporation.

The decision in *ASIC v Rich (Rich)*<sup>17</sup> provides the most detailed judicial analysis of the statutory business judgment rule. Austin J emphasised that the defence applies only where directors have actually exercised judgment and informed themselves appropriately about the subject matter of the decision.

His Honour also noted that the rule protects commercial decision-making rather than shielding directors who fail to turn their minds to the relevant issue or who fail to inform themselves appropriately about the subject matter of the decision. For this reason, board papers and minutes often become the primary evidence through which a court assesses whether directors informed themselves appropriately and exercised an independent judgment.

Minutes may assist in demonstrating that a relevant “business judgment” was in fact made. However, much of the recent governance litigation arises not from flawed commercial decisions but from failures in systems, controls or escalation processes.

Courts in Australia have been reluctant to apply the rule to these circumstances, as the safe harbour was found not to be available where:

- the CEO failed to show he consciously turned his mind to whether to escalate material risk information to the board;<sup>18</sup>
- a failure by directors to properly supervise a lending process that resulted in significant losses<sup>19</sup>;

- the oversight and monitoring of financial statements is a non-delegable duty and does not involve a “business judgment”;<sup>20</sup>
- causing a company to breach the law (the “stepping stone” theory) is not an exercise of business judgment that the rule was intended to protect;<sup>21</sup>
- the assessment involves determining whether to comply with statutory disclosure obligations;<sup>22</sup> and
- misleading statements were made to the market regarding “binding” contracts with Chinese entities.<sup>23</sup>

Properly prepared minutes that record the decision considered by the board and the resolution ultimately adopted help establish that there was a good-faith commercial decision made by directors about how the company should conduct its business, involving a choice between alternatives and informed by the information reasonably available to them, rather than a mere failure of oversight or inattention to risk.<sup>24</sup>

Where appropriate, minutes should record key considerations that informed the board’s decision. This can be satisfied by including a brief record that the board considered particular risks, assumptions or strategic factors in order to demonstrate that the directors held a rational belief that they acted in the best interests of the corporation.

For these reasons, the preparation of minutes should be approached with an appreciation of the role they may later play in demonstrating that directors satisfied the requirements of the business judgment rule. Minutes cannot themselves create a defence where the underlying process was deficient. They can, however, provide the contemporaneous record through which a court may conclude that directors informed themselves appropriately, exercised independent judgment and acted in what they rationally believed to be the best interests of the corporation.

17 *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.

18 In *Rich* Austin J concluded at [7278]:

“the discharge by directors of their ‘oversight’ duties, including their duties to monitor the company’s affairs and policies and to maintain familiarity of the company’s financial position, is not protected by the business judgment rule, because the discharge or failure to discharge those duties does not involve any business judgment as defined.”

19 *Gold Ribbon (Accountants) Pty Ltd v Sheers* [2006] QCA 335.

20 *Centro*.

21 *ASIC v Cassimatis (No 8)* [2016] FCA 1023 (Storm Financial Case).

22 *ASIC v Vocation* [2019] FCA 1607.

23 *ASIC v Fortescue Metals Group* [2011] FCAFC 19.

24 Andrew Lumsden, ‘The business judgment defence: Insights from *ASIC v Rich*’ (2010) 28 *Company and Securities Law Journal* 164 at 176-7.

## 6 AI and the preparation of minutes

A further development affecting the preparation of board minutes is the increasing use of digital tools and AI to assist with the organisation, synthesis and recording of board materials. Governance bodies have recently begun to address the implications of these technologies for board processes, recognising that the tools available to directors and company secretaries are evolving rapidly.<sup>25</sup>

Governance guidance has emphasised that AI tools should be treated as drafting aids rather than as substitutes for professional judgment and that human oversight remains essential to the integrity of the final record. The preparation of board minutes requires contextual understanding of the issues considered by the board and careful editorial judgment in determining what should be recorded. The creation of automated transcripts or recordings may undermine the status of the minutes as the authoritative corporate record and may also create additional discoverable documents in litigation or regulatory investigations.

Governance professionals have increasingly considered the implications of AI tools for minute preparation. The Governance Institute of Australia notes that while AI may assist in producing draft materials or transcripts, the preparation of board minutes requires human judgment and careful editorial oversight.<sup>26</sup>

AI may assist in a number of aspects of the board process, including summarising lengthy board papers, identifying key themes across large volumes of documents, extracting action items from meeting discussions and generating preliminary drafts of minutes, but its use requires careful oversight to ensure that the resulting record accurately reflects the board's deliberations. In organisations where board packs can extend to hundreds of pages, these tools may assist in organising information in a way that allows directors to focus their attention on the matters most relevant to the board's oversight responsibilities.

