THE ROLE OF
THE COMPANY SECRETARY: INFLUENCE, IMPACT AND INTEGRITY

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AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS

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It is my wish that this book showcases the breadth and depth of your company secretary work. All too frequently, this is hidden in the myriad roles that you undertake as compass, curator and cultural broker.

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Introduction

> As the great ones depart, eating their dinner, the secretary sits getting thinner and thinner, racking his brain as he tries to record and report what he thinks they think they ought to have thought.

The poem above has been widely attributed to Arthur Bryant, a favourite historian of a number of British Prime Ministers, including Churchill. It is reminiscent of a befuddled board, perhaps filled with the 'pipe and slippers' men[1] of that era leaving the hard-working and weary company secretary to make sense of the ramblings of their meeting whilst they, the directors of the organisation, shuffle off, more interested in supper than the governance role they fulfil.

How times have changed! Bryant lived until 1985 and almost a decade passed after his death before the handing down of the Cadbury Report[2] which raised the bar for boards and their directors. The Cadbury Report started the ball rolling on creating an awareness of corporate governance as a significant part of a director's landscape, thereby generating sweeping change within organisations and how they were governed. Cadbury and the subsequent deep dives into corporate governance from academics and practitioners over the last few decades has promulgated a wonderful industry of corporate governance consultants and services, however the magical elixir which saves organisations from corporate collapse is yet to materialise. The number of variables in the corporate governance cauldron is vast: the number of directors, length of tenure of directors, the experience of the management team, the size and maturity of the organisation, the external commercial and legal environment—to name just a handful. Accordingly, there are great difficulties determining with pinpoint accuracy exactly which variable or combination of variables will be the panacea for good corporate governance

1 A Pettigrew and T McNulty, 1995, "Power and influence in and around the boardroom", *Human Relations*, Vol 48, No 8, p 860.

2 Cadbury Report, 1992, Committee on the Financial Aspects of Corporate Governance, Moorgate, London.

practices within any one organisation, let alone overall organisational performance (without even pondering the question of the vexed issue of board performance).

What is unlikely to be challenged is that irrespective of government and regulator attempts to prevent corporate collapses—however they may be caused—the focus on corporate governance has reached a crescendo. The board is often in the firing line for the times when an organisation has been found wanting. This may be rightly so, given the duties and obligations of a company's directors (and officers). That being said, the board is part of the black box of an organisation's governance—a hermetically sealed environment bounded by the walls of the boardroom. In this environment, only a few people get to see and play a part in the deliberations of the board.

One key player within the corporate governance black box however has remained in the shadows: the company secretary. Despite the clear links to the board even whilst acting as a 'humble servant', this role has remained in the background. This is not for any nefarious reason but more because when the best company secretaries are excelling in their role, very few people are aware of it.

As a result of a greater focus on corporate governance over the years and the more frequently publicised corporate deficiencies seen in organisations today, particularly now that 'word of mouth' has been replaced with 'word of mouse', the role of the company secretary is moving more and more into the spotlight. It will be harder and harder for the company secretary to stay out of the public eye as the organisation's 'behind-the-scenes' administrator. This is due to the influential and potentially powerful role that the company secretary holds within an organisation. They are—at the very least—a legal officer of the organisation and the chief administrator to the board. As well as being one of the key confidantes to the board, the company secretary is often charged with liaising with regulators and key stakeholders on behalf of the organisation. All of this means that the company secretary contributes to the governance issues around the board table and within the organisation. The company secretary can—and many do—genuinely make an impact within their organisations by bridging the divide between governance and management.

A word of caution—this is a book about company secretaries and the role of the company secretary in Australian organisations today. It is not a technical guide to the role of the company secretary. The premise of this book is that every company secretary knows how to perform their technical role and has a good understanding of the legislative and administrative functions that are associated with the role. Performing the technical company secretary role is the bread and butter of any functioning company secretary and is often the role referred to as the Chief Administrative Officer (CAO) or—for some—the humble clerk. If, as a company secretary, you are unclear on the CAO role, there are many detailed and instructive books—already in circulation—which will help serve that need. This book also assumes that every company secretary performs their technical role at least adequately. It is therefore not a dummies guide to the role.

This book is a resource for those wanting to understand how to excel in the company secretary role and the implications of being responsible to the board and, more often than not, to management. The double-hat often worn by a company secretary with one foot in governance and the other in management ensures that a myriad of corporate governance tensions is wrapped up in this role. Whilst it can be a minefield for the double-hatted company secretary, they can—and many do—become key influencers in their organisation. A reticulist like no other, the company secretary must be discreet, diplomatic and diligent.

Despite the structural similarities in the Australian legal landscape and the limited number of corporate vehicles used to incorporate entities either for-profit or for-purpose, it seems trite to say it, but every board is different.

There are nuances in the operation of every board which turn on the 'built-environment' in which the organisation and board operates. The 'built-environment' is made up of the structural artefacts which impact and influence the governance of the organisation. These include the legislation under which the organisation is incorporated; the organisation's constitution; whether for-profit or for-purpose (and if for-profit, whether listed or unlisted, private, or statutory); the shareholders or members (and their concentration); and the number of executive and non-executive directors. All of these give a unique setting for every organisation in terms of the governance role the board undertakes.

The company secretary role often traverses the push and pull of governance and management; of confidentiality and transparency and sometimes, right and wrong. This book is written to help company secretaries navigate the difficult terrain within which the various internal and external stakeholders operate.

Without delving into the role of the board in an organisation and how it differs in each and every organisation, the role of the company secretary is ultimately focused on support for the board. Each board and its need for support varies significantly between organisations and turns on a number of the 'built environment' factors referred to above.

Before exploring what makes the company secretary role so pivotal and influential within an organisation, it is important to note that Australian Courts have recognised that:

> The expression 'company secretary' is not a term of art. The responsibilities of company secretaries can vary from company to company, within companies, and over time. They have tended gradually to wax over many decades…[3]

The etymology of the word 'secretary'[4] comes from the Latin word 'secretum' meaning secret. A 'secretarius' was a confidential officer. This brief etymological lesson gives clear insight into to how the company secretary role has been able to evolve into one of the key roles within the broader corporate governance context of organisations, particularly over the last few decades. As the officer in possession of corporate 'secrets', the company secretary has, to all intents and purposes, become the protector or steward of confidential business.

Historically, this role has been much simpler than it has become in the technology and information saturated world of today. In today's environment, competition, technology, legislation and regulation along with a cadre of other strategic and environmental factors means that a seismic shift has occurred in the role of the company secretary and its importance to organisations.

This book seeks to give context to those who fill and wish to fill the company secretary role. Whilst the role will be different in every organisation, it does provide an opportunity to substantially influence the organisation and to create a positive and lasting impact on the decision-making culture within the organisation.

The personal experiences of many highly regarded and well-respected company

3 *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; [2012] HCA 18 at [41].

4 Online Etymology Dictionary, [website], http://www.etymonline.com/index.php?term=secretary (accessed 16 August 2017).

secretaries are covered in this book. These company secretaries have kindly offered their experiences, on an anonymous basis, to give guidance and cautionary advice to those who will come to fill this extremely important and pivotal governance role. The fields from which these company secretaries are drawn are broad. They include for-profit, including ASX and internationally listed companies; for-purpose (global charities, health, and membership-based); and public utilities. The sectors from which they are drawn are equally wide-ranging, including transport, banking and finance, energy, health, poverty eradication, and mining and resources. The length of experience for the company secretaries interviewed is, on average, above 10 years. The author is extremely grateful for their input, and trust that you, the reader, will profit from their generous and invaluable insights.

Part 1

Influence

The influencing role that company secretaries perform today

> …the company secretary has to build relationships, because it is ultimately a role of influence…[5]

The execution of the company secretary role requires influence. Sometimes the company secretary's influence comes with the benefit of authority, sometimes not. A company secretary's authority can be sourced from the legal obligations imposed on the company secretary; as a result of the organisation's hierarchy; or through the imprimatur of the board. However, the large roster of stakeholders within the company secretary's remit means that on many occasions the company secretary will need to influence stakeholders, both internal and external to the organisation, over whom they do not have actual or tacit authority.

Historically speaking, the company secretary role has often been limited to the pure corporate compliance obligations imposed directly on the company secretary by the *Corporations Act 2001* or any relevant incorporating legislation. Over the years this has changed and will continue to do so.

5 T McNulty and A Stewart, 2015, "Developing the governance space: A study of the role and potential of the company secretary in and around the board of directors", *Organization Studies*, Vol 36, No 4, p 526 (quoting interview transcript).

In each organisation, the company secretary role sits on a rather broad spectrum. At one end is a company secretary who is appointed because there is a minimum legal requirement to do so. On the other, is the company secretary whose role is one of governance significance in the organisation and whose skills, expertise and knowledge of the organisation are harnessed for the benefit of the board and the organisation.

