



# Restoring Corporate Trust:

**What it means for the  
General Counsel**

Today's organisations are facing a more complex regulatory environment, changing demands from shareholders and a razor sharp focus on trust, integrity and culture.

# What role will the General Counsel play in driving the trust agenda?

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Today's organisations are facing a more complex regulatory environment, changing demands from shareholders and a razor sharp focus on trust, integrity and culture.

KPMG Forensic works with General Counsels across the country helping them respond to the most challenging bribery, fraud, anti-corruption and commercial disputes, so we took the opportunity to go straight to the source.

The role of the General Counsel is becoming more complex and more is being asked of those who perform it. There was broad endorsement that in order to succeed the General Counsel needs a seat at the executive table with direct reporting to the CEO. General Counsels were of the view that only with this access can they provide the strategic, commercial advice and the stewardship that is being asked of them.

KPMG sincerely thanks the Australian General Counsels who were very generous with their time and candid in their responses and we are delighted to have helped frame such an important discussion.

Throughout 2019, detailed interviews were undertaken with more than 25 Australian leading General Counsels from ASX 100 companies, not for profit organisations and the country's largest privately held companies. We also drew on research undertaken by KPMG Globally<sup>1</sup> with leading General Counsels.

**The results are not as predictable as might be expected:**

## **1. Broader executive roles for the General Counsel or stick to your knitting?**

Death to legal professional privilege or the only way to provide commercially relevant advice; Australia's General Counsel Community appears divided.

## **2. Does the Corporate Governance hat fit?**

It appears this is one of the hats that seems to fit, taking on increased responsibility for corporate governance, driving the trust agenda and ensuring the organisation consistently 'gets it right' is being embraced by the General Counsel.

## **3. Company Secretary or not to Company Secretary? That is the question**

Somewhat surprisingly, whether the General Counsel should be the Company Secretary appears to have divided Australian General Counsels evenly. Some of Australia's leading General Counsels pointed to irreconcilable conflicts, role confusion and workload to support a view that it wasn't the right fit. Whilst others equally as passionately pointed to synergies, board access and 'best person for the role' to explain the merits of the role combination.

## **4. Regulations and Regulators bringing the General Counsel to the table**

Increasing complexity in regulation and more focus on how organisations respond to regulators is driving companies to ensure their General Counsel has a seat at the executive table.

## **5. Moral compass or corporate cop out?**

The General Counsel is uniquely equipped to provide the moral conscience for their organisation, however, there are mixed views as to whether they should.

**Dean Mitchell**  
Partner  
KPMG Forensic



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<sup>1</sup> [Through the looking glass: General Counsel Report 2016 \(KPMG Global\) https://home.kpmg/be/en/home/insights/2017/03/risk-newsletter-through-the-looking-glass.html](https://home.kpmg/be/en/home/insights/2017/03/risk-newsletter-through-the-looking-glass.html)



# 1. Broader executive roles for the General Counsel or stick to your knitting?

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Whether the General Counsel should confine themselves strictly to providing legal advice or whether they should embrace broader roles within the organisation appears to have divided Australian General Counsels.

The majority position of the General Counsels interviewed by KPMG was that broader executive roles were appropriate and in some instances necessary. General Counsel's generally felt the need to be more involved in the day-to-day operations of their companies, to work closely with other departments and to understand better the way their business works.

The adoption of broader executive roles was also seen as an important way for the General Counsel to have a seat at the executive table. There was a strong view that very few companies had the appetite for one of their senior executive positions to be occupied by a General Counsel, who was solely responsible for providing legal advice.

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"Whether we want a broader role or not is largely a moot point, if the General Counsel wants a seat at the executive table, which they need in order to do their job effectively, then they must have broader responsibility across the company. There are only so many seats!"

ASX 100 GC

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Amongst the General Counsel interviewed by KPMG there were functions as diverse as Procurement, IT, Human Resources and Risk, reporting into the General Counsel. Interestingly, the rationale behind many of these reporting lines was obscure or absent. A number of the General Counsel suggested the rationale was as diverse as the functions themselves. The rationale ranged from "no one else wanted it," to "they just

kept adding functions until it was senior enough to be a direct report to the CEO," to a more reassuring "compliance was becoming more and more legalistic in our company, so it made sense."

A subset of the group who suggested the General Counsel should have a broader role believed this meant being more involved in the business but not necessarily having responsibility for other functions. The view was that the General Counsel needed to be involved more in the business, negotiating contracts and providing advice on strategic priorities rather than remaining isolated from the business.

