IMPLICATIONS OF CANON LAW FOR
CHURCH ORGANISATIONS OPERATING
IN AUSTRALIA

JOHN E DATE OAM

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ABSTRACT

In addition to the civil laws which are relevant to the operation of Catholic schools and hospitals in Australia, the laws of the Church itself, known as canon law, must also be taken into account. Canon law is derived from a formal code promulgated in 1983, and from canonical jurisprudence which has evolved over many years.

The thesis examines that part of the code which deals with the need to safeguard and protect Church property, sometimes referred to as ecclesiastical goods. Church property comprises such tangible assets as are owned by public juridic persons. ‘Public juridic persons’ are recognised canonical statutory bodies within the Church and they include all dioceses throughout the world, all parishes, all religious institutes and the administrative body of the Church itself, known as the Holy See.

Book V of the code sets out several important requirements for the administration of Church property, one of which is that ownership of Church property should be ‘protected by civilly valid methods’. This has been interpreted to mean that trading entities such as schools and hospitals should be incorporated as civil legal entities, separate from the canonical public juridic person that sponsored them. Incorporation also happens to be a useful corporate structure in the civil sense because it helps to protect the parent from liability for the torts and contractual obligations of the subsidiary.

The code defers to civil law in most respects, but only to the extent that the civil laws are not contrary to canon law. It is in the area of the civil incorporation of a Catholic school or hospital that the two legal systems overlap. The canon lawyers believe that an incorporated subsidiary is still part of the totality of the public juridic person, and that consequently the assets of the subsidiary are owned in canon law as Church property, by the public juridic person. As a result, the canonists suggest that if a school or hospital does become separately incorporated, the parent should reserve sufficient powers to itself to be able to fulfil its canonical obligations to safeguard and protect such Church property as may be involved.

The thesis points out that incorporation per se does not necessarily guarantee that the Church property is properly protected. In some circumstances a civil court may ignore the separate entity doctrine and pierce the corporate veil. Therefore the corporate charter of the operating entity must be drafted in such a way as to afford the parent a sufficient degree of control to fulfil its canonical obligations, while at the same time endeavouring to ensure that there can be no interference from the civil courts.

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Declaration

I certify that this thesis is my work alone, except where due acknowledgement is made in the text, and does not include material for which any other university degree or diploma has been awarded.

Name: John Edward Date

[Signature of Candidate]

Date: 15th April 2008
# IMPLICATIONS OF CANON LAW FOR CHURCH ORGANISATIONS OPERATING IN AUSTRALIA

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INTRODUCTION

In Australia there are many Catholic Church organisations that own property and carry on trading operations. In every State there are Catholic dioceses, there are Catholic parishes within those dioceses and there are religious institutes. Between them they conduct numerous community based operations including schools, hospitals, social welfare agencies and aged-care facilities.

Roman Catholics in Australia constitute the largest single religious group, representing 26.6% of the total population.\(^1\) The Church itself in Australia is the biggest non-government employer, employing some 180,000 people. It is also the largest property owner.\(^2\) Church entities own and operate 1700 schools, 65 hospitals and more than 485 aged-care homes and hostels.\(^3\)

Worldwide, the Roman Catholic Church operates in 235 countries and has 1.3 billion followers, making up 21% of the world's total population.\(^4\)

It is self-evident that for Church organisations to operate in a country such as Australia, they must, like everyone else, comply with the laws of that country. But in addition to the many civil laws which will be relevant to the operation of Church organisations, these bodies are also required to take account of the laws of the Church itself, known as canon law. For Church organisations that own property or carry on a business, such as a school or hospital, canon law has significant

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\(^2\) Adele Ferguson, 'Inside the Catholic Church' (March 2005), Business Review Weekly 47.

\(^3\) Ibid.

implications, particularly with reference to the protection and safe-guarding of Church property.\(^5\)

Catholic Church authorities in English speaking common law countries that have reasonably comparable corporate laws, such as Australia, the United Kingdom, Canada and the United States, have developed a canonical jurisprudence regarding the protection of Church property which is generally shared. Most of the material has originated in America or Canada and, consequently, almost all of the resource material available in the area of incorporation and ownership of Church property is based on the American and Canadian experience.\(^6\)

This thesis contributes by applying and modifying, where necessary, these works in the Australian context.

Taking the canonical jurisprudence into account, this thesis will examine whether it is possible for a Church organisation, in creating a civil corporate entity either for the ownership of property or as a trading operation, to observe the canon law requirements relating to the preservation of Church property, while at the same time complying with civil law.

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\(^5\) When referring to the protection and safe-guarding of Church property, the thesis deals with the protection of the ownership of property and the way in which the title to property should be held. The thesis does not deal with protection of property in the sense of repairs, maintenance and insurance.

\(^6\) Numerous articles on the protection of Church property have appeared over the years in both *The Jurist*, the journal published by the Canon Law Society of America, and *Studia Canonica*, the Canon Law journal published by Saint Paul University, Ottawa. On the other hand very little has been written specifically for the Church in Australia; since 1983 when the code was promulgated, only three articles have been written on the subject of Church property for the magazine of the Canon Law Society of Australia and New Zealand. In 1988 a Canadian author, Fr Francis Morrisey, wrote an article entitled 'Ownership of Church and Congregational Property and Its Implications for Leadership'. (Francis J Morrisey, 'Ownership of Church and Congregational Property and its Implications for Leadership' (1988) *Canon Law Society of Australia and New Zealand*) An Australian, Fr Rodger Austin published an article entitled 'Temporal Goods Within the Church - Some Canonical Reflections' for the magazine in 1992 (Rodger J Austin, 'Temporal Goods within the Church' (1992) *Canon Law Society of Australia and New Zealand*). He wrote a further article in 1997 called 'Canonical Perspective on Diocesan Development Funds' (Rodger J Austin, 'Canonical Perspective on Diocesan Development Funds (1997) *Canon Law Society of Australia and New Zealand*). The latter article is not really concerned with the canonical aspects of the preservation of Church property as such. It was written to illustrate that a Diocesan Development Fund (a fund established to receive money on loan from the Catholic population) would be less vulnerable to sex abuse claims if the assets were held by more than one incorporated body. As a consequence of the lack of local material, the jurisprudence relied upon by religious institutes in Australia and New Zealand is based almost entirely on the American and Canadian experience.
The expression 'civil law' in the context of this thesis refers to the law other than canon law, i.e. the secular law of the various states and governments around the world. To legal practitioners, the expression 'civil law' has another meaning, as an area of law which is the non-criminal body of law within the system. However, in referring to 'civil law', the 1983 code refers to the secular laws of states and governments both civil and criminal.

The two legal systems are compatible in most respects, with canon law expressly accepting the civil jurisdiction in contractual and commercial matters; in some areas cannon law does not have its own rules and expressly defers to civil laws.\(^7\) It defers, however, only to the extent that the civil laws are not contrary to canon law; when the civil law conflicts with canon law, the latter prevails.\(^8\)

But there are, nevertheless, areas where the two systems are at odds: 'Individually, each of these laws is relatively straightforward; however when they overlap the result can be confusing.'\(^9\)

**Canon Law**

Canon law is the body of laws and regulations developed by the Roman Catholic Church for the government of the Church and its members. It is not a moral code or a theological code; it is a system of rules which provides the framework for the administration and governance of the Church's structures.\(^10\) The Church is a worldwide organisation which is made up of the central administration based in

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7. Canon 1284–§2.3. Reference in this thesis to a 'canon' is a reference to a canon contained in *Codex Iuris Canonici, Ioannis Pauli II, promulgatos* (1983).

8. Canon 22: 'Civil laws to which the law of the Church yields are to be observed in canon law with the same effect, insofar as they are not contrary to the divine law and unless canon law provides otherwise'.


10. Although the canon law is an administrative code, rather than a moral or theological code, nevertheless there is a relationship between canon law and theology. For a system of laws to be authentic and of practical use, it must represent a system of values i.e. the structure of laws must be for the ultimate benefit of community values and public order. See James A Coriden *An Introduction to Canon Law* (1990) 4.
Rome and, at the local level, dioceses, parishes and religious institutes. The Catholic trading operations such as schools, hospitals, social welfare agencies and aged-care organisations are all owned and operated either by a diocese, a parish or a religious institute.

The Church developed a legal system in its earliest days because, like any other organisation, club, association or community, some rules and regulations were necessary for the orderly conduct of daily affairs. Without appropriate laws the basic structure of an organisation such as the Church would have foundered and inevitably collapsed. The legal system in the Church today is the result of 2000 years of gradual development and it has played a vital role in preserving good order and stability in the Church for most of those years.

The history of the civilisation of Western Europe and the growth of canon law are closely linked; in fact in the early 300s, when Constantine became a Roman Emperor, the laws of the State and the laws of the Church went hand in hand. Thereafter until the Middle Ages the Church was as dominant as the State in the lives of its citizens and it exercised authority over almost every aspect of life at that time relating to religious beliefs and morality. Potter’s *Historical Introduction to English Law* notes that the number and variety of ecclesiastical courts were considerable and that they exercised a jurisdiction which played a significant part in the development of the English legal system.\(^{11}\) The rules of canon law, like the English common law, evolved over time in accordance with the needs of the day, the prevailing culture and the demands on the administrative processes.

Until 1917 the canon law consisted of collections of decrees, texts, treatises, learned discourses, papal writings and the like. It was then codified for the first time following 13 years of preparation and drafting, bringing with it clarity and order that had never before been available.

In 1963 at the beginning of the Second Vatican Council, Pope John XXIII appointed a commission of cardinals to carry out a further review to update the law for the

\(^{11}\) Harold Potter, *An Historical Introduction to English Law and Its Institutions* (2nd ed, 1943) 186. Appendix A of this book sets out details of the influence of canon law in English legal history.
modern world. This resulted in the second codification of 1983, which has further refined and simplified the law of the Church.\(^\text{12}\)

The history and background of canon law is relevant to this thesis because, although the law was codified initially in 1917 and again in 1983, much of the law of the Catholic Church which is relevant to the incorporation of schools and hospitals and to the protection of Church property comes not from the code itself but from the jurisprudence which has evolved over a long period of time.

Canonists need to be able to look back beyond the 1983 code to understand the principles on which the code is based. They are actually asked by the code itself to take the overall context into account when interpreting the code:

> Ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purposes and circumstances of the law, and to the mind of the legislator.\(^\text{13}\)

The canonical tradition holds in high regard not only official interpretations by legislators, judges and administrators, but also the private interpretation of canon law by scholars, known as doctrinal interpretation.\(^\text{14}\) The 'circumstances of the law' are the relevant historical facts about the matter in question and the factors which led to the creation of the law. Investigation of these circumstances would take the interpreter into the field of history, especially Church history, and include the political, social and ecclesial factors plus other influences relevant to the making of the law.\(^\text{15}\)

When determining canon law requirements for the safeguarding of Church property, the 1917 Code, the 1983 Code and both official and private interpretations of canonical jurisprudence must all be taken into account.

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\(^{12}\) *Codex Iuris Canonici, Ioannis Pauli PP II, (1983)* (hereinafter cited as 'the code').

\(^{13}\) Canon 17.


\(^{15}\) Ibid 74.
Civil Structures

Until comparatively recent times, most religious and charitable organisations in Australia carried on their work in a format which could be described legally as 'unincorporated associations' and, until the 1960s and 1970s, this format proved to be quite adequate to suit the purpose. All of the Catholic hospitals were owned and operated by religious institutes, whereas Catholic schools fell into two categories: those operated by the Church itself as parish schools and regional schools, and those privately owned and operated by the religious institutes. In a typical non-parish, privately owned school the principal was a sister, brother or priest belonging to the religious institute; most of the teachers were religious personnel; assets such as the real estate were held in the names of trustees on behalf of the unincorporated religious institute; and the employer of any lay staff was either the principal, or in some cases, the provincial (leader) of the religious institute. This type of structure existed for many years and during this time little attention was given to the business aspect of the operation, as evidenced by the situations which emerged years later where titles could not be found or where it was discovered that the title stood in the names of trustees who could no longer be contacted.

In the early 1980s, a number of Catholic schools and hospitals began to take on corporate structures, a process which was assisted and encouraged by a book published in 1984 by James Gobbo, a Justice of the Supreme Court of Victoria and a respected Catholic layman. The book was designed specifically to facilitate the decision making process for religious groups in the incorporation of their apostolic works and it highlighted the many advantages of civil incorporation. As the corporatisation of apostolic works became more accepted by the religious institutes, only brief attention was given to the canonical effects because the new code was not promulgated until 1983 and it then took a number of years for its effects to be felt. It was not generally known at that time that, in the process of civil incorporation, there were strict canonical rules also to be observed.


Overview of Thesis

Catholic organisations operating in Australia need to observe both canon and civil rules of law, which can sometimes lead to uncertainty with regard to the administration of Church property. The potential conflict between the two rules of law comes about in the process of setting up a Church organisation as a civil incorporated entity. The canonical jurists claim that the assets of the incorporated body are still the property of the original Church entity. As such, they must be under the control of the Church entity, notwithstanding that the members and the directors of the incorporated body are, in civil law, independent of the Church organisation and notwithstanding that the responsibilities and duties of the members and directors are governed by civil law.

Experience in America has shown that, following corporatisation, some religious institutes lost 'control' of the new entity, and in doing so lost their ability to comply with canon law obligations that require a religious institute to retain ownership of any Church property involved.\(^\text{18}\)

In Australia the number of priests, brothers and sisters involved in the operation of schools, hospitals, social welfare agencies, aged-care facilities and other not-for-profit type organisations has diminished considerably in the last two decades, which means that if the apostolic works are to continue on into the future they must, of necessity, be administered by lay (non-religious) people. Proper legal structures will need to be established to accommodate a partnership with lay administrators. At the same time, however, the canon law requirements must still be respected because those ongoing corporate structures will, in many cases, involve Church property.

This thesis attempts to provide in chapter 1 an historical background of the Church and the development of canon law, which is a pre-requisite to a proper understanding of how the code of canon law operates in parallel with the body of canonical jurisprudence that has evolved over the centuries.

\(^{18}\) See footnote 54 on page 54.
Chapter 2 deals with those aspects of Book V of the code which legislate for the protection of Church property. When a religious institute arranges for the separate incorporation of a school or hospital, the concept of protecting Church property is the fundamental consideration. Chapter 2 provides an understanding of what constitutes 'Church property' and how it should be protected; it also deals with the jurisprudential material affecting the concepts of alienation and stable patrimony, that are relevant to the definition of Church property. Ultimately, it is the responsibility of the canonical stewards to translate these canon law concepts into a civil law structure.

Australian laws that are relevant to the incorporation of not-for-profit organisations are examined in chapter 3. These organisations may become incorporated either as a company under the Corporations Act 2001 (Cth) or as an incorporated association under the various States' incorporated associations legislation. In addition to the legislation available for companies and associated incorporations, there is special legislation for the incorporation of Catholic organisations in most States and Territories. Chapter 3 also outlines the advantages and disadvantages of carrying on business as an incorporated entity and it compares the company structure against the format of an incorporated association.

The proposition that certain assets might be owned in canon law by one entity and in civil law by another entity will, obviously, lead to a conflict between the two legal systems and consequently, ways and means need to be developed to harmonise the interests of the religious institute under canon law and the civilly incorporated entity. Chapter 4 presents the possibility of structuring an incorporated entity in such a way as to allow the religious institute to protect its canonical ownership rights over the relevant property. However care needs to be taken so that creditors are not able to 'look through' the incorporated entity and thus seek redress from the religious institute. Chapter 4 suggests ways of affording a religious institute the control it needs over a subsidiary while at the same time keeping the corporate veil intact. Effective control over an incorporated entity is tantamount to ownership of the goods held in the name of the entity, and the chapter points out that such control can be achieved in several different ways.
It is recommended in chapter 4 that an incorporated subsidiary should be structured in such a way that all of the canon law requirements are built into the civil constitution without any actual reference to canon law in the documentation. If this is done, it should never be necessary for a civil court to enter into an examination of the canon law aspects.

Schools and other business undertakings owned and operated by a diocese or a parish have not followed the trend towards civil incorporation. Chapter 4 discusses the risks attendant on the diocesan and parish schools remaining unincorporated. However, the main thrust of this thesis is with regard to those Catholic organisations that have taken on a civil incorporated status or intend to do so, and it will pose the question whether it is possible for a civilly incorporated Church entity to comply with both the Church laws and the civil laws.

The conclusion to the thesis is outlined in chapter 5, which recommends that trading entities such as schools and hospitals should be incorporated as separate and legally distinct entities to their religious parents. However, civil incorporation per se does not automatically ensure that Church property is protected. The degree of control, and the method of control, by a parent over a trading subsidiary are important factors in determining whether the corporate relationship is vulnerable to the risk of the corporate veil being pierced by a civil court. The conclusion also notes that the property of individual parishes in Australia is at risk under the existing method of ‘ownership’ of parish assets.
CHAPTER 1

THE LAWS OF THE CHURCH

Introduction

This chapter outlines the sources and nature of canon law in order to provide a background to the laws which are relevant to Church organisations in carrying out their obligation to protect and safeguard ecclesiastical property.

A Brief History of Canon Law

By necessity the Church has always had laws and rules intended for the better management, supervision and control of the administration of the Church itself, its many constituent organisations and its faithful followers. These laws, known as 'canons' have slowly evolved from a diverse collection of manuscripts and decrees into what is known as Codex Iuris Canonici (1983) or the 1983 Code of Canon Law.¹

About the same time as codification of various civil legal systems was taking place in Europe, the Catholic Church was moving in a similar direction. The First Vatican Council held in 1869 recognised the need for the reform of canon law.² After noting that very little had happened in this area in the 350 years since the Council of Trent, Coriden states:

The sheer number of extant laws was vast; they had grown like mushrooms in the ensuing centuries. They were not systematically arranged; often they were listed in chronological order. Some of the documents in the collections were not laws at all, some were contradictory, some had been abrogated or fallen into desuetude, many were written in a diffuse and obscure prose. The canons had grown into a large thicket in which living and dead branches intertwined, making passage exceedingly difficult even for the skilled canonist. In preparation for the First Vatican Council a group of French bishops had written to Rome: 'We are drowning in laws'.³

For the first time in the history of canon law, the code of 1917 abrogated all previous canonical enactments and replaced the great collections of earlier years; no previous legislation had ever been enacted that superseded all previous laws. Not only did the code supersede all earlier canon laws, it endeavoured to disassociate the current canon law with all previous sources of law, such as custom and jurisprudential opinions. The other obvious effect of the 1917 code was that it centralised power and authority at the top government level in Rome.

The 1983 code arose out of the Second Vatican Council (1962–1965). Pope John XXIII decided in calling the Council that a full revision of the canon law code should also take place.

The new code superseded all previous laws and legislation, including the 1917 Code; Canon 6 provides that all existing laws are abrogated unless other provision is expressly made for them in the new code. It is to be noted that canon 6–§2 brings back into consideration certain canonical customs and jurisprudence which had existed prior to 1917: 'Insofar as they repeat former law, the canons of this code must be assessed also in accord with canonical tradition.'

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4 Kuttner, above n 2, 139.
5 This approach was reversed by the 1983 code.
7 Canon 6:

§1. When this Code takes force, the following are abrogated:

1o the Code of Canon Law promulgated in 1917;
2o other universal or particular laws contrary to the precepts of this Code unless other provision is expressly made for particular laws;
3o any universal or particular penal laws whatsoever issued by the Apostolic See unless they are contained in this Code;
4o other universal disciplinary laws regarding matter which this Code completely reorders.

§2. Insofar as they repeat former law, the canons of this Code must be assessed also in accord with canonical tradition.

8 Canon 6–§2.
Canon 6–§2 is strengthened by canon 27, which provides the simple philosophy that 'custom is the best interpreter of laws'. These two provisions allow the canonists to use sources of law outside the code to interpret the canons in the context of the needs of a particular region of the Church. In this respect, the new code provides the opportunity for the development of a 'particular' law, as distinct from a 'universal' law, for the betterment of local regions. This has brought about a degree of decentralisation in the administration of the Church's affairs, with more power accorded to the local bishops—subject always to the final authority of the Pope.

The decision by the Church to put virtually all its laws into one code has brought many advantages, including clarity and brevity, but has also contributed significantly to an increase in rigidity—'no matter how urgent the need for reform is concerning one subject, it is difficult to introduce major changes in a unified code'.

Due to the rapid social and cultural changes which took place in the 20th century, the 1917 code lost its usefulness quite quickly. Likewise, due to further and continuing changes in society, particularly with reference to the Church, the 1983 code is already in need of review and, while the code itself has undergone just two formal amendments—one introduced in May 1998, the other in January 2005—the canonical jurisprudence meantime has increased significantly since 1983. Stating that 'a lot has changed in canon law' in the intervening years, Beal, Coriden and Green note that many new documents and interpretations have enlarged and reshaped the canonical scene since the 1983 code.

The code was intended to be a self-contained system of law, independent of any other legal system, and was designed to regulate and govern the many aspects of the Church's undertakings and initiatives throughout the world. The fact that it was drafted to apply to the Church and its activities in so many different countries, with diverse historical backgrounds and cultures, meant that the code needed to express

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9 Canon 27.


12 Beal, Coriden and Green (eds), above n 10, xix.
the legal principles in general terms which were capable of being interpreted to suit particular local circumstances. Consequently, since the codification of Church law took place, initially in 1917 and again in 1983, a sub-strata of canonical opinion has developed to supplement the code itself. There are different interpretations of the code, some relating to the translation from the original Latin text into English, and some relating to more fundamental issues such as the intended effect of a particular canon. This has created an area of canonical jurisprudence regarding the meanings (actual or intended) of certain aspects of the code. Unlike the Anglo-Saxon common law system, which was formulated, developed and administered by the common law courts and also based partly on the practices and customs of the local community, the post-1983 body of canonical thought and opinion has evolved entirely from the academic work of canonists themselves.

One writer has expressed the view that the history of canon law has not yet been written. The sheer volume of available material on the various aspects of canon law has presented scholars with a daunting task. Plentiful documentation has been preserved over the centuries but it has been difficult to rationalise and co-ordinate this information due to different cultures, different languages and the different political eras from whence the material emanated. In addition to the important legal aspects, there are other facets of canon law which also have to be taken into account, including ecclesiastical, theological, and social implications.

Notwithstanding the observation that the history of canon law has not yet been written, there are nevertheless hundreds of scholarly works and studies in this area, many of them listed in the select bibliography contained in James A Brundage's

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13 The Latin text is and will remain the only official version of the code. This was affirmed by the Vatican Secretariat of State in January 1983. The English translation does not replace or replicate the Latin'. Code of Canon Law Latin–English Edition prepared under the auspices of the Canon Law Society of America (1983) viii.

Medieval Canon Law. Most of the works referred to in this bibliography specialise in particular eras and particular countries so that there has never been an overall work which could be singled out as the definitive authority on the history of canon law. Now at last there is the recent, partially completed work of Wilfried Hartmann and Kenneth Pennington, *History of Medieval Canon Law*, which will make the study of the history of canon law much more accessible.

Sources of Canon Law

Canon law is similar to that of Australian civil law in that it comes from two major sources. Civil law comes from the common law, which has evolved through the court system, and from the legislation of Parliament. Canon law comes from the jurisprudence which has emerged over nearly 2000 years and from the Code of Canon Law (1983).

A practical example of the combined effect of the two areas of canon law is the canon law 'requirement' for the civil incorporation of schools and hospitals. In this respect it is necessary to examine not only the canon law code itself, in which there are several references to civil incorporation, but one must also refer to the body of canonical jurisprudence written and developed over the years by canonists. There are some canons which impact directly on the proposition that the trading entities of religious institutes should be separately incorporated, but the main background and understanding of the Church's attitude to such matters is to be found in the academic opinions.

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The Nature of Canon Law

Canon law is the official body of laws governing the operation of the Roman Catholic Church throughout the world.\textsuperscript{17} Canon law is commonly known as ecclesiastical law, even though there is a technical difference between the two expressions which is often glossed over, even in the code itself.\textsuperscript{18} Canon law denotes the body of Church law under the supervision of the Roman Curia, which deals with administrative matters and includes, in particular, the rules set out in the code. Ecclesiastical law, on the other hand, is a more general expression referring to all laws made by Church authorities at various levels, and it also includes those contained in the code.\textsuperscript{19}

Universal and Particular Laws

The code divides the law into universal law and particular law. Universal laws are binding on Catholics everywhere in the world, whereas particular law applies only to those persons who live in a certain area or who belong to an identifiable group of people. Universal laws set the general norm within which the particular laws must operate. For example, there is a universal rule that Catholics are not allowed to eat meat on Fridays.\textsuperscript{20} Dispensation from this law is possible for Australian Catholics under a particular law made pursuant to canon 1253 which allows a Conference of Bishops to determine more precisely the observance of fasting and abstinence.\textsuperscript{21}

\textsuperscript{17} The word 'canon' comes from the Greek word \textit{kanon}, meaning 'a rule or measure'.

\textsuperscript{18} The code, in canons 7–22 uses the words 'ecclesiastical laws'. Contemporary canonical literature refers to the laws as 'canon law' or 'Church law'. See Beal, Coriden and Green (eds), above n 10; Adam J Maida and Nicholas P Cafardi, \textit{Church Property, Church Finances, and Church-Related Corporations} (1984); Coriden, above n 3 and Daniel C Conlin, \textit{Canonical and Civil Legal Issues Surrounding the Alienation of Catholic Health Care Facilities in the United States} (2000) 63.

\textsuperscript{19} The term 'ecclesiastical law' is also relevant to the law of the Anglican Church and to the laws of other Christian churches. In the context of this thesis, the expression 'canon law' is intended to relate to the law of the Roman Catholic Church.

\textsuperscript{20} Canon 1251: 'Abstinence from eating meat ... is to be observed on every Friday of the year...'.

\textsuperscript{21} Canon 1253: 'The Conference of Bishops can determine more precisely the observance of fast and abstinence...'. 
Reference is also made in Church literature to proper law and to special law; proper law usually refers to the internal statutes or constitutions of religious institutes and special law is that which governs an administrative process such as the management of an office within the Roman Curia or the election of a Pope.

The Language of the Code

The style of expression used in the code varies considerably from directives and precepts to recommendations and suggestions. Coriden classifies the different forms of expression as exhortations, admonitions, directives, precepts, prohibitions, penalties and procedures, citing various canons which are expressed in these diverse forms.22

It is also apparent that the style of vocabulary in which the code is expressed is designed to help the harmonious implementation of the universal and particular laws. Many of the canons establish strict rules of law while subsequent canons then dilute the rigid approach so that the law can be applied in various circumstances more suitable to local conditions in different countries. In other words, the law is often expressed as a general principle with exceptions. Joseph Koury classifies these as hard and soft canons which establish seemingly fixed rules of law and then mitigate them by other provisions of flexibility.23

A common technique of the code is to use a nisi clause, the effect of which is to override the first rule with a second rule that is contrary to the first. The word 'nisi' (unless) is used some 478 times throughout the code although some of the entries are multiple references in a single canon.24 In addition 'Dummodo' (as long as/provided that) appears 49 times in 45 canons and 'exceptio' (exception) is used 59 times in 55 canons. Limiting expressions such as 'attamen' (however) and 'pro regula generali'

22 Coriden, above n 3, 32.


24 Ibid 461 – all statistics in this paragraph are taken from Koury.
(as a general rule) are also commonly used expressions. Also, the word 'aut' (or) is used over 700 times in the code, further indicating the provisional nature of many of its norms.

The number of canons which exist to soften a previous statement of law or make exceptions to it suggests that the *Codex Iuris Canonici (1983)* is not really a code in the legislative sense, but rather a handbook or digest of current canons which provide general rules with alternatives or exceptions which themselves become rules. 'Every rule is liable to its own exceptions. Every exception is itself also a rule'.

As a consequence of the legal flexibility so commonly provided by the code, the universal laws are able to be adjusted to suit particular circumstances at the local diocesan and parish levels.

**Interpretation of the Code**

An understanding of the meaning of certain words and expressions used in the code can only be found in the jurisprudence. The code, especially Book V, makes frequent reference to certain words and phrases such as 'alienation', 'temporal goods', 'ecclesiastical goods', 'Church property', 'dominium', 'ownership', 'stable patrimony', 'administration' (of ecclesiastical goods), 'public juridic person' and 'private juridic person' which each have a recognised canonical meaning, but the code itself does not provide any definition, other than to say in canon 27 that 'custom is the best interpreter of laws'. The accepted interpretation of each term (which is not necessarily an official interpretation) comes from collections of jurisprudential opinions written both before and after the code; however the code simply assumes that there is an established and recognised meaning for such words and expressions.

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As an example, canon 1291 provides that:

The permission of the authority competent according to the norm of law is required for the valid alienation of goods which constitute by legitimate designation the stable patrimony of a public juridic person and whose value exceeds the sum defined by law.

Each of the terms highlighted in this example above has a technical canonical meaning but the code provides nothing by way of definition. It has been left to the canonists to develop a meaning or to endorse an accepted meaning for these terms.

An added complication, is that there are different translations from the original Latin text into English in the interpretation of some of the canons.26

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26 A popular translation is *Code of Canon Law, Latin-English Edition* 1998, prepared under the auspices of the Canon Law Society of America and set out in John P Beal, James A Coriden and Thomas J Green (eds), *New Commentary on the Code of Canon Law* (2000). There is another translation *The Code of Canon Law in English Translation*, prepared by the Canon Law Society of Great Britain and Ireland in association with the Canon Law Society of Australia and New Zealand and the Canadian Canon Law Society (1983). Both versions are recognised as having a certain authenticity in English-speaking countries. However, there are numerous other 'unofficial' versions by individual authors e.g. in Adam J Maida and Nicholas P Cafardi *Church Property, Church Finances, and Church-Related Corporations*, (1984), it is stated on page xii that:

In order to assist our readers, we have done our own unofficial translation of Book V of the code, "on the Church's temporal goods" and include it as an Appendix. Our translation is perhaps more literal than literary, but it does convey the meaning of Book V without, we hope, running afoul of the Italian maxim that every translator is a traitor (tradutore e traditore).

The comment that the authors have done their own 'unofficial' translation is an implication that there is an official English translation (see footnote 13).

All citations of the code in this thesis are from the American translation, which the author considers more faithful and accurate to the Latin original than the translation by the Canon Law Society of Great Britain and Ireland. The latter is slightly more interpretative, and contains added punctuation.
The Church, through The Pontifical Council on the Interpretation of Legislative Texts, may indicate a preference for one particular interpretation of the code over another, but there is no simple process available to make a definitive ruling in areas of doubt or dispute.\(^{27}\)

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\(^{27}\) Canon 16 gives the 'legislator' authority to interpret the laws of the code. The 'legislator' means the Pope (see following footnote) or an Ecumenical Council. Within the Roman Curia a Council known as the Pontifical Council on the Interpretation of Legislative Texts (PCILT) has been appointed to assist with the authentic interpretation of universal laws, but it has no power to legislate or to enforce its decisions.

The Roman Curia is made up of:

- the Secretariat of State which is an organisation very close to the Pope and which has comprehensive competence;
- 9 Congregations which are the major (government) departments, each consisting of a group of Cardinals and Bishops;
- three Tribunals exercising judicial powers –
  - the Apostolic Penetentiary which deals with internal matters;
  - the Apostolic Signatura which addresses external concerns and handles cases at first instance; and
  - the Roman Rota which also handles external matters and which is the pre-eminent appellate tribunal;
- 12 Pontifical Councils some of which focus on the study and promotion of pastoral life, and others which exercise certain governmental functions. The PCILT is one of these Pontifical Councils and its role is to interpret canon laws both for the Latin and Eastern Churches;
- Commissions. The Curia contains numerous Commissions some permanent, some temporary, which are generally consultative or promotional without governmental power.

The PCILT has an authoritative role in the sense that it is the official organisation within the Roman Curia which has the responsibility from the supreme legislator (the Pope) under canon 16 to carry out the role of official interpretation of canon law. The authority to authentically interpret laws is for both the Latin and Eastern Churches. It assists other Curia organisations to ensure that their general decrees and instructions conform to canon law, and that they are expressed in the proper juridic form. The PCILT also examines general decrees of episcopal conferences and, at the request of interested parties, it may review the conformity to universal law or particular laws and general decrees issued by other lower level legislators such as diocesan bishops.
To address an error or rectify a misinterpretation of the code, it is necessary to formally amend the code.\textsuperscript{28}

In the common law countries there are certain precedents and presumptions which have evolved over the centuries and which are accepted as being the proper law applicable to a particular situation; there are, in fact, legal precedents which some English and Australian courts regard as binding.\textsuperscript{29} On the other hand, opinions, customs and practices in the canon law field are not necessarily accepted as precedents, so that opinions and determinations which are published and accepted in one country may not be followed in another jurisdiction.\textsuperscript{30}

There is also the consideration that the code itself is not always consistent in its choice of words. In many instances the code is drafted in general, even vague terms, thereby requiring the canonists to make interpretations in order to give the code some meaning and relevance to a particular situation. As an illustration, there are two canons that indicate the need for the written permission of a competent superior to be obtained before the alienation of Church property is permitted. Canon 638–§3 refers to the worsening of the patrimonial condition (\textit{condicio patrimonialis}), whereas canon 1291, in similar circumstances, refers to the stable patrimony (\textit{patrimonium stabile}). A reference to the patrimonial condition of a religious institute is a reference to its overall financial wellbeing, whereas the concept of stable patrimony involves only particular items of a religious institute's assets, but not necessarily all of its assets.

\textsuperscript{28} The Pope is the only person in the Church who has authority to amend the code. Under c.331 '...he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely'. Canon 333–§3 provides that 'no appeal or recourse is permitted against a sentence or decree of the Roman Pontiff'.

\textsuperscript{29} Some courts in England and Australia consider themselves to be bound by the previous decisions of the same court. Some courts are bound by decisions of a higher court - See generally Alastair MacAdam and John Pyke, \textit{Judicial Reasoning and the Doctrine of Precedent in Australia} (1998).

\textsuperscript{30} 'Unlike many other systems of rules, the decisions of the church's courts and administrative agencies do not have the force of law, i.e., do not establish precedents'. Coriden, above n 3, Canon 16–§3 provides that: 'An interpretation in the form of a judicial sentence or of an administrative act in a particular matter, however, does not have the force of law and only binds the persons for whom and affects the matters for which it was given'.
Canon 1284 provides an example of the general terms in which some of the canons are written, stating that all administrators are bound to fulfil their office with the diligence of a good householder, and that consequently they must 'take care that the ownership of ecclesiastical goods is safeguarded through civilly valid methods'. This canon is open to a number of interpretations, the most obvious being that in the ownership of ecclesiastical goods administrators should not do anything illegal, or should at least observe the civil law. Although this canon contains no exhortation that trading entities should be civilly incorporated or that ecclesiastical goods should be held in the name of incorporated entities, recognised canonists consider that canon 1284 is authority for the proposition that the major assets of a religious institute must be held in the name of a civilly recognised corporate entity.\(^{31}\)

It is interesting that in canon 1254 the Church on the one hand claims independence from civil laws,\(^ {32}\) yet under canon 1284–§2.3, administrators are required to observe all relevant civil laws.\(^ {33}\) Notwithstanding the claim of independence from civil authority, canon 1284 leaves no doubt that civil law considerations must be taken into account at a number of levels for the protection of the ownership of goods and for the protection of goods by insurance. It also requires that administrators must be on guard so that no damage comes to the Church itself from the non-observance of civil laws.

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\(^{31}\) Adam J Maida and Nicholas P Cafardi, *Church Property, Church Finances, and Church-Related Corporations* (1984) 143 and 151.

\(^{32}\) Canon 1254–§1: 'To pursue its proper purposes, the Catholic Church by innate right is able to acquire, retain, administer and alienate temporal goods independently from civil power.'

\(^{33}\) Canon 1284–§2.3: 'Consequently they must ... observe the prescripts of both canon and civil law or those imposed by a founder, a donor, or legitimate authority, and especially be on guard so that no damage comes to the Church from the non-observance of civil laws...'.

