Director’s duties: boards can’t just blame the GFC for their mistakes

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CBA chairman David Turner blames the financial crisis for the bank’s financial planning saga. Paul Miller/AAP

The Australian Institute of Company Directors (AICD) is pushing for reforms allowing directors to rely on honest and reasonable conduct as a defence against company liability. The AICD believes this new defence will improve corporate governance and act against overly risk-averse strategies and defensive cultures.

This comes at a time, however, when the Commonwealth Bank of Australia (CBA) is facing the fallout from its financial planning scandal. ANZ is also facing criticism for its role in collapsed Timbcorp investments. It is therefore no surprise that shareholders are restless and boards defensive.

Commonwealth Bank in the spotlight

Culture, integrity and trust were common themes at CBA’s annual general meeting this week. Chairman David Turner, in response to a question on why the bank took so long to act against dodgy financial planners, blamed the financial crisis. He asked shareholders to “think back” to 2008-2009 and the pressure all financial institutions were under at that time.

That the board at that time was focusing on global financial turmoil and uncharted waters is believable. However, this explains rather than excuses the lapses. All other boards of large listed...
companies were under similar pressures.

This AGM allowed Turner to explain the board’s position on the scandal. He said that, following a compliance improvement program, the financial planning matter became a board issue in 2010-2011. He also admitted the “bank is accountable” for the scandal.

However, the issue has progressed past whether the bank is accountable, to whether the directors are accountable. Yet it does give confidence that changes, particularly applying to monitoring lending culture, will occur.

The Australian Securities and Investments Commission says it has now appointed KordaMentha to review the bank’s financial planning arm. The forensic accountants will ensure the bank is compliant with new Australian financial services licence conditions.

The bank’s review program is underway but has a long way to go. CBA has recently stepped up its action on the scandal through its open advice program, access to review panels and independent customer advocates. It says it will broaden its notification program by giving written notice to its customers of the compensation scheme.

The bank has also undertaken an advertising blitz across print, radio and online to promote the program. Turner says that over 4200 customers have asked for reviews. Yet the action cannot be assessed until details are released about who gets compensated and how much they get.

ANZ is also facing the consequences of financial advice gone astray. Evidence in the inquiry into the Timbercorp collapse suggests that funds were still being advanced even though the managed investment scheme was in substantial debt. It is no coincidence that a strongly commission-driven culture among financial advisers existed in both cases.

However, Turner’s AGM address gives hope for investors. The bank has changed the remuneration structure of the relevant arms of the business. He states that “our people (are) now recognised and rewarded for improving the satisfaction of our customers by understanding their needs objectively”.

Although this seems a little difficult to measure, it is a clear cultural change and reflects the introspection the bank has undergone since the exposure of the incidents.

**Director’s duties**

The Directors Sentiment Index regularly identifies compliance issues as having a significant impact on how directors carry on business. According to the index, directors are too risk-averse.

The AICD proposal seeks to provide a broader defence for directors than the current business judgment rule. Under the proposal, directors will escape civil liability if they act honestly and with reasonable care and diligence.

The AICD says corporate governance is best achieved when management and professional advisers deal with compliance issues. The board can then focus on a company’s governance, strategy and
performance.

This proposal fits with the government’s push to rid business of red tape and provides directors with some respite from personal liability concerns.

It remains to be seen whether such a proposal will gain traction amid a host of Senate inquiries seeking to hold companies responsible for investor loss. What we do know is there is a lesson to be learnt for all companies in the negative publicity, and the widespread condemnation, surrounding the CBA’s financial planning crisis.

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