Information and support for directors

MCCG Intended Outcome 1.0

Every company is headed by a board, which assumes responsibility for the company’s leadership and is collectively responsible for meeting the objectives and goals of the company.

MCCG Practice 1.5

Directors receive meeting materials, which are complete and accurate within a reasonable period prior to the meeting. Upon conclusion of the meeting, the minutes are circulated in a timely manner.

⚠️ The internalisation and application of the content “Why” and “How” should be read in tandem with the line of sight outlined by the Intended Outcome.

Why

The case for change

Information is the lifeblood of a board. Owing to the oversight nature of their roles, directors (particularly non-executive directors) inherently lack in-depth knowledge on the operations of a company in comparison to senior management. Directors rely on management for the information necessary to carry out their oversight duties.

In a similar vein, management cannot properly execute the directives of the board if those views are not communicated in an effective and timely manner. Thus, information flow between the board and management is critical to the proper functioning of both, as well as the execution of a company’s strategic plan and many other critical processes.

What could go wrong:

- Lack of robust challenge during board and board committees’ deliberations due to lack of, inaccurate or unclear information and information not being provided to the board in a timely manner.
- Minutes of meeting do not serve as an evidence of the board and board committees’ proceedings at material time due to poorly captured meeting minutes.
- Directives from the board are not carried out accordingly in a timely manner by management.
Point for reflection

The changing corporate landscape and rising stakeholders’ expectations have resulted in directors being more proactive by deepening their commitment and becoming more engaged in their roles. Directors are also increasingly devoting more time to strategic and forward-looking aspects (i.e. spending more time to “scan the road ahead” rather than just looking in the “rear-view mirror”)\(^1\).

This shift has naturally driven the volume of information that is being presented to boards. A Thomson Reuters global survey in 2013 (“Board Governance Survey”) which covered more than 125 general counsels and company secretaries across a cross-section of industries highlighted that on average, companies prepared 92 board books annually; each an average of 116 pages. This represents a 50% uplift from the average pages reported in the prior year (2012).

Directors are also increasingly seeking additional sources of strategic context and financial insights. The aforementioned survey revealed that over 70% of directors reported a need for competitor insights, financial analytics and industry information – all of which are sought outside of traditional board materials.

The trend on the intensity and complexity of information disseminated to directors is expected to continue as companies increasingly compete in the data-driven marketplace, owing to technological advances such as “big data”.

Recognising the importance of sound and timely information flow to board effectiveness, regulators have enumerated provisions to allow directors to receive relevant information prior to meetings whilst also ensuring that the proceedings and decisions of the board are properly recorded for further action.

Third Schedule of Companies Act 2016\(^2\)

**Paragraph 4 (Notice of meeting)**

A notice of a meeting of the Board shall be sent to every director who is in Malaysia, and the notice shall include the date, time and place of the meeting and the matters to be discussed.

**Paragraph 13 (Minutes)**

The Board shall ensure that the minutes of all proceedings at meetings of the Board are kept.

The rights of directors to rely on information and seek resources in furtherance of their services as directors are provided for in Companies Act 2016 and Bursa Securities Listing Requirements.

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\(^1\) Casal, C and Caspar C 2014, *Building a forward looking board*, McKinsey

\(^2\) As stated in Section 212 of the Companies Act 2016, “Subject to the constitution, the provisions set out in the Third Schedule shall govern the proceedings of the Board”.

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Section 215(1) of Companies Act 2016

A director in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data, prepared, presented or made by –

(a) any officer of the company whom the director believes on reasonable grounds to be reliable and competent on the matters concerned;
(b) as to matters involving skills or expertise, any other person retained by the company in relation to matters that the director believes on reasonable grounds to be within the person’s professional or expert competence;
(c) another director in relation to matters within the director’s authority; or
(d) any committee to the board of directors on which the director did not serve in relation to matters within the committee’s authority.