However, the emergence of these technologies does not alter the fundamental legal position that responsibility for corporate decision-making rests with human decision-makers. Courts have consistently emphasised that directors must apply their own judgment to the matters before them. Technology may assist comprehension and administration, but it cannot displace the exercise of informed human judgment that the law requires.

The potential use of AI in the preparation of minutes also raises a number of governance considerations. First, the accuracy and reliability of AI-generated summaries or drafts must be carefully reviewed. Automated tools may omit contextual information or mischaracterise the substance of board discussions if relied upon without careful human oversight. The preparation of minutes therefore remains a task that ultimately requires professional judgment and editorial discipline.

Secondly, the use of AI tools may raise issues concerning confidentiality, data security and information governance. Board materials frequently contain commercially sensitive information, strategic plans and legal advice. The use of external AI systems that process such material may expose organisations to risks if appropriate safeguards are not in place. For this reason, many organisations have begun to restrict the use of unapproved external tools in the handling of board materials and minutes.

A further consideration concerns the creation and retention of digital records. Some technologies are capable of generating meeting transcripts, storing audio recordings or maintaining detailed drafts of documents generated during the preparation of minutes. While such tools may assist the drafting process, they may also create additional records that could become discoverable in litigation or regulatory investigations. Organisations should therefore consider carefully how such records are created, stored and retained within their broader document management frameworks.

In light of these considerations, emerging governance guidance generally adopts a cautious but pragmatic approach to the use of AI in board processes. Technology may assist in organising information and preparing preliminary materials, but the responsibility for reviewing and approving the official record of board deliberations remains with humans. Minutes should ultimately reflect the considered judgment of those responsible for preparing them rather than the output of an automated system. As Lee J commented in *Star*:

Any use of AI should be controlled and transparent. It seems to me prudent that boards should discuss and deliberately govern any AI use by formal adoption of policies, rather than just wink at informal "shadow" use. Chairmen and company secretaries have a critical role in preserving role boundaries with management and promoting proper director engagement.<sup>27</sup>

25 For further guidance, see the AICD and Governance Institute of Australia's 'Effective board minutes and the use of AI: A joint statement'.

26 Governance Institute of Australia, *AI and Board Minutes: Issues Paper* (Issues Paper, July 2024) <<https://www.governanceinstitute.com.au/app/uploads/2024/07/AI-and-Board-minutes-Issues-Paper.pdf>>.

27 *Star*, [394].

The emergence of AI therefore does not fundamentally alter the principles governing board minutes. Instead, it reinforces the importance of disciplined governance processes. As board information systems become more technologically sophisticated, the need for clear, accurate and carefully considered minutes becomes even more significant.



## 7 Document management

The preparation of board minutes is rarely a single-step process. In most organisations minutes are initially prepared by the company secretary or another officer responsible for governance administration, circulated to the chair for review and then distributed to directors for comment before being finalised and approved at a subsequent meeting. During this process a number of different records may be created, including preliminary drafts of minutes, internal working notes and comments from directors. Directors may also retain their own personal notes of board discussions. These materials may sit alongside the minutes as part of the evidentiary record and, in some cases, may be used to test or challenge the accuracy of the minutes themselves. They therefore raise important issues of document management and information governance.

In corporate disputes the minutes of board meetings are seldom the only documents examined by courts or regulators. Drafts of minutes, email exchanges commenting on revisions and personal notes taken during meetings may also become relevant in reconstructing what occurred in the boardroom. Governance protocols should therefore address not only the preparation of the final minutes but the broader documentary environment in which those minutes are created.

Increasingly, board materials are distributed and stored through secure portal systems in order to improve the administration of board processes. However, these systems also alter the documentary record of board activity and may retain earlier versions of documents, record when directors accessed board materials and preserve historical board packs. Boards should therefore consider how portal records interact with their document retention and information governance policies, including whether earlier drafts and usage logs are retained, archived or deleted in accordance with established governance practices.

Draft minutes themselves also require careful management. Preliminary drafts prepared during the drafting process may contain incomplete or provisional descriptions of the discussion that occurred. If retained without context, such drafts may later create uncertainty about the accuracy of the final record. Many organisations therefore adopt document management practices under which earlier drafts are replaced by the final approved version once the minutes have been formally adopted by the board, subject to any applicable legal or regulatory retention requirements.

