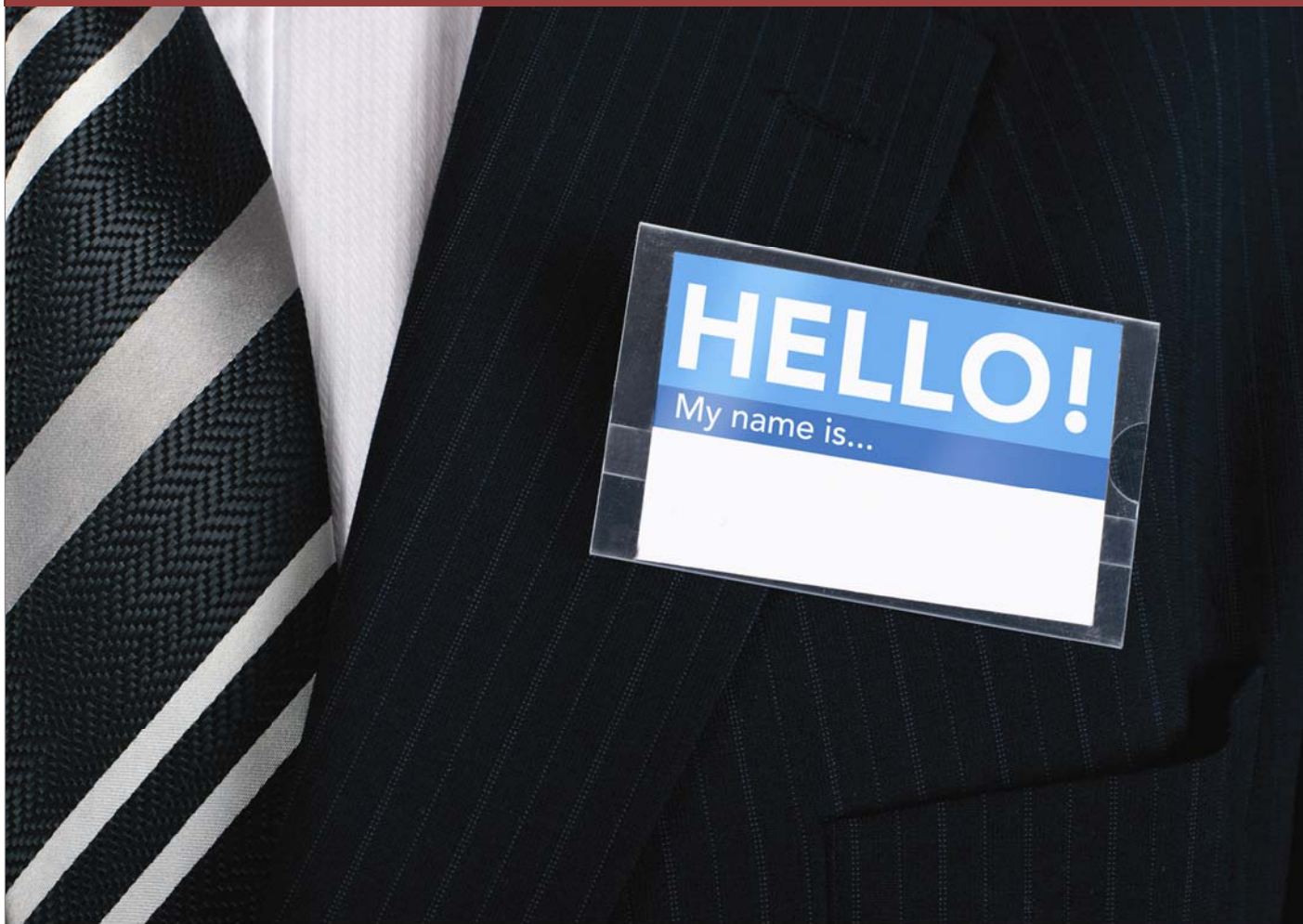


Church Matters

Issue 8

Legal and tax affairs for church administrators

January 2010



Legal

Identity issues for church organisations

Accounting

Are you still a “charitable organisation”?

Canon law

The Parish Priest and the parish

MAKINSON & d'APICE
LAWYERS

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Public ancillary funds crackdown!

“A parish ancillary fund cannot make a distribution to a diocesan ancillary fund, such as the charitable works fund”

On 12 January 2010 the Australian Taxation Office (ATO) issued a newsletter about public ancillary funds breaching their trust obligations following its compliance review of a number of these funds. It is expected that the ATO will continue its focus on compliance issues for these funds and for the newly established category of private ancillary funds.

