

Under the Cloak of COVID[®] - Corporate Psychopaths and Bullies come out to play[©]

By Fiona C. Shand 28 June 2020



It has been a challenging period throughout the COVID lockdown and the associated socio-economic upheaval in Australia and around the globe. However, as the scientists work towards a vaccine, more worrying for our long-term recovery are the frightening events occurring under the Cloak of COVID.

There are amazing stories of corporate cooperation and compassion. Let's hope that these stories achieve greater notice as the crisis eases. They are the exemplar for courage and good leadership - where Chairs, directors, management and employees have come together, stepped up, innovated and adapted to the changed conditions to produce extraordinary results. These leaders, using their power of influence for common good rather than individual benefit, demonstrating the core benefit and reason for companies engaging independent directors.

Today however we must discuss 'the other leaders', those who use their power and influence for self-interest or self-aggrandisement. How we recognise these corporate psychopaths and bullies, how we can counter their actions and protect ourselves against them.

Directors are required to exercise influence, and the ability to influence derives from two sources:

- **Achieved Influencers** – who derive their power to influence from their life and character demonstrating innate or acquired traits and achievements of life such as depth of experience, relevant skills, talent, intelligence, education, principles and empathy; and
- **Derived Influencers** - who are perceived as powerful due to external factors such as substantial wealth, large shareholding, prominent family or public profile and connections i.e. 'being part of the right crowd or a power circle'.

Through their own achievements, Achieved Influencers acquire respect and, the best of them, also acquire some of the external indicia of Derived Influence. However Derived Influencers have not earned 'the respect they demand' particularly where they refuse to gain Acquired Influencer indicia. Derived Influencers often do not take quality and principled decisions or actions as they lack the foundation of experience, knowledge or necessary personal traits and the self-awareness of their deficiencies in those areas. These Derived Influencers then wield their power to influence through intimidation aimed largely to retain or increase their own power, to protect their own, largely unearned, reputations and to quash or silence dissenters.

At the other end of the of corporate cooperation spectrum stories are emerging from both listed and unlisted companies of the most alarming actions by Derived Influencers, the corporate psychopaths and bullies coming out to play:

- significant shareholder & executive director bullying independent non-executive directors to pass related party transactions favouring him and his companies;
- founder & executive director bullying and issuing threats to executive management team members via calls, emails and Zoom conferences;
- founder & executive director bullying independent non-executive directors to sanction or ignore past and current personal transgressions;
- significant shareholder & executive director refusing to provide Board and Committee members with information or access to management for that information;
- significant shareholder & executive director disseminating false information;
- independent non-executive directors being threatened with reputational ruin by prominent directors— despite begin aware of the sanctity of Board confidentiality.
- executive director refusing to 'engage' with an independent director as the executive's demands had been questioned and were eventually not agreed by the independent non-executive director and demanding their resignation;
- independent non-executive directors being pressured to vote with the majority and against ASX listing rules, the Corporations law, company policies and basic elements of decent human interaction; and
- independent non-executive directors being threatened with the spurious rumours, deliberately false fabrications under the guise of (specious) legal threats when they requested simple compliance with the Corporations law or company policies.

All these examples have occurred under the Cloak of COVID and in front of other directors passively watching these events from the (Zoom) Board table. Lockdown has not been all bad news for some — there are several stories of staff and even board members, bullied and harassed before COVID, who have been able to shelter behind the Zoom conferences and their 'working from home' status to avoid some of the constant harassment and gain much needed breathing space.

And on the positive for companies and directors, the Government has recognised the uncertain trading conditions and responded by instituting sensible regulatory exemptions from the current governance regime, for example, director's relief from personal liability for insolvent trading and continuous disclosure changes. However, these exemptions are **temporary**.

There has been **no suspension** of the normal director's duties, their obligations or available defences, the Corporations or common law, the requirement of compliance with company policies or the raft of other legislation which continues to impose personal liability upon directors.

Despite the ongoing and unchanged obligation to act properly, under cover of COVID, the corporate psychopaths and bullies have come out to play. They believe that the Cloak of COVID is some form of Harry Potter Invisibility Cloak* so that none of their transgressions will see the light of day.

Similarly, they believe that any additional power they can gain at this time will be their source of power into the future and so it's '*worth the risk*' and that they can act with impunity — that no one is watching or that no one cares about their actions. Just as the Marauder's Map* shows Hogwarts castle, its grounds, the secret passages and the presence of all those wandering the halls, under lockdown the psychopaths and bullies are using their insider knowledge to wrest advantage for themselves at the expense of other shareholders.