### 7.1 Governance protocol

An effective governance protocol should address matters such as:

- the process for the preparation, review and approval of draft minutes;
- the treatment of preliminary drafts, internal working notes and comments provided during the review process;
- the handling of directors' personal notes and other informal records of board discussions;
- the management of board records within board portal systems;
- the retention of historical board packs and related portal records, including information concerning when and by whom board materials were accessed and the treatment of earlier document versions stored within the system;
- the treatment of draft presentations or board papers prepared by external advisers (such as investment banks, tax advisers or consultants), including how draft versions are circulated, stored and retained prior to the final materials being presented to the board or otherwise identified as the materials actually considered by the board;
- whether meeting transcripts, audio recordings or other automated records of board discussions are created and how any such records are created, stored and retained; and
- the use of AI or other technological tools in the preparation or handling of board materials, including appropriate controls to protect confidentiality, data security and the integrity of the board's official records.

### 7.2 Directors' personal notes

Directors' personal notes present a different set of considerations. Directors frequently take notes during meetings as an aid to recollection or to record questions they wish to raise. Such notes may assist directors when reviewing draft minutes or preparing for subsequent meetings. However, personal notes are not themselves the official corporate record of the meeting. Where litigation or regulatory investigations arise, such notes may nevertheless become relevant evidence if they shed light on the matters discussed by the board.

Ultimately, the existence of additional records does not diminish the central role of formally approved board minutes, which remain the authoritative corporate record of board proceedings. The purpose of governance protocols dealing with drafts, notes, portal systems and technological tools is therefore not to replace the role of minutes, but to ensure that the broader documentary environment in which they are created supports their reliability as an accurate account of the board's deliberations.

## 8 A practical framework for recording significant board decisions

While the principles discussed above provide guidance on the preparation of minutes, boards and company secretaries often benefit from a structured approach when recording deliberations on matters of particular significance. Major transactions, management of regulatory issues, strategic decisions and matters involving material risk frequently attract closer scrutiny from regulators, courts and shareholders. For these reasons it is often useful to adopt a consistent framework for recording the board's consideration of significant matters.

A practical approach to recording significant board decisions may involve the following elements.

### 8.1 Materials considered

Minutes should ordinarily record the principal materials placed before the board. This may include identifying the relevant board paper, presentations by management, reports from advisers or other documents that informed the board's deliberations. Where appropriate, the minutes may also record that drafts of transaction documents or other key materials were tabled and reviewed.

Identifying the materials considered by the board provides a clear record of the informational basis on which the board acted. It may also assist in demonstrating that directors informed themselves appropriately about the subject matter of the decision.

### 8.2 Management recommendation

In many cases the board will be considering a proposal or recommendation developed by management. Including the recommendation presented to the board and the key features of the proposed course of action in minutes provides context for the board's discussion and assists readers in understanding the decision ultimately taken.

### 8.3 Key issues discussed

Minutes should ordinarily record the principal issues raised during the board's deliberations. This may include identifying significant risks associated with the proposal, assumptions underlying management's recommendation or matters raised by directors during discussion.

The purpose of such summaries is not to attribute statements to individual directors or to record every aspect of the discussion. Rather, they provide a concise account of the issues that were considered material to the board's decision.

### 8.4 Advice and expertise relied upon

Where the board has relied upon the advice of external advisers, such as legal, financial or technical experts, the minutes may record that such advice was considered. Similarly, where a committee of the board or a particular executive has undertaken analysis of the proposal, the minutes may note that work as part of the decision-making process. Recording the involvement of advisers or specialist analysis may assist in demonstrating that the board had access to appropriate expertise when considering the matter and that any reliance on that expertise was reasonable in the circumstances.

In significant transactions external advisers such as investment banks, tax advisers or other specialists may circulate draft versions of presentations or analytical materials to management or the board in advance of the meeting at which the matter is considered. In practice these materials often evolve through a number of iterations and may never be formally issued as a "final" document. Governance protocols should therefore focus on identifying and retaining the version of the materials that was actually before the board at the time the decision was taken. That version should be preserved with the board papers or otherwise clearly referenced in the board record. Earlier drafts do not ordinarily need to be reflected in the minutes themselves, but organisations should consider how such drafts are managed within their broader document retention and information governance frameworks.

### 8.5 The board's decision

The minutes should clearly record the board's final decision and any resolutions adopted. Resolutions should be drafted in clear and unambiguous terms so that the authority conferred by the board can be readily understood. Where necessary, the resolution may also authorise officers of the company to take steps required to implement the decision.