The ATO has found that a number of public ancillary funds endorsed as deductible gift recipients (DGRs) are in breach of their obligations. Common errors identified in the ATO reviews include:

- distributions paid directly to entities located off-shore;
- benefits provided to non-DGRs located in Australia; and
- distributions made to other ancillary funds.

Many dioceses, parishes, religious institutes/congregations/provinces and other Church bodies have established public ancillary funds and, in light of the ATO activity in this area, it is appropriate to review the

provisions applicable to public ancillary funds.

What are public ancillary funds?

Public ancillary funds act are funds established by Will or more generally by a trust deed. Ancillary funds act as conduits or temporary repositories for money that is to be channelled to "eligible recipients". Gifts of \$2 or more made to endorsed ancillary funds are tax deductible for donors (ie endorsed public ancillary funds are DGRs).

To whom can public ancillary funds distribute moneys?

Public ancillary funds that are endorsed as DGRs can only distribute moneys to other DGRs which are identified in item 1 of section 30-15 of the *Income Tax Assessment Act 1997 (the Act)*. The recipient must also be an entity whose ordinary and statutory income are exempt from tax under Division 50 of the Act or under other Commonwealth legislation.

A public ancillary fund cannot distribute moneys to another public ancillary fund even though that second public ancillary fund is an endorsed DGR.

Many parishes have established ancillary funds. Many dioceses in which such parishes are situated may have also established an ancillary fund (eg a charitable works fund).

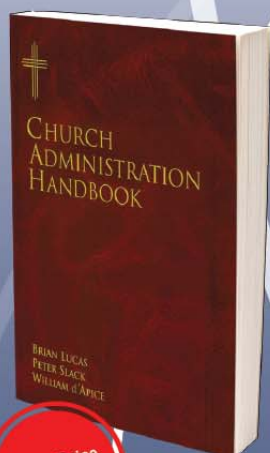
A parish ancillary fund cannot make a distribution to a diocesan ancillary fund such as the charitable works fund because one ancillary fund cannot distribute moneys to a second ancillary fund. However, a parish ancillary fund could distribute money to other entities within the parish/diocese which were endorsed DGRs under item 1 of section 30-15 of the Act (eg school building



(Continued on page 2)

CHURCH ADMINISTRATION HANDBOOK

By Brian Lucas, Peter Slack and William d'Apice



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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?

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Public ancillary funds

(Continued from page 1)

fund, scholarship fund, Centacare/CatholicCare, CCD etc).

Some other requirements of a public ancillary fund

- A public ancillary fund is not entitled to accumulate investment income excessively. The ATO regards distribution of a substantial part of the fund's income (but not necessarily capital gains) as essential, but accepts that a fund may use some of its income to acquire assets which, in the future, would produce more income for charitable purposes. A fund may accumulate some of its income for later distribution.
- A public ancillary fund must distribute its income **solely** for permitted purposes. The use of the term "*solely*" means that a public ancillary fund would cease

to qualify as a DGR as soon as the fund made a distribution that was not in accordance with permitted purposes.

- The fund must be a public fund to which members of the public are invited to donate.
- It must be established and maintained under a Will or an instrument of trust.
- It must only be allowed to invest gift moneys in ways that Australian law allows trustees to invest trust moneys.
- It must be managed by a majority of persons who are "*responsible persons*" as defined by the ATO in taxation ruling TR95/27.

If you are operating a public ancillary fund, it is appropriate to review its activities to ensure that it is not breaching trust obligations and therefore putting at risk its DGR



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status and its entitlement to give donors tax deductible receipts.

Should you have any questions in connection with the establishment and/or operation of a public ancillary fund, please do not hesitate to contact us. ■



Are we a charity? A PBI? A DGR?

“It is a worthwhile exercise to periodically review your entitlement to endorsements”

The law governing charities and non-profit organisations in Australia is most confusing. It is so perplexing that charities and non-profit organisations have been screaming for years for the Federal Government to review the laws as they apply to charities and non-profits with a view to simplifying them. This confusion is one of the main catalysts behind the Senate inquiry into the third sector in Australia which took place in 2008.