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"Of course, you have responsibilities to provide legal advice, but you're also meant to be a part of the business – not sitting on the sidelines, writing lengthy advice and throwing it over the fence."

Global GC

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However, there was a significant minority of interviewees who were fierce in their view that the role of the General Counsel was to provide strictly independent legal advice. In their view, the only way to do this was to be independent of the business, free to challenge and say "no" without fear or favour in order to protect the company and their shareholders.

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"Broader roles for the General Counsel can mean the death for legal professional privilege"

ASX 100 GC

Another consistent basis for the opposition to broader roles was the potential impact on legal professional privilege. General Counsel's reported the ability to separate roles and be clear in which capacity they were acting was becoming increasingly difficult which according to a number of Counsel put privilege in peril.

It was also contended that involvement in functional adjacencies could compromise the independence of the General Counsel and leave them serving two masters.

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"Everyone says they can wear multiple hats, but can they really? If we learnt anything from the Royal Commission it was that the General Counsel must be there calling it like it is. In my view it's pretty simple, the GC should stick to their knitting!"

ASX 100 GC

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General Counsel who advocated for a narrower role suggested there was an inherent tension in the General Counsel role between taking an active part in the commercial decision-making process and remaining the conscience of the business. The broader roles, it was suggested, inhibited the ability to take a purely legal, dispassionate view of when it is, or is not, in the company's interest to pursue a particular action. It is a difficult balance.







# 2. Does the corporate governance hat fit?

Following the Hayne Royal Commission many Australian Boards increased their focus on trust, integrity and reinforcing strong corporate governance. Whilst there was some division amongst Australian General Counsel on the issue of broader functional responsibility for a General Counsel, there was overwhelming support for the General Counsel taking a leadership or at least active role in corporate governance.

Counsel is uniquely situated to act as facilitator between the Board of Directors and Management Team and take the leadership on a variety of governance-related issues.

The General Counsel is all about governance but you're not always given the oversight across the whole business to know what's going on. If you want good corporate governance, you need your GC at the table when the important decisions are being made"

ASX 100 GC

There appeared to be alignment in Australia and abroad that the General Counsel can and should play a crucial

role in a number of components of governance:

<b>Corporate Strategy/Risk Management</b>	Setting risk tolerances is a major component of the corporate strategy process.
<b>Compliance</b>	Focus on compliance is not simply a matter of developing a "Code of Conduct" or Conflict or Interest Policy. This function is often part of the legal department or otherwise reports through the GC.
<b>CEO Succession Planning</b>	As a key Senior Executive, the GC would naturally play a role in the strategic planning and succession planning for critical executive roles. Counsel can help ensure that the Board keeps in mind all appropriate criteria when seeking a new CEO or other senior executive – not just specific business skills or performance record, but also integrity and risk management capabilities.
<b>Executive Compensation</b>	Increasing focus of shareholder proposals and public scrutiny. Counsel can play a critical role in educating Board members
<b>Crisis Management</b>	The current communications environment (social media, etc.) makes it even more important to get out in front of the crisis with a strong and cohesive narrative. Counsel can play a key role in crisis management by preparing the organisation and also preventing crises by identifying the company's vulnerabilities. In a crisis, it is crucial that the Counsel knows the organisation and the relevant personalities, and can judge when he/she needs to take a lead role vs knowing when to bring in outside experts.

Working closely with those dealing with the risk and governance agenda is seen as an important way of managing these risks and ensuring that compliance with regulations is not just a tick box exercise.

According to a leading Global General Counsel, "... **it can't just be a nice policy and it can't be just a bit of training. You've also got to work with people who can actually work into the day-to-day activities. This collaboration is seen as helping to embed the**

**willingness to comply, as people become involved in the process and have had an input into the solution."**

It appears there is broader acceptance across the Australian General Counsel community that Corporate Governance is a role more consistent with the functions of the General Counsel than other corporate responsibilities. However, when KPMG explored whether this extended to the Company Secretary, the consensus fell away.

# 3. Company Secretary or not to Company Secretary? That is the question

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Wide support existed for the General Counsel undertaking a broader role in Corporate Governance in Australian corporations, however the wide support did not extend to the General Counsel also being the Company Secretary.

General Counsels were almost equally divided as to whether the General Counsel should also be the Company Secretary.