### 8.6 Actions and follow-up

Significant decisions frequently involve further work by management or advisers following the meeting. Minutes may therefore record the actions required to implement the board's decision, including any reporting back to the board or relevant committees. Many organisations maintain a formal action list or "matters arising" process to track these follow-up steps. Adopting a structured approach to the recording of significant decisions ensures that the essential elements of the board's deliberative process are captured in a consistent and intelligible manner.

## 9 Culture, conduct risk and board oversight

In recent years, corporate governance discourse has increasingly emphasised the responsibility of boards to oversee organisational culture, conduct risk and compliance systems. These developments reflect a growing recognition that many corporate failures do not arise from a single flawed decision but from systemic weaknesses in organisational oversight. The role of the board in guiding and monitoring management therefore extends beyond the approval of strategic decisions to include ongoing scrutiny of how the organisation conducts its business.

In *Star*, the Court emphasised the distinction between failures of management and failures of board oversight. Although the Court ultimately concluded that ASIC had not established breaches of duty by the non-executive directors, the judgment contained several observations that underscore the governance expectations placed upon modern boards. Lee J observed that the law now expects significantly more of company officers in the discharge of their duties and when delegating responsibilities to others. The role of directors, particularly in industries exposed to heightened regulatory risk, requires vigilance and active engagement with the ethical and legal standards governing the organisation's activities.

The case also illustrates how failures of organisational culture can emerge gradually within complex institutions. Evidence before the Court indicated that senior management had failed to escalate significant risks and had provided incomplete or misleading information to external stakeholders. While those failures were ultimately attributed primarily to management rather than the board, the circumstances nevertheless raised questions about the effectiveness of the oversight structures through which such risks were reported and monitored.

In this context, board minutes may play an important role in demonstrating that directors have engaged with matters of culture, compliance and conduct risk. Minutes need not attempt to document every aspect of these discussions. However, where the board considers issues such as regulatory developments, risk management systems, internal investigations or compliance concerns, the minutes may record that these matters were considered and that appropriate questions were directed to management.

Such records help illustrate that the board has exercised its oversight responsibilities in a structured and engaged manner. They show that the board has sought to understand how the organisation manages legal and regulatory risk and that it has required management to report on matters that may affect the integrity of the company's operations.

The oversight of organisational culture presents particular challenges because culture is rarely reducible to a single decision or policy. It is reflected instead in patterns of behaviour, incentives and management practices over time. For this reason, boards frequently address cultural issues through periodic reporting, risk reviews and discussions with senior executives responsible for compliance and risk management.

Minutes may therefore record that the board considered reports from management or board committees addressing these matters. They may also note where directors requested additional information or sought clarification regarding the effectiveness of compliance frameworks or internal controls.

Well-prepared minutes will not, of themselves, prevent governance failures. They can, however, provide evidence that the board actively engaged with the oversight responsibilities entrusted to it. In an environment where corporate conduct is subject to increasing scrutiny from regulators, courts and the public, the existence of such a record may assume considerable significance.



## 10 Approval and authentication of minutes

Section 251A of the Corporations Act requires that minutes of directors' meetings be entered in the minute book within one month and signed by the chair of the meeting or the chair of the next meeting. Once signed, the minutes constitute prima facie evidence of the proceedings of the meeting.

### 10.1 The role of the chair

The chair plays a central role in the authentication and reliability of board minutes. Once signed, the minutes constitute prima facie evidence of the proceedings of the meeting. The act of signing therefore carries legal and evidentiary significance beyond administrative formality. The chair is effectively verifying that the minutes provide a fair and balanced record of the proceedings and that the resolutions recorded accurately reflect the decisions taken by the board including the treatment of any abstentions, conflicts or dissents that arose at the meeting. In practice, the chair is expected to verify that the minutes accurately reflect the substance of the board's deliberations and the resolutions that were adopted. Courts have long treated properly signed minutes as important evidentiary records of board decision-making.

Governance guidance from the Australian Institute of Company Directors and the Governance Institute of Australia emphasises that minutes should capture the key issues considered, the information placed before the board, and the outcome of the discussion, while avoiding unnecessary narrative detail.

The chair performs a critical quality-control role: ensuring that the record accurately reflects the board's reasoning, that resolutions are recorded correctly and unambiguously, and that the minutes demonstrate the board's engagement with the issues before it. This function has particular importance in contemporary governance litigation, where minutes and related board materials may become central evidence in assessing whether directors exercised the care and diligence required by law.<sup>28</sup>

In *Star*, the Court repeatedly noted the evidentiary limitations created by gaps in the documentary record. As Lee J observed, "what occurred, and what can be proven to have occurred, are not always the same thing,"<sup>29</sup> particularly where alleged discussions took place without any contemporaneous record in board minutes or other documentation.

