

# Minutes — let the record speak

By **Adrian Kelly**, Transcripts Plus

Minutes allow the record to speak, except they didn't speak, according to the outcome of a recent court case in the USA. Of course, minutes by their very nature are not meant to be an exact word-for-word portrayal of what occurred at, say, a board meeting, but according to many in the legal fraternity and others, as a result of the Delaware Chancery Court's decision in the case of *In re Walt Disney Co Derivative Litigation* (2005), No 15452, a wake-up call was issued for corporate secretaries, board directors and general counsel. The promoters of a 'less is more' approach might well need to change their thinking.

## The Disney case

The *Disney case* had been awaiting decision for many years. It involved allegations related to breaches of fiduciary duty when Michael Ovitz filed for a severance payment worth \$US140m following his termination from his employer, Walt Disney Co. In the end, the directors won the case, but what remains pertinent to this paper is the highly critical nature of the decision in relation to the way the directors, among other things, 'conscientiously and intentionally disregarded their responsibilities'.

The board minutes of discussions around the hiring of Mr Ovitz were so lacking in detail that it brought into question what, if any, business judgment the directors had undertaken when hiring this person. According to an article recently written in Law.com on the implications of the case, the chairman of the meeting often used to discuss matters one-on-one with others or in groups outside the board meetings, and while this is often done, it was considered very important that there be formal discussion and consideration of the same topic within the board meeting — and have this reflected in the minutes. In other words, yes, we have discussed such and such previously in 'fireside chats' but now let's summarise that again for the full board and allow full and transparent debate of the topic. Where there may be conflicts of interest, these can be clearly laid bare for all to see, and completely eliminate the need for later questions in relation to someone's integrity or independence.

- *The Corporations Act requires that a company record minutes of its meetings within a particular time frame but there is scope to do much more*
- *In the US, the Disney case highlighted the need for detailed minutes surrounding key board decisions*
- *Various forms of new technology are available to make minute taking easier and faster*

## Confusion reigneth

There is often much confusion about what minutes are. Some people think minutes are a verbatim transcript. They're not, although it is permissible to compile a combined document — a summary and some verbatim word-for-word aspects, especially of, say, an annual general meeting. A company, for that matter, could have two documents: one, the summary, representing the minutes, and then the verbatim transcript showing exactly what occurred. This is highly valuable, again, for an annual general meeting where shareholders may well wish the ability to reference exactly what was said as well as the minutes.

## Australian law

In Australia, s 251A of the *Corporations Act 2001* stipulates:

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

- proceedings and resolutions of meetings of the company's members; and
- proceedings and resolutions of directors' meetings (including meetings of a committee of directors); and



- (c) resolutions passed by members without a meeting; and
- (d) resolutions passed by directors without a meeting; and
- (e) if the company is a proprietary company with only 1 director, the making of declarations by the director.

Now, that basically lays down the bare minimum requirements, but the reality is far different. In fact, minutes are a historical record of what actually transpired, and can represent the planning process that went into a decision. How often have you heard people say, 'The board has made a decision, but I wonder what they considered, if they knew about ...'. Imagine the cost savings in litigation if all was perfectly clear from the record — not a blow by blow outline, but one sentence or two that throws light upon matters of dispute.

### Minutes in detail

The *Disney case* decision brings into focus a subject which is often raised: how much and to what extent should the minutes of a meeting reflect what occurred? We know that there are different types of minutes, and these can be broadly defined as follows.

- Style A: introductory remarks to an item and action outcome
- Style B: Minutes of Narration — introductory remarks to an item, key discussion points (to assist with understanding how a decision was made) and action/outcome boxes
- Style C: Minutes of Resolution — purely the actions/outcomes, nothing else. This is usually done on a laptop computer

From my own experience of producing professional minutes for a vast array of organisations over 14 years, in the majority of cases board members present at a meeting — and for that matter those who were absent, or even members who may wish to have access to the minutes — often like to know how a decision was reached, and what considerations were taken on board when a decision was reached. This frequently occurs where previously only action items were requested. With Style A and Style C minutes anything more than the skeleton is not possible, you only really get the outcomes and little else. How the decision was reached is just a matter of memory. Style B, I believe, offers the best all-round style of minutes.

