



## Strict compliance with Act required for Minutes to be evidentiary

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The recent case of *Australian Securities and Investments Commission v Macdonald (No 11) [2009] NSWSC 287 (ASIC v Macdonald)* decided in the New South Wales Supreme Court, highlights the importance of strict adherence to the requirements of the *Corporations Act 2001* (Cth) when preparing minutes of Directors' meetings (**Board Meetings**) for them to be relied upon as evidence in a proceeding.

### Facts of the case

The central issue was whether or not the ASX Announcement (**Announcement**) was approved at a Directors' meeting and whether or not the minutes of the meeting could be relied upon as evidence as provided by under s1305(1) of the *Corporations Act 2001* (Cth) (Act).

The defendants argued that the Announcement was approved at a meeting of the Directors of the James Hardie Industries Limited (**JHIL**) on 15 February 2001. The minutes contained an entry that explained the impact of the resolution, the passing of the resolution itself and approval for the Announcement to be prepared and sent to the ASX. The chairman signed the minutes at the following Board Meeting on 4 April 2001. The minutes of the meeting of 15 February 2001 were sent to the Company Secretary on 7 April 2001, some 51 days later for inclusion in the company's minute book.

### The basis of ASIC's argument

Section 251A(1)(b) of the Act provides that a company must keep proceedings and resolutions of Directors' meetings and record them in its minute book within 1 month of the meeting. Section 251A(2) provides that these minutes must be signed by the chair of the meeting or the chair of the next meeting. If these criteria are met, then Section 251A(6) provides that the minutes that are so recorded and signed are evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proven.

It was successfully argued by ASIC that Section 251A(6) was not engaged because of the excessive period of time between the Board Meeting on 15 February 2001 and when the minutes were filed in the minute book by the Company Secretary on 7 April 2001. Therefore the Minutes were of no evidentiary value to the defendants. The principle from *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239 that minutes must be prepared and filed strictly within one month of the meeting was applied by the Court.

*Strict compliance with the time limits described in section 251A(1) is required for minutes to be evidentiary*

### The principle

Minutes are meant to be contemporaneous documents designed to be a true and accurate reflection of the events occurring at the meeting. The statutory requirements outlined in s251A of the Act are strictly applied by the Courts.

### The format and content of minutes of Directors' meeting

There has been little prescriptive judicial guidance regarding the format and content of minutes of Director meetings. In the case of *John J Star (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd and others* – (1991) 6 ASCR 63 (**Star**) Young J refers to Horsley's Meetings, 3rd edition at pp164-8, which was written prior to the advent of the Corporations Act. The Act now codifies Directors duties mainly under sections 180 - 183, 189, 190, 191, and 588G (although other relevant provisions exist). Therefore, there appears to be an expanded requirement for the content and format of minutes to act as an enabling mechanism for Directors to establish that they had discharged their duty and acted properly.

### Guidance from the United States

In 2005, in re The Walt Disney Co Derivative Litigation (a decision of Chancellor Chandler of the Delaware Court of Chancery) the Delaware Court of Chancery had to determine whether directors had breached their fiduciary duties in relation to the hiring and subsequent termination of former Disney President Michael Ovitz. Chancellor Chandler remarked that it would have been helpful to see if the minutes had shown how long the directors considered Mr Ovitz's appointment for and the substantial discussion that took place, particularly in relation to other matters that were considered.

This decision by Chancellor Chandler does not appear to have gone unnoticed by the Australian Institute of Company Directors (AICD). Its publication entitled 'Minutes, Frequently Asked Questions' at page 3 states that 'reasons for decisions should be included in minutes' and further states that:

*“a brief outline of factors material to the decision, any dissenting views and the amount of time spent on discussion may help to establish that directors have exercised proper care and diligence in their decision making. Recording the length of time spent on a discussion can denote the relative importance of a matter to a board meeting, reinforcing that directors have given it due consideration”.*

ASIC v Macdonald establishes that for minutes to be evidentiary strict compliance with the Act is required, however Directors should also consider the need for the content of minutes to show that they adequately discharged their statutory duties.

It therefore follows that minute takers should not only understand the procedural compliance issues required to make minutes evidentiary, but also, the format and content of minutes required for Directors to establish a defence if alleged to have breached their duties.

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