### Practical guidance for boards and company secretaries

Preparing effective board minutes

#### 1. Focus on the decision, not the transcript

Minutes should record the essence of the discussion and the reasoning supporting the decision without attempting to reproduce the detail of debate.

#### 2. Record the key materials considered

Where appropriate, minutes should identify the board papers and presentations considered by the board.

#### 3. Capture the board's engagement

Minutes should demonstrate that directors actively considered the issue, asked questions and addressed key risks.

#### 4. Record dissent and abstentions

Where a director abstains or votes against a resolution, this should be recorded.

#### 5. Avoid unnecessary narrative

Minutes should be sufficiently detailed to demonstrate the board's reasoning but not so extensive that they become a transcript of the meeting.

#### 6. Ensure timely preparation and approval

Draft minutes should be circulated promptly after the meeting and approved at the next board meeting, with the chair confirming their accuracy.

#### 7. Treat AI as a drafting tool, not a substitute for judgment

Artificial intelligence may assist in preparing draft minutes or summarising board materials, but the final responsibility for the accuracy and appropriateness of the record rests with the company secretary and the board.

The judgment therefore illustrates a practical governance point: where minutes fail to capture the substance of board deliberations, courts may be left to reconstruct events from fragmentary evidence. Ensuring that minutes accurately record the matters considered by the board, the information placed before it and the decisions taken is therefore an important aspect of the chair's stewardship of the board's decision-making process.

<sup>28</sup> The statutory framework makes the chair's signature the mechanism by which the evidentiary status of the minutes is activated. Without the chair's signature (coupled with recording in the minute book within one month), the minutes do not attract the benefit of s 251A(6) of the Corporations Act.

<sup>29</sup> *Star*, [1948].

In that sense, the chair's role in reviewing and signing the minutes is not merely administrative. It is part of the governance architecture through which the board demonstrates that it has engaged with the issues before it and exercised its judgment in accordance with its legal duties.

## 10.2 Disputes as to contents of minutes

In the absence of a statutory mechanism for resolving pre-execution disputes about the content of minutes, the position is essentially governed by the general law, the company's constitution, and any applicable board charter. The following practical principles can be drawn from the authorities:

1. Where a director disputes the accuracy of draft minutes, the chair should not simply override that objection and sign the minutes without taking reasonable steps to ascertain the correct position. The chair's duty of good faith and the significance attached to the act of signing both point towards this conclusion.<sup>30</sup>
2. Where the dispute cannot be resolved, it is open to the board to adopt the minutes with the dispute noted, such as by recording the dissenting director's objection in the minutes themselves. This approach ensures the corporate record reflects the disagreement and preserves the director's position.
3. Where amendments are made to draft minutes during the review process, the courts have accepted that this is a normal and appropriate governance practice, provided the amendments are made in good faith for the purpose of improving accuracy. However, where amendments appear to have been made for an ulterior purpose, such as sanitising the record in response to a regulatory investigation, the court will scrutinise the amendments with care.
4. The failure to raise a contemporaneous objection to the content of draft minutes carries real forensic risk for a director. If the minutes are subsequently signed and entered into the minute book without objection, a court is likely to treat the director's silence as evidence that the minutes were accepted as accurate. This underscores the importance of directors reviewing draft minutes carefully and raising objections promptly.<sup>31</sup>



30 *Re Ryde Ex-Services Memorial & Community Club Limited (Administrator appointed)* [2015] NSWSC 226 at [104]–[108] (duty of the chair to act impartially and “in a way calculated to ensure that the true will of the meeting is ascertained, rather than in pursuit of some personal desire or preference”).

31 *James Hardie*, [136] (the absence of any objection by a director to the accuracy of the minutes when they were approved was treated as inconsistent with a later argument that the minutes were inaccurate).

## 11 Conclusion

In an environment where corporate decision-making is increasingly examined through the lens of directors' duties, regulatory oversight and shareholder scrutiny, minutes frequently become the most important contemporaneous record of how boards actually discharge their responsibilities.

The cases discussed in this article illustrate that courts rarely assess board conduct by reference solely to the outcome of a decision. Instead, judicial analysis often focuses on the processes through which directors informed themselves, engaged with management and exercised their judgment. In reconstructing those processes years after the relevant events, courts necessarily rely on the documentary record created at the time. Board papers, internal memoranda and minutes therefore become central elements of the evidentiary framework through which directors' conduct is evaluated.

