

**Bullying in the NFP boardroom: latest developments N° 1**  
**paper prepared for**  
**Collins & Co lunchtime seminar**  
**11 July 2017**

This paper is one of two July 2017 papers prepared by DF Mortimer & Associates for a lunchtime seminar that discusses alleged bullying of board members in not for profit organisations (“NFPs”).

This paper concludes a story that began in 2014 on a registered charity’s efforts to use internal processes to address alleged bullying by certain of its directors, and a subsequent Ombudsman investigation initiated by the charity.<sup>1</sup>

The second paper describes a 19 May 2017 Fair Work Commission decision<sup>2</sup> affirming that the chair of a registered charity may apply for a “stop bullying order” against another board member.

With reference to case law, that second paper also discusses internal strategies that NFPs could consider to prevent and address board room bullying.

**Disabled Motorists Australia: alleged bullying and an Ombudsman investigation**

**Factual outline**<sup>3</sup>

Disabled Motorists Australia (“DMA”) is a registered charity. In May 2014 DMA lawfully convened and conducted an Extraordinary General Meeting (“the EGM”) of members where special resolutions were unanimously passed to remove certain “rogue directors”.<sup>4</sup>

The facts leading up to the EGM asserted by DMA were:

- (a) Over several months the rogue directors engaged in sustained verbal and written attacks against another DMA director (who we refer to as “the aggrieved member”);

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<sup>1</sup> DF Mortimer & Associates acted for Disabled Motorists Australia (“DMA”) during the relevant period and has prepared this paper with the permission of DMA and the aggrieved member.

<sup>2</sup> *Mr Adamson* [2017] FWC 1976 (19 May 2017).

<sup>3</sup> The factual outline is publicly known by our 30 June 2014 paper “The rogue directors and the aggrieved member” attached to a *Pro bono News* 3 July 2014 article “ACNC Approach to Governance Under Scrutiny”.

<sup>4</sup> The term “rogue director” reflects that the certain directors refused to participate in mediation and grievance processes set out in DMA’s constitution.

- (b) Amongst other things, the attacks included untested allegations regarding the aggrieved member's financial propriety that were recorded by the rogue directors in board minutes and later, in correspondence to the Australian Charities and Not for profits Commission ("ACNC"), on facebook and in an open letter to members;<sup>5</sup>
- (c) DMA considered that the rogue directors had a case to answer for being in breach of a DMA bylaw that required its members to not engage in gossip and innuendo;<sup>6</sup>
- (d) DMA members tried to engage the rogue directors in grievance and mediation processes mandated by DMA's constitution. The rogue directors declined to engage;
- (e) The rogue directors also purported to expel the aggrieved member from DMA, without applying the disciplinary process set out in the DMA constitution;<sup>7</sup> and
- (f) DMA members called for an EGM to consider special resolutions to remove the rogue directors and appoint new directors. The rogue directors were invited to attend to put their side of the story but they did not appear.

After the May 2014 EGM, DMA notified the ACNC of the change in its directors by submitting ACNC forms 3A and 3B, together with signed and witnessed minutes of the EGM.

However the ACNC refused to process the forms on the basis that it had received "conflicting information" from the rogue directors. Instead, the ACNC required DMA to settle the "internal dispute" with the rogue directors. The ACNC attempted to enforce this requirement by withholding from its public charity register, the names of directors appointed at the EGM.

To overcome this immediate difficulty, DMA notified ASIC of the EGM decisions and ASIC changed the names of DMA directors on its own company registry accordingly.

### **Outcome of Ombudsman investigation**

It is uncontroversial that in a member based NFP such as DMA, members in general meeting may appoint and remove board members.<sup>8</sup> These general meeting processes may be subject to the NFP's constitution, and legislation.

Generally, case law also requires the general meeting processes to be "procedurally fair" and requires decisions to not be "so unreasonable that no reasonable decision maker could ever come to it". Decisions made in general meeting are decisions of the NFP.