Scope of the Code

The scope and application of the code is limited to the Latin or Western Church. A separate code of canon law was promulgated in 1990 for the 21 Eastern or Orthodox churches around the world who profess allegiance to the Bishop of Rome.\(^{34}\)

The code deals mainly with matters of administration and governance of Church affairs throughout the world, and although it states: 'for the most part the code does not define the rites which must be observed in celebrating liturgical matters',\(^{35}\) nevertheless some liturgical matters are governed by it; to the extent that liturgical matters are to be found in the code, they are set out in Book VI. Even larger in volume than the legal code, the Universal Liturgical Law is found in liturgical books in which the long established rules are set out in a complete and rich context of theological and pastoral explanations.\(^{36}\)

The Penal Code

Every legal code or system must contain sanctions or penalties in order to maintain the integrity of the law, otherwise law enforcement would be pointless. However, a significant feature of the 1983 code is the sharp reduction in the number of penal canons, from 220 in the 1917 code to 89 in the present code. Obviously the reduction in the number of penal canons is not necessarily an indication that the code is less penal – the remaining canons could theoretically still impose harsher punishment. However, canon 1341 states that penalties should be a last resort, to be employed only after all other measures have failed to address the problem. Church authorities are directed not to impose penalties unless all other available non-penal options have been exhausted.\(^{37}\)

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\(^{34}\) Codex Canonum Ecclesiastum Orientalum (1991).

\(^{35}\) Canon 2.

\(^{36}\) Coriden, above n 3, 40.

\(^{37}\) Canon 1341: 'An ordinary [bishop] is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal connection or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.'
Canon 1341 expresses the reasons for penal discipline: 'to repair the scandal, to restore justice and to reform the offender'. The harshest punishment, rarely exercised, is excommunication from the Church. It would require a very serious and very public difference of opinion between the Church and the offender before such a measure is put into effect. The only other punishment under Church law that has any significant impact is removal from office or demotion to a lower office; however, this penalty is relevant only to the clergy, not to Catholics generally.

The penal provisions of the code do not seek retribution, their purpose being to repair scandal, restore ecclesiastical peace and justice and to reform and reconcile the offender within the religious community. Most of the laws in the code involve no penal discipline whatever. For example, the code has strict provisions for the alienation of Church property; however, there is no specific sanction against the party who breaches these rules. Canon 1296 provides that whenever ecclesiastical goods have been alienated without the required canonical formalities, the competent authority, after having considered everything thoroughly, is to decide whether and what type of action is to be instituted by whom and against whom in order to vindicate the rules of the Church. In most cases where real estate has been alienated by civil transfer without permission, there is very little one could do to restore the status quo. Perhaps if the alienation took place between two Church bodies, the recipient could be ordered to return the property to the original owner. But even in that situation, the code lacks practical sanctions which could enforce such a decision. Ultimately, if a religious institute flatly and persistently refused to implement a direct order given by the Church in Rome, the only possible legal redress would be the suppression of that religious institute.

The suppression of a religious institute has happened on rare occasions, but never in respect to financial dealings or unauthorised alienation of property. Generally the observance of the canon law code depends almost exclusively on the integrity and good will of the constituent organisations which make up the Church.

The underlying principle with regard to the observance of the code is that the law is intended to apply to all Catholics who are voluntary members of the Church. They are expected to observe the laws of the Church as a condition of that membership.
The Seven Books of the Code

Altogether the code is made up of seven books. The first, *De Normis Generalibus* (General Norms), outlines the fundamental principles and administrative rules applicable to the science of canon law and to the rest of the code.

Book II, *De Populo Dei* (The People of God), deals with the rights and obligations of all members of the Church, both lay persons as well as clerics. It also deals with the hierarchical structure of the Church, allocating certain authority at different levels, and covers the rules which apply to all religious institutes and their constitutions.

Book III, *De Ecclesiae Munere Docendi* (The Church's Teaching Function), provides for the regulation and integrity of the Church's teaching, its missionary initiative, the provision of Catholic education throughout the world in Catholic schools and universities and the publication of ecclesiastical works.

Book IV, *De Ecclesiae Munere Sanctificandi* (The Church's Sanctifying Function), is concerned with the regulation of the Church's divine worship. As indicated earlier, most of the Church's liturgical rules are found elsewhere than in the code. Book IV tends to focus on essentials—on the minimal requirements for the administration of the sacramental life of the Church—but one would need to look elsewhere in the books of liturgy to find the actual detail. It is a further example of how the code relies heavily on custom, tradition and laws which lie outside the code, while professing to be the ultimate book of rules for the conduct of the Church's affairs.

Book V, *De Ecclesiae Bonis Temporalibus* (The Church's Temporal Goods), consists of only 56 canons which outline the canon law implications for Church organisations operating in a civil law jurisdiction. Under the sub-heading 'Duties of Administrators', the centrepiece of Book V is canon 1284. Under this provision there are 10 specific duties required of canonical stewards, nearly all of which 'are nothing more than commonly recognised principles of sound administration'. Nine of these provisions are compulsory, while the 10th, regarding preparation of budgets, is

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38 An overview of Book V is attached as Appendix A.

39 Beal, Coriden and Green (eds), above n 10, 1486.
strongly recommended. The one requirement which stands out over and above the basic dictates of sound administration is canon 1284–§2.20, that administrators must ‘take care that the ownership of ecclesiastical goods is protected by civilly valid methods’. As indicated elsewhere in this thesis, this requirement has been interpreted by recent canonical jurisprudence as requiring the vehicle in which ecclesiastical goods are owned to be civilly incorporated so that it has civil recognition. Book V, particularly canon 1284, is the focus of this thesis.

Book VI, De Sanctionibus in Ecclesiae (Sanctions in the Church), sets out the punitive aspects of the Church’s laws as required for the restoration of order and justice, the reparation of scandal and the reform of the offender.

Book VII, De Processibus (Judicial Procedures), provides for judicial and administrative processes to assist with resolving disputes, preserving matters of justice and protecting rights.

The Church as a Legal Entity

The Church itself considered as a world-wide communion has no statute or constitution, although in 1965 Pope Paul VI commissioned a draft constitution to outline the external structures of the Church. The project to set up a basic legal framework was called Lex Ecclesiae Fundamentalis, but the work was abandoned in 1980 due to strong opposition on the grounds that the Church was founded on scripture rather than legalities and that a formal identity might hinder its ecumenical endeavours. However many of its draft provisions were transported into the code. Consequently, the Roman Catholic Church has no corporate status or identity in civil law terms. The Church is an unincorporated association consisting of natural persons who are perceived as a group because of their common purpose and relationship. As

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40 Details of the specific duties which are incumbent on canonical stewards are described in detail by Adam J Maida and Nicholas P Cafardi, Church Property, Church Finances, and Church-Related Corporations (1984) 68–73.

41 See chapter 2, page 45.

42 Coriden, above n 3, 45.
an operating entity throughout the world the Church consists of a large number of public juridic persons knows as dioceses, parishes and religious institutes; under canon law these public juridic persons are financially autonomous and independent of the Church.

In canonical terms, the Church itself is recognised as a public juridic person and as such is capable of owning property. Canon 1257–§1 states 'All temporal goods which belong to the universal Church, the Apostolic See, or other public juridic persons in the Church are ecclesiastical goods ...'. The reference to 'other public juridic persons' indicates that the Church itself is considered to be a public juridic person.

Public Juridic Persons

The operational side of the Church in its many endeavours is carried on by organisations with the canonical status of public juridic persons. Like a civil law corporation, a juridic person is a fiction of the canon law; it has perpetual existence and is the holder of rights and duties. At the local level, all of the dioceses and parishes of the Church and all of the religious institutes are examples of public juridic persons. A juridic person in the Church is often compared to a civil corporation:

Although the comparison is not entirely correct, a juridic person in canon law could be compared to a corporation in civil law. They are not the same, however, since not all separately incorporated entities have juridic personality, and not all juridically established entities have separate civil status.43

Whilst the code does not provide a definition of 'public juridic person', there are a number of elements described in canons 113–§2, 114 and 116–§1 to indicate that a public juridic person is an artificial entity: it is distinct from its individual members; it is established by ecclesiastical authority with an apostolic purpose (for works of

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A juridic person in canon law is akin to a corporation in American civil law ... a juridic person is also an artificial being which is created by canon law and endowed with certain rights and responsibilities of the Church. It is an aggregate of persons or things and has a mission or work of the Church as its purpose.
piety or works of charity); it is perpetual in nature; it has canonical rights and obligations and it has its own internal statutes.

This thesis is concerned primarily with the trading activities of parishes and religious institutes; the parishes operate most of the Catholic schools in Australia and the religious institutes operate some schools and most of the hospitals. Under the code, there are also created private juridic persons, not relevant to this thesis, which are 'Catholic' organisations, not officially part of the Church, but which perform roles that are congruent with the Church's mission. For example, the St Vincent de Paul Society is known as a Catholic welfare organisation; it has a close affiliation with the Catholic Church, but is really an outgrowth of a lay association.

Public juridic persons under canon 116–§1 may act in the name of the Church;\(^{44}\) whereas private juridic persons, although given canonical autonomy, cannot act on behalf of the Church. Property owned by a private juridic person is not categorised as Church property, and consequently such property is not subject to the law restricting dealings with property, such as alienation.

**Dioceses as Civil Law Entities**

In many countries, including Australia, the Catholic Church is not recognised as a civil entity and consequently is not permitted to own property in its own right. For the benefit of the Church itself, as distinct from religious institutes, the Parliaments of most States and Territories of Australia have enacted legislation to create statutory corporations which are permitted to hold property on behalf of the Church. An example of this in Victoria is the *Roman Catholic Trusts Act 1907* which facilitates

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\(^{44}\) Canon 116:

§1. Public juridic persons are aggregates of persons (*universitates personarum*) or of things (*universitates rerum*) which are constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfil in the name of the Church, according to the norm of the precepts of the law, the proper function entrusted to them in view of the public good; other juridic persons are private.

§2. Public juridic persons are given this personality either by the law itself or by a special decree of competent authority expressly granting it. Private juridic persons are given this personality only through a special decree of competent authority expressly granting it.
the creation of a corporate body for each Catholic diocese in the State. Section 3(a) provides 'That there be constituted within the diocese a corporate body of trustees for the purpose of holding, managing and dealing with property within such diocese in trust for the benefit of the Church'.

It should be noted that the statutory corporation does not own the property; it holds, manages and deals with the property 'in trust for the benefit of the Church'. The Church is defined as 'The Roman Catholic Church'. The Act does not contain a definition or description of what constitutes the Roman Catholic Church so that, for civil law purposes, the Roman Catholic Church remains an unincorporated association of people.

Similar legislation exists in all other States and Territories of Australia (except South Australia) for the benefit of the Catholic Church. Chapter 3 outlines in greater detail the variety of legislation which exists for the benefit of corporate Church entities.

Religious Institutes as Civil Law Entities

Religious institutes are also part of the Church structure; they are subject to the laws of the Church, but otherwise they are free to operate with financial autonomy and with their own (Church approved) canonical constitutions. Religious institutes, like the Church itself, are, in civil law terms, unincorporated associations of natural persons.

Some religious institutes in Australia have adopted a civil corporate structure either as an incorporated association under State law or as a company under the Corporations Act 2001 (Cth). Most religious institutes in Australia have chosen to remain civilly unincorporated and have either:

- utilised State legislation, where available, to operate through corporate trustees;\(^{45}\) or

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\(^{45}\) This option is available in New South Wales and Queensland through the Roman Catholic Church Communities' Lands Act 1942 (NSW) and the Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld), both of which are discussed in greater detail in chapter 3, 99-108.
• have incorporated their trading entities, such as schools and hospitals, as separate civil legal entities under various Acts of the State and Commonwealth Parliaments.46

Parishes as Civil Law Entities

As already indicated, dioceses, parishes and religious institutes are all individual public juridic persons in canon law. However, in the civil law context, Catholic parishes around Australia are different to dioceses and religious institutes in the way they operate. All dioceses in Australia (except those in South Australia) have trust corporations for the ownership of property, by virtue of special Church legislation. Similarly, religious institutes are able to use special legislation in several States to establish trust corporations for the institutes themselves and have been able to use the Corporations Act 2001 (Cth) or an associations incorporation Act to incorporate their trading entities.

Parishes, on the other hand, have remained civilly unincorporated and as a matter of convenience they allow their assets (owned by each individual parish in canon law) to be held in the name of the relevant diocesan trust corporation. Chapter 4 discusses the risks involved in vesting civil law ownership of parish assets in the name of a diocese.

Conclusion

In line with the general thinking of that era, the decision by the Church in 1904 to put its laws into the form of a code brought significant advantages to the teaching, propagation and understanding of canon law, but it also brought about a rigidity which had not existed before. It also had the effect of further centralising the administration of the Church in Rome.

46 The various options for incorporation of religious trading entities are discussed in Chapter 3 under the heading 'Statutory Corporations'.
The current 1983 code still has the inflexibility of the earlier code but, on the positive side, it encourages the concept of subsidiarity, with greater emphasis on universal laws for general application and particular laws for local jurisdictions.47 There has also been a deliberate attempt to make the law less penal.

The new code has been in force for a little over 20 years and already there is a need for revision in some areas, particularly with regard to the administration of ecclesiastical goods where the Church's laws are not entirely in harmony with some of the civil law jurisdictions.48 The code could offer, for example, more specific directions on how ecclesiastical goods should be protected (in civil law). The code could also contain definitions of words and expressions which already have an accepted meaning within the Church and could particularise any customs and procedures which are already regarded as being suitable for general use.

The specific and detailed requirements for the administration of ecclesiastical goods that are contained in the code are considered in further detail in chapter 2, when the thesis considers the need to observe both the civil law and the canon law when a religious institute creates a separate legal entity for a school or hospital. A religious institute under Book V of the code is required to take whatever steps are necessary to protect its assets; however this is not straightforward in a situation where the assets are 'owned' by a separately incorporated subsidiary. The institute is required to retain both civil and canonical control of that entity lest the transition is deemed to be an alienation of ecclesiastical goods.

47 See 'Universal and Particular Laws', chapter 1, page 16.

48 Beal, Coriden and Green, above n 10, xix and see Francis Morrissey 'Sponsorship Models: Role of Religious Institutes' (Paper presented at a Leadership Retreat for the Sisters of Charity, Melbourne, Victoria, 8 April 2005) 1 - 'Like so many other things in the world, canon law is changing rapidly. Already, the "new" Code promulgated in 1983 is obsolete, or at least seriously dated'.

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CHAPTER 2

CANONICAL CONSIDERATIONS FOR THE PRESERVATION AND MAINTENANCE OF CHURCH PROPERTY

Introduction

This chapter will explain the nature of Church property (ecclesiastical goods) and the laws of the Church which must be observed in relation to the preservation and maintenance of Church property.

An understanding of the nature of Church property and the laws of the Church affecting Church property is crucial in the overall context of this thesis. For example, the assets shown in the balance sheet of an incorporated entity are, according to civil law, the assets of that entity; whereas from a canon law perspective those same assets are still 'owned' by the sponsoring religious institute. This chapter will explain the nature of the Church laws that require the continued ownership and control of Church property.

A religious institute is required by the Church to comply with its laws and, although the code does 'canonise' certain aspects of the civil law, it expressly rejects the overall concept that canon law is in any way inferior to civil law. When the civil law conflicts with divine law or canon law, the latter prevails. For example, if a contract to sell Church property is valid in civil law but invalid in Church law, an ecclesiastical tribunal must attempt to enforce the canon law.

Differing canonical views have been expressed on the effect, canonically and civilly, of civil incorporation. The canon law code itself is not specific on the need or

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1 See c.22: 'Civil laws to which the law of the Church yields are to be observed in canon law with the same effect, in so far as they are not contrary to divine law and unless canon law provides otherwise'. The code specifically adopts the civil laws which apply to guardians of minors, prescription (adverse possession), the civil effects of marriage, proxy marriages, contracts, possessory rights and rules for arbitrated agreements (see cc. 98–§2; 197; 1105–§2; 1290; 1500; 1714 and 1716 respectively).

desirability to incorporate subsidiary bodies; however the majority of canonists favour such incorporation. The Church’s position, expressed by jurists rather than the code itself, is that these separately civilly incorporated bodies are subject to two sets of rules, civil and canonical. In the 1960s and 70s the competition between the two legal systems caused some uncertainty:

The problems could be summed up in this way: one set of facts (ownership) but two legal systems, canonical and civil, one game but two sets of rules. While it is not always the case that these two legal systems may contradict, it is the case that they will frequently collide before they ever, if ever, harmonise into any kind of complementarity. In short, sometimes both legal systems cannot be applied equally or at all to the same set of facts. An ecclesial institution thus finds itself with canonical and civil legal questions about ownership but with two sets of rules, two sets of answers and two sets of competing parents. McGrath taught that the civil eclipsed the canonical.³

One of the high profile canonists, John J McGrath, argued that once the apostolic works were incorporated, they became completely separated from the sponsoring body and the assets of the body corporate no longer belonged to the religious institute:

Charitable and educational institutions chartered as corporations under America law are not owned by the sponsoring body. The legal title to the real and personal property is vested in the corporation. It is the corporation that cares for the sick or grants academic degrees. It is the corporation that buys and sells and borrows money. If anyone owns the assets of the charitable or educational institution, it is the general public. Failure to appreciate this fact has lead to the mistaken idea that the property of the institution is the property of the sponsoring body.⁴

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McGrath's thesis, as it became known, was popular in America in the 1960s and 70s with religious institutes who operated colleges, universities and hospitals. According to one author, the McGrath thesis had 'major repercussions on the 846 hospitals and 381 colleges and universities conducted under Catholic auspices in the US'.

A number of influential educators endorsed the McGrath thesis, including Paul J Reinert, a Jesuit priest and President of St Louis University who was, according to Conlin, considered one of the leaders not only of Jesuit higher education but of all Catholic higher education in the United States for four decades.

Contrary to the McGrath thesis, the prevailing view of contemporary canonists is that the separately incorporated apostolic works do remain part of the sponsoring religious institute for canon law purposes. This view is supported by a number of canonists such as Adam Maida and Nicholas Cafardi, who state that 'the canon law looks at the totality. It sees the province and its hospitals as one public juridic person'.

The question of whether the assets of a Catholic school or hospital remain the property of the sponsoring religious institute, thereby defining such assets as Church property which may only be dealt with according to the rules of canon law, still remains an issue among canonists. There is nothing in the code which assists in making a final determination on the matter. As will be seen later in this chapter, plausible arguments can be made in favour of the McGrath thesis, notwithstanding that it is currently not favoured by contemporary canonists.

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5 Conlin, above n 3, 75.
6 Ibid 78.
7 Adam J Maida and Nicholas P Cafardi, Church Property, Church Finances, and Church-Related Corporations (1984) 149.
Church Property

The reason that religious institutes need to observe canon law as well as civil law is because the Church has laid out special rules of its own which govern or control the use of ecclesiastical goods. The Church asserts its independence from civil authority in canon 1254–§1: 'To pursue its proper purposes, the Catholic Church by innate right is able to acquire, retain, administer and alienate temporal goods independently from civil power'. The Church claims the ability to do four things in respect of temporal goods: acquire them, hold them, administer them and alienate them. For the purpose of this thesis, the provisions of the code and the jurisprudential material produced by canon lawyers relating to the 'administration' and 'alienation' of temporal goods have particular significance.

Book V, which is titled 'The Temporal Goods of the Church' deals both with temporal goods and ecclesiastical goods. 'Temporal goods' is a general term used to describe all material things having a monetary value, including land and buildings, jewels, precious metals, furniture, vehicles, stocks, bonds and money. 'Ecclesiastical goods' are those temporal goods (i.e. the land and buildings, jewels, precious metals etc.) which belong to the Church itself, and to all public juridic persons within the Church.8 As dioceses, parishes and religious institutes are all categorised as public juridic persons, all property owned by these entities is classified as ecclesiastical property, also known as 'Church property'. Property owned by individual persons, by bishops and priests and by private juridic persons, is not ecclesiastical goods and is not subject to the rules of the code.9

While the whole of Book V deals generally with temporal goods, some of the canons deal specifically with ecclesiastical goods. Under the heading 'On the Administration of Goods', canons 1273–1289 provide for the safeguarding and protection of

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8 Canon 1257–§1 provides that such temporal goods as belong to the Church and other public juridic persons are ecclesiastical goods.

9 Private juridic persons include organisations which are Catholic in name but are not Church organisations. These are not subject to the authority of the Church and specifically are not subject to the provisions of Book V of the code. Examples of a private juridic person are the St Vincent de Paul Society and the Knights of the Southern Cross, who are not official Church organisations, whose property is not designated as ecclesiastical property and therefore are not subject to the rules of Book V.
ecclesiastical goods; under the title 'On Contracts, Especially Alienation Contracts', canons 1290–1298 set out the rules for a valid alienation (transfer of ownership) of ecclesiastical goods.

Consequently, the title to Book V 'The Temporal Goods of the Church' is somewhat misleading in that, although the introductory canons do generally refer to temporal goods, the operative canons are concerned only with ecclesiastical goods.

The difference between temporal goods and ecclesiastical goods is the crucial canonical issue in considering the effect of the incorporation by a religious institute of its trading entities. If the McGrath thesis is correct and the business of the school or hospital is canonically separated from the institute, then the assets of that trading entity are not ecclesiastical goods because they are no longer owned by a public juridic person. Therefore, the assets would not be subject to the provisions of Book V of the code.

Alienation

The Pope as supreme administrator of Church property derives his power from canon 1256, which provides that ownership of temporal goods belongs to such public juridic persons who have acquired them, but 'under the supreme authority of the Roman Pontiff'. The Pope is able, via the Vatican bureaucracy, to control the day to day administration of Church property by means of the total prohibition placed on the alienation of ecclesiastical goods valued above a certain figure. The rules relating to alienation are set out in Book V, canons 1290–1298.

While canon law does not actually define 'alienation', the term has been described as 'the conveyance to another party, the encumbrance or the placing in jeopardy of loss of any interest in a public juridic person's stable patrimony (immovable goods or fixed capital'). A similar definition is contained in an article by Rodger Austin.\(^\text{10}\)

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\(^\text{10}\) Maida and Cafardi, above n 7, 85.

\(^\text{11}\) R J Austin, 'Temporal Goods Within the Church—Some Canonical Reflections' (1992) \textit{Canon Law Society of Australia and New Zealand} 18: 'A definition in common use among Church lawyers is "the transfer to another party or the encumbrance or placing in jeopardy or loss of any right in regard to temporal goods which constitute the stable patrimony of a juridical person".'
An act of alienation is invalid in canon law if the required permission of the competent authority has not been obtained.\textsuperscript{12}

Technically, alienation should only involve an actual transfer of ownership. The Latin verb *alienare* means 'to make something another's'. Beal, Coriden and Green note that since alienation is the transfer of ownership, there is no alienation if no transfer of ownership takes place.\textsuperscript{13} Consequently, in their view, mortgaging property is not strictly an act of alienation, nor is leasing or granting an option to purchase one's property, as none of these transactions entails a transfer of ownership, even though some mortgage type transactions could ultimately lead to the loss of ownership if the mortgagee were to exercise the right of sale.\textsuperscript{14}

Maida and Cafardi take a much broader view and include as examples of alienation the following:

- the sale of real property;
- the use of fixed capital for any reason beyond that to which it was initially dedicated;
- the leasing of real property;
- the mortgaging of real property;
- the pledging of real property or fixed capital for any other purpose; and
- the relinquishing of canonical control of an incorporated apostolate, i.e. where the sponsoring public juridic person fails to reserve the civil powers necessary to control the incorporated apostolate.\textsuperscript{15}

\textsuperscript{12} Canon 1291: 'The permission of the authority competent according to the norm of law is required by the valid alienation of goods which constitute by legitimate designation the stable patrimony of a public juridic person and whose value exceeds the sum defined by law'.

\textsuperscript{13} Beal, Coriden and Green, above n 2, 1494.

\textsuperscript{14} Ibid 1494.

\textsuperscript{15} Maida and Cafardi, above n 7, 86.
Maida and Cafardi point out that the separate incorporation of an apostolate is not alienation, even when title to real estate is placed in the name of the new incorporated entity, provided that the new entity remains responsible to the sponsoring public juridic person for any subsequent transfer of its property.\textsuperscript{16}

The difference of opinion as to whether a mortgage or lease constitutes an alienation of property is due, perhaps, to the confusion between two different canons. Canon 1291 provides that the permission of the competent authority is required before 'the valid alienation of goods', thereby restricting the right to transfer ownership of the goods, whereas canon 1295 deals with other circumstances 'which can worsen the patrimonial condition of a juridic person'. Whilst a mortgage or a 99-year lease may not constitute an alienation in the sense of a transfer of ownership, nevertheless either transaction may have a detrimental effect on the stable patrimony of the religious institute.

Francis Morrisey rationalises the two canons by referring to acts of alienation under canon 1291 as alienation in the strict sense, and to acts covered by canon 1295 as acts of alienation in the broad sense.\textsuperscript{17}

The purpose of the Church's laws restricting alienation, it is claimed, is not to maintain the wealth of the Church, but rather to protect the economic viability and stability of each public juridic person by guarding against imprudent loss of temporal goods by any individual public juridic person.\textsuperscript{18} The code gives an indication of the sort of documentation which must be submitted to the competent authority for permission to alienate Church property, which includes proper valuations, formal consents of the public juridic person's own administrative structure, advice from relevant experts such as accountants, lawyers or financial advisers expressing support for the proposal and details of the proposed sale with a copy of the relevant offer

\textsuperscript{16} Ibid 86.

\textsuperscript{17} Francis Morrisey, 'Alienation and Administration: System Re-Structuring Often Entails Four Types of Canonical Acts' (September – October 1998) Health Progress 24, 25.

\textsuperscript{18} Beal, Coriden and Green, above n 2, 1495.
(if available). The tenor of canons 1292–1294 is one of economic caution to ensure that Church administrators, some of whom may have no financial background, do not act imprudently.

Canon 1295 is a general prohibition on any transactions which may jeopardise the patrimonial stability of a religious institute, whether alienating or not. In this context 'patrimonial stability' means the overall economic wellbeing of an institute.

Even if a property transaction is not likely to compromise the economic foundation of an institute as envisaged by canon 1295, a transaction is still restricted by canon 1291 if three basic elements are present in the transaction. First, the transaction must involve the actual transfer of ownership to another person, so canon 1291 does not apply to mortgages, leases or other dealings which constitute less than a transfer of absolute ownership.

19 Canon 1293–§1: 'the alienation of goods whose value exceeds a defined minimum amount also requires ... a written appraisal by experts of the asset to be alienated ... [and] other precautions prescribed by legitimate authority are also to be observed to avoid harm to the Church'.

Canon 1294–§1: 'An asset ordinarily must not be alienated for a price less than that indicated in the appraisal'.

Francis Morrisey 'The Alienation of Temporal Goods in Contemporary Practice' (1995) 19 Studia Canonica 293, 298 - gives an indication of the type of documentation which would be required to accompany a request to Rome for permission to alienate property:

It might be asked what documents are to be included when a file is to be presented to the Holy See in order to obtain the required permission. The following could be forwarded:

- explanation of the just cause (c.1293–§1);
- written evaluations (c.1293–§1);
- noting how other precautions, if any, prescribed by particular law have been observed (c.1293–§2);
- the consent of the intermediate bodies required (i.e. finance council, college of consultors, interested parties or, for religious, of the appropriate councils) (c.1292–§1); usually, this takes the form of a copy of the minutes of the meeting where approval was given;
- a statement regarding divisible goods (c.1292–§3);
- the offer to purchase (if possible) (c.1294–§1);
- a statement of what is to be done with the money received (c.1294–§2);
- sometimes, a statement regarding the observance of secular law formalities (see c.1296).

In the case of a religious institute, the Congregation for Institutes of Consecrated Life and for Societies of Apostolic Life has, in addition, been requiring a letter from the diocesan bishop stating that he does not object to the transaction.
Second, the transaction must affect the stable patrimony (as distinct from the 'patrimonial stability') of a religious institute. The term 'stable patrimony' is not defined by the code and again canonical jurisprudence must be relied upon to assist in discerning which of a religious institute's assets are defined as stable patrimony and which of its assets may be freely disposed of without restriction. Basically, stable patrimony includes the major assets of an institute which are necessary for the continued operation of the institute and its apostolic works.

Third, the value of the property in question must exceed a figure nominated from time to time by the competent authority. The relevant figure above which formal permission must be sought for the alienation of Church property in Australia is $4m, indexed to CPI annually.20

According to canon 1291, transactions which meet all these specifications must observe the laws regarding alienation. If one of the elements is missing then the rules of alienation do not apply.

**Stable Patrimony**

As indicated under the previous heading, the laws of the Church that restrict the alienation of ecclesiastical goods apply only to goods 'which constitute by legitimate designation the stable patrimony of a public juridic person...'.21

The code does not define 'stable patrimony', but relies on continuing jurisprudence to provide a meaning. Until recent times the expression 'stable patrimony' was clearly understood to consist of the immovable property and fixed capital of public juridic persons. The stable patrimony of a public juridic person would have been the major assets, such as the monasteries, convents, hospitals and other institutional style buildings, which provided the durable basis upon which a public juridic person was able to provide the means to fulfil its reason for existence.

20 The figure is set from time to time by the Australian Catholic Bishops' Conference.

21 Canon 1291.
The Church laws on the alienation of stable patrimony go back to the very beginnings of the Church when Christian communities began to accumulate property and goods. Alienation of Church property was discouraged as early as the rule of Pope Lucius I (253–254) who likened those who unlawfully alienated Church property to those who committed murder, although for just causes when necessity demanded it (for example, in times of war or famine), alienation was permitted. The Council of Hippo in 393 forbade priests to sell parochial property without the knowledge of the bishop, and in 447 Pope Leo the Great advised bishops that the alienation of property was forbidden. In 1467, Pope Paul II forbade the sale or donation of any immovable and precious movable goods which have been dedicated to God, and whereby churches, monasteries and pious places are governed and made beautiful, and from which their ministers claim a living for themselves. For many centuries the fixed real estate, valuable works of art and precious objects were easily identifiable and were automatically regarded as stable patrimony, never to be sold without a just cause.

The nature of immovable property and fixed capital changed in the 20th century when buildings which were once of great value became expensive and onerous to maintain and it was considered to be more prudent to convert assets of a wasting nature to other forms of financial investments. Consequently it was no longer possible to designate certain assets, by their very nature, as stable patrimony. Following the 1983 code, stable patrimony meant those ecclesiastical goods which were identified as such 'by legitimate designation'.

The ultimate criterion as to whether temporal goods belong to stable patrimony is whether or not those goods have been lawfully designated as being part of stable patrimony. Goods are not automatically considered as stable patrimony, as they were before the code, nor are goods automatically assigned to stable patrimony.


23 Ibid 56.

24 Ibid.

25 Ibid 60.

26 Canon 1291.
'Only legitimate assignment can transform goods into stable patrimony'. For a legitimate assignment or designation to occur, the public juridic person which owns the goods must formally resolve and then record that certain goods constitute part of its stable patrimony. If such a resolution is not made, and if a proper inventory of goods which constitute stable patrimony is not maintained, then the goods are not considered by the laws of the Church to be subject to the restrictions on alienation.

It is not known how many or to what extent public juridic persons have legitimately designated their stable patrimony. A simple defence to an allegation that valuable ecclesiastical goods have been alienated without permission would be that such goods were never formally designated as stable patrimony. There is no system in the Catholic Church to record details of the stable patrimony of the public juridic persons which operate within the Church. Each public juridic person is afforded complete autonomy in its financial affairs and in its designation or non-designation of stable patrimony; therefore it would be impossible to enforce the laws of alienation unless a public juridic person voluntarily submitted itself to the operation of those laws and unless it, in the circumstances of a proposed alienation, chose to accept the process required to obtain the necessary permission.  

Notwithstanding that canon 1291 makes it clear that the alienation rules only apply to ecclesiastical goods 'which constitute by legitimate designation the stable patrimony of a public juridic person', Beal, Coriden and Green argue that certain ecclesiastical goods acquire the status of stable patrimony by the very nature of the goods themselves, saying that 'absent such an explicit designation, the parcel of land would implicitly be allocated to stable patrimony by virtue of the kind of asset it is'.

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28 The author is closely associated with some 10 religious institutes in Australia and New Zealand and is not aware of any of them having designated any of their property as stable patrimony. For the purpose of this thesis the author has specifically asked a number of Provincials of religious institutes if they have designated certain goods as stable patrimony, and the response has been that the Provincials are not even aware of the need to do so.

29 Beal, Coriden and Green, above n 2, 1496.
Beal, Coriden and Green provide a modern definition of stable patrimony which indicates that ecclesiastical goods that have not been legitimately designated as stable patrimony should still be considered as such in certain circumstances:

Stable patrimony is all property, real or personal, movable or immovable, tangible or intangible, that, either of its nature or by explicit designation, is destined to remain in the possession of its owner for a long or indefinite period of time to afford financial security for the future. It is the opposite of free or liquid capital which is intended to be used to meet operating expenses or otherwise disposed of within a reasonably short period of time (within one or, at most, two years). 30

Consequently there is now some difficulty in identifying those ecclesiastical goods which constitute stable patrimony and those which do not. The reality is that much of the stable patrimony which once consisted of large institutional buildings has been sold, with good reason, and the proceeds have been invested in securities such as investment properties, stocks, bonds and treasury notes which have no specific designation.

The considerations on stable patrimony are relevant to religious institutes that wish to separately incorporate a school or hospital because the Church laws restricting dealings with Church property only apply in limited circumstances to the category of ecclesiastical goods which form part of the stable patrimony of that religious institute and which have been legally (or implicitly) designated as such. The proportion of Church property which has been legitimately designated as stable patrimony is not known and would be impossible to calculate, but in the last 100 years the nature of assets owned by religious institutes has changed so dramatically that the real wealth is now held in investments, very little of which would be subject to Church law.

Stable patrimony, which, until recent times, has been a traditional concept throughout the history of the Church, is notionally still an important part of Church law, but in practice is now of less consequence in the financial affairs of Church organisations than it has ever been.

30 Ibid 1495.
Canon 1284—§ 2.2° and the Need for Civil Incorporation

Canon 1284 provides:

§1. All administrators are bound to fulfil their function with the diligence of a good householder.

§2. Consequently they must: ...

2° take care that the ownership of ecclesiastical goods is protected by civilly valid methods.

The requirements relating to the administration, maintenance, upkeep and insurance of ecclesiastical goods are covered generally in canon 1284, but it is canon 1284—§2.2° in particular which specifically provides that the ownership of ecclesiastical goods must be protected by 'civilly valid methods'. Where it is possible to register ownership of certain goods, such as share portfolios, cash deposits, motor vehicles and real estate, obviously this should be done in the best way available in each jurisdiction.

For religious institutes that operate in countries where civil incorporation is possible, it is generally agreed by canonists that canon 1284 requires civil incorporation for the protection of both the tangible goods, such as those referred to above, and also for ownership of business entities such as schools or hospitals:

Canon 1284 also requires the canonical stewards to see that their public juridic person and all its sponsored apostolates have the correct civil law structure ... without this legal structure, the public juridic person's canonical ownership is not legally protected ... the canon law does not simply advise that the legal structure of religious institutes and dioceses or of their sponsored apostolates be established in a canonically acceptable way; it requires this.31

Maida and Cafardì's book was first published in 1984, soon after the 1983 code came into effect, and their view on the need or desirability of incorporation of subsidiary activities has subsequently been widely accepted. In support of the Maida and Cafardì interpretation of canon 1284, Francis Morrisey wrote in 1988:

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31 Maida and Cafardì, above n 7, 69.
In a context of civil litigation where fabulous sums are often involved, and where insurance coverage is not always available, it would be important to make certain that the goods of an entire religious institute are not jeopardised because of one of its apostolates. For this reason, many institutes now incorporate their works separately from the institute itself. This seems to be prudent measure, one which helps to apply the principle of canon 1284–§2.2°.32

Nevertheless, it is possible to interpret canon 1284–§2.2° in such a way that ownership of ecclesiastical goods could be protected merely by registering the title in the best way available in a particular country, without necessarily doing so in the name of an incorporated entity. This would still constitute a civilly valid method of protecting the ownership and thus could be said to comply with canon 1284–§2.2°.