If the company secretary is the pure chief administrative officer (CAO) there is little risk of being involved in the management of the company[6] beyond the minimum filings of the organisation with regulators and perhaps the collation of papers and the minutes which flow from the meetings. If the company secretary role is the chief governance officer (CGO) with a larger governance remit within the organisation (although the CGO title itself is not often used), the role itself can be an excellent proxy for the microcosm of in-built tensions that arise between the governance/management divide in the Australian corporate governance context.

Resolving or at least reconciling the governance/management tensions within the company secretary role through influence can be viewed in a positive or negative light. According to Merriam-Webster, influence is "the power to change or affect someone or something". Influence is a part of many facets of our lives, for example, politics, advertising, and leadership.

Influence may be viewed as seeking to change a person's opinion to agree with your own opinion—or to change their currently held opinion to another one. Influence may also be focused on getting people to do what you want willingly and ethically or simply, seeking to get your own way, irrespective of the ethics or the outcomes. In the corporate governance context, it may be influencing alignment between the board and management, the organisation and its stakeholders or diverse opinions within the board.

Leaders and managers within any organisation are inherently in the business of influence. They are professional influencers and get paid to do so, particularly in a knowledge-intensive world where hierarchical command and control leadership is considered a relic of a more industrial age.

In the company secretary role, there's more than fifty shades of influence.

6 See excerpt from *Club Flotilla (Pacific Palms) Ltd v Isherwood* (1987) 12 ACLR 387, below.

From a company secretary perspective, there are clearly some formal governance structures which influence and impact on the governance decisions made in any organisation. The parts of the governance built-environment which clearly impact on the ability of a person to exert influence on the organisation's decision-making process include, for example, whether the CEO and chair of the board are the same person as opposed to the role being held by two people; the number of board directors; the skills of the directors or those advising them; and the more administrative matters concerning how often the board meets.

In addition to the built-environment factors, there is also an influencing process which goes on in board meetings, as well as outside of board meetings. There is influence at the board level between directors and the chair of the board. The influence of board members depends on factors such as each person's skill, expertise and contribution; the complexity of the work being done by the board; the context of the external environment and the interwoven relationships of the directors (inside and outside) the boardroom. This is the complex world in which the company secretary operates and it is no mean feat given that each director will have their own legal, political and economic values and frameworks which they will, quite literally, bring to the table.

Of course, the chair influences the matters that are brought to the board for decision and how the matters are discussed and decided. From a corporate governance perspective, a person without hierarchical power will more likely deploy indirect influence in order to achieve certain outcomes. The company secretary will operate with different levels of direct and indirect influence in terms of the stakeholders on their influence roster.

There are many ways a company secretary may seek to influence, although some of them are completely off-limits. This book briefly investigates dishonesty, coercion, manipulation, persuasion and legitimate authority.

Where does influence start and stop? This is the ethical and value-laden minefield in which the company secretary dares to tread every day.

For example, a company secretary could, at any decision-making point, take advantage of a board by engaging in various simple and ethically questionable mind 'hacks' that exploit the very limited ability for the human brain to process and understand information under time pressure. As a general principle, disclosing information to the board can improve deliberations and encourage better decision making. On the other hand, overloading a board with information can bypass a director's deliberative capacity and seeks instead to take advantage of the brain's limited processing capacity. The information delivered therefore is not to help directors but to obfuscate or confuse them.

The company secretary ought to always be aiming for influence which creates a better decision-making environment for the board. Depending on the circumstances, this might require a more limiting or expanding influence being used by the company secretary. For example, a manager wishing to flood the board with information to cloud a bad business case would be a prime reason for the company secretary to exert a more limiting influence. This influence could extend to insisting that the business case be redrafted to be more concise and fact-based or even instigating a conversation with the author of the paper to rethink whether the case should be progressed at all. The dark side of influence is explored in another part of this book.

Acting as company secretary, there is often no hard-edged right or wrong—quite often it is ensuring the *different* views on the decisions being made at the board can be and are aired, considered and progressed in the best interests of the company as a whole. They are also probably one of the only officers in the organisation who, as Kirby J discussed in *Rich v ASIC*,[7] recognise that being a director is a "*privilege* to be earned each day [which] … may be withdrawn for misconduct but also for incompetent, improper or lax activities in the functions of corporate management". The company secretary role is to help directors earn and retain their governance *privileges* in this regard.

As a result of this most unusual role within the corporate structure, it is imperative the board understands the importance of developing a strong, robust and honest working relationship with the company secretary. As a general rule, the company secretary will also operate on a day-to-day basis with the CEO and the management team and so these relationships are a vital key to the effectiveness of the company secretary as well.

7 *Rich v ASIC* (2004) 220 CLR 129; [2004] HCA 42 at [105] (emphasis in original).

I often think of the company secretary role as that of a caddy. You are providing the right implement at the right time with the right advice about the conditions in which to play the right stroke. If there is a thunderstorm on the horizon and one of the key people on the team doesn't tell me about it, I won't know I have to pack the umbrella that day.

All of these relationships—if built on trust—will allow even some of the most difficult conversations to be facilitated by the company secretary.

The process of holistic governance

> A secretary is a mere servant. His position is that he should do what he is told, and no person can assume that he has any authority to represent anything at all.[8]

Considerable influence is vested in the company secretary by virtue of the legal and administrative functions held by the role. In this regard, the company secretary's influence in the 'legal officer' role can, today, be easily identified—although it has taken a while to reach that point.

In 1902, the company secretary was observed by Lord Macnaghten as having duties which "are of a limited and of a somewhat humble character".[9] This view drew upon a quote from an earlier 1887 decision of *Barnett v South London Tramways Co*[10] which has been extracted at the beginning of this chapter.

The early case law on company secretaries can easily be contrasted with the authority acknowledged for the more modern role of the company secretary in the English case of *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*.[11] In this case, the company secretary was found to have 'ostensible authority' to enter in to contracts for and on behalf of the company. Whilst noting earlier case law on the topic, Lord Denning said (somewhat politically incorrectly given today's standards) at All ER 19:

> But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Acts, but also by the role which he plays in the day-to-day business of companies. He is no longer a mere clerk. He regularly makes representations on behalf of the company.

8 *Barnett, Hoares & Co v South London Tramways Co* (1887) 18 QBD 815.
9 *George Whitechurch Ltd v Cavanagh* [1902] AC 117.
10 (1887) 18 QBD 817.
11 [1971] 3 All ER 16.

> He is certainly entitled to sign contracts connected with the administrative side of a company's affairs ...All such matters now come within the ostensible authority of a company secretary.

Australia's common law reliance on legal precedent has ensured that we have followed suit and adopted a similar approach to that taken in the United Kingdom in the cases of *Club Flotilla (Pacific Palms) Ltd v Isherwood* (1987) 12 ACLR 387 and *Holpitt Pty Ltd v Swaab* (1992) 105 ALR 421. The *Club Flotilla* case did seek to define the limits of the company secretary's general authority through the following statement (at ACLR 390):

> ...the secretary of the company is the chief administrative officer and he is entitled, *inter alia*, to sign contracts connected with the administrative side of the company's affairs...That, in my opinion does not take the authority of the secretary into the management of the company, the decisions associated with the activities of directors of normal companies.

As can be seen, the Court's view of the company secretary role has changed significantly. So much so, that some company secretaries have been found, based on certain facts, to have fiduciary obligations to the organisation, much the same as that of a company director.[12]

In the Australian context, under the *Corporations Act 2001*, companies are required to have a company secretary. Accordingly as a matter of good governance, the role or position description ought to also explicitly include—at its most basic level—responsibility and accountability for those matters for which the company secretary is personally responsible under s 188 of the *Corporations Act*. Moreover, the *Corporations Act* specifically makes the company secretary personally responsible for certain obligations of the company. Those obligations are such that, if the company breaches any of the obligations, the company secretary is automatically in breach of a section, and subject to a range of fines and penalties. The relevant company obligations, therefore, become the personal responsibility of the company secretary.

12 *Minlabs Pty Ltd v Assaycorp Pty Ltd* (2001) 37 ACSR 509.

Appreciating these responsibilities is important so as to ensure that the company secretary and the board understand the matters in which they have a combined interest and, therefore, intertwined destinies: that is, where the company secretary shares similar, and in some cases identical, legal responsibilities as directors. It is important to also understand the ways in which the duties of director and company secretary differ as this can become a company secretary's foundation of influence with the board. The legal power vested in the company secretary as an officer of the organisation and the direct reporting line to the board gives licence to alert the board to organisational failings, both potential and/or actual.

