

## ORGANISATION

# Role of the company secretary

The importance of the company secretary's role has increased over the years. No longer the person who merely keeps the minutes of the board and handles board correspondence, the company secretary role can now include administering the affairs of the company and managing/supporting the business of the board.

The corporate collapses of the late 1990s and early 2000s resulted in an increased shareholder focus on corporate governance and transparency. Some could say that this focus has emphasized the company secretary's role in assisting with and supporting the governing and monitoring role of the board within their organisations.

As the responsibilities of the board have increased, the volume of work and necessary skills to support the board have augmented the role of the company secretary. Depending on the size and resources of a company, the company secretary can be considered the chief governance specialist within an organisation, and it is a role which is increasingly relied upon by the board to provide advice and implement good governance practices. This chief governance specialist role is a more proactive role than in previous times.

Company secretaries have legal responsibilities, in addition to their work in support of the board, which will vary according to the specific needs of the organisation.

The value of company secretaries is recognised in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*<sup>1</sup> which states in the commentary to Recommendation 1.4:

*The company secretary of a listed entity plays an important role in supporting the effectiveness of the board and its committees. The role of the company secretary should include:*

- *advising the board and its committees on governance matters;*
- *monitoring that board and committee policy and procedures are followed;*
- *coordinating the timely completion and despatch of board and committee papers;*
- *ensuring that the business at board and committee meetings is accurately captured in the minutes; and*
- *helping to organise and facilitate the induction and professional development of directors.*

*Each director should be able to communicate directly with the company secretary and vice versa.*

*The decision to appoint or remove a company secretary should be made or approved by the board.*

1. ASX Corporate Governance Council, 2019, *Corporate Governance Principles and Recommendations*, 4th edition, February, Recommendation 2.4, p 15, <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>, (accessed 8 May 2019).

## What are the legal requirements for appointment and departure for a company incorporated under the *Corporations Act 2001*(Cth)?

The *Corporations Act 2001* (Cth) (the Act) outlines rules regarding the appointment and departure of a company secretary:

- **A public company must have a company secretary** – Each public company must appoint at least one company secretary and at least one of its secretaries must ‘ordinarily reside’ in Australia (s 204A(2)). A proprietary company is not required to appoint a company secretary (s 204A(1)) but, if it does have one or more secretaries, at least one must ‘ordinarily reside’ in Australia;
- **Natural person** – A company secretary must be a natural person who is at least 18 years of age (s 204B(1));
- **Disqualified persons** – Generally, a person disqualified from managing companies under Part 2D.6 may not be appointed as a company secretary. However, such an appointment can be made where it is approved by the Australian Securities and Investments Commission (ASIC) (s 206F) or by leave of the Court (s 206G). Similarly, a person automatically ceases to be a company secretary if they are disqualified from managing companies under Part 2D.6 during their term (s 204G), unless permitted to continue by ASIC (s 206F) or by leave of the Court (s 206G);
- **Appointment and terms** – Directors appoint the company secretary (s 204D) and determine the terms and conditions of the office, including remuneration (s 204F);
- **Notification** – ASIC must be notified of the appointment within 28 days (s 205B(1) and ASIC Form 484);
- **Consent required** – The person must give their signed consent to act as secretary before being appointed (s 204C(1)) and the consent must be kept by the company (s 204C(2)). Failure to obtain or keep the consent is an offence under the Act (s 204C(3));

- **Act by secretary is effective** – An act done by a secretary is effective even if their appointment, or the continuance of their appointment, is invalid because the company or secretary did not comply with the company’s constitution or the Act (s 204E(1)). Section 204E (1) of the Act does not deal with the question of whether an effective act by a secretary binds the company in its dealings with other persons or makes the company liable to another person (s 204E(2)). However, a person may assume that anyone who appears to be a company secretary of the company (from information provided by the company that is available from ASIC) has been duly appointed, and has authority to exercise the powers and perform the duties customarily exercised or performed by a company secretary of a similar company (s 129(2));
- **Leaving a company** – When a company secretary leaves, the company is required to notify ASIC by lodging a notice in the prescribed form (ASIC Form 484) within 28 days of the resignation/retirement (s 205B(5)). If the secretary has given ASIC written notice of their resignation/retirement in prescribed form (Form 370), together with a copy of the letter of resignation given to the company (under s 205A), the company is excused from the requirement to notify ASIC (s 205A(6));
- **Director and secretary** – There is no prohibition in the Act on a person acting both as director and secretary of a company.