Paragraph 15.04 of Bursa Securities Listing Requirements

Rights of directors

Unless otherwise provided by or subject to any applicable laws or these Requirements, a listed issuer must ensure that every director has the right to the resources, whenever necessary and reasonable for the performance of his duties, at the cost of the listed issuer and in accordance with a procedure to be determined by the board of directors, including but not limited to –

(a) obtaining full and unrestricted access to any information pertaining to the listed issuer;
(b) obtaining full and unrestricted access to the advice and services of the company secretary; and
(c) obtaining independent professional or other advice.

Provisions for financial institutions in this regard are encapsulated in Standard 9.6 (minutes of meeting) and Standard 9.7 (access to advice from third party experts) of Bank Negara Malaysia’s Policy Document on Corporate Governance.

3 As stated in Standard 9.6 of Bank Negara Malaysia’s Policy Document on Corporate Governance, the board must ensure that clear and accurate minutes of board meetings are maintained to record the decisions of the board, including the key deliberations, rationale for each decision made, and any significant concerns or dissenting views. The minutes must indicate whether any director abstained from voting or excused himself from deliberating on a particular matter.

4 As stated in Standard 9.7 of Bank Negara Malaysia’s Policy Document on Corporate Governance, the financial institution must provide the board with access to advice from third party experts on any matter deliberated by the board as and when required, and the cost of such advice shall be borne by the financial institution.
The practice in substance

As stated in Guidance to Practice 1.5 of MCCG, in order to facilitate robust deliberations, the chairman together with the company secretary should ensure that directors are provided with sufficient information and time to prepare for board meetings.

The information provided should be of a quality which is appropriate to enable decision-making on the issues at hand. In other words, the information should be accurate, clear, comprehensive, timely, and inform the director of what is expected of him or her on that issue.

Upon conclusion of the meeting, all directors should ensure that the minutes of meetings accurately reflect the deliberations and decisions of the board or board committees, including whether any director abstained from voting or deliberating on a particular matter.

Key considerations relating to the application of this Practice are discussed below:

How should the board formulate its meeting agenda?

The board meeting serves as an avenue for governance discussions and decision-making by the board. Whilst the minimum number of meetings is not prescribed, it would be in the best interest of the company for the board to meet regularly (i.e. at least five meetings if not more frequently as circumstances dictate).

In this regard, the board (led by the Chairman) should be in control of the meeting agenda, rather than delegating the development of board agenda to management or the company secretary.

A carefully prepared board agenda will enhance the board’s productivity and strengthen its strategic and supervisory role. The agenda should be prepared, taking into account the formal schedule of matters reserved for the board’s decision.

A range of matters that should be periodically included in a board agenda is outlined on the following page.

Dos

- Encapsulating the right of directors to seek additional resources and formalising the relevant procedures for the furtherance of their duties in the board charter.
- Confining the use of circular resolutions to administrative matters.
- Preparing in advance an annual tentative calendar for the scheduling of the board or board committee meetings (usually performed in the last quarter of the current financial year).
- Establishing procedures to ensure that matters arising from the board or board committee meetings are acted upon.

Don’ts

- Having irregular and infrequent board and board committee meetings.
- Omitting matters reserved for the board and terms of reference of the respective committees in developing the meeting agenda.
Examples of agenda items (non-exhaustive):

- business planning;
- direction and strategy formulation, including review;
- risk management issues and resolution;
- budget, approval and monitoring against actual performance, including variance reporting;
- funding requirements;
- formulation and monitoring of key company policies;
- evaluation of management’s performance;
- corporate exercises, e.g. acquisitions, mergers, divestments and takeovers;
- regulatory changes that impact the company’s business;
- emerging business issues;
- corporate disclosures and announcements;
- investor and stakeholder relations;
- litigation matters against the company;
- board, committee and individual director performance assessment; and
- board, committee and individual director training, education and development.

A similar process can be adopted in developing the agenda for meetings of board committees.
What materials or information should be provided to directors before a board or board committee meeting?

The information provided (meeting pack) should at the very least include the following:

- graphical presentations may be utilised but care must be taken that they are not overwhelming in terms of superfluous information or misleading;
- long management presentations which leave little time for thoughtful, reflective deliberations or presentations that are too short and contain little value to the board should be avoided;
- filtering of unfavourable information (e.g. key risk factors, worst case scenarios, less flattering information) should be avoided; and
- information should be used to assist the board in discharging its role and should not be scrutinised to an extent of obsession where the board micromanages the company.