Most recently the *James Hardie* case gave some guidance to company secretaries who also have a management role within their organisations. It was clear that the double-hatted company secretary/ management role may make it difficult to tease out which function (from a governance or management perspective) is being performed at any given time. This case is discussed below under the heading 'The double-hat: blessing, burden or both?'. Therefore, whilst the *Corporations Act 2001* may characterise the role of the company secretary as being that of the humble clerk or mere servant, this approach is primarily designed to ensure that the minimum administrative filings and compliance obligations are met. Accordingly, this does not mean that the role is limited to clerical and compliance matters and that no influence attaches to it.

There is no excuse for missing a filing.

You have to know the regulations that the organisation reports to and you can never not meet them.

However, failure to meet the bare minimum requirements of the Chief Administration Officer could attract the interest of regulators but, even before that, it should raise red flags for the organisation's directors. The company secretary can and should ensure that the board has a calendar of compliance obligations to give the board some comfort that all administrative matters are in hand.

This administrative role is bread and butter for a company secretary. If you are not getting board papers out, good minutes and meeting basic compliance obligations this means you aren't meeting the board's most baseline expectations.

The Chief Administration Officer role, in and of itself, means that the company secretary is a master planner; handling the logistics of meetings as well as ensuring that all hotel, plane and taxi reservations are made. If this part is not done well, directors will remember that they were left standing at the airport without a ride to the board meeting rather than any other matter that comes up at the board meeting itself. The role, in these instances, means that the only person who is 'sweating the small stuff' is the company secretary. It is difficult to paint a definitive picture of the role of the company secretary to fit easily with the varied and differing practices between organisations and their company secretaries.

Watch out for your personal stress levels. As a company secretary, you need to look after your well-being. These can be high pressure roles and you have to accept that your calendar is not your own. Directors can be demanding and they often come with very high standards. They can also be unforgiving and sometimes lack perspective. I helped with a huge and successful capital raising and I still had someone saying that they ordered a piccolo, not the coffee received.

From Chief Administrative Officer to Chief Ethics/ Governance Officer

The company secretary role, the subject of this book, is the much broader role than the traditionally accepted role of administering the general business of the board. As can be seen from the brief excerpts of case law and a cursory glance at the national papers, the business of the board has changed dramatically over the past century, with a much sharper focus on corporate governance. Not surprisingly, the role of administering the business of the board has become commensurately complex and this means that the company secretary role has become considerably more complex.

In 2015, a model was developed in the United Kingdom[13] identifying the spectrum into which the role of the company secretary can be divided:

1. Humble clerk: the company secretary has responsibility for statutory returns and regulatory compliance;
2. Chair support: the chair's *aide de camp* as he or she operates the board with the support of the company secretary;
3. Advocate for the collective conscience of the company: the secretary, as a unique legal officer of the company, distinct from that of a director, can steer the board to exercise a collective conscience;
4. Boundary spanner: occupying an independent position, between the executive and the non-executive, the role affords the company secretary brokerage opportunities as the go-between;
5. Honest broker: the company secretary can engage in activities, to manage information flows, and broker effective and meaningful relationships between other members of the board; and
6. Governance change agent: the secretary can directly and/or indirectly influence board process and outcomes.

This company secretary model is a great springboard for understanding the stratification of the company secretary role on a corporate governance spectrum. Whilst this company secretary governance spectrum is an important concept to grasp, however, by no means does the model definitively carve up the company secretary role into easy bite-size pieces. Moreover, some company secretary functions may sit neatly in one category or another, or various functions within the one role may sit in one or more categories.

Categories one to three are identified as the company secretary role being performed through the construction, drafting and interpretation of the company secretary's written position description. This is the business-as-usual (BAU) of a company secretary.

Even at these BAU levels, the company secretary has the opportunity to be a key influencer. For example, the humble clerk and the chair's *aide de camp*, as described in 1 and 2 above, whilst considered to be more 'technical' and 'administrative' in

13 T McNulty and A Stewart, 2015, op cit, p 521.

nature, will still give the company secretary an opportunity to influence the board to ensure the organisation does the right things, in the right ways at the right time.

This influence, even at these levels, is due to the company secretary being the pivot point for the board's most basic key result area: coming together to meet and make decisions as a board. The board meeting is the point in time where the directors gather as a group, engage in critical discussions and make decisions. Therefore, even as a humble clerk, the company secretary has an integral part to play in the board's key meeting and decision-making functions and the opportunity to influence the board on important matters.

If you see yourself as a clerk, that's all you will be. Be more than what others think you are, and you will eventually come to be seen for what you really are.

How the sum of policies and procedures can lead to a robust governance framework

Company secretaries must have more than a passing interest in ensuring that the documented individual policies and procedures promulgated by the board will, as a collective part of the built-environment, lead to a robust governance framework within the organisation.

The company secretary must have a genuine belief that governance and the implementation of a governance framework within the organisation adds value. That value can come in many forms including:

- creating a genuine cultural alignment between governance decisions made and management's implementation of those decisions within the organisation;
- improved organisational performance including the ability to measure that performance against the strategic plan;
- providing assurance to those stakeholders on the influence roster of the robust process and integrity within the organisation;
- improving the organisation's reputation through the accountability of its board and transparency of its decision-making processes; and
- managing organisational risks.

The last three categories on the company secretary governance spectrum referred to above, fall into a category of "walking the organisational lines and working the organisational spaces".[14] The company secretary may be seen as a 'boundary rider', of sorts. These three categories seek to give granularity to the company secretary's contribution to and development of the governance space in and around the boardroom.

Whilst this company secretary governance spectrum gives a good taxonomy for the variances in the company secretary role, the 'boundary rider' concept introduced to describe the company secretary working the 'organisational spaces' is, in Australian governance vernacular, more readily understood with the more familiar terms of organisational culture, for those 'spaces' within the organisation, and board dynamics, and those 'spaces' within the built-environment of the board. The concept of board dynamics comprises the non-tangible exchanges within a board: it includes matters such as culture and purpose (as a lived experience, not necessarily the result of the built-environment such as codes of conduct and cultural statements promulgated by the board or management).

To give more context to the intangibles of board function, Sonnenfeld[15] described what makes great boards great as follows:

> So if following good-governance regulatory recipes doesn't produce good boards, what does? The key isn't structural, it's social. The most involved, diligent, value-adding boards may or may not follow every recommendation in the good-governance handbook. What distinguishes exemplary boards is that they are robust, effective social systems.

The good company secretary understands and is part of creating the structure of the organisation's governance built-environment through policy, protocol and programmes, but they also add to the 'robust effective social system'. They do this by occupying the spaces between the governance built-environment. These spaces are filled with the behavioural and cultural norms which exist within any board and the organisation itself. It is a clear recognition that these intangibles of the board's dynamic are part and parcel of the structural power and influence present in the built-environment.

14 T McNulty and A Stewart, 2015, op cit, p 528.

15 J Sonnenfeld, 2002, "What makes great boards great", *Harvard Business Review*, September, p 4.

Operational teams can create silos within organisations. Unbeknownst to boards, these silos can bring tunnel-vision and turf-protection into the boardroom. Given a company secretary's deep integration in the organisation, they have the ability to traverse and cut-through the various operational silos. They can see, be, and if necessary, fill the space between each word on the page of every board pack.

> *The company secretary is the person who often joins the dots. Diverse areas come to you with problems which are solved by what you know [is] happening elsewhere. You get to break down silos. And to do that, you need to walk the floor—much like a good CEO.*

The company secretary can assist the board with maintaining a continuous loop on the monitoring and reviewing of policy to ensure that improvements are made over time and, more importantly, at the outset of the implementation of the policy. This means that they will look for any perverse incentives unknowingly buried within a policy and identify any unintended consequences of a policy within the governance framework approved by the board.

Company secretaries can also assist boards through their creation of a robust governance framework and their understanding of what kind of reception the policies and procedures will be met with within the organisation. For example, some policies which severely tighten monetary controls can send signals of distrust. Sometimes policies can be inconsistent with values, thereby creating an opportunity for an erroneous interpretation and implementation within the organisation. For example, short term remuneration strategies can result in a lack of focus on the long-term sustainability of the organisation.

How far along the company secretary governance spectrum any individual company secretary can walk will be highly dependent on a number of factors, the most important of which is whether the chair is supportive of a broader contextual role for the company secretary, the size of the organisation and the resourcing for the company secretary role (which is often, for resourcing purposes, combined with other managerial roles).

For those company secretaries further along the governance spectrum, their influence will be paramount to ensure buy-in for the governance framework from those within their stakeholder roster: that is, people within the senior leadership team, the organisation generally and external stakeholders.

With so much focus on corporate culture in today's corporate governance discussions, the company secretary is in one of the prime positions to help the board develop and articulate a clear vision of the culture expected within the organisation and to ensure, as best as possible, that the directors conduct themselves in accordance with the organisation's cultural expectations.

