

Board Dynamics: Keeping it dynamic despite (inevitable) dysfunction

Better Boards Conference 2019:

3 August 2019

Brisbane Convention Centre, Brisbane

Topics for today's presentation:

- **The story of a regulator**
- **Fallacies that prevent investigation of NFP disputes**
- **A selection of cases and a charity independent investigation**
- **Time for Q & A**

The story of a regulator part 1

- In 2014 the ACNC decided to not engage in a charity “internal dispute” telling the parties to “resolve their differences as soon as possible”
- The ACNC said its decision was based on “conflicting information” from the parties (2 directors) ie ACNC does not know which director to believe
- 1 director alleged “possible fraud”; the 2nd director welcomed an ACNC investigation “to clear their name”

The story of a regulator part 2

- In April 2017, following a 16 month investigation, the Commonwealth Ombudsman said:
 - The ACNC's decision to not engage was not "supported" by its legislation
 - The ACNC should have allowed the parties to submit further information or conduct a formal review
- The ACNC had previously accepted the dispute subject matter ("possible fraud") was within its jurisdiction

Fallacies that prevent resolution of NFP disputes

- *Argumentum ad temperantiam* - truth is a compromise between 2 opposite positions
- *The slippery slope* - once the first step is taken, then other (disastrous) steps inevitably follow
- *False Equivalence* – implying that evidence from each party is of equal quality

Fallacies that prevent resolution of NFP disputes

- *The tone fallacy* - criticizes a person for expressing emotion to divert attention from the substance of the person's concern
- *Argumentum ad populum* – the majority has decided (but the decision may remain unjustified)
- *Authority bias* – the committee's view prevails

Esposito v Wilderness Society

[2010] TASSC 21

Commentator: I think the judge will tell them to grow up and get some order into the organisation. The World Today, Monday 3 May 2010

Court says:

- **Subterfuge in relation to AGM notices “blatantly dishonest”**
- **AGM is invalid and those involved knew it**

Swan v Monash Law Book Co-operative

[2013] VSC 326

- **Committee aware of staff OH&S issue but did not act**
- **Committee action contributed to the issue**
- **Compensation awarded to staff member for stress**

Goodwin v VVMC Club Australia (NSW Chapter)

[2008] NSWSC 154

- Correspondence between president and member did not amount to “grievance process” under Club constitution
- Club sought to expel member by general meeting
- Court says:
 - Club should have known that expulsion by general meeting would fail – costs awarded to member

Faehrmann v Van Vucht

[2018] NSWSC 397

- **QC opinion on constitution given to Association committee but no action**
- **Court said interpretation of constitution a matter of law not appropriate for mediation**
- **Duty of committee to consider interests of Association**

Re Peninsula Kingswood Country Golf Club

[2014] VSC 437 and appeal [2015] VSCA 16

- Evidence that board considered benefits to the other Club of a proposed merger
- Court found the board exercised its powers to give effect to the merger, which was oppressive to current members
- Court observed: An impermissible purpose might be found despite the altruistic motive of persons who exercise power
- Court however said member was out of time

Cambodian Buddhist Society of NSW v Meng Eang Thai

[2017] NSWSC 1433

- Court says: “not satisfied either party has any legitimate claim for authority”
- Appoints an Administrator due to irregularities that cannot be cured by orders
- Administrator to consult with Temple Abbot regarding faith services and practices

2019 Investigation into Oxfam UK: Independent Commission & Charity Commission part 1

“UK inquiry finds Oxfam failed to act on child sex abuse claims”

Pro Bono News 12 June

13-year-old Haitian girl tells Oxfam that she and a 12-year-old girl were physically abused by an Oxfam “boss” and used for prostitution

It was suspected by Oxfam at the time (2011) but not then proven that the girl’s allegations were not genuine

2019 Investigation into Oxfam UK: Independent Commission & Charity Commission part 2

Charity Commission said:

- **Oxfam's handling of allegations was influenced by desire to protect reputation and donor relationships**
- **Oxfam did not report allegations of child abuse, and senior staff implicated in sexual misconduct claims were dealt with more leniently than junior staff**

Q & A

suggested topics

- **Avoid excuses and blame**
- **Consider jurisdiction and responsibility**
- **Gather information promptly and impartially**
- **Make decisions with the NFPs purpose in mind**

**Thankyou for coming to this
presentation**

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