One of the contributing factors to this confusion is the terminology. Many people, even those who work in the third sector, do not understand the distinction between the different types of charitable and non-profit categories which exist, especially as applied by the Australian Taxation Office (ATO). The ATO has attempted to address this confusion by publishing a number of guides and fact sheets which explain the law, as applied by the ATO, but the confusion still prevails.

In particular, many individuals who work for Church agencies and organisations struggle to understand the technical differences between a charity, as compared

with a public benevolent institution (PBI), and as compared with a deductible gift recipient (DGR). This article will attempt to unravel the confusion surrounding this terminology. Once unravelled, it may be that some Church agencies/organisations will discover that they are eligible for endorsement as a charity, PBI or DGR for which they have not applied.

We hope that this article will encourage those Church agencies/organisations to apply, where they think they may be eligible, so as to access all of the tax concessions and exemptions which are available to charities, PBIs and DGRs (as the case may be).

What is a charity?

A charity is an entity established for altruistic purposes that the law regards as charitable. The ATO does not set the criteria to determine whether or not an entity is a charity. Criteria for deciding what constitutes a charity have been established and continue to be established by case law.

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“Most Catholic organisations and agencies would be eligible for endorsement as charities”



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Are we a charity? A PBI? A DGR?

(Continued from page 3)

Charities include most religious institutions, aged person homes, homeless hostels, organisations relieving the special needs of people with disabilities, and societies that promote the fine arts.

The characteristics of a charity are:

- it is an entity that is also a trust fund or an institution;
- it exists for the public benefit or the relief of poverty;
- its purposes are charitable within the legal sense of that term;
- it is non-profit; and
- its sole purpose is charitable.

It is established law in Australia that the four main categories of charity are:

- relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community not falling into any of the preceding categories.

The advancement of religion

Of most interest to those working within the Catholic Church is whether the particular activities carried on by their organisation/agency fall within the "advancement of religion" category of charity. The Courts have held that the following purposes do qualify as being for the advancement of religion:

- spreading of religious doctrine;
- mission work;

- provision of facilities for worship;
- preaching of the gospel;
- Christian work;
- assistance in poor parishes;
- saying of masses;
- burial grounds associated with churches; and
- gifts for the provision and maintenance of clergy.

Endorsement

As from 1 July 2000, charities in Australia must be endorsed by the Federal Commissioner of Taxation as charities in order to access all of the exemptions and concessions available to charities under the Federal tax laws.

As at 2010, it can be assumed that most Catholic organisations and agencies have been endorsed by the ATO as charities (being established for the advancement of religion).

What is a public benevolent institution (PBI)?

Although most Catholic organisations and agencies would be eligible for endorsement as charities by the ATO, only a limited number of those same organisations/agencies would be eligible for endorsement as PBIs. A PBI is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution or helplessness as arouses compassion in the community.

Being endorsed as a charity means that these organisations and agencies:

- are exempt from:
 - income tax; and
 - capital gains tax; and
- enjoy certain concessions in relation to:
 - GST; and
 - FBT; and
- are entitled to a refund of franking credits on dividends they receive.

As not all charities satisfy this definition, it is clear that a charity is not automatically a PBI, however it is unlikely that any PBI would not also itself qualify as a charity. In other words, PBIs are considered to be a subset of charitable institutions.

Throughout the Catholic Church in Australia, most social welfare agencies such as Centacare, CatholicCare etc are endorsed by the ATO as PBIs. Other examples of PBIs in the Catholic Church are:

- agencies looking after migrants;
- agencies established to minister to Aborigines;
- hospital chaplaincies;
- services aimed at assisting the homeless; and
- certain limited counselling services etc.

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Are we a charity? A PBI? A DGR?

(Continued from page 4)

PBIs enjoy greater tax concessions and exemptions than those available to mere charities, as PBIs:

- are exempt from fringe benefits tax; and
- will, in most circumstances, be entitled to DGR endorsement.

What is a deductible gift recipient (DGR)?

Certain entities are entitled to be endorsed by the ATO as DGRs.

DGRs are entities to which donations can be made where the donor will receive a tax deduction.

DGRs are also a subset of charities. Subdivision 30-B of the *Income Tax Assessment Act 1997* contains tables that identify general and specific recipients of deductible gifts in the following areas:

- health;
- education;
- research;
- welfare and rights;
- defence;
- environment;
- industry, trade and design;
- the family;
- international affairs;
- sports and recreation;
- philanthropic trusts; and
- cultural organisations.