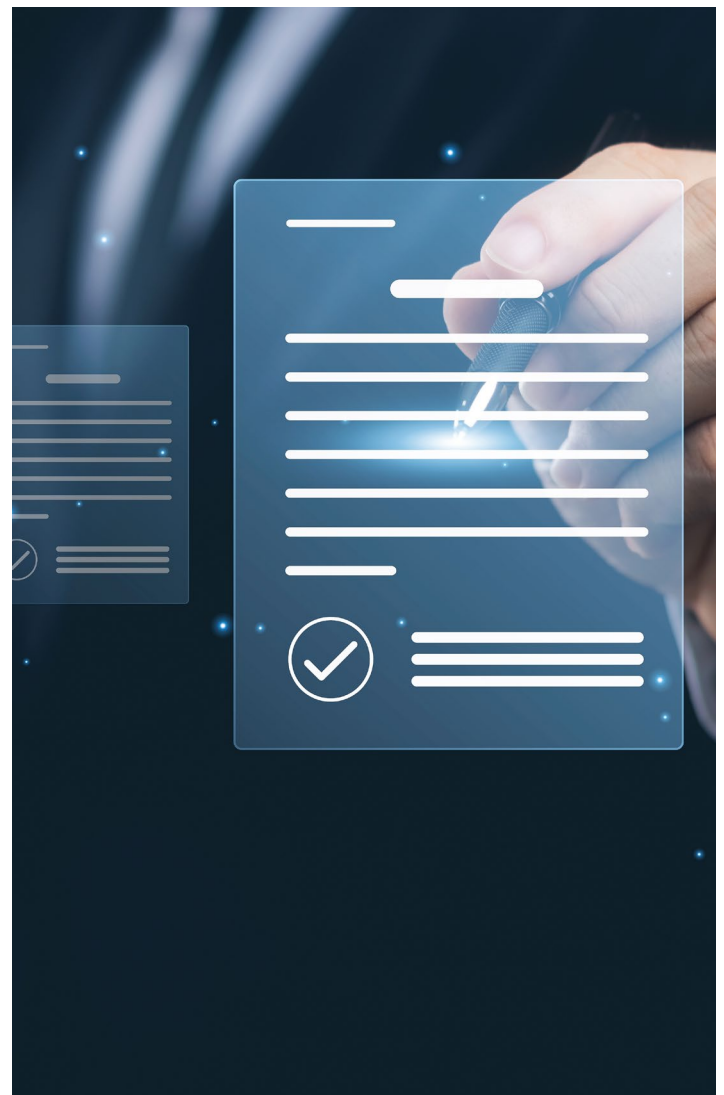
Minutes should not be understood as a transcript of boardroom discussions or as a defensive document drafted with litigation in mind. Their purpose is more straightforward and more important: to provide an accurate and intelligible record of the board's deliberative process. Properly prepared minutes form a key part of the governance architecture through which boards demonstrate that they have exercised the care and diligence expected of them and they do so by recording engagement with material issues rather than the detail of the discussion.

The increasing complexity of modern corporate governance makes this function even more important. Boards operate within sophisticated information environments characterised by extensive board papers, specialised risk reporting and layered organisational structures. Directors must often navigate large volumes of material in circumstances where critical risks may be embedded within complex reporting systems. In such an environment, the existence of clear and well-structured minutes provides an important record of how the board engaged with the information before it.

At the same time, emerging technologies are beginning to reshape aspects of the board process. AI and digital tools may assist in synthesising board materials or preparing preliminary drafts of minutes. Yet these technologies do not alter the fundamental legal principle that responsibility for corporate decision-making rests with human decision-makers. The statutory duties imposed upon directors require the exercise of independent judgment, informed by appropriate information and deliberation. Technology may assist that process, but it cannot substitute for it.

Ultimately, the significance of board minutes lies in what they reveal about the functioning of the board itself. Where minutes demonstrate that directors considered the relevant information, engaged with material risks and exercised independent judgment, they may provide powerful evidence that the board fulfilled its governance responsibilities. Conversely, where the corporate record reveals little evidence of engagement or deliberation, the absence of such a record may itself become part of the narrative through which courts assess the conduct of directors.

In this sense, minutes sit at the intersection of corporate governance practice and the legal framework governing directors' duties. They are not merely administrative records but part of the institutional architecture through which boards demonstrate accountability. As corporate governance continues to evolve, the disciplined preparation of board minutes will remain an essential element of effective board practice.



