

Church Matters

Issue 2

Legal and tax affairs for church administrators

July 2008



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Complying with a subpoena to produce documents

Accounting

Tax thresholds and salary packaging



Canon law

Public juridical persons within the Church

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Taking an enterprise-wide approach to managing risk

“An ERM strategy can help Church administrators achieve the right balance of controls to manage risk effectively”

Have you ever wondered why the words ‘risk management’ are heard so widely today? Is this yet another process and language we need to include in our already busy lives that distract us from what we are really here for?

Regardless of how we perceive risk, the greatest burden in connection with risk is that some losses are inevitable.

This article aims to provide an insight into what it means for a Catholic organisation to develop a framework to address the risks inherent in the services it offers to the community.

The risk problem

When a building is destroyed by fire or money is embezzled or a significant donor withdraws financial support, there is a financial as well as a physical loss. Indeed, the indirect losses due to the destruction of Church artefacts are often irreparable. When someone is negligent and that negligence results in an unexpected injury to a person or damage to property, there is both financial and personal loss.

These direct and indirect losses are the primary outcomes of risk and the reason why administrators, who are responsible for the assets owned by the Church and the services provided to the community, need to protect their valuable reputation by managing risk effectively.

So, how does a Catholic organisation manage risk inherent in its activities?

Enterprise Risk Management

One way to recognise and manage inherent risks is to take an enterprise-wide approach rather than address them separately and individually. This enables the leadership team to evaluate the interrelationship of these activities and how best to achieve the organisation’s strategic objectives. Inherent in each activity is a plethora of risks that could result in a negative outcome if not considered and actioned in a timely way.

Enterprise Risk Management (ERM) provides a structured and disciplined methodology to evaluating and managing the uncertainties and consequences faced by the organisation as it aims to achieve strategic objectives and to make a positive contribution to the Church community.

An ERM framework clearly sets out risk management policy, processes and accountability for the leadership team to manage assets, people and resources effectively. It also aims for good governance and manages risk inherent in the organisation’s activities to the satisfaction of the broader Church, the public and, in some cases, regulators.

There are some important questions that the leadership team should consider when reviewing the organisation’s activities and its ‘appetite for risk’:

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Taking an enterprise-wide approach to managing risk

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- What are the inherent risk exposures in our key activities?
- Are we focused on the risk exposures that really matter?
- What is our appetite for these risks?
- Who is accountable for them?
- Are we accepting an appropriate level of risk?
- Have we assigned the correct balance of resources and people to manage these risks?
- How are we protecting and improving the organisation?



Assess the risk

The answers to these questions should initiate a conversation to determine the causes of inherent risk in all of the organisation's activities. For instance, statistics demonstrate that an accident in a school playground is more likely to occur in the last 10 minutes of lunch-time compared with other times. Similarly, fraud is more likely to occur if a parish's financial records are not checked regularly by an independent and qualified bookkeeper and/or an external auditor every year.

To assess risk, we should organise risks into major categories such as operational, legal, financial and reputation risk. This enables the

leadership team to assess risk that is within their expertise and to seek professional advice on those risks with which they are unfamiliar.

Secondly, a comparison of those risk assessments with the organisation's strategic objectives and risk appetite will enable the leadership team to prioritise risk inherent in the organisation's activities and develop action plans to address any undesirable exposure within a prescribed timeframe.

Formulate ERM strategy

ERM policy and processes are intended to complement the organisation's goals. It should be communicated in a language that all people understand so that they can manage risk inherent in their activities.

ERM simply addresses each activity in a risk context. It then embeds risk management controls within the activity to influence the exposure to and possibility and consequence of risk to achieve a preferred outcome.

The aim is to apply a combination of risk treatment techniques – such as reduction, retention, transfer and sharing – to achieve the right balance of controls to manage risk effectively.

The example (above right) demonstrates how ERM engages a parish council to consider the financial risk inherent in a parish activity and then to choose the best combination of elementary risk controls to protect the parish's funds and employees.

By embedding ERM into all the organisation's activities, the Church

Example of an ERM strategy

A parish council anticipates a large congregation to witness the ordination of a Catholic priest in their church. Parishioners have also organised a fete and entertainment to celebrate the occasion. The councillors expect an unusually large amount of cash to be collected from these activities compared with the normal takings at that time of the year. Fraud or theft is possible without effective risk management controls and the direct and indirect consequences could be devastating.

