

Church Matters

Issue 9

Legal and Tax affairs for church administrators

October 2010



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Accounting

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Canon Law

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The New Australian Credit Licence Laws and How They Affect Development Funds

“The Australian Securities and Investments Commission (ASIC) has the power to grant exemptions “



The *National Consumer Credit Protection Act 2009* was passed by Federal Parliament at the end of last year.

It requires all lenders, mortgage managers and finance brokers or other intermediaries engaged in consumer credit or leasing activities to be licensed.

Will Development Funds require a licence?

Development Funds will require an Australian Credit Licence if they:

1. provide, arrange or procure finance for natural persons or strata corporations wholly or predominantly for personal, domestic or household purposes or for the purposes of renovating, improving or refinancing residential investment property. This would arguably include loans to priests or other members of the clergy of a Diocese;
2. provide, arrange or procure consumer leases; or
3. perform obligations or exercise rights in relation to either of the above.

Development Funds that only make loans to schools and parishes will not require an Australian Credit Licence.

The Australian Securities and Investments Commission (ASIC) has the power to grant exemptions from licensing requirements in the *National Consumer Credit Protection Act 2009*, and it may be possible for Development Funds to obtain exemptions in certain circumstances. For example, if

the only consumer loans a Development Fund made were to priests or other clergy, then it may be possible to obtain an exemption from ASIC in respect of such loans. However, an application would need to be made to ASIC.

Steps to take if an Australian Credit Licence is required

Obtaining an Australian Credit Licence is a 2 step process:

1. Register with ASIC before 1 July 2010 any time from 1 April 2010. Registration can be undertaken online between 1 April 2010 and 30 June 2010 at www.asic.gov.au/credit. **After 30 June 2010 you cannot undertake consumer credit activities if you did not register with ASIC before that date.**
2. Once registered you have until 31 December 2010 to apply for a licence. You can apply for a credit licence online at www.asic.gov.au/credit.

Do officers of a Development Fund need a licence if the Development Fund has a licence?

If an officer of an organisation engages in credit activities which require a licence on behalf of a licensee, and their conduct is within the authority of the licensee and they are either:

- a. an employee or a director of the licensee or of a related body corporate of the licensee; or
- b. a credit representative of the licensee,
- c. they do not need to have a licence.

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The New Australian Credit Licence Laws and How They Affect Development Funds

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“Development Funds that undertake consumer lending activities will need to register with ASIC and subsequently apply for a licence.”

Steps to take before Registration

Development Funds that undertake consumer lending activities will need to register with ASIC and subsequently apply for a licence.

Before registration can take place, the applicant for the licence will need to confirm that it is a member of an external dispute resolution scheme and that this is a scheme that has been approved by ASIC. The schemes are listed on the ASIC website and are updated from time to time. They include:

1. financial ombudsman service; and
2. credit ombudsman service.

Criteria for granting of the licence

Once registration occurs the next step is to apply for a licence. As a general rule, ASIC must grant the licence if the application is made in the approved form and the following requirements are satisfied:

1. ASIC has no reason to believe that the applicant is not a fit and proper person to engage in credit activities.
2. ASIC has no reason to believe that the applicant is likely to breach

licence obligations imposed on the licensee.

In this regard ASIC must be satisfied that the applicant is able to:

- (a) undertake credit activities efficiently, honestly and fairly;
- (b) comply with credit legislation;
- (c) have internal systems in place to ensure that clients are not disadvantaged by conflict of interest;
- (d) have and maintain the competence to engage in credit activities authorised by the licence;
- (e) ensure that its employees and representatives are adequately trained and are competent to engage in credit activities authorised by the licensee;
- (f) ensure that its employees and representatives are adequately monitored and supervised; and

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The New Australian Credit Licence Laws and How They Affect Development Funds

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“The National Consumer Credit Protection Act 2009 also contains responsible lending obligations”

- (g) have an internal dispute resolution system procedure that complies with standards or requirements made or approved by ASIC.