Advocates for the dual role pointed to a number of synergies in the roles. However, the dominant explanation for performing both functions was access to the Board. A number of General Counsel expressed a view that they could not adequately undertake the role of General Counsel without access to the Board and the Company Secretary role provided that access.

General Counsels tended to point to being privy to board deliberations rather than board members themselves was the key to being an effective General Counsel. It was suggested this understanding of the strategic deliberations and risk appetite, enabled the General Counsel to provide more commercial and actionable legal advice.

The importance of being both the General Counsel and Company Secretary appeared to be impacted by whether the General Counsel reported directly to the CEO. In situations where this direct reporting line did not exist, it was viewed as much more important to have the access to the strategic deliberations of the Board.

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“The General Counsel is absolutely the right person to be Company Secretary, they have an understanding of the business, understand the legal issues in play and can make sure the board is getting the visibility of the organisation that they require”

ASX 100 GC

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However, amongst the General Counsel interviewed by KPMG there were equally as many who firmly believed the General Counsel should not be the Company Secretary. There were principally two justifications for the need for role separation: i) the roles are too big for one person; and ii) it can present irreconcilable conflicts, or at least lead to confusion as to which hat is being worn.

There was some agreement that for smaller organisations or those operating outside a listed environment, the workload might be manageable for one person. However, a number of those advocating for a separation of the roles were of the view that in an ASX 100 listed environment the workload could inhibit performance of both roles effectively.

It was suggested that these issues were particularly acute when the company was in crisis or ‘deal mode’ and issues of continuous disclosure were in play.

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“If there is a deal on, or a close call on market disclosure, then you need your GC and CoSec on top of their game, this is when you need them both at their best, if they are juggling both roles that’s not good for them or for the company”

ASX 100 GC

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Other General Counsel pointed to what they believed to be irreconcilable conflicts between the two roles to explain why the roles should be separated.

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“When you talk to the Directors about continuous disclosure, or their Directors duties or other issues, who are you? The General Counsel or Company Secretary? Even if you’re clear what hat you’re wearing, the Directors may not be”

ASX 100 GC

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There was however, almost universal agreement from all of the General Counsel interviewed that if the Company Secretary was not the General Counsel then there was a clear advantage for them to be legally trained in order to execute the role effectively.





# 4. Regulations and regulators bringing the General Counsel to the table

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It perhaps comes as no surprise that navigating increased regulation and managing interactions with the regulators charged with enforcing them is the most significant challenge facing today's General Counsel. The Hayne Royal Commission directed a bright light on not only how companies behave but also how they respond to regulator scrutiny.

"The game has changed, we already were dealing with increased regulation in the areas of Anti-Bribery, Modern Slavery and Anti-Competitive Behaviour; however, now there is much greater scrutiny on not only how we meet our obligations but how we interact with regulators"

ASX 100 GC

Whilst the Hayne Royal Commission sharpened the focus on conduct and regulation, it has been an increasing focus of General Counsel for many years, both in Australia and abroad. Globally, General Counsels who responded to a KPMG survey chose regulation as the single largest risk that their companies face.

A general increase in volume and complexity of regulation was identified as the greatest risk to their companies in the next five years. The top three principal areas of regulatory risk were around competition, consumer protection and anti-bribery and corruption.

There was a broad consensus that that the General Counsel was in the best position to lead this assessment of potential impact of regulatory change. The role lends itself to being able to advocate with the appropriate agency if needed to modify or stop the regulation proposed, whilst simultaneously bringing the facts, impact, experts and financial costs to the organisation.

The regulatory changes and the ascendancy of principles based legislative obligations, which by their very nature are more nuanced and demanding of interpretation than the traditional rules based frameworks, are increasingly bringing the General Counsel to the executive table.

"Your ability to be completely on top of those forthcoming changes, and be able to advise on how to approach them, is something that puts you at the forefront at many of the important meetings that take place."

Global GC

Australian General Counsels reported to KPMG that today more than ever, they are being invited into broader conversations than they were historically. Whilst it was common place for in house lawyers to provide advice on regulatory compliance, they were often not part of the broader conversation about the cultural or behavioural elements of compliance. Discussions around ethical culture and integrity were often left to the business units with support from the People and Change teams.

Perhaps the invitations are arriving due to the sometimes opaque nature of principle based regulatory obligations. However, a number of General Counsel suggested it is because regulation is becoming more complex, further reaching and with increased obligations being placed on company Directors.

