

**Bullying in the NFP boardroom: latest developments N° 2**  
**paper prepared for**  
**Collins & Co lunchtime seminar**  
**11 July 2017**

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

The first 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.

This paper describes a 2017 Fair Work Commission (“FWC”) case<sup>1</sup> affirming that the chair of a registered charity may apply for a “stop bullying order” against another board member.

This paper will then discuss internal strategies that NFPs could consider to prevent and address board room bullying with reference to a 2013 Supreme Court of Victoria judgment.<sup>2</sup>

**Bullying: an overview**

In brief, workplace bullying occurs when:

1. an individual or group repeatedly behaves unreasonably towards a worker or a group of workers at work; and
2. the behaviour creates a risk to health and safety.<sup>3</sup>

The FWC accepts<sup>4</sup> that depending upon the conduct and context, bullying can include:

- aggressive and intimidating conduct
- belittling or humiliating comments
- victimisation
- practical jokes or initiation
- exclusion from work-related events
- unreasonable work expectations
- making vexatious allegations against a worker
- spreading malicious, rude or inaccurate rumours
- conducting an investigation in a grossly unfair manner.

<sup>1</sup> *Mr Adamson* [2017] FWC 1976 (19 May 2017).

<sup>2</sup> *Swan v Monash Law Book Co-operative* [2013] VSC 326 (26 June 2013).

<sup>3</sup> s789FD(1) of the *Fair Work Act 2009*.

<sup>4</sup> Fair Work Commission *Benchbook: Anti-Bullying* (30 August 2016), 18-19. See also House of Representatives Standing Committee on Education and Employment *Workplace Bullying We just want it to stop* October 2012.

## **A Board member can seek a “stop bullying order”: Mr Adamson<sup>5</sup>**

This decision affirmed that the chair of a registered charity was entitled to apply to the FWC for a “stop bullying order” against another board member. However by the time the FWC decided that the charity’s chair was entitled to apply for the order, the chair had resigned his position and was not “at future risk” of bullying. The FWC accordingly dismissed the application.

### ***Factual outline***

Until his resignation, Mr Adamson was chair of the Executive of Anangu Pitjantjatjara Inc ABN 77 261 612 162 (“APY Inc.”). APY Inc. is a registered charity and is incorporated by the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA). Mr Adamson was not employed by APY Inc.; he was elected to the Executive and then nominated to the position of Chair.

Mr Adamson lodged an application to the FWC for a “stop bullying order”.<sup>6</sup> The application alleged that two APY Inc. members, including an APY Inc board member generally:

- refused to engage with the Chair and disrespected his wishes
- interfered with the Chair’s conduct of Executive meetings
- orchestrated events to prevent a quorum at Executive meetings
- prevented the Chair from accessing Executive meeting minutes
- “defamed” the Chair.

According to the decision, Mr Adamson did not provide particulars of the alleged bullying to support his application. It is worth noting that Mr Adamson did not first attempt to use the dispute processes under the APY Inc. “Code of Conduct”.

### ***The relevant law***

The definition of “worker”<sup>7</sup> contains two elements. First, the person must “carry out work”. Secondly, the work must be carried out for a “person conducting a business or undertaking” [“PCBU”].

Commissioner Hampton of the FWC noted<sup>8</sup> that the “worker” definition includes “volunteer work”. It is also not necessary that there be a contract or payment for the work.<sup>9</sup> A PCBU need not be a conducted for profit ie a PCBU can be a not for profit organisation.<sup>10</sup>

Commissioner Hampton accepted that APY Inc was a PCBU.<sup>11</sup>

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<sup>5</sup> [2017] FWC 1976 (19 May 2017).

<sup>6</sup> under s789FC of the *Fair Work Act 2009*.

<sup>7</sup> Section 789FC of the *Fair Work Act 2009* applies the definition of “worker” found in s7(1) of the *Work Health and Safety Act 2011*.

<sup>8</sup> [2017] FWC 1976 (19 May 2017) [41] – there is a specific exclusion from the definition for a “volunteer association” not relevant to the matter.

<sup>9</sup> *Balthazaar v Department of Human Services (Commonwealth)*. [2014] FWC 2076.

<sup>10</sup> Section 5(1) *Work Health and Safety Act 2011*.

<sup>11</sup> [2017] FWC 1976 (19 May 2017) [45].

The respondent parties submitted that APY Inc did not “control” the chair’s activities.<sup>12</sup> However after an extensive review of Mr Adamson’s activities as Chair, the Commissioner said:<sup>13</sup>

“[Mr Adamson] does (or did), however, serve the organisation, and the APY community, as the Chair ... and I have found that he undertakes work in that capacity.” The Executive Board can be directed by the AGM ... and as Chairperson, he can be directed to act for and on behalf of the Executive Board ... ?”.