To obtain DGR endorsement, entities need to be endorsed by the ATO or specifically named in the relevant table in subdivision 30-B. An example of a recipient specifically named in the table is the St Patrick's Cathedral Parramatta Rebuilding Fund.

In addition to these DGR categories, a public ancillary fund or a private ancillary fund can achieve DGR status if they are established by Will or trust deed solely for the purpose of providing money, property or benefits to other DGRs.

Conclusion

For those church organisations/agencies which do not enjoy all or any of the above endorsements from the ATO, it is a worthwhile exercise to periodically review your entitlement as the laws surrounding charities, PBIs and DGRs are amended from time to time, and so therefore an entitlement may arise where it did not exist before. This is especially the case with the DGR categories, which continue to gradually expand. ■



Aid/Watch case—restricting the definition of “charitable organisations”



“Churches should review the governing documents of their charitable organisations to ensure their main purposes are charitable”

MOORE STEPHENS
ACCOUNTANTS & ADVISORS

The decision of the full Federal Court of Australia in *Commissioner of Taxation v Aid/Watch Incorporated* [2009] (**Aid/Watch**) highlights the need for Churches to be mindful of the purpose of entities they establish if those entities are to retain their tax concessions and endorsements.

The outcome in this case narrows the definition of a charitable organisation for income tax purposes.

According to common law, a charitable purpose is one that concerns:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or

■ other purposes beneficial to the community.

In this case, Aid/Watch, a small charity that monitored Australia’s international aid programs, had its charitable status revoked on the basis its main purpose was not charitable. Despite having an explicit purpose to alleviate poverty, the Court ruled the wording in the entity’s constitution indicated its main purpose was to take a view on the government’s aid program and to influence its decision making, being a political agenda. Aid/Watch has lodged an application for special leave to appeal to the High Court.

This decision indicates that while a charity is permitted to have multiple purposes (including some of

which are non-charitable), any non-charitable purposes should be secondary to the main purpose, which must be charitable. In light of this decision, Churches should review the governing documents of their charitable organisations to ensure their main purposes are charitable, as the tax concessions associated with their tax-exempt and/or deductible gift recipient (DGR) status could be at risk. ■



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The Parish Priest and the parish

“In the exercise of his office, the parish priest acts under the authority of the diocesan Bishop”

Every diocese is divided into distinct parts which are known as parishes.¹ A parish is a community of Christ’s faithful whose pastoral care is entrusted to a Parish Priest. He is the proper pastor of the community, caring for the people and celebrating the sacraments. In the exercise of his office the Parish Priest acts under the authority of the diocesan Bishop.²

A parish may be either *territorial* (ie found within defined boundaries) or *personal* (ie composed of people of a particular rite, language or nationality).³

Appointment of a Parish Priest

While a priest is generally appointed who is known as the Parish Priest (or pastor in some countries), canon law also provides that the pastoral care of a parish, or group of parishes, can be entrusted to a group of priests. One of the priests must be appointed, however, as the moderator.⁴

A priest may also be appointed Parish Priest of a number of parishes.

Where there is a shortage of priests, a deacon, lay person or a community of persons can share in the pastoral care of a parish. In these circumstances, however, the diocesan bishop is obliged to appoint a priest to direct the pastoral care. This priest has all the powers and faculties of a Parish Priest.⁵

In these circumstances the use of titles such as “*pastor*,” “*chaplain*,” “*coordinator*,” “*moderator*” or other such similar titles are reserved to that of a bishop or priest. Directing, coordinating, moderating or governing a parish belong to a priest alone.⁶

In the absence of a Parish Priest the interim governance is

undertaken by the assistant priest, senior by appointment, or by a Parish Priest determined by particular law. If the parish is vacant, a priest is appointed as administrator.⁷

A Parish Priest is appointed for an indeterminate period of time. However, the diocesan bishop can appoint a Parish Priest for a specified time. In Australia, by decree of the Australian Episcopal Conference, this is for six years.⁸ The bishop is free to renew the appointment for further periods of six years.

A Parish Priest can be transferred.⁹ At the age of 75 he is exhorted to submit his resignation which the diocesan Bishop is free to accept or not.¹⁰ In certain circumstances, a Parish Priest can be removed from office.¹¹

Obligations of a Parish Priest

The Parish Priest has a twofold obligation: to proclaim the Gospel and work toward the salvation of souls.¹² In the fulfilment of these duties he is to involve the entire parish community.

