Directors' meetings:

by Warren Pengilley*

Whilst there are a considerable number of requirements under the *Companies Code* as to the notice required of, and formalities at, general meetings of companies, the question of the formalities required of directors' meetings is quite differently treated.

It is usual for Articles of Association to provide very generally in relation to the formalities required for directors' meetings.

A typical Article covering the formalities is likely to be: "The Directors may meet together for the despatch of business and adjourn and otherwise regulate their meetings as they see fit."

The question arises as to how formal directors' meetings have to be.

This involves issues of procedure, rules of discussion and the minuting of proceedings.

There is little law, but much folklore, on these points.

The decision of the Supreme Court of New South Wales in John J Starr (Real Estate) Pty Ltd v Robert R Andrew (A'Asia) Pty Ltd (1991 9 ACLC 1372: Young J), however, gives considerable enlightenment to this murky area of law.

The facts of the case are not of particular relevance.

The case involved an allegation of oppression brought by minority directors against the majority directors. Some of the issues raised involved the tactics adopted at certain directors' meetings.

It is this area which is most interesting. The case discusses (1) fair and foul "tactics", (2) formalities of discussion and (3) the requirement of minutes.

Fair and Foul Tactics

Mr Justice Young utilised his own experience in relation to company boards in order to reach his conclusions. They were:

(1) It is not unusual for skillful directors and executives of companies to increase their chances of having their views accepted by the board by employing legitimate commercial tactics. One favourite method of executives is to place voluminous documentation before a board at short notice, usually accompanied by expressions of urgency. Sometimes this procedure cannot be avoided by the exigencies of the situation. If, however, this occurs on a large number of occasions, many without any urgency except that created by management failing to action board matters expeditiously, then one does suspect that unfair tactics are being used.

(2) It is quite a legitimate tactic to wait for a board meeting at which the principal opponent is on holidays and then bring on a proposal or "forget" to include a matter on an agenda of a board meeting, or to adjourn a proposal for personal or tactical reasons. It is only when this happens on a sufficiently large number of occasions, or where there is deception or failure to make proper disclosure, that one goes over the line between legitimate commercial tactics and grounds for complaint. There is also ground for complaint when such tactics are so constantly employed by the majority that the minority are vitually deprived of their statutory right fully to participate in general or directors meetings.

(3) Another common tactic is to contend that an opponent's motion is out of order, or that insufficient notice has been given, or that the matter should have progressed through some special procedure before being dealt with by the board. Confident directors know how to combat this very common tactic, but those who sit on boards perhaps infrequently are put off by it.

(4) There is also the device of diverting awkward issues by sending them off to a subcommittee whose members are too busy to meet and which is stacked with sympathisers of the diverter. Again, one can always say that the matter needed to be deferred for more information which one knows one will never get. All these in their place between business people of experience are legitimate enough. It is only when they are used so frequently as to prevent the minority from really participating as they ought that they step over the boundary between legitimate tactics and oppression.

(5) Another tactic is the so-called "mini board meeting." This description is used of meetings of a particular faction to pre-digest issues before the board meeting. There is nothing wrong with the meeting together of some members of the board before a broad meeting. Indeed, in many busy boards there will be an actual steering or executive committee to pre-digest issues and to formulate draft resolutions so that the meeting can proceed smoothly. In many boards, the directors represent different interests and will talk matters over with persons of similar interests for quite legitimate purposes; for the purpose of considering how the proposed resolution will affect them or those who they particularly represent, or to get more information, or otherwise to put themselves in a position where the matter can be meaningfully debated. However, when many board meetings get to the stage at which the participants have irrevocably decided how they will vote at the board meeting, so that virtually no matter what anyone says at the meeting the decision of the mini board meeting will prevail, that gets over the legitimate line and can constitute oppression. It is very difficult, however, to say when boards go beyond legitimate bounds. The problem appears to be whether the mini board meetings are the "real board" meetings such that the real board meetings are a charade. This will happen when there is an attempt to stifle discussion at the board meeting with comments such as "the majority resolved that the decision is X."

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Formalities of Discussions

His Honour held:

(1) It is, of course, for a chairman to control a meeting subject to the meeting resolving to dissent from his rulings. In controlling a meeting, the chairman may lay down at least preliminary guidelines as to how it will be conducted. The meeting, too, as master of its own business, can lay down procedural rules. However, neither the chairman nor the meeting can by procedural resolutions remove a director's statutory right to have a meeting convened and to have the business for which the meeting is convened fully and fairly discussed.

(2) Absolute time limits for speeches raise awkward questions. It is false to say that if there are (say) 8 people entitled to speak at a meeting and there are 80 minutes available for discussion then a chairman should allot each speaker 10 minutes. At any meeting, some people will have special knowledge or qualifications to speak, some will be more articulate than others, some will be more affected by the proposals being debated and will need to speak for longer than members not in that category. Indeed, there usually will be some less informed, less articulate and less effective people at the meeting and some people who would almost rather die than have to speak publicly at any meeting.