32 Morrisey, above n 17, 19. For further reference to protection of ownership of ecclesiastical goods vis a vis c.1284–§2.2° see:


... it should be noted that among the canonical responsibilities of administrators of ecclesiastical property enumerated in the 1983 Code of Canon Law is the obligation to see to it that the ownership of ecclesiastical property 'is safeguarded through civilly valid methods'. Such a prudent exercise of good administration, now obligatory, may have been the sole intention of administrators in years past in putting property 'in the name of' separately incorporated charitable institutions. That such was the sole intention would appear to be reinforced in those situations where the transfer was accompanied by civil-law provision for reversion of the property to the sponsor upon dissolution of the separately incorporated charitable institution.

b) R J Austin 'Towards a Theology of Incorporation' (1991) Canon Law Society of Australia and New Zealand 21: 'One response [to canon 1284–§2.2°] of many religious institutes has been to incorporate individually their apostolic works'.


Because religious institutes, in terms of the Australian and New Zealand legal systems (that is, the civil law), are unincorporated associations, it has been necessary to make use of legal entities in order to fulfil the obligations of canon 1284–§2.2°. To this purpose religious institutes, as far as their ownership of real property is concerned have made use of different legal entities.

d) Austin, above n 11, 16:

Vatican II called upon all religious institutes to 'faithfully maintain and accomplish their proper apostolic works' and at the same time 'to make adjustments in them according to the needs of time and place and in favour of what will benefit the universal Church and particular churches'. The incorporation of apostolic works is a means whereby religious institutes have responded to this challenge.
Another possibility is that Church property might be protected by means of a charitable trust. It is settled law that charitable trusts are trusts for purposes, not for individual beneficiaries. Consequently, the eventual outcome of establishing a trust would be that a religious institute (either directly or through the agency of a subsidiary company) would have control of the assets, but it would no longer have any beneficial interest in them because the assets would be dedicated to charitable purposes, not to the institute itself. The establishment of a trust would mean that the canonical rules of alienation would need to be observed because the parent would no longer have *dominium* i.e. would no longer have both ownership and use of the assets.

Having dedicated the assets in a trust for stated purposes, the legal effect civilly and canonically would be that the assets could not be used for any other purpose. This could be to the detriment of a religious institute if at some future time the assets were to be required for other of the institute's religious objectives. A further observation is that a trust lacks the flexibility of a company under the *Corporations Act 2001* (Cth). A company has unlimited powers and its Constitution and objects can be amended without difficulty, whereas a charitable trust would normally need an order from a civil court to change the beneficial entitlements. Therefore, if a religious institute transferred assets to a trust, it would have less flexibility in the event that it wished to call the assets back for its own use and benefit.

Michael Fitzgerald takes a fairly general view when he points out that canon law is silent about which particular form of civil law should be used to protect ecclesiastical goods. He notes:

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33 '...[E]very charitable trust is a trust for a purpose or purposes that are charitable, not a trust for a person or persons, although persons benefit from the fulfilment of the purpose'. *Stratton v Simpson* (1970) 125 CLR 139,144.
Canon law does not prescribe what form of entity must be used for the ownership of Church property. Nor does canon law restrict the type of entity that may be used for the ownership of Church property. Rather canon law simply provides that the civil law of the jurisdiction where the property is located must be observed unless it is contrary to divine law or unless canon law makes some more specific provision.\(^{34}\)

The challenge therefore is to find a structure which works administratively and is canonically coherent. It might be argued that canon 284–§2.2\(^{o}\) could have been more specific if the code really intended to make civil incorporation a requirement. An earlier section of the code, canon 1274–§5 refers to certain entities being established 'in such a way that they also have recognition in civil law'. For an institute to be recognised in civil law, there would need to be an identifiable legal entity in the form of a body corporate. Canon 1274–§5 requests that the institutes be established in this way 'if possible', accepting that in some jurisdictions legal recognition, or incorporation, may not be possible. Had canon 1284–§2.2\(^{o}\) adopted the same language as canon 1274–§5, the question of incorporation as a means of civilly protecting ownership would be much clearer.

While the academic canonists are in general agreement about the intended effect of canon 1284–§2.2\(^{o}\), there are those, who in practice, do not respect this theory. Most of the private Catholic schools in Melbourne and Sydney, i.e. those operated under the sponsorship or auspices of a religious institute are incorporated along the lines recommended by canonists, whereas none of the diocesan schools and parish schools operated by the archdioceses of Melbourne and Sydney are separately incorporated. Therefore, the Catholic regional schools and the parish primary schools conducted throughout the Archdiocese of Melbourne are not individually and separately incorporated as recommended by the canonists, but instead have the same legal status as the diocese itself.\(^{15}\) It seems that the diocese can canonically justify the non-incorporation of its various schools because, on a strict interpretation of canon


\(^{35}\) See the comments of Hansen J in Roman Catholic Trusts Corp v Van Driel Ltd [2001] VSC 310, para 104.
1284–§2.2⁶, there is no unequivocal statement that operating entities should be separately incorporated.⁶

This is an area of the code which needs to be revised to provide stronger guidelines regarding the protection of ecclesiastical goods. As Francis Morrisey said, the 1983 code is obsolete, or at least seriously dated.⁷ Until the code is revised to address uncertainties such as these, it would perhaps be safer for the religious institutes to adopt the Maida and Cafardi view regarding incorporation of their trading entities because of the civil law advantages that flow from separate incorporation, especially in regard to insulating the institute's assets against liabilities arising out of the subsidiary's activities.

In 1911 the Vatican firmly expressed a view of its preference for incorporation when the Sacred Congregation of the Clergy wrote to the bishops of America:

Among the methods which are now in use in the United States for holding and administering church property, the one known as Parish Corporation is preferable to the others, but with the conditions and safeguards which are now in use in the State of New York. The Bishops should therefore immediately take steps to introduce this method for the handling of property in their dioceses, if the civil law allows it. If the civil law does not allow it, they should exert their influence with the civil authorities that it may be made legal as soon as possible.⁸

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⁶ The lawyers representing the Catholic Archdioceses of Sydney and Melbourne were interviewed by the author on 24 August 2004; they confirmed that the parish schools and regional schools in those dioceses are not civilly incorporated.


Like so many other things in the world, canon law is changing rapidly. Already, the "new" Code promulgated in 1983 is obsolete, or at least seriously dated. When it was promulgated, for instance, the Iron Curtain was still in place, the Internet and its implications for communication and other things did not exist, the sexual abuse scandal had not reared its ugly head and the law was not designed to address the issue, religious institutes had not begun pooling their resources, public juridic persons for health care were not a known commodity in the Church, and so forth.

So, canon law—like its counterparts in the secular world—evolves to respond to new needs. It is not the role of law to be creative, or to force new structures or principles on people; rather, it takes the common wisdom and tries to express in terms that allow for future development.

In practice however, this view was not translated at all into the 1917 code, and is only obliquely inferred in canon 1284–§2.2° in the 1983 code. Further, the view has been ignored by the bishops of America, and the parishes still remain unincorporated.

Penalties

Penalties under the code are dealt with generally in Book VI, canons 1364–1399 which indicate a dual purpose: first, the conversion, repentance and reconciliation of an offending person and second, the restoration of order and reparation of scandal, i.e. repairing harm done to the community and deterring abuse. Nevertheless, punishment is a last resort and pastoral exhortation, admonition and correction normally precede all other penalties.

The code has several other provisions dealing with consequences of the alienation of ecclesiastical goods without due permission of the competent authority. The penalty under canon 1296 applies to a situation where ecclesiastical goods have been alienated by a transfer which is valid in the civil law and which cannot be reversed. In such circumstances the relevant authority, after having considered everything thoroughly, is to decide whether and what type of action is to be instituted by whom and against whom in order to vindicate the rights of the Church. This is understood to mean that, if the civil transaction is irreversible, the parties within the Church whose rights have been affected are expected to make some adjustments as between themselves.39

Canon 1377 applies to all other acts of alienation not covered by canon 1296 and provides that 'a person who alienates ecclesiastical goods without the prescribed permission is to be punished with a just penalty'. The nature of the just penalty is not specified.

39 Procedural requirements set out in c.1293 require written valuations from at least two experts plus another independent commercial recommendation to be submitted with the request for permission to sell a certain property. Therefore obtaining the necessary consents from the Vatican is a slow process which is at odds with modern commercial considerations. In practice, therefore, 'indults' (permissions) are often requested after the alienation of an asset has taken place, on the basis of the Vatican maxim 'that it is easier to seek forgiveness than it is to seek permission'. 
The lack of 'real' penalties in the civil sense may be the reason that many public juridic persons, namely dioceses, parishes and religious institutes, do not respect the canon law requirements on alienation. According to Adam Maida, only about 60% of religious institutes in the United States faithfully carry out their canonical responsibilities in property dealings, with no repercussions from Rome for the 40% who do not.\footnote{Adam J Maida, 'Canon Law Implications of Real Estate Transactions: Impact of the New Canon Law' \textit{Catholic Lawyer} (1982) 27, 218.}

Francis Morrisey supports this sentiment:

Even today the best-intentioned administrators are satisfied to observe the requirements of civil law. They are often neither familiar with canonical prescriptions nor overly concerned about some of them. Compliance with the canonical prescriptions presupposes faith in the Church community and, indeed, has little meaning outside it.\footnote{Francis Morrisey, 'New Canon Law on Temporal Goods Reflects Vatican II's Influence in the New Canon Law' (1983) \textit{The Catholic Health Association of the United States}, 50.}

The McGrath Thesis

It was outlined under the heading in this chapter 'Church Property' that all assets owned by a public juridic person are ecclesiastical goods and, as such, these goods are subject to the laws of the Church regarding stewardship and alienation. Whether the same Church laws apply to the assets of an incorporated subsidiary of the religious institute is not as clear cut.

In civil law there is no doubt that the assets shown in the balance sheet of an incorporated entity are the sole property of that entity, to be dealt with and protected according to civil law. The McGrath thesis contradicted the contemporary thinking in this area, and for several decades the thesis created a marked difference of opinion.
John J McGrath was a practising lawyer in Pittsburgh in the United States before he became a Catholic priest and was subsequently a professor of canon law at the Catholic University in America, Washington DC.42

According to McGrath, all trading entities incorporated under the civil law were no longer owned by the sponsoring religious institute and consequently the legal title to real and personal property became vested in the corporation itself.43 His argument was that if a school or hospital was created to serve the general public, then the general public was the equitable or beneficial owner of its assets: 'If anyone owns the assets of the charitable or educational institutions, it is the general public. Failure to appreciate this fact has led to the mistaken idea that the property of the institutions is the property of the sponsoring body.'44 If, on the other hand, the incorporated entity also had the status of a public juridic person in its own right, then McGrath conceded that the assets were to be considered as Church property. By his own admission it was a rarity for a trading entity such as a school or hospital to be both civilly incorporated and acquire the status of a public juridic person.45

Conversely, McGrath's belief that the general public is the real owner of the assets of a separate corporation meant that the sponsoring institute no longer owned the property. He stated the property, real and personal, of Catholic hospitals and educational institutions which have been incorporated as American law corporations is the property of the corporate entity and not the property of the sponsoring body or individuals who conduct the institution.46

If McGrath's theory that a canonical bond between a religious institute and a school or hospital no longer exists after incorporation is correct, then the conclusion to this thesis would simply be that there are no canonical implications for incorporated

42 Conlin, above n 3, 73–75.
43 McGrath, above n 4, 33.
44 Ibid.
45 Ibid 17. At the time of McGrath's work only two organisations had the status of both civil and church corporate personality, they were the Catholic University of America in 1889 and the Niagara University in 1956. See Maida and Cafardi, above n 7, 148.
46 Ibid 24.
Church organisations operating in Australia. The schools and hospitals sponsored by religious institutes would be free to operate solely under the civil law with no regard to the laws of the Church that govern the maintenance and stewardship of property. Church law would no longer apply.

Initial Support for the Theory

McGrath found considerable support for his theory and as a result many 'Catholic institutions allowed themselves, on the advice of their lawyers, to relinquish ownership of some of their properties through civil incorporation'. Although McGrath's thesis was not formally published until 1968, his influence on the civil incorporation of Catholic hospitals and universities was evident earlier than that. In 1967, for example, the newsletter of St Mary's College in Notre Dame, Indiana, entitled Crux, reported that: 'Many representatives of religious Orders have consulted with Father McGrath during the past year and are expected to make announcements in the near future concerning the administration of "Church" property'.

Also in 1967, Webster College, operated by the Sisters of Loretto in Saint Louis, Missouri, formally 'secularised' the College, specifically to remove the College from the canonical control of the Church. Several months after Webster, the boards of Saint Louis University and the University of Notre Dame were reconfigured into predominantly lay boards which were no longer under the direct control of the religious institutes which had sponsored them. In hindsight, it appears that some

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47 Stamp, above n 22, 20.

48 Conlin, above n 3, 75–83, gives detailed examples of some of the institutions that reconfigured their corporate structures in accordance with McGrath's advice, even before the McGrath thesis was published in 1968.

49 'McGrath Study to Have Major Repercussions'. (November 29, 1967) Crux.

50 Jacqueline Grennan, 'Freeing the Catholic College from Juridical Control by the Church' Journal of Higher Education, 40 (February 1969) 104. At the time of the changes in 1967, Sister Grennan was president of Webster College. Sister Grennan simultaneously abdicated from her religious vows so that the College could be truly said to be secular. 'And so, it is now more and more generally maintained that the Orders do not own the institutions and, therefore, that the institutions are no longer subject through them to hierarchical control'. (Grennan, 104).

51 Conlin, above n 3, 84–85.
institutions, in attempting to laicise the boards of the Colleges, i.e. to achieve a representation of non-religious members who had educational and business qualifications, inadvertently, in following the McGrath thesis, 'secularised' the boards, i.e. removed the Catholic influence from them altogether.\textsuperscript{52}

In 1984, another canonist, Jordan Hite, wrote in support of the McGrath thesis:

This [ownership by a public juridic person] would be in contrast with a college or hospital that is a separate civil law entity and is managed or operated by diocesan personnel or a religious institute. Such an arrangement is usually made by contract and even though the facility may have a religious name, it is not a public juridic person and its property is not Church property.\textsuperscript{53}

Douglas Stamp wrote that McGrath may have been correct in stating that, through civil incorporation, what was once ecclesiastical property 'is no longer Church property', and that, as a consequence of the McGrath thesis, 15 Jesuit universities and colleges all accepted the theory of corporate ownership and the absence of Church control over such organisations.\textsuperscript{54}

The Contrary Views

The McGrath thesis was first challenged in 1973 by Adam Maida, who was also a civil lawyer (by coincidence also in Pittsburgh) before joining the priesthood. He worked in the Vatican for some 12 years drafting aspects of the new 1983 code and is presently Cardinal Archbishop of Detroit.\textsuperscript{55}

\textsuperscript{52} Ibid 90.


\textsuperscript{54} Stamp, above n 22, 17. Stamp refers to 15 Jesuit universities and colleges no longer under Church control. Daniel Conlin, \textit{Canonical and Civil Legal Issues Surrounding the Alienation of Catholic Health Care Facilities in the United States} (2000) 82–86, actually identifies Webster College in Saint Louis Missouri, Saint Louis University and the University of Notre Dame as examples of organisations which were reconfigured with the result that their assets were no longer Church property. For further instances of support of the McGrath thesis, see Conlin, above n 3, 77–79.

\textsuperscript{55} The personal profile of Adam Maida is provided by the author who is a friend and colleague.
The rebuttal from Maida was strong and clear:

A few years ago, Msgr. John McGrath introduced a theory of both canon and civil law that concerned the ownership of religious institutions. He made some practical conclusions and recommendations and, to this day, to the best of my knowledge, his theories have not been rebutted, his recommendations have received wide acceptance, and the consequences have been most serious for the Church... Thus what Henry VIII did with a sword in England, what Napoleon did with his armies in France, what Lenin did with a political philosophy, McGrath has attempted to do with a legal theory. The unchallenged receptivity of the theory and its conclusions throughout the country is utterly amazing.  

Maida regarded a civilly incorporated trading entity of a religious institute as being part of the assets and apostolate of the institute, despite having separate incorporation: 'Without equivocation, there can be no doubt that canonically these institutions are part and parcel of the moral persons known as the Diocese or Religious Order which brought them into existence in the beginning.'

Maida's strong view was that civilly incorporated institutions remain under canon law simply as an expression of the apostolate of the sponsor, and the assets of the civilly incorporated institution remain, canonically, the property of the sponsor:

Prior to incorporation there is absolutely no controversy concerning the canonical reality that the hospital is part of the apostolate and a portion of the assets which belong to the religious order. The fact of incorporation afterwards, canonically, does nothing; it is permitted or even encouraged so that ecclesiastical dimensions may be preserved and protected in an often hostile society.

Maida points out that religious institutes and their trading entities are subject to two independent legal systems, canonical and civil. Juridic acts under one system have no necessary juridic effects under the other. Just as a public juridic person is given no

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57 Adam J Maida, 'Ownership, Control and Sponsorship of Catholic Institutions: A Practical Guide' (Paper presented at the Catholic Conference, Pennsylvania, 1975) 37. Maida's work was written in 1975 when the 1917 Code was still in effect. Under the 1917 Code what are now known as public juridic persons were called 'moral persons' and religious institutes were known as 'Religious Orders'.

58 Ibid 37.
civil recognition, so too, the act of civil incorporation has no effect on previous canonical status.

Father Maida’s position was supported by a letter written in 1974 by the Sacred Congregation for Catholic Education in Rome to the Apostolic Delegate in the United States expressing concern that valuable Church property and even the names of Catholic institutions were being lost forever to the Church due to the McGrath thesis.⁵⁹ A subsequent letter from the Sacred Congregation for Religious and Secular Institutes made it clear that the McGrath thesis had never been considered as valid by the Congregation.⁶⁰

Maida’s view that an incorporated entity is part of the totality of the public juridic person and that the assets of the juridic person must be protected according to the prescriptions of canon law was also accepted by Conlin, Kennedy and Stamp,⁶¹ with

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⁵⁹ For some time this Sacred Congregation has been anxious about the status of the property and name of the many Catholic colleges and universities in the United States. We have not been unaware of the growing tendency for the ecclesiastical entities that own and operate these institutions to alienate them from ecclesiastical control and ownership, frequently through civil corporate structural changes (Boards of Trustees, Regents, etc) often citing the "McGrath thesis" as justification for this action, an action that takes place without ecclesiastical approbation, indeed, often with the knowledge of Church authorities, who are presented only with a fait accompli, alienations that are probably invalid both canonically and civilly.

It is our genuine concern that millions of dollars of Church property and even the names of these institutions are being lost forever to the Church in this way, not through government confiscation, but by means of a gradual and inexorable drive toward secularization, assisted by the passivity and often tacit approval of Church superiors, by financial and other strains, and by the rather confused situation involving ecclesiastical control and authority in these institutions.

Canon Law Digest, above n 8, 368–369, citing the Sacred Congregation for Catholic Education, prot.N. 427/70/15; original English text, 2 January 1974.

⁶⁰ Ibid 370.

We would ask the commission to consider the advisability of contacting all such institutions asking them not to make any changes (or further changes, where these have been initiated) in their administrative structure or corporate status, without first informing, and where necessary obtaining approval from, our Congregations.

We know that in the course of the study, the influence of the so-called 'McGrath thesis' will emerge as one of the principal bases for the action of some institutions in regard to alienations, etc. We wish to make it clear that this thesis has never been considered valid by our Congregations and has never been accepted.

⁶¹ Conlin, above n 27,114; Kennedy, below n 64, 367 and Stamp, above n 22, 17.
the reservation that public donations and government funding given to the incorporated entity as capital grants should be separately accounted for on the basis that those funds should be ultimately returned to the original donors or, with the consent of the donors, re-directed to similar charitable objectives.

According to William Bassett, a professor of law at the University of San Francisco, the McGrath thesis stated, in substance, that civil incorporation created an essentially secular entity, regardless of the religious motivation underlying its creation and operation. As a consequence, Bassett believes that McGrath 'was wrong in both canon law and civil law', and that the fundamental flaw of the thesis is McGrath's misunderstanding of the effects of civil incorporation:

Incorporation, in and of itself, has no real effect upon the religious nature of a church organisation. Nor should it. The constitutionally-protected right of citizens to assemble and form cooperative ventures is not conditioned or burdened in state law upon abdication of religious faith or mission. To hold otherwise, would fly in the face of the most basic constitutional jurisprudence.

Incorporation itself is religiously and legally neutral. It does not secularize a religious organisation, nor within the Church itself does it change the canonical status of its assets. Incorporation has no more legal significance in this respect than inclusion of a church in a local fire district.

A further rejection of the McGrath thesis is found in a work by Robert Kennedy, who identifies a fundamental contradiction in the McGrath argument:

Curiously, but correctly, McGrath acknowledged that the sponsoring religious body itself may also be, and usually is, civilly incorporated, and hence, in addition to being a creature of ecclesiastical law, is often a creature of civil law as well. But the civil incorporation of religious bodies such as dioceses, parishes, and religious communities is, according to McGrath, subordinate to their essential character as ecclesiastical entities, and such "religious corporations" are an entirely different species of civil-law corporation than is the church-related college, university or hospital. Nonetheless,

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63 Ibid 743–744.
McGrath did acknowledge that the religious body under whose auspices an educational or charitable institution is conducted is itself both an ecclesiastical juridic person (subject to canon law) and a civilly incorporated entity (governed by civil law).\(^{64}\)

In essence, the contradiction in McGrath's thesis is that it is possible for the parent to have dual canonical and civil existence, but the subsidiary may not.

Other Considerations

Kennedy also points out that Maida's theory itself is oversimplified and notes that while the civil incorporation, in and of itself, is irrelevant to canonical status 'the matter becomes considerably more complicated when one looks beyond the act of civil incorporation to the deeds of the property'.\(^{65}\)

Complications arise for many incorporated schools and hospitals because the assets belonging to the incorporated entity may have come from different sources. The matter is relatively straightforward when a religious institute incorporates a school or hospital and endows that incorporated entity with the assets necessary to carry on the trading operation. The difficulty comes when the school or hospital acquires or receives assets from a source other than the religious institute. Charitable and religious organisations often have many sources of funding, including benefactors, donors and substantial government grants. Funds received from these other sources have never been the property of the religious institute and as such have never been ecclesiastical goods. Maida himself acknowledges the fiduciary responsibility of a Catholic hospital to account separately for public donations and government funds of a capital nature, with a possible obligation on the hospital to return those funds to the government or the general public upon dissolution of the incorporated entity.\(^{66}\)

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\(^{65}\) Ibid 370.

\(^{66}\) Maida, above n 56, 35–36.
One obvious complication is that in the course of trading and conducting the business of a school or hospital the funds originally attributable to the religious institute and the funds donated by the public will become intermingled, thereby making it impossible to identify the assets in their original form. In this case, religious institutes should estimate the proportion of public funds against the amount of Church property contributed to an incorporated entity so that a percentage of the total could be regarded as publicly held funds. As a result, the trading entities of religious institutes may hold some assets which are subject to the laws of the Church and others which are not.

Kennedy's view of the McGrath–Maida debate is that each individual situation needs to be looked at on its own facts. Although Maida's view would be appropriate in some circumstances, such a conclusion would not be appropriate in all circumstances:

It is undoubtedly true that some such institutions retain their original canonical status as apostolic works of the founding diocese or religious community; but it seems no less true that the canonical status of other such institutions might have been altered and a new status acquired, and that still other institutions might never have had the original canonical status of belonging to their sponsoring religious bodies. While it may fairly be said that McGrath oversimplified a complex matter by concluding that virtually no separately incorporated Catholic institution is subject to the laws of the Church governing ecclesiastical juridic persons, it seems equally fair to say that Maida also oversimplified by concluding that all such institutions are so subject.

For Church organisations operating in Australia it would seem prudent to follow the recommendation of Robert Kennedy that each individual situation be looked at on its own facts. It is submitted that for those incorporated subsidiaries that hold Church property, i.e. property given or lent to them by their parent (or by another public juridic person), they should be structured according to the Maida approach. It should be noted that 'Church property' can, in addition to the tangible assets, include the goodwill of the operation of a Catholic school or hospital.

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67 Kennedy, above n 64, 376.

68 Ibid 377.
For other incorporated subsidiaries that do not administer Church property, for example those that may have been set up to administer a community facility fully funded by a State or Federal Government, the Maida view (that all incorporated subsidiaries of a public juridic person are subject to the rules of canon law), would seem to be overstating the position.

The McGrath thesis had a wide influence and a dramatic impact on the Catholic Church in America in the 1970s and 80s and, as has already been noted, the ownership of Church property in America was adversely affected. Institutions situated in Australia are subject to the same canonical jurisprudential influences as those in America and, although irreversible problems have not as yet arisen in Australia, that does not necessarily mean that such problems do not exist. Until a major event occurs, such as a proposed corporate restructure or the intended sale of a key property, the loss of control by the religious institute over its trading entity will not be recognised.69

69 In the case of the Saint Louis University, it took 30 years for the full extent of the problem to materialise: 'what happened in Saint Louis in 1967 came home to roost in 1997 with the attempted sale of Saint Louis University'. See Conlin, above n 27, 86. Conlin explains that the dilemma with the sale of the Saint Louis University Hospital was that the sale agreement entered into by the Jesuit sponsored entity for US$309m to a for-profit non-Catholic corporation was opposed by Archbishop Justin Rigali, Archbishop of Saint Louis, by other Catholic not-for-profit health care organisations who had collectively offered US$200m and, initially, by the Holy See. Approval from Rome was subsequently given after the event.

The principal concern was whether canonical approval was necessary at all; the Jesuit president of the hospital contended that the property was not Church property, whereas the Archbishop was equally adamant that Church approval was necessary because the constitutional changes made in 1967 had done nothing to exclude the canon law rules. A further concern was that although the new owner, Tenet Health System, had contracted with the Jesuits that the Catholic nature of the hospital would be maintained and that its charitable and educational purposes would be respected, such standards would not necessarily be maintained if Tenet were to sell the facility to a new for-profit owner.
An Australian Case History

The McGrath thesis has been responsible for a number of religious institutes failing to retain control, and consequently failing to retain ownership of Church property. Another way in which control of the ownership of Church property can be lost is evidenced by the example of the Good Shepherd Youth and Family Service Inc. This case illustrates how easily Church property can be inadvertently transferred without due regard to the canonical requirement that a religious institute must retain control. The Youth Service is an initiative of the Good Shepherd Sisters in Melbourne and is recognised as a charity by the State and Commonwealth governments and by most major philanthropic trusts, as a consequence of which it receives millions of dollars annually by way of grants and donations. It also controls substantial assets contributed by the sisters themselves. Until 1985 the Service was managed by a board of volunteers consisting mainly of lay people and several sisters. The board decided to incorporate the service in 1985 for several reasons, the main one being to comply with a government requirement that recipients of government funding should be incorporated but also to afford the board members the legal protection from the debts and obligations of the service, which by then was a large business operation.

The sisters, hitherto the legal owners and operators of the Service, acquiesced in the move to incorporation, but did not take control of the process. Instead, the board arranged through its own lawyers, who had no knowledge of canon law, to draw up a constitution which allowed an open membership to members of the public who were friends and generous supporters of the Service. In time the membership, which elected the board, grew to the point where the annual general meeting had to be held in the Collingwood Town Hall. This large crowd of well intentioned and enthusiastic followers of the Good Shepherd Youth and Family Service Inc. had the legal control of the Service, which was once, and should canonically have remained, an apostolic work of the sisters. The members thus had the ultimate control of the assets of the Service, including those assets which were strictly Church property and which should have remained under the canonical stewardship of the sisters. Fortunately in 2001 the canonical problem was recognised and, after a series of difficult general meetings, the situation was resolved in favour of the sisters by the membership
agreeing to amend the constitution to provide for two classes of members: governing and ordinary. The governing members now comprise the Provincial Council plus any nominees of theirs, and the ordinary members consist of the general membership of the rank and file. The critical difference between the governing members and the ordinary members is that now, although all members are entitled to attend general meetings, only the governing members have the right to vote.

The key factor in reinstating the canonical control to the sisters was securing the goodwill and cooperation of the large membership, a difficult task in itself because the membership enjoyed the 'feel good' atmosphere of the annual general meetings in the Town Hall.

In the American context, the loss of control over Church property in the instances cited by Conlin was directly attributable to the McGrath thesis. However, the sisters' oversight in 1985 in allowing a legal process which permitted Church property to be removed from their supervision and control was not because of the influence of the McGrath thesis. In this case it arose more from the lack of knowledge of the canonical requirements and the lawyer's lack of experience in canonical matters. The Good Shepherd case illustrates how easily control can pass from one group to another and, potentially, how difficult it might be to retrieve the situation.

Summary

The McGrath thesis, written in 1968, received widespread support from canonists and Catholic institutions throughout America at the time but, following the publications by Maida in 1975, Kennedy in 1990, Stamp in 1993, Bassett in 1999

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70 The 1985 and 2001 constitutions are filed with the Registrar of Incorporated Associations, Melbourne and are a matter of public record.

71 The author is the lawyer who was instructed to arrange for an annual general meeting to approve an amendment to the Constitution in order to restore the sisters to a position of control of the Youth Service and its assets.

72 Conlin, above n 27, 63.
and Conlin in 2000, it is generally accepted amongst canonists that the McGrath thesis is seriously flawed.

It is also accepted that Maida's view is correct in so far as it holds that an incorporated trading entity should be part of the public juridic person (religious institute) and should be controlled by the public juridic person for two reasons: because it is part of the apostolic work of the juridic person and also because, under the code, the juridic person's assets employed by the trading entity must be safeguarded. However, not all assets in the trading entity are necessarily derived from the public juridic person and to this extent the Maida theory is oversimplified.

The code requires Church property to be safeguarded.73 Whether all of the assets of an incorporated subsidiary should be considered to be Church property is a question which has not yet been satisfactorily resolved. The code itself offers no assistance in determining the canonical connection between the sponsoring religious institute and the incorporated subsidiary, which leaves the resolution of the matter in the realm of the jurisprudence developed by the canonists. In 1990, Kennedy unable to find a final conclusion one way or the other, summed up his investigation of the issue by saying that the problem 'in effect seems far more complicated than either McGrath or Maida appeared to realise, and requires, in each instance, detailed studies of the facts surrounding the establishment and continued governance of the institution'.74

It is possible that the complications raised by the McGrath and Maida theories can be alleviated to some extent by referring to the laws of 'alienation'. The code is quite specific on some aspects of alienation.75 If these rules are taken into account when a public juridic person sets up a separate incorporated entity and if that incorporated entity is endowed with Church property, then the public juridic person should take special care to ensure that the new structure is set up in such a way as to make sure that Church property is not alienated in the process. The complications might have been eliminated altogether if the opinions expressed in the letter from the Sacred Congregation for Catholic Education in January 1974 and by the Sacred

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73 Canon 1284–§2.2°.
74 Kennedy, above n 64, 400.
75 Canons 1290–1298, both inclusive, outline the laws on alienation.
Congregation for Religious and Secular Institutes in October 1974 had been given due effect in the code, which was promulgated some nine years later.

Setting aside the issue whether or not an incorporated entity remains part of the public juridic person, the need to safeguard Church property (canon 1284) and the requirement not to alienate Church property (canon 1291) require the sponsoring institute to take special care in arranging for the incorporation of a trading entity.

**Conclusion**

The above outline of the key factors in the code that are relevant to safeguarding Church property and the incorporation of apostolic works (such as schools and hospitals), illustrates some of the considerations and dilemmas which must be taken into account by religious institutes in their endeavours to comply with both Church and civil legal systems.

When setting up trading entities such as schools and hospitals as separately incorporated entities, there are three aspects of canon law which must be observed:

- Church property generally must be safeguarded and maintained, as required by canon 1284;
- Stable patrimony must not be alienated without due permission as required by canon 1291; and
- Church property should not be dealt with in such a way as to jeopardise the patrimonial stability of a religious institute, as required by canon 1295.

There are competing claims to ownership of certain assets, which are clearly the property of an incorporated entity under civil law, but which the Church claims to be ecclesiastic goods under canon law. In some respects, these are not dissimilar to the conflicts experienced in private international law where there can be uncertainty about the jurisdiction of one sovereign state over another; such conflicts can sometimes be resolved one way or the other by relying on the body of jurisprudence
which has evolved. Within Australia, the competing interests of Commonwealth and State legislation are resolved by the Constitution, which says that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. 76

McGrath's thesis had one advantage: that religious institutes only needed to comply with the civil legal system. But the majority of Church organisations that do not accept the McGrath thesis need to find a way to observe both sets of laws: 'While it may be possible to make an institution civilly and legally secular, it is not possible to canonically alienate ecclesiastical goods without ecclesial permission'. 77

The canon law relating to ecclesiastical goods is clear in some respects and ambivalent in others. It is a straightforward exercise to identify ecclesiastical goods: all assets which are owned (in the civil sense) by a public juridic person or by the Church itself (the Holy See) are ecclesiastical goods. The identity of public juridic persons within the Church, having been established by Church authority, is also clear. All parishes, dioceses and approved religious institutes are public juridic persons. The need to safeguard and protect ecclesiastical goods under Church law is also well recognised.

However, there is no common understanding of the ways and means of safeguarding and protecting these goods and, in fact, there is no common agreement on which ecclesiastical goods are subject to which particular canon laws. It is not universally accepted that the code protection laws require a corporate structure to be used to protect goods. 78

It is generally accepted that the McGrath thesis is incorrect, but the opposing view, that the assets of an incorporated entity remain ecclesiastical goods belonging to the canonical parent, is not necessarily a complete answer. As Kennedy points out,

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76 Commonwealth of Australia Constitution Act 1900 (Cth), s. 109.

77 Conlin, above n 3, 83.

78 Canon 1284-§2.2° requires that ecclesiastical goods be protected by 'civilly valid methods'.
correctly it is submitted, each situation needs to be studied in detail and determined according to the relevant facts.  

According to some authors the concept of ownership in Church law is simple in that ownership is absolute and does not recognise equitable interests. This may be true in theory, but in practice it could be argued that in view of canon 1256, which provides for 'ownership under the supreme authority of the Roman Pontiff', and in view of the strict control by the Vatican over alienation of goods, ownership is less than absolute in canon law.

Although canons 1290–1298 of the code deal specifically with alienation, there is no definition of that term, with the consequence that learned canonists differ in their approach. Maida and Cafardi, who have produced the only textbook on Church property for English-speaking countries since the 1983 code was introduced, give a liberal interpretation which includes a number of business transactions that they consider ought to constitute alienation, whereas Beal, Coriden and Green take a literal rather than liberal approach, confining alienation to the actual transfer of title of ecclesiastical goods. In the middle ground is Morrisey who distinguishes between alienation in a strict sense and alienation in a broader sense. Although he does not say so directly, one assumes that the consequence of an act of alienation of either description would be the same.

A close examination of canon 1291 indicates that permission for an alienation is only required if the goods in question are part of the stable patrimony of a public juridic person and if the value of those goods exceeds the sum designated from time to time. Consequently, the laws of alienation have only limited application. Taking this limited application into account, along with the difficulty in establishing which assets of a public juridic person would be classified as stable patrimony, it appears that the

70 Kennedy, above n 64, 400.
80 Morrisey, above n 41, 53.
81 Maida and Cafardi, above n 7, 85.
82 Beal, Coriden and Green, above n 2, 1494.
83 Morrisey, above n 17, 25.
laws relating to alienation would be almost impossible to enforce on a consistent basis.

The enforcement of the laws on alienation relies on Church bodies voluntarily submitting themselves to the laws of the Church and voluntarily requesting the necessary permissions. Whether a public juridic person decides to apply for permission to carry out a particular transaction depends almost entirely on its own subjective interpretation of what constitutes an alienation.

