



## Federal Budget Initiatives A change in the landscape for churches

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## Federal Budget Initiatives - A change in the landscape for churches

“The Government resolved to establish the ACNC despite submissions by Church bodies”

On 10 May 2011, the Federal Treasurer, Wayne Swan announced a range of budget measures which will have significant impacts upon activities of Churches, in some cases from 1 July 2011.

The main announcements and their potential impacts on Churches are as follows:

### Statutory Definition of Charity

The Government is once again determined to introduce a statutory definition of “charity” applicable across all Commonwealth agencies from 1 July 2013.

In the absence of a statutory definition, whether an NFP is entitled to endorsement and the resulting tax concessions as a charity is determined by the application of laws developed over 400 years through judgments handed down in the Courts.

Readers may recall that the Howard Government looked to implement a statutory definition of charity in 2001. The project was abandoned.

There was one positive sign out of that process in that the *Extension of Charitable Purpose Act 2004* was passed which did extend the meaning of “charity” by including additional groups which may have been on the borderline of entitlement to be endorsed as a charity. Importantly, one of those groups which were legislated to be charitable was “contemplative religious orders”.

Church bodies will need to closely monitor developments in this area and it is expected that the Government will issue a discussion paper shortly. It will be important to resist trends which have occurred in other jurisdictions where there have been questions raised about whether religious activities are “for the public benefit”.

### Australian Charities and Not-For-Profits Commission

The Government will establish an Australian Charities and Not-For-Profits Commission (ACNC) which will operate from 1 July 2012.

Already, the Government has established an implementation task force chaired by Robert

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## Federal Budget Initiatives - A change in the landscape for churches

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Fitzgerald who has previously been State President of St Vincent de Paul Society (NSW).

The ACNC will take responsibility for determining the status of the charities and Not-For-Profits (NFPs) and in that regard will take over the role of the Australian Taxation Office in endorsing church bodies as charities.

The ACNC will also be responsible for implementing a "report-once use-often" general reporting framework for charities and NFPs which if successful is likely to provide significant benefits to those in the sector who are required to report to a number of different Government agencies. Support by State agencies in accepting this form of report will provide even greater benefits to the sector.

The Government resolved to establish the ACNC despite submissions by Church bodies concerned about another form of regulation and its impact upon compliance costs.

It remains to be seen whether the ACNC will make life easier for Churches or add another level of complexity and administration.

### New Income Tax Arrangements

The most controversial and challenging of all announcements was that the Government will impose income tax on unrelated commercial activities of Churches (and other NFPs) where surpluses are not applied for the altruistic purposes of those organisations. This new tax

has been given the acronym UBIT (ie Unrelated Business Income Tax).

Despite the fact that UBIT has come into effect from 1 July 2011 the basis upon which it will apply is still unknown.

It is only to apply to "new" unrelated business activity (that is, business activity commenced after the date of the budget ie 10 May 2011). UBIT on those "new" activities will apply from 1 July 2011 and eventually UBIT will apply to all charities and NFPs if the relevant legislation is passed in the environment of a hung parliament.

The Government has issued a Discussion Paper which is accessible at

<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2056>

The Consultation Paper invites submissions.

Some areas of concern for Churches include:

- What will constitute commercial activities of a Church body?
- Is the sale of surplus Church property considered to be a property development and therefore a commercial activity?
- Is there a difference if the property was vacant land or if it was the sale of a disused Church for example?
- What is the position in relation to an activity which has two purposes, eg a school staff car park by day and a commercial car park by night?

- To what extent will the "passive investing" exemption apply?
- In what circumstance will a commercial activity of a Church be considered to be "unrelated"?

The Consultation Paper proposes three potential structures for conducting unrelated business activities by Churches. Each of these will involve some accounting and legal cost in the establishment as well as ongoing costs. Please refer to the article by Moore Stephens in this edition of Administry for an insight into some of the potential accounting issues.

The Consultation Paper contains some concerning examples of what may constitute a "new" activity, eg a significant change in the conduct of a pre-existing activity could convert it into a "new" activity and thereby attract UBIT.