Further, the licensee must:

- (h) be a member of an approved external financial dispute resolution scheme such as the financial ombudsman service;
- (i) have adequate arrangements and systems in place to ensure compliance with its obligations;
- (j) have measures in place to ensure that there are adequate human and technological resources to engage in credit activities and undertake supervisory arrangements;
- (k) have adequate financial resources unless it is a

body such as an Authorised Deposit-taking Institution (ADI) already regulated by the Australian Prudential Regulation Authority (APRA);

- (l) unless already regulated by APRA, have adequate arrangements in place for compensating consumers, that is, a licensee must have adequate professional indemnity cover; and

- (m) except where the licensee is a body regulated by APRA, have adequate risk management systems.

Responsible Lending

The *National Consumer Credit Protection Act 2009* also contains responsible lending obligations which will be required to be adhered to by holders of Australian Credit Licences. If Development Funds obtain an Australian credit licence and make consumer loans they will need to comply with a range of obligations including:

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The New Australian Credit Licence Laws and How They Affect Development Funds

“Some of the responsible lending obligations will come into effect on 1 July 2010”

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- (1) Providing a credit guide containing information about the licensee and its obligations. This will be in a prescribed form.
- (2) Providing the customer with a credit or lease proposal disclosure document which must contain certain prescribed information.
- (3) Giving a binding written quote and disclosure document.
- (4) Assessing whether a particular credit contract is unsuitable for a particular customer and, if requested by the customer, provide a copy of this preliminary assessment in writing. The contract will be unsuitable if, at the time of the assessment, it is deemed unlikely that the customer will be able to comply with their financial obligations under the contract or could only comply with substantial hardship.

In this regard the law requires licensees to make reasonable enquiries about the consumer's financial situation and their requirements and objectives.

Some of the responsible lending obligations into effect on 1 July 2010. The obligations to provide disclosure documents, credit guides and quotes will not come into effect until 1 January 2011.

There is an extended timetable for compliance for ADIs.

Summary

If Development Funds undertake consumer credit activities, they will need to apply for an Australian Credit Licence by registering with ASIC. They will subsequently need to apply for a licence before 31 December 2010.

This will involve an examination of all internal processes including training and qualifications of personnel. There are minimum requirements for qualifications of senior personnel, but there are some transitional arrangements to enable qualifications to be gained in some circumstances.

If the consumer credit activities undertaken by a Development Fund are limited, it may need to consider outsourcing these activities or ceasing them. Some activities may be granted an exemption by ASIC, for example, loans to priests. However, these would need to be considered by ASIC in the circumstances and granted a specific exemption.

Our firm is able to advise on all aspects of the *National Consumer Credit Protection Act 2009*, including the licensing and registration process and exemptions from the Act. ■

Nancy Bramley-Moore
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Are you collecting all of your bequests?

The following is a 12 step process to assist Church agencies, congregations, parishes, schools etc (hereinafter referred to as the **Church Entity**) in understanding what legally occurs after the death of a benefactor who has left a bequest to a Church Entity. By developing a better understanding of the legal process involved, it is arguable that Church Entities will be in a stronger position to collect their bequests in a timely fashion and without any unnecessary deductions being made from the bequest.

Step 1 – Learn of death of benefactor

As difficult as it is to arrange, it is in the interests of a Church Entity to learn of the death of a benefactor as early as possible.

Step 2 – Church Entity seeks to obtain a copy of the will

Whether or not a Church Entity is, at this point in time, entitled to insist upon receiving a copy of the will depends upon the State or Territory in which the

benefactor lived. A summary of the position is set out in the table below:

Step 3 – Executor applies for Probate

Following the death of the benefactor, the executor must apply to the Supreme Court Registry for a grant of probate.

The simpler the assets and liabilities of the benefactor, the sooner the executor should be able to obtain a grant of Probate.

Step 4 – Probate is granted

The executor is now free to collect all of the assets of the estate, pay the liabilities and commence paying the legacies and distributing the estate to the beneficiaries generally.

Step 5 – Church Entity obtains a copy of the Probate, including the inventory of assets

It is of great benefit to a Church Entity to obtain a copy of the grant of the Probate (which will often also include a copy of the will and a copy of the inventory of assets and liabilities). In most jurisdictions it is possible to obtain a copy of these documents directly from the Supreme Court Registry.

State/Territory	Legal Entitlement
NSW	Yes
Queensland	Yes
Victoria	Yes
South Australia	No legislative entitlement
ACT	No legislative entitlement
Northern Territory	Yes
Tasmania	Yes
Western Australia	No legislative entitlement

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Are you collecting all of your bequests?