The parish council assess the inherent risks and decides to implement a combination of risk controls to protect the expected income:

- Trustworthy people are invited to collect and deliver donations and fete proceeds periodically to a counting room.
- Two people count the cash separately, compare their tally and record it in the parish accounts book.
- The public cannot observe this activity inside the counting room.
- An appropriate money safe will hold the cash until the next banking day.
- The parish hires a contractor to bank the cash on its behalf rather than place an employee at risk.
- The bank receipt is cross-checked with the parish account book entry and filed for a bookkeeper and auditor to inspect at the next audit.
- An insurance policy provides protection up to the specified limit if money is stolen between collection and banking.

community can be assured that the parish council understands and manages responsibly the parish's exposures to risk.

Identify and develop capable people

Church organisations should identify a group of capable people to assist

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Civil law issues in establishing new public juridical persons

Elsewhere in this newsletter, Father Ian Waters, a respected canon lawyer, has touched on recent developments within the Church whereby various Church apostolates have been passed on to new public juridical persons (PJPs) within the Catholic Church.

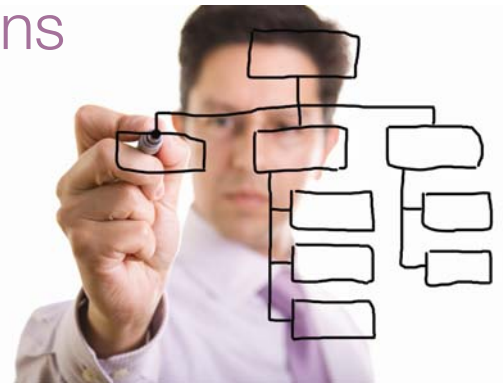
The establishment of new juridical persons has implications in civil law as well, largely because of the obligations under canon 1284§2 2° for juridical persons to safeguard their assets in ways that are valid in civil law. There are also significant practical implications.

In this article, we attempt to briefly outline some of the issues which might be considered in the establishment of a new PJP from both a practical and a civil law perspective.

Who should be involved?

- The appropriate canonical authority in the existing PJP must determine that the apostolate should be transferred to a new PJP. In many cases, this will involve consultation at appropriate levels within the existing PJP because the process will result eventually in the alienation of the assets of the existing PJP to the new PJP.
- Once a general decision has been made to establish the new PJP, it would be appropriate that a steering committee be established, constituted by members of the leadership team of the existing PJP, a canon lawyer, a civil lawyer, one or more

persons involved actively in the apostolate of the existing PJP, accounting and other relevant advisers.



Structure

- A decision needs to be made as to whether the new PJP will be accountable to Rome (ie a PJP of pontifical right) or accountable to a local bishop or group of local bishops.
- Canonical statutes need to be prepared establishing and governing the new PJP. This will involve consideration of who should be the founding members and who should act in the position of “directors” carrying out the executive functions of the new PJP.
- A decision needs to be made on the appropriate civil law structure. The options are: a company limited by guarantee, an incorporated association, or a corporate trustee established under the provisions in each State and Territory for establishment of Church corporate trustees. The members and “directors” of the PJP under the statutes and canon law should also carry out those roles in the civil law entity.
- There may need to be an additional civil law entity or entities operating the activities of the apostolate (eg a hospital or series of hospitals). If there is to be a separate civil law entity operating those facilities, then appropriate reserve powers as between the operating entity and the

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“A PJP must establish a civil law structure in order to be recognised in Australia’s legal system, to be able to protect the Church’s interest in its property”



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Civil law issues in establishing new public juridical persons

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new PJP need to be defined in the constitution and/or statutes.

- A name needs to be identified for the new PJP.
- The assets to be transferred from being the ecclesiastical property of the existing PJP to being ecclesiastical goods of the new PJP need to be fully identified. It is likely that not all of the assets of the existing PJP will be transferred to the new PJP.

Communication

- There needs to be appropriate communication not only amongst people interested in the existing PJP and its apostolate, but also with bishops of dioceses within which the existing PJP operates.
- Appropriate formation programs for members and directors of the new PJP need to be determined.

Funding

- A budget needs to be established for the steering committee.
- Ongoing funding of the new PJP also needs to be considered as does the funding for the retirement of members of the existing PJP (eg Sisters and Brothers).