These changes will not result in the Government obtaining any significant revenue and will come at a cost to the Church sector which will reduce funds available for charitable purposes.

The devil will be in the detail and we will keep you informed of developments.



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## Licence to Worship

Given the expense to a Church community of purchasing land and building a place of worship for ongoing worship and community activities, it is becoming increasingly common for “new Australian” Christians to use, with the consent of the leaders of the church community who owns the place of worship, other communities’ churches for ceremonies and social gatherings. Being Christian, the owning community has a tendency to be liberal about sharing space, allowing the new community to freely use church premises for the Sunday ceremony and even other events. But is this really the answer to the problem of these new communities and the church owners? What we are hearing is that problems can arise with the new community taking liberties with parking spaces, church premises and areas for social gatherings at times when the owning church community has a responsibility to provide those areas to others for baptisms, weddings and funerals themselves.

It may just be that you need to set the boundaries between the use of the premises by church owners and the newcomers in the form of a licence. A licence can deal with all



*“a document that is not signed by both parties and expressed to be the entire agreement between the parties, will provide great uncertainty during the resolution of disputes”*

kinds of issues that may present a problem to you during the course of the relationship, such as the areas that the new community are free to use, when they need to clean it, what kinds of repairs the new community need to carry out as a result of their use of the space, whether any contributions need to be made towards food and beverages that may be available in social space and, most importantly, insurance issues. Has your visiting community arranged for public liability insurance, for example? This is a question that you may well ask but it may be too late if not dealt with at the outset. And what happens if the incoming priest or pastor has important equipment lost or stolen while on the premises?

In addition to these practical questions, it is clear that the matter will not be resolved by simply sending a letter to the incoming community setting out the terms upon which they can use the premises. As a matter of contract law, it is always the case that a document that is not signed by both parties and expressed to be the entire agreement

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## Licence to Worship

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between the parties, will provide great uncertainty during the resolution of disputes in that the terms of the contract will need to be ascertained from the conduct of each of the parties. This involves taking statements from relevant witnesses just to prove what was agreed between the parties. Cases such as *Banks v Williams* (1912) 12 SR (NSW) 382 and *Wilson v Belfast Corporation* (1921) 55 ILT 205 demonstrate that upon receiving such a letter, the incoming community will not be taken to be bound by the contents of the owning community's letter if they have not informed the owning community of their decision in the matter. Contract law cases demonstrate the ambiguity of silence

on the part of the recipient of such a letter and provide that it is not always enough to justify a finding that there has been an offer and acceptance, leading to a valid contract. In this regard, we note cases such as *MSC Mediterranean Shipping Co. SA v BRE-Metro Limited* (1985) 2 Lloyds Rep 239.

In addition if it is a concern that the church community do not want to "over-legalise" the situation or to take the other community to Court, the matter can be dealt with by a carefully crafted dispute resolution clause that allows for matters to be discussed sensibly by the leaders of each community behind closed doors.

If any major works are to be carried out on church premises, you may be able to politely follow the terms of your licence to notify the incoming community of changes to access to the premises during that time. Having an agreement about this from the start will avoid any feelings of being uncomfortable about changes to the arrangements later on.

So the next time a community approaches yours with a proposal to share space, protect your community's interests and set the benchmark high in the form of a licence.



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*“problems can arise with the new community taking liberties with parking spaces, church premises and areas for social gatherings”*



# How much supervision is enough supervision?

*“The duty of care applies in the classroom, in the playground, and during sporting or recreational activities”*

The overwhelming majority of cases commenced against school authorities include an allegation that there was a breach of duty to provide any or any adequate supervision.

During those periods when the teacher and pupil relationship is in existence, it is necessary for the teachers assigned to supervision duties to closely and directly supervise children under their care and for the school authority to ensure that an adequate system of supervision is put in place to protect pupils from a foreseeable risk of injury.

The Courts have historically avoided any specific formula or directive as to how much supervision is adequate. Rather, the Courts have always stated that it depends on the circumstances of the particular case in question.