In this area we again see consistency between the Australian context and the experience of our Australian General Counsels colleagues abroad. International General Counsels reported one of the greatest challenges in responding to regulators is a lack of clarity around what is expected by the regulators themselves. There was overwhelming agreement (80%) that regulators need to be clearer in their expectations.

This broader involvement in framing the ethical norms and ensuring the right behaviour has opened a broader conversation of whether the General Counsel was uniquely placed to act as the moral compass of the organisation.

# 5. Moral compass or corporate cop out?

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Whether it is a deep rooted sense of what is right, extensive study and intellectual debate on ethics, or the unwavering pursuit of what is just, lawyers are particularly attuned to making objective assessments based on merit.

In an environment where organisations are being asked to not just comply with both the letter and spirit of the law, but also meet the evolving concept of community expectations, perhaps it is the General Counsel who is best placed to act as the moral compass for the organisation.

Australian General Counsels appear divided on who should be the moral guardian of an organisation or whether it in fact should be any individual at all. The majority of General Counsel consulted by KPMG resisted the introduction of a Chief Ethics Officer, a role much more common in US companies than Australian organisations.

US technology companies in particular have embraced the role of the Chief Ethics Officer to help their organisations deal with complex moral dilemmas. In 2019, Salesforce appointed a Chief Ethics Officer with a wide mandate to “To develop a strategic framework for the ethical and humane use of technology.”

Often the role of the Chief Ethics Officer extends to investigating alleged violations of company policies, codes of conduct or other legal obligations. This extended responsibility often leads to the function falling to the General Counsel or Senior In House Counsel working within the Office of General Counsel.

A number of Australian General Counsel were supportive of the concept that they would have some influence over the morally precarious decisions taken within their organisation. They agreed that they were uniquely placed and experienced in balancing ethical and

moral tensions and they should be the one at the table to call a “time out” when commercial considerations overtook ethics.

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“If you want the General Counsel to be the moral guardian, and I think they should, it rests very comfortably with how we are trained and how we practice; you must provide them with the psychological safety to speak up”  
ASX 100 GC

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However, other Australian General Counsel resisted the role of moral guardian for their organisation, pointing to inherent conflicts with their substantive role of providing fiercely independent and legally sound advice on complex matters.

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“I’m here to provide the best possible legal advice for the company, which is the expectation of the board and shareholders; I’m not here to provide moral counsel!”  
ASX 100 GC

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A third school of thought rejected the concept entirely, arguing that not only was it not the role of General Counsel to be the moral compass but it should be no individual’s role, including a Chief Ethics Officer. Assigning responsibility for “ethics” to an individual took away the personal responsibility every member of an organisation should have to champion ethics, it was contended.

A number of General Counsel pointed to the Hayne Royal Commission as evidence that ethical decision making had to be installed as a foundational obligation of every employee. They suggested allocating responsibility to an individual allowed management in particular to throw the metaphorical ethical football over the fence.

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“You can’t have an ethical policeman on each street, you need to ensure proper KPI’s are in each employee’s contract, that all levels of management are genuinely walking the talk. Assigning ethics to one person or group of people dilutes the responsibilities of others!”  
ASX 100 GC





# Contact us



**Martin Dougall**  
**Partner in Charge, Forensic**  
**T:** +61 405 033 049  
**E:** mwdougall@kpmg.com.au



**Dean Mitchell**  
**Partner, Forensic**  
**T:** +61 457 897 810  
**E:** deanmitchell@kpmg.com.au



**Christine Oliver**  
**Partner, Forensic**  
**T:** +61 439 714 718  
**E:** cmoliver@kpmg.com.au



**Greg Meredith**  
**Partner, Forensic**  
**T:** +61 437 266 198  
**E:** gmeredith@kpmg.com.au



**Paul Black**  
**Partner, Forensic**  
**T:** +61 414 254 321  
**E:** paulblack1@kpmg.com.au



**Michael Khoury**  
**Partner, Forensic**  
**T:** +61 404 062 893  
**E:** mkhoury2@kpmg.com.au



**Luke Howman-Giles**  
**Partner, Forensic**  
**T:** +61 450 283 500  
**E:** lhowmangiles@kpmg.com.au



**Natalie Faulkner**  
**Partner, Forensic**  
**T:** +61 412 076 877  
**E:** nfaulkner1@kpmg.com.au

[KPMG.com.au](https://www.kpmg.com.au)

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