Working with the chair to communicate the framework effectively to the board

Anyone who has worked with or sat on a board for any period of time will know that the chair of the board has additional responsibilities which go with the role. These include responsibilities for overall board performance both inside and outside of meetings, as well as the information flow to the board.

Specifically, the higher duties of a chair of a listed entity have been articulated in interlocutory proceedings, to include taking reasonable steps to ensure that the chair and other members of the board:

- monitor the management of the company, properly assess its financial position and performance, and properly and promptly detect and assess any material adverse development affecting its financial position or performance; and
- are informed of all material financial information to enable them to carry out their obligations to ensure that the material financial information includes information, which reveals the adequacy of the cash reserves within the company, the actual financial position and performance of the company and key events or transactions that affected the financial position or performance.[16]

The company secretary is one of the key resources who ensures that the chair can deliver on these extra duties. The chair/ company secretary relationship therefore is one of the most crucial relationships in the company secretary relationship roster,

16 *ASIC v Rich* (2003) 44 ACSR 341.

if not the most crucial. From the outset, company secretaries must start building a strong working relationship with their chair by establishing an open and honest line of communication with them.

The chair/ company secretary relationship will give the chair the opportunity to address concerns outside the boardroom with the company secretary. The company secretary will also assist the chair with the meetings which are necessary to assist the board when making significant decisions.

Not surprisingly, given the above, the chair of the board will have a greater call on company secretary time and resources. This is often evidenced by a direct and close relationship with the company secretary, particularly in more sizable organisations which often come replete with well-structured management teams and sophisticated frameworks. The chair may therefore have as much contact with the company secretary as the CEO, perhaps even more so at certain times of the annual board cycle, particularly around the time of the annual general meeting and the preparation of the organisation's annual report.

The company secretary must have a good working relationship with the chair of the board. There will be times in the life of a company secretary where they will need to go to the chair and not the CEO. That can be very difficult and cause a great deal of conflict if the CEO does not accept that the company secretary will be a source of independent information for the chair.

Indeed, the annual report was one board output highlighted in the *HIH* case. In this case, Chief Justice Wood stated:

> …a failure to properly discharge the duties owed in respect of the preparation and release of annual reports [which, of course, includes your role as directors signing off on those reports,] involves serious criminality, which risks undermining the public confidence in published accounts, that is essential for the orderly conduct of financial markets.[17]

17 *R v Williams* (2005) 216 ALR 113; [2005] NSWSC 315 at [27].

The goal for the company secretary is to as soon as possible understand, and where possible, shape the rules of engagement between themselves and the chair. These rules must give both of these key corporate governance players clarity as to the role the company secretary will undertake for the chair (and the board more broadly) and how each will interact with the other. It is in this context, a discussion of the expectations of the role and how it is to be performed will be explored. This discussion will include important matters, such as the reporting lines to the CEO and the chair, how contentious issues are resolved or at the very least highlighted, and whether the chair will lead the performance appraisal of the company secretary in the company secretary role.

I found that developing a good relationship with the chair's own PA as a stakeholder was important. Not in any obsequious kind of way but genuinely because I cannot do my job without them and having a good relationship with the PA makes things work effectively.

On the ground, it can be described as a relationship of trust, mutual respect and candour. The company secretary will be the honest broker and a black box in terms of confidences shared. Once the relationship is established, the company secretary will ensure that the things that matter and the right matters are brought to the chair. No chair wants to be concerned with the 'administrivia' of the board business and the company secretary must ensure that that part of the role is under control. The company secretary will ensure that the chair understands the purpose of the papers in the board pack. They will also raise matters which the chair ought to appreciate in order to make good decisions.

I worked with a chair who played bridge. He once said, "When you are playing bridge, you tap the card to say that there's something wrong or a defect in the hand". This discussion gave me licence to step out of the ranks of management. I was able to 'tap the card' to let him know of matters which I thought needed attention. For example, when he needed to read a particular report very carefully or meet with the author of the report.

There are certainly some benefits of a direct reporting and performance appraisal line to the chair to assist with the independence (or at least, perceived independence) of the role particularly in the case of the double-hatted company secretary.

This conversation ought to also raise the possibility of the company secretary requiring external advice to assist the board in its role and securing an adequate budget with sufficient discretion to request that advice when necessary.

Have a budget to get outside help. Have enough leeway to be able to ask for legal opinion on sensitive matters without the first thing being to awkwardly ask the person against whom the legal advice is sought.

Getting legal advice can be frustrating at times. As a company secretary you can be briefing external lawyers and they will regurgitate 90% of what you said but it is the 10% extra that is the value and the assurance upon which you rely.

It is also important to develop the ‘trust bank’ between the chair and the company secretary to ensure that difficult conversations can be had when the circumstances require them to be held. This is an absolute necessity for a truly successful working partnership. This will usually take time. In this regard, a company secretary must always be aware that their personal calling card is their reputational standing. This will often determine the starting point for the chair/ company secretary relationship.

Be careful. Your good reputation can only be lost once. After that it may never be regained.

First point of recourse is often the chair but if it’s the chair that is the trouble-maker you have a problem. You must then look to the deputy chair or the chair of a committee, like the audit committee.

Of course, even chairs can get it wrong and the case of *Whitlam v ASIC*[18] is dealt with in this book below under the heading 'Ethical dilemmas'. Although technically the case didn't really touch on the direct tension between the chair (Whitlam) and secretary, it is implicit given that the chair, who was being prosecuted by ASIC, wished for a particular vote to be carried at a meeting but was vested with 3973 proxies that would have ensured the vote went against the chair's wishes on the vote.

In a different context, the company secretary can also be relying on the chair to preserve the company secretary's compass and cultural broker role within the organisation (discussed in the section 'Compass, curator and cultural broker'). For example, where management is not disclosing enough information to the board, if they are trying to hide information or not being forthcoming in their disclosure, the company secretary can do everything possible to set the record straight but if this is not adequate then the company secretary will need to talk to the chair. In this conversation, the company secretary can also provide the chair with the right questions to ask so that the chair does not burn bridges or destroy the company secretary's relationships within the organisation.

To properly deliver on the company secretary role and the potential within the role to influence the governance of the organisation, the energy of the whole board must be harnessed. And it will take much more than governance frameworks in the form of process and procedure to do this.

> *The more you talk about processes, that is all people will think you care about or do.*

> *I help directors understand that a governance structure is like an insurance policy and if you don't have it everything can fall down around you. I think many of the corporate scandals we see often relate to governance structures not giving insight into part of the business doing the wrong thing.*

18 *Whitlam v ASIC* (2003) 57 NSWLR 559; [2003] NSWCA 183.

It is important that the company secretary be the champion for the implementation of the corporate governance framework throughout the organisation. To do this, the company secretary must know the business, not just the governance of the business. They must also know the board, and not just the business of the board.

Accordingly, the company secretary must take the time to understand each and every director. Understanding the values, background and drivers of each director allows information, whether for board or committee packs, to be tailored or brought to the attention of a particular director in order to assist the director in their decision-making process.

Sometimes your role will require you to undertake a different role for the same director. Sometimes the director just wants you to get things done—without providing any advice. I call that the servant leadership model—and sometimes [these] are the days [when] you just have to suck it up. Other times, that director will want you to provide them with advice. You have to be able to pick which one they want at different times.

However, human nature is such that a company secretary may be tempted to allow personal feelings about the likeability (or otherwise) of each director to impact on the assistance provided to the directors. This is a luxury that the company secretary simply cannot afford. Directors will come and go but the company secretary is charged with assisting the board, no matter how likeable the board members are.

You cannot play favourites with directors. They all want, and think, you are on their side.

I've seen some company secretaries give away their feelings [about] directors during board meetings by shaking their head or visibly wincing while [a particular] director adds to the board's discussion. [In one instance,] the company secretary's feelings for [a] director were clear and no doubt [this] impacted on the relationship between that director and the company secretary.

A good company secretary requires a great poker face.

The company secretary is also a key part of the offline communications and assistance to the directors and management team between board meetings.

In terms of the directors, the company secretary will often be requested to assist new directors so that they can familiarise themselves with the organisation and its processes. In this regard, the company secretary is a lifeline to a new director to get up to speed on strategically significant or organisation-transforming decisions already in progress. Given the limited bandwidth of board time available for questions, a new director will often seek assistance from the company secretary to be able to understand the basics of the business and the opportunities already in-flight but not yet decided upon. More generally however, the company secretary will often be the first port of call for documents, particularly those of a historical nature such as board minutes. The company secretary may also facilitate external professional advice to assist the board.