## What are the legal duties and obligations?

Company secretaries fall under the definition of ‘officer’ of a corporation (s 9 of the Act), so they have many of the same duties and obligations as directors.

These duties include the following:

- to exercise their powers and discharge their duties with care and diligence (s 180);
- to exercise their powers and discharge their duties in good faith and for a proper purpose (s 181);
- not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the company (s 182);
- not to improperly use information obtained by virtue of their position (s 183); and
- it is also a criminal offence if a company secretary is either reckless or intentionally dishonest and fails to exercise their powers and discharge their duties in good faith in the best interests of the company, or for a proper purpose (s 184).

### Should the company secretary be covered under the board's D&O insurance policies and deeds of access and indemnity?

Because company secretaries are subject to many of the same liabilities as directors, they may be covered under the organisation's directors and officers liability (D&O) insurance policies. Coverage will depend on the terms of the insurance policy and the board's decision on whether to extend coverage or not. It is recommended that company secretaries check the terms of their company's D&O insurance policy/policies and, particularly, whether they are included within the list of 'Insured Person'. If appropriate, or required, a company secretary may obtain professional legal and financial advice after consulting their board's chair.

Company secretaries may also enter into deeds of access and indemnity, although it is important to note that anything that purports to indemnify or insure a company secretary against a liability, or exempt a company secretary from liability, that contravenes s 199A or s 199B of the Act is void.

### What are typical tasks of a company secretary?

The role of the company secretary has elements of both compliance and performance. While their formal legal duties have not changed enormously in the last decade, their additional tasks have. Section 188 lists the provisions of the Act which the company secretary will be held responsible for, if contravened by the company.

These are to:

- maintain a registered office, and to notify ASIC of any change in address within 28 days (s 142);
- keep the registered office open to the public during certain hours (public company only) (s 145);
- notify ASIC of a change to the principal place of business (s 146);
- notify ASIC of changes to the member register (proprietary company only) (s 178A);
- notify ASIC of changes to the share structure (proprietary company only) (s 178C);
- lodge notices with ASIC regarding personal details of directors and secretaries (s 205B);
- notify ASIC of any issue of shares (s 254X);
- lodge financial reports with ASIC (ss 319(1) and 320(1));
- respond to extract of particulars, and to return of particulars (ss 346C and 348D); and
- notify ASIC of changes to ultimate holding company (proprietary company only) (s 349A).

In defence of an allegation of contravention, the company secretary may argue that he/she took all reasonable steps to ensure that the company complied with the provision (s 188(3)). If a proprietary company does not appoint a secretary, each director of the company is responsible for the company's contravention of these provisions.

In addition to the responsibilities listed in s 188 of the Act, compliance responsibilities of the company secretary typically include:

- managing board processes such as board and committee papers and the circulation of agendas, minutes, discussion papers, proposals for the board and its committees;
- ensuring members' and directors' meetings are properly called and held – a company secretary cannot call a meeting without authority (for example, a delegation/instruction is required from the board);
- ensuring the necessary registers are established and properly maintained and ensuring that the company's financial records are maintained, and reports prepared in accordance with the requirements of the Act;
- ensuring records of members' and directors' meetings are kept in compliance with the Act and the organisation's constitution (again, the company secretary cannot do this without authority);
- understanding and ensuring the company complies with its statutory obligations, ensuring requirements of ASIC and other regulators are met, including continuous disclosure;
- providing or procuring advice for directors regarding application of the Act, company constitution, ASX requirements and other legal and regulatory requirements; and
- development, implementation, communication and maintenance of compliance policies, processes and procedures.