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Obtaining a copy of the inventory of assets will assist the Church Entity in assessing roughly how long it will be before the Church Entity is paid its bequest.

Step 6 – Executor realises the assets and pays all of the debts of the estate

After Probate has been granted, the executor will need to realise the assets of the estate and commence paying all of the liabilities. If a Church Entity is a residuary beneficiary, it will often need to wait until the assets have been realised and the liabilities have been paid before the Church Entity can receive an interim or final distribution.

Step 7 – Executor attends to taxation issues of the deceased and the estate

It is the duty of the executor to lodge tax returns on behalf of both the deceased and the estate.

Step 8 – A claim may be made against the estate under the Family Provision legislation

A claim which is made under the relevant Family Provision legislation will expend some of the assets of the estate and will inevitably result in delays in the final distribution of the estate. A Church Entity which is a beneficiary of an estate where a Family Provision claim has been made should obtain legal advice about how to respond to that claim.

Step 9 – Executor makes an interim distribution to the beneficiaries

At any point during the administration of the estate, if the executor has



calculated how much of the estate is necessary to pay out all of the liabilities (including tax) and all of the legacies, the executor should be in a position to make an interim distribution to a Church Entity which is a residuary beneficiary.

Step 10 – A commission is negotiated between the beneficiaries and the executor

An executor is entitled to apply to the Supreme Court to be allowed to deduct from the estate a commission to recompense him or her for the pains and troubles incurred by the executor in administering the estate. The earlier that a Church Entity, which is a beneficiary, reaches agreement with the executor in relation to his or her commission, the sooner that the final distribution of the estate can occur. Further, costs will not be incurred by the estate in an executor making an application for commission to the Supreme Court.

Step 11 – Executor accounts to the beneficiaries

An executor, as a trustee, must:

- (a) keep full and proper accounts of the estate property, income and outgoings; and
- (b) render these accounts when required by the beneficiaries.

Step 12 – Release and indemnity

The executor may ask a Church Entity which is a beneficiary to sign a Deed of Release and Indemnity in favour of the executor. Assuming that the terms of that Deed are reasonable, the signing of such a Deed will often speed up the final realisation and distribution of the estate.

Step 13 – Executor makes final distribution to the beneficiaries

Once all of the other steps listed above have been attended to, the executor is in a position to make a final distribution to the residuary beneficiaries of the estate. ■

Legislative Changes to the Law Governing Retirement Villages in NSW

The law governing retirement villages within New South Wales has recently undergone significant change. According to the NSW Office of Fair Trading, there are approximately 591 retirement villages scattered across New South Wales, accommodating more than 36,000 residents. The effects of the legislative changes in this area are therefore far reaching.

History

The changes to the *Retirement Villages Act 1999 (Act)* and the *Retirement Villages Regulation 2000* (now replaced by the *Retirement Villages Regulation 2009 (Regulations)*) took effect on **1 March 2010**. The changes are retrospective in nature, meaning that, unless otherwise provided for in the amended Act, these recent amendments will apply to all existing village agreements, regardless of when those agreements were entered into. In addition, the Act cannot be contracted out of, meaning that any provisions contained in a village contract that purport to exclude, modify or restrict the Act, will be void.

A Summary of Major Changes

The more salient changes that the amended Act and Regulations have introduced include:

- The requirement for a General Inquiry Document to be provided to all prospective residents (in addition to the Disclosure Statement).

- A 90 day 'settling-in period', up until the end of which residents may terminate a Licence Agreement without penalty (except for reasonable costs as prescribed in the legislation).
- Residents will be permitted to remove fixtures and make alterations to their premises with the operator's consent (which shall not be unreasonably withheld).
- A revision of the treatment of capital maintenance and capital replacement.
- Operators will be required to meet budget deficits.
- A reduction in the maximum period that an operator can continue to charge a former resident recurrent charges after that former resident has moved out or passed away.
- Introduction of a statutory charge in favour of each resident to protect their ongoing contribution.

General Inquiry Document

In addition to the Disclosure Statement, operators must now also provide a person with a General Inquiry Document within 14 days after becoming aware that a person is a prospective resident.