(3) There are very great difficulties in absolute time rules and one should never have a situation where, come what may, someone will be cut off at a predetermined time limit which has expired. Indeed, there are very real dangers in announcing arbitrary time limits which would be vigorously adhered to. Whilst it is appropriate for a chairman to lay down some general guidelines as to length of speeches, this must always be subject to giving every participant a fair opportunity to exercise his or her right to speak and to put before the meeting the details that the speaker considers relevant to the motion. Further, even if there are time limits laid down, a person should feel that he or she has the right at the end of the time to ask for a reasonable extension to finish what is being put. Obviously, however, this cannot be taken too far. For example, there will be cases where a person is merely talking for the sake of talking and is not contributing anything to the debate or is filibustering where it may be quite proper to require the speaker to sit down.

(4) The general point is that the meeting should allow fair discussion in order to have the views of participants fairly aired and in order to enable the meeting to ascertain the wishes of members as a whole. It may well be beyond all reasonable bounds to confine a person to a limited time in which he or she thinks that he or she can put forward only, say, the three best points, whereas there may be three or more other good points to be made as well which have to be left unspoken but which may be helpful to others attending the meeting. In the event of a restriction of this nature for a specific purpose, the Court may draw conclusions as to the general attitude of the majority towards the minority.

Minutes of Meetings

There is very little law as to what is required in relation to minutes of meetings. The case is thus of considerable assistance in this regard. The principles in relation to the minuting of board meetings found by His Honour are:

(1) "Minutes" mean a record of "how the business of the meeting was conducted and what resolutions were passed." Even if in fact there is a complete transcript of proceedings, no one can complain that this transcript is not regarded as "minutes" and the minutes merely consist of "how the business of the meeting was conducted and what resolutions were passed."

(2) The minutes should also record "everything that directors do in their capacity as directors of the company." This being so, the fact that each person attends as a director should be recorded, the fact that a person proposed or seconded resolutions as part of his or her duty should be recorded. However, an extreme case of a person misbehaving himself at a meeting need not be recorded as this is not part of his or her duty.

(3) His Honour held that whilst there are no reported cases exhaustively defining what should go into board minutes, his view, based on practice works which give fairly uniform guidance, was that the following should be included in the minutes of meetings: (a) the nature and type of meeting, the time of commencement and like details; (b) a full and accurate record of all business including a list of who was present and all resolutions passed; (c) at least where disqualification follows non-attendance, the minutes should contain a list of apologies accepted (the distinction between a tendered apology and an accepted apology can, in some cases, be quite significant); (d) minutes should be as concise as possible, thus reasons for resolutions are seldom recorded; (e) minutes should be phrased in non-emotive language and must appear impartial and above suspicion; (f) a minute is not a report, therefore speeches and arguments do not have to appear; (g) minutes must contain a record of all appointments made and the terms of reference of any committee that is set up; (h) normally, failed motions need not be recorded; (i) in the case of larger meetings, there is no necessity to record the name of the mover or seconder or the voting on motions although the minute taker may consider it appropriate to record these matters; (j) a person present may insist that his or her vote or abstention be recorded; (k) incidents occurring at the meeting which may be significant should be

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recorded but unrelated incidents need not be. His Honour noted a prior case which said that the minutes should have recorded "at this point another director knocked Mrs Hermann unconscious and she sank to the floor." However, His Honour said that minutes of a conference which he attended which was interrupted by an intrusion of some entertainers need not have recorded "at this point the meeting was invaded by Santa Claus and some miniskirted elves!"; (l) reports of committees are not summarised in the minutes. A copy should be initialled or otherwise identified by the chairman and a copy may be circulated with the minutes; (m) time of closure of the meeting and, unless on a regular day, the time and place of the next meeting are to be noted; (n) minutes must be prepared within a reasonable time after the meeting.

Lessons from the Case

It has been held on numerous occasions that board meetings require no formality.

This decision confirms the principle. Nonetheless, the Court clearly enough will not support a proposition that board meetings may be "rigged" by procedural ploys or where discussion at board meetings is inhibited or treated as irrelevant.

Such tactics may be regarded as oppression. Clearly enough, the line between legitimate tactics and "oppression" is a fine one.

The Court will look at all the circumstances. In the case of a particularly important issue or in the case of a course of conduct, the Court will regard "dirty tactics" with considerable suspicion.

Although numerous chairmen and managing directors tend to believe that they can run board meetings as they wish, it is necessary to recall that the purpose of any meeting is to discuss issues and to ascertain the opinion of the membership of such meeting as a whole.

The Courts will allow considerable latitude in relation to company board meetings but, nonetheless, the above basic principle of all meetings still applies.

Should it be transgressed, especially if such transgression is part of a continual process, the Courts will step in and hold the conduct oppressive. Within the general concept is that a meeting is called to ascertain the general wishes of those present and that all should be allowed to express their views, the Court has shown a resilience in relation to rules of discussion and debate at board meetings.

But discussion and debate must still be allowed because that is the essence of the function of all meetings.

Finally, the case gives guidance to those who have never quite known what to include in, and exclude from, the minutes of meetings.

The cardinal rule is the minutes must show "how the business of the meeting was conducted and what resolutions were passed."

We must all be indebted to the Court for clarifying in law much of what previously can be regarded only as folklore.

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