In summary we could say that he is involved in the following areas, either directly or indirectly:

- proclamation of the word of God, through preaching, teaching, catechesis and the promotion of Catholic education (cc 211, 213, 217, 757, 759, 761, 762, 767-771, 773-774, 776-777, 779, 788-789, 793-794, 796, 798);
- leading people in worship through the liturgy (cc 210, 213-214, 526 §2, 530, 534, 535, 834, 835 §4, 836-837, 839, 840, 843, 851, 857-858, 861, 877, 890, 895, 897-899, 912, 914, 920-922, 934, 937, 941-942, 959, 986-989, 998, 1001-1002, 1063, 1115, 1121, 1128, 1173-1174, 1176-1177, 1182, 1245, 1246-1253);
- leadership and service of the parish community (cc 212, 216, 226, 519, 529, 536, 545, 1285);

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The parish priest and the parish

(Continued from page 7)

- seeing to the administration of temporal goods (cc 222, 231 §2, 532, 533, 537, 1214-1221, 1240-1243, 1254-1269, 1279-1310);
- promotion of mission outreach and support (cc 211, 225 §1, 233 §1, 528 §1, 771 §2, 781, 786, 788, 789, 791);
- promotion of social justice (cc 215, 22 §2, 225 §2, 768 §2).

Legal status of a parish

In order to provide for a legal recognition in church law, a parish is recognised in church law as a *juridic person*. As the name suggests it is considered to be an entity in itself with legal rights and obligations in the same way as a physical person. At Church law it can own property, enter into contracts, seek remedy for damages and operate various apostolates. It can be amalgamated with another juridic person or it can be divided.¹³

It should be noted that, in Australia, parishes are not recognised as such in civil law. At best they are unincorporated associations and their rights are recognised through various legal instruments recognised by the civil law.¹⁴

Administration

In regard to administration of Church goods belonging to the parish, the Parish Priest acts for the parish. He is to ensure that the parish goods are administered in accordance with cc 1281-1288.¹⁵ He fulfils this duty in accordance with canon and civil law.

The Parish Priest is obliged to establish a finance council and consult with it in accordance with the provisions of canon law.¹⁶ He is free to establish a parish pastoral council, unless diocesan law has made it obligatory.

Parish pastoral councils and parish finance councils enjoy a consultative vote only and cannot in any way become deliberative structures. Only those faithful who possess the qualities prescribed by the canonical norms may be elected to such responsibilities.

The Parish Priest presides at the pastoral and finance councils (though he can appoint a person to chair the meeting). Any deliberations entered into, (or decisions taken), by a pastoral or finance council which has not been presided over by the Parish Priest or which has assembled contrary to his wishes are to be considered as null and void.¹⁷



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In administering the goods of the parish, the Parish Priest is required to act in the best interests of the parish. Once appointed as Parish Priest, the Church law gives him a rightful autonomy as a canonical administrator. As a separate juridic person the goods of the parish belong to it in canon law. Its goods cannot be appropriated for other purposes.

In the administration of the goods he is subject to the provisions of Church law in regard to acts of ordinary and extraordinary administration and alienation of the patrimony of the parish.¹⁸ He is also required to furnish an annual report to the diocesan Bishop¹⁹ and also to the members of the parish.²⁰

As can be seen, the role of Parish Priest brings with it great responsibilities. Our modern age has imposed organisational burdens on his role which, if he does not share with others will reduce him to a functionary and a bureaucrat, a planner rather than a pastor. The Parish Priest is called to be, above all, a shepherd, a pastor. It is the task of all to support him in this role.²¹ ■

1 CIC canon 374 §1.

2 CIC canon 515 §1.

3 CIC canon 518.

4 CIC canon 517 §1.

5 CIC canon 517 §2.

6 Congregation of the Clergy, Questions regarding the collaboration or the non ordained faithful in the sacred ministry, 15th August 1997, article 4, http://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_interdic_doc_15081997_en.html [accessed 18 January 2010].