The General Inquiry Document is a 'watered-down' version of the Disclosure Statement. It is only required to contain

information pertaining to the village as a whole, rather than to specific residential premises. To date there is no prescribed form of General Inquiry Document contained in the new Regulations.

Settling-in period

In addition to a resident's cooling off rights (which provides a resident with a right to rescind a village contract within seven business days after entering into it), the amended Act now provides a resident with an additional 90 day settling-in period. Unlike the cooling off period, which is waived if the resident commences to live in the residential premises, the settling-in period allows the resident to occupy the premises. Before the end of the settling-in period, a resident may terminate a village contract by vacating the premises or providing the operator with written notice of his/her intention to terminate before the end of the settling-in period.

The 'end of the settling-in period' means:

- 90 days after the date on which the resident is entitled to occupy the premises;
- 90 days after the resident first occupies the premises; or
- such date as may be agreed upon by the operator and the resident.

If a resident terminates a village contract

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Legislative Changes to the Law Governing Retirement Villages in NSW

during the settling-in period, that (former) resident will only be obliged to pay:

- fair market rent for the period (if any) during which the resident occupied the premises;
- the cost of any repairs for damage to the residential premises in excess of fair wear and tear; and
- a reasonable administration fee (not exceeding \$200.00).

The 'end of the settling-in period' means the later of:

- 90 days after the date on which the resident is entitled to occupy the premises;
- 90 days after the resident first occupies the premises; or
- such date as may be agreed upon by the operator and the resident.

If a resident terminates a village contract during the settling-in period, that (former) resident will only be obliged to pay:

- fair market rent for the period (if any) during which the resident occupied the premises;
- the cost of any repairs for damage to the residential premises in excess of fair wear and tear; and
- a reasonable administration fee (not exceeding \$200.00).

Renovations and Alterations

A new section has been inserted into the Act which provides residents with the right to undertake renovations and alterations to fixtures and fittings, and to the residential premises. Whilst

the written consent of the operator is required (in most cases), the operator must not unreasonably withhold consent.

Whilst an operator cannot unreasonably withhold consent, the grant of consent can be subject to reasonable conditions. For example, the consent may be granted subject to the condition that on termination of the resident's Licence Agreement, the premises are returned to the same condition as they were in immediately before the consent was given.

Capital Maintenance and Replacement

The amended Act has clarified much of the confusion that existed in the previous Act in relation to the responsibility for *capital maintenance* versus *capital replacement*.

The operator is responsible for the maintenance and/or replacement of any item of capital within the village, other than an item of capital that is owned by a resident of the village. The amended Act has a new definition of what constitutes *capital maintenance*. Works are *capital maintenance* if they are carried out for the purpose of repairing or maintaining an item of capital. The Regulations specifically prescribe works which are *capital maintenance works* and those which are not *capital maintenance works*. *Capital replacement* has, under the amended legislation, become any works that do not fall within the definition of *capital maintenance*.

The new legislation provides that the operator may fund the cost of capital maintenance from:

- a capital works fund; or
- the recurrent charges,

and, therefore, the residents indirectly pay for all capital maintenance.

However, the operator **MUST** bear the cost of capital replacement.

The amended Act also now provides a resident with the right to carry out capital maintenance or replacement in respect of an item if it is urgent and the resident first gives the operator a reasonable opportunity to carry out either the maintenance or

Legislative Changes to the Law Governing Retirement Villages in NSW

the replacement of the item. The operator must then reimburse the resident for the reasonable costs incurred.

Deficits

A deficit is to be made good by the operator of the retirement village.

Unlike under the previous Act, an operator must now not:

- carry forward a deficit (except where provided by the Regulations*);
- request or receive from the residents any special additional payments for making good a deficit;
- increase recurrent charges for the purpose of making good a deficit (except where provided by the Regulations*);
- use any of the recurrent charges to make good a deficit (except where provided by the Regulations*); or
- use any of the capital works fund to make good the deficit.

The operator must not charge residents interest in respect of a deficit.

Recurrent Charges

A major change in the amended Act in relation to the payment of recurrent charges by non-owners (which includes

residents occupying premises pursuant to a licence agreement) is that the maximum 6 month period previously contained within the Act, following which the operator had to assume responsibility for the recurrent charges (worst case scenario), has been reduced to 42 days.

