

DIRECTOR'S BRIEFING NOTICE OF BOARD MEETINGS: SOME POTENTIAL ISSUES

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Introduction

There has been a recent development in the conduct of directors' meetings that is worthy of note. The development pertains to the need for a notice of a directors' meeting to set out the nature of the business to be transacted. While in Canada there is no express requirement to do so, a recent case out of Australia demonstrates the consequences of setting out such particulars.

Meetings of Boards of Directors

Board meetings are central to the proper discharge of the directors' collective responsibility to manage the business and affairs of the corporation. Directors can exercise their powers only at duly convened meetings of the board.^[1] Meetings provide all directors an opportunity to express their views before coming to a collective decision.

In order to participate in board meetings and to discharge their duties to act fairly and in the best interests of the corporation, directors are entitled to receive sufficient information in respect of all business put before the Board for a vote to allow them to make informed decisions on the matters raised.

No Need to Specify Purpose of Meeting

Subsection 126(8) of the Ontario Business Corporations Act ("OBCA") calls for specification in the notice of the general nature of any business to be transacted at a meeting called by a quorum of directors. The subsection reads as follows:

Calling meeting of directors

(8) In addition to any other provision in the articles or by-laws of a corporation for calling meetings of directors, a quorum of the directors may, at any time, call a meeting of the directors for the transaction of any business the general nature of which is specified in the notice calling the meeting. R.S.O. 1990, c. B.16, s. 126 (8). [emphasis ours].

Subsection 114(5) of the Canadian Business Corporations Act ("CBCA") has a different provision which specifies when a notice must set out particulars in certain situations. Subsection 114(5) reads as follows:

Notice of meeting

(5) A notice of a meeting of directors shall specify any matter referred to in subsection 115(3) that is to be dealt with at the meeting but, unless the by-laws otherwise provide, need not specify the purpose of or the business to be transacted at the meeting.^[2]

Subject to subsections 126(8) of the OBCA and 114(5) of the CBCA, there are no express requirements for a notice of a directors' meeting to set out the nature of the business to be transacted. While they may provide otherwise, the by-laws do not generally require the notice to set out such particulars.

At common law, in *Compagnie de Mayville v. Whitley*, [1896] 1 Ch. 788 (C.A.), it was held that a notice calling a directors' meeting need not specify the nature of the business to be considered at the meeting. Were it to hold otherwise, the Court reasoned, it would put a great burden on directors in the discharge of their duty to manage corporations efficiently. Directors are bound to attend each meeting, whatever the business, and do not need the same degree of explicitness as shareholders do in the description of a meeting's subject matter for the purposes of deciding whether to attend.

Special Business to be Conducted at a Meeting

Where it is proposed to conduct some special business at a meeting of directors, it is prudent to give the directors notice of the nature of the business intended to be conducted. In *Wills v. Murray*, 4 Exch. 843 (Exch.), the incorporating documents provided that special notice was to be given in the case of an extraordinary meeting of directors, and the notice was to specify the purpose thereof. The Exchequer Court considered inadequate a notice stating that the meeting was to be held for "special business". The Court invalidated a call on shareholders made at the meeting by the directors.

Dhami v. Martin, [2010] NSWSC 770, provides some caution in setting out the particulars of a meeting when not required to do so. Here, the Court held that where a notice of meeting of directors sets out the nature of the business to be transacted, even when not required to do so, only those items can be validly attended to.

Mr. Martin, Mrs. Martin and Mr. Dhami were all directors of Ace Developments Pty Ltd.; however, Mr. Dhami was disqualified on July 22, 2009. Mr. Dhami, at all material times, had the shareholding and voting power equal to the combined shareholdings and voting power of Mr. Martin and Mrs. Martin.

On April 15, 2010, pursuant to s. 249F of the Corporations Act, Mr. Dhami took action to convene a general meeting. The notice given specified the purposes of the meeting as follows:

"To appoint two new directors (being Kay Dhami and Norman Brien) to provide balance in the direction of the Company and to protect the interests of the shareholders as permitted by Article 75 of the Company's Articles of Association or otherwise."

Mr. Martin and Mrs. Martin were not present at the first meeting and the meeting was adjourned. At the adjourned meeting, Mr. Martin and Mrs. Martin were once again not present. Mr. Dhami conducted the meeting because the constitution provided that in the special circumstances of a meeting already adjourned for want of a quorum the members present should be a quorum.

At the meeting, resolutions were passed that went beyond the purposes set out in the notice of meeting. The issue surrounding the case was whether the resolutions that were passed that went beyond the purpose set out in the notice of meeting were valid.

The Court held that where there is a requirement that the notice convening a meeting state the purpose of the meeting or the business proposed to be transacted, the position is as stated in *McLure v. Mitchell* (1974) 24 FLR 115 at 140:

"The purpose of a notice of a meeting is to enable persons to know what is proposed to be done at the meeting so that they can make up their minds whether or not to attend. The notice should be so drafted that ordinary minds can fairly understand its meaning."

Further, where the person summoning the meeting chooses to state what is proposed to be, even though there is no requirement to do so, the position is the same as stated in *McLure*.

The Court did note that there was no provision of the constitution that required the notice to state the business proposed to be transacted and that there is no general law requirement to that effect. In fact, the general principle is that directors should come together whenever called on notice of reasonable length and without any expectation of being told why they are being summoned to a meeting. This is the Canadian position noted above.

The Court in the Dhimi case went on to say that a statement of purpose for a meeting, whether or not required, is put forward in order that those entitled to attend can decide whether or not to do so. In the context of a board of directors where there is no requirement that the proposed business be stated, the implied message conveyed by the statement of purpose and its inclusion is that the meeting is being summoned not to do anything and everything that the board of directors has power to do and may decide to do but for the particularly defined and limited purpose noticed. Finally, if it had been intended that the meeting would potentially range over the whole of the company's affairs and deal with anything and everything that might be brought up, the notice would either have stated no proposed business or concluded with words such as: "To transact such other business as may be lawfully brought forward."

There are some commentators who feel this latter suggestion by the Court might be too broad. It has been stated this way:

"Only non-substantive or informal matters should be dealt with under the heading of 'other business'. Otherwise, it can be argued that the notice calling the meeting was defective. Even though the notice of a meeting of directors need not set out details of the business to be conducted, surprise items can provide a basis for complaint by a dissident director." [3]

Conclusion

Full particulars of the business to be discussed at the meeting, if set out in the notice, should be carefully considered in light of the above Australian case.

[1] A resolution in writing signed by all directors is as valid as a resolution passed at a meeting: see subsection 129(1) of *Ontario Business Corporations Act* and subsection 140(3) of *Canadian Business Corporations Act*.

[2] Subsection 115(3) of the *CBCA* lists the following matters (abbreviated): (a) submit to the shareholders any question or matter requiring the approval of the shareholders; (b) fill a vacancy among the directors or in the office of auditor, or appoint additional directors; (c) issue securities except as authorized by the directors; (c.1) issue shares of a series; (d) declare dividends; (e) purchase, redeem or otherwise acquire shares issued by the corporation; (f) pay a commission; (g) approve a management proxy circular; (h) approve a take-over bid circular or directors' circular; (i) approve any financial statements; or (j) adopt, amend or repeal by-laws.

[3] See Nathan and Voore: *Corporate Meetings Law and Practice* at 11-6.