

## Role of the Company Secretary

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Source: AICD

The importance of the company secretary's role has increased over the years and now generally includes administering the affairs of the company and managing 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. As a result, the company secretary's role in governing and monitoring the organisation has been emphasised.

As the responsibilities of the board have increased, the volume of work and necessary skills to support the board have enhanced the role of the company secretary. The company secretary is now often considered to be the chief governance specialist within an organisation, increasingly relied upon to provide advice and implement good governance practices. It 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* which state in the commentary to Recommendation 2.5:

*'The company secretary plays an important role in supporting the effectiveness of the board by monitoring that board policy and procedures are followed, and coordinating the timely completion and despatch of board agenda and briefing material. It is important that all directors have access to the company secretary. The appointment and removal of the company secretary should be a matter for decision by the board as a whole. The company secretary should be accountable to the board, through the chair, on all governance matters.'*

What are the legal requirements for appointment and departure?

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

- **Public company must have 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 over 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 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 (sec 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 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 *Corporations Act* 2001 (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 *Corporations Act 2001* on a person acting both as director and secretary of a company.

## What are their 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:

- 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);
- 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 policies and deeds of access and indemnity?

Because company secretaries are subject to the same liabilities as directors, they may be covered under the organisation's D&O policies. However, Chartered Secretaries Australia's '*Benchmarking governance in practice in Australia*' (2012) showed that there is a large percentage of company secretaries with no insurance cover.

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 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 (see discussion above) 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);
- To keep the registered office open to the public during certain hours (public company only) (s 145);
- To notify ASIC of a change to the principal place of business (s 146);
- To notify ASIC of changes to the member register (proprietary company only) (s 178A);
- To notify ASIC of changes to the share structure (proprietary company only) (s 178C);
- To lodge notices with ASIC regarding personal details of directors and secretaries (s 205B);
- To notify ASIC of any issue of shares (s 254X);
- To lodge financial reports with ASIC (s 319(1));
- To respond to extract of particulars, and to return of particulars (s 346C, 348D);

- To 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 would typically include:

- Managing board processes – board and committee papers and circulation of agendas, minutes, discussion papers, proposals for the board and its committees;
- Ensuring members' and directors' meetings are properly called and held. Note a company secretary cannot call a meeting without authority (e.g. a delegation / instruction 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;
- Development, implementation, communication and maintenance of compliance policies, processes and procedures.

Newer roles relating to board performance include:

- Advising the board on good practice in corporate governance, e.g. giving guidance on the legal implications of the way it discharges its duties, runs meetings, and makes decisions;
- 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 the Business Judgment Rule defence);
- Organising board performance reviews;
- Being involved in risk management and corporate responsibility matters;
- Policy formulation for the board;
- Managing director induction and maintenance of a director manual;
- Organising Directors' & Officers' (D&O) insurance.

A survey of company secretaries showed that in 2012 they were responsible for:

- Management of the board
- ASX announcements and continuous disclosure
- Corporate governance matters
- The organisation and running of annual general meetings
- Management of board committees
- Ensuring the annual report is compiled and distributed to shareholders

### To whom does a company secretary report?

Historically, the company secretary has reported to the Chief Financial Officer or Chief Executive Officer. Given that the board technically appoints the company secretary and that the role is heavily focused on board performance, it is also appropriate that they report to the chair of the board. The *Corporate Governance Principles and Recommendations* recommend that the company secretary be accountable to the board through the chair on all governance matters.

### 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)).

Because of the volume of legal compliance work and required knowledge of the *Corporations Act* and other legislation, it is common for company secretaries to have legal qualifications. Their role is often combined with that of general counsel, although this is apparently decreasing.

If boards prefer their company secretary to have a formal qualification signalling their commitment to high governance standards, Chartered Secretaries Australia (CSA) offer a Graduate Diploma in Applied Corporate Governance. CSA is the professional body for company secretaries and membership is denoted by the post-nominals ACIS for a member and FCIS for a Fellow.

### 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 their written job description and list of responsibilities. To supplement this, a pro-forma from Chartered Secretaries Australia might assist.