To assist management, the company secretary must be in tune with each director both inside and outside of the boardroom. In both these fora, directors may make off-the-record or off-the-cuff comments and the company secretary is often in the position to interpret those comments or determine to whom the messages were intended and how they should be delivered. Here is where trust comes into play—directors need to know that the company secretary understands their position and will ask clarifying questions if they don't. Directors also expect that the company secretary will deliver messages in the most appropriate manner so that any actions arising out of feedback will enhance corporate culture rather than detract from it. The role is thereby dynamic, interactive and not for the faint-hearted.

The company secretary will also assist the management team to frame material for board submissions although this does not mean that the company secretary should write papers for the board on behalf of the management team. Management will then be able to see how the company secretary adds value because they will be able to communicate more effectively with the board, with less need for questioning or more information before decisions can be made.

Best advice? Do not write board papers for lazy or busy authors. However, I think we do need to articulate how a paper could be better structured.

Holding a genuine belief that governance and the implementation of a governance framework within the organisation adds value means that the company secretary undertakes the role of governance champion within the organisation for the board and management.

The company secretary role can be described as one of 'governance whisperer'.

Rarely will there be a lengthy period of time where a board does not make a decision that requires some form of change. In this context, the company secretary will be exercising their social influence to create impact and change within the organisation.

The company secretary can also take on the role of advocate for the board within the management team. It is common to hear management teams questioning the value of the board and their contribution to the decision-making process.

The company secretary can, in the board's absence, highlight the role of the board in the organisation and the functions it performs at the 'apex' of corporate governance. For many management team members, the organisation in which they are working is the primary focus for their time, attention and discretionary effort. The company secretary can often alert management team members to the fact that non-executive directors, particularly those who sit on a number of boards, may not necessarily have a primary focus on their organisation at all times, thereby allowing management team members to obtain an insight into a board's frame of reference.

Working with the CEO to proactively ensure dual accountability is understood

Much has been written about the double-hatted company secretary/ management role, some of which is examined in the section below headed 'The double-hat: blessing, burden or both?'.

Legal and ethical issues often arise for company secretaries in the context of their day-to-day relationship with the organisation's CEO which potentially puts them at professional peril. Company secretaries can experience a significant conflict between their duties to the law, responsibilities to the board, and responsibilities as a member of the management team of the organisation, reporting to the CEO.

> *Whether I would accept a double-hatted role depends on the dynamic between [the] chair and CEO. I would ask for a meeting with both of them together to witness their personal dynamic, so I know what it's going to be like if I am sandwiched between the two of them.*

A common example is a CEO choosing not to disclose certain information to the board. The company secretary, on the other hand, may consider that the information ought to be disclosed to the board to ensure directors are kept informed about the affairs of the organisation given the fiduciary and other duties of the board. Ordinarily, the company secretary would express this view to the CEO, however if the CEO persists with the decision not to disclose the information, a very real conflict arises for the company secretary in these circumstances. This conflict is, at its heart, a matter to be resolved in light of the statutory duties as outlined in s 181 of the *Corporations Act*—duty of good faith to act in the interests of the organisation and their duties as an employee which may under their terms of employment be owed immediately and expressly to the CEO.

> *I've had a situation where the CEO hasn't wanted certain information to go to the board. After discussion with the CEO, he still hadn't budged. I've always been up front about my role—where I think it's a governance issue I will tell the chair. I do generally let the CEO know that I raised a particular issue with the chair but it's difficult and can feel like you're dobbing someone in. But I judge my actions on whether I feel like I've discharged my duties to the company.*

Over and above the conflict around legal duties, the chair and the CEO may have markedly different views as to the role of the company secretary within the organisation and how the role ought to be executed in practice: right down to the tin-tacks of how much time should be dedicated to the board as opposed to the management role. In this regard the company secretary must have done the groundwork with the chair to understand the expectations and deliverables for the board.

The CEO must then 'buy in' to the company secretary role and understand its importance in relation to the governance of the organisation or be given the details of the expectations of the chair and allow the role to be performed. However no-one, especially the company secretary, wants the CEO scowling on the sidelines.

A good CEO will know, no matter how embedded in the organisation you are as a company secretary, you will always be a source of independent information for the chair.

Any self-respecting board and CEO will understand that the company secretary role is independent and must be so to be effective. It all comes back to their understanding of corporate governance.

In reality, a direct relationship between the company secretary and the CEO can often give the CEO another person to confide in and the ability to access expertise which may not sit neatly within their own skillset. CEOs are often strategic thinkers: visionaries. This is not quite the personality type that thrives on details, nor wishes to spend time overseeing papers from the management team. These are often the BAU of the company secretary.

To better ensure CEO understanding and therefore support for the role, the company secretary must speak a language that resonates with the CEO. That will be the language of organisational value, strategy and helping to give the CEO peace of mind regarding the governance frameworks.

For starters, the company secretary can ensure that the CEO doesn't have too many masters. In between meetings for example, the CEO can feel like they are being inundated with written and verbal requests, or reporting or talking to each director on the board rather than the board as a collective. In these situations, the company secretary can be the conduit through which director communication is channelled. This means that the CEO is not put into a situation where they are in receipt of conflicting instructions from different directors and have to deal with how to disclose such issues to the directors in question.

On the governance front-foot, many savvy company secretaries will copy CEOs into as many of the communications relating to their governance role as possible and request a reciprocal arrangement.

> *I put it this way to a CEO once: Part of my role as company secretary is to be as prepared as possible to help you do what you need to do from a governance perspective. If you are not copying me into the governance conversations you're having, then I won't be able to support you.*

The company secretary will also be continually focused on adding value through their role as well as ensuring that the best decision-making dynamic is achieved around the boardroom table (and beyond the boardroom). In this regard, the company secretary can encourage the CEO to ensure that the company secretary voice around the management table is seen as the voice of the board as a whole. In saying that, however, the company secretary must not be seen to become disconnected from management and too aligned with the board, otherwise their ability to see into the organisation may very well be lost.

> *You have to maintain confidentiality on the part of the board, but don't be holier-than-thou about it.*

The way a company secretary can harness senior leadership team members and management is by drawing attention to the policy, procedure and governance achievements already within the organisation. This means the company secretary, particularly if new to an organisation, must take time to understand the organisation's current policies, procedures and how they are executed by the people within the organisation. Understanding the pain points and identifying the easy wins will build confidence and trust for the company secretary. Then the company secretary ought to create an environment in which the organisation and its people have the opportunity to build on any governance framework successes that have been identified. They must be in a position to offer solutions to the challenging issues around process—or at least explain why they are necessary for the organisation.

> *I have a philosophy that the management team understands when it comes to bringing issues to me. I get them to ask, "Does it seem strange or have a smell? If so, you should tell me." I may not have a legal background but I know when I need to get advice.*

Generating energy and harnessing change will be easier if people know they are building on success already within the organisation. This approach can then generate energy and enthusiasm for governance process and the frameworks that support it.

> *It is important to have a great relationship with the board and the management team, and for both to understand the role of the company secretary. If there is a healthy understanding right from the beginning of your appointment, it will stand you in good stead and work in your favour.*

A company secretary who comes to an organisation brandishing the newest iteration of governance thinking with a view that everyone within the organisation must alter and change what they do to suit a new framework (which often comes complete with new language and terminology that can confuse and alienate) will be setting themselves, and quite possibly, their organisation up for troubled times ahead.

> *When board processes become analogous to "that painful board paper exercise that we can't wait to get to the end of", it's a disservice to the company.*

In speaking the language of strategy, the company secretary can give key insights as to the governance frameworks which will assist the CEO and the management team to progress strategic objectives of the organisation. This will also facilitate appropriate and effective oversight of the strategic progress for the board.

If the CEO embraces the company secretary role, the company secretary can also play a key role to ensure particular strategic initiatives are within the risk appetite of the board, especially as it pertains to reputation and risk. The CEO may also see the role as one of the standard-bearers for the organisation's culture and also use the company secretary as their eyes and ears into the organisation's operations.

Influencing quality decision making via the committee process

There is a dexterity and agility in the committee process. As a company secretary, you need to be able to identify where these committees will assist with board decision-making and make that suggestion. Decisions can then be progressed and the committee populated with skills that may not be sitting around the board table.

There is, apparently, wisdom in crowds and boards, by their very nature, are episodic decision-making groups which meet regularly for board and committee meetings.

The company secretary can influence quality decision making by proactively assisting the board in the early identification of opportunities to form a committee or working group, particularly when the decisions of the board are being held up or bogged down during board meetings. In doing so, a smaller group of directors, perhaps with particular expertise, can perform a deep dive into a topic or issue before reporting back to the board as a whole. The company secretary can also suggest dispensing with committees that no longer serve the board.

Practically, there are some hygiene factors which must be attended to by the company secretary in the committee process. These include ensuring any committees required by by-law, regulation, standard, or code are established to provide particular guidance to the board. Once these have been established, the terms of reference for each committee must be promulgated by the board and reviewed annually.