# Model board minutes reflecting the agreement to proceed with an M&A proposal

## Project Dingo

The Managing Director of the company and relevant subsidiaries (**Company**) tabled the board paper entitled “Project Dingo (26-02C1);” which was circulated to directors prior to the meeting. The board paper included a two-page executive summary outlining the key elements of proposed acquisition of the Normandy division of Spitfire Group Ltd (ASX: WW2) and relevant subsidiaries (**Spitfire**), together with financial analysis, due diligence findings and a summary of the transaction’s key risks (**Proposed Transaction**). The operating division of Spitfire, Normandy, was a standalone business with good prospects for integration into the company’s existing business.

The Chair and the company secretary confirmed that the board had been provided with the material prior to the meeting.

The board noted that the materials circulated in advance of the meeting had been reviewed.

The Managing Director advised the board that the summary outlined the value proposition of the proposal, the business case, key risks and material financial information relevant to the proposed transaction.

The Managing Director also confirmed that the Chair and several other directors had received preliminary briefings from management concerning the proposed transaction prior to the meeting and the Board paper reflected those discussions and comments. In particular, he confirmed that the issue of both negative and positive synergies had been fully explored in the board paper.

**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.

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 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 the 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 therefore abstained from voting on the Proposed Transaction.

**Annotation:** The minutes should disclose any abstentions and the reasons for abstaining. 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 declared that she held a material personal shareholding in Spitfire and had previously been involved in matters concerning that company. Ms Hurricane did not participate in the discussion of Project Dingo and left the meeting during consideration of the matter. It was agreed that she would not receive further papers relating to the Proposed Transaction while the conflict remained.

**Annotation:** The minutes should disclose any conflicts of interest and the actions taken to address them such as a director’s decision to recuse themselves. 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 that he had been kept informed by management of negotiations with Spitfire in relation to 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 board paper 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 and board papers may be the only means of capturing the substance of external opinions and reports. 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.

Representatives of BoutiqueBank presented to the board on various aspects of the Proposed Transaction. The board considered the presentation titled "Project Dingo – Transaction Overview" dated [date], a copy of which was tabled at the meeting and retained with the board papers.

**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 a number of questions and matters of inquiry concerning the Proposed Transaction, including:

- the key assumptions underpinning Project Dingo including how quickly and effectively the assets could be integrated and what unique benefit the Company would gain;
- whether the Company was provided with all 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 during 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;
- 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 Project Dingo (i.e. comparing where the board wanted to go with acquisitions (top-down)), what management wanted to achieve and whether they had examined priorities and the unique benefits of the Proposed Transaction; and
- whether there were particular reasons for the urgency with the Proposed Transaction.

The discussion focused on these matters in order to test the board's understanding of the Proposed Transaction and the principal risks associated with it.

**Annotation:** Directors who ask probing questions demonstrate they are not simply passively receiving information but are actively assessing risks, scrutinising assumptions and ensuring that decisions of the board are grounded on informed and thorough analysis. Adopting an inquisitorial approach to board discussions is critical for directors to be alert to 'red flags' and reinforces a culture of sound and responsible governance.

Further, and as noted in an opinion provided to the AICD,<sup>30</sup> “[i]f facts come to the attention of a director which awake their suspicion that something is amiss or that would have awoken the suspicion of a reasonable director in their position with their responsibilities, then the director has a duty to enquire further into the matter with a degree of care commensurate with the risk of harm”.

The questions were answered by the Managing Director, BoutiqueBank 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.

The board considered and discussed whether the internal and external advisers collectively had all the necessary skills to advise the board on the material matters relevant to Project Dingo.

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

Mr Churchill expressed reservations regarding the proposed transaction and requested that his views be recorded in the minutes, noting that in his opinion the acquisition did not fully align with the Company’s previously agreed non-organic growth strategy. Mr Churchill indicated that he would support the proposed resolution.

**Annotation:** Material dissent should be noted and individual dissenting directors should be identified. Recording this information may be helpful to establish that directors have reached their own informed but independent views and that the Board has collectively given due consideration to all perspectives before a final decision was made.

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.

## Proposed transaction

Having considered the materials provided and the matters raised in discussion, the board formed the view that the Proposed Transaction was in the best interests of the Company.

## 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).

**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.

## Approved documents

The Chair tabled drafts of the SPA and the related transaction documents (together the **Approved Documents**) and indicated to the board 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 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.

<sup>30</sup> Directors’ section 180 duty of care and diligence & regulatory compliance obligations, Opinion, prepared by Michael Hodge KC and Sonia Tame, available at <https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/s180-opinion-michael-hodge-kc-and-sonia-tame.pdf>.

