
Companies and Securities Advisory Committee

Report to the Minister for Financial
Services and Regulation

on

Qualifications and experience for
secretaries of public companies

August 2000

Request from the Minister

During debate on the CLERP Bill in the Senate in 1999, the Australian Democrats proposed an amendment to what is now s 204B (Who can be a Secretary), to insert a new subsection (3):

“ASIC may determine the qualifications or experience that a person must have to be appointed as a secretary of a public company.”

By letter of 7 December 1999, the Minister for Financial Services and Regulation, The Hon Joe Hockey MP, requested the Advisory Committee to consider and advise on whether it is appropriate to give ASIC or another body the power to determine the qualifications and/or experience that a company secretary should have.

Who can be a company secretary

A public company must have at least one secretary, to be appointed by the directors.¹ A secretary holds office on the terms and conditions that the directors determine.² A secretary must consent to his or her appointment.³

There are no prerequisite qualifications or experience for a person to be appointed as a secretary, other than age (18 years⁴) and residence in Australia (at least one company secretary must ordinarily reside in Australia⁵). However, a person who is disqualified from managing a corporation cannot be appointed a company secretary, except with the consent of ASIC or the court.⁶ Likewise, the court may disqualify a company secretary from acting in that or any other managerial position if that person has contravened a civil penalty provision or has been an officer of two or more failed companies.⁷ A person is also automatically disqualified from being a company secretary in certain circumstances, including bankruptcy and conviction for certain dishonesty offences.⁸

Tasks of company secretaries

The principal role of a company secretary is to support the Board of Directors and oversee the various governance functions of the company. The secretary carries out administrative functions and, together with any director of the company, may execute documents on behalf of the company.⁹ A company secretary has ostensible authority to bind the company in administrative matters.¹⁰

¹ ss 204A(2), 204D.

² s 204F (this is a replaceable rule).

³ s 204C.

⁴ s 204B(1).

⁵ s 204A.

⁶ s 204B(2).

⁷ ss 206C, 206D.

⁸ s 206B.

⁹ s 127.

¹⁰ s 129(2)(b), *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited* [1971] 3 All ER 16.

Company secretaries commonly perform the following functions as part of their duties:

- organise and attend meetings of directors and shareholders, including sending out notices, preparing agendas and compiling minutes
- ensure that the necessary registers required to be kept under the Corporations Law are established and properly maintained
- ensure that all returns required to be lodged with ASIC are prepared and filed within the appropriate time limits
- be conversant with Stock Exchange requirements if the company is listed
- be aware of meeting procedures both under the Corporations Law and under the company's constitution so as to advise the chair if necessary, and
- supervise the company's share capital, including preparing documents for share issues and handling share transfers.

Corporations Law duties of company secretaries

A company secretary is an officer of the company¹¹ and is therefore subject to duties of such a person under Part 2D.1. These duties, which impose civil and criminal liability, are:

- to exercise the degree of care and diligence that a reasonable person would exercise as secretary of a corporation in the corporation's circumstances¹²
- to act in good faith in the best interests of the corporation and for a proper purpose¹³
- not to make improper use of information acquired by virtue of his or her position (or the position itself) to gain, directly or indirectly, an advantage for himself or herself or for any other person or to cause detriment to the corporation (the prohibition on use of information also applies to former secretaries).¹⁴

A secretary contravenes the Corporations Law if the company contravenes one of the following requirements:¹⁵

- to have a registered office in Australia that is open to the public¹⁶

¹¹ s 9 definition of "officer", s 82A.

¹² s 180.

¹³ s 181.

¹⁴ ss 182, 183.

¹⁵ s 188(1). Under s 188(3), the secretary has a defence if that person can show that he or she "took all reasonable steps to ensure that the company complied with the section.

¹⁶ ss 142(1), 145(1), 145(2).

- to lodge personal details of directors and secretaries within 14 days after appointment¹⁷
- to lodge an annual return.¹⁸

A secretary can be summoned by a court for examination about the company's examinable affairs.¹⁹

A secretary can be required to provide information to a regulatory body or in an insolvency.²⁰

United Kingdom law

The UK legislation imposes a duty on the directors of a public company to take all reasonable steps to ensure that the company secretary has the requisite knowledge and experience to discharge that function and either is a member of certain specified professional bodies or “by virtue of his holding or having held any other position or his being a member of any other body appears to the directors to be capable of discharging those functions”.²¹ There is no provision for external assessment of these matters.

