

Directors' personal exposure will increase in 2020

By [Patrick Bracher](#)

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If you are a director of a company engaged publicly you need to examine your role, responsibilities and potential liability as you go into 2020 because director's liability is expected to increase. This expectation is confirmed by the fact that claims against directors and officers liability insurers increased in 2019 and the trend is expected to continue markedly.



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When overseeing the strategy of the company the directors are obliged to see that its major risks are mitigated as far as possible. The risks are growing in some major respects. If the risks eventuate because of wrongful conduct of the directors, personal liability for damages could follow.

Security risks

Cyber risk is seen by governments and companies worldwide as the major risk of this decade. Businesses must, out of necessity, rely on increasingly sophisticated technology. This carries two notable risks. Cyberattacks on corporations are increasing, some of them for extortion, some of them out of pure malice or ego, and some of them for political reasons.

Secondly, the failure to protect personal customer information will receive strong regulatory attention and large fines are being imposed on corporations that fail to protect this data. The additional reputational damage is causing harm to the goodwill of companies with consequent loss of business. Directors must ensure that the electronic systems and firewalls in the company are adequate to protect it as far as possible against losses of money and reputation.

Keep it green

Environmental issues arising from climate change are a daily threat to many companies. For instance directors who increase earnings or declare dividends instead of spending money on necessary maintenance which leads to environmental damage may live to regret the consequences. Climate change is also becoming a public issue and the operations of companies and the nature of their investments are being criticised where they are seen to contribute to global warming.

Spotlight on bad behaviour

The fact that there is a camera in every cell phone and therefore a camera at every event, and the fact that there are millions of potential commentators on social media exacerbates the adverse effect of any failure by the directors of the company to prevent losses to the company or any damage caused to third parties. Movements such as #MeToo have led to hefty damages claims against corporations based on inappropriate corporate behaviour either because of gender or other discrimination or because of sexual harassment. Directors cannot turn a blind eye or excuse bad behaviour because it will potentially create liability and reputational harm for themselves and their company.

Personal liability and conduct

Increasing regulation, particularly in relation to financial institutions, means that many corporate responsibilities are now specifically the responsibility of the board of directors. There is potential personal liability for penalties imposed for breaching financial sector laws which cannot be unloaded onto insurers.

Despite being vigilant to these problems, directors must conduct themselves in a way that protects them as far as possible from personal liability. Directors need hardly be reminded of the common law obligations to act in good faith, for a proper purpose and in the best interests of the company and not themselves.

The degree of care, skill and diligence they are expected to apply to their duties will take into account their personal knowledge and experience. But a director lacking experience in regard to any specific aspect of the company's business must make sure that they take advice from someone within the company or an external advisor such as an auditor or legal counsel or someone else having professional skill, to assist them to make rational decisions.

A director who is against a decision of the board should record in the board minutes their opposition to that decision. In the worst case of disagreement, resignation is the answer.

Finally, make sure that the company has sufficient directors and officers insurance and cyber risk insurance and environmental risk insurance, drawing the balance between what the potential risks of the company are and the amount of premium that can be borne by the company.

ABOUT THE AUTHOR

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