Petition

- After appropriate consultation and acceptance of the statutes and the constitution, a petition needs to be presented either to the authorities in Rome or locally depending upon whether or not the proposed PJP will be a public juridical person of pontifical right.
- The petition should also seek approval for the alienation of the existing PJP's relevant ecclesiastical goods to the new PJP.



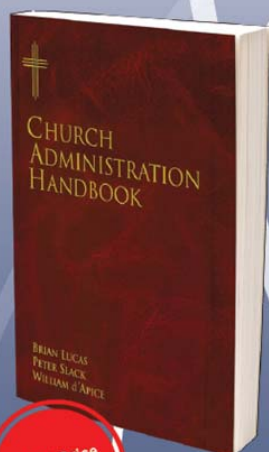
Tax

- After incorporation of the civil law entity, application should be made for endorsement of the civil law entity as a tax concession charity and for various other tax concessions.

The above list is by no means exhaustive, but hopefully it may assist those religious institutes who may be considering the establishment of a new PJP in understanding some of the practical implications. ■

CHURCH ADMINISTRATION HANDBOOK

By Brian Lucas, Peter Slack and William d'Apice



Retail Price
\$45.00

Does the parish priest have to be a Canon and Civil Lawyer to administer his parish?

How does a school principal retain up-to-date knowledge of all State and federal law as well as Church law?

In the litigious world of today can you afford not to know?

The Church Administration Handbook is the only reference book available to help with matters of administration and law for Church entities, and anyone who needs to work with the Catholic Church.

Order your copies now online at www.stpauls.com.au/publications

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Salary packaging

This article serves as a reminder for charities to review their current salary packaging arrangements in light of the recent tax changes below:

Fringe Benefits Tax (FBT) rate

The 2007 FBT year was the first year of application for the new FBT rate of 46.5%, which was amended to agree to the revised top marginal tax rate for individual taxpayers. This resulted in a change to the gross-up rates required to determine the FBT liabilities of employers.

'Minor and infrequent' exemption threshold

For the 2008 FBT year, this threshold was increased from \$100 to \$300 (GST-inclusive).

Reportable fringe benefits amount threshold

For the 2008 FBT year, the threshold (for reporting fringe benefits on an employee's PAYG payment summary) was increased from \$1,000 to \$2,000.

Individual marginal tax rates

Some of the thresholds at which particular marginal tax rates apply have changed in the 2007, 2008 and the 2009 income years. For example, the threshold for the 30% marginal rate has increased from \$25,000 (2007), to \$30,000 (2008) to \$34,000 (current). Also, the threshold for the 40% and 45% marginal

rates have increased from \$75,000 to \$80,000 and \$150,000 to \$180,000 in the current income year.



2007-08 Budget announcement tightening current FBT exemption for certain work related items, such as laptops

The Government has ensured that the current FBT exemption for certain work related items, such as laptop computers, personal digital assistants and tools of trade will only apply for such items primarily used for work purposes. Another feature of the restriction of this FBT exemption is that it is generally limited to one item of each type per employee per year. Also, the current list of FBT exempt work related items has been updated to reflect changes in technology.

This measure applies to items purchased after 7.30 pm (AEST) on 13 May 2008 and ensures consistency with the rules for mobile phones, computer software and protective clothing by imposing a work-related requirement for actual use.

This announcement became law on 30 June 2008. ■

Allan Mortel, Director—Taxation and James Robson, Manager—Taxation, Moore Stephens Pty Ltd

“Fringe Benefits Tax (FBT) and marginal tax rate thresholds have been increased”



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Public juridical persons within the Church

The notion of a legal person in the Catholic Church

The Catholic Church recognises not only physical persons, but also uses the term 'person' for artificial legal entities, which, like physical persons, have rights and obligations. These legal entities are quite separate from the physical persons who may be part of them. The entities are known in canon law as juridical persons, and are recognised as having obligations and rights, regardless of the individual physical persons who may be part of them.

Some entities in the Church are always juridical persons. The most familiar to the average Catholic is the parish. The Church has decreed that every Catholic parish in the world is a juridical person. A parish is a subdivision of a diocese. It is primarily and essentially a community of Catholics. A bishop establishes a new parish because



there is a community of Catholics in that place who need the Scriptures and the sacraments under the governance of a priest appointed by the diocesan bishop. But that parish does not depend on the physical Catholic persons in it. The goods of the parish belong to the parish, not to the parishioners. If all the parishioners moved away, or were killed by an atomic bomb, the parish would still exist until it was lawfully suppressed by the bishop.

