Church Matters

Issue 10

Legal and tax affairs for church administrators

April 2011

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PJP Inc

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PJP Inc

Our firm has observed some momentum for the establishment of Public Juridical Persons (**PJPs**) particularly by religious congregations for the ongoing ownership, management and control of some of their ministries. This trend is evident particularly in the health aged and community care sector and the education sector.

The establishment of new PJPs has implications in civil law as well as Canon Law 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.

Our issue of *Church Matters* in July 2008 contains articles by Father Ian Waters, Canon lawyer, and Bill d'Apice of this office concerning the establishment of PJPs and some practical civil law issues in establishing PJPs. It may be helpful to review those articles which can be found at: http://www.makdap.com.au/docs/Church%20Matters%20-%20issue%2021.pdf .

"appropriate to review incorporation options"

There have already been a number of PJPs which have been established and we note that a number of them have used different civil law corporate structures to act as trustee for the new PJP.

In light of these different choices and in response to requests from some clients, we thought it would be appropriate to review incorporation options that are available to canonical bodies looking to establish PJPs and to discuss their advantages and disadvantages.

The principal options are as follows:

1. A company limited by guarantee

Public companies limited by guarantee are incorporated under the Commonwealth *Corporations Act* 2001. This option is available throughout all states and territories.

This is the typical vehicle used by charities and Not-For-Profit organisations, particularly those whose operations extend beyond a single State or Territory.

In this type of company, there are no shareholders but rather members agree to contribute a specified amount in the event that the company is wound up.

The principal benefits in establishing a company limited by guarantee are the ease of using the structure throughout the Commonwealth of Australia and the ready recognition of this form of legal entity in the general commercial world.

This structure also provides the greatest legal protection for the member. The liability of a member is generally limited to a nominal sum.

The disadvantages include significant responsibilities placed upon directors of companies under the *Corporations Act* 2001, the need to file accounts and annual returns with the Australian Securities and Investments

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Commission (**ASIC**), the supervision of the company by ASIC and the need to file regular notifications to ASIC in the event of a change of directors or secretaries.

2. Incorporated Association

It is possible to incorporate under Associations Incorporation Acts in each State and Territory. The activities of such an incorporated association are monitored and governed by the relevant State or Territory government rather than the Commonwealth.

The advantages of incorporation are similar to those for a company limited by guarantee but, in addition, the cost of establishing an incorporated association is considerably less than for a company limited by guarantee.

However, an incorporated association has similar disadvantages to that of a company limited by guarantee. Also, the activities of an incorporated association are generally limited to operation within the State or Territory of incorporation.

In addition, the State and Territory Acts were not designed with the intention that significant asset holding associations would incorporate under that legislation. The legislation is intended to provide a vehicle for smaller community, Not-For-Profit and sporting bodies to be incorporated.

In some circumstances, incorporation under the local *Associations Incorporation Act* will be appropriate for a church body, particularly where activities are limited within a State or Territory or where specific legislation relating to incorporation of church bodies does not exist in that jurisdiction.

3. Specific Church Legislation

In a limited number of States and Territories, it is possible to incorporate entities under legislation that applies specifically to church bodies. An example of this is the *Roman Catholic Church Communities Lands* Act in New South Wales.

To achieve incorporation under that Act, it is necessary to satisfy the local bishop that the particular *"order,*

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congregation, community, association or society" constitutes a community within that Bishop's diocese. It is then necessary to request the Governor to incorporate the entity.

It is necessary for a PJP to have a site or house in New South Wales (whether as owner, lessee, licensee, etc) from which it conducts activities. Such an entity can operate outside the territory of New South Wales but, in that case, must register and comply with certain provisions of the *Corporations Act*.

Once incorporated, the day-to-day governance of the incorporated entity is much simpler and the entity is more flexible in its operations than companies limited by guarantee or incorporated associations.

An entity incorporated under "*church legislation*" does not have to comply with the *Corporations Act* (unless operating in different states as indicated above) and there is therefore no need to file regular returns or statutory accounts.

Companies limited by shares are generally inappropriate for church entities except where required by Government regulators, eg Catholic Church Insurances Ltd.

"Organisations considering incorporation should take professional accounting and legal advice (canonical and civil)"

Post-incorporation

Once incorporated, a legal entity has perpetual succession; it can enter into contracts; and it can sue and be sued in its own name. It can also provide limited liability in certain circumstances and, where it does, it provides significant protection to church bodies and members against personal liability.

Once incorporated, there are a number of housekeeping matters which would need to be attended to including obtaining Australian Business Numbers, seeking endorsements as tax concession charities and/or deductible gift recipients, seeking membership of the Catholic Church Religious Group and other general governance matters.