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<sup>5</sup> Those untested allegations were put to the test by an independent insolvency practitioner appointed by DMA during the time DMA was managed by the rogue directors. The allegations were found to be without substance.

<sup>6</sup> Fair Work Commission *Benchbook: Anti-Bullying* (30 August 2016), p19 notes that "making of vexatious allegations" and "spreading rude and/or inaccurate rumours" could be bullying, depending on the conduct and context.

<sup>7</sup> Ibid p19: "conducting an investigation in a grossly unfair manner" could be bullying, depending on the conduct and context.

<sup>8</sup> Elizabeth Boros "How does the division of power between the board and the general meeting operate?" (2010) 31 *Adelaide Law Review* 169-185 – the author states: "...the power to replace the board or some of the directors is ... straightforward, but requires sufficient voting power and the will to use it...".

What did cause controversy was the ACNC's decision to withhold from the charity register, the names of DMA directors appointed by the EGM.

In correspondence to DMA immediately after the EGM, the ACNC purported to withhold the directors' names by reference to section 40-10(2) of the ACNC Act.<sup>9</sup> Section 40-10(2) permits the ACNC to withhold information from the charity register where:

(b) the information is inaccurate, is likely to cause confusion or is likely to mislead the public.

However, the ACNC never at any time alleged that the completed forms 3A and 3B and the signed and witnessed minutes of the EGM submitted by DMA were or might be inaccurate or misleading to the public.

At the initiative of DMA, the Commonwealth Ombudsman undertook an investigation into the matter. The investigation lasted approximately 16 months. The Ombudsman's findings were given in a letter to DMA dated 28 February 2017.

The Ombudsman's findings are expressed in diplomatic language. However, the Ombudsman's findings do not support the ACNC's claim immediately after the EGM that the ACNC was entitled to withhold DMA directors' names under section 40-10(2).

That is, the ACNC does not have a "right" to withhold director names from the charity register when it considers that a charity is experiencing an internal dispute, nor does the ACNC have a right under section 40-10(2) to direct parties to settle their differences.

The Ombudsman did accept however that the ACNC may exercise "discretion" to withhold names of directors from the charity register in the specific circumstance where ACNC officers are unable to discern whether information submitted to it by charity representatives is accurate. That is, the ACNC may withhold information where the ACNC:

"... is not in a position to preference one party's claims over another ...".<sup>10</sup>

In response to the Ombudsman,<sup>11</sup> DMA said that the circumstances outlined by the Ombudsman that would enable the ACNC to exercise that discretion were not present in its particular case; the ACNC had information before it and at the time, that would enable it to readily preference DMA's claims over the claims of the rogue directors.

DMA said that the internal dispute regarding the EGM was defined thus:

1. The rogue directors (via a letter from their legal practitioner) specifically alleged to DMA that the EGM lacked the required quorums and threatened to seek injunctions to declare the EGM invalid on that basis; and
2. In addition to forms 3A and 3B, DMA submitted signed minutes of the EGM to the ACNC. The minutes indicated that a quorum at the EGM had been reached.<sup>12</sup>

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<sup>9</sup> *Australian Charities and Not for profits Commission Act 2012*.

<sup>10</sup> Ombudsman letter to DMA 28 February 2017 page 2.

<sup>11</sup> DMA Closing Submission to Ombudsman 17 March 2017.

<sup>12</sup> It should be noted that these ACNC forms state that penalties may be applied for giving false information. Section 251A *Corporations Act 2001* says that minutes of a meeting "so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved."

The ACNC was also aware at the time that DMA had written an open letter to the rogue directors in response to the rogue directors' threat to seek injunctions and the ACNC was aware that the rogue directors did not proceed with that litigation threat.

### **Conclusion**

As a consequence of the Ombudsman investigation it is now beyond controversy that DMA was entitled to remove the rogue directors from office at the EGM. It is also beyond controversy that information DMA supplied to the ACNC after the EGM was accurate and was not misleading.

DMA's page on the ACNC charity register (eventually) recorded the names of directors appointed at the EGM.

