

STRENGTHEN THE COMPANY SECRETARY

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It may be only a matter of time before company secretaries enjoy mention in corporation law cases along with company directors. Current practice and recent legal cases encourage this change:

- In practice, non-executive directors are often heavily dependent upon the company secretary for communications on company business. The company secretary may frame the agenda, provide a briefing for the next board meeting, clarify the history on a favourite issue, generally act as a useful resource for background information.
- Legally, there is recognition of the company secretary. "He is no longer a mere clerk ... The secretary is the chief administrative officer of the company." Richard Jones reminded readers of the Panorama Developments case, in the June 1997 issue of the Australian Company Secretary. It is now accepted that the company secretary may act on behalf of the company.
- The changing interpretation of directors' responsibilities means that a sleeping or passive director will not be protected. The door is open for a decision to deem a company secretary to have been sleeping or passive, and also not protected.

- A director who is deliberately silent, because of self-interest, will not be protected. How long will it be before a company secretary is criticised for remaining silent in self-interest?

Responsibilities

Directors, in exercising an independent judgement, listen to and assess what is said by colleagues. Non-executive directors are dependent on argument put to them by executive directors. In the author's view, it would be dishonest of the company secretary to remain silent when possessing knowledge relevant to a board discussion, whether or not he/she is asked for an opinion. The knowledge may be matters of fact, law, or technical or professional standards.

Communication of information by a company secretary, and maybe indications of opinions, does not entail decision-making. The decision rests with the directors. Sir John Harvey-Jones, Chairman of ICI, stated the matter in a nutshell in the interview quoted in the February 1996 Journal: "All the company secretary can do is to draw the attention of the board continuously to any departure from what is regarded as good governance - but that decision ultimately rests with the chairman and the board as a whole". ... "Nothing avoids the company secretary's responsibility of saying that 'I fear that while what we are doing is within the letter of the law we're not within the spirit'."

Some risk is entailed for the company secretary. Whistle-blowers are not liked. Communication in print is usually effective, but stating a problem in print is likely to draw biting criticism on the grounds that "evidence" has been thereby created. Cases are found of careers suddenly interrupted due to such statements.

Developments

The following steps in expanding a pro-active role are suggested:

- The company secretary actively ensures that board agenda and board information papers are adequate, and that board resolutions are clear. Participation in board meetings is a privilege, and entails responsibilities. He/she is a trained professional, and may maintain diverse contacts with a very wide range of people: shareholders, employees, customers, creditors, financiers, local community, and government. The good company secretary is not a passenger. Non-executive directors may be particularly dependent on the company secretary for professional and objective information. The company secretary may therefore shoulder some of the base teaching load of executive directors. If information to the board is not adequate, or board decisions are not clear or are not being implemented, the author believes the company secretary has the responsibility to so advise the board, direct.
- The company secretary would normally agree the process of providing information to the board, and to outsiders, with the chairman. It may be difficult for the company secretary to advise the whole board intent on making a decision that their information is inadequate. It is therefore preferable to agree the process with the board, and include a facility for a secretary to signal concern with information adequacy, in advance.
- The company secretary may suggest to the board methods of dealing with corporate

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governance problems. Don Munro, CICS President in Australia, described a Board Self Appraisal, with the help of a facilitator, working through a series of questions concerning corporate governance and ethics, in the April 1997 journal. No quantitative analysis is yet available as to the results of the approach.

Precautions

- The prudent company secretary will make a note to file recording discussion on corporate governance problems.
- The company secretary may develop links with company secretaries in parent entities. These links may take considerable skill to maintain, to ensure that directors receive the best professional advice without interference.
- External advice may be sought on a no-names basis. A peer at the Chartered Institute of Secretaries may be a helpful confidant, and can be expected to appreciate the particular problems of the company secretary role.
- A training group with independent personnel who have an interest in corporate governance, might also be established, to consider case studies in ethical issues on a no-names basis. There is a great deal to be learned in tactics, in dealing with the ethical shortcomings of our workmates.

Conclusions

To strengthen the role of the company secretary is to strengthen the role of non-executive directors. Non-executive directors cannot function properly if they are kept in the dark. The company secretary is an essential link in achieving good corporate governance.

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