The Archdiocese of Sydney was established by Pope Gregory XVI in 1842. The original archbishop, priests and people are long dead, but the Archdiocese continues. The property it owns does not belong to the Archbishop. It does not belong to the Catholics who live within the Archdiocese at present. The property belongs to the Archdiocese, a juridical person. Calvary Mater Newcastle Hospital belongs to another juridical person, namely the Australian province of the Little Company of Mary. It does not belong to the physical Sisters of the Little Company of Mary but to the juridical person of the province.

The Church has legislated that some entities within it are always juridical persons. These are every:

- parish;
- diocese;
- ecclesiastical province;
- seminary;
- national bishops' conference;
- religious institute, province of religious institutes, and religious house in the Catholic Church; and



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- Catholic association that has been established by the Church.

As well as these entities in the Church that are always juridical persons, there are some others as well. These are of two types. Some are called public and others private, according to whether they were started by private individuals or by Church authority. Public means establishment not by private initiative, but by public Church authority. It is specially established by the Church for a specific purpose.

The purpose of a juridical person

Canon Law requires a purpose for the establishment of a juridical person. The purpose is to be something that transcends the purpose of individual persons. The purposes must be one or more of:

- works of piety (eg something to do with the worship of God);
- works of the apostolate (eg Catholic health care and Catholic education); or
- works of charity (such as to feed the poor, help the underprivileged).

Existing juridical persons carry out one or more of these three purposes in the name of the Church.

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Public juridical persons within the Church

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For example, a particular parish provides and conducts a Catholic primary school; a particular province of a religious institute provides Catholic secondary schools. Sometimes, a particular apostolate is passed from one juridical person to another. For example, a Catholic secondary school has been established and run by the province of a religious institute. The religious institute can no longer provide the resources of personnel and finance to run the school, so they sell or gift it to a diocese. The school continues as a Catholic school, but is now owned and operated by the diocese.

Essentially, a public juridical person acts in the name of the Church.

Recent developments

In recent decades, various Church apostolates (eg the health care facilities established, owned and operated by a religious institute of Sisters) have been passed on to new public juridical persons within the Catholic Church, to ensure that these facilities will always continue as a Catholic service and work. The reason for looking for the new structure is that some religious institutes find it increasingly more difficult - because of diminishing and aging membership - to provide personnel and resources within the existing structure of their own institute to continue this valuable work.

For example, in 2004 the Bishops of Western Australia established a new public juridical person, St John of God Australia, to assume canonical ownership and operation of the health care apostolate of the Sisters of St John of God and some other religious institutes. In 2008, the Holy See established Mary Aikenhead Ministries to assume canonical ownership and



governance of the various Ministries until now owned and conducted by the Sisters of Charity of Australia.

The governance of juridical persons

In the Church, physical persons represent and act in the name of juridical persons, much like a young boy is represented in law by an adult guardian until he reaches his majority. Canon Law clearly indicates which physical persons represent certain juridical persons. For example, the parish priest always represents and acts in the name of the parish, the diocesan bishop always represents and acts in the name of the diocese.

When other juridical persons are established by some Church authority, the establishing authority must determine in the statutes of the juridical person which physical person or persons are to represent and act for the juridical person. There are various ways of providing - choosing or appointing - the physical persons who represent the juridical person. Such physical persons are regarded as holding an office in the Church, as juridical persons are Church entities. It is practically universally held that one must be a member of the Church before one can hold an office in the Church.

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“The goods and property of a public juridical person are Church goods and property”



Public juridical persons within the Church

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Accountability of juridical persons



The governance of a juridical person is subject to supervision by higher Church authority, such as a diocesan bishop or the Holy See. The establishing authority must approve the statutes. Those statutes can only be changed with the consent of the establishing authority. The establishing authority also has the power to suppress the juridical person for a just reason, for example, because the juridical person is no longer carrying out the purpose for which it was established.

Canon Law lays down very specific regulations about accountability for some juridical persons. For example, for the juridical person of the parish, these regulations include the right of visitation by the diocesan bishop, and the submission of annual reports concerning administration, and concerning finances. When establishing a new juridical person, the establishing authority can determine quite specifically which channels of accountability are appropriate or desirable.