Under the particular circumstances, Commissioner Hampton accepted that Mr Adamson was eligible to bring the stop bullying order application.<sup>14</sup>

The Commissioner noted however that it may only make a stop bullying order if “there is a risk that the worker will continue to be bullied at work by the individual or group”.<sup>15</sup> Because Mr Adamson had resigned as chair, the Commissioner Hampton considered that Mr Adamson was not at future risk of bullying.<sup>16</sup> The Commissioner dismissed the application.

### **Opinion**

The present FWC decision was made on 19 May 2017. A previous FWC<sup>17</sup> decision dated 10 March 2017 addressed “procedural issues”. Conciliation had occurred in early December 2016 after which a “statement of recommendations” was agreed to by the parties, but allegedly not implemented.

Hence allegations of bullying at APY Inc are likely to have been manifest for at least 6 months. It is difficult to imagine how a board could function effectively over such a period whilst allegations of bullying between board members were on foot.

Commissioner Hampton noted that dispute resolution processes under the APY Inc. “Code of Conduct” could have been used to address the allegations. Those processes may have helped to quickly address the alleged bullying behaviour. Early intervention is important to avoid damage and injury.<sup>18</sup>

### **A useful guide to prevention of bullying: *Swan v Monash Law Book Co-operative*<sup>19</sup>**

The Supreme Court of Victoria awarded nearly \$600,000 damages for pain and suffering and pecuniary loss against an NFP. Whilst it acknowledged that it was an employee of the NFP who had engaged in bullying conduct, the Court found that the NFP itself had failed to have workplace policies in place and failed to act on complaints.

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<sup>12</sup> Ibid [47].

<sup>13</sup> Ibid [74].

<sup>14</sup> Ibid [77].

<sup>15</sup> Section 789FF *Fair Work Act 2009*

<sup>16</sup> [2017] FWC 1976, [109]

<sup>17</sup> *Mr Adamson* [2017] FWC 1340 (10 March 2017).

<sup>18</sup> *Swan v Monash Law Book Co-operative* [2013] VSC 326 (26 June 2013), 187.

<sup>19</sup> Ibid.

### ***Factual outline***

Monash Law Book Co-operative is a not for profit organization. It operated a law book retail outlet at Monash University. The Co-operative employed two permanent part-time workers: a person designated as “Manager”, and a person designated as “Assistant Manager”. The plaintiff, Ms Swan, was employed as Assistant Manager.

The Court accepted that repeated acts of the Manager over about 5 years constituted bullying behavior.<sup>20</sup> The Manager’s acts towards Ms Swan included yelling, dismissive language and throwing a book.

The Co-operative’s board was aware of Ms Swan’s concerns albeit the concerns were not expressed as a formal complaint. The board assessed the cause of the problem to be “role ambiguity”. The board did not have job descriptions, employment contracts and workplace behaviour policies in place and because it had encouraged a “flat” management style.

### ***The Court’s analysis and decision***

His Honour Justice John Dixon observed that the NFP had failed to:

- clarify the differing notions of employee status – was the Manager Ms Swan’s manager or Ms Swan’s equal colleague?<sup>21</sup>
- stop making misrepresentations to Ms Swan that employment contracts, written job descriptions and workplace behaviour policies were imminent
- properly define relations between the NFP board and the NFP’s employees – Ms Swan reported to the board on some matters<sup>22</sup>
- act when it was clear that the Manager had developed “arbitrary and brusque work practices” towards Ms Swan and that a want of written position descriptions, and workplace behaviour policies was contributing to the practices
- directly investigate what was occurring in the bookroom instead of relying on choices made by Ms Swan: ie the fact that the board sought and obtained assurances from Ms Swan that she was happy “did not eradicate or alleviate the risks that had been foreseen” by the board
- consider informal responses, such as a direct personal communication by the board with the Manager
- give any direction to the Manager about his dealings with Ms Swan<sup>23</sup>
- articulate expectations of workplace conduct
- introduce defined complaint procedures to address allegations of bullying
- follow through with any employee assessment processes
- train its board members to deal with bullying behaviour and complaints.

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<sup>20</sup> Ibid [153].

<sup>21</sup> Ibid [24].

<sup>22</sup> Ibid [176].

<sup>23</sup> Ibid [175].

His Honour Dixon J concluded:<sup>24</sup>

“[the board] ... having identified a risk, *could not simply assume that a continuing absence of complaint, or renewed complaint, meant that the risk had abated. ...*” .

### **Opinion**

In our opinion, his Honour Dixon J’s analysis of what went wrong at the Cooperative serves as a useful guide with some adaptations, to preventing bullying occurring between an NFP’s board members. The analysis also provides some approaches that could be used if bullying allegations did arise.

In the Cooperative’s own judgement, its problems came about through “role ambiguity”, however it did not act to address that problem.

NFP board members do have certain roles to play; it is important that those roles are not ambiguous and are supported with position descriptions and board conduct policies. Generally for example, all board members must exercise independent (but not necessarily contrary) judgment when board decisions are discussed and voted upon.

### **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 Paper64) 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>24</sup> Ibid [176 “1”].