### **Opinion**

In our opinion, DMA successfully removed certain directors from office because:

- it had a clearly expressed by-law in place requiring members to not engage in gossip and innuendo
- it gave the directors fair opportunity to discuss and substantiate their alleged grievances
- it took scrupulous care to follow the EGM processes set out in its constitution.

Removal of the directors from office was a "last resort" action to end what to DMA had become repeated, unreasonable behavior towards another director and the charity as a whole over several months.

In our opinion, a refusal by an NFP regulator to process a "change of director" form where board room bullying is alleged could inadvertently:

- reward the bullying behavior of an NFP board member legitimately removed from office by the NFP in general meeting
- delay the legitimate processes of an NFP to remove a board member from office where that action is necessary for the NFP to discharge its obligations (where they apply) to keep its workplaces safe
- actually exacerbate board dysfunction.<sup>13</sup>

In the particular instance at DMA, the ACNC interfered with a legitimate decision of a charity to remove directors who were allegedly in breach of the charity's anti-bullying bylaw and in whom its members had lost confidence. The ACNC had no right to refuse to process forms 3A and 3B under section 40-10(2), nor was it necessary for it to exercise its discretion to not process the forms.

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<sup>13</sup> In *Swan v Monash Law Book Co-operative* [2013] VSC 326, 187 his Honour Dixon J noted "the importance of early intervention to avoid or limit the damage and injury that flowed from sustained workplace stress". This case in relation to employees of an NFP is discussed in our July 2017 paper *Bullying in the NFP boardroom: latest developments No 2*.

The facts and law in this matter were never seriously in doubt. The facts in dispute boiled down to a matter of simple arithmetic; whether the required quorums were achieved for the EGM or not.

DMA's experience can be seen as another example of an NFP regulator not taking the subject matter of an NFP internal dispute seriously.<sup>14</sup> Issues around bullying are serious, not only for the persons involved, but for the NFP as well.<sup>15</sup>

DMA is to be commended for taking its internal dispute seriously and addressing it fairly and effectively.

### **Who we are**

DF Mortimer & Associates is a Melbourne based boutique law practice that focusses on the law of charities and not for profit organisations.

Readers may also like to consider reading the following articles by Mr Mortimer:

- DF Mortimer & Associates *Occasional paper 2017: Bullying in the NFP boardroom: latest developments No 2* (the 19 May 2017 Fair Work Commission decision)
- DF Mortimer & Associates *Occasional paper 2012: The Register of Members*
- "Trouble in the house-Resolving Disputes in Nonprofit Organisations" in *The Australian Nonprofit Sector Legal and Accounting Almanac 2014* (ACPNS working Paper 64) March 2015 (ed Myles McGregor-Lowndes) QUT, p231-233
- "Dispute Management" in *Not for Profit Best Practice Manual* (2013) (Thomson Reuters) [55.1.105].

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### *Disclaimer*

*The information presented on alleged bullying and processes to address such allegations in this paper is of a general nature only and does not constitute legal advice. Circumstances can vary depending on amongst other things, the type of NFP and applicable legislation and constitution.*

*The opinions expressed in this paper are the opinions of DF Mortimer & Associates unless otherwise indicated.*

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<sup>14</sup> The ACNC's response to DMA's issues recorded in the *Pro bono News* 3 July 2014 article "ACNC Approach to Governance Under Scrutiny" was that the ACNC only intervened in "serious mismanagement" matters, with the implication that DMA's internal dispute was not serious; see also Myles McGregor-Lowndes, *The Visitor-Facilitation of internal dispute resolution in non-profit Organisations* (Working Paper No. PONC 82, QUT, 1998) 4 which states: "Government officers who administer Acts dealing with incorporated associations relate remarkably similar stories about the bitterness of internal disputes over seemingly trivial issues and their powerlessness to meet the public's expectations of justice."

<sup>15</sup> House of Representatives Standing Committee on Education and Employment *Workplace Bullying We just want it to stop* (October 2012) 11-13.