This does not imply that the establishing authority is liable for the mistakes or poor governance of a

juridical person. A juridical person is autonomous. Just as the Holy See is not responsible for a diocese once it has created it, and just as a bishop is not responsible for a parish after he has created it, the establishing authority is not responsible for a new juridical person after it has been created.

“An essential quality of being a public juridical person is that the entity is subject to Church authority.”

Other options besides a juridical person

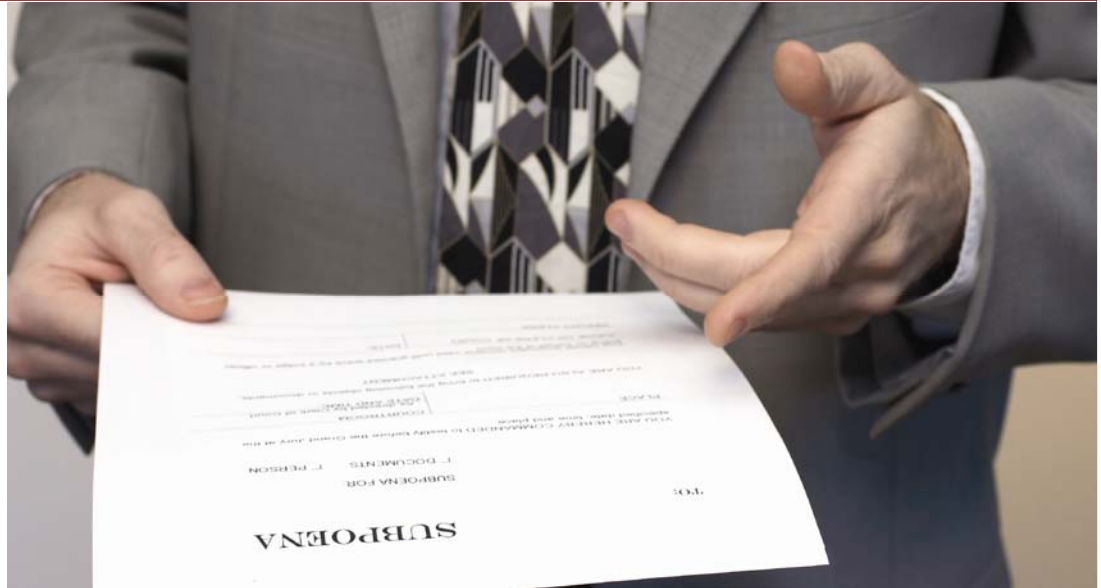
An essential quality of being a public juridical person is that the entity is subject to Church authority. It fulfills its functions in the name of the Church. The goods and property of a public juridical person are Church goods and property, which must always be administered according to the laws or canons governing all Church property.

What other options besides a public juridical person are in fact possible?

■ There could be transfer to an individual or lay group not formally affiliated with the Church. The institutions would cease to be Church institutions. Instead the goods would be owned by the

individual members of the group, or by a civil corporation established by them. Even if they promised to conduct the facilities with the same charism and mission that the religious institute had, the Church would have no authority to enforce that promise or to supervise it.

- There could be transfer to a group of Catholics within the Church. Even if that group had statutes approved by a diocesan bishop, the facilities would cease being Church property. The bishop would have the same control over it as he has over the homes of ordinary Catholics in his diocese. In other words, the Church would lose ownership, and at the most would have very limited supervision and no control.
- There could be transfer to a private Catholic association, such as the Knights to the Southern Cross, the Catholic Women's League, or the Society of St Vincent de Paul. However control would be under the members of the association, rather than Church authority. It would be under the control of that autonomous association, rather than the Catholic Church as such. ■



“You must produce to the Court all relevant documents which are within your possession, custody or control”

Subpoenas are a serious business. They should not be ignored, thrown away or used for origami practice.

A Subpoena is a Court order requiring a person to whom it is addressed to give evidence before a Court and/or produce physical evidence, usually in the form of documents, to the Court. Failure to comply with a Subpoena may ultimately result in a warrant being issued for the arrest of the person to whom the Subpoena was addressed so that he may be brought before the Court.