**RESOLVED** that:

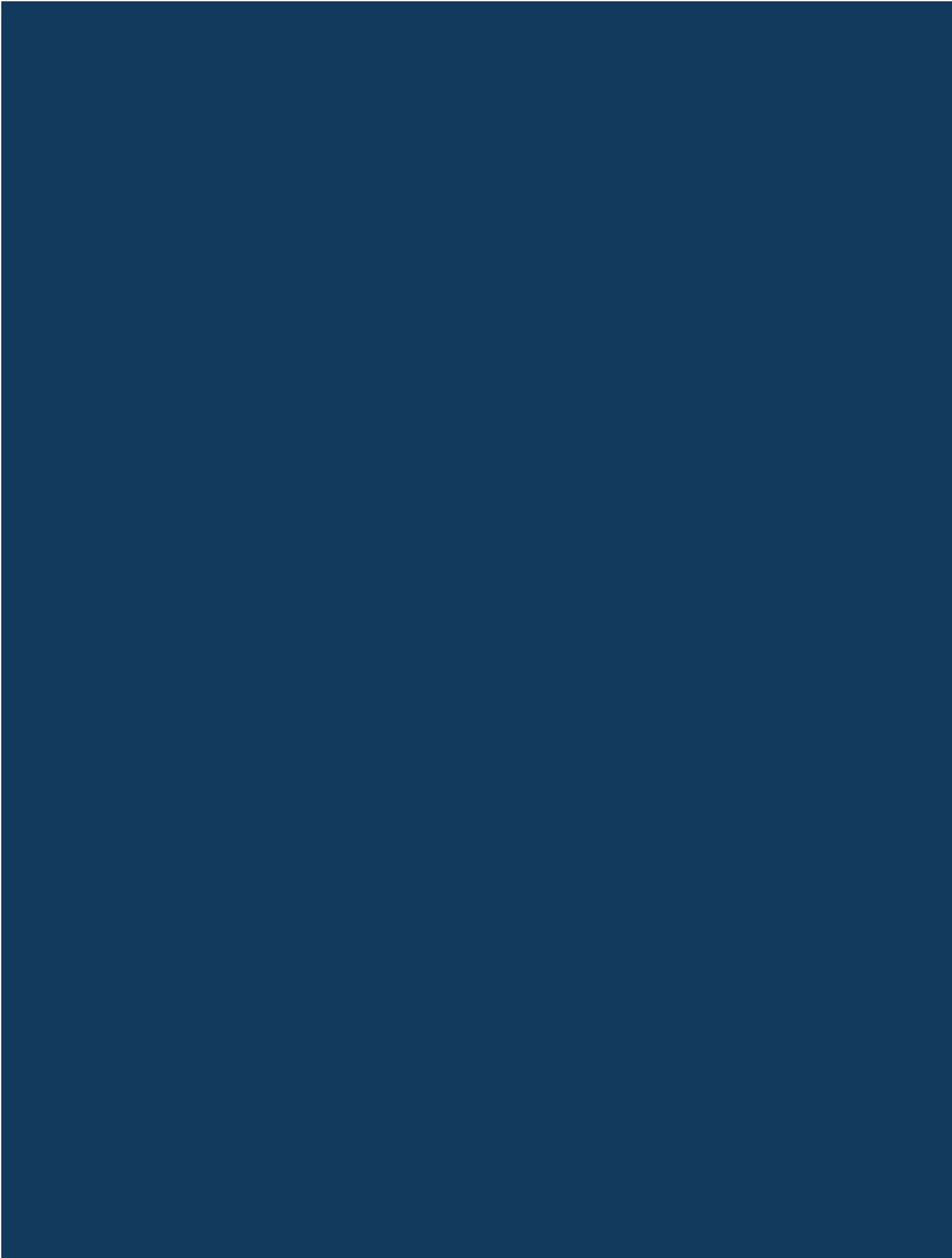
1. The Managing Director of the Company, in consultation with the Chair, be authorised to approve and issue on behalf of the Company:
  - a. the final form of the Approved Documents;
  - b. any notices, announcements or similar to ASX, ASIC or other government authority; and
  - c. any other document 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 be authorised to do anything and to execute any document which they consider necessary, advisable or incidental in connection with:
  - a. the preceding resolutions;
  - b. any Approved Document or Incidental Document; or
  - c. the Company's involvement in the Proposed Transaction; and
  - d. perform or cause to be performed the Company's obligations under the Approved Documents and Incidental Documents.

## Voting result

Mr Bader abstained from voting.

Ms Hurricane was absent from the meeting during consideration of the matter.

All other directors voted in favour of the resolution.



Sydney  
Melbourne  
Brisbane  
Perth  
Port Moresby