Conlin notes that about 40% of the religious institutes in the United States do not abide by the canons that affect the administration of Church property, and that the authorities in Rome are sometimes surprised when they receive proper petitions for the sale of Church property because this has rarely happened in the United States. Usually property is alienated without any concurrence from the Holy See.\(^84\)

Membership in the Catholic Church is voluntary, and those who obey the canon law do so not for fear of sanctions, but simply because they are expected to do so. It is submitted that as a general rule all canonical administrators, if questioned, would express the intention to uphold the law of the Church and to observe their canonical obligations. The fact is however that the canonical obligations are capable of different interpretations because the canon law code and the jurisprudence which surrounds it are of such a general nature, having been drafted and developed for universal application in many countries, that the law often suffers in the local subjective interpretation.\(^85\) Administrators can and often do find convenient solutions to particular issues, where the canon law is equivocal, for example, on the issues of whether parish schools should be incorporated.

\(^84\) Conlin, above n 3, 51.

\(^85\) See 'Universal and Particular Laws', chapter 1, page 16.
CHAPTER 3

THE LAWS IN AUSTRALIA RELEVANT TO THE INCORPORATION OF CHURCH - RELATED ACTIVITIES

Introduction

This chapter will outline the different forms of corporate entities that are available in Australia pursuant to both Commonwealth and State legislation and will highlight those corporate entities that are particularly suited for use by religious institutes and their trading entities. An understanding of the relevant legislation is important because the only way to achieve a legally recognised corporate status is to become registered according to one of the various Acts of Parliament.

As shown in chapter 2, the canon law code has been interpreted to mean that trading entities being operated by religious institutes should be separately incorporated as a means of protecting Church property.\(^1\) Chapter 2 also indicates that canon lawyers have asserted that the property owned by the incorporated subsidiary of a religious institute remains, in canon law, the property of the religious institute itself. Therefore, when setting up an incorporated subsidiary to carry on the trading operation of a school or hospital, a religious institute must ensure that the type of corporate entity is suitable for the purpose, i.e. that the religious institute has the ability to control the subsidiary absolutely.

Some of the legislation available in Australia is suitable for not-for-profit organisations generally; not only charitable and religious entities, but also social clubs, sporting and recreation groups, arts and cultural bodies, community service organisations, philanthropic bodies and the like. Some of the legislation has been designed specifically for Catholic organisations, however, all of the legislation that is relevant to not-for-profit organisations will be considered in detail in this chapter.

\(^1\) See chapter 2, page 45.
Persona Ficta

The idea of an entity with a separate legal existence, sometimes known as a legal person, sometimes known as a fictitious person (as distinct from a natural person), has existed since Roman times. Harry Henn refers to organisations being accorded corporate personality as early as 2083 BC, although the concept is more generally accepted as a product of Roman law, which allowed a corporate personality to a number of institutions. The res publica, or public thing, was the description of the government itself as a legal person. Similarly recognised as separate legal entities were certain religious organisations (the sodalitas); the form of public corporation (the societas); the municipal corporation (the municipium); and the non-commercial type of public corporation called the collegium.

Canon law adopted many aspects of Roman law and if canon law was silent on a particular issue, the Church simply adopted the Roman law. Canonists took up the concept of a separate legal identity around the era of Gratian, a monk based at Bologna University, in 1140, at that time the European centre of culture and learning. Gratian’s work brought about a major revival in the interest and study of canon law and he is noted for his famous work Concordantia Discordantium Canonum, ‘A Harmony of Discordant Canons’, which immediately became the recognised reference work for canonists, one of whom was Pope Innocent IV (1243–1254), himself a well known canonist and to whom the expression persona ficta is attributed.

In English law, the corporation sole evolved in medieval times, so that land managed by a Church official could be passed on death to the person succeeding in that office. Lawyers developed the theory that the series of successors to a particular Church office constituted an artificial legal person in which the title to property could

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3 Ibid.
4 Ibid.
be vested. The artificial legal person was called a corporation sole. In Australia, religious office-holders are not (with one exception) treated as corporations sole in the absence of a Crown grant or statute. In the case of Trustees of the Roman Catholic Church v Ellis it was held that the Roman Catholic Archbishop of Sydney was not a common law corporation, a corporation sole under a Crown grant, or a statutory corporate sole. The exception is that in Western Australia, the office of the Catholic Archbishop of Perth is constituted as a corporation sole by virtue of the Roman Catholic Church Property Act 1911 (WA).

The rules and regulations governing corporations as they are known today are comparatively recent, going back to the Companies Act 1862 (UK), referred to as 'the Magna Charter of co-operative enterprise'. This Act was followed by the Companies Consolidation Act 1908 (UK), from which the Australian corporations law is devolved. 'Legal personality' is another frequently used expression for persons or entities who have legal rights and responsibilities through incorporation.

The Nature of a Corporation

The essence of a corporation is that it has a legal identity distinct from that of its members (or shareholders, depending on how the corporation is structured) and directors.

In 1897, the House of Lords in Salomon's case confirmed unanimously that a company is a legal entity separate from its shareholders and directors. Subsequently known as the separate entity doctrine, the concept of a corporation having a separate legal existence has been upheld both judicially and by corporate legislation.

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6 Ibid.
7 Ibid
8 Trustees of the Roman Catholic Church v Ellis [2007] NSWCA 117.
9 Sir Francis Palmer, Company Law (9th ed, 1911) 1. A more cynical description is that of Ambrose Bierce who defined a corporation as 'An ingenious device for obtaining individual profit without individual responsibility', A Bierce, The Devil's Dictionary (1911).
For example, in 1990 Deane J in NSW v Commonwealth confirmed that 'Incorporation means the acquisition or conferral of corporate personality under the law'.

The Corporations Act 2001 (Cth) contains a concise summary of the legal consequence of becoming registered as a company; although the Act deals particularly with companies, the same attributes apply to any other type of incorporated body.

The explanatory guide in Part 1.5, paragraph 1.1 of the Act states:

As far as the law is concerned, a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees and agents. A company has its own property, its own rights and its own obligations. A company’s money and other assets belong to the company and must be used for the company’s purposes.

A company has the powers of an individual, including the powers to:

- own and dispose of property and other assets;
- enter into contracts;
- sue and be sued.

The Act further provides that the company has perpetual succession until such time as it is deregistered by the Australian Securities and Investments Commission (ASIC). Paragraph 1.7 notes that a company does not have a physical existence and that consequently it must act through certain individuals, such as directors, company secretary, company employees or agents.

An organisation may only become incorporated as a legally recognised entity by way of one form of legislation or another. Companies registered under the Corporations Act 2001 (Cth) have unlimited legal capacity. 'A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all

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12 Ford’s Principles of Corporations Law, above n 5, [1.220]. 'Incorporation, the most significant feature of any company, whether limited or unlimited, means that the law treats it as a type of legal person; it has a legal entity separate from its members'.
the powers of a body corporate...\textsuperscript{13} The doctrine of ultra vires, which in earlier years required companies to expressly set out the scope of their powers in their memorandum of association, has been abolished.\textsuperscript{14} Corporate entities other than companies use their own particular legislation or their constitutions as the source of their corporate attributes and powers.

As a separate legal entity, a corporation has the ability to conduct and manage its own affairs with a two-tiered system of governance. At the highest level of corporate authority are the members (or shareholders), who have the power to control the destiny of the corporation through their authority to ensure that the objects and purposes of the corporation are carried out, to approve the admission of other members, to appoint and remove the directors, to determine how any surplus assets are distributed upon a winding up, and other incidental powers.

At the other level of governance, the directors have the day to day responsibility for the operation of the corporation. Unless otherwise provided in the constitution of a company, s.198A of the Corporations Act 2001 (Cth) provides that the business of a company is to be managed by or under the direction of the directors and that the directors may exercise all the powers of the company except any powers which need to be exercised in general meeting. The powers to be exercised in general meeting are such matters as are reserved by the Act or by the company's constitution for determination by the shareholders in general meeting. Accordingly, the directors have the responsibility, under s.198A (1), to manage the business operations of the company, and s.198A (2), gives them the necessary powers to do so.

Each corporation has a corporate charter which outlines the rights and responsibilities of both the members and the directors. Under the Corporations Act 2001 (Cth), this corporate charter is known as a 'constitution', formerly known as the 'memorandum and articles of association' for companies registered in earlier years. In the case of an incorporated association, the charter is known as the 'rules'. It is within the framework of such constitutions or rules, which are binding on both the corporation and its members, that the governance of the corporation is carried out.

\textsuperscript{13} Corporations Act 2001 (Cth) s.124 (1).

\textsuperscript{14} Corporations Act 2001 (Cth) s.125.
It is worth noting that although the members have the highest level of corporate authority and are in a position to control the destiny of the corporation and to appoint and remove the board of directors, it is entirely the responsibility of the directors to manage the business affairs of the corporation. It is the directors who bear risk, both under the Corporations Act 2001 (Cth) and at common law, to act in the bona fide interests of the corporation, to avoid conflicts of interest, to exercise care, diligence and honesty and not to make improper use of their position or of information they may receive by reason of their position.

Part 2D.1 of the Corporations Act 2001 (Cth) outlines the duties and powers of directors, other officers and employees. The general duties of directors and other officers are:

- to exercise their powers and discharge their duties with the degree of care and diligence as outlined in s.180(1);

- to make business judgements in accordance with the standards outlined in ss.180(2) and 181, which require them to exercise their powers and discharge their duties in good faith, in the best interests of the company and for a proper purpose.

Directors, other officers and employees must not:

- use their position improperly to gain an advantage for themselves or someone else or to cause detriment to the corporation as provided in s.182(1);

- improperly use information obtained in such role to gain advantage for themselves or someone else or to cause detriment to the corporation as provided by s.183(1).15

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15 Section 9 of the Corporations Act 2001 (Cth) defines ‘officer’ to include a director or secretary or a person who makes, or participates in making, decisions that affect the whole or a substantial part of the business of a corporation, or who has the capacity to affect significantly the corporation’s financial standing, or in accordance with whose instructions the directors of the corporation are accustomed to act.
Civil penalties are imposed for breaches of these provisions and in some circumstances where the offences are committed recklessly or with intentional dishonesty, criminal sanctions may also be applied.

Furthermore, under s.588G, it is a director's duty to prevent insolvent trading by the company. By failing to prevent the company from incurring a debt when the company is insolvent (or if there are reasonable grounds to suspect that the company is insolvent), a director may, under ss.588J and 588K, be liable to compensate the company.

**Types of Corporation**

The Parliaments of the Commonwealth, States and Territories have provided a number of ways in which an organisation may become a separately recognised legal entity with the status of a corporate body.

Under Commonwealth legislation, the *Corporations Act 2001* (Cth) provides the framework for registering a variety of companies, which collectively constitute the majority of corporations registered in Australia. Section 112(1) of the Act recognises the six types of companies which may be registered. Of those types of companies available, the company limited by guarantee is considered the most suitable for use by the typical not-for-profit organisation.16

Under the States and Territories' legislation there are corporate vehicles, other than the company provided for under the Commonwealth Act, which have been designed for use by not-for-profit organisations, namely:

- statutory corporations;

- incorporated associations (under eight different associations incorporation Acts); and

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- bodies corporate specifically designed for religious, charitable and educational organisations.

The various types of corporate entity are considered later in this chapter under the headings:

- the company limited by guarantee;
- statutory corporations;
- the associations incorporation Acts;
- the New South Wales Act; and
- the Queensland Act.

The Advantages of Incorporation

Incorporation of an organisation, whether as a company or as some other type of corporate entity, will bring about a number of benefits for the sponsors or promoters. These benefits arise from the fact that an incorporated entity enjoys a separate legal existence to that of its sponsors or promoters.

The main advantages of incorporation are:

- protecting the members/shareholders from primary liability for the debts and wrongs of the corporate entity;
- ease of administration;
- the need to comply with a government requirement that a recipient of government funding be legally identifiable;
- the ability to clearly identify the parties to a contract; and
- enabling a Church-related organisation to comply with the canonical requirement of canon 1284.
Limited Liability

Generally speaking, committee members of an unincorporated association are personally liable under contracts which are concluded on behalf of the association, and they are also liable in tort. For example, in the case of Bradley Egg Farm v Clifford (1943) 2 All ER 378, the members of the Council of an unincorporated poultry society were held personally liable for damages awarded against the society for breach of contract. A large number of fowls belonging to the plaintiff had been destroyed, allegedly as a result of the breach of a contract with the defendants to test the fowls for certain diseases, and because of the alleged negligence of an employee of the Council. The majority of the Court of Appeal held that the members of the Council were liable personally, not merely as representatives of either the society or its members as a whole, but also because, as the Council, they were in charge of its operations. In the case of Kennaway v Thompson (1980) 3 All ER 329 (CA), all the members of a motor boat racing club were found liable for the nuisance caused by the noise of their boats, and as occupiers of the man made lake on which the races were held.

This personal liability of committees and members for the debts or torts of an association can be generally alleviated simply by incorporating the organisation. Nevertheless, there are some instances when a director of a company can still be personally responsible, for example, for the breach of the duties required by ss.182–184 of the Corporations Act 2001 (Cth) or for failure to prevent insolvent trading under s.588G; a director may also be liable to compensate the company under ss.588J and 588K. However, in normal circumstances acting honestly, in good faith and in the interests of the company, a director will not be personally liable for the debts or wrongs of the company.

Limited liability is important not only for the members of an incorporated body, but also for its parent or sponsor. For a religious institute, the advantage in incorporating its trading entities is that the institute is no longer liable for the debts of the trading entity; if a school or hospital incurs a liability, whether a debt arising from normal

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17 A S Sievers, Associations and Clubs Law in Australia and New Zealand (2nd ed, 1996) 31.

See also Peter MacFarlane and Simon Fisher, Churches, Clergy and the Law (1996) 50.
trading activities or a judgement debt arising from allegations of abuse or negligence against the corporation, those debts are not necessarily passed back to the religious institute. Failure to incorporate the trading entity of a religious institute could create significant liability problems both for the institute itself and for the persons who are responsible for its operations, resulting in the threat to Church property which the administrators have an canonical obligation to protect.

In circumstances outlined in s.588V of the Act, a parent company may still be liable for the debts of a subsidiary. If a subsidiary is insolvent when it incurs a debt, and if there are reasonable grounds for suspecting that the company is insolvent at that time, the debts of the insolvent subsidiary may be recoverable from the parent, having regard to the nature and extent of the parent’s control over the subsidiary. The provisions of s.588V only apply if both the parent and the subsidiary are companies under the Corporations Act 2001 (Cth); if the parent body is unincorporated or is incorporated under legislation other than the Corporations Act 2001 (Cth), these provisions relating to the insolvent trading of a subsidiary are not applicable.

Administration

A useful aspect of incorporation is that it simplifies the administration of the incorporated entity’s affairs ‘by virtue of the corporation having perpetual succession’.\(^{18}\) The advantage in this regard is that property can be held in the name of the body corporate. In the case of an unincorporated association, real estate is usually held in the names of the members of the committee of the association or, in the case of the religious institute, in the names of the provincial councillors from time to time. The consequence is that upon a change of committee or change in the composition of a provincial council, it is necessary to employ lawyers to transfer the title from the names previously registered into the names of the new committee or council.

\(^{18}\) Ford’s Principles of Corporations Law, above n 5, [2.080]...‘it has been traditional in grants of incorporation to state that a corporation has perpetual succession. This makes it clear that despite changes of membership, the corporation continues as a distinct legal entity’. 
The preamble to the Roman Catholic Church Communities' Lands Act 1942 (NSW) illustrates this point:

[Whereas] property real and personal held on trust for or for the use or benefit or for the purposes of certain orders, congregations, communities and associations of the Roman Catholic Church in New South Wales is vested in many different bodies of trustees, and, owing to deaths and other causes, the necessity for the appointment of new Trustees frequently arises: And whereas it is expedient that bodies corporate be created for the purpose of holding, managing and dealing with property so held, that provision be made for the vesting in bodies corporate to be created by this Act of real property so held, that conveyancing transactions in respect of property so held be facilitated and rendered less expensive and also that other activities which are or may be for the benefit of the Roman Catholic Church or of those orders, congregations, communities and associations of the Roman Catholic Church may be conducted by those bodies corporate.

The administration of both the incorporated entity and the sponsoring organisation are further enhanced by virtue of the necessity to keep separate financial accounts. As an unincorporated enterprise, the financial dealings of a school or hospital have often been intermingled with those of the religious institute.

The incorporation of a school or hospital under most forms of legislation also provides the opportunity to appoint experienced lay people to the board whereas previously only members of the religious institute would have been eligible to sit on the board. The ability to appoint lay people provides the potential to improve the administration, management and governance of the enterprise. However, it is not possible to appoint lay people to the boards of corporations under the Roman Catholic Church Communities' Lands Act 1942 (NSW) or the Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld) because only members of the religious institute can be officers or members of the body corporate.
While the primary purpose, and often the sole purpose, of incorporating a commercial operation is to provide limited liability protection for corporate investors, a further compelling reason for the incorporation of many of the religious organisations is to simplify the administration of their affairs, particularly, the holding of real estate.

Perpetual Succession

An inherent advantage of an incorporated body is the aspect of perpetual succession, which allows the incorporated entity to continue indefinitely until such time as it is wound up or liquidated. The continuous and perpetual nature of an incorporated body eliminates the paperwork associated with amending partnership deeds and deeds of trust when it becomes necessary to admit new members to a partnership, to retire others, to record a change in the composition of trustees, to vest the trust property into the names of the new and continuing trustees or to indemnify retiring trustees. This paperwork can be avoided through the simple act of incorporation.

Government Requirement

A compelling reason for incorporation is the fact that the government departments that subsidise social welfare, community projects, schools, health care facilities and aged-care facilities are now only prepared to deal with incorporated entities. The funding agency usually requires the constitution or rules of the body corporate together with a certificate of incorporation before an approval is given for government funding. Although it is a normal departmental policy to require the incorporation of the recipients of public funding, there are several Commonwealth Acts which actually specify this requirement. 19 Likewise, the Australian Tax Office will only grant a tax exempt status (DGR) to incorporated entities whose constitutional charter contains requirements similar to those set out in s.150 of the Corporations Act 2001 (Cth) and which meet the strict requirement regarding the

19 Aged Care Act 1997 (Cth) s.8 (1); Aged or Disabled Persons Care Act 1954 (Cth) s.7 (3) (c).
distribution of funds following a winding up. In a similar vein the major philanthropic groups that distribute funds each year to charities will only deal with incorporated organisations so that they can ensure they distribute funds only to legally identifiable parties.

Contracts

An unincorporated association usually enters into contracts with outside parties through its committee members, who bear primary liability for such contractual obligations. 'The fact that an unincorporated association is not a separate legal entity has always caused difficulties in contractual disputes between an association and a third party'.

The difficulty in identifying a contracting party to a building contract is illustrated in the case of *Roman Catholic Trusts Corp v Van Driel Limited*, where it was necessary for the Supreme Court of Victoria to determine whether the Roman Catholic Trusts Corporation was the appropriate plaintiff. Although the building contract showed 'Emmaus College' as the proprietor, no such legal party existed. Having examined the *indicia* of identity contained in the building contract itself and having considered all the extrinsic circumstances, Hansen J decided that the Roman Catholic Trusts Corporation was the only legal entity amongst a number of unincorporated entities which possibly could have been identified as the 'proprietor'.

Hansen J found that Emmaus College, which was shown as proprietor in the building contract, was not a body corporate, was not an unincorporated association and was not even a registered business name; it was merely the name of the school conducted at the site. A considerable amount of time and money could have been saved had

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20 Sievers, above n 17, 28. Sievers sets out a number of reported cases where legal difficulties have arisen due to the unincorporated nature of one of the contracting parties.


22 Ibid at para 77.

23 Ibid.
the school been separately incorporated and been able to enter into the contract in its
own right.

Likewise, contracts of employment and contracts of insurance can be seriously
complicated if the identity of a contracting party is obscure. Concerns such as these
can be effectively eliminated by using an incorporated entity to undertake contractual
arrangements.\textsuperscript{24}

Canonical Requirement

As discussed in chapter 2 under the heading 'Canon 1284–\$2.2\textsuperscript{o} and the Need for
Civil Incorporation', canon law imposes an obligation on religious institutes to
safeguard and protect Church property by using whatever civil devices are available,
specifically by way of separate incorporation of trading entities.\textsuperscript{25}

Summary

Incorporation has advantages for a religious institute itself and its members because:

- any liability from trading operations can be quarantined in the operating
  company itself;

- members of the religious institute who are personally vulnerable to litigation in
  their roles as school principals or directors of nursing of unincorporated entities
can be protected by a corporate entity;

- there is more legal certainty in the contractual dealings of an incorporated
  entity, especially in contracts of insurance; and

\textsuperscript{24} James Gobbo, \textit{Religious Orders and Advisory Bodies, Governing Bodies for Undertakings of

\textsuperscript{25} Canon 1284–\$2.2\textsuperscript{o}. 
• administration of the major assets, especially real estate, can be simplified by using a corporate entity as the registered proprietor.

Incorporation has overall advantages for the directors and officers because:

• committee members and administrators of unincorporated organisations will be less likely to be sued in their personal capacity if they instead serve as officers of an incorporated entity; and

• outside experts can be enlisted to join the boards of incorporated entities, whereas they cannot be part of the board of a religious institute itself.

The Disadvantages of Incorporation

The disadvantages to incorporating not-for-profit organisations are generally perceived to be:

• the cost;

• the need for public disclosure and accountability; and

• the onerous directors' responsibilities.

Cost

It is accepted that setting up an incorporated entity involves a certain amount of money. Registration fees for the incorporation of associations vary from State to State, but generally speaking the fees are several hundred dollars less than the fee payable on the incorporation of a company under the Corporations Act 2001 (Cth).26 However the incorporation fee is a one off payment, and therefore it should not influence the important decision as to which type of incorporated entity would best suit the organisation in the long term.

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26 The fee to register a company limited by guarantee is $330. The fee to register an incorporated association in Victoria is $107.50.
The major up front cost is usually the legal fees associated with drafting the constitution to suit the purposes of the organisation, especially for a not-for-profit entity being formed under the auspices of a religious institute. Some organisations, such as sporting clubs and community organisations that have basic standard requirements, may avoid legal costs altogether by simply adopting the model rules offered by the incorporated associations' legislation or by the Corporations Act 2001 (Cth).

The biggest ongoing expense in operating an incorporated entity is the cost of complying with the statutory requirements to maintain adequate accounting records of financial transactions and to present to an annual meeting of members or shareholders a statement of the income and expenditure and of the assets and liabilities of the organisation. Public companies registered under the Corporations Act 2001 (Cth) must file audited accounts with ASIC,27 and in most jurisdictions incorporated associations must lodge financial statements as a measure of accountability with the registrar under local legislation. An additional cost for incorporated associations is that the financial statements must be audited before they are lodged.28

It could be said that the requirement to prepare and lodge audited accounts is an onerous financial responsibility to impose on a small organisation such as a suburban tennis club incorporated as an association. (The audit requirements do not apply in New South Wales and Western Australia, and in Victoria and South Australia they only apply to organisations with an annual turnover of more than $200,000). On the other hand, it can be argued that good stewardship requires that any organisation, however big or small, have its financial affairs properly organised, not only for the overall benefit of the membership, but also for the benefit of the committee or board of directors so that they may have a proper view of the financial wellbeing of the

27 The most common vehicle used by not-for-profit organisations under the Corporations Act 2001 (Cth) is the company limited by guarantee – see Peter MacFarlane and Simon Fisher, Churches, Clergy and the Law (1996) 35. A company limited by guarantee is a public company and, as such, is subject to audit.

28 Audited accounts are required in all States and Territories of Australia other than New South Wales and Western Australia – Sievers, above n 17, 139.
organisation from time to time during the year and fulfil their obligations more professionally.

Consequently, in most instances the amount of work involved in keeping proper financial records and in filing an annual return, with or without audit, is no more than the organisation should do for its own wellbeing in the normal course of events.

Financial Disclosure

The requirement for financial disclosure, or public accountability, is a consideration which concerns some not-for-profit entities, particularly the church organisations who would prefer to keep their financial affairs private. MacFarlane and Fisher indicate that some churches may regard the disclosure requirements as an unwarranted fetter on their liberty and suggest that a tailor-made *Religious Corporations Act* 'is required to facilitate the incorporation of churches and para-church organisations'.

Most, if not all, not-for-profit organisations such as schools and hospitals are the recipients of government funding and as such they must be publicly accountable in any event; they have an obligation to use the government funding for the intended purpose and they should be held accountable for the proper management of those funds. It needs to be noted that in most cases it would be the trading entity, rather than the Church itself, which would be required to file its accounts, meaning that the disclosure will relate only to the assets of that entity, not the assets of the religious institute or the assets of the Church.

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30 According to an article by Robert Skeffington in *Business Review Weekly* July 15–21, (2004) 39, just over 50% of the operating budgets of all States and Territories in Australia are spent on education and health.
Directors' Responsibilities

The other suggested disadvantage to incorporation is the possibility of exposing the directors and officers to personal liability under the rigorous regime of the \textit{Corporations Act 2001} (Cth) and, to a lesser extent, under several of the associations incorporation Acts.\textsuperscript{31} Regardless of the legal structure, whether unincorporated, a company or an incorporated association, the committee members, directors and officers all have the same basic common law duties and obligations to act honestly, in good faith and for the benefit of the organisation. However, under the \textit{Corporations Act 2001} (Cth), the responsibilities of directors, other officers and employees are more clearly defined.\textsuperscript{32}

The directors of an incorporated association registered in South Australia, Western Australia or the ACT also have certain statutory obligations to act with reasonable care and diligence. Directors of incorporated associations registered in all other States, although they may not have any statutory responsibilities, are subject nevertheless to similar obligations which arise under common law and the laws of equity relating to trustees. According to A S Sievers,\textsuperscript{33} 'it has always been assumed that committee members of incorporated associations are in a similar position to company directors and owe similar fiduciary duties to the association', citing \textit{Haselhurst v Wright},\textsuperscript{34} where Owen J held that the directors of a building society were in a similar position to directors of a company and had a fiduciary duty to act in the interests of the corporate body as a whole.

\textsuperscript{31} Under the \textit{Associations Incorporation Act 1985} (SA) s.39A there is a duty to act with care and diligence, not to use information for personal gain, to disclose interests, etc. and in the \textit{Associations Incorporation Act 1991} (ACT) s.6 and \textit{Associations Incorporation Act 1987} (WA) ss.21–22 there are disclosure requirements and provisions for regulating conflicts of interest.

\textsuperscript{32} Section 9 of the Act defines 'director'; it also defines 'officer' to include a director or secretary of the corporation and, although it does not define 'employee', the term 'officer' includes persons who make or participate in making decisions which affect business of the corporation or who have the capacity to affect the corporation's financial standing. The responsibility of directors and officers is discussed at length in \textit{Ford's Principles of Corporations Law}, Chapter 8. Sections 180–183 of the Act outline the main responsibilities.

\textsuperscript{33} Sievers, above n 17, 121.

\textsuperscript{34} \textit{Haselhurst v Wright} (1991) 4 ACSR 527, 531.
Likewise, committee members of an unincorporated association are expected to act honestly and not take advantage of their position for personal gain. As a matter of principle, committee members are in a fiduciary position and as such have a duty to act in the best interests of the members of the association.\textsuperscript{35} Over the centuries the courts have developed strict equitable rules to protect beneficiaries under trusts and to ensure that a trustee is not able to use a trust asset for his own benefit or profit from the trust in any way; a trustee with a fiduciary relationship must act only in the interests of the trust and its beneficiaries. A committee of an unincorporated association is in a similar position in that they have a fiduciary responsibility to the association.

It is evident that the duties and obligations under the \textit{Corporations Act 2001} (Cth) are more strictly regulated and are more onerous than the directors' responsibilities under the associations incorporation Acts of those States which have regulatory provisions viz South Australia, Western Australia and the ACT, but nevertheless there is the basic requirement of honesty and fair dealing for all incorporated entities.

In mitigation of their legal responsibilities, directors may be afforded some comfort by an indemnity given by the corporate entity or a related entity or by an insurance policy for the protection of directors and officers. It is common, for example, for an indemnity clause to be included in the constitution that protects a director against any liability incurred as a director, unless the liability arises out of conduct involving a breach of duty owed to the company. Section 199A of the \textit{Corporations Act 2001} (Cth) provides that a company or related body corporate must not exempt or indemnify a person from a liability to the company itself. And under normal circumstances it is permissible for a company to pay an insurance premium on behalf of a director for an insurance contract that protects the director from liability, with the exception that under s.199B of the \textit{Corporations Act 2001} (Cth) neither the company nor any related body may pay a premium to protect the director against liability arising from a breach of duty in relation to the company or arising out of a contravention of ss.182 or 183.

\textsuperscript{35} Sievers, above n 17, 16.
Summary

Peter MacFarlane and Simon Fisher find that the Corporations Act 2001 (Cth) 'imposes many obligations and disadvantages on religious corporations and their officers which may outweigh the benefits of incorporation'.\(^{36}\) They indicate that a decision to avoid incorporation under the Corporations Act 2001 (Cth) is understandable when taking into account the requirements for financial accountability through the disclosure of financial information to ASIC coupled with the concern about directors' and officers' liability.

When commenting on the effects of alternative incorporation under the various incorporated associations acts, MacFarlane and Fisher note:

Most jurisdictions impose on incorporated associations an obligation to keep proper accounts and financial records ... this transparency of financial information which must be divulged by compulsion of law militates against churches incorporating as incorporated associations.\(^{37}\)

It could be argued, however, that the impact of the obligations imposed by the Corporations Act 2001 (Cth) or by the associations incorporation Acts are not as debilitating as they may first appear and that, in the day to day operation of most incorporated entities that have adopted systems of good governance, these statutory obligations are administrative matters which would (or should) be undertaken by the corporation in any event.

In deciding whether or not to incorporate, a not-for-profit organisation or a religious institute needs to take into account these three so-called disadvantages of incorporation: the cost, public accountability and potential liability of directors and other officers. As indicated, the cost factor falls into two categories: the initial, one-off cost of registering the incorporated entity and the legal costs of preparing a special constitution if required, plus the ongoing costs of annual compliance (if necessary) for the corporation to file accounts. For a school or hospital with a significant annual turnover the cost factor should only be a minor consideration.

\(^{36}\) MacFarlane and Fisher, above n 29, 41.

\(^{37}\) Ibid 48.
Public accountability and the filing of annual returns is a serious consideration, not so much for organisations of a sporting or community nature, but particularly for religious institutes that might prefer to keep their financial information confidential. However, as stated, there is a difference between disclosure of the religious institute's own private financial details and publication of the financial information relating to its trading entity, which in most circumstances would be an entity in receipt of public funding.

With regard to the perceived disadvantage of the directors and other officers being personally liable for the debts of the corporation or being held personally responsible for decisions made on behalf of the corporation, there is comfort in the availability of directors' and officers' insurance to cover against any liability, plus the benefit of a written indemnity from the corporation itself. Provided that the directors and other officers act honestly, diligently, in good faith and in the interest of the corporation, their exposure to personal liability, it is submitted, is less onerous than that of a committee member of an unincorporated association.\(^{38}\)

Whether the disadvantages of incorporation outweigh the advantages is a subjective consideration for the organisation involved. For religious institutes that conduct schools or hospitals, the threat of litigation arising from the negligence or misconduct of employees is a real risk that a good administrator should seek to modify or eliminate. Setting aside the other advantages of incorporation outlined earlier, the aspect of limited liability alone for religious institutes operating schools and hospitals should outweigh other considerations.

In any event, for religious institutes that are responsible for the administration of Church property, civil incorporation is a canonical requirement regardless of the perceived disadvantages.\(^{39}\)

\(^{38}\) Sievers, above n 17, 42.

\(^{39}\) See chapter 2, page 45.
Statutory Corporations

There is no Commonwealth legislation designed specifically for Churches and religious organisations, but the States have enacted a considerable amount of legislation to assist religious organisations achieve the status of a statutory corporation.\textsuperscript{40}

An example of a statutory corporation formed under State legislation specifically for the Catholic Church is the Victorian Act, known as the \textit{Roman Catholic Trusts Act 1907} (Vic), which allows Church property in the Catholic dioceses in Victoria to be held in a corporate name. In the case of the Melbourne archdiocese, this is called the Roman Catholic Trusts Corporation (RCTC).

The type of legislation available for the RCTC in Melbourne exists in all other States and Territories of Australia with the exception of South Australia, where Church property in that State is held by an association under the \textit{Associations Incorporation Act 1985} (SA).

In addition to this legislation which assists Catholic dioceses, there are many State and Territorial Acts designed specifically for other Churches, including Anglican, Greek Orthodox, Lutheran, Methodist, Presbyterian, Russian Orthodox, Salvation Army and Uniting, as listed by MacFarlane and Fisher.\textsuperscript{41}

The \textit{Corporations Act 2001} (Cth)

The number of companies registered under the \textit{Corporations Act 2001} (Cth) far exceeds the number of incorporated associations and statutory corporations under the legislation of the States and Territories, all added together. Whereas the number of incorporated associations under the eight different associations incorporation Acts is estimated to be around 100,000, there are, under the \textit{Corporations Act 2001} (Cth), approximately 1,000,000 proprietary companies limited by shares, approximately

\textsuperscript{40} MacFarlane and Fisher, above n 29, Table of Statutes pp xx-xxiii.

\textsuperscript{41} ibid.
10,000 public companies limited by shares and 10,000 companies limited by guarantee.\textsuperscript{42}

Section 112 of the Commonwealth Act sets out the six types of company which may be registered:

- Proprietary companies: Limited by shares, Unlimited by share capital
- Public companies: Limited by shares, Limited by guarantee, Unlimited by share capital, No liability company

The company limited by guarantee has been created by the Act specifically for not-for-profit organisations because it has a membership structure rather than a shareholding, with the members typically having no financial interest in the company other than being liable to contribute a modest sum should the company be wound up.\textsuperscript{43}

**The Company Limited by Guarantee**

Section 9 of the *Corporations Act 2001* (Cth) defines a company limited by guarantee as 'a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up'.

The major difference between a company limited by guarantee and the other types of company registrable under the *Corporations Act 2001* (Cth) is that a company


\textsuperscript{43} McGregor-Lowndes, Fletcher and Sievers, above n 16, 25.
limited by guarantee does not have a share structure, a share capital or shareholders. The format of a company limited by guarantee is such that its members do not have a proprietary interest in the company but they are liable to pay a guaranteed amount in the event that the company is wound up or goes into liquidation. Because the amount of the guarantee can be as little as $10, the concept of the members guaranteeing the liabilities of the company is a legal fiction and, for practical purposes, may be disregarded.

The lack of the usual capital structure suggests that a company limited by guarantee would be not be a suitable vehicle for trading purposes because its members cannot acquire a financial interest in the company. On the other hand, a company limited by guarantee is a suitable vehicle for not-for-profit organisations, including charitable and voluntary groups, which all prefer a format in which their membership has no financial interest in the company. Although it is legally possible for a company limited by guarantee to make distributions to its membership, it is normal, as will be seen later, for the constitution of a company limited by guarantee to contain a prohibition on such distributions to members. This is a necessary provision in order to obtain an exemption under s.150 of the Act, and in order to secure an income tax exemption.\(^4\)

Under s.112 of the Corporations Act 2001 (Cth), a company limited by guarantee is classified as a public company, and as such it has more onerous regulatory responsibilities than a company classified as a small proprietary company; a public company must be audited and is required to lodge a financial report and a directors’ report with ASIC annually.

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\(^4\) Two taxation rulings were released by the Australian Tax Office on 21 December 2005 being TR 2005/21 which confirms the Tax Office’s long standing approach of allowing a tax exemption for charities. TR 2005/22 is to the effect that the income of a company which is controlled by a tax exempt entity is not necessarily tax-exempt, and that the exemption of such companies depends on whether they themselves satisfy the legal requirements for income tax exemption. TR 2005/22 has recently been found to be invalid by a decision of the full Federal Court on 14 November 2007, see Commissioner of Taxation v Word Investments Limited [2007] ATC 5164. Unless this decision is reversed by the High Court, the income of an incorporated subsidiary of a tax-exempt entity will also be tax-exempt.
Section 150 of the *Corporations Act 2001* (Cth) allows a company limited by
guarantee to omit the use of the word 'Limited' from its name provided the
corporation is fashioned in a certain way. Thus, if a charitable organisation wishes to
avoid the public perception of being a commercial enterprise it can register a
company limited by guarantee, without the need to include the word 'Limited' as part
of the name. To achieve this objective the company would need to provide in its
constitution:

- objects which require the company to pursue charitable purposes only;
- that its income be applied solely towards the promotion of those purposes; and
- a prohibition on the company making distributions to its members and paying
  fees to its directors.