Other responsibilities of the company secretary relating to board performance include:

- advising the board and board committees on good practice in corporate governance (for example, giving guidance on the legal implications of the way duties are discharged, meetings are run, and decisions are made);
- ASX announcements and continuous disclosure;
- organising and running of annual general meetings;
- ensuring the annual report is compiled and distributed to shareholders;
- promoting the compliance framework to safeguard the integrity of the organisation;

- counselling the board on standards of ethical and corporate behaviour;
- ensuring the board has the information it needs to make informed decisions (for example, the Business Judgment Rule defence);
- organising board performance reviews;
- being involved in risk management and corporate responsibility matters;
- policy formulation for the board;
- MD induction and maintenance of a director manual; and
- organising D&O insurance.



The minutes should stand as a record of constructive debates between directors or when directors raise constructive questions with management - in this way, the minutes will reflect the discussions occurring.

The role of the company secretary is evolving however and will continue to change with the governance expectations placed on boards. In this regard, the final reports of the Prudential Inquiry into the Commonwealth Bank of Australia and the Royal Commission into Misconduct in Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) point out the importance of good quality board information and board meeting minutes. These are both matters within the company secretary's responsibilities.

In relation to the quality of board information, the company secretary plays a key role in coordinating board material and board papers between boards, committees and executives. Both final reports mentioned above<sup>2,3</sup>, illustrate that lengthy board information makes it difficult for directors

to focus on key governance and priority matters. At the same time, over-simplified content without sufficient supporting material hampers directors' abilities to fully understand the core issues. Company secretaries should assist their boards and committees to strike an appropriate balance between the 'quality' and the 'quantity' of information, as well as to refine the format and the structure of board reporting material.

In relation to board meeting minutes, the company secretary is usually the 'default' minute taker for board and committee meetings. The final report of the Financial Services Royal Commission<sup>4</sup> highlighted that meeting minutes need to be an accurate record of events and discussion. While it is not necessary to transcribe discussion verbatim, the minutes should do more than record directors' attendance, topics presented/discussed, board resolutions and actionable items. The minutes should stand as a record of constructive debates between directors or when directors raise constructive questions with management - in this way, the minutes will reflect the discussions occurring. The AICD and the Governance Institute of Company Directors issued a *Joint statement on board minutes* in August 2019.<sup>5</sup>

### To whom does a company secretary report?

Given that the board technically appoints the company secretary and that the role is heavily focused on board performance, it is also appropriate that the company secretary reports to the chair of the board. The ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* recommends that the company secretary be accountable to the board through the chair on all governance matters (Recommendation 1.4).<sup>6</sup>

2. K M Hayne, 2019, *Final Report Royal Commission into Misconduct in Banking, Superannuation and Financial Services Industry, Volume 1*, p 400, <https://static.treasury.gov.au/uploads/sites/1/2019/02/fsrc-volume1.pdf>, (accessed 3 June 2019).

3. J Laker, J Broadbent and G Samuel, 2018, *Prudential Inquiry into the Commonwealth Bank of Australia*, Australian Prudential Regulation Authority, April, p 15, [https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry\\_Final-Report\\_30042018.pdf](https://www.apra.gov.au/sites/default/files/CBA-Prudential-Inquiry_Final-Report_30042018.pdf), (accessed 3 June 2019).

4. Op cit, pp 396-397.

5. Australian Institute of Company Directors and the Governance Institute of Australia, 2019, *Joint statement on board minutes*, August, <https://aicd.companydirectors.com.au/~media/cd2/resources/advocacy/research/2019/pdf/govinst-aicd-minutes-project-july-2019-final-v2.ashx>, (accessed 18 September 2019).

6. ASX Corporate Governance Council, 2019, *Corporate Governance Principles and Recommendations*, 4th edition, February, Recommendation 1.4, p 8, <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>, (accessed 8 May 2019).