Areas where ASIC can currently review qualifications or experience

ASIC is required to register an applicant as an auditor or liquidator if it is satisfied that, inter alia, the person is a member of a relevant professional body or has other relevant qualifications and has appropriate practical experience in auditing or the winding up of bodies corporate, respectively.²²

Under the current law, ASIC is required to grant an applicant a securities or futures licence if, inter alia, “it is satisfied that the person's educational qualifications and experience are adequate having regard to the nature of the duties of a holder of a licence of the kind applied for”.²³

The draft Financial Services Reform Bill proposes that ASIC license the providers of financial services. Section 884B provides that ASIC must grant a licence to an applicant if the Commission is satisfied, inter alia, that “the applicant will comply with the obligations that will apply if the licence is granted”. Section 883A provides that one of the general obligations of a financial services licensee is to “maintain the relevant competence, skills and experience to provide those financial services”. This would permit ASIC to determine whether an applicant has the relevant competence, skills and experience before granting the licence.

¹⁷ s 205B(1), (3).

¹⁸ s 345.

¹⁹ s 596A, s 9 definition of “examinable officer”.

²⁰ s 429 (receiver), 475 (liquidator), 497 (creditors), ASIC Act ss 43(2) (ASIC), 59 (ASIC), 194 (the Panel), 218 (the CALDB).

²¹ Companies Act 1985 s 286.

²² ss 1280 (auditor), 1282 (liquidator).

²³ ss 783, 784, 1144A, 1145.

Submissions

The Advisory Committee considered submissions from the Chartered Institute of Company Secretaries, the Australian Institute of Company Directors, the Australian Securities and Investments Commission and the Australian Shareholders' Association.

Chartered Institute of Company Secretaries

The Institute of Company Secretaries submitted that company secretaries should be subject to prerequisite requirements, though these should be determined by appropriate industry bodies, rather than by a regulator. These qualifications should include post-graduate academic requirements, relevant experience and membership of an appropriate professional body. Properly qualified company secretaries would improve overall compliance with the law, reduce public enforcement costs and ensure greater shareholder protection in public companies. Having these standards set by industry bodies would also ensure that company secretaries are bound by the ethical standards of those bodies.

Australian Institute of Company Directors

The Institute of Company Directors did not consider it necessary or appropriate for ASIC to determine the qualifications of secretaries of public companies. The role of company secretary varies from company to company. In some companies, the role has a legal focus and is sometimes combined with the office of general counsel; in others, the role has a financial/administrative and/or marketing focus. It should be left to the directors and senior management of each company to determine the appropriate qualifications or experience necessary for the position in each company.

Australian Securities and Investments Commission

The Commission did not consider it appropriate for the Corporations Law to vest ASIC or any other body with the role of determining the qualifications and/or experience that a person must have to be eligible for appointment as a company secretary.

ASIC set out various reasons in support of its view, including:

- ASIC is not aware of any empirical or other evidence to suggest that standards of company secretarial practice are generally in decline or are so generally poor as to require intrusive legislative intervention. ASIC's impression is that these standards are improving rather than declining
- the appointment of a company secretary is an issue of corporate governance. However, if the law imposes corporate governance standards that are too detailed or prescriptive, it may impose unwarranted costs or may inhibit appropriate innovation and better performance
- to impose qualifications and experience requirements for company secretaries would be incongruous, given the lack of statutory qualification or experience requirements for company directors who are the primary

governors of the corporate enterprise and who may appoint, remove and give directions to the company secretary as they see fit.

ASIC indicated that it would not oppose an amendment to s 300(10) of the Corporations Law to require compulsory annual disclosure of the qualifications and experience of the company secretary of a public company, if this would be regarded as useful by the market.

Australian Shareholders' Association

The Association, while expressing support for the proposal put forward by the Chartered Institute of Company Secretaries in Australia, suggested that the proposal itself and the nature of the appropriate qualifications and experience should be subject to wider exposure and comment before any legislative or regulatory action is undertaken.

Advisory Committee view

The Advisory Committee considers that, while educational courses for company secretaries should be encouraged, no case has been made out for requiring ASIC to determine the qualifications or experience necessary for a person to be a secretary of a public company. The broad diversity in the role and functions of company secretaries is not amenable to administrative prescription. Also, such prescription would be incongruous, given that there is no statutory qualification or experience requirement for company directors. Instead, the responsibility to appoint an appropriate company secretary should remain with the board of each company.

The Advisory Committee sees merit in the idea raised in the ASIC response of an amendment to s 300(10) of the Corporations Law to require the annual report of public companies subject to that provision to disclose the qualifications and experience of their company secretaries (as well as their directors). A company secretary must ensure that the company satisfies its compliance and other obligations. The qualifications and experience necessary to perform those tasks should be disclosed. Disclosure may assist investors to gain a fuller understanding of the role of the modern company secretary, and who fulfils that role in each company.

Recommendations

The Corporations Law should not be amended to give ASIC or any other body the power to determine the qualifications or experience that a person must have to be appointed as a secretary of a public company.

Subsection 310(10) of the Corporations Law should be amended to require the annual report of public companies subject to that provision to disclose the qualifications and experience of their company secretaries.