## Playground supervision

Some guidance on this point was given by the High Court in 1982 in the celebrated “flagpole case” of *Commonwealth of Australia v Introvigne* (1982) 56 ALJR 749. In this case, a 15 year old boy was skylarking with some of his friends in the school quadrangle before school was due to commence. They swung on the halyard attached to the flagpole. Without warning, the truss fastened to the top of the flagpole became detached and fell, striking Master Introvigne on the head and severely injuring him. There were about 900 pupils in the playground at the time. All members of the teaching staff except one were at a staff meeting called by the acting principal to inform the staff that the principal had died. The meeting only lasted 5 minutes during which time the accident occurred. One staff member was excused from the meeting to supervise the children in the grounds.

Justice Mason conceded that the school teachers’ duty of care does not require that 15 year old boys be kept under constant supervision and observation. However, his Honour held that “... It would be unreal to suggest

that no supervision was called for. In ordinary circumstances, supervision at that time was provided by members of the teaching staff ranging in number from 5 to 20. This provides some measure of what was considered to be appropriate ...”

By providing only one teacher, the school authority failed to provide an adequate system of supervision to ensure that Master Introvigne was not exposed to an unnecessary risk of injury. The Court found that the flagpole was a lure for children and that the risk of children incorrectly playing with it was foreseeable in the sense that it was not farfetched or fanciful.

More recently, the High Court again examined the issue of supervision in the playground in *The Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba* [2005] HCA 31. In this case, an 8 year old girl was injured while using a flying fox in a playground during a recess period. The particular area where the plaintiff was injured was supervised by two teachers. The school had in place a ‘hands off rule’ requiring the children not to touch each other during play.

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## How much supervision is enough supervision?



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This rule was regularly reinforced at school assemblies. During the morning recess, the plaintiff ascended a platform of the flying fox and took hold of the triangle in preparation to ride across to the other platform. There were approximately 40 children in the area. Contrary to the school rules, a boy and girl in Year 3 each grabbed one of the plaintiff's legs. The plaintiff struggled to free herself, and was pulled off the flying fox; her face struck the platform as she fell to the ground.

The High Court held that supervising teachers cannot be everywhere at once and that constant supervision (involving a specific commitment of staff and financial resources) goes beyond the bounds of reasonableness. The Court recognised that constant supervision of students is also likely to retard the teacher/pupil relationship by removing the element of trust. Further, the High Court held on the question of causation that a different supervision regime would have been unlikely to prevent the plaintiff's injuries.

### Sporting and recreational activities

Another important decision in the area of supervision, particularly involving sporting and recreational activities, is *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajan*

[2001] NSWCA 308. In this case, the Court of Appeal considered the liability of a Catholic school in conducting a modified game of hockey in which the plaintiff was tragically killed when accidentally struck by a hockey stick wielded by another student.

The Court of Appeal made the following observations:

- The duty is only to take reasonable care for the safety of the pupils concerned.
- A school is not absolutely liable for injuries sustained by pupils where they are under the supervision of their teachers.
- Reasonable steps should be taken to guard against foreseeable conduct on the part of children that may result in harm to themselves or others.
- Where an injury is caused by an unfortunate concurrence of circumstances that reasonable precautions could not have prevented, no breach of duty will have occurred.
- Factors such as the benefits of the game, the magnitude of the risk involved, its degree of probability, the degree of possibility of inadvertence or negligent conduct on the part of participating children, the training given to the children and their skill level, are important in determining whether reasonable steps were taken to prevent injury occurring.

### Conclusion

Supervision is a key element in the discharge of a school's duty of care towards pupils under its control. The above cases illustrate the way in which Courts interpret this duty, whether it be in the playground, classroom or during sporting/recreational activities.

It is clear that since the NSW Court of Appeal decision in *Kondrajan* in 2001, superior courts are taking a more realistic and commonsense approach towards the analysis of this duty and in particular having greater regard to the reality that school authorities cannot provide direct one-on-one supervision of pupils at all times.

The level of supervision required is such as is commensurate with the activity taking place rather than any artificial formula which applies in every situation.