When should the meeting materials be distributed to the board or board committee?

As stated in Guidance to Practice 1.5 of MCCG, the meeting materials should be circulated at least five business days in advance of the board meeting.

The general rule of thumb may also be applied for meetings of board committees. It is important for directors to be provided with sufficient time to review the relevant materials and prepare for meetings. In order to ensure information and documents are disseminated in a timely and efficient manner, companies should leverage on technology to deliver documents to directors.
What should be encapsulated in the meeting minutes of the board or board committees?

The purpose of the minutes is to accurately record the proceedings and decisions made during the meeting. The way in which they are prepared may also assist to establish that directors applied their minds sufficiently to the matters under consideration in the discharge of their duties.

The minutes of the meeting proceedings should be prepared with, but not limited to, the following details:

Suggested content of meeting minutes (non-exhaustive):

- the name of the company;
- the time, date and place at which the meeting was held (including the time at which the meeting was opened and closed);
- names of those present and in attendance, as well as any apologies (for absence or lateness);
- those who arrived or left during the meeting and the time at which they did so;
- the agenda and other materials that the board members received either before or during the meeting;
- what was decided and why – resolutions passed and actions to be taken by the board and delegates (including deadlines);
- fundamental questions raised and key points of discussions;
- any dissent, abstentions (and reasons provided for them); and
- any conflicts of interest including what the conflict was and how the board handled the situation.

What procedures should be put in place to facilitate timely circulation of accurate meeting minutes upon conclusion of the meeting?

The chairman of the board should agree with the board members and company secretary upon a procedure for circulating and approving minutes, taking into account the nuances of the company.

In drafting the minutes, the company secretary should, where relevant, seek the clarification from technical experts within management (e.g. chief executive officer, chief operating officer) to ensure that the draft minutes appropriately capture relevant technical points and issues discussed at the meeting.

The draft minutes should be reviewed by the chairman of the meeting prior to being circulated to all board members or board committee members for approval. Any amendments that may be required should be communicated to the company secretary within the time period agreed in the procedure.

As a general rule of thumb, meeting minutes shall be entered into the books within 14 days of the relevant meeting date.

Circular resolution

It would not be reasonable to expect the board to meet on every decision especially where it is administrative in nature. For this reason, the practice of using circular resolutions is sometimes deployed by companies.

However, caution should be exercised as there is a risk that the written resolutions are circulated to avoid discussion or scrutiny on certain contentious matters.

In this regard, the following safeguards should be applied:

- relevant information pertaining to the said resolution to be passed should be attached to the circular resolution which is circulated to the directors, so as to enable the directors to make an informed decision;
- circular resolutions which do not require the signature of all directors should still be circulated to the entire board. This is to ensure that the board, as a whole, is aware of decisions that are being made; and
- summary of circular resolutions, which have been passed since the last board meeting, should be circulated for notation of the board and minuted.

Boards should refrain from using circular resolutions to approve complex matters requiring rigorous deliberation.

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5 Board Meetings Practice Guide: Good decision making through effective meetings 2015, Institute of Directors New Zealand
### Case study: James Hardie Industries Limited (Australia)

**Background:**
- The Australian Securities and Investments Commission (“ASIC”) brought civil penalty proceedings against the directors and an officer (company secretary) of James Hardie Industries Limited for contravening Section 180(1) of the Corporations Act 2001 in Australia which relates to failure to act with care and diligence as officers and directors of a corporation.