A further provision, not required by s.150 but normally included in the constitution
of a company limited by guarantee for tax exemption purposes, is that if the company
is wound up or dissolved, any surplus assets or property must not be paid or
distributed to the members of the company but must be given to a comparable
charitable institution with similar objectives.\(^{45}\)

As s.150 of the Act exists only for the purpose of dispensing with the use of the word
'Limited' in the name, there is otherwise no need for the constitution of a company
limited by guarantee to contain the provisions set out above. There is nothing else in
the Act which prevents the distribution of profits to the membership. Consequently,
unless there is some restriction in the constitution of the company itself, trading
profits may be distributed to the members and, on a winding up, the surplus assets
could be distributed to the membership. However, a company in these circumstances
would not be tax exempt.

The membership structure of a company limited by guarantee is particularly well
suited to the requirements of Church organisations because it is possible for the

\(^{45}\) Although this provision is not specifically required by s.150, it is a logical extension of the section
and is a provision that ASIC would expect to see when approving a proposed constitution for a not-
for-profit organisation. It is also a requirement of the Australian Taxation Office as a prerequisite to
gaining an income tax exemption.
membership of the company to mirror the composition of the provincial council of the sponsoring religious institute, as recommended by canon lawyers. A typical provision in a constitution of this nature would provide that the membership of the company will ipso facto be the same as the composition of the provincial council of the religious institute from time to time. This is because the religious priests, brothers or sisters who constitute a provincial council have the responsibility under canon law for the stewardship of the institute's assets. Consequently, when Church property is transferred into a separate corporate entity, those stewards are, through their membership of the body corporate, in a position to discharge their responsibilities of stewardship by exercising the necessary degree of control over the body corporate and hence over the Church property.

The company limited by guarantee is well suited for the purpose of incorporating not-for-profit organisations; however Church organisations, more than most not-for-profits, need to be conscious that the company limited by guarantee must publicly disclose its financial details.

The Associations Incorporation Acts

Each of the States and Territories in Australia has an associations incorporation Act. These Acts provide an opportunity for the incorporation of not-for-profit organisations, which do not necessarily need to be charitable in nature. No two Acts are the same, but essentially they all serve the same purpose in allowing not-for-profit organisations to attain corporate status.

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46 Adam J Maida and Nicholas P Cafardi, Church Property, Church Finances, and Church-Related Corporations (1984) 41.

47 Northern Territory: Associations Incorporation Act 1963 (NT)
Tasmania: Associations Incorporation Act 1964 (Tas)
Victoria: Associations Incorporation Act 1981 (Vic)
Queensland: Associations Incorporation Act 1981 (Qld)
New South Wales: Associations Incorporation Act 1984 (NSW)
South Australia: Associations Incorporation Act 1985 (SA)
Western Australia: Associations Incorporation Act 1987 (WA)
ACT: Associations Incorporation Act 1991 (ACT)

48 For a detailed comparison of the eight associations incorporation Acts of the six States and Territories see Sievers, above n 17, 84–153.
The common requirement for a not-for-profit organisation to be eligible for registration under any of the Acts is that the purpose or function of an association must be lawful and it must exist primarily for non-profit activities; any profits which do arise must not be distributed to members. Some of the Acts actually list the purposes for which an association may become incorporated, others are more flexible.

For comparatively small organisations that do not carry on trading activities, the decision whether to incorporate under an associations incorporation Act or whether to incorporate as a company limited by guarantee is relatively straightforward, and most would be well served by the local associations incorporation Act. For larger organisations, including schools and hospitals, the business operations are often greater than the pursuit of their primary, non profit purposes and therefore they need to carefully consider their options. The associations incorporation legislation in five of the eight jurisdictions allows the local authorities to require an organisation to transfer its incorporated status over to the *Corporations Act 2001* (Cth) if its trading operations are of a nature, or on a scale, which would be more appropriately carried out under the Commonwealth Act.\(^{49}\)

The advantages of an incorporated association are similar to those of a company registered under the *Corporations Act 2001* (Cth) in that:

- the entity has corporate status;
- it has perpetual succession;
- the members have no liability for the debts of the incorporated association;
- the incorporation process itself is no more or less onerous than the incorporation process for a company under the *Corporations Act 2001*(Cth), but the registration fees are in the vicinity of $200 less than the registration fee for a company. Legal costs normally incurred for the drafting of a constitution to suit the organisation's needs can be minimised by adopting the model rules;

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\(^{49}\) Sievers, above n 17, 88 and 100.
- some jurisdictions allow an incorporated association to distribute surplus money to its members upon a voluntary winding up.\(^{50}\)

- in most jurisdictions the doctrine of ultra vires has been either abolished or modified, so that when drafting a constitution for an incorporated association or considering the adoption of the model rules, the members can be assured in most cases that the association will automatically have the necessary legal capacity to carry out any lawful business transaction in pursuit of its objects.\(^{51}\)

Generally, incorporated associations are not permitted to trade or carry on a business, but in certain circumstances a charitable organisation may be permitted to do so. For example, in s.51 (1) of the *Associations Incorporation Act 1981* (Vic) there is a general prohibition that an incorporated association shall not trade or secure pecuniary profit for its members, but an exemption is granted by ss.(4) to organisations whose predominant purpose is charitable; however the distribution of surplus assets on a winding up must be distributed to another charity.

It could be argued that the operation of a school or hospital with a large annual turnover would constitute a business and would fall within the definition of 'trading'. Consequently, to satisfy the Victorian Act, an incorporated association of this nature must in the first instance be charitable in nature (which a school or hospital would usually be) and must contain in its constitution a prohibition on the distribution of its assets to members on a winding up.

The disadvantages of the associations incorporation legislation are that:

- an incorporated association is only permitted to conduct its business in the State or Territory in which it is registered. For many sporting, social, community and recreational associations, this would not constitute a disadvantage, but organisations which have involvement in more than one State may be required to register under s.601CA of the *Corporations Act 2001* (Cth), which provides that 'a registrable Australian body' must not carry on

\(^{50}\) Ibid 148.

\(^{51}\) Ibid 105. The doctrine of ultra vires for incorporated associations has been abolished or modified in all States and Territories other than in Tasmania and Northern Territory.
business in a State or Territory, other than its home State, unless it is registered under the Corporations Act 2001 (Cth). A registrable Australian body includes any body corporate;\(^5\)  
- all incorporated associations, regardless of their jurisdiction, must keep proper accounting records and, with the exception of Western Australia and in some circumstances South Australia, incorporated associations are required to lodge an annual return with a financial statement; in some jurisdictions the accounts must be audited;\(^6\)  
- there are other duties peculiar to certain jurisdictions, such as the requirement under the Queensland Act to keep minutes;\(^7\)  
- New South Wales and Queensland require that all incorporated associations should keep up public liability insurance; in reality this is not a disadvantage because good business practice would expect any organisation, whatever the level of its activity, to carry public liability insurance;\(^8\)  
- Queensland legislation requires an incorporated association to hold committee meetings at least every two months; in most cases this should not constitute a burden, but it may be a nuisance for an organisation which only conducts an annual event;\(^9\)  
- some legislation imposes a duty of care and honesty on committee members and officers of incorporated associations.\(^10\) For example, the Victorian legislation requires members and former members of the committee of an

\(^5\) See definition of 'registrable Australian body' in s.9 of the Corporations Act 2001 (Cth).

\(^6\) Audited accounts are required for 'large' associations in Victoria, South Australia and for all associations in Queensland, Tasmania, ACT and Northern Territory. Audited accounts are not required for 'small' associations in Victoria and South Australia or in New South Wales and Western Australia. See Sievers, above n 17, 138.

\(^7\) MacFarlane and Fisher, above n 29, 45.

\(^8\) McGregor-Lowndes, Fletcher and Sievers, above n 16, 14.

\(^9\) Ibid.

\(^10\) Sievers, above n 17,121.
incorporated association not to make improper use of information gained from their position for any pecuniary benefit for themselves so as to cause detriment to the incorporated association; also, members of the committee must not knowingly make improper use of their position for personal gain or to the detriment of the incorporated association;

- as pointed out earlier, no two Acts are the same and some of the differences can be significant when deciding whether to incorporate as an association in one particular jurisdiction or whether to become a company limited by guarantee. For example, the minimum number of members for an incorporated association varies from State to State. In Queensland the minimum number of members is seven; in Western Australia it is six; in New South Wales, Victoria and the ACT it is five and there is no specified number for Tasmania, South Australia and the Northern Territory. The number of members in the proposed incorporated association could be important for a religious institute wishing to incorporate a trading entity because, as was seen in chapter 2, the membership of the incorporated entity should, for canon law reasons, mirror the composition of the provincial council of the religious institute. In many instances, the composition of a provincial council is five persons or less. This would make it difficult for a religious institute with five provincial councillors to become incorporated as an association in Queensland or Western Australia.

Sievers has the view that committee members of incorporated associations are in a similar position to company directors and owe similar fiduciary duties to the association.\(^{58}\) Regardless of whether their responsibilities arise under the local legislation of the associations incorporation Act or under the common law rules, committee members are well advised to expect that their conduct and actions will be judged by the standards of behaviour required of directors under the Corporations Act 2001 (Cth).\(^{59}\)

\(^{58}\) Ibid.

\(^{59}\) Ibid.
The rules and regulations by which companies operate under the Corporations Law 2001 (Cth) are uniform throughout Australia, whereas the suitability of the local associations incorporation legislation must be carefully considered before a final decision is made as to the choice of the best corporate vehicle for the purpose.

The New South Wales Act

For Catholic religious institutes that are based in New South Wales, there is legislation which was specifically designed to help Catholic entities achieve the status of civil law incorporation in a way which is compatible with their public juridic personality under canon law.\footnote{In New South Wales there is the Roman Catholic Church Communities' Lands Act 1942 (NSW). Queensland has a similar Act, the Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld).}

Registration of a religious institute under the Act results in a corporate name beginning with 'The Trustees of …' and it is under this corporate name that the majority of religious institutes in New South Wales carry on their apostolic works in all areas of education, health and welfare. Although the corporate arrangement facilitates the ownership of property and the certainty of insurance contracts, employment contracts and other commercial dealings, it still leaves the institute vulnerable to the debts and liabilities of a trading entity.

The New South Wales Act contains a preamble which indicates that the primary intention of the Act is to facilitate property ownership by Catholic organisations.\footnote{See page 79 above for the text of the preamble.} Notwithstanding that the principle objective of the Act is to facilitate dealings in land, towards its conclusion the preamble envisages that 'other activities which are or may be for the benefit of … [Catholic organisations] … may be conducted by those bodies corporate'.

The suggestion of wider powers beyond the ability to hold, manage and deal with property is supported by s.10 of the Act, which provides that a body corporate created by this Act 'has all the powers of a natural person'. This has been liberally
interpreted by the legal profession in New South Wales as giving these bodies corporate extremely wide powers, certainly sufficient to carry on a business such as a school or hospital.

The Act provides in s.4 that the persons who are canonically responsible for the administration of the religious institute are the same people who are deemed to constitute the membership of the body corporate from time to time, thus ensuring that the religious institute and the body corporate are closely aligned.

One significant advantage of holding property through a corporate body registered under the New South Wales Act is with regard to the variation of trusts. In a situation where a normal trustee would need to make an application *cy pres* to the Supreme Court to vary a trust where it has become impossible or inexpedient to carry out or observe the trust, a body corporate under the Act may itself by resolution declare that the property be held subject to other trusts which are as near as may be possible to the purposes for which the property was originally held.

There are several drawbacks to registration under the New South Wales Act. It is not possible for an institute to incorporate its apostolic works as separate legal entities under the Act; some other method of incorporation must be employed for them. Another disadvantage is that it is not possible to give lay people any role or involvement in the operation of the body corporate. The members of the body corporate, in other words the canonical administrators of the religious institute, are, by virtue of the Act, the body corporate. Section 5 of the Act refers to the members of the body corporate in the context of attaching a common seal and for constituting a quorum, but otherwise there is no need for directors, meetings or other administrative responsibilities; hence there is no opportunity to appoint a lay person to an office of any consequence. As it is now essential for trading entities such as schools and hospitals to have expert business people sitting on the boards, it is necessary to have these trading entities incorporated in their own right, if for no other purpose than to be able to provide the entity with a competent business board.

While this type of corporate body is not suitable for the incorporation of trading entities such as schools and hospitals, it is still useful for the religious institutes
themselves in terms of property holding and for entering into contractual obligations. Incorporation under the New South Wales Act does not mean that the religious institute itself has become incorporated; a new body corporate is created, but the institute itself remains unincorporated. The legal effect of registering a religious institute under the Act is that the body corporate acts as agent on behalf of the unincorporated institute. The Act does not transform the religious institute into a body corporate; it creates a body corporate which has the ability to hold property and assets on behalf of the unincorporated religious institute.\textsuperscript{62} If a religious institute carries on a trading activity such as a school or hospital it still remains vulnerable to the debts incurred by that activity. Consequently, if limited liability is to be achieved, the trading activity would have to be separately incorporated.

Technically, the operation of a body corporate under this legislation should be restricted to the jurisdiction of New South Wales, in the same way that an incorporated association under one of the State's associations incorporation Acts is limited in its operation to the State of its formation. However, there are many examples of a body corporate under the New South Wales legislation operating in Victoria and Queensland with the apparent approval of the government authorities in these two States.

The Registrar of Titles in Victoria had some reservations years ago about allowing a body corporate under the New South Wales Act to become the registered proprietor of real property in Victoria because the Victorian statutory authorities had no jurisdiction over the entity. However, the present Registrar has no reservations whatever.\textsuperscript{63} The State Revenue Office in Victoria allows to these New South Wales entities the same exemptions from stamp duty and land tax as are normally available to local charities and there has been no suggestion from any of the Victorian government authorities that these New South Wales entities should become registered under s.601CA of the Corporations Act 2001 (Cth).

\textsuperscript{62} The preamble of the Roman Catholic Church Communities' Lands Act 1942 (NSW) provides... 'Whereas it is expedient that bodies corporate be created for the purpose of holding, managing and dealing with property so held, ... for the benefit of the Roman Catholic Church or of those orders, congregations, communities and associations of the Roman Catholic Church'.

\textsuperscript{63} The author has interviewed past and present Registrars of Title on this point.
Summary

The experience of institutes approved under this Act confirms the simplicity of the registration process and the ease of operation and administration of the body corporate itself.

Since the members of the body corporate are the same persons who are the canonical administrators of the religious institute from time to time, there is no need to appoint and remove members, no need for a register of members, or meetings of members, and there are no directors as such. The administrative structure of a body corporate under this Act resembles as closely as possible the structure of the institute itself under its internal canonical statutes.

The Act allows the creation of an ideal vehicle for the purpose stated in the preamble 'of holding, managing and dealing with property'. The body corporate 'has all the powers of a natural person...' thereby enabling it to carry on a business, but because the membership of the body corporate is restricted to the membership of the provincial council of the institute, there is no possibility of appointing lay persons to the board of management of the business undertaking.

The Queensland Act

The Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld) is similar in effect to the New South Wales legislation. The ICE Act, as it is known, replaces previous legislation known as The Religious Educational and Charitable Institutions Acts 1861 (Qld) (the REC Act) under which most of Queensland's religious institutes are presently registered. The REC Act was repealed in 1981, but the corporations registered under it were permitted to continue as if the Act still existed.
The REC Act was repealed by s.4(1) of the *Associations Incorporation Act 1981* (Qld), which brought the associated incorporations legislation to Queensland for the first time. The *Associations Incorporation Act 1981* (Qld) provided for the repeal of the REC Act,\(^6^4\) but with the proviso that:

Subject to the provisions of this Act, Letters Patent issued pursuant to the provisions of the repealed Act will continue to be of full force and effect and be subject to the provisions of that Act as if this Act had not been passed.\(^6^5\)

The passing of the *Associations Incorporation Act 1981* (Qld) meant that religious institutes which had become bodies corporate under the REC Act 1861 continued to remain as bodies corporate, notwithstanding that the enabling legislation had been repealed, which, in the author's view creates an unusual legal situation. It is suggested it would have been preferable to amend the old Act to provide that henceforth further Letters Patent would not be issued. That at least would have given the existing bodies corporate a more credible legal status; one can imagine the reaction of a lending institution to a request for a multi-million dollar loan from a body corporate registered under an Act which no longer exists. Subsequent to the 1981 Act, a religious institute could only become incorporated under the associations incorporation legislation, or under the Companies Code, neither of which provided the same advantages offered by the REC Act, which had been designed specifically to provide for the incorporation of religious entities. Subsequently, in 1994 the ICE Act was passed which does provide specifically for the incorporation of Catholic religious bodies.

Unlike the *Roman Catholic Church Communities' Lands Act 1942* (NSW), which was designed specifically for the Roman Catholic Church, the REC Act was available for such religious, educational, and charitable organisations as were approved by the Governor of Queensland on the advice of the Executive Council. Therefore, the incorporation process was available not merely for Catholic organisations, but also for religious organisations of any denomination and for secular organisations with educational or charitable purposes.

\(^6^4\) *Associations Incorporation Act 1981* (Qld) s.4(1)

\(^6^5\) *Associations Incorporation Act 1981* (Qld) s.4(2)
The Letters Patent issued under the 1861 Act provided that the holders of certain offices and their successors forever should be a body corporate by a designated name. The perpetual succession of the body corporate was linked to the holders of certain offices and their successors forever, so that, presumably, if the offices ceased to exist or if no one occupied those offices, the body corporate would cease to exist.

Unlike the New South Wales Act there is no preamble to the ICE Act to explain the reason for providing the means by which Catholic religious organisations may become incorporated. The ICE Act was designed specifically for Catholic organisations; under s.12, a corporation has a seal, it may sue and be sued in its corporate name and, if the corporation has corporators, the corporation has perpetual succession. There is nothing in the Act to indicate what a 'corporator' might be, but the perpetual succession of the corporation seems to depend on the corporation having them.

Registration Under the ICE Act

Organisations previously incorporated under the REC Act were given the right to apply to become a corporation under the ICE Act and, although there are some apparent disadvantages to these organisations in continuing their corporate status under the REC Act, all of them to this point have chosen to remain as they are, mainly, it is thought, because the process of incorporation under the ICE Act is expensive and complicated.

New Catholic religious institutes commencing operation in Queensland after 1994 are restricted in choice either to register under the ICE Act, or to take up incorporation under the Corporations Act 2001 (Cth) or under the Associations Incorporation Act 1981 (Qld). Only some six organisations have chosen to become registered under the ICE Act in the first 10 years after the enactment.67

66 See preamble to the Religious Educational and Charitable Institutions Act 1861 (Qld).
67 The author interviewed the General Secretary of the Roman Catholic Archdiocese of Brisbane in September 2005.
The process of incorporation under the ICE Act was established by the bishops of Queensland who, in October 2001, published an Interim Policy for the incorporation of Catholic Church entities and a paper entitled 'Processing of Applications for Incorporation Under the ICE Act'. The process for incorporation appears simple and straightforward, with s.9 of the Act providing 'a bishop may ask the chief executive to incorporate a Church entity functioning in the bishop’s diocese or archdiocese'. The Corporation of Bishops has, however, made the following requirements:

- the payment of a fee of $500, (which is in excess of the fees payable under the associations incorporation Acts or the registration as a company limited by guarantee);

- the applicant must obtain the consent of the bishop of every diocese in which the religious institute operates. For an organisation such as the Sisters of the Good Shepherd, which has religious works in various States, this would involve arranging consents from 11 or 12 bishops;

- the religious institute must have a 'significant' operation in Queensland; this may constitute a problem for a smaller community with a limited presence in Queensland;

- entities that have a Church character but which are predominantly commercial ventures, even though non-profit, might not be appropriate for incorporation under the Act. This requirement may effectively eliminate entities such as schools and hospitals from incorporation under the Act;

- real property held in the name of an existing body must be transferred into the name of the entity incorporated under the ICE Act. This may not necessarily suit religious institutes that operate Australia wide and hold their real property in a separate corporate entity;
the internal canonical statutes of the religious institute must be reviewed and approved by a Brisbane canon lawyer. Inevitably statutes that were prepared over a hundred years ago in France or Italy would not meet the requirements of the canon law expert, who must ensure that the constituent documents comply with current canon law. Following the two codifications in 1917 and 1983, the statutes of most religious institutes around the world would be in need of revision;

applicants are advised that it usually takes at least two months to review the documentation. This would not include the time taken to re-draft the internal statutes and have them approved by the Australian institute and, in the case of an international institute, by the head office administration;

the applicants are advised in the Processing of Applications form that the Queensland Government will usually require a list of all assets that will be vested in the new entity and that, therefore, a copy of the most recent audited accounts and a list of the institute's total assets will be required. Religious institutes are accustomed to disclosing details of their operating entities such as schools and hospitals, but not of their own private assets; some institutes may have audited accounts showing their total fixed assets, but many others would not. Some may be prepared to indicate the nature of the assets to be administered in Queensland, but would prefer not to list the total assets of the institute throughout Australia.

For an organisation which does register as a body corporate under the I CE Act, the membership of the new body, as it is under the New South Wales Act, is constituted by the canonical administrators from time to time. This structure is simple and effective, without the need for directors, meetings or a register of members.
Summary

From 1981 when the REC Act was repealed by the Associations Incorporation Act 1981 (Qld) until 1994, charitable organisations and religious institutes who wished to incorporate, were forced to rely on either the 1981 Act or on the Corporations Act 2001 (Cth). After 1994, when the ICE Act came into effect, a new opportunity for registration became available for Catholic organisations only. It has not proved to be popular and all religious institutes registered under the 1861 legislation have preferred to remain there rather than convert over to the ICE Act.

Notwithstanding the shortcomings, Catholic organisations in Queensland can operate either under the extinct REC Act or the tortuous requirements of the ICE Act. Both pieces of legislation do provide a suitable corporate vehicle for holding, managing and dealing with property. However, as with the New South Wales legislation, it is still necessary to separately incorporate trading entities such as schools and hospitals.

Conclusion

This chapter has outlined the background and the advantages and disadvantages of incorporation in a way which would allow a not-for-profit organisation to assess its options regarding incorporation. Public juridic persons do not enjoy the luxury of being able to decide whether it is better to incorporate an organisation or not; they are required by canon law to incorporate as a means of protecting Church property. For Church organisations, the choice is not whether to incorporate, but how to select the most appropriate corporate identity.

The types of corporations available for religious not-for-profit organisations are:

- Statutory Corporations
  This type of legislation has been useful in establishing corporate trusts for the benefit of various dioceses, for example the Roman Catholic Trusts Corporation for the diocese of Melbourne. The legislation does not, however, assist religious institutes which have a separate identity to the diocese both in civil law and in canon law.
The Corporations Act 2001 (Cth)
Of the six types of company which may be registered under this Act, only the public company limited by guarantee is of real interest because it has a structure which is well suited to the circumstances of a religious institute operating a business. The normal format of a company limited by guarantee provides for an appointee or appointees of the religious institute to constitute the membership of the company.

Incorporated Associations
With different legislation operating in each State, it is difficult for an incorporated association to trade in more than one jurisdiction. Incorporated associations must have a minimum membership, which precludes the possibility of a single member company which is available under the Corporations Act 2001 (Cth).

The New South Wales Act
It is possible for religious institutes based in New South Wales to operate trading entities under this legislation, however the institutes are still legally responsible for the activities of the trading entities. It is not possible to appoint lay people to the boards of such trading entities, otherwise than in an advisory capacity. Although technically restricted to operations in New South Wales, religious institutes have also operated successfully under this Act in Victoria and Queensland.

The Queensland Act
Again, the religious institute is not isolated from the legal liability of its trading entities and it is not possible to appoint lay people to the board. The activities of religious institutes under this legislation appear to be confined to Queensland; there are no known instances of a body corporate under the ICE Act operating in New South Wales or Victoria.
CHAPTER 4

PROTECTION OF CHURCH PROPERTY

Introduction

This chapter is divided into two parts. The first part will outline the risks facing administrators of Church property that arise from the possible intervention of the civil courts. The second part will suggest ways of eliminating or minimising those risks.

The chapter will identify the areas of canon law relating to protection of Church property which administrators of Church property are obliged to observe, and it will point out where the observance of those canon laws may be at odds with civil law principles. Under canon 1284 administrators are expected to observe both the canon law and the civil law and to be 'especially on guard so that no damage comes to the Church from the non-observance of civil laws'.¹ This chapter will point out several areas of potential conflict where civil courts may be inclined to pierce the corporate veil to the effect that the assets of both a parent and a subsidiary could be vulnerable to meet the judgement debts of one corporate entity or the other, and also where assets are canonically owned by a public juridic person with no civil identity.

For canonical stewards who are responsible for safeguarding Church property, there are three different types of ownership to take into consideration. One is the protection of ecclesiastical goods which are owned in the name of an incorporated subsidiary; another is the protection of goods owned in the name of a religious institute itself; and the third is with respect to ecclesiastical goods canonically owned by an institute itself, but where those assets are held in the name of a third party (such as parish assets held in the name of a diocesan authority).

¹ Canon 1284–§2.3°.
Ownership of ecclesiastical goods in the name of an incorporated subsidiary entails a canonical responsibility for a religious institute to retain proper control over the subsidiary in the civil law jurisdiction. Therefore, if a religious institute is to enjoy the benefit of limited liability, in relation to liabilities incurred as a result of the activities of the incorporated subsidiary, then the degree of that control will need to be such as to ensure that the two entities, parent and subsidiary, are not regarded by civil law courts as the one entity.\(^2\)

As indicated earlier,\(^3\) the separate incorporation of a trading entity by a religious institute does not sever the canonical bonds between the institute and the incorporated subsidiary. The assets held in the name of the incorporated subsidiary are still regarded in canon law as Church property belonging to the religious institute:

> There should be no doubt, then, that the separate incorporation of an apostolate by a public juridic person does not sever the canonical bonds between sponsor and incorporated apostolate. Canonically, the incorporated apostolate remains a part of the sponsoring public juridic person.\(^4\)

The problem facing the canonical stewards of religious institutes has been to give this canonical requirement a civil law effect, without impairing its civil law separateness and without putting at risk the assets of the entire religious institute.

The perceived solution to the dilemma of a religious institute having canonical responsibility over Church property owned by a civilly incorporated subsidiary has been to give the canonical stewards of the religious institute civil law powers to control the subsidiary. These corporate powers are intended to mirror the religious institute's canonical obligations. Such control by a religious institute over an

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\(^2\) The term 'subsidiary' has a technical legal meaning according to the provisions of the *Corporations Act 2001* (Cth). Section 46 of the Act provides that a body corporate (the first body) is a subsidiary of another body corporate if, and only if, the other body controls the board of the first body or has the majority vote at a general meeting, or holds more than one-half of the issued share capital. Therefore a parent–subsidiary relationship can only exist where two bodies corporate are involved. For the purposes of this chapter the term 'subsidiary' will be used in a more general sense because, although a subsidiary will invariably be a civilly incorporated trading entity sponsored by a religious institute, in some instances the parent religious institute itself may not necessarily be a body corporate.

\(^3\) See chapter 2, page 35.

incorporated subsidiary raises the question of whether that control vitiates the primary purpose of incorporation, namely insulation of the religious institute from legal liability, and whether it creates a 'passing on' of legal liability from the subsidiary to the parent religious institute. This possibility is brought about by the legal doctrine known as 'piercing the corporate veil', sometimes referred to as the alter ego theory.

If the corporate structures of a parent and subsidiary are able to be designed in such a way as to reduce the risk of the corporate veil being pierced, or to eliminate that possibility altogether, then those structures will serve to protect the assets of both parent and subsidiary; the parent will be protected against the liability for the tortious and contractual obligations of the subsidiary, thus safeguarding its own assets. It will also allow the religious institute to comply with both civil and canon law requirements.

Although the number of cases involving a piercing of the veil has increased substantially over the years,\(^5\) there is nevertheless a general reluctance on the part of the courts to depart from the separate entity doctrine unless there are compelling reasons to do so.\(^6\)

Drawing on the principle outlined in chapter 2, that a religious institute must comply with the canonical requirement not to alienate Church property and to retain control of incorporated subsidiaries which 'own' those assets under civil law, this chapter will examine whether this degree of corporate control can be achieved without risking a lifting of the corporate veil, thereby leaving the religious institute open to primary liability for the debts and wrongs of the subsidiary. This chapter will examine the law on piercing the corporate veil and will consider the powers by which a parent might control a subsidiary in order to ascertain whether a judicious use of certain powers might provide a sufficient degree of control while at the same time preserving the protection afforded by the separate entity doctrine. Church


property must be able to be controlled or managed according to canon law, while at the same time recognising that the property is 'owned' by the subsidiary under civil law.

The other major consideration for the canonical stewards who are responsible for safeguarding Church property concerns the assets of religious institutes that are held in the name of a third party, as, for example, in a situation where the assets owned by a parish are held in the name of a central diocesan authority controlled by a bishop. As will be indicated under the next heading, 'Involvement of Civil Courts in Church Affairs', Church property owned canonically by a parish but held in the name of a central diocesan authority has been judged by civil law courts to belong to the diocesan authority and to be available to the creditors of the diocese. This civil law outcome is contrary to the intended canonical ownership of Church property and the stewards responsible for the administration of the Church property need to be aware of such risks.

The final matter to be addressed in this chapter is an apparent conflict within the code that public juridic persons are required to 'promote social justice and ... to assist the poor' (canon 222–§2) while at the same time being urged to 'take care that ownership of ecclesiastical goods is protected' (canon 1284–§2.2°). Maida and Cafardi indicate that canon law imposes obligations on religious institutes to act in accordance with religious and moral teachings, but in practice they take the view that the need to protect Church property is the more evident priority.

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7 Maida and Cafardi, above n 4, 53–59.

8 Ibid 132–133.
PART I

THE RISKS FACING CHURCH ADMINISTRATORS

Involvement of Civil Courts in Church Affairs

Church entities, whether they are incorporated or not, all operate or exist in a civil law jurisdiction and, regardless of their canonical responsibilities, must observe the civil laws and must accept the consequences of operating or existing in that environment:

All administrators are bound to ... observe the prescripts of both canon and civil law ...
... and especially be on guard so that no damage comes to the Church from the non-
observance of civil laws.9

If a religious entity becomes involved in a legal dispute the outcome will be determined in a civil court, notwithstanding that there may be underlying canon law issues. Consequently, religious institutes should be aware of the possibility that canon law principles may come under review in a civil court and that, in some cases, the end result may be contrary to the canon law position.

Until recently it was generally accepted that the civil courts in Australia would prefer not to intervene in Church affairs.10 In Attorney-General for Victoria v St John the Prodromos Greek Orthodox Community Inc., Mandie J said, referring to Wylde v Attorney-General for NSW, 'a member of the bench expressed unhappiness at a civil court having to decide such [ecclesiastical] issues at all – a sentiment with which one can only agree'.11

The established principle was that the courts would assume jurisdiction in matters of property and natural justice, but not in regard to theological issues or religious teaching,12 and, where the issues overlapped and where matters of property and civil

9 Canon 1284–§2.39
10 Wylde v Attorney-General (NSW) (1948) 78 CLR 224 at 282 per Rich J.
11 Attorney-General for Victoria v St John the Prodromos Greek Orthodox Community Inc. [2000] VSC 12, 124.
rights were mixed with theological considerations, the courts would adjudicate only
to the extent necessary to resolve the legal dispute affecting the proprietary or civil
rights interest.\textsuperscript{13}

Australian civil courts' authority to adjudicate on Church property matters has been
confirmed by two recent cases but, in contrast with earlier cases, the judges
concerned showed no reluctance in becoming involved in canon law and the
interpretation thereof. In \textit{Roman Catholic Trusts Corp v Van Driel Ltd}, Hansen J was
required to discern the proper plaintiff and did so by referring to a public juridic
person in canon law in order to resolve a property dispute.\textsuperscript{14} In the New South Wales
Supreme Court, Campbell J also dealt with a 'public juridical person' under canon
law and considered whether a parish priest who had authority to administer property
under canon law had the same authority to enter into civil commercial dealings with
the property.\textsuperscript{15}

In America there are numerous recent examples of the courts becoming directly
involved in canonical issues. Two research papers, one by Catharine P. Wells, a
professor at the Boston College Law School, and another by Jonathan C. Lipson, an
associate professor of Law, Temple University Beasley School of Law, both cite
numerous cases of civil courts determining the ownership of Church property, taking
 canon law into account.\textsuperscript{16}

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\textsuperscript{14} \textit{Roman Catholic Trusts Corporation v Van Driel Ltd} [2001] VSC 310 at para [74].

\textsuperscript{15} \textit{The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects and
Planners} [2005] NSWSC 381 [at paras 14–21].

\textsuperscript{16} Catharine P Wells, 'Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy'
(Legal Studies Research Paper 85, Boston College Law School, November 2005); Jonathan C Lipson,
'When Churches Fail: the Diocesan Debtor Dilemmas' (Research Paper No.2006-05, Temple
University Beasley School of Law, January 2006).
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Protection of Canon Law Principles in Corporate Structures

While it is not possible to prevent civil courts intervening in the affairs of the Church, whether in Australia or elsewhere, when the ownership of Church property is in dispute between two civil litigants, it should be possible to set up corporate structures for religious institutes and their subsidiaries in such a way as to preclude a civil court examining the canon law relationship between the entities and thus protecting the integrity of the canonical position. Maida and Cafardi offer the view that in this regard the process of incorporation should begin with a thorough examination of the canon law requirements so that they can be built into the corporate documentation in civil law language.¹⁷ If the civil law documents embrace all of the relevant requirements of canon law, without specific reference to canon law, then the civil courts will not need to discuss the canon law in more general terms. This may avoid the possibility of a court examining the canon law nexus between a parent and a subsidiary whereby the parent, as a public juridic person, owns all of the assets in the canonical group. This is not to say that civil judges are incapable of understanding or applying canon law but, considering the theological background of the canon law and the canonical jurisprudence which has developed over the centuries, it is considered a more prudent option to leave the Church law to its own experts and tribunals.¹⁸

In Jones v Wolf, Justice Blackmun urged churches to organise their affairs in such a way as to preclude civil law review:

Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to Church property in the event of a particular contingency, or what religious body will determine ownership in the event of a schism or doctrinal controversy. In this manner, a religious organisation can ensure that a dispute over the ownership of Church property will be resolved in accord with the desires of the members.¹⁹

¹⁷ Maida and Cafardi, above n 4, 111.
¹⁸ Ibid 111 and see the case of Stevens v Bishop of Fresno, 49 CAL.APP. 3d 877 (1975).
An examination of canonical principles by a civil law judge may possibly indicate to a court that a parent organisation is entitled to absolute ownership of all of the assets in the group. If other factors existed in civil law to indicate a close corporate bond between parent and subsidiary, then the canonical concept of the parent and subsidiary being part of the same public juridic person may have sufficient persuasive force to enable a judge to conclude that they are the one economic entity in civil law. In this way canon law could be relevant to the resolution of ownership disputes. Catharine Wells has expressed the view that canon law is a kind of 'private ordering' in that certain provisions of canon law determine the Church's structure in the same way that a civil constitution defines the corporate charter of a corporation:

In those circumstances where Courts generally look to private ordering, they should regard Canon Law as a relevant factor … In an ambiguous case, one way to determine the expectations and intent of parties is to examine the rules that they themselves have recognised as regulating the transaction in question. Thus, Canon Law will often be relevant in determining the intent of certain factors within a Church context.20

There are examples in Australia of civil constitutions drawn up on behalf of religious and charitable organisations which refer to the company being carried on as 'part of the mission of the Catholic Church and in conformity with its Canon Law', or words to that effect.21 If a court is looking to find a link between the company and a Church organisation, this recognition of the company being carried on 'as part of the mission of the Church' would probably help to establish that link. Also, the reference to '…in conformity with its Canon Law' opens up the possibility of an examination of the relevant canon law and whether the company has fulfilled its obligations in that regard.