Once a committee is established, the company secretary ought to proactively assist the chair of the committee to create a calendar of activities for the committee which feeds into the board's priorities, as well as ensuring committee meetings dovetail with the board meetings to allow the benefit of any committee input to be incorporated into a future board pack.

The company secretary will also often have a direct relationship with the chair of each of the board's committees to ensure that the chair's expectations and requirements in relation to committee functions are understood and met.

Good practice is that the corporate secretary should also be the secretary of any board committees. This ensures that good corporate governance practices are maintained at the committee level and that the discussions of the committees may be conveyed to the board by the company secretary at a later date, if required. The board may wish to circumvent this practice to accommodate double-hatted company secretaries, who report or are the lead management member on a committee. This will help to avoid difficulties with reporting lines.

Another way that the company secretary can influence quality decision making is to ensure that boards, upon the approval of any organisational policy, take the time to consider the "what next?" for the policy and its implementation within the organisation. The company secretary can ensure that the committee gives the CEO guidance as to how the board ought to monitor the implementation of a newly approved policy. In this discussion, the company secretary can encourage discussion as to what comprises the key performance indicators signalling the success or failure of the policy's implementation throughout the organisation, and whether the board expects regular reporting to monitor the implementation or whether reporting will be on an exceptions basis.

This tactic can also be used to ensure appropriate rigour in the monitoring of the strategic performance of the organisation. In this regard, the company secretary can ensure that business proposals, once approved, are followed up with a supplementary paper to show how the board will be able to monitor the progress of the proposal (if it has not already been incorporated into the proposal itself). This monitoring function can then be cascaded into the committee structures of the board.

Likewise, the company secretary can ensure that the committees of the board do not become silos of board or management knowledge. The company secretary will be able to join the dots between the various discussions in the different board and committee forums and ensure that matters do not slip through the net and are referred to the right decision-making group.

On a deeper level, the company secretary will understand that all decision-making groups are vulnerable to biases in decision making—both individually and from a group perspective. Not only that, the board's decision-making dynamic can be subject to the vagaries of the ebbs and flows of personal relationships between directors, and between directors and the management team.

The influencing role that company secretaries may perform in the future

> *The company secretary role needs to be recognised as the great leadership and career opportunity that it is. I doubt many people put their hands up for the role as a career path because they can't see past the old cardigan club and cul-de-sac where people went there to die in those roles.*

The company secretary is in a position of great authority and influence but it is a far more subtle power than one might ordinarily find in organisational hierarchies. Well beyond a mere scrivener, the role may not be one of profile and awards but its influence can nonetheless be felt in the corridors of organisational power.

Compass, curator and cultural broker

The bottom line is that ultimately, the principal role of a company secretary is one of service to the board and the organisation. The company secretary directly assists with and, many times from the sidelines, reinforces the various governance functions of the organisation. The needs of Australian boards have changed over time due to an increase in public scrutiny, legislative and regulatory risk and a 24-hour news cycle with a social media chaser—a forum in which everyone feels entitled to a view and has the platform (and perceived right) to air it.

The 21st century company secretary acts in the role of compass through their curatorial and cultural brokering functions. Although these functions are imbued with importance, paradoxically when a company secretary is performing them most effectively, few people are aware of it. This is influence at its least observable and yet at its most impactful.

Compass

A couple of concepts are captured in the notion of a company secretary being a compass within the organisation.

The first is that the company secretary becomes a physical embodiment of a pivot or axis point within the organisation. The company secretary is often privy to and present for almost all board discussions. As a natural consequence, this means that the company secretary will witness some of the most sensitive discussions relating to all of the affairs of the organisation, including strategic, financial and management issues.

The company secretary will also be the pivot point for the chair of the board who will often confide in the company secretary and seek their view on prickly, delicate or emerging matters. For non-executive directors, the company secretary can assist them to navigate the social norms of the board: that is, to help them understand the history of the board as well as the mystery which comprises the intangible and sometimes invisible constraints on their decision-making influence.

Secondly, the company secretary also has the opportunity to become a moral pivot point within the organisation through a cultural broker function; a diagnostic fulcrum—a canary in the coalmine, if you will—for the governance health of the organisation. If there are matters afflicting the company secretary, then there may be issues afflicting your organisation. This can mean that information is not flowing properly, people are unable to speak their minds, or important matters are being missed or lacking in terms of appropriate oversight.

Curator

Company secretaries can be the ultimate curators of information and opinion within their respective organisations.

Each and every paper put forward by management is drafted to seek connection with the board. It seeks to persuade or influence the board to act according to a recommendation. These papers are often one of the first impressions the board will have in relation to any proposal put forward by management and, given that papers are distributed in advance, a director often forms a view as to the capacity and capability of the author of the paper. Before a paper even reaches the board, it must go through the gatekeeper of the company secretary.

From first principles, a paper only makes its way to the board if it is on the agenda. The agenda is a powerful planning tool for managing and messaging the content of meetings. It also presents the company secretary with an opportunity to assess whether papers are truly ready for the board's consumption. The company secretary may wish to encourage a practice which requires papers drafted for the board's consideration to be prepared and considered by the company secretary and/or CEO (or sometimes, chair) before any item makes an appearance on the agenda. This process recognises that once a paper is written, all a company secretary may be left with is editing or massaging the wording of the paper. Whilst a reasonable manager may still be receptive to the company secretary's recommendation to hold back a paper if it is not ready, there is, in reality, more likelihood that the manager will want the paper to progress to the board.

The narrative put forward by the author, in any paper which finds its way into a board pack, should create a cogent and consistent story which will enable a director to understand the (potentially chaotic) reality being perceived by the author and their preferred solution for the organisation to take advantage of or avoid the possible consequences of that reality.

In this regard, many papers strive to create a narrative to connect the recommended course of action to the purpose, vision and strategic plan of the organisation. Alternatively, papers can highlight the areas in which the organisation requires some protection (usually couched in the language of risk management).

Controlling the narrative is the currency of influence. The built-environment conveying the narrative to the board is the board paper and any presentation given to the board by the author or CEO in support of the paper. The paper submitted to the board will establish the desired outcome (i.e. recommendation) and the narrative frames the decision as to the desired outcome.

Research has shown that the author who sets up the context and framework within which the decision is made will always have the advantage. This framing then starts to shape the lens through which the author wishes the board to view the paper and it is up to each director to consciously recognise the narrative *as presented* and to think outside of that frame. Directors understand that each decision of the board not only has an immediate impact on the organisation through the implementation of the decision itself, but also that the decision becomes a part of the organisation's narrative.

The narrative will, however, also be impacted by intangibles. This can comprise conversations outside the board meeting and before the paper is submitted to the board. These conversations can be between the chair and the board, the chair and CEO, or members of the board (either during committee meetings or otherwise) with various management team members, and they can have a strong impact on the success of a proposal. Often these conversations will be facilitated, attended or filtered through the company secretary.

Here is where some of the real influence of the company secretary can be felt. The company secretary can be the Babel fish translating between the executive and non-executive. They are a conduit, a translator and overseer of information that comes from the executive to the board. The company secretary can help in the creation of the narrative by ensuring the paper hits the desired mark to benefit the board and the author. They can give guidance on whether the narrative is sufficiently connected to strategy. They can also point out where the narrative leaves the reader wanting more or suggest where the logic is missing-in-action.

Company secretaries can also provide the author with insights into the board, the way the board operates, perhaps even down to some of the decision-making drivers for the directors sitting around the table. This may also include providing the author with an indication of the various learning styles of each director. Some directors much prefer the brevity of graphs and charts with red/amber/green dashboards. Other directors are inherently distrusting of this style of presenting information—thinking that there's something to hide in these more quantitative-style reports. In this regard, if the company secretary can be seen to be using their curating function to assist the progression of the management team's goals, they will be seen to be a natural starting point for the positive and constructive interaction between the board and the author.

The way the papers are drafted will guide the board as to where you want them to play. Too much detail and it's likely they'll play low [in the operational space] but if you stick with giving them strategic information in the papers, they'll play high. And that's what a good board does—they add value to the organisation through strategic input and oversight.

Some may blanch at the company secretary's deep involvement in the development of papers—the divulging of insights into the black box of the board. Perhaps this is due to feeling a little uncomfortable that this process is manipulative in itself. Here is where discretion comes in—the company secretary must be driven by an overriding sense of what is good for the company and the imperative that their words, deeds and actions do not breach the trust and confidence which they have built up with any of the connections that they have made within the organisation. Again, the work of a company secretary must be judged at various points in time on the decision-making spectrum and at no stage should any director or management team member be left with the feeling that they've been 'had' by the company secretary.

The company secretary has the opportunity to see the patterns and disjunctions in the material that management presents to the board and can bring to bear a perspective that is more holistic.