If served with a Subpoena to Produce Documents, you should collate the documents which fall within the ambit of those categories of documents listed in the Subpoena which are within your possession, custody or control and produce them to the Court, along with the Subpoena itself. This includes documents which others may hold on your behalf, for example, documents held by your solicitor or bank in safe custody. It is prudent to retain copies of the documents you produce, as it is not unknown for Courts to misplace in Court original documents. If

the documents you are required to produce are such that it is difficult or undesirable to produce the original document to the

Court, you can contact the lawyer who had the Court issue the Subpoena, and seek his consent to the production of clear, good quality photocopies of the documents, rather than the originals.

Certain documents are subject to privilege which means that they may not have to be produced to the Court in answer to the Subpoena, and even if they are produced to the Court, the Court might not allow the parties to inspect them. These documents include those which have been brought into existence for the purposes of obtaining confidential legal advice, especially in relation to contemplated or actual litigation.

If a Subpoena requires production of documents which are not really relevant to the case before the Court, then the person subpoenaed can challenge the Subpoena and seek to have it set aside – that is, be excused from producing the documents. This also applies if the documents are sought for some collateral purposes – that is, they are not really required for the proceedings before the Court, but are really sought by the person at whose request the Subpoena was issued for some other purpose, for example, to gain access to otherwise confidential commercial information.

Alternatively, if a Subpoena requires the production of a large number of documents,

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Subpoenas

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only some of which are relevant to the matter to be tried before the Court, the Court may restrict the scope of the Subpoena by requiring the person subpoenaed to produce only some, but not all, of the documents subpoenaed.

Sometimes, if documents are particularly sensitive in nature, but are not, strictly speaking, privileged from production, the Court will nevertheless restrict inspection of them to a limited class of persons, for example, the legal representatives of the parties.

If you are served with a Subpoena and, for whatever reason, you are unable to produce the documents required by the due date, you should contact the lawyer at whose request

the Subpoena was issued and seek an extension of time in which to produce those documents. Usually such an extension will be forthcoming. If it is not, then you should arrange to be represented before the Court to seek an extension of the time allowed for compliance with the Subpoena.

The person issuing a Subpoena has an obligation to provide the person to whom the Subpoena is addressed with conduct money, which is to defray the expenses incurred in producing the documents to the Court. Generally speaking, conduct money is a token amount of \$25–\$30. However, in cases where large numbers of documents are required to be produced, the person subpoenaed may seek from the person issuing



the Subpoena confirmation that the actual expenses incurred in locating, collating and producing the documents will be met. In the absence of such confirmation, the person subpoenaed may seek an order from the Court that his expenses so incurred be met.

Being served with a subpoena is an event which often excites alarm in those not experienced in dealing with them. Such alarm is usually not warranted and can be assuaged by obtaining some simple advice from your lawyer about how best to comply with it. ■

Taking an enterprise-wide approach to managing risk

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the leadership team to build and integrate ERM into all policies, processes and activities.

These people, the 'risk owners', will require education and ongoing training to develop their capability to administer ERM across all levels of the organisation.

The risk owners will need financial support and resources if they are to be held accountable for managing the risk inherent in their area of responsibility.

The support of the leadership team is critical if risk owners are expected to lead by example and to encourage others to embrace and support ERM.

Monitor performance and continually improve ERM

'Good policy and procedures, regularly followed' should be the ERM mantra for the organisation.

It is important that ERM policy and procedures are reviewed and improved periodically to ensure ERM reflects any changes in the organisation's activities.

This is vital - risk is not static. New risks will arise and old risks will

disappear. Both the severity and frequency of risks will change from time to time.


Records of discussions held and decisions made by both the leadership team and risk owners will provide a useful reference for this review. In particular, a summary of risk assessments and actions required by whom and within what timeframe are an invaluable reference to ensure responsibility and accountability.

And finally, encourage everyone throughout the organisation to share their experiences and knowledge about risk. This will encourage all people engaged in the administration of the Church to be actively engaged in ERM. ■



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Back issues

All issues of *Church Matters* are available online at www.makdap.com.au. Articles in the last issue include:

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- Administration means stewardship
- The *Ellis* decision
- Wills, Powers of Attorney and Appointments of Enduring Guardians for Religious
- Principal impacts of GST for Church organisations
- How much supervision in our schools is enough?
- Tips for those considering building projects

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