### Capturing the minutes

The capturing of minutes is quite a vexed question. Years ago, as we know, people had that wonderful skill, shorthand, that enabled them to record, if need be, almost word-for-word what was said and to then create a very much abbreviated version. This talent is now as rare as hen's teeth, and often not immediate enough. Taking minutes on a laptop is common, but unless the minute secretary is a skilled typist and minute taker, the results are going to be very sketchy indeed, and could well slow a meeting up while the minutes are attempted to be typed. A summary of the discussion is often out of the question, and even then involves a very skilled and talented person who can quickly think on their feet, as it were. If you were wishing to compile more than action minutes (those that include only the outcomes) the choices might be as follows.

1. Type up a rough draft at the meeting, distribute it, and then provide the proofed version later
2. Type up a rough draft at the meeting and fill in discussion points by referring to an audio recording at a later time
3. Make an audio recording of the meeting and later compile the minutes from that recording

While all of the above are doable — and in fact are probably the most common methods — there are now other alternatives.

### The latest technologies

- Using a special 'mask' device that fits snugly over the mouth, containing a specially designed microphone, one can compile the minutes in real time when the mask feed (that is, your voice) is fed through a speech recognition engine. That is, no typing, merely editing. This mask acts like a mini sound booth that excludes extraneous noises, and mutes your voice as well. The minutes are created at the time of the meeting — and of course, one can speak much faster than type, so more detail can be included. This does, however, require the ability to think on one's feet, as it were
- Software programs are available that can assist you to type in the minutes as well as digitally record the meeting for later reference
- Digital pens can allow you to write on a special laptop and convert that to typed form, or even send your note files over the internet for someone else to type up the minutes as the meeting is occurring. Imagine your taking the minutes in Hong Kong while another person in Sydney is compiling the final document and sending it back to you — perhaps even

The art of providing concise, yet clear and readable, minutes is often very much underrated in this country. But be warned, as we can see from the *Disney case*, the difference between a later lengthy and costly court hearing, and perfectly transparent operational procedures that meet all the necessary legal requirements, depends on the quality of minutes. Minute taking is an art, and should never be given over to someone who is untrained and not highly professional.

including missing documents that the board requires or wishes to have appended to the minutes, or overheads, without the need to have them copied at expensive hotel rates. In the future, it may even be possible to instantly convert pen shorthand symbols into typed words. There is even a new pen where one writes on special paper. The pen — in effect, a mini-computer — records the room audio as well, and by tapping the nib at a word in your writing, plays back the room audio at that point

- When you require a verbatim transcript so that in-house professionals can compile the minutes from this, DVDs can now be produced straight after a meeting that can include one, two or all of the following: the draft transcript/minutes, the digital recording and the video. That is, as soon as the meeting ends, a DVD can instantly be burnt that contains all the media you may require. The implications and breadth of scope for this is enormous. Imagine presenting at a meeting and then having the ability to take away your presentation in any media form you may wish to review on the plane home by slipping the DVD into your computer! For the hearing impaired, this is also a real bonus

### The future of minutes

Minutes have always been and will continue to be an essential element of professional meetings. The art of providing concise, yet clear and readable, minutes is often very much underrated in this country. But be warned, as we can see from the *Disney case*, the difference between a later lengthy and costly court hearing, and perfectly transparent operational procedures that meet all the necessary legal requirements, depends on the quality of minutes. Minute taking is an art, and should never be given over to someone who is untrained and not highly professional. To do so would smack of amateurishness and a lack of understanding of just how important those minutes might be one day. They are, after all, the history of an organisation, and years later can shed light on how a decision was made. Who knows; if done properly, they might even negate the need to call in the legal team!

### A final note

I am more than happy to be contacted for further information about the latest technologies for compiling minutes.

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