7 CIC canons 539-541.

8 CIC canon 522.

9 CIC canons 1748-1752.

10 CIC canon 538 §3.

11 CIC canons 1740-1747.

12 CIC canon 538.

13 Brian Lucas, Peter Slack, William d'Apice, *Church Administration Handbook* (St Pauls, 2008), 66.

14 Lucas, *Church Administration Handbook*, 241.

15 CIC canon 532.

16 CIC canon 537.

17. Questions regarding the collaboration or the non ordained faithful in the sacred ministry, article 5.

18 CIC canon 1281 §2; canon 1291.

19 CIC canon 1276.

20 CIC canon 1287.

21. Congregation for the Clergy, Instruction, The Priest, Pastor and Leader of the Parish Community, 2002, article 29, http://www.vatican.va/roman_curia/congregations/cclergy/documents/rc_con_cclergy_doc_20020804_istruzione-presbitero_en.html [accessed 18 January 2010].

Business names or trade marks – which has more legal weight?

“Registering a business name does not give your entity ownership of that name”

The difference between a business name and trade mark may sometimes cause confusion for business traders and the public. You should be aware that there are a number of different registration mechanisms in Australia for names of organisations, each of which offer different advantages and have different requirements. As such, this can make it confusing in trying to understand what needs to be registered, when and for what purpose. Accordingly, we will simplify the difference between a business name and trade mark and under what type of registration a trading Church should operate.

What is a business name?

A business name is a title under which a person or other legal entity may conduct its business. Business names are registered

under the *Business Names Act 2002* (in NSW, but there is similar legislation in each State and Territory in Australia), which is administered by the Office of Fair Trading (or its equivalent) in each State. The purpose of registering a business name is to simply provide a means of finding out the details of the proprietor of a trading entity where the entity is not trading under the proprietor’s name. For example, if John Smith owns a business in NSW, but is trading under ‘John Smith Patisserie’, then the registration of that name becomes compulsory with the NSW Office of Fair Trading.

Who owns a business name?

Beware that registering a business name does not give your entity ownership of that name. Registering a particular name will not stop another person or Church entity/agency



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Business names or trade marks – which has more legal weight?

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from registering a similar name. For example, if a Church entity/agency registers the name 'Australian Church', there is nothing to stop another Church from registering the name 'Church of Australia'.

A common misconception is that a name need only be registered as a business name. However, as mentioned above, a business name registration does not provide any proprietary rights to the name. Having a registered business name does not exclude the owner from infringing the rights of another trader. Instead, the onus is upon the owner of the business name to ensure that their use of a new business name does not infringe upon the rights of another trader.

If another trader does have existing rights to a particular business name (by virtue of a prior registered trade mark), they can legally force the new business owner to cancel the business name registration and change their name. Therefore, if a Church entity/agency wishes to trade under a business name without having to worry about infringing someone else's rights, it may be wise to also register the business name as a trade mark.

What is a trade mark?

A trade mark may include any word, name, symbol, or design, or any combination used in business trading in order to identify and distinguish the goods and services of an entity from another. In short, a trade mark is effectively a brand name.

“A trade mark registration will provide the owner with the exclusive right to use that name throughout Australia”

As mentioned above, the best way for a Church entity/agency to protect the registration of its business name is with a trade mark registration. A trade mark registration will provide the owner with the exclusive right to use that name throughout Australia and to prevent others from using a similar name in relation to the registered goods or services. Trade marks are also relevant for company names (which is different from a business name), company logos and domain names. Each of these serve to distinguish the entity from its competitors and each, therefore, function as trade marks. Trade mark registration is Australia wide, as opposed to a business name registration where it is limited to the state/territory only.

A final word

The bottom line is that if two separate Church entities/agencies have the same names registered, one as a business name and the other as a trade mark, the latter will

effectively have priority and may sue the former for infringing its trade mark, if the business name owner uses the same name for goods or services similar to those covered by the trade mark owner.

You should note that trade mark law and procedure is vastly more complex compared with the law and procedure for business, company and domain name registration. There is a full legal process for trade mark registration, while other forms of name registration are largely an administrative process. A trade mark registration takes about 12 months or more, whereas for other types of name registration it can be done in as little as 5 minutes. ■

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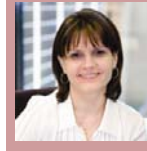
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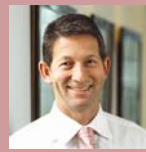
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Back issues

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

Issue 7, October 2009

- The ever present problem of bullying in schools
- Land use and liability for taxes
- Likely developments in financial reporting obligations for charities
- The Church and archives

Issue 6, July 2009

- Are your school uniform agreements in order?
- Financial reporting requirements for Church entities
- To incorporate or not to incorporate – that is only one question?
- Incorporation options
- Cemetery conservation and care
- Gaining access to available tax concessions

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