With access to, and indeed responsibility for, information flows to, from and around the board, there may be temptation for a company secretary to over-curate information such that there is a material omission of information or to permit information which goes against the recommendation being requested. If this is the case, it will be met with cases such as *ASIC v Vines*[19] in which the Court insisted on:

> …the fundamental importance of senior executives providing their boards with all information they have that is material to the board's decisions…

In a world that can focus on fake news and be driven by emotion rather than logic, there may be a temptation on the part of management to 'gild the lily', finesse the facts, or appeal to a certain sentiment rather than offering a genuine and well-rounded argument based on truth and logic. In these cases, there is room for the company secretary to expose overly optimistic/confident proposals and reveal some of the inconvenient truths which are at odds with the business case that is being put forward by the author.

The company secretary can therefore reduce the number of cognitive biases at play in the board decision-making process as opposed to taking advantage of them or allowing others to take advantage of them. For example, time pressures can result in oversimplification of proposals and/or an overemphasis on the negative aspects of a proposal. In these scenarios, the company secretary can become involved in the intentional withholding or inundation of information which results in the creation of a false or inaccurate message in the mind of a director and the reduction of their

19 (2006) 58 ACSR 298; [2006] NSWSC 760 at [143].

decision-making powers. This must also be balanced with the fact that some groups perform exceedingly well in terms of the information-sparse and speedy world of decision-making heuristics.

If the authors of papers have been offered assistance by the company secretary, and that assistance has not been accepted, the company secretary must allow the writers of papers and submissions to stick to their approach and own the ways in which their papers are framed.

Ultimately a paper and its presentation will either stand on its merits or not. It is not the company secretary's role to write other people's papers (unless it is prescribed in their position description) although many will take on an editorial-style role by giving feedback on how to prepare a paper on which the board is to make a decision. In this regard, the company secretary may simply let the paper through and give the chair a 'heads-up' that the paper may be deficient. It is then up to the chair to determine whether the proposal gets air-time at the next board meeting.

It's not a control game, it's a facilitator game.

The curator role will also involve preparing and delivering the built-environment in which management should engage with the board—for example, providing tools such as template submission documents, feedback on material, the allocation of time on the board agenda, explanations as to why decisions have been made one way or another or descriptions and clarifications concerning ongoing requests regarding particular papers. The company secretary may also be able to more adeptly interpret requests for further information from the board as a call for more concise, relevant and accessible papers.

The company secretary therefore collaborates on papers with all stakeholders but is a captive of none.[20] Sitting as the curator of information, the company secretary is not beholden to the management boundaries and reporting lines and must seek, above all, to extract as much value from each of the governance players within the organisation as possible. In the role of curator, the company secretary is part of the

20 R Willcock, 2007, "Advisor, counsel, conduit — Wearing many different hats", *Keeping Good Companies*, Vol 59, No 8, September.

decision-making process but is also a cleanskin—they do not have a vested interest one way or the other in a particular outcome. They are driven instead by the imperative that the right information has surfaced.

Cultural broker

As a steward within and of the organisation, the company secretary must be able to intellectually recognise that the incorporated organisation is ultimately a legal structure with a separate legal identity through which business—either for-profit or for-purpose—is conducted. Even so, the company secretary must always keep in mind that the right for this separate legal entity to 'exist' is predicated on the entity doing the right thing. That is, acting in accordance with societal expectations, even though it has no soul to save and no body to intern in relation to any legal wrongdoing (let alone a breach of ethical or moral norms).

In this regard, the company secretary can be the advocate for the *collective conscience* of the board, particularly within the organisation when the board is not sitting. They also make a significant contribution to the development of the *collective conscience* by helping to steer the board to do the right thing in the right way. The legal power vested in the company secretary as an officer of the organisation gives a licence to alert the board to organisational failings or, more particularly, potential failings.

The law speaks to this function through cases such *Permanent Building Society (in liq) v McGee*. If the company secretary is aware that an officer or a director has possession of facts material to a particular decision, particularly if there is a conflict of interest, there is a positive duty to divulge those facts to protect the interests of the organisation. The company secretary must ensure the officer or director with the relevant facts must "at least" takes steps to "ensure that the other directors appreciated the potential harm inherent in the [decision]".[21] If the director or officer is unwilling to act in these circumstances, the company secretary must bring it to the board's attention. This is usually done through the means of a strong relationship with the chair.

The concept of the *collective conscience* calls on the company secretary to strive for genuine compliance in relation to legal and regulatory requirements, as well as the

21 *Permanent Building Society (in liq) v McGee* (1993) 11 ACSR 260, at 289–90.

appearance of compliance. For example, a company secretary who becomes aware that the answers to a work, health and safety induction questionnaire are being handed out to inductees by their line-manager must report this through the organisation's complaint or whistleblowing policies.

In this regard, the company secretary fulfils the role of "a conduit through which the critical relationships of the boardroom are created and maintained, and also the 'piping system' through which the vital information flows to, through and around the relationships and actors that characterize and populate the boardroom".[22]

To enact the cultural broker function, building effective relationships is critical. The ability to contribute to the business of the board requires trust in relationships not only at the board table but those managers and other executive team members who are reporting to the board. This does not mean creating a vice-like grip on the relationships between the board and management team but being the facilitator and broker of relationships between them—as well as relationships between individual directors themselves. In this regard, "...there are social and psychological dimensions of space inherent in the behavioural dynamics of boards that need to be developed for the boardroom to be a place where effective governance can thrive. Without the development of the boardroom as a social and psychological space in which relationships between directors flourish, the board in all its physical materiality can give the appearances of good governance, but fail in practice to deliver the substance of good governance".[23] Company secretaries are therefore a steward or guardian of the organisation as a whole and not just in relation to organisational process.

The opportunities to undertake this function will rely on the company secretary creating and taking advantage of brokerage opportunities and managing interpersonal relationships so as to optimise the contributions of all board members. There are possibilities for the company secretary to 'tease out' the best possible contribution from each member of the board, acting with an independence and impartiality which fosters an internal credibility and a reputation to broker relations between the different actors and constituents of the board.[24]

The cultural broker function helps guide the discretionary behaviour of the

22 T McNulty and A Stewart, 2015, op cit, p 530.
23 T McNulty and A Stewart, 2015, op cit, p 516.
24 T McNulty and A Stewart, 2015, op cit, pp 513–35, 528–29.

management team and fills the spaces where the policy process book is shut. The company secretary can assist the management team to respond to unprecedented and unforeseen circumstances. They can give guidance as to whether to elevate the bad news quickly to the board, pitching a new idea or burying yet another skeleton. In this regard, the management team will make decisions on an everyday basis and quite often they will do so in terms of their own perspective.

For much of the time that the management decisions are being made within the organisation, the board will not be in session. The cultural broker function is the company secretary personifying the board and its desired culture within the organisation. This function therefore is critical to ensuring that effective governance can prosper. It is in this function that the board's reliance on governance structure and systems is more likely to be based in reality as opposed to the situation where the trappings of the governance structure are in place but in practice fail to deliver good governance.

Future specialist skills and technical knowledge that will influence culture

The company secretary is, in truth, akin to a mythical beast much like the unicorn. They must have a strong grasp of both the formal legal expectations of the organisation and the board, and the broader governance pressures which drive the fluctuating expectations of the board and of the company secretary role in the modern corporate environment. They must also display the required interpersonal competencies of being "personable, respectful, reliable, tolerant, diplomatic, caring and committed" whilst simultaneously having "tact, discretion, nous, political astuteness and awareness, scrupulous accuracy and efficiency, integrity, professionalism…". This combination has been described as the "impossible string of virtues".[25]

Very often, too, a person's skill or expertise will allow them to, for example, focus on detail but this expertise is often to the exclusion of being a broad or strategic thinker. A details-person is therefore not usually combined with the skillset of a person who can conceptualise a large strategic framework or picture for the organisation, and vice versa. The company secretary must be able to see and do both. Combine this with requisite emotional intelligence: the ability to manage their

25 T McNulty and A Stewart, 2015, op cit, p 517.

own emotions and understand other's emotions through the conversations and behaviours displayed at and beyond board meetings—it is nothing short of a rare combination. Emotional intelligence is, in fact, an attribute that many corporate players simply don't possess.

The company secretary must keep on top of developments in governance. These developments can be in terms of court decisions or even looking at the front page of the newspaper.

I look at organisational shortcomings on the front page of the paper. When I see those developments I think about them and ask myself the question "Are we measuring up? What is really going on there? Do we have any shortcomings?" Because sometimes it's not bad people with bad motivations, it's bad process or something else that has led to a blind spot for the organisation.