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## Added complexities for Accountants from Proposed Tax Concession Changes

The Federal Government’s proposed tax concession changes for Not-For-Profits (NFPs) consider three structural options for NFPs undertaking ‘unrelated commercial activities’ under any changed regime. These are outlined in the consultation paper *‘Better targeting of not-for-profit tax concessions’* issued on 27 May 2011 by the Assistant Treasurer and Minister for Financial Services and Superannuation as follows:

Option 1 – undertaking unrelated commercial activities through a separate entity which would be taxed in an equivalent manner to other commercial activities.

Option 2 - undertaking unrelated commercial activities through a separate entity with profits retained in the entity at the end of the financial year being taxed.

Option 3 – undertaking unrelated commercial activities within the NFP entity with any element not directed to the NFPs altruistic activities being taxed.

All of these options will result in added accounting complexities and costs for NFPs and particularly in respect to the following aspects:

- The separate identification of all income, expenses, assets and liabilities of the unrelated commercial activity.

- Ensuring all transactions between the unrelated commercial activity and the other elements of the NFP are accounted for at arms length prices.
- Investing in and developing systems, procedures, controls and risk management frameworks to ensure the proper accounting for and reporting of the separate income, expenses, assets and liabilities of the unrelated commercial activity.
- Evaluating the nature and level of reporting requirements that might apply to the separated entity or division including the application of all relevant accounting standards.
- The preparation of separate financial reports for the entity or division.
- Dealing with the significant complexities of accounting for taxation under the Australian Accounting Standard, AASB 112 ‘Income Taxes’, being one of the more complex standards within the current financial reporting framework.
- Accounting for the tax and other consequences of joint venture/control type arrangements.
- Funding of and accounting for the payment and recovery of tax in situations where it is ultimately refunded to the NFP from the receipt of franked dividends.

*“All of these options will result in added accounting complexities and costs for NFPs”*



These requirements will not be capable of being addressed by most NFPs without incurring significantly greater costs. Given that in many cases there may be no ultimate taxation consequences due to the use of all surplus funds for altruistic purposes, these added costs of compliance may see no public benefit, with the only

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# Added complexities for Accountants from Proposed Tax Concession Changes

*“These requirements will not be capable of being addressed by most NFPs without incurring significantly greater costs”*

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consequence being the loss of the NFP’s resources for altruistic purposes.

The options set out in the consultation paper do not promote any particular form of entity into which the unrelated commercial activity might be separated. Most of the current regimes available for the creation of such an entity would see additional financial reporting requirements for the NFP on top of the taxation consequences. If this is not intended it will be important for the Government to rethink these proposals in their ongoing deliberations.

Many NFPs are currently structured in a form that would see it being highly problematic, if not extremely unrealistic, to separate from an accounting perspective ‘unrelated commercial activities’ as the concept is set out under these proposals. A more practical approach would ensure that unrelated commercial activities are defined so as to exclude the majority of activities where the funds are ultimately used for altruistic purposes, thus avoiding much of the accounting cost burden for NFPs.

In summary these tax proposals, if implemented in the manner set out in the consultation paper, will have major accounting implications for NFPs even if the ‘unrelated commercial activity’ is ultimately not taxable. These implications will not come without a cost burden for the Charity Sector thus reducing the funds available for

altruistic purposes, with in many cases no added public benefit.

If you would like any further advice on any of these aspects please contact the writer.



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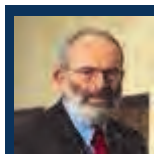
# Administry

Issue 9

Assisting in the administration of your ministry

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## Back issues

All issues of *Administry* are available online at [www.makdap.com.au](http://www.makdap.com.au). Articles in the last two issues include:

### Issue 8, April 2011

- Clarification of Discrimination Exemption for Religious Organisations
- Important Reminders with Impending FBT Return Lodgements
- Children's Corner

### Issue 7, November 2010


- New Australian Credit License Laws
- Are you collecting all your bequests?
- Changes to the Retirement Villages Act
- Uncertainty as to the Future Financial Reporting Framework for Charities

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