Many company secretaries face the challenge inherent in the duality of their role being one of governance and also management. At the same time as they are a member of the board, they are also a member of the organisation's management team. Historically, the company secretary has reported to the Chief Financial Officer or Chief Executive Officer. Sometimes, the company secretary role may also be combined with other management duties in an organisation. When company secretaries report to their CEO and work with other executive members, they should always be mindful of and ensure they do not disclose any board or company secretarial matters to other management members. It is prudent for company secretaries to clarify their roles, priorities, level of involvement with management and reporting lines with their board chair and their CEO.

### What qualifications should a company secretary have?

There is no legal requirement for a company secretary to have any particular qualifications or experience. However, for public companies, the experience and qualifications of each company secretary must be disclosed in the annual report (s 300(10)(d)). Because of the volume of legal compliance work and required knowledge of the Act and other legislation, it is common for company secretaries to have legal qualifications and/or experience. Their role is often combined with that of general counsel, although this is apparently decreasing. In addition, a company secretary with sound financial literacy, a good understanding of audit/internal controls, risk management and industry knowledge will assist their board fulfilling their reporting and compliance duties.



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If boards prefer their company secretary to have a formal qualification signaling their commitment to high governance standards, the Governance Institute of Australia offers a Graduate Diploma in Applied Corporate Governance. The Governance Institute of Australia is the professional body for company secretaries and membership is denoted by the post-nominals AGIA or ACIS for an associate member and FGIA or FCIS for a fellow.

Furthermore, boards generally see company secretaries as their key source of regulatory updates and recent developments in governance best practice. It is prudent that continuous professional development opportunities in this regard be offered or undertaken.

### How does the board evaluate the company secretary's performance?

The board should regularly evaluate the performance of the company secretary. The appraisal should be based on a written position description and list of responsibilities. To supplement this, a pro forma from Governance Institute of Australia might assist.

### What is the situation of a company secretary/general counsel?

A high percentage of company secretaries also act as their corporation's general counsel. The High Court made clear in the James Hardie case (*Shafron v ASIC* (2012) HCA 18) that a person with these twin roles has a high responsibility to protect the corporation from legal risk and generally cannot operate in one capacity some of the time and in the other capacity at other times.

In that case, the High Court approved earlier court decisions that the company secretary/general counsel had breached the duty of care under s 180(1) of the Act – “a company secretary with legal background would be expected to raise issues such as potential misleading statements (in relation to the draft ASX announcement) and disclosure obligations...with the board”. Before the

High Court, the company secretary/general counsel argued that the contraventions alleged against him concerned his responsibilities as general counsel, not company secretary, and should not be subject to s 180 (1). The High Court rejected this argument, holding that his responsibilities in this case were indivisible:

*A fundamental difficulty with Mr Shafron's submission is that there was no evidence demonstrating or suggesting that Mr Shafron performed certain tasks in one 'capacity' and other tasks in another. Mr Shafron did not give evidence at trial. What evidence there was about the role of a 'company secretary and general counsel' of a listed public company did not support the distinction Mr Shafron's submissions sought to draw. Yet, as has been stated, what responsibilities Mr Shafron had was a question of fact.*

*As the title 'general counsel and company secretary' given to Mr Shafron indicates, he was qualified as a lawyer ... An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The primary judge and the Court of Appeal described this aspect of Mr Shafron's responsibilities as a duty to*

*protect the company 'from legal risk'. No doubt that included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But Mr Shafron's responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.*

*All of the tasks Mr Shafron performed were undertaken in fulfilment of his responsibilities as general counsel and company secretary. More particularly, because of his qualifications and the position in which he was employed, his responsibilities as general counsel and company secretary extended to proffering advice about how duties of disclosure should be met. And when he procured advice of others and put that advice before the board for its use, his responsibilities could, and in this case did, extend to identifying the limits of the advice that the third party gave.*

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