Therefore, 42 days is now the maximum period that operators can charge residents recurrent charges once the resident has vacated the premises. It may be earlier where a new village contract is entered into, or a new resident takes up residence in the premises etc.

The operator must pay the former resident's recurrent charges from the date on which the former resident's liability to pay the recurrent charges ceases until the date on which the operator enters into a village contact with a new resident.

Protection of Ingoing Contributions

Where an ingoing contribution is payable by a resident (other than a registered interest holder/owner) and all or part of that ingoing contribution is to be refunded to the resident, then upon the date on which a village contract is entered into, a charge over all the land within the retirement village is created, which charge secures the entitlement of a resident to a refund under the village contract.

This is a new section which applies retrospectively i.e. to all village contracts even if they were entered into prior to 1 March 2010. Consequently, a charge will be created in relation to all village contracts for the village.

However, this new section does not apply to any refund which does not exceed the amount prescribed by the Regulations, namely \$10,000.00. Therefore, where the amount of the refund is less than \$10,000.00, no charge over the land is created in favour of the resident.

Conclusion

We have set out above some of the major changes that the amended Act and Regulations have introduced, however this article is by no means an exhaustive list of the changes contained within the new legislation. Although not mandatory, all operators should have by now amended their village contracts so as to ensure that they comply with the new legislation. It would also be prudent for residents to familiarise themselves with the more salient changes to the legislation so that they are fully aware of their rights and obligations there under.

For more information on the changes to the legislation governing retirement villages, please contact our office. ■



** As at 20 September 2010 the Regulations do not contain any such exceptions other than deficits caused by certain maintenance expenses and certain increased costs*

Uncertainty as to the Future Financial Reporting Framework for Charities

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Given that many Church entities currently have little or no regulatory financial reporting requirements, the outcomes of the recommendations of the Productivity Commission's Research Report concerning Not-For-Profit organisations, combined with the current proposals by the Australian Accounting Standards Board (AASB) on financial reporting for Not-For-Profit entities, could have far reaching and costly impacts for church organisations.

The AASB recently released an exposure draft for comment proposing a differential framework of financial reporting for entities that are not publicly accountable, for-profit entities. Non-publicly accountable, for-profit entities and private, Not-For-Profit entities would be able to apply these reduced requirements and still be preparing general purpose financial reports. The reduced requirements would see the full application of the measurement aspects contained within the current standards, but with significantly reduced disclosure requirements.

At the same time the International Accounting Standards Board has issued an international standard, "IFRS for SMEs", which not only reduces significantly the disclosure requirements for SMEs in preparing annual financial reports, but also simplifies many of the measurement aspects. The exposure draft issued for comment by the AASB does not propose to follow this more simplified approach.

If the current AASB proposals are approved,

charities which are required to make their financial reports 'publicly' available in some form would be obligated to follow these requirements. Thus these requirements might apply to many charities now, or alternatively at some point in the future if the regulatory framework was to change. These changes are likely to have immediate implications for church entities which deal with Government in terms of funding and other arrangements. Even for church organisations which may not be required to follow these requirements, governance expectations may see a creep towards their adoption.

In jurisdictions such as the United Kingdom, where most charities have financial reporting obligations, there is a specific statement of recommended practice in place for accounting and reporting by charities which more effectively deals with their unique issues. If we were to see similar regulatory arrangements come into place in Australia, applying current Australian Accounting Standards, or the new AASB proposals, would likely result in many anomalies in financial reporting for church organisations and significantly greater cost than at present.

Given both the current and potential future impacts for church organisations of the AASB proposals, it is important that stakeholders take an active role in providing comment to the AASB on these developments.

If you would like more detail on the AASB proposals, please contact the writer. ■

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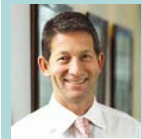
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Back issues

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

Issue 8, January 2010

- Public ancillary funds crackdown
- Are we a charity? A PBI? A DGR?
- Aid/Watch case - restricting the definition of "charitable organisations"
- The Parish Priest and the parish
- Business names or trade marks—which has more legal weight?

Issue 7, October 2009

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

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