**Facts:**
- The James Hardie group of companies had been involved in the manufacture and sale of products containing asbestos. The subsidiaries responsible for the distribution of these products were subject to claims for damages for personal injury. In response, the board of James Hardie Industries Limited (i.e. parent company) decided to separate the relevant subsidiaries from the rest of the group, by creating the Medical Research and Compensation Foundation (“Foundation”) to manage and pay out asbestos claims made against the subsidiaries.
- The minutes of the meeting of the board of James Hardie on 15 February 2001 recorded that the board had approved a draft Australia Stock Exchange (“ASX”) announcement containing statements to the effect that the Foundation was "fully-funded" and would have "sufficient funds to meet all legitimate compensation claims".
- On the next day, a finalised ASX announcement was made (in similar form to the draft ASX announcement, including the reference to “fully-funded”) which was ultimately shown to be incorrect as there were not sufficient funds to meet all claims. It was discovered that the Foundation was underfunded by over $1 billion. The ASIC then commenced proceedings against the directors and officer (i.e. general counsel and company secretary) of James Hardie.
- The directors in their defence submitted that the minutes tendered as evidence of the board meeting in February were false and no draft ASX announcement was tabled at the meeting, or approved by resolution of the board. They further submitted that the board’s subsequent adoption of the minutes was also false, as the minutes adopted were not an accurate record of the proceedings of that February meeting. The respondents admitted that the errors in the minutes had not been picked up because of a lack of care.
- The High Court found that the minutes were a contemporaneous record of the board meeting and were the only direct evidence of the proceedings of that meeting. The High Court found that the directors and officer of James Hardie were in breach of their duty of care [Section 180(1) of the Corporations Act 2001] by failing to prevent the company from making false or misleading statements to the market.

**Lessons Drawn:**
- Directors should exercise care when reviewing and approving minutes to ensure they are an accurate record of the meeting proceedings. Otherwise, directors may be faced with evidence in a proceeding that does not correctly reflect the relevant state of events.
Regional/international perspectives

As in the case of Malaysia, numerous jurisdictions have enumerated provisions to govern the supply of information to directors as well as the recording of meeting minutes in order to enhance the effectiveness of board or board committee meetings.

For example, the Hong Kong Corporate Governance Code and Corporate Governance Report has detailed prescriptions on the setting and distribution of board meeting agenda, the supply of information to directors and the capturing and dissemination of meeting minutes.

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<th>Provision(s)</th>
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<tr>
<td>Hong Kong</td>
<td>Arrangements should be in place to ensure that all directors are given an <strong>opportunity to include matters in the agenda</strong> for regular board meetings <em>(Provision A.1.2)</em>.</td>
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<td><strong>Notice of at least 14 days should be given of a regular board meeting</strong> to give all directors an opportunity to attend. For all other board meetings, reasonable notice should be given <em>(Provision A.1.3)</em>.</td>
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<td>Minutes of board meetings and meetings of board committees should record in sufficient detail the matters considered and decisions reached, including any concerns raised by directors or dissenting views expressed. Draft and final versions of minutes should be sent to all directors for their comment and records respectively, <strong>within a reasonable time</strong> after the board meeting is held <em>(Provision A.1.5)</em>.</td>
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<td>There should be a procedure agreed by the board to enable directors, upon reasonable request, to seek <strong>independent professional advice</strong> in appropriate circumstances, at the issuer’s expense. The board should resolve to provide separate independent professional advice to directors to assist them perform their duties to the issuer <em>(Provision A.1.6)</em>.</td>
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<td>For regular board meetings, and as far as practicable in all other cases, an agenda and accompanying board papers should be sent, in full, to all directors. These should be sent in a timely</td>
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<td>manner and <strong>at least 3 days before the intended date of a board or board committee meeting</strong> (or other agreed period) <em>(Provision A.7.1).</em></td>
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Management has an obligation to supply the board and its committees with adequate information, in a timely manner, to enable it to make informed decisions. The information supplied must be complete and reliable. To fulfil his duties properly, a director may not, in all circumstances, be able to rely purely on information provided voluntarily by management and he may need to make further enquiries. Where any director requires more information than is volunteered by management, he should make further enquiries where necessary. So, the board and individual directors should have **separate and independent access to the issuer's senior management** *(Provision A.7.2).*

All directors are entitled to have access to board papers and related materials. These papers and related materials should be in a form and quality sufficient to enable the board to make informed decisions on matters placed before it. **Queries raised by directors should receive a prompt and full response, if possible.** *(Provision A.7.3).*