

Board minutes: Not just an administrative formality

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Recent high-profile director liability cases have highlighted the importance of ensuring that the preparation of board minutes is given due care and attention. In this blog post, we explore some of the key considerations relating to board minutes, including their purpose, when they may need to be disclosed and best practice with regards to their preparation.

Recap: What are the legal requirements with respect to board minutes?

The Companies Act 2006 (**CA 2006**) requires that all companies record proceedings of directors' meetings and failure to do so is a criminal offence for the directors. Articles of association and other internal documents such as shareholders' agreements are likely to contain additional requirements (including in relation to recording directors' decisions taken outside of board meetings) so should always be checked. In general though, there is very little prescription in relation to board minutes and so practice in respect of style, content, structure and the degree of detail contained will vary from company to company.

Recap: What is the purpose of board minutes?

As highlighted by the Chartered Governance Institute (formerly ICOSA) in their guidance 'Minute Taking' (the **CGI Guidance**), the proper purpose of board minutes is to provide a formal, long-term internal record of board meetings that is accurate, impartial and balanced, for the benefit of the company rather than any third party. However, it is worth keeping in mind that board minutes are also an important means of demonstrating that directors have fulfilled their statutory duties eg showcasing they have properly considered shareholder/stakeholder impacts, declared any interests, and authorised any director conflicts in accordance with statutory requirements. The CA 2006 provides that minutes made in accordance with the relevant provisions and signed by the chair of the meeting or of the next board meeting are evidence of the proceedings of the meeting, unless the contrary is proved.

Practically, minutes remind participants of the actions they have agreed to take and enable board members who were unable to attend to understand what took place. They can also be a helpful tool when inducting new board members.

Recap: When might board minutes need to be disclosed?

Generally, board minutes are kept for internal records. However, in certain circumstances there may be a requirement to disclose/provide third parties with the record of board minutes. Examples of this include during disclosure in legal proceedings or arbitration, due diligence in transactions, or to satisfy a regulatory request or freedom of information request. This may, in some instances, lead to the board minutes (or extracts thereof) becoming public eg if included in a court judgment or scrutinised by a Select Committee. Any such external review of board minutes may take place long after the date of the meeting. The possibility of external scrutiny should therefore be a consideration when preparing board minutes.

Lessons from recent case law:

Recent case law has emphasised that:

- board minutes can be the best guide as to findings of fact;
- courts are more likely to rely on minutes which are clearly a contemporaneous record of the meeting;
- less weight will be given to minutes which have obviously been prepared in advance by lawyers and even less so to standard form language or statements, particularly where repeated in multiple minutes;
- if there is a question mark as to the accuracy of the minutes, the court will look at any relevant evidence as to what actually took place, including any retained notes taken at the meeting but also email or other correspondence between the directors and/or company secretary in relation to the board meeting and the matters purported to have been considered at it;
- courts will reject language which was added to minutes at a later date where there is evidence to suggest such language does not reflect the facts; and
- key documents (including memoranda of advice from lawyers) on which the directors have relied in reaching a decision should be tabled at the meeting and referred to in the board minutes.

Best practice?

* Board minutes should focus on the decisions made or actions agreed and should record the reasons for the decisions made and any key discussions. Sufficient but succinct background information should also be included for context and future reference.

* Whilst there are many advantages of preparing draft minutes in advance of a board meeting, it is vital that the final board minutes reflect reality. Therefore someone who attended the meeting should review any pre-drafted minutes and, as required, update them to ensure they are an accurate reflection before they are signed. This review and update should take place as soon as possible after the meeting.

* Any draft minutes which have been prepared in advance can act as an agenda but should not restrict discussion or seek to prescribe how the meeting unfolds.

* Standard form language can be helpful in ensuring that directors are reminded of statutory duties and requirements (eg in respect of s172 considerations and conflicts of interest) but there should be meaningful engagement on these points in the meeting.

* Any notes taken by the company secretary during the meeting should be kept at least until the time the minutes are signed by the chair. After that, the CGI Guidance suggests that it may be preferable on balance to destroy the original notes on the basis that the approved minutes form the legal record of the meeting and that the risks associated with disclosure outweigh the benefits.

* Whilst the CA 2006 requires that minutes are retained for 10 years, it is best practice to retain them for the life of the company (in line with the CGI Guidance).

* Companies may want to consider implementing a minute-taking policy and/or style guide that is signed off by the board.

If you would like more information on any of the above, please speak to your usual Freshfields contact.