Accordingly, legal documentation should be drafted in such a way as to take into account whatever it is about the mission of the Catholic Church and its canon law provisions that need to be included as part of the objectives and purposes of the subsidiary corporation, but without specific reference to the Church or its canon law.

20 Catharine P Wells, above n 16, 11.
21 This provision is contained in the Constitution of St Clare's College Limited, see Appendix B.
A way to achieve this is to ensure that the Constitution of an incorporated subsidiary sets out its own purposes and objectives, rather than to provide that it will carry out the purposes and objectives of its parent. The purposes of the subsidiary can, in fact, reflect the objectives of the parent, but there need be no specific reference to the parent. And, as stated above, the civil law documents should embrace the necessary canonical principles (e.g. to ensure continuing control by the parent) without specific reference to canon law. In these circumstances it should not be necessary for a civil court to find any relevance in an investigation of the canon law considerations.

Protection of Canon Law Principles in Property Ownership

It has been noted that the intervention of civil courts in Church affairs cannot be entirely eliminated but that arrangements can be made within Church structures to ensure that, if a civil court does become involved, the civil and canonical outcomes are aligned in the sense that the civil structure is in harmony with the canon law. In the same way, the ownership of Church property should be aligned, where possible, to reflect the true civil law and the canon law situation.

Several recent bankruptcy cases in the United States show that unless the civil law and canon law considerations are properly aligned, a decision in a civil court can be quite contrary to the canonical position. Three Catholic dioceses have gone into bankruptcy: the diocese of Tucson, Arizona went into bankruptcy in May 2005; the diocese of Spokane, Washington in August 2005; and the diocese of Portland, Oregon in December 2005. According to a research paper by Jonathan C. Lipson, a number of other dioceses have indicated that bankruptcy may be likely including Boston, Los Angeles and Davenport, Iowa.

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In each of the bankruptcy cases in America, the issue arose as to whether property owned by the parishes within each diocese could be included in the bankrupt estate. The canon law code states that each parish is a public juridic person in its own right, separate from the public juridic person which is the diocese. 24 Canon 1256 provides that 'ownership of goods belongs to that juridic person which has acquired them legitimately'. In canon law it is clear that parish assets are owned by the parish.

The individual parishes in these three bankrupt dioceses were not separately incorporated and as a matter of convenience, because the parishes had no individual civil entity, the assets of all the parishes were held in the name of the diocese.

In the Tucson case the court acknowledged: 'The diocese of Tucson is a public juridic person under canon law. Similarly, each parish is a juridic person separate from the diocese'. The court approved a settlement of the diocesan assets, excluding those assets which were owned by the parishes, with a proviso that each parish should incorporate separately as a non-profit corporation in order to take legal title to their own property.

However, in the cases of the other two dioceses, Spokane and Portland, the court decisions were contrary to the canonical position. In the Portland case, the diocese did not disclose the parish assets of some $500m in its records and in the Spokane case the diocese excluded $80m of parish assets from its statement of assets. In each case the bankruptcy courts held that the civilly unincorporated parishes were not legally distinct from the diocese, that the dioceses owned all parish property outright, and that the parish assets should be included in the bankrupt estates.

The Tucson case, which reflected the correct canonical situation, was decided before the Spokane and Portland decisions were given, and it is interesting to speculate whether the Tucson creditors, who consented to the settlement, would have made the same decision again had they known the outcome of the other cases.

The final outcome in the Spokane and Portland cases would likely have been different had individual parishes within those dioceses been separately civilly

24 A diocese is a public juridic person, see cc.369-373.
A parish is a public juridic person, see c.515-§3.
incorporated and if their assets were held in the name of their civil entity (and assuming that the corporate veil was not pierced).

In the light of the decisions in Spokane and Portland, it seems that all parochial and other Church-related assets within a diocese can be made available to satisfy creditors' claims against any individual parish or organisation, because all the assets are held by one diocesan body and there is only the one body with civil law status. In Australia, none of the Catholic parishes is individually incorporated and therefore there is nothing to prevent the same outcome as in Spokane and Portland happening here. If each parish were to be properly structured as a civil entity, the incorporation of the parishes would firstly limit the exposure of all other parishes and dioceses to actions of a tortious or contractual nature and secondly would protect their individually owned assets. It is interesting to note that the Vatican has requested the Canadian bishops to arrange for the separate incorporation of every parish in that country.25 Logically, the same direction should be given to every bishop in every English-speaking country with a common law system because the current method of a diocese holding all of the assets involves unnecessary liability risks.

The current method of a diocese holding all of the assets of the parishes and organisations within the diocese is also clearly contrary to canon law. In their commentary on canon 1256 (which provides that ownership of goods belongs to that public juridic person which has acquired them legitimately), Beal, Coriden and Green indicate that the central ownership and control of Church property is contrary to the law of the Church:

While such a structure is considered desirable by some because of the high degree of centralized control it affords, and because of its capacity to offer ample collateral as security for large construction and other loans, the corporation sole is viewed by others as highly undesirable from the viewpoint of liability, exposing as it does all parochial and other church-related assets within a diocese to satisfy creditors' claims

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25 Email from Fr. Francis Morrisey, Titular Professor of Canon Law, Faculty of Canon Law, Saint Paul University, Ottawa, to the author on 5 May 2006 advised that 'Rome has just written to the Canadian bishops telling them to incorporate the parishes civilly, and not to have everything in the one basket under the guise of a corporation sole!'
against any individual parish or institution, and because centralized ownership and control of all church property within a diocese is contrary to the law of the Church.²⁶

Some of the corporate structures used in Australia for ownership of Church property do not, according to Beal, Coriden and Green, comply with the canon law of the Church. Canon 1284-§2.2⁵ requires public juridic persons to 'take care that the ownership of ecclesiastical goods is protected by civilly valid methods'. As indicated earlier, this canon has been interpreted as meaning that ecclesiastical goods should be held in the name of a civilly incorporated entity.²⁷ Most religious institutes conduct their trading activities, such as schools and hospitals, in the name of an incorporated entity, but the dioceses and parishes do not.

It is also interesting to note that certain organisations within the Church are not committed to upholding the canon law, but are prepared to use it as a matter of convenience depending on the circumstances. A judge in the Spokane case ruled that the Spokane diocese was 'judicially estopped' from advancing the argument that the individual parishes owned their own property,²⁸ because in previous litigation, the same diocese had taken the opposite view and argued that it was the diocese which owned all the property, not the parishes, citing Munns v Martin as authority.²⁹

According to canon law the proper structure for ownership of Church assets is that the canonical public juridic person should own its own property by means of a civilly incorporated entity. Ownership by a civil corporation can be arranged to mirror the canonical structure. If each of the parishes in the dioceses of Spokane and Portland had been separately civilly incorporated, the parish assets would have been protected and would not have been included as part of the bankrupt estates. For the same reason, all parishes throughout Australia and all religious institutes should, in accordance with the requirements of canon law, have suitable corporate structures to


²⁷ See chapter 2, page 45.


properly protect Church property and to ensure that liability for tortious and contractual actions is limited to the organisation where the dispute has arisen, rather than risk the flow on to other assets in the group.

**Piercing the Corporate Veil**

A basic element of corporation law is that a company is a legal entity separate from the persons behind it, separate from the members and directors, and one of its main advantages is that it affords the members and directors a certain degree of protection from liability. The incorporated body is primarily liable for the debts it has incurred.

As a departure from what is known as the 'separate entity doctrine', a court may, in exceptional circumstances, consider mitigating the doctrine by ascribing to the persons behind the company, or to the members or to the directors, liability for the company's actions. In so doing a court is said to be 'looking through' the company or lifting or piercing the corporate veil.

Religious institutes in Australia, in providing for their control of a subsidiary, need to be aware that in some circumstances a court may be persuaded to pierce the corporate veil and treat the group as one economic entity. One of the conclusions reached in Ian Ramsay and David Noakes' 2001 study of Australian cases involving attempts to pierce the corporate veil is that 'there has been a substantial increase in the number of piercing cases heard by Courts over time'. From this finding, it seems fair to judge that a challenge to the separate entity doctrine is always a possibility and that, therefore, religious institutes should endeavour to arrange their subsidiary corporate structures in such a way as to make the intervention of courts less likely.

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31 Ibid [4.250].
32 Ramsay and Noakes, above n 5, 267.
Religious institutes should also be aware that, regardless of the cases which mitigate the separate entity doctrine, s.588V of the Corporations Act 2001 (Cth) provides that a holding company will be liable for the debts of an insolvent subsidiary, in situations where the parent is aware or should be aware of the insolvent trading of its subsidiary.\textsuperscript{33}

In Australia, according to Ford's Principles of Corporations Law, there are different circumstances which give rise to the courts lifting the corporate veil, but 'no all-embracing principle has emerged'.\textsuperscript{34}

The Control Factor

Courts in recent Australian cases have expressed the view that something more than the capacity of a parent to control and direct a subsidiary is required to lift the corporate veil. In Bray v F Hoffman-La Roche Ltd, Merkel J observed:

\textit{... [80] In my view something more than the indirect legal and commercial capacity of the parent companies to control and direct the subsidiaries, plus the parent's involvement in implementing the cartel arrangement, is required to lift the corporate veil between the subsidiaries and their parents or to find that each of the subsidiaries is carrying on its business as agent for the parent.} \textsuperscript{35}

Justice Merkel's view was later endorsed by Bell J in Cauvin v Philip Morris Limited and Ors.\textsuperscript{36}

While it is evident that Australian courts will not pierce the corporate veil simply on the grounds of control, the degree of control is still a factor to be taken into account.

\textsuperscript{33} Section 588V (1) Corporations Act 2001 (Cth). This section provides that a parent company is liable for the debts of a subsidiary company if the parent, or a director of the parent, knew that the subsidiary was insolvent or 'having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that...' the parent company or one or more of the directors of the parent company should have been aware of the insolvency.

\textsuperscript{34} Ford's Principles of Corporations Law above n 30, [4.150].

\textsuperscript{35} Bray v F Hoffman-La Roche Ltd [2002] FCA 243.

\textsuperscript{36} Cauvin v Philip Morris Limited and Ors [2005] NSWSC 640.
because, as a dissenting judge in the James Hardie case, Meagher J A, pointed out, there have been a number of cases in the US when the veil was lifted in circumstances where the parent had dominated the subsidiary to the point that it had no separate existence.37 Andrew Muscat notes that 'the domination must be significantly more intrusive than the control which is normally exercised by a controlling shareholder' and he points out that there is no definition of those features which would determine whether the veil should be pierced.38 The authors of Ford's Principles of Corporations Law agree that there is uncertainty in this area of the law and indicate 'that in the present state of the law about lifting the corporate veil, it is not possible to say what evidence would ultimately suffice to make out a case'.39

Grounds Other Than Control

It remains to be examined, therefore, what additional elements, over and above control, need to exist in order to place a parent and subsidiary in a position where the courts may intervene and mitigate against the separate entity doctrine.

Some of the grounds that exist under the general law for piercing the corporate veil are set out by Ramsay and Noakes as agency, fraud, sham or façade, group enterprises and unfairness/justice.40 They also indicate that these categories are not necessarily exhaustive.41

Although it is theoretically possible for any of these grounds to apply to an incorporated Catholic school or hospital, it is unlikely that the categories of fraud or sham would be applicable. If at all, the corporate veil might be pierced in the cases of agency, group enterprises or unfairness/justice. All of the possible grounds for


39 Ford's Principles of Corporations Law, above n 30, [4.310].

40 Ramsay and Noakes, above n 5, 267.

41 Ibid 253.
piercing the corporate veil are fully canvassed by Ramsay and Noakes, but for the purpose of this thesis the categories of agency, group enterprises and unfairness/justice are briefly noted.

**Agency**

Ramsay and Noakes point out that the 'agency' ground has been used to demonstrate that the acts of the subsidiary are deemed to be the acts of the parent where the parent company has 'such a degree of effective control that the company is held to be the agent of the shareholder'.\(^{42}\) They point out that courts are now more willing to apply agency principles 'certainly where the control has been absolute such that the company can properly be seen as a mere agent for the shareholder'.\(^{43}\) It does not matter if a particular case is an example of piercing the corporate veil or a question of agency, the end result is the same. A court will attribute the debts and wrongs of the subsidiary to the parent.

**Group Enterprises**

Another ground on which a religious institute and its subsidiaries could be susceptible is that of 'group enterprises'. Ramsay and Noakes indicate that it may be proper to pierce the corporate veil and treat the parent company as liable for the acts of the subsidiary if the corporate group is operating in such a manner as to make each individual entity indistinguishable.\(^{44}\) They point out that a court may pierce the corporate veil on the ground of 'group enterprises' where there is a sufficient degree of common ownership and common enterprises.\(^{45}\) Maida and Cafardi note that where the parent and subsidiary have common directors, officers and employees, there is a

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\(^{42}\) Ibid 254.

\(^{43}\) Ibid.

\(^{44}\) Ibid 257.

\(^{45}\) Ibid.
greater possibility that the group could be treated as one economic entity. They also issue the warning that 'in reserving corporate powers to themselves, the canonical stewards should bear in mind the degree of economic control such powers will give them in the eye of a civil Court'.

The factors which might be considered by the Courts in determining whether the parent and subsidiary are in effect one economic activity are summed up by Bryant as follows:

- the co-mingling of funds and other assets;
- the representation that one entity is liable for the debts of the other,
- the use of the same offices and employees,
- the parent's use of the subsidiary's property as its own,
- the subsidiary's officers acting at the direction and in the interests of the parent's officers,
- the failure to observe the legal, formal requirements of the subsidiary, and
- the substantial identity of corporate directors between parent and subsidiary.

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46 Maida and Cefardi, above n 4, 208.
47 Ibid 204.
49 Ibid 1132–1134.
50 Ibid 1146.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid 1127.
None of these factors of itself would necessarily be conclusive, but each additional factor tends to show a closer or more direct economic relationship between the parent and the subsidiary and an accumulation of these factors could tend to increase the possibility that the control of the parent over the subsidiary is excessive.\(^55\)

Some consideration must also be given to the possibility of using the flexibility allowed by s.187 of the Corporations Act 2001 (Cth) in allowing the directors of a subsidiary, in certain circumstances, to act in the best interests of the parent. For s.187 to operate, the constitution of the subsidiary must expressly authorise such an activity. Taking into account any other factors which may already link the two entities, a specific provision in the subsidiary's constitution that allows its directors to act in the best interests of the parent might constitute further evidence towards a conclusion that the two entities are in fact one organisation.

Unfairness/Justice

The degree of legal and actual separation between a parent and subsidiary is also an important factor when considering the likelihood of a court piercing the corporate veil in cases where there is a suggestion of impropriety or unfairness: '...sometimes a party may seek to pierce the corporate veil on the grounds that to do so would bring about a fair or just result'.\(^56\) The authors of Ford's Principles of Corporations Law indicate that unfairness alone will not necessarily lead to the lifting of the corporate veil: '...it is not enough to justify departure from the separate entity doctrine to show that in a particular case it leads to unfairness. Salomon's case itself led to a manifestly unfair result'.\(^57\)

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\(^{56}\) Ramsay and Noakes, above n 5, 259.

\(^{57}\) Ford's Principles of Corporations Law, above n 30, [4.250].
Avoiding an Existing Obligation

Where the avoidance of an existing legal obligation is the sole or dominant purpose for the formation of a subsidiary company the courts will lift the corporate veil and attribute the liability to the appropriate party.\textsuperscript{58}

In a situation where the assets of a religious group are held by an incorporated body in a deliberate attempt to protect those assets against existing legitimate claims by judgment creditors, a court would look at factors or circumstances which closely link the parent and subsidiary to the extent that the corporate veil might be pierced on the grounds of fairness and justice.

Conclusion to Part I

The authors of \textit{Ford's Principles of Corporations Law} point out that whilst courts cannot ignore the existence of a company:

What really happens is that the existence of the company is accepted but instead of the company remaining opaque it is made transparent so that in a proper case the persons behind it can be seen as the persons to whom the corporate right, privilege, duty or liability can be ascribed.\textsuperscript{59}

The risk of a court piercing the corporate veil is that the benefit of limited liability may no longer exist between a parent and its subsidiary so that all of the assets of both entities become exposed.

The authors of \textit{Ford's Principles of Corporations Law} also note that the cases relating to the piercing of the corporate veil 'usually involve private companies or wholly owned subsidiary companies'.\textsuperscript{60} This observation is relevant to religious institutes because their incorporated trading entities are invariably wholly owned. If

\textsuperscript{58} Ibid. And see \textit{Gilford Motor Co. Ltd v Horne} [1933] Ch 935 and \textit{Jones v Lipman} [1962] 1 WLR 832.

\textsuperscript{59} Ibid.

\textsuperscript{60} Ibid.
this risk profile is coupled with the risk factor noted by Ramsay and Noakes that 'there has been a substantial increase in the number of piercing cases heard by courts over time',\textsuperscript{61} the conclusion must be that the possibility of the corporate veil being ignored by the courts in certain circumstances is a real one.

\textsuperscript{61} Ramsay and Noakes, above n 5, 267.
PART II

WAYS OF PROTECTING CHURCH PROPERTY

Accepting that canon law requires canonical stewards to safeguard the ownership of Church property, it is then necessary to consider the ways and means by which the canonical stewards are able to maintain control and supervision over Church property, first in circumstances where the property continues to be owned by the parent and is leased or licensed to the operating subsidiary, and second in circumstances where the property is transferred to and is owned by the civilly incorporated trading entity.

Where Ownership is Retained

The most obvious way for a public juridic person to maintain control and supervision over Church property is for that person to retain ownership in its own right. However, in many cases the property, especially real estate, needs to be made available for the use of a school or hospital; consequently the premises will be owned in the name of the religious institute and will be occupied by the incorporated trading entity. This relationship would satisfy the canonical need for the parent to control the property, to the effect that no alienation of Church property can take place, but the relationship may cause other canonical tensions.

It is not uncommon for trading entities, such as schools, hospitals or aged-care facilities to carry out capital works programs, either as a requirement to secure continued government funding or as a normal commercial consideration to keep the business up to date with modern facilities. When issuing a loan, banks and lending institutions normally require a mortgage over the title to the real estate which means that the religious institute is required to execute a mortgage and often a personal guarantee in respect of the loan. Although the trading entity is the primary borrower, the religious institute nevertheless, by virtue of the mortgage and guarantee, has a contingent liability. Therefore, although each trading entity at the relevant date of the

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62 Canon 1284.
loan may be financially sound and able to meet its commitments to amortize the loans over a period of time, the parent religious institute will have a number of contingent liabilities which, when aggregated with other mortgages and guarantees, could constitute an alienation according to canon 1295.63 This canon refers to dealings 'which can worsen the patrimonial condition of a public juridic person'.

To overcome the problem that the patrimonial condition of a religious institute is endangered by assuming the contingent liabilities for the borrowing of its subsidiaries, it is possible for a parent to grant to the subsidiary a long term lease over the real estate which would enable the subsidiary to arrange a loan, secured not by mortgage over the real estate but by a debenture over the operating company itself coupled with a mortgage over the long term lease. In the case of Sacre Coeur, a company limited by guarantee, the sisters of the Society of the Sacred Heart granted to the school company a 99-year lease over the property in Burke Road, Glen Iris, which enabled the company to borrow funds for a capital works program with the borrowings secured by way of mortgage of lease, with no resultant liability on the sisters.

Although Maida and Cafardi maintain that the leasing of real property constitutes an alienation,64 a lease to a subsidiary which is wholly owned and totally controlled by the religious institute should not be considered an alienation because, according to canonical jurisprudence, the incorporated trading entity remains part of the sponsoring public juridic person, i.e. under canon law both the parent and the subsidiary are the same entity and therefore if a parent grants to the subsidiary a 99-year lease, the benefit of that transaction will be enjoyed only by the same public juridic person, not by any outside party.

63 For example the Brigidine Sisters have seven schools operating in Victoria and South Australia. The Sisters of the Little Company of Mary operate eight hospitals in Australia. Multiple contingent liabilities could constitute an alienation.

64 Maida and Cafardi, above n 4, 86.
Care would need to be taken, however, that the incorporated subsidiary will always be subject to the control of the parent so that if circumstances change during the course of the 99-year period, the parent would need to be able to influence the subsidiary in such a way as to terminate the lease or to allow other dealings with the property.

Where Ownership is Transferred to a Subsidiary

In circumstances where property is 'owned' by a civilly incorporated trading entity, the ways for the parent to maintain control and supervision over that Church property include:

- the appointment of religious personnel as directors;
- the appointment of a majority of directors;
- a Power of Attorney; and
- reversion.\(^{65}\)

Appointment of Religious Personnel as Directors

The simplest method for a religious institute to exercise control over an incorporated subsidiary has hitherto been for the members of the institute to constitute the membership and directorship of the corporation. In these circumstances it has been possible in the past for the canonical stewards of the institute, i.e. the Provincial Superior and the Provincial councillors, to be appointed as the members and directors, thus translating the canonical model of authority over into the civil law

\(^{65}\) In some jurisdictions, such as the United States of America, it is possible for a property to revert back from the civil ownership of a subsidiary to the civil ownership of a parent on the happening of certain events, see Maida and Cafardi, above n 4, 76. In Australia it is not possible for a property to revert back to a previous owner after the title has been registered in the name of another party. For example, the Transfer of Land Act 1938 (Vic) Section 41 provides that the interest of a registered party is indefeasible. Consequently, 'reversion' is not further canvassed in this thesis.
jurisdiction. Although this model has been completely effective in terms of control, the disadvantages are that:

- it is not practical for the same religious personnel to administer and govern both the institute and the apostolic works because of both personal time constraints and the shortage of religious personnel;

- by restricting the directorship to religious personnel only, there is no opportunity to appoint lay experts and business people to the board; and

- special care would have to be taken to effectively separate the management and administration of the two entities, parent and subsidiary, because, while the courts cannot ignore the separate entity doctrine following Salomon's case, there are circumstances where a court may identify a company which is closely aligned with its parent or sponsor, either as the agent of the parent or as the alter ego of the parent. In either circumstance a Court may be persuaded to 'pierce the corporate veil'.

Appointment of Majority of Directors

Another way of maintaining control is by weight of numbers. For example, in the original memorandum and articles prepared for the incorporation of Sacre Coeur School in Melbourne, the religious institute attempted to retain control of the company by reserving the right to appoint eight out of the 15 directors.68

The present difficulty in trying to retain control of a corporation by appointing nominees to the board is that once the nominees become directors, then their primary obligation is, under the Corporations Act 2001 (Cth), to exercise their powers as


67 Ford's Principles of Corporations Law, above n 30, [4.240].

68 The company was incorporated in 1982 and the Memorandum and Articles are on public record.
directors 'in the best interests of the corporation'.\textsuperscript{69} This leads to a possible conflict of interest for the directors because the best interests of the company are not necessarily the same as the best interests of the organisation which appointed them.

However s.187 of the Act, in certain circumstances, exonerates a director from acting in the best interests of the corporation where a corporation is a wholly owned subsidiary and where the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company. Since the introduction of s.187 in 1999, a director may act in the interests of the holding company if:

- the constitution of the subsidiary expressly authorises the director to do so; and
- the director acts in good faith in the best interests of the holding company; and
- the subsidiary is not insolvent and does not become insolvent as a result of the director's act.

Section 187, however, only alleviates the first of two requirements set out in s.181 (1) which provides that a director must act:

- 'in good faith in the interests of the subsidiary corporation; and
- 'for a proper purpose'.

Consequently, if a religious institute wishes to exercise control over a wholly owned subsidiary by virtue of the weight of numbers, it may expect the directors to act in good faith in the best interests of the institute provided those best interests also amount to a proper purpose of the subsidiary. This means that in any event the directors of the subsidiary, whether acting in the best interests of the subsidiary or of the parent, must still respect the subsidiary’s own objects and purposes as laid down in the constitution.

\textsuperscript{69} Section 181(1) Corporations Act 2001 (Cth).
Power of Attorney

Some of the advantages of incorporation might be achieved by incorporating the trading entity, which would then operate the school or hospital on behalf of the sponsoring religious institute under a power of attorney. For example, the Kincoppal–Rose Bay School in Sydney operated on this basis for 10 years; the company acted purely as an attorney and the school was owned and operated by the sisters of the Society of the Sacred Heart, who continued to bear the risk of liabilities arising out of the operation of the school.\(^{70}\) The company's balance sheet showed no assets or liabilities on its own account, but the corporate form afforded legal protection for the directors.\(^{71}\) Xavier College in Melbourne has a similar legal structure.

The Power of Attorney model does give the religious institute full control of the assets which are deemed to be Church property, but it has the disadvantage that the parent is still open to liability for problems arising out of the conduct of the trading entity. The parent would be liable for the actions of the attorney in accordance with the general law of principal and agent.\(^{72}\)

Division of Powers under the Corporations Act 2001 (Cth)

It is worth noting the difference between the role of the membership and the role of the directors. Under the Corporations Act 2001 (Cth) there are two levels of governance within a company whereby certain decision-making powers are conferred on the members/shareholders and the remaining powers, specified or otherwise, are conferred on the directors. Neither level is necessarily superior to the

\(^{70}\) The Memorandum and Articles of the company and the Power of Attorney were registered in 1990 as a public record.

\(^{71}\) The Kincoppal–Rose Bay model was changed in 2000 when ownership of the school and associated assets was transferred from the sisters to the school company, thereby relieving the sisters of future liability arising from the school. The new constitution is registered with the ASIC as a public record.

\(^{72}\) Ford's Principles of Corporations Law, above n 30 [13.020]
other and they both play an important role in the administration of a company. The 'reserved powers' discussed under the next heading are those powers which are allocated to the members.

The power to make decisions on behalf of a company is split between the board and the members,\(^7\) and the division of power between the board and the members is governed by the company's constitution or, if the company has no constitution, by the replaceable rules under s.198A(2) of the Corporations Act 2001 (Cth) which provides that 'the directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting'. The constitution of most companies will normally contain a provision along the same lines as s.198 (A)(2).

Subject to the powers reserved by the constitution or by the Act, the directors possess the remainder of the powers necessary to manage the company. As stated in Ford's Principles of Corporations Law, the corporations law achieves a 'constitutional' balance by recognising constitutional provisions which vest management power exclusively in the directors while giving members other powers, the most important of which is to appoint and remove the directors.\(^4\) The authors of Ford's Principles of Corporations Law note that if the members disagree with the directors but do not believe that their replacement will address the problem, the state of affairs can be altered by amendment to the corporate constitution:

For example, an amendment to the constitution could limit the directors' power to decide specified major matters such as the sale of the company's main undertaking, or could provide that the power of directors is subject to the shareholders' agreement which requires that some matters be approved by a shareholders' committee.\(^5\)

The right of the directors to manage and control the company in matters other than those reserved to the members in the constitution or under the Act has been defended

\(^7\) Ford's Principles of Corporations Law, above n 30, [7.070].

\(^4\) Ibid [7.123].

\(^5\) Ibid.
strongly in two cases, *NRMA v Bradley,*\textsuperscript{76} and *Massey v Wales; Massey v Cooney,*\textsuperscript{77} where both courts held that initiatives of the members in general meeting could not be sustained and that the matters being considered by the meeting of members were beyond the power of the shareholders.

**Reserved Powers in a Constitution**

After establishing an incorporated subsidiary, a religious institute must, according to canon law, maintain control of the activities of the subsidiary in order to fulfil its obligations to safeguard any Church property which has been transferred to the subsidiary and also to ensure that such property has not been alienated. The most common way for an institute to maintain sufficient control over the subsidiary is for the institute to reserve to itself, via the membership in the company, certain key powers in the constitution to the exclusion of the authority of the directors.

The corporate constitution may define and set limits in the interests of the members 'either by purporting to prohibit the company from undertaking certain activities, or by limiting the powers of the board (perhaps by requiring shareholder approval for certain matters)'\textsuperscript{78}

'Reserved power' is an American expression used frequently by canonists in relation to stewardship of ecclesiastical goods. The expression is not found in Australian legal dictionaries, but the concept of reserving powers to be exercised only by the members is equally applicable in both jurisdictions. In Australia, the *Corporations Act 2001* (Cth) reserves a number of powers for members in general meeting (these powers will be discussed under the next sub-heading 'Recommended Powers').

Normally a reserved power in civil law is a power 'withheld' in the sense that it is not mentioned or reasonably implied in other powers conferred by a constitution or

\textsuperscript{76} *NRMA v Bradley* (2002) 42 ASCR 616.

\textsuperscript{77} *Massey v Wales; Massey v Cooney* (2003) 47 ASCR 1.

\textsuperscript{78} *Ford's Principles of Corporations Law*, above n 30, [8.160].
Reserved powers recommended for canonical circumstances are not merely denied to the board, they are specifically allocated and reserved to the membership. 'Reserved powers are necessary if a corporation is to maintain a Catholic identity and the canonical stewards are able to meet, directly or indirectly their canonical obligations'.

The directors then carry out the day to day operations of the company within the context of the limitations brought about by the reserved powers. According to Gonsorcik, the directors are in an 'Adam and Eve' situation whereby they are allowed to do anything except that which they are forbidden to do.

In reserving certain powers to the membership, the challenge is to find some way of expressing such powers that will not lead the civil courts to identify the two corporations, parent and subsidiary, as being one and the same, thereby opening up the possibility of a piercing of the corporate veil. The essential powers, as recommended by several canonists, and their acceptability in terms of the corporate veil being pierced are discussed under the next sub-heading 'Recommended Powers'. The discussion under the further sub-heading, 'Expression of Reserved Powers in a Constitution' sets out actual instances of how certain powers might be reserved in favour of the members.

Directors occupy a fiduciary position in relation to the company whereby they must use their powers only for the benefit of the company as a whole; by contrast, the members do not stand in the fiduciary position to the company. The authors of Ford's Principles of Corporations Law note that Australian law has not yet come to regard members as subject to a fiduciary duty, as is the trend in American courts, which

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79 H C Black, Black's Law Dictionary, (1990) 1308: 'A reserved power is a power specifically withheld because it is not mentioned or reasonably implied in other powers conferred by a constitution or statute.'

80 Douglas Stamp, The Alienation of Temporal Goods in Clerical Religious Institutes.(Dissertation submitted to the Faculty of Canon Law, Saint Paul University Ottawa, Canada in partial fulfilment of the requirements for the degree of Doctor of Canon Law, 1993) 146.

81 Patsy Gonsorcik, The Separately Incorporated Apostolate: Reserved Powers and their Influence on Liability (Dissertation for Doctoral Thesis, Faculty of Canon Law, Saint Paul University Ottawa, 1996), 25. Gonsorcik's dissertation on reserved powers does not express an opinion on which powers he thinks are useful or essential. He accepts verbatim the view of Maida and Cafardi in this regard.
would prevent them from exercising voting rights in a self-interested way.\textsuperscript{82} Nevertheless, it is noted that Australian courts may move towards treating the controlling interests in a general meeting as fiduciaries and, if so, those members may not be able to use their voting power in a self-interested way.\textsuperscript{83} Pending any such developments in the Australian law, members, unlike directors, do not need to be concerned about conflicts of interest and may act in a way which represents their own interests rather than the best interests of the company.\textsuperscript{84}

Recommended Powers

The consensus among canonists who have written in this area is that in order to avoid alienation of Church property, there are certain powers which must be exercised only by representatives of the religious institute in their capacity as members of the company. Maida and Cafardi set out what they describe as 'essential' powers.\textsuperscript{85} Francis Morrisey refers to similar 'minimum' powers,\textsuperscript{86} and Rodger Austin sets out 'important matters' which should be included in the constitution of a company.\textsuperscript{87}

There are some minor individual differences between these three authors, but generally there is a consensus about the type of reserved powers which are necessary. Not all of the powers referred to are necessarily dangerous in terms of the corporate veil because, in a normal civil law context, the members or shareholders have certain rights and powers in any event. At a typical annual general meeting, the members would be asked to approve the annual accounts, appoint an auditor (if required by law) and appoint directors. The members would also need to be involved in other

\textsuperscript{82} Ford's Principles of Corporations Law, above n 30, [11.040].

\textsuperscript{83} Ibid [9.330].

\textsuperscript{84} Ibid.

\textsuperscript{85} Maida and Cafardi, above n 4, 157.


affairs of the company, such as amending the constitution, changing the name and voluntary winding up, because these matters must be dealt with under the *Corporations Act 2001* (Cth) by way of special resolution. Only the members can pass a special resolution to do any of the above things, therefore it could not be argued that in exercising any of these powers, the members have reserved to themselves undue control.

The following table summarises the powers that the canonists referred to above recommend should be exercised only be representatives of the religious institute. It also contains a column showing the necessary powers favoured by the author.

<table>
<thead>
<tr>
<th>Maida &amp; Cafardi</th>
<th>Morrisey</th>
<th>Austin</th>
<th>Author</th>
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<tbody>
<tr>
<td>1 Appoint board</td>
<td>Appoint board</td>
<td>Appoint board</td>
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<td>2 Amend constitution</td>
<td>Amend constitution</td>
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<td>3 Appoint auditor</td>
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<td>4 Winding up</td>
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<td>5 Formulate policy</td>
<td>Formulate policy</td>
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<td>6 Appoint CEO</td>
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<td>7 Approve budgets</td>
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<td>8 Limit real estate</td>
<td>Limit real estate</td>
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<td>9</td>
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<td>Appoint chair</td>
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<td>10 Limit mortgages</td>
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<td>11 Limit subsidiaries</td>
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<td>12</td>
<td></td>
<td>Limit capital expenditure</td>
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<td>13</td>
<td></td>
<td>Planning matters</td>
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As previously stated, some of the reserved powers recommended by canonists are already in the domain of the membership or shareholders in any event. The powers listed 1–4 on the chart are powers conferred on members or shareholders by the Corporations Act 2001 (Cth). Consequently, there should be no risk in reserving these powers because they are normal corporate powers which are conferred on members/shareholders of all companies. However, in reserving further powers above and beyond those envisaged by the Corporations Act 2001 (Cth), the company and its parent may be open to the possibility that a court would identify the two corporations as being the same economic unit:

Some lawyers (civil and canonical) are of the opinion that the very existence of reserved powers is a risk to the church since those following the "deep pocket theory" will wish to sue the church itself for the actions of its institutions. I guess this is a risk, but I feel it should not be exaggerated. Indeed, there is little gained without some risks being entailed. It is at this point that "vision" comes into play ... to find a way that is adapted to the local situation, and which safeguards both the canonical and civil requirements.

Of the second tier powers listed 5–7, those relating to establishing corporate policy, appointing the chief executive officer and approving budgets are important for two reasons: first, to ensure that the Catholic identity of incorporated trading entities, such as schools and hospitals, is maintained; and second, to exercise a direct influence on the financial aspects of the operation of the subsidiary company. When a religious institute creates an incorporated subsidiary, it must be able to ensure that the parent's corporate values continue to be publicly identified with the activities of the subsidiary and that the operation of a business as a 'Catholic' school or hospital does not in any way bring discredit on the parent as a Catholic institution or on the Church generally. The appointment of the chief executive officer affords a religious institute the opportunity to involve an appropriate person who can assist in

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1 In a typical corporate structure it is normal for a parent to 'control' a subsidiary in the formal sense as defined by s.50 AA of the Corporations Act 2001 (Cth). This control is the ability to determine the outcome of decisions about the subsidiary's financial and operating policies.

2 Francis Morrissey, above n 86, 21.
promoting the charitable integrity of the parent; it would be expected that the chief executive officer would be familiar with the philosophy, ethics and values of the parent so that the conduct of the subsidiary would favourably reflect those values.

However, in expressing these reserved powers the constitution should not, as in the case of the constitution of St Clare's College (rule 5 (a)), refer to carrying out the philosophy 'as determined' by the member where the member is the religious institute. The constitution should set out the company's own philosophy, which may in fact closely resemble that of the parent, but without the specific right for the parent to determine the philosophy and values of the subsidiary. Creating a close relationship between parent and subsidiary could be detrimental to the relationship, as discussed previously under the heading 'Piercing the Corporate Veil'.