The role of the company secretary and its progression over the last 200 years has already been captured briefly in this book. It should be no secret that the future will require the company secretary (and others within their organisations) to do more with less (as this is happening right now). Nor should it be a surprise that directors and officers duties are likely to wax, rather than wane. Yet, despite increased regulation and compliance regimes which must be implemented to ensure adherence, there will be a need for the company secretary to be alert to much broader organisational and societal issues.

So, looking forward, organisations will have a greater impact on our lives (although we may notice it less). Health is becoming more sophisticated with computers being able to diagnose illness and disease with more accuracy and speed than a human with years of training. Advances in medical science have introduced the concepts of nanotechnology, DNA editing and significantly reduced medical research timeframes. Lifestyle and entertainment is on a spectrum of being materially more extreme and yet in other areas, more virtual. Wearable technology, now the norm, means that the true impact and unbounded potential of artificial intelligence and robotics is about to be realised. Yet, in this ever changing and virtual arena, innovations in environmental sustainability seek to maximise outcomes and minimise impacts on our planet and in what we do. There will also be global threats to manage and respond to such as climate change, pandemics, cyber-attacks and terrorism. Crypto-currency and crowd-funding will become mainstream and the future of government influence and regulation in a connected world may be challenged.

In this world, where our lives are more and more impacted by algorithms and predictive technology, the company secretary will need to become a trend-spotter and train-spotter. They will play an important role in spotting trends within their own organisations, but must also be externally focused to see trends that might impact on core business. They will also need to be scanning the environment to help the board understand whether the light at the end of the decision-making tunnel is sunlight…or an oncoming train.

Importantly, the company secretary will need to be in a position to align reporting which includes compliance and strategy to ensure that the board has comfort in areas where there can and should be certainty, so that the uncertain and unpredictable can be dealt with in the boardroom.

Where there are matters that require board decisions and it is clear that the board does not have the expertise or skills in the area in which they are being asked to make a decision, the company secretary can offer to the board the opportunity to bring in an external expert who could help shape the discussion. This will ensure that the board's knowledge is at a level to enter into an informed debate that will increase the likelihood that a good decision can be made.

As the future is shaped by algorithms, which will sometimes literally determine life and death, boards will need to be a source of ethical excellence. They must feel comfortable discussing the complexities and opportunities this new world offers their organisation and making decisions without division. In this regard, the board will serve as a role model for the development of a culture where conflicts are constructively resolved. The company secretary role will likely be one of the first to ensure ethical dilemmas are identified, framed appropriately and put onto the board agenda.

In the corporate environment of the new millennium, the company secretary's impact on culture can have a deep impact; positively and negatively, depending on how they wield their influence.

Appropriate versus inappropriate influence

> Power lasts ten years, influence not more than one hundred.[26]

Influence may be a push/pull style depending on a number of circumstances.

When a government seeks to influence its citizens, how do policy makers determine the line between encouraging certain behaviours in its citizens and propaganda? Even behavioural nudges from government ought to preserve dignity and autonomy, and promote welfare and self-government. A lack of trustworthiness perceived by a government 'nudging' its citizens can be assisted by transparency and accountability.[27]

A number of influences will come to bear on a company secretary in their role. These will include authority pressure, peer pressure, role pressure and time pressure.

Influence is often situational and shaped by features of the content and context in and around change, so are the political processes in organisations. Often a person's influence is limited to certain spheres or domains. Aspects of structure and context are capable of being mobilised or activated by directors as they seek to obtain outcomes that are important to them.[28]

Previous engagement by the board and other stakeholders will also feed into the ever-changing social dynamics surrounding the board and shape the emerging context for influence.

In the suite of influence within the company secretary's grasp what is considered 'acceptable influence' and 'unacceptable influence', some consider that intention (if there is intention to mislead, cause harm or deliberately withhold information) makes the influencing behaviour bad or unethical. In this regard, the company secretary should ensure that all information pertinent to the decision at hand is brought to bear and aired. In such a way, spin is minimised or called out as such.

Influence is acceptable if it is geared towards improving a director's decision-making

26 Proverb.
27 C R Sunstein, 2016, *The Ethics of Influence: Government in the Age of Behavioral Science*, Cambridge University Press.
28 A Pettigrew and T McNulty, 1995, op cit, p 853.

or the process by which the decision is made without clouding, obfuscating or limiting the capacity of the director—or their autonomy—to do so.

Dishonesty

Dishonesty, for example, comes cloaked in many guises. Think fraud, lying and deception.

Fraud is a deliberate deception. Fraud can not only be wrongful but also criminal. Fraud is often considered the highest order of deceit because there is a moral delinquency or turpitude evidenced by the person perpetrating the fraud with the intended result often resulting in the financial or personal gain of the fraudster, at the expense of another or in the case of a company secretary, the organisation.

Lies, on the other hand, attempt to alter, curtail or manipulate behaviour by engaging people on matters other than the merits of the decision being made. In this regard, a lie is disrespectful to its victims because it attempts to exert influence without asking people to make a deliberative choice in light of relevant facts.[29] From a company secretary perspective this would be asking the board to consider falsehoods in the context of the decision being made. Quite often, but not always, the lies are in support of the liar's goals.

Deception however, unlike fraud or lies, can be the provision of too much truthful information which buries the real issues in a sea of narrative, with the reader (the director) being held hostage by the numerous cognitive biases which arise when there is an over-abundance of information.

Clearly, there is no place for these types of 'influence' within the company secretary's extensive skill set.

Coercion

In corporate governance, many of the compliance programmes implemented within an organisation rely on a level of coercion. To provide a more detailed explanation in support of this notion: the government forbids murder and exceeding the speed limit whilst driving your vehicle. To enforce these laws, the government engages in a program of 'if this, then that'. For example, if you murder someone, you will go to

29 C R Sunstein, op cit, p 88.

jail; if you speed in your vehicle, you will be fined or potentially lose your licence. Technically, this is a form of coercion. State-sanctioned coercion but coercion nevertheless. People are *coerced* when they face a credible threat of punishment if they act contrary to certain rules.

As an employee within an organisation, you will be required to comply with certain processes that comprise a compliance program, and if you do not, you may face a sanction or punishment. Some of the obligations in these compliance programmes are based on legislative obligations that the organisation itself must comply with. Failure to do so may result in the organisation facing fines or sanctions. Other obligations are those which the organisation imposes on itself through the promulgation of policies and processes.

Whilst there are valid arguments that panoptical compliance programs with strong overtones of control and punishment ensure that these programs are highly effective, the company secretary should avoid using this ‘coercive’ power without the appropriate frameworks to ensure consistency in the use and application of such coercion. Aside from the above, the power of coercion ought to be limited and, at the very least, sanctioned, regulated and monitored by the board or management.

Manipulation

Understanding the difference between influence and manipulation may not always be clear. “Manipulation is not exactly persuasion, not precisely coercion, and not merely similar to deception. This elusive phenomenon is located somewhere in the grey area between those motivating actions, and this grey place presents essential difficulty in characterizing manipulation and measuring its impact.”[30]

A commonly accepted definition of manipulation is that it is about influencing someone so that she or he does not know the intention of the manipulator or that it is a way of exerting influence in which the target does not know that she or he has been influenced.[31]

The ultimate manipulator is the corporate psychopath, who, without empathy

30 S Handelman, 2009, *Thought manipulation: The use and abuse of psychological trickery*, Praeger, Santa Barbara, California, p ix.

31 T P Auvinen, 2013, “Leadership manipulation and ethics in storytelling”, *Journal of Business Ethics*, Vol 116, No 2, p 415.

or remorse uses people as pawns, patrons and patsies. These terms for these three players in the psychopath's corporate playground have been coined by the doyen of observing and diagnosing psychopathic behaviour, Dr Robert Hare. In 2006, Dr Hare co-authored a book with Dr Paul Babiak which looked at how the corporate arena was the perfect hiding place for a functional psychopath. According to Babiak and Hare, psychopathic manipulation is employed by a person who is willing to use what they have learned [about human nature] for their own selfish purposes.[32]

Putting the corporate psychopath to the side however, manipulation is everywhere. It can ride the boundary between fair and unfair, legitimate and illegitimate, but ultimately focuses on how "an individual's autonomy, independence, and freedom of choice [is] guaranteed and decision-making improved, according to his or her preferences, priorities, and best interests".[33] Often the distinguishing mark of manipulation is a justified sense of betrayal when having found out what happened, or having reflected on it, people think that they have not been treated properly.[34]

Manipulation can be based on spoken or written language. Building a narrative for a business case, for example, is one of the key mediums for manipulation in the company secretary arena. The company secretary may not be a direct participant in this type of manipulation however they could indirectly be involved if they turn a blind eye to it or don't raise it as an issue with the author or the chair.

32 P Babiak and R Hare, 2007, *Snakes in suits: When psychopaths go to work*, Harper Business, p 68.
33 S Handelman, op cit, p x.
34 C R Sunstein, op cit, p 83.