Organisations considering incorporation should take professional accounting and legal advice (canonical and civil) to ensure that the proposed entity is appropriate and will achieve the intended outcome in furthering the mission of the church organisation.

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Clarification of Discrimination Exemption for Religious Organisations

The Court of Appeal clarified "the circumstances under which a religious organisation … can rely on section 56 of the Act as a defence to a claim for unlawful discrimination"

Background

New South Wales courts and tribunals have recently handed down decisions providing guidance to religious organisations in relation to exemptions from anti-discrimination laws.

In 2002, OV and OW, partners in a same sex relationship, sought to be authorised as foster carers by an agency of the Wesley Mission. They were informed that an application from them would not be accepted because of their relationship as a homosexual couple. The claimants sought to challenge that refusal claiming that it contravened the prohibition against discrimination on the grounds of homosexuality and marital status under the *Anti-Discrimination Act* 1977 (NSW) (**the Act**).

The Wesley Mission sought to rely on the general exemption for religious bodies in section 56 of the Act.

In 2008, the Equal Opportunity Division of the Administrative Decisions Tribunal upheld the complaint on the ground of sexuality but not on the ground of marital status. The Wesley Mission appealed from this decision to the Appeal Panel of the Administrative Decisions Tribunal. The Appeal Panel set aside the decision and remitted a number of questions to be heard and decided again by the Equal Opportunity Division.

OV and OW appealed against the decision of the Appeal Panel. In the course of its judgment, the Court of Appeal was called upon to clarify the circumstances under which a religious organisation such as Wesley Mission can rely on section 56 of the Act as a defence to a claim for unlawful discrimination.

In summary, section 56(d) provides that nothing in the Act affects any other act or Practice by a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Court of Appeal Decision

In the course of considering the operation of these exemptions, the Court of Appeal made the following observations:

- Section 56(d) does not permit the doctrines of part of the relevant religion to be examined rather than the doctrine of that religion taken as a whole.

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- It is not necessary for a religious body to prove that all the adherents of that religion may have their religious susceptibilities infringed – although the Court stated that it is a mistake to try and identify quantity or number, beyond saying that the adherence must be a significant proportion of the group, such that the phrase as a matter of fact is satisfied.

- The correct approach to the construction of section 56(d) is not to take individuals words in isolation and ask whether each is used in its ordinary meaning but to address the structure of the provision as a whole.

- In the first limb of section 56(d) "*established*" is not used strictly in the past tense but is used to ascertain whether the acts or practices conformed to the doctrines being adhered to by their religious body at that time, even if those doctrines have evolved or changed since the body was first established.

- There is no basis in section 56 for an inference that Parliament intended to exempt from the operation of the Act only those acts or practices which formed part of the religion common to all Christian churches, or all branches of a particular Christian church, to the exclusion of variance adopted by some elements within a particular church.

- The correct approach is the identification of the religion that the subject body, in this case Wesley Mission, was established to propagate. It is then necessary to ascertain whether the act of that religious body for which exemption is sought, conforms with the doctrines of that religion. If that is the case, then the religious body must go on to establish that the religious susceptibilities of adherents of that religion might be infringed if the particular act called in to question (that is in this case to allow a homosexual couple to be approved as foster parents) might be infringed.

"The decision has wider ramifications for religious institutions than merely its arrangements in relation to foster carers"

- There was a lack of procedural fairness by the Equal Opportunity Division to Wesley Mission by relying on the definition of "*doctrine*" in the Pocket Catholic Dictionary which was of uncertain origin and reliability.

The Court of Appeal did not finally determine whether or not Wesley Mission was protected by the exemption in section 56(d). The reason was that this was a factual matter which must be determined by the Equal Opportunity Division of the Administrative Decisions Tribunal. Accordingly, the matter was remitted back to that division for determination taking in to account the observations made by the Court of Appeal to guide the division in that process.

Administrative Decisions Tribunal

Following the guiding principles enunciated by the Court of Appeal, the matter was considered afresh by the Administrative Decisions Tribunal.

The Tribunal considered detailed evidence put forward by the Chief Executive Officer and in-house lawyer of Wesley Mission amongst others.

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In summary, that evidence set out the history of Wesley Mission; the relationship between Wesley Mission and the Uniting Church; the way in which Wesley Mission theology was implemented in practice; Wesley Mission's approach to homosexuality generally; and Wesley Mission's approach to homosexual foster carers.

Having considered that evidence, the Tribunal was satisfied that the refusal to consider an application to authorise a same sex couple to foster a child conformed at that time to the doctrines of the religion which Wesley Mission was established to propagate.

Further, the Tribunal found that the act of not providing an application to become foster carers by Wesley Mission was necessary to avoid injury to the religious susceptibilities of the adherents of the faith.