The right to approve the budget of a subsidiary is a useful form of control over the overall financial operation of the entity, but it does not mean that the members would necessarily be intruding into the area of management. Under the Corporations Act 2001 (Cth) it is usual for the members to 'consider the annual financial report, directors' report and auditor's report', so there is an expectation that the members should be involved to some extent in the financial affairs of the company. Reviewing the annual reports is retrospective, after the event, whereas in approving the annual operating budget the parent should be able to supervise, in advance, matters relating to capital expenditure, borrowings and other financial dealings.

The remainder of the recommended powers, those listed 8–13 regarding buying and selling real estate, regulating borrowings, approving capital expenditure, future planning and creating further subsidiaries, are all matters which would normally come within the expertise of the board of directors rather than the members; therefore, the shifting of these powers from the board to the members should only be done if it is considered necessary to do so.

90 See Appendix B.
91 Corporations Act 2001 (Cth) s.250 R.
If, for example, a subsidiary is a passive investor that simply holds the surplus assets of the group, then tighter controls by the parent over the subsidiary are less of a risk. However, if a subsidiary operates a school or hospital which has regular dealings with the public, there is a greater risk of contractual or tortious liability which could lead to the possibility of a challenge to the separate corporate status of the parent and subsidiary.

Rather than include all of the reserved powers recommended by the canonists, the draftsman of a constitution for an incorporated subsidiary should carefully choose such of those reserved powers as are actually necessary for the parent to exercise its canonical duty of control and supervision, bearing in mind the purpose and proposed activity of the company.

Expression of Reserved Powers in a Constitution

Such powers as are to be reserved to the members may be set out in the constitution in several ways: either by a direct provision in the document to the effect that these powers may only be exercised by the membership; or by an indirect method whereby the nominated powers may be exercised by the board of directors in the normal course of business, but subject to the written approval of the membership before any decision of the board becomes effective.

Appendix B to this thesis includes extracts from the charters of two companies limited by guarantee, the Articles of Association of St. Albert's College, a residential college at University of New England, Armidale, in New South Wales and the Constitution of St Clare's College, a school in Waverley, New South Wales. These documents illustrate several ways in which the reserved powers may be expressed. Whilst the St. Albert's documents set out the powers in a direct way with the effect that those powers may only be exercised by the members, the document for St Clare's expresses the powers in an indirect way with the effect that the directors may exercise those powers with the approval of the members. The latter method is not strictly a members' power because the members cannot exercise such power in their own right, but the members are able to control the use of the power by the directors.
Article 5 of the St. Albert's College document sets out 13 powers and functions which only the members of the company may exercise in general meeting. At the same time, the council of the College (the board) under Article 23 has the obligation to administer and manage the company but always 'subject to these Articles, and in particular to Article 5'. Article 25 lists the duties and powers of the council (board), again with the proviso that these duties and powers are 'subject always to the powers of the members in general meeting'. Some of the 13 powers and functions reserved to the members under Article 5 are powers which are normally given to members under the Corporations Act 2001 (Cth), i.e. appointing directors, appointing auditors, amending the Articles and resolving to wind up the company. This means that the other powers and functions set out would, according to the Act, be considered to be part of the administrative role of the council or directors.

The constitution for St Clare's College does not contain a reservation of powers similar to Article 5 of St. Albert's, but instead contains Rule 21 which provides that, notwithstanding Rule 14 (which vests management of the company in the board), the board must obtain written approval of the member before any decision of the board becomes effective in respect of the matters set out in the five sub-rules. The board has the authority to deal with these five issues, but only after the member has given written consent. Effectively this means that the member has a power of veto on issues which would normally be regarded as management matters.

The constitution of St Clare's College also serves to illustrate a potential problem which could occur by referring to the parent body in the subsidiary's documentation. Rule 5 (a) provides that one of the objects of the company is 'to govern conduct and carry on St Clare's College ... as part of the mission of the Catholic Church and in conformity with its canon law and the Educational Philosophy of the College as determined from time to time by the Abbess'.

The first point to note is the reference to carrying on the College as part of the Catholic Church and in conformity with its canon law. This raises two possibilities: as the College is being carried on 'as part of the Catholic Church', a litigant may be

92 The Constitution of St Clare's College provides for a sole member.
encouraged to pursue the Catholic Church as a defendant in an action arising out of the conduct of the College; or, a challenge may be made by a disaffected parent or director or by a creditor that the company is not being carried on in accord with its constitutional obligations, in that certain canonical aspects have not been observed.

This could open up the possibility of a court examining the canonical issues by way of expert evidence given by canonists called to testify on behalf of the parties. A decision of a civil court based on expert canonical evidence is not necessarily the same decision to which a Church tribunal would come.

In the case of Stevens v Bishop of Fresno the canonical expert called by the plaintiff prevailed against the Bishop's expert. Maida and Cafardi's opinion of the outcome was that 'although such a view is canonically incorrect, nonetheless the jury believed the plaintiff's expert and found against the diocese.'

An examination of the canonical principles could eventually lead to expert evidence being given to the effect that in canon law both the parent and the subsidiary are the one public juridic person and that their combined assets are Church property, owned and controlled by the parent. Given that other circumstances may exist, which as a matter of justice and fairness raise the possibility that the corporate veil could be lifted, this canonical linking of the two bodies may be a further factor that could help persuade a judge to ignore the separate entity doctrine.

The second matter to note relates to a possible relationship of agency existing between the parent and subsidiary when Rule 5 (a) refers to the college being conducted in conformity with the educational philosophy of the college as determined from time to time by the Abbess; the Abbess is not a member of the company, but is the leader of the sponsoring congregation. The possibility of an agency relationship existing between the college and its parent is further highlighted by Rule 5 (c) which permits the college 'to carry on or assist in carrying on and promotion of the religious, apostolic and charitable activities of the Congregation'.

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93 Stevens v Bishop of Fresno (1975) 49 CAL.APP. 3rd 877

94 Maida and Cafardi, above n 4, 111.
Again, if other circumstances exist which tend to indicate a relationship of agency, then this provision would enhance that relationship.

An example of a form of constitution that could be criticised for reserving too many powers to the members, who happen to be one and the same as the canonical administrators of the religious institute, is that of a school known as Presentation College Windsor, the relevant extract of which is included as Appendix C. Rule 7 reserves 14 different powers to be exercised exclusively by the membership, some of which are powers normally given to members under the Corporations Act 2001(Cth), some of which are recommended under the earlier heading in this chapter 'Recommended Powers', and some of which clearly intrude into the domain of board management. Rule 30 then sets out 10 instances where the board, in its conduct and management of the company, must obtain the written approval of the members before a decision of the board becomes effective. Some of the Rule 30 matters reserved to members for consent actually overlap with the members' direct powers set out in Rule 7, to the extent that they are contradictory. For example, Rule 7 (h) provides that the purchase of real estate is an exclusive function of the members, whereas Rule 30 (a) (vi) provides that the board may purchase real estate with the consent of the members. The powers set out in the constitution of Presentation College Windsor could be judged to be excessive in a case where the piercing of the corporate veil is a possibility.

Identifying the risk profile of the subsidiary is an important step in the process of deciding which powers and controls should be set out in the constitution. If the operating company is a school or hospital with continuous dealings with the public and with the associated risks of tortious liability, it is recommended that the number of powers reserved for the parent should be kept to an absolute minimum bearing in mind, in the words of Maida and Cafardi, that "the closer the symbiosis between sponsoring religious groups and incorporated apostolate, the greater risk that civil

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95 The constitution of Presentation College Windsor referred to in Appendix C was registered with ASIC in September 1998. The constitution has since been replaced by a new constitution lodged with ASIC in July 2006, the text of which is set out in Appendix D.
law liability might pass from the apostolate back to the sponsors.\textsuperscript{96} Having said that, Maida and Cafardi then set out 15 by-laws which an incorporated subsidiary could adopt in addition to what they term as the 'essential powers'.\textsuperscript{97} If the subsidiary company is merely a passive property-holding company then it should not matter which or how many of these powers are reserved in favour of the parent. In such circumstances, there would be a low level of legal exposure, as opposed to an activity such as a school or hospital, and the total corporate control would involve minimal risks which should be easily insurable.

Consequently, the types of controls which could be included in the constitution of an incorporated entity depends entirely on what the particular circumstances are and what the parent wishes to achieve in balancing the canonical considerations against the practical reality of legal liability. A Model Constitution has been included as Appendix D as a guide to a form of constitution that achieves a sufficient degree of control without an excessive amount of power.

Where Church Property is Owned in the Name of a Third Party

In Australia and most other common law countries, including the United Kingdom, the United States and Canada, real estate belonging to a parish is usually held in the name of a diocesan corporate body controlled by a bishop. For example, in the Melbourne archdiocese the Roman Catholic Trusts Corporation (RCTC), has been set up under the \textit{Roman Catholic Trusts Act 1907 (Vic)} 'for the purpose of holding, managing and dealing with property within such diocese in trust for the benefit of the Church'.\textsuperscript{98} The RCTC holds title to all property owned by the diocese itself, to all real estate owned in canon law by the parishes within the archdiocese and to real

\textsuperscript{96} Maida and Cafardi, above n 4, 167.

\textsuperscript{97} Ibid. The suggested by-laws cover a wide range of activities, some of which would normally be in the realm of management. The suggested by-laws include future plans, variation from budgets, capital expenditure, mergers, dealings in real estate, investments, loans, applications for government funding, fund raising, annual reports, enforcement of legal rights, employee entitlements, and 'other matters' as determined by the members.

\textsuperscript{98} \textit{Roman Catholic Trusts Act 1907 (Vic)}, s.3 (a).
estate canonically owned by those religious institutes operating in the diocese who are not civilly incorporated. In cases where the RCTC holds property on behalf of an unincorporated religious institute, the corporation executes a declaration of trust to the effect that it holds the property on behalf of the nominated institute.\textsuperscript{99} The RCTC does not, however, execute declarations of trust in favour of the individual parishes.

Following the bankruptcy of the Portland and Spokane dioceses, where it was held that the unincorporated parishes were not legally distinct from the diocese itself and that the diocese owned all parish property outright,\textsuperscript{100} it could be argued that the parishes and the religious institutes for whom the RCTC holds property are not separate entities from the diocese and that the archdiocese of Melbourne, in the eyes of a civil court, may own outright the property it purportedly holds in trust for the parishes and religious institutes. Even when the RCTC has executed a declaration of trust in favour of an unincorporated religious institute, the benefit of the trust may be unenforceable in a civil court because the identity of the beneficiary in question may be difficult to establish.\textsuperscript{101}

Church property held by a corporate entity such as the RCTC on behalf of unincorporated parishes or religious institutes could possibly be safeguarded by:

- the RCTC establishing a charitable trust in which a parish or religious institute is identified as the beneficiary;

- the separate civil incorporation of the parish or religious institute, so that the Church property could then be held in the name of a civil entity other than the RCTC; or

\textsuperscript{99} Examples of religious institutes whose property was held by the RCTC are the Pastorelle Sisters in respect of property in Thornbury and the Sisters of the Holy Infant Jesus for property in Chadstone. In these cases the RCTC executed a declaration of trust in favour of the unincorporated religious institute.


\textsuperscript{101} 'For a trust to be valid the three certainties must be present: certainty of words, of subject and of object'. Keith L Fletcher, The Law Relating to Non-Profit Associations in Australia and New Zealand (1986) 149. And see A S Sievers Associations and Clubs Law in Australia and New Zealand (1996) 6.
amending legislation to the effect that in a statute such as the Roman Catholic
Trusts Act 1907 (Vic) the separate legal existence of these other entities could
be acknowledged.

Charitable Trusts

If property owned canonically by a parish or a religious institute were to be held by a
diocesan corporation in the form of a charitable trust, Australian courts would uphold
the validity of the trust notwithstanding that the beneficiary may be an
unincorporated entity. Instead of the present situation where a body corporate such as
the RCTC holds property simply on behalf of an unincorporated parish or an
unincorporated religious institute, the RCTC might, by way of a formal document,
hold the property on trust for 'Church purposes' thereby creating a charitable purpose
(the advancement of religion being an established charitable purpose). 102

The Roman Catholic Trusts Act 1907 (Vic) provides in s.7 that property may be
transferred to the body corporate 'for the purpose of holding property in trust for the
benefit of the Church'. Trusts for 'the benefit of the Church' or for 'Church purposes'
are clearly charitable, 103 but something more than those words would be needed if
the interests of the actual parishes and the religious institutes that own property
canonically were to be recognised. A diocesan body corporate such as the RCTC
would need to execute a written declaration of trust to the effect that a specified
property is held in trust for the benefit of the Church in a nominated parish. The
resultant trust would then be charitable on the basis of Re Moroney, where a legacy
to a priest 'for Church purposes in the Casino parish' was held to be valid. 104

102 Glebe Administration Board v Commissioner of Pay-roll Tax (1987) 10 NSWLR 352 at 357–358;
Scandrett v Dowling (1992) 27 NSWLR 483 at 563; see also H A J Ford and W A Lee, Principles of

103 H A J Ford and W A Lee, Principles of the Law of Trusts (2004) [19240]; see also MacFarlane and
Fisher, above n 13, 56.

104 Re Moroney (1939) 39 SR (NSW) 249.
Holding Church property for a parish in the form of a charitable trust appears to overcome the shortcoming of the beneficiary being an unincorporated association. MacFarlane and Fisher, however, indicate that this mechanism does not completely eliminate the problem:

Because Churches adopting the legal form of an incorporated association encounter greater difficulties with the holding of church property by the members of the church in community with one another than under the charitable trust route, the latter is the preferred legal mechanism for holding church property because it reduces (but does not completely eliminate) legal difficulties associated with the holding of church property. 105

MacFarlane and Fisher do not advance a reason why they consider that the legal difficulties are not completely eliminated, but there appears to be some residual doubt in their minds. On the other hand, the law of charities is well settled and, provided some care is taken in drafting the declaration of trust for a charitable purpose in the strict legal sense, it is considered that the validity of such a trust should be upheld.

A body corporate such as the RCTC holding property canonically owned by a parish could be different to a situation where property is held for a religious institute. A trust for the benefit of a religious institute is not necessarily charitable as such because some of the activities of a religious institute may not qualify as activities which benefit the community. Rather than rely on a declaration of trust from the RCTC for the benefit of a religious institute, it would seem prudent that an institute should arrange for its own corporate entity to hold its real estate.

105 MacFarlane and Fisher, above n 13, 57.
Incorporation of Parishes in Australian Dioceses

A more secure option, rather than relying on the law of trusts, would be for individual parishes to be incorporated as civil corporations or, alternatively, for parishes to set up civil corporations for the purpose of holding title to property. It has been said that the bishops of the Church are comfortable with the present system because 'ownership' of real estate in the name of the diocesan body corporate allows the bishops to monitor the dealings in Church property.106 Although a parish property is not canonically owned by the diocesan corporation, the fact that it is held in the name of that corporation means that the paper title is held by the diocese and the seal of the diocesan corporation is needed before a real estate transaction can be concluded. In order to maintain the status quo, so that the bishops can retain the same degree of control as they presently enjoy, several safeguards could be introduced in the event that parishes were to be separately incorporated and were to hold title to their own property. First, the parish body corporate could be structured in such a way that the hierarchical system which presently exists for the operation of a parish under the supervision and control of a bishop could be duplicated in the membership structure of the company. The management structure of the company could also be modelled on the existing method of management of a parish. Next, protocols could be put in place whereby dealings with certain parish property could be regulated by agreed rules and conditions, more of a contractual nature and independent of the code of canon law regarding alienation of property. As an additional safeguard, the paper title could be held by the bishop or the RCTC in escrow so that a property could not be sold or mortgaged without the prior knowledge of the bishop.

106 Beal, Cordien and Green, above n 26, 1457.

While such a structure [where Church related assets are owned by the diocese] is considered desirable by some because of the high degree of centralised control it afford ... the corporation sole is viewed by others as highly undesirable from the viewpoint of liability, exposing as it does all parochial and other Church related assets within a diocese to satisfy creditors' claims against any individual parish or institution, and because centralised ownership and control of all Church property within a diocese is contrary to the law of the Church.

Email from Father Francis Morrisey, Titular Professor of Canon Law, Faculty of Canon Law, Saint. Paul University Ottawa, to the author on 5 May 2006 making the observation that Rome had written to the Canadian bishops telling them to incorporate the parishes civilly and adding 'I don't know if the bishops will act - they are always in favour of Rome if it doesn't affect them directly ... but ... in this case, they would lose control over the assets'.
Amending Legislation

Legislation such as the Roman Catholic Trusts Act 1907 (Vic) exists in all States and Territories other than South Australia, where the diocesan authority operates through an incorporated association known as the Catholic Church Endowment Society Inc., registered under the Associations Incorporation Act 1985 (SA). The likelihood of all States and Territories amending legislation to recognise the existence of separate parishes within each diocese is considered to be a remote possibility given that the Christian influence which was once in evidence in Australian Parliaments is now less of a consideration. Nevertheless, Appendix A of MacFarlane and Fisher's book setting out 'Church Legislation' in Australia does indicate comparatively recent legislation in some States. In New South Wales, Acts were passed in 1991 for the Russian Orthodox Church, in 1994 for the Greek Orthodox Church and in 1995 for the Presbyterian Church. In Tasmania, legislation was passed in 1989 for the Anglican Church. In addition to those Acts shown in the Appendix to MacFarlane and Fisher's work, legislation for the benefit of the Roman Catholic Church was passed in the ACT in 1986, in Queensland in 1994, in Victoria in 2001, in New South Wales in 2004, and most recently a new Victorian Act, the Coptic Orthodox Church (Victoria) Property Trust Act 2006 was passed.

Section 6 of the Roman Catholic Trusts Act 1907 (Vic) provides that the RCTC 'may acquire, take, hold, manage and deal with any property in trust for the Church within the diocese'. It is desirable that the Act should be amended to enable the RCTC to hold property not simply 'in trust for the Church' but in trust for the Church in specific ways; for example, in trust for the Church itself where the property is diocesan property or in trust for a named parish where the property is parish property.

Such an amendment would allow legal recognition of the separate ownership by the RCTC of Church property in a way which would satisfy a civil court that certain property is held on behalf of a legally identifiable entity.

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107 MacFarlane and Fisher, above n 13, Appendix A, 135.
Whilst not entirely discounting the possibility of amending legislation in some States, the safer way to protect parish property and the property of unincorporated religious institutes held by an organisation such as the RCTC is the separate incorporation of such entities. The separate incorporation of parishes and religious institutes is the preferred course of action by the Church in Rome and by canonical commentators, including Beal, Coriden and Green and Maida and Cafardi.\footnote{Beal, Coriden and Green, above n 26, 1457; and Maida and Cafardi, above n 4, 131.}

**Ethical Considerations in Protection of Church Property**

In addition to providing for the administration of Church affairs and matters of theology, religious sacraments and observances, canon law also deals with matters of social conscience, morals and values. In his encyclical *Evangelium Vitae*, Pope John Paul II called for a vision which included 'the doctrine on the necessary conformity of civil law with moral law' which the Pope stated was both a continuity with the tradition of the Church and 'also part of the patrimony of the great juridical traditions of humanity'.\footnote{Pope John Paul II *Evangelium Vitae* (1995) 71.}

The responsibility of Church bodies to observe the teachings of the Church in the area of faith and morals is discussed at length by Maida and Cafardi in Chapter 6 of their book *Church Property, Church Finances, and Church-Related Corporations*.\footnote{Maida and Cafardi, above n 4, 53–59.}

The chapter concludes that canon law imposes obligations on public juridic persons and their assets to the effect that they 'are dedicated to act or to be used in accordance with the authentic religious and moral teaching authority of the Church, as set forth in the canons'.

It would seem, therefore, that in giving effect to the Church's responsibility to conform 'civil law with moral law', Church bodies should be expected to act with fairness and justice in respect of their legal obligations. But these expressions of moral and ethical propriety can be difficult to reconcile with the provisions of Book V of the code, which require canonical stewards to ensure that property of a public
juridic person is protected through civilly valid methods. Maida and Cafardi present an argument in a later chapter that is contrary to the ethical approach; they point out that where there is a danger that the public juridic person will become liable for the acts or omissions of the incorporated trading entity, the failure of the canonical stewards to insist on a separate civil law structure presents 'a very real danger' and the public juridic person is in fact violating canon law by not acting 'in the best interests of the Church or the individual public juridic person'.

On the face of it there is conflict between the Roman Catholic Church itself as the paragon of goodness, ethics and morality and the public juridic persons within the Church who are encouraged to use the devices of civil law to insulate themselves from civil liability. However, it is submitted, that for the most part, the incorporation of trading entities such as schools and hospitals should be done for the same valid and proper reasons as apply to the incorporation of any business enterprise. The authors of *Ford's Principles of Corporations Law* outline the benefits of limited liability, stating that limited liability is a privilege which is available to all companies which are companies limited by shares or limited by guarantee:

> It is a privilege because otherwise they [the members] would have to stipulate in every contract they entered that the other party should have limited recourse to the company's assets rather than the totality of their personal assets. Limited liability also reduces their exposure to vicarious liability for torts committed by employees in the enterprise in the course of their employment and reduces the amount of insurance that would otherwise be necessary.

The process of incorporating to achieve limited liability for the parent or shareholders is a normal commercial procedure provided specifically by legislation for that purpose.

Applying such legal principles to the incorporation of a Church entity should be no different to normal commercial situations and, it is submitted, there is no ethical

111 Ibid 70.

reason why a Church organisation should not incorporate to protect the parent from contractual or tortious liabilities of the subsidiary.

Ethical considerations become more relevant when legal structures are put in place to deliberately evade or avoid an existing liability. In this regard canonical stewards need to be aware of the civil laws relating to bankruptcy and insolvency because some financial dealings can be reversed by the courts in the interests of creditors and certain legal structures can be 'looked through' in cases where the corporate veil doctrine is applicable.

The ethical considerations become more complex when religious institutes are involved in claims arising from the past operation of schools, boarding schools or orphanages. There have been many claims made in recent years for sexual abuse or institutional abuse by former students and residents. Clearly if a religious institute has notice of a claim it would be improper, legally and morally, to attempt to move the major assets beyond the reach of claimants. Where a religious institute has no notice of a claim, but is vulnerable i.e. it has operated schools, boarding schools or orphanages and may possibly reasonably expect a claim at some future time, there is no legal reason why the institute should not be insulated against future claims. But the question remains whether it is ethical to do so. While most religious institutes subscribe to the 'Towards Healing' process, which ensures that victims receive proper treatment, the religious institutes need also to be aware that under Book V of the code they are obliged to protect and safeguard their assets to the best of their ability.\textsuperscript{113} It can be argued that the overall community interests may be better served by preserving the ability to educate children in the schools and to care for the sick in the hospitals, rather than being forced to close the establishments to satisfy legal demands of certain individuals: ... the object of ecclesiastical law is the common welfare of the community, although it may cause inconvenience to individuals ... the

\textsuperscript{113} The fact that religious institutes may take steps to protect their assets by legal means does not necessarily mean that they neglect their moral obligation to pay legitimate claims. The Catholic Church in Australia has adopted a protocol known as 'Towards Healing' which sets out a procedure for claims against the clergy and religious institutes to be processed and acknowledged. Every religious institute in Australia (except the Jesuits) and every diocese in Australia (except the archdiocese of Melbourne) subscribes to the process of 'Towards Healing'. 'Towards Healing' is a publication of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes, issued in December 1996, setting out the principles and procedures for responding to complaints of sexual abuse against personnel of the Catholic Church in Australia.
object therefore of ecclesiastical law is all that is necessary or useful in order that society may attain its end. The recent sexual abuse crisis in the United States has resulted in unprecedented financial liability for Church entities and in the bankruptcy of certain dioceses and the closure of various parishes. The justification for most claims has been based on the maxim of respondeat superior, which means that an employer can be responsible for the actions of an employee or agent. Even if priests in their ministry are officially employed by a corporation separate from the diocese, the diocese itself remains legally responsible under this doctrine if it moves a priest, being a known paedophile, from one parish to the next. The Church authority remains legally and ethically responsible where the authority itself has not acted in the best interests of the community and, in such cases, it would be clearly unethical for legal structures to be set up for the primary purpose of defeating claimants.

Professor Nicholas Cafardi in an interview in 1994 said that religious institutes in America were taking and had taken steps to protect themselves against future claims of sexual abuse and institutional abuse by way of incorporated entities. He indicated that in a typical religious institute in the United States there are four corporations, one for the institute itself, one for its superannuation fund, one for the investments belonging to the institute and another, devoid of all assets, which employs the priests in their daily ministry.

This practice is confirmed by Francis Morrisey:

It might be worthwhile considering not having all the diocesan funds registered in the same Corporation or Trust. Perhaps some divisions might be helpful, particularly if one fund has a stated registered purpose; in that case the money might be more protected and could not be taken to pay Court awards if ever they began to reach

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115 Jonathan C Lipson, above n 23, 363. This article discusses the litigation which preceded the bankruptcy of the dioceses of Spokane in Washington, Portlan in Oregon and Tucson in Arizona and also the possible bankruptcy of the Boston diocese.

116 The author interviewed Professor Nicholas Cafardi in Pittsburgh, USA, in March 1994 at which time Cafardi was the Dean of the Faculty of Law and Professor of Law at the Pittsburgh University. He subsequently became In-house Counsel to the National Conference of Catholic Bishops in America when the Church in that country experienced multiple sex abuse claims.
astronomical sums. However to be recognised, such a division has to take place in due
time and not tempore suspecto. 117

The reality is that measured against the concept of social responsibility, the
protection of Church property is a clear priority.118

In summary there are instances where the use of a corporate entity to protect the
parent from liability is justifiable both legally and ethically, but in other instances it
is difficult to reconcile the need for ethical behaviour in order to conform with the
Church’s teaching on social conscience while at the same time carrying out the duties
of a responsible steward under the provisions of Book V. In order to achieve a
balance between corporate social responsibility and economic reality, each individual
case should be considered on its own merits.119

Conclusion to Part II

All religious organisations have to operate in a civil jurisdiction. They have to
observe both the canon law rules and the civil law rules. Canon 1284 provides that
administrators must ‘observe the prescripts of both canon and civil law’,120 and it also
provides that care must be taken ‘that ownership of ecclesiastical goods is protected
by civilly valid methods’.121

The general consensus of modern canonists is that in order to protect Church
property, religious institutes should civilly incorporate their trading entities such as
schools and hospitals. In establishing these corporate structures, each constitution

117 Francis Morrissey, ‘The Clergy and Sexual Abuse of Children-Canonical Issues’ (Paper presented at

118 Maida and Cafardi, above n 4, 132.

119 Email from Fr. Francis Morrissey, Titular Professor of Canon Law, Faculty of Canon Law, Saint
Paul University Ottawa, to the author on 5 May 2006 advised that he is not aware of any opinion or
writing on the morality of the situation. He confirms that it is the standard practice in the Church to
make use of all ‘advantages’ that the civil authorities are willing to grant to the Church, cc. 289–§2 and
672 being examples of this. He confirms that the major canon 1284–§2.2 makes it an ‘obligation’ to
protect ownership of goods in ways that are civilly recognised.

120 Canon 1284–§2.3.

121 Canon 1284–§2.2.
needs to be drafted to satisfy the individual needs and circumstances of the group so as to ensure that the necessary powers are reserved to the members without usurping the authority of the board of directors in its day to day management of the company, and without creating a potentially dangerous nexus between the parent and the subsidiary.

Notwithstanding the preference of some canon lawyers for comprehensive powers to be reserved for the benefit of religious institutes, it has been argued in this chapter that the control provided to a parent company under the Corporations Act 2001 (Cth) does usually allow sufficient protection. If the other controls prove to be inadequate, the appointment and removal of directors by the members is a power which can be exercised, as a last resort. Having chosen and appointed the directors, the parent should, in normal circumstances, have confidence that the directors would be sympathetic with the views of the parent. Under the Corporations Act 2001 (Cth), the directors’ primary responsibility is, subject to s.187, to act ‘in the best interests of the corporation’.122 However, this obligation does not necessarily preclude them from taking the parent’s wishes into account. Because of the close relationship of two Church bodies, the interests of both the parent and the subsidiary should be compatible in most cases. It is likely, therefore, that the parent’s interests and the canonical connotations should be able to be safeguarded. However, in unexpected circumstances where a board might ignore the wishes of the parent, for example if the board of a Catholic hospital decided to include an abortion clinic as part of the hospital activities, (an initiative opposed by the parent on ethical and moral grounds), then under the powers of the constitution, the board could be dismissed and more sympathetic directors could be appointed. Alternatively, the hospital’s constitution could be set up in such a way that matters of policy, philosophy and ethics remain the sole domain of the members or that a decision of the board in respect of those matters would not be valid without the written consent of the members. Another possibility, suggested in Ford’s Principles of Corporations Law,123 is that the members could amend the constitution to remove the directors’ power in regard to certain matters.

122 Section 181(1).

123 Ford’s Principles of Corporations Law, above n 30, [7.123].
Canon law does not require any particular corporate powers to be specifically reserved to the parent; canon law only requires that the parent be in a position to control and protect Church property. Consequently, it is recommended that in preparing a corporate structure for a school or hospital, under the auspices of a religious institute, such safeguards as are deemed to be absolutely necessary should be identified so that they can be legitimately protected. All other ancillary reserved powers should be left to the directors lest the accumulation of such powers in the hands of the members could allow a court to lift the corporate veil, thus imposing liability on the religious institute.
CHAPTER 5

CONCLUSION

The implications of canon law for Church organisations operating in Australia as outlined in this thesis relate to the canon law rules which deal with the safeguarding of Church property. The thesis has explained the canonical requirements regarding the protection of Church property namely that all temporal goods which belong to the universal Church, the Apostolic See, or other public juridic persons in the Church are ecclesiastical goods and are governed by the canons in Book V.¹

The thesis has also outlined the areas of civil law which are relevant to Church organisations, such as the involvement of civil courts in Church affairs, and the risks which exist in civil law in respect of Church property owned by civilly unincorporated entities. Possible ways have been suggested for the two legal codes to operate in harmony in order to achieve the objective for a Church entity, which is a public juridic person in canon law, to be able to carry on a business in a civil law system while at the same time respecting the canonical rules.

Alienation laws which once played a significant role in the administration of ecclesiastical goods no longer have the same relevance in the 21st century because the nature of 'stable patrimony' has changed over time.² However, notwithstanding the decline in the importance of the concept of 'alienation', there is still the general prescript in canon 1284 that all Church property must be administered according to certain norms, one of which is that care be taken that the ownership of Church property is protected by 'civilly valid methods'. This has been interpreted to mean that the title to Church property should be protected by the use of a corporate entity either to carry on business or for the ownership of property.³ It has been shown that by carrying on a business such as a school or hospital by means of a corporate entity, the parent is protected from the primary legal liability arising out of the operation,

¹ Canon 1257–§1.
² See chapter 2, page 41.
³ See chapter 2, page 45.
thus shielding the assets of the parent. Ownership of property in the name of a body corporate, controlled by the parent, establishes an effective method of safeguarding such property.

It has been noted that the property of Church bodies that are not civilly incorporated must be held in the name of another entity which is, itself, a civilly recognised entity of one kind or another and, that there is a risk that such property may be regarded by a civil court as the property of that other entity. Such an outcome is contrary to canon law because, as provided in canon 1296, ownership of Church property belongs to the public juridic person that has acquired it, and, under canon 1284, canonical stewards are required to take whatever steps are necessary to retain ownership and control over Church property in their care. If canonical stewards allow Church property in their care to be owned in the name of another entity over which they have no control, they are not observing the requirements of canon 1284.

The predominant view of canonists supports the proposition that ownership of Church property should be protected by means of a civilly recognised entity, which in common law countries involves the use of a corporation. It is evident however that many Church organisations have not heeded the canonists' advice in this regard and that many parishes, schools, hospitals and other Church organisations remain unincorporated. In Australia, none of the Catholic regional schools or parish schools is incorporated and there are also a number of schools operated by religious institutes that are not incorporated.

In the United States most parishes remain unincorporated and, on the basis of the cases involving the dioceses of Spokane and Portland, the assets of all those unincorporated parishes are at risk. Likewise, in Australia and Canada the property of unincorporated parishes, which is owned in canon law by each individual parish, also remains at risk because the parishes' assets are held in the name of a diocesan corporation. Perhaps after the repercussions of the Spokane and Portland cases

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4 See chapter 4, page 146.

5 Ibid. Church authorities in Rome have recently asked the Canadian bishops to arrange incorporation of each individual parish. See footnote 25, page 119.
become more widely appreciated and perhaps if other dioceses such as Boston, Los Angeles and New York follow suit, the enormity of the problem will eventually be recognised.

As pointed out earlier, had canon 1284–§2.2° adopted the same language as canon 1274–§5, the question of incorporation as a means of civilly protecting ownership would be much clearer. It is submitted that the code should be amended to make the effect of canon 1284–§2.2° more specific in the need for civil incorporation (if available in the relevant civil jurisdiction). The result would be that in English speaking common law countries, every public juridic person and every major trading entity operated by a public juridic person should each have a separate civil law identity.

The thesis has also shown that the incorporation of a trading entity or property holding body does not automatically achieve the desired result of protecting Church property. Careful drafting of the corporate charter is necessary to ensure that there is proper legal and practical separation between a parent and subsidiary. Canonical stewards need to be aware that civil courts may be inclined to lift the corporate veil where one corporate entity has excessive control over another or where, for civil law purposes, the two entities might be regarded as the one economic unit. Even where a trading entity such as a school or hospital has been separately incorporated, there is always the possibility that a court may be asked to 'look through' the company in the interests of creditors.

With regard to the courts lifting the corporate veil, it has been observed that 'no all embracing principle has emerged'. It has also been said that 'in the present state of the law about lifting the corporate veil, it is not possible to say what evidence would ultimately suffice to make out a case'. These views indicate that there is still uncertainty with regard to lifting the corporate veil and that the law is still evolving

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6 Chapter 2, page 48.
8 Ibid [4.310].
in this regard. Ramsay and Noakes set out some of the grounds that exist for piercing the corporate veil, but they indicate that these categories are not necessarily exhaustive.9

Whether or not the principles relating to lifting the corporate veil could ever be extended to the relationship between a diocese and a parish remains to be considered. Thus far the cases relating to the piercing of the corporate veil 'usually involve private companies or wholly owned subsidiary companies',10 which would tend to suggest that a parish corporation may not be as vulnerable to a lifting of the veil as other companies. However, assuming that a parish were to be separately incorporated, the judge in the diocese of Spokane case observed that a separate corporate existence would not necessarily prevent the assets of a parish being consolidated with the assets of the debtor diocese:

Even though a non-debtor entity [the parish] may have a legal existence separate from the debtor [diocese] that does not necessarily defeat substantive consolidation. Nor does the fact that title to real estate is held in the name of a non-debtor preclude a determination that the debtor has an interest in that real estate.11

This obiter dictum seems to imply that the principles of piercing the corporate veil would be appropriate even between bodies as diverse as a diocese and a parish. Possibly because of the hierarchical nature of the Church and the degree of authority of a diocese over a parish, a corporate relationship of this nature could be even more vulnerable to the piercing of the corporate veil than that of a normal commercial relationship. This is something to be borne in mind if ever it is decided to incorporate parishes in Australia. The civil documentation would need to be set up in such a way as to provide clear legal separation between a diocese and a parish, while at the same time preserving the canonical administrative status quo between a bishop and a parish priest.


10 Ford's Principles of Corporations Law, above n 7, [4.250].

The thesis has noted the view of the Holy See, expressed in 1911, that parishes in the United States should be incorporated. In 1984 a note of caution was given by Maida and Cafardi in the context of incorporation to the effect that:

There is a genuine danger in acquiescing in legal descriptions of the Church that do not jibe with this ecclesial polity. Eventually, it will result in the civil law characterization replacing, or superseding, that polity as individual courts decide matters of the civil law liability of individual dioceses. Such a substitution of the civil for the ecclesial, which occurs by judicial imposition, appears to be a clear infringement of the Church's right to function according to its own self-perception and self-description.\(^{12}\)

Had these warnings been heeded by the American dioceses, the problems which arose in Spokane and Portland would not have been as severe – only the diocesan property would have been sequestrated for the benefit of creditors rather than the parish-owned properties as well. The cases of Spokane and Portland are being appealed, with the possibility that the assets canonically owned by the parishes may eventually be exempted from the bankrupt estates.\(^{13}\) However, the point is made that unless the method of canonical and civil ownership is properly aligned at the outset, there can be very significant risks to Church property.

