

Who needs a company Secretary?

Introduction

The Corporate Law Economic Reform Program Act 1999 (CLERP) implements a number of changes to the Corporations Law relating to, for instance, directors duties and more importantly, the structure of companies. Despite the CLERP changes not taking effect until March 2000, it may be pertinent to consider the restructuring of your company before the changes become fully operational. The particular focus of this brief concentrates on the changing role of the Company Secretary. Firstly though, a few initial questions have to be answered.

Is Your Company A Public Company?

If your company is registered as a public company then the CLERP changes to the Corporations Law will have no direct effect in relation to the role of the Company Secretary. You will still be required by law to have a registered Company Secretary.

Is Your Company a Private Company?

If you have answered "yes" to this question then the changes to the Corporations Law have a direct effect on the structure of your company. The new Section 204A of the Corporations Law effectively abolishes the requirement on proprietary companies to have a Company Secretary.

This does not mean that your company cannot have a Company Secretary, but rather it allows smaller companies the option as to whether they wish someone to hold the office of Company Secretary. There are many reasons as to why it may be advantageous to structure your company without a Company Secretary. Some of these may include the limiting of personal liability, as it means one less person is exposed to the personal responsibility that can be imposed on officers of the company, and another reason follows closely with the Corporations Law recognising sole proprietary companies. This means that the Corporations Law now recognises that it is superfluous to require, in the case of sole proprietary companies, the one director to act as Company Secretary as well, merely for the sake of technicality.

The Changing Liability of the Company Secretary

The CLERP changes also remove the provisions stating that company secretaries are deemed to be party to contraventions of the Corporations Law relating to the maintaining of a registered office, keeping it open during certain hours, and lodging annual returns and certain other notices with the ASIC. In effect the Corporations Law reflects commercial reality in that it is the director's or senior officer's responsibility and not the responsibility of the Company Secretary to ensure that the above mentioned statutory requirements are satisfied. Exemplifying this point is the commercial fact that the Company Secretary does not lodge the annual returns but rather the company's accountant prepares the documents and presents them to the board of directors for their final approval. The law now recognises that the Company Secretary should not be held liable for contraventions of these aspects of the Law.

Conclusion

If you are a Public Company then you must have a Company Secretary, though the new laws allow Proprietary Companies the option as to whether a secretary is required. Furthermore, the liability of the secretary has been reduced reflecting the commercial reality of the situation. Again, this information acts as a guide only and it is recommended that independent legal advice be sought in relation to a detailed account on how the changes will affect your company.