That being the case, the defence set out in section 56(d) was satisfied and the complaint was dismissed.

The Tribunal made no order as to costs. That meant that after seven years of litigation, the parties were put to enormous expense in seeking to justify their respective positions and having ultimately succeeded, Wesley Mission was not granted a costs order in its favour.

Implications for Religious Organisations

The decision of the Court of Appeal provides further clarification in relation to the proper interpretation of section 56 of the Act.

It is apparent that the proper construction of that section will vary from case to case depending on the particular circumstances. It is also apparent that the section is not as straightforward as might appear at first blush in assisting religious organisations seeking exemption from discriminatory acts.

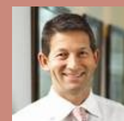
"Having considered the evidence, the Tribunal was satisfied … and the complaint was dismissed"

The Court of Appeal has made it clear in the Wesley Mission case that whether or not a religious organisation can avail itself of the exemption in section 56(d) is a complex factual question which must be thoroughly examined by the particular court or tribunal.

It is necessary in such proceedings for a religious organisation to lead evidence and establish the following:

- That it propagates a particular religion.
- What its particular doctrines might be.
- What the religious susceptibilities of adherents of that religion might be.
- That the particular act in question which is otherwise discriminatory is exempt because it has satisfied the above elements.
- The history and structure of that religious organisation.
- The aims and objects of that religious organisation.

The decision has wider ramifications for religious institutions than merely its arrangements in relation to foster carers. In particular, the decision of the Court of Appeal is sufficiently wide as to provide guidance for all religious institutions seeking to utilise the exemption under section 56(d) of the Act.



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Important Reminders with Impending FBT Return Lodgements

Fringe Benefits Tax (**FBT**) returns preparation season is now upon us and this is a timely reminder of potential traps for FBT-exempt and rebatable employers when completing the FBT return.

The issues below may affect both exempt benefits (whether the capping threshold is $17,000 or $30,000 per employee) and rebatable employers (such as religious institutions).

Trap 1: Disclosure requirements for FBT-exempt employers

These are different to those for most employers, specifically:

- Where the relevant capping threshold has been exceeded for an employee, only item 13C (aggregate non-exempt amount - hospitals, ambulances, public benevolent institutions and health promotion charities only) must be completed with the aggregate grossed-up value of benefits in excess of capping amounts. Many exempt entities incorrectly disclose figures in items 13A and/or 13B (aggregate amount).

- Where a capping threshold has been exceeded for an employee, item 22 (aggregate non-exempt amount - hospitals, ambulances, public benevolent institutions and health promotion charities only) requires the disclosure of the total value of taxable benefits provided (with the exception of benefits to be excluded from the capping amounts noted above, including meal entertainment, entertainment facility leasing expenses and car parking benefits).

[The references above are to the 2010 FBT return as the 2011 FBT return is yet to be released by the ATO.]

Trap 2: The payment or reimbursement of an employee's car parking expenses and grocery bills are not excluded from the concessional caps

The payment or reimbursement of an employee's car parking expenses is an expense payment fringe benefit, and is to be distinguished from an employer providing a car parking benefit. The taxable value of car parking benefits are excluded from the concessional cap.

Similarly, the payment or reimbursement of an employee's grocery bill is an expense payment fringe benefit, and is to be distinguished from the provision of meal entertainment. The taxable value of meal entertainment is also excluded from the concessional cap.

Trap 3: Reportable Fringe Benefit Amount requirements mutually exclusive to lodging requirements for FBT returns

All employers (including FBT exempt and rebatable employers) are required to include a value for reportable fringe benefits on the employee's payment summary where the notional taxable value of reportable fringe benefits received by an employee during the FBT year is more than $2,000. Accordingly, it is possible to have reportable fringe benefit amounts without having to complete a FBT return.

We hope the above will be of assistance to you in preparing your 2011 FBT returns.

"A timely reminder for potential traps for FBT."

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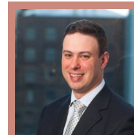

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Children's Corner

Three significant bills have passed through the New South Wales Parliament recently which will affect regulation of early childhood education in New South Wales. Some of the changes that the legislation brings will affect early education providers and others will affect teachers of children over the age of six and after school care.

New National Law

The *Children (Education and Care Services National Law Application) Act* 2010 will adopt the Education and Care Services National Law which is set out in the Schedule to the *Education and Care Services National Law Act* 2010 of Victoria. The National Law gives effect to the agreement endorsed by the Council of Australian Governments in December 2009 to establish a jointly governed, uniform national quality framework and facilitate the introduction of a national quality standard.