Emerging from these stories are two distinct categories of Board members:

A. the silent majority — passive, disinterested or status-orientated directors complying with the psychopath's directions either to retain their board positions or believing in Chamberlain's failed appeasement pact announced on 30 September 1938 '*for peace in our time*'; OR

B. the engaged minority — courageous, independent non-executive directors who are opposing the self-interested actions of the corporate psychopaths and bullies by standing up for the rule of law, principle and good governance.

The Cloak of COVID is a cold and lonely place. These strong independent voices - standing up for good governance practice and compliance with the law – risk being marginalised, victimised or forced to resign rather than risk their reputations by condoning improper behaviour.

What can and should we do?

Anyone interested in the benefits of good governance, including shareholders, commentators, company analysts and debt funders, should examine the list of independent non-executive directors who are resigning now from these boards. They should ask questions at briefings and AGMs for the reason for the departures, read the company announcements and results packs with a higher degree of scepticism than normal and ask specific questions on the actual rather than general state of adherence to the ASX principles of good corporate governance including closely examining any related party transactions. The Regulators will most certainly be asking these questions in due course.

Anyone investing or interested in investing in companies and others within the governance and investor community will be asking questions about what happened under the Cloak of COVID. If we don't, then all the governance benefits that we have gained over the last 35 years including the advances that allowed Australia to survive and thrive during and post the GFC, the last global downturn, will be lost.

For the psychopaths and bullies who think they will “*get away with it*” - your actions will catch up with you. We know Regulators' investigations and Royal Commissions grind slowly but they do grind forward. There will be a reckoning as surely as class action lawyers file suits against companies and their directors. The tenets of a good governance will not stand for these flagrant breaches once revealed - for revealed they will be.

What can, and should, independent non-executives do?

To those directors in the first category - a timely reminder of the words in 1867 of John Stuart Mill:

“Bad men need nothing more to compass their ends, than that good men should look on and do nothing.”

More recognisable is the same warning commonly attributed to Edmund Burke by John Fitzgerald Kennedy:

“The only thing necessary for the triumph of evil is for good men to do nothing.”

A warning to all Board members - standing by and condoning the behaviours makes you **complicit** in those behaviours.

So, what can or should all directors, even the passive directors, do?

1. Remember that you continue to owe your duties as directors and obligations to the company and your stakeholders as a whole – not to appease one powerful influencer;
2. Use your access rights under your director's deeds, the Board Code of Conduct and the Corporations law to uphold the ASX principles by seeking necessary information;
3. Make your voice heard in the boardroom by continuing to ask respectful questions – do not be fobbed off by belligerent reactions or excuses – until you get the information you require;
4. Carefully examine and challenge any information including related party transactions or requests and reject them if not in the Company's best interests;

5. Get support by seeking impartial internal assistance and, if that is not available, external independent advice once again under your external assistance (once again under your Director's Deeds or the Board Code of Conduct);
6. Provide support to others by allowing all voices (executive and non-executive) to be heard in the boardroom and '*take up united space for good governance*' so that the psychopaths and bullies have fewer places to hide;
7. Support an external board or board and management review or a governance review to have an external, independent voice providing support for your governance objectives particularly if you are feeling under siege;
8. At the first hint of a claim or circumstances likely to give rise to a claim, notify your D&O insurer sooner rather (than hoping someone does) later; and
9. There are the '*nuclear options*' if all else fails – including applying for whistle-blower protection under the Corporations law to make a qualified disclosure or publicly outing the behaviour of the psychopaths and bullies through the AGM or EGM process.

Psychopaths and bullies thrive in the shadows, dividing and conquering so use the light cast by board meetings, thereafter regulators' investigations and transparent communication to shareholders through the Members' meeting process.

Realistically none of these options are ideal however, doing nothing to stop these behaviours is not a viable option, as 'doing nothing' provides no protection to a director. When living in extraordinary times we are sometimes called upon to demonstrate extraordinary courage. By standing together for good practice you will protect the company, your staff and ultimately your own reputations.

One director cannot turn the tide, however it is the duty of all directors to try to raise the alarm. Ultimately if we cannot convince the other board members then it is appropriate to protect yourself through resignation.

To all those directors who have, and continue to '*stand a post for good governance*' even if you have been forced into resignation, we thank and commend you for your efforts.

To those Chairs, directors, managers and employees who have worked so hard to innovate and adapt – thank you.

To all these groups, we thank you for being the example of great leadership

"to influence others to gain their willing consent in ethical pursuit of mission" #

Influence is a neutral power - it can be wielded for good or evil. It's our choice to do something to make a positive difference which matters.

Fiona C Shand FAICD

Principal TWG Governance www.thewaltongroup.com.au
Principal Shand & Associates www.shand.com.au

(*with acknowledgment and apology to JK Rowling and Harry Potter; and # thanks to the Australian Defence Department for their leadership definition)