"changes will affect early education providers and teachers of children over the age of six "

The new law will provide a national approach to regulation, assessment and quality improvement for early childhood education and care and outside school hour's care. It will replace existing separate licensing and quality assurance processes for pre-school, family day care and outside school hours care. It will also establish a public rating system for education and care services. As the law is part of a uniform law strategy across Australia, the other states and territories participating in the national licensing scheme need to enact their legislation before this Act will entirely commence in New South Wales. Affected schools should therefore contact their lawyers to ascertain whether the provisions about which they may be concerned have yet commenced.

The National Law will be known as the *Children (Education and Care Services) National Law* (referred to in this Article as the National Law).

"… financial assistance is available to certain carers "

The Victorian Act states that the principal objective of the legislation is to establish the National Quality Framework and the Australian Children's Education and Care Quality Authority to oversee its administration. It provides a role for regulatory authorities in approving persons and services that provide education and care, monitoring compliance with the National Law and assessing and publically rating services against a new national quality standard. Some new offences are created by the legislation which are intended to ensure the health, safety and well-being of children and the operation of the National Approval System. The legislation provides for the tools that the regulatory authority may use to ensure compliance with the National Law and is intended to ensure the safety, health and wellbeing of children attending education and care services. The legislation also establishes the Australian Children's Education and Care Quality Authority Fund, reporting requirements, legal proceedings and providing for the development and commencement of national regulations.

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Voluntary Out-of-Home Care

The *Children and Young Persons (Care and Protection) Act* 2010, which has fully commenced, makes provision in respect of voluntary out-of-home care. Out-of-home care does not include private arrangements between parents for the care of their children after school. This new Act clarifies that financial assistance is available to certain carers and provides for probity checks on persons involved in the provision of children services, clarifies the power to take photographs and other recordings during the removal of a child or young person from any premises or place, provides that certain decisions about permanency plans for children and young persons are not reviewable by the Administrative Decisions Tribunal and other minor amendments.

Report to the Department of Community Services

The Act also provides that the report that a teacher makes in relation to a child's health or wellbeing, which may result in a report to the Department of Community Services, can be

"this may have the effect of causing teachers not to report serious incidents reported by children"

admissible only in the following proceedings:

- care proceedings in the Children's Court;
- proceedings in relation to the child or young person under the *Family Law Act* 1975 (such as those related to divorce proceedings);
- proceedings in relation to the child or young person before the Supreme Court of the Administrative Decisions Tribunal;
- proceedings before the Victims Compensation Tribunal or the Guardianship Tribunal; and
- proceedings under the *Coroners Act* 2009.

The disclosure of the identity of a person who makes a report (such as a teacher) will not be prevented if it is disclosed in connection with the investigation of a serious indictable offence or reportable conduct alleged to have been committed or done against a child or young person. Unfortunately, this may have the effect of causing teachers not to report serious incidents reported by children.

Licensing Regime Change

The *Children and Young Person (Care and Protection) Amendment (Children's Services) Act* 2010, which is also fully enforced, replaces the previous licensing system for children's services, provides for a more extensive range of investigation and enforcement powers in connection with the regulation of children's services and improves access to information about children's services.

Children's services are services that provide education or care (or both) for one or more children under the age of six years who do not ordinarily attend school.

Under the new provisions, the Director General of the Department of Human Services will be able to issue service provider licenses, children service approvals and supervisor approval. A service provider licence will authorise licensees to provide children services, no longer being tied to the premises at which services are to be provided or the authorised supervisor. Children service approvals will authorise the operation of a particular children service. Supervisor approvals will authorise a person to supervise the operation of any specified children service. No doubt this will have impacts on documents that schools require their licensed

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providers of care for children under the age of six years to provide before leasing premises to them.

Investigation and Enforcement Powers

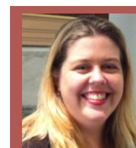
The Director General will be able to require persons who are providing children's services to provide records kept in connection with those children's services to the Director General and to answer questions. New offices are also created by this act.

Children's Services Register

The Director General will be required to keep a children's services register to record the following information about children's services:

- particulars of the children's service approval;
- the name and address of the licensed service provider;
- particulars of the service provider licence;
- the name of any person who is an authorised supervisor;
- particulars of the supervisor approval; and
- particulars of any enforcement action taken against the licensee or an authorised supervisor.

For more information on the changes to the legislation governing early childhood education, please contact our office.



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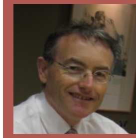

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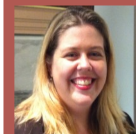

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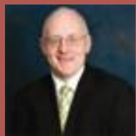

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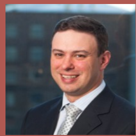

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Back issues

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

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

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?

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