The conclusion of the thesis is that incorporation, whether it be for a parish, school, hospital or property holder, is the best option, perhaps the only option, available to canonical stewards for the protection of Church property, and that with judicious use of reserved powers a safe and predictable outcome that complies with the requirements of canon law can be achieved. The recommended reserved powers will depend on the nature of the activity and the legal risks that the operation carries. Where the activity is purely 'intra-Church' or where the activity involves a passive role, such as the holding of property or investments, the risk of legal liability is


remote and there is no reason why the corporate structure could not include reasonably tight controls.

Where there is a greater risk, for example, where the activities include the operation of a school or a hospital, the corporate structure should not evidence a strict control that might create a passing of legal liability from one corporation to the other. Ramsay and Noakes point out that 'commentators have usually argued that courts should be more prepared to pierce the corporate veil in tort actions compared to contract actions'.\textsuperscript{14} By nature, schools and hospitals are more prone to claims of abuse and negligence and therefore their corporate structures need to be designed specifically to ensure that there is little or no legal exposure for the parent. As a matter of prudence the degree of control by the parent over the subsidiary should be confined to those essential powers which a court would not find unusual or uncommon.

In addition to the canonical reasons for embracing the concept of civil incorporation for Church organisations operating in Australia, there are also the practical reasons which virtually compel trading entities such as schools or hospitals to adopt a corporate structure:

- incorporation is a requirement for most entities to be eligible for government funding;
- incorporation is necessary if lay people are to be involved as directors and administrators; and
- incorporation is essential to limit legal liability from flowing from an operating entity to the sponsoring religious institute.\textsuperscript{15}

\textsuperscript{14} Ramsay and Noakes, above n 9, 267.

\textsuperscript{15} See chapter 3, page 77.
Notwithstanding the considerations of ethical responsibility,\textsuperscript{16} the protection of Church property is a clear priority both in terms of the canons expressed in the code and in terms of the canonical jurisprudence. The protection of Church property will necessarily involve the establishment of corporate entities, which means that in regard to these entities, the Church laws will have to be taken into account to satisfy the canonical requirements and, at the same time, the civil laws must also be respected and observed.

\textsuperscript{16} See chapter 4, page 152.
BIBLIOGRAPHY
BIBLIOGRAPHY

ARTICLES/BOOKS/REPORTS


'Canonical Perspective on Diocesan Development Funds' (1997) Canon Law Society of Australia and New Zealand


Bierce, A, The Devil's Dictionary (1911)


Donahue Jnr. Charles, 'Why the History of Canon Law is Not Written' (1986) *Seldon Society Lecture*

Ferguson, Adele, 'Inside the Catholic Church' (March 2005), *Business Review Weekly*


'The Canon Law Implications of the Physician-Hospital Organisation in the United States of America' (1988) 22 *Studia Canonica*


*The Canonical Status of Separately Incorporated Health Care Apostolates in the United States; Current Status and Future Possibilities for the Public and Private Juridic Person* (Dissertation for the Degree of Doctor of Canon Law, Saint Paul University Ottawa Canada, 2001)
Grennan, Jacqueline, 'Freeing the Catholic College from Juridical Control by the Church' (1969) 40 Journal of Higher Education

Hartmann, Wilfried and Pennington, Kenneth, (eds), History of Medieval Canon Law, (1999 Volumes 1–11)


Kennedy, Robert T, 'McGrath, Maida, Michiels: Introduction to a Study of the Canonical and Civil-Law Status of Church-Related Institutions in the United States' (1990) 50 The Jurist

Koury, Joseph J, 'Hard and Soft Canons; Canonical Vocabulary for Legal Flexibility and Accommodation' (1990) 50 The Jurist

Kramer, Peter, 'Response to Carlo Redalli' (1997) 57 The Jurist

Kuttner, Stephan, 'The Code of Canon Law in Historical Perspective' (1968) 28 The Jurist


Maida, Adam J, 'Civil Law and Canon Law Status of Catholic Hospitals' Hospital Progress (1973)


Maida, Adam J, and Cafardi, Nicholas P, Church Property, Church Finances, and Church-Related Corporations (1984)


Morrisey, Francis G, 'A Pastoral Guide to Canon Law' (1976) 15 *Chicago Studies*


'Juridic Status: Canonical Provisions, Possible Applications' (1986) September *Health Progress*

'Ownership of Church and Congregational Property and its Implications for Leadership' (1988) *Canon Law Society Journal of Australia and New Zealand*


'The Alienation of Temporal Goods in Contemporary Practice' (1995) 19 *Studia Canonica*

'Alienation and Administration: System Re-structuring Often Entails Four Types of Canonical Acts' (1998) September *Health Progress*


Palmer, Sir Francis, *Company Law* (9th ed, 1911)

Potter, Harold, *An Historical Introduction to English Law and Its Institutions* (2nd ed, 1943)


CASE LAW

Attorney-General for Victoria v St John the Prodromos Greek Orthodox Community Inc. [2000] VSC 12, 124

Bradley Egg Farm v Clifford (1943) 2 All ER 378

Bray v F Hoffman-La Roche Ltd [2002] FCA 243

Briggs v James Hardie & Co. Pty Ltd (1989) 16 NSWLR 549

Cauvin v Philip Morris Limited and Ors [2005] NSWSC 640

Commissioner of Taxation v Word Investments Limited [2007] ATC 5164


Gilford Motor Co. Ltd v Horne [1933] Ch 935

Glebe Administration Board v Commissioner of Pay-roll Tax (1987) 10 NSWLR 352

Haselhurst v Wright (1991) 4 ACSR 527

Kennaway v Thompson (1980) 3 All ER 329 (CA)

Jones v Lipman [1962] 1 WLR 832
Jones v Wolf (1979) 443 U.S. 595

Massey v Wales; Massey v Cooney (2003) 47 ASCR 1

Re Moroney (1939) 39 SR (NSW) 249

Munns v Martin, 930, P.2d 318, (Wash.1997) (en banc)

New South Wales v Commonwealth (1990) 169 CLR 482, 504-505

NRMA v Bradley (2002) 42 ASCR 616


Roman Catholic Trusts Corp v Van Driel Ltd [2001] VSC 310

Salomon v Salomon & Co. Ltd [1897] AC 22

Scandrett v Dowling (1992) 27 NSWLR 483

Stevens v Bishop of Fresno 49 CAL.APP. 3rd 877 (1975)

Stratton v Simpson (1970) 125 CLR 139,144

Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects and Planners [2005] NSWSC 381

Trustees of the Roman Catholic Church v Ellis [2007] NSWCA 117


Wylde v Attorney-General (NSW) (1948) 78 CLR 224
LEGISLATION

Aged Care Act 1997 (Cth)

Aged or Disabled Persons Care Act 1954 (Cth)

Associations Incorporation Act 1963 (NT)

Associations Incorporation Act 1964 (Tas)

Associations Incorporation Act 1981 (Vic)

Associations Incorporation Act 1981 (Qld)

Associations Incorporation Act 1984 (NSW)

Associations Incorporation Act 1985 (SA)

Associations Incorporation Act 1987 (WA)

Associations Incorporation Act 1991 (ACT)

Codex Canonum Ecclesiarum Orientalium (1991)

Codex Iuris Canonici, Ioannis Pauli PP 11, promulgatos (1983)

Commonwealth of Australia Constitution Act 1900 (Cth)

Corporations Act 2001 (Cth)

Religious Educational and Charitable Institutions Act 1861 (Qld)

Roman Catholic Church Communities’ Lands Act 1942 (NSW)

Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld)

Roman Catholic Church Property Act 1911 (WA)

Roman Catholic Trusts Act 1907 (Vic)

Transfer of Land Act 1958 (Vic)

.............
OTHER SOURCES


*Canon Law Digest* (1956), (1974)


*Catholic Encyclopaedia: Canon Law* – <www.newadvent.org/cathen>

*Crux: Newsletter of St. Mary's College, Notre Dame*


*Studia Canonica*, Publication of the Faculty of Canon Law, Saint Paul University, Ottawa, Canada 1971–2006


*Towards Healing* (a publication of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes, 1996)
APPENDIX A

AN OVERVIEW OF BOOK V OF

THE 1983 CODE
APPENDIX A

An Overview of Book V of the 1983 Code

Book V is made up of an Introduction (canons 1254–1258) and four Chapters:

- Chapter I – The Acquisition of Goods (canons 1259–1272);
- Chapter II – The Administration of Goods (canons 1273–1289);
- Chapter III – Contracts and Especially Alienation (canons 1290–1298); and
- Chapter IV – Pious Wills in General and Pious Foundations (canons 1299–1310).

The Five Introductory Canons

These five canons present the Church’s attitude to the ownership of property. It claims under canon 1254–§1 the right ‘to acquire, retain, administer, and alienate temporal goods independently from civil power’. While this canon claims the authority to exercise rights over private property independently from civil power, nevertheless in a later canon in Chapter III, the code ‘canonises’ the civil law in the various jurisdictions in respect of contractual matters by providing in canon 1290 that the civil law in respect to contractual matters must be observed ‘unless canon law provides otherwise’. By adopting the civil law relating to contracts into the canon law code, canon 1290 places on canonical administrators a responsibility to be aware of the local civil law in relation to all matters of contract. The day to day management of dioceses, parishes, hospitals and schools involves many contractual arrangements relating to employment, the ownership and maintenance of property, plant and equipment, motor vehicles and the like. Consequently, administrators should have a good working knowledge of legal matters generally.

Just as the canonical administrators need to be familiar with the civil law, it follows that the civil lawyers acting on behalf of parishes, dioceses and religious institutes should also be reasonably familiar with the restrictions that canon law places on the dealings with such goods.
Chapter I – The Acquisition of Goods

This chapter deals with the general principles regarding acquisition of material possessions by any fair and legitimate means including fund-raising and taxation. A bishop has in the case of emergency the power to tax parishes and religious institutes within his diocese. The law also provides for the acquisition of goods by 'prescription' which equates to the civil law concept of adverse possession. If a public juridic person possesses ecclesiastical goods belonging to the Apostolic See, those goods may become prescribed after a period of 100 years. If they belong to another public juridic person other than the Apostolic See, they are prescribed by a period of 30 years.

Chapter II – The Administration of Goods

Chapter II confirms the hierarchical structure of the Church when it states in canon 1273 'by virtue of his primacy of governance, the Roman Pontiff is the supreme administrator and steward of all ecclesiastical goods'. The subsequent canons deal with administration by local bishops and other administrators.

The chapter provides generally for the administration of ecclesiastical property to ensure that it is preserved and used for the purpose it was acquired. The ideals of the Church are to be maintained and the ecclesiastical goods are to be used solely with a view to the pursuit of the proper objectives of the Church, those being to order divine worship, to care for the decent support of the clergy and other ministers, and to exercise works of the Sacred Apostolate and of charity, especially toward the needy.¹

The code also requires funds to be collected and administered for the benefit of the clergy. The organisation of these funds is to be on a diocesan, inter-diocesan and supra-diocesan basis with a special direction 'if possible, these institutes are to be established in such a way that they also have recognition in civil law'.² This canon refers to attaining civil recognition for superannuation funds or retirement funds for the clergy in the various civil jurisdictions around the world. Civil recognition might

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¹ Canon 1254–§2.
² Canon 1274–§5.
be achieved by incorporation or by way of trust, the clear purpose being to ensure that the superannuation money is kept legally separate from the general diocesan funds. Consequently there is less risk of the loss of these funds in the event that diocesan funds should be attached in cases that involve say matters of negligence or abuse.

Chapter II of Book V refers generally to administrators. The Roman Pontiff is the supreme administrator and subject to his authority 'the administration of ecclesiastical goods is the responsibility of the individual who immediately governs the person to whom the goods belong'. Usually in the case of a religious institute, the 'individual who immediately governs the person to whom the goods belong' is the provincial of the institute.

Canon 1282 allows the possibility that 'clerics or lay persons' may legitimately take part in the administration of ecclesiastical goods. In fact there are numerous instances where clerics and lay persons are appointed to boards of schools and hospitals and in such capacity are responsible for the administration of ecclesiastical goods. Many of the lay people who sit on these boards have been appointed because of their professional expertise in business, law, accountancy or administration and they have been chosen for their skills rather than their religious background.

There are therefore many non-Catholic lay persons who have the responsibility of administering ecclesiastical goods and would therefore presumably be subject to canon 1282 in the sense that they are required to fulfil their duties in accordance with canon law. Canon 1282 provides: 'All clerics or lay persons who take part in the administration of ecclesiastical goods by a legitimate title are bound to fulfill their functions in the name of the Church according to the norm of law'. The question of non-Catholics being subject to canon law is not without some doubt because canon 11 says that only Catholics recognised by the Church are subject to its laws. However it is presumed that in accepting a place on the board of a Catholic hospital a director, whether Catholic or not, will voluntarily agree to observe the canon law where possible and provided there is no conflict with the director's civil duties.

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3 Canon 1279–§1.
Canon 1284 begins with the words 'all administrators...', again raising the question whether this canon is intended to apply to Catholics and non-Catholics. In any event, this canon imposes on administrators of ecclesiastical goods extensive responsibilities that will guarantee the safe and profitable management of the assets in the same way as would be expected of trustees of property under civil law.

Chapter III – Contracts and Especially Alienation

Chapter III begins by 'canonising' the civil law of local jurisdictions with respect to contracts and their implementation. Canon 1290 provides that the civil laws of a territory which have been established for contracts and their implementation 'are to be observed with the same effects in canon law unless the provisions are contrary to divine law or canon law provides otherwise'. The Church has chosen to adopt or 'canonise' civil laws in a territory which are applicable 'for contracts and their disposition', an expression which covers a very wide range of business and legal activities and mutual obligations.

Canons 1291–1294 outline the procedures to be followed in a situation where public juridic persons wish to sell or dispose of ecclesiastical goods, with the added requirement in canon 1295 that they must also observe the alienation rules in situations (other than sales) which might 'worsen the patrimonial condition of a juridic person'.

Chapter IV – Pious Wills in General and Pious Foundations

This chapter deals with the establishment and administration of charitable trusts, the terms of which are to be strictly observed and administered according to the wishes of the donor. In most respects these laws are similar to the English law on trusts. Should a religious institute consider the incorporation of a school or hospital involving property previously given to the institute on trust to be used for a particular purpose, the institute must be careful both in civil law and canon law that the trust assets are protected and applied in such a way that the purposes of the trust are observed and implemented.
APPENDIX B

EXTRACTS from the

- CONSTITUTION OF ST CLARE'S COLLEGE LIMITED
  
  and

- ARTICLES OF ASSOCIATION OF ST. ALBERT'S COLLEGE
Extracts from the Constitution of St Clare's College Limited

OBJECTS OF THE COMPANY

5. The objects for which the Company is established are:

(a) To govern conduct and carry on St Clare's College, subject always to the provisions of relevant legislation, at Waverley or elsewhere in the State of New South Wales as part of the mission of the Catholic Church and in conformity with its canon law and the Educational Philosophy of the College as determined from time to time by the Abbess;

(b) To undertake the management and control of St Clare's College and for this purpose to take over such of the funds, assets and liabilities of the Trustees relating to the College and used in connection therewith as the Trustees determine;

(c) To carry on or assist in the carrying on and promotion of the religious, apostolic and charitable activities of the Congregation;

(d) To provide, within a Christian environment, the highest standard of education for the students;

(e) To create an environment for all staff members to act in accordance with the Educational Philosophy of the College;

(f) To promote programs of and provide a working environment for staff development and appraisal by means of teaching, continuing education, training activities and other means;

(g) To ensure the closest collaboration between the parents and staff to whose care the students have been entrusted;

(h) To co-operate and collaborate with other Catholic education facilities and community organisations;

(i) To do all such other things as are incidental or conducive to the attainment of the objects of the Company.

BOARD OF DIRECTORS ("BOARD")

14. The management of the Company shall be vested in the Board which shall consist of not less than six (6) and not more than fourteen (14) persons who, subject to this Constitution, shall be appointed by the Member of the Company in the manner provided in Rule 18. Upon appointment each such person shall be a Director.
21. Notwithstanding Rule 14 the Board must obtain the written approval of the Member of the Company before any decision of the Board becomes effective where the decision involves the following:

(a) Where at the meeting of the Board at which the decision is made or by written notice within three (3) days following such meeting any Director advises the Chairperson that such decision is in his or her opinion not in accordance with the mission and the Educational Philosophy of the College;

(b) where the decision involves capital expenditure by the Company in excess of the limit from time to time determined by the Member of the Company;

(c) where the decision will involve long term financial commitments by the College whether secured or unsecured in excess of the limit from time to time determined by the Member of the Company;

(d) where the decision concerns long term strategy plans involving or requiring substantial changes in the ministry as carried on at the College;

(e) where the decision involves the appointment of the Principal, Assistant Principal and Business Manager.

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POWERS OF MEMBERS

5. The powers and functions of the members of the Company assembled in
general meeting shall be as follows:

(a) To determine the policies and philosophy of the Company in relation
to the operation of the College.

(b) To make the necessary arrangements to educate and familiarise the
Members, Council members and staff with the philosophy and values
of the Order by means of workshops, orientation days and group
evaluations so that the Members, Council members and staff will
understand these values, will share them and will assist in
implementing them.

(c) To appoint up to 4 persons to the Council of the Company pursuant to
Article 24(c)(ii) and to remove such persons at will. One such person
shall be appointed as Chairman of the Council and another as the
Deputy Chairman.

(d) To adopt amendments or modifications and alter, amend, add to or
repeal the Memorandum of Association and/or the Articles of
Association.

(e) To approve the operating and capital budgets of the Company.

(f) To purchase, acquire, sell, lease, transfer or encumber, construct or
undertake the demolition of land and/or buildings owned or occupied
by the College or in which the College has or will have legal or
equitable title.

(g) To authorise the Council to borrow money for the purposes of the
Company and to give security over the assets of the Company to
support such borrowings.

(h) To merge, consolidate or affiliate the Company with any other
Company, Association or College.

(i) To grant prior approval to any increment or additions to the capital
debt or to re-negotiate, modify or otherwise change the existing
capital debt obligations of the Company.

(j) To authorise any fund raising for the capital improvements of the
College.

(k) To require a certified audit of the funds of the Company at any time
and to name the qualified accountant who shall conduct the audit;

(l) To terminate the existence of the Company pursuant to the Law.

(m) To determine the distribution of assets upon the winding up of the
Company.
MANAGEMENT OF THE COMPANY

23. Subject to these Articles, and in particular to Article 5, the Council shall conduct the administration and management of the Company, and, for this purpose, shall have and perform the duties and functions and shall have and may exercise the powers and authorities imposed or conferred on it by these Articles.

DUTIES AND POWERS OF THE COUNCIL

25. (a) The duties and the powers of the Council shall be as follows (but subject always to the powers of the Members in General Meeting):

(i) to implement the policies and philosophy of the College as determined by the Members of the Company;

(ii) to conduct and manage the ordinary affairs and business of the Company and to carry out its objects;

(iii) to take all measures necessary for the welfare of the College and watch over the concerns and the welfare of the residents and non-residents of the College;

(iv) in co-operation with the Master to provide for the education and opportunities referred to in clauses 2(a) and (2(b) of the Memorandum of Association;

(v) to control, manage and safeguard all the real estate and other property now or at any time belonging to the Company and used for the purposes of the College (subject to all existing trusts, engagements and liabilities affecting the same) and to provide for the maintenance and protection thereof;

(vi) to conduct, control and administer all of the finances of the Company;

(vii) subject to these Articles to co-operate with the Provincial Council to appoint the Master upon such terms and conditions in all respects as the Provincial Council shall consider desirable;

(viii) subject to these Articles, to determine what persons or class of persons shall be admitted to resident and non-resident membership of the College and generally to deal with all matters relating to such membership and exclusion from such membership;

(ix) to fix the fees from time to time of resident and non-resident members;

(x) to arrange the horary or timetable of the College;
(xi) to make and amend from time to time rules or regulations for the good government of the College;

(xii) to fix the numbers, conditions of engagement and salaries of members of the administrative, academic, clerical and supervisory staff, excluding the Master, Dean and Bursar, the appointment and dismissal of whom shall be the responsibility of the Master;

(xiii) to appoint and dissolve such Committees as it may consider advisable from amongst its own members or others and to delegate specific powers to such Committees provided that such powers shall be not in excess of the powers of the Council. The Council may at any time remove any member of a Committee, and may fill any vacancy;

(xiv) to recommend to the Members of the Company amendments and additions to these Articles approved by the Council members convened for the express purpose of considering such amendments or additions;

(xv) to establish, maintain and/or contribute to superannuation pension and endowment funds or otherwise to assist employees or ex-employees of the College or their dependants;

(xvi) to cause to be kept a correct Register of all residents and non-residents, their ages, the dates of commencement with and the departure from the College together with the names and addresses of their parents or guardians as appropriate;

(xvii) to develop the plans for the necessary financial support and funding for the Company’s long term stability;

(xviii) to prepare an annual report to the Members of the Company and such other reports as may be required by the Company;

(xix) to do all else necessary to promote the specified physical and financial well being of the Company and the College;

(xx) to ensure that there is no religious test imposed as a condition of residents and non-residents being admitted to the College and that residents and non-residents are not required to participate in any religious observance; and

(xxii) to establish and maintain to the satisfaction of the Council of U.N.E., a tutorial system for the benefit of resident and non-resident students to supplement formal teaching provided by U.N.E.
(b) In addition to the particular powers hereinbefore conferred upon it, the Council may exercise all the powers of the Company and do all such acts, matters and things as are by law required to be done by the Company excepting only those acts, matters and things which may lawfully be done by the Company only at any General Meeting and those acts, matters and things which are required by these Articles to be done by the Master or the Secretary.
APPENDIX C

EXTRACTS from the
CONSTITUTION OF PRESENTATION
COLLEGE WINDSOR (1998)
7. The powers and functions of the Members of the Company assembled in general meeting will be as follows:

(a) To determine, clarify and enunciate the Catholic educational philosophy of the Company and to formulate congruent policy determinations in relation to the operation of the College as a Catholic girls' College in the tradition of the Institute;

(b) To make the necessary arrangements to educate and familiarise the Members and the Directors with the philosophy, principles and values of the Institute by appropriate means so that the Members and the Directors will understand these values, will adopt them, and will guarantee their promotion through adequate policy formulations;

(c) To appoint at least six (6) and no more than ten (10) persons to the Board of the Company pursuant to Rule 29 and to remove such persons at will. Such appointments will be made after consultation with existing Directors. The appointments will be for a term of 3 years (unless revoked) and will be notified in writing to the Company by the Congregation leader on behalf of the Members;

(d) To approve the appointment or removal of the Principal of the College by the Board;

(e) To approve the appointment or removal of the Chairman of Directors by the Board;

(f) To adopt amendments or modifications and to alter, amend, add to or repeal the Rules or any of the Rules made under this Constitution;

(g) To approve the operating and capital budgets of the Company prepared by the Board;

(h) To purchase, acquire, sell, lease, transfer or encumber, construct or undertake the demolition of land and/or buildings owned or occupied by the College or in which the College has or will have legal or equitable title;

(i) To authorise the Board to borrow money for the purposes of the Company and to give security over the assets of the Company to support such borrowings, where such borrowing is in excess of the annual limit fixed by the Members from time to time and notified to the Board by the Congregation Leader;

(j) To grant prior approval to any increment or additions to the capital debt or to re-negotiate, modify or otherwise change the existing capital debt obligations of the Company;

(k) To authorise any fund-raising for the capital improvements of the College;
(l) To require a certified audit of the funds of the Company at any time and to name the qualified accountant who shall conduct the audit;

(m) To terminate the existence of the Company pursuant to the Law;

(n) To approve any proposed change to the name of the College or to the name of the Company.

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APPROVAL OF MEMBERS

30. (a) The approval of the Members notified to the Board in writing under the hand of the Congregation Leader will be required as a prerequisite to any decision of the Board becoming effective in the following events:

(i) Where at the meeting of the Board at which the decision is made or by written notice within seven (7) days following such meeting the Congregation Leader advises that such decision is in her opinion not in accordance with the education philosophy of the Institute;

(ii) Where the decision involves capital expenditure by the Company in excess of the annual limit fixed by the Members from time to time and notified to the Board in writing under hand of the Congregation Leader;

(iii) Where the decision will involve long term financial commitments by the Company whether secured or unsecured in excess of the limit from time to time determined by the Members and notified to the Board in writing under hand of the Congregation Leader;

(iv) Where the decision concerns long term strategy plans involving or requiring changes in the education apostolate as carried on at the College;

(v) Where the decision involves the appointment of the Principal, or the Chairman of the Board;

(vi) Where the decision involves the acquisition or leasing of real property;

(vii) Where the decision involves any change or amendment to the Rules made under this Constitution;
(viii) Where the decision involves the reconstruction or winding up of the Company, or the merger of the Company with any other corporation or association;

(ix) Where the decision involves any change to the name of the College or to the name of the Company;

(x) Where the decision involves public fund-raising.

(b) Notwithstanding anything herein contained to the contrary the Board:-

(i) Will submit to the Members prior to the commencement of each financial year a budget of income and expenditure;

(ii) Will adopt the budget after receipt of approval of the Members notified to the Board in writing under the hand of the Congregation Leader;

(iii) Will not exceed the budget without the approval of the Members notified to the Board in writing under hand of the Congregation Leader.

(c) Where a decision of the Board is one which requires the approval of the Members pursuant to this Rule the Board will prepare a written statement of the issue and the reasons in support of the Board's decision and forward the same under the hand of the Chairman to the Congregation Leader on behalf of the Members.
APPENDIX D

A MODEL CONSTITUTION –
CONSTITUTION OF PRESENTATION
COLLEGE WINDSOR (2006)
Corporations Act
A Company Limited by Guarantee
Not having a Share Capital

CONSTITUTION
of
PRESENTATION COLLEGE WINDSOR
ACN 084 586 121

NATURE OF THIS COMPANY

1 This company is a public company limited by guarantee.
2 The name of the Company is Presentation College Windsor.
3 All of the replaceable rules set out in the Corporations Act which the company is entitled to displace are displaced by the rules set out in this Constitution.

DEFINITIONS

4 In this Constitution the following definitions apply unless the context otherwise requires:
   “Act” means the Corporations Act 2001 as modified amended or re-enacted from time to time;
   “Board” means the Directors from time to time of the Company;
   “Chairperson” means the Chairperson of the Board;
   “Company” means the company limited by guarantee and called Presentation College Windsor;
   “Constitution” means the Constitution for the time being of the Company.
   “Institute” means the unincorporated Religious Institute within the Catholic Church known as the Presentation Sisters Victoria;
   “Member of the Company” or “Member” means the Presentation Property Association Inc, which body corporate is the sole Member of the Company;
   “Principal” means the Principal for the time being of the College;
   “College” means Presentation College, Windsor, Victoria, which is conducted by the Company;
   “Secretary” means any person appointed to perform the duties of the Secretary of the Company;
   “Students” means the students attending the College from time to time;
INTERPRETATION

In this Constitution, unless a contrary intention appears:

(a) the singular includes the plural and vice versa;

(b) a reference to a person includes a firm, body corporate, an unincorporated association or an authority;

(c) a reference to a gender includes the other genders;

(d) headings are for convenience only and do not form part of this Constitution or affect its interpretation;

(e) a reference to a Rule is to a rule or sub-rule of this Constitution; and

(f) an expression in these Rules that deals with a matter dealt with by a particular provision of the Act, has the same meaning as in that provision of the Act.

OBJECTS OF THE COMPANY

5 The objects for which the Company is established are:

(a) to undertake the ownership, management and control of the College, and to govern, conduct and carry on the College, subject always to the provisions of relevant legislation, at Windsor in accordance with the mission of the Catholic Church and with an Educational Philosophy identical to that of the Institute;

(b) to provide a Catholic education according to the precepts, teaching and practice of the Catholic Church, to all pupils under its jurisdiction. The College aims to create an educational environment, faithful to the tradition and spirit of the Institute where the dignity of each person involved with the College is nurtured and valued and the full development of the individual person is fostered in a school community. The education provided will be broad and general allowing development in arts, humanities, mathematics, sciences, languages, technologies and religious education in accordance with the beliefs, teachings and traditions of the Catholic Church. In addition to personal, intellectual, spiritual, social development and pastoral care provisions, the educational milieu will be to encourage a spirit of justice and social responsibility;

(c) to carry on or assist in carrying on and promotion of the religious, apostolic and charitable activities of the Institute;

(d) to do all such other things as are incidental or conducive to the attainment of the objects of the Company.

POWERS OF THE COMPANY

6 The Company has all the powers given to it under the Act including all powers necessary to enable the Company to carry out its objects except that the power of investment by the Company is limited to one or more of the following: a major
Australian retail Bank; any Catholic Arch/Diocesan Development Fund; or such other institution as may be approved by the Member of the Company.

7 (a) All of the income and property of the Company from wherever it is derived must be applied solely towards the promotion of the objects of the Company and no portion is to be paid or transferred directly or indirectly by way of dividend bonus or otherwise by way of profit to the Member of the Company, provided that this restriction does not prevent the payment in good faith of:

(i) remuneration to any officers, other than the Directors of the Company, or employees of the Company or to any other person in return for services actually rendered to the Company;

(ii) out-of-pocket expenses incurred by a Director of the Company in the performance of any duty as a Director of the Company;

(iii) interest on money lent to the Company by the Member of the Company at a rate not exceeding the rate for the time being charged by the Company’s bankers for overdrawn accounts;

(iv) reasonable and proper rent, remuneration or return for any premises of the Member of the Company occupied by the Company.

(b) The Directors must approve all other payments the Company makes to Directors.

8 (a) If the Company obtains deductible gift recipient status from the Australian Taxation Office, it will maintain for the objects of the Company stated in this Constitution a fund, called the Building Fund, to which gifts of money or property for that purpose will be made and to which any money received by the Company because of such gifts is to be credited and the Building Fund will not receive any other money or property.

(b) The Company is to apply gifts made to the Building Fund and any money received because of such gifts only for the objects of the Company.

(c) At the first occurrence of either the winding up of the Building Fund or the revocation of the Company’s endorsement under Sub-division 30-BA of the Income Tax Assessment Act 1997, the Company is to transfer any surplus assets of the Building Fund to a fund, authority or institution to which gifts can be deducted under Division 30 of the Income Tax Assessment Act 1997, nominated by the Member of the Company.

(d) Any other provisions which from time to time are required in order to maintain the status of the Company as a Company to which gifts can be deducted under the Income Tax Assessment Act 1997 are deemed to form part of this Constitution.

WINDING UP

9 Subject to Rule 8, if the Company is wound up or dissolved (other than for the purposes of reconstruction or amalgamation) and there is property remaining
after the satisfaction of the debts and liabilities of the Company, that property will not be paid or distributed to the Member of the Company but will be given or transferred to a Catholic institution, as nominated by the Member of the Company, which is tax exempt pursuant to section 30 of the Income Tax Assessment Act 1997 as amended and whose objects are restricted to one or more charitable purposes as specified in section 150(1) of the Act and which by its constitution is required to apply its profits (if any) or other income in promoting its objects and is prohibited from paying any dividend to its members.

**MEMBERSHIP OF THE COMPANY**

10 The liability of the Member of the Company is limited.

11 The Member of the Company undertakes to contribute to the property of the Company in the event of the Company being wound up while it is the Member of the Company or within one (1) year after it ceases to be the Member of the Company, for payment of the debts and liabilities of the Company (contracted before it ceases to be the Member of the Company) and of the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding $100.00.

12 The Member shall be the only Member of the Company, unless the Member resigns as the Member of the Company and nominates a new Member of the Company in its place.

13 All resolutions and decisions required by the Act or by this Constitution to be made by the Member, shall be passed and made by the Member recording the resolution of decision and signing the record, without holding any annual general meeting or other general meetings.

**BOARD OF DIRECTORS ("BOARD")**

14 The management of the Company shall be vested in the Board which shall consist of not less than eight (8) and not more than sixteen (16) persons who, subject to this Constitution, shall be appointed by the Member in the manner provided in Rule 18. Upon appointment each such person is a Director.

15 The Board must comprise persons who have suitable qualifications or experience or are representative of community interests and who are considered by the Member to be suitable to participate in the mission of the Institute and specifically in the ministry of Catholic education.

16 Directors will be appointed for a term not exceeding three (3) years and will be eligible for re-appointment, provided that a Director will normally retire after holding office for nine (9) consecutive years, or otherwise at the Member's discretion.

17 In addition to the circumstances in which the office of a Director becomes vacant under the Act the office of a Director becomes vacant if the Director:

(a) is absent without the consent of the Board from three successive meetings of the Board;

(b) resigns by notice in writing to the Member and to the Board;
(c) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health;

(d) is directly or indirectly interested in any contract or proposed contract with the Company and fails to declare the interest as required by this Constitution and the Act;

(e) is removed by notice in writing by the Member to the Director and to the Board.

18 Notice of Appointments and re-appointments by the Member to the Board and removal therefrom must be in writing addressed to the Board from the Member.

19 The Member is to appoint the Chairperson and Deputy Chairperson of the Board and nominate their term of office.

20 Whenever a casual vacancy occurs in the office of Chairperson or Deputy Chairperson the Member will appoint a person to fill the vacancy.

APPROVAL OF THE MEMBER TO THE COMPANY

21 Notwithstanding Rule 14 the Board must obtain the written approval of the Member before any decision of the Board becomes effective where the decision involves the following:

(a) where at the meeting of the Board at which the decision is made or by written notice within three (3) days following such meeting any Director advises the Chairperson that such decision is in his or her opinion not in accordance with the objects of the Company;

(b) where the decision involves, in the opinion of the Member, any change to the educational philosophy, including Catholicity and ethos of the College;

(c) where the decision involves the selection, appointment or re-appointment of the Principal.

22 Where a decision of the Board is one which requires the approval of the Member pursuant to this Rule the Board is to prepare a written statement of this issue and the reasons in support of the Board’s decision and forward the same under the hand of the Chairperson to the Member.

POWERS AND DUTIES OF THE BOARD

23 Subject to the Act and this Constitution:

(a) the Board is to oversee the management of the Company and exercise all powers of the Company not required by the Act or by this Constitution to be exercised by the Member;

(b) without limiting the generality of paragraph (a) of this Rule, the Board may exercise all the powers of the Company to borrow money, buy and sell property, to charge any property or business of the Company or give any other security for a debt, liability or obligation of the Company or of any person.
24 The Board may by power of attorney appoint any person or persons to be the attorney or attorneys of the Company for such purposes with such powers authorities and discretions (being powers authorities and discretions vested in or exercisable by the Board) for such period and subject to such conditions as the Board thinks fit.

25 Any such power of attorney may contain provisions for the protection and convenience of persons dealing with the attorney as the Board thinks fit and may also authorise the attorney to delegate all or any of the powers authorities and discretions vested in the attorney.

26 All cheques, promissory notes, bankers' drafts, bills of exchange and other negotiable instruments and all receipts for money paid to the Company must be signed, drawn, accepted, endorsed or otherwise executed as the case may be by any two Directors or in such other manner as the Board determines.

PROCEEDINGS OF THE BOARD

27 The Board may meet together for the despatch of business and adjourn and otherwise regulate its meetings as the Board thinks fit.

28 The Chairperson or any two Directors may at any time, and the Secretary must, on the requisition of two Directors, convene a meeting of the Board.

29 A meeting of the Board may be held with one or more of the Directors taking part by telephone, audiovisual link up or other instantaneous communication medium, if the meeting is conducted so that Directors are able to hear the proceedings of the entire meeting and to be heard by all others attending the meeting. Such a meeting is deemed to be held at such place as is agreed upon by the Directors being a place at which at least one Director was present for the duration of that meeting.

30 Subject to this Constitution, questions arising at a meeting of the Board must be decided by a majority of votes of Directors present and voting and any such decision will be for all purposes deemed a decision of the Board. In the case of an equality of votes the Chairperson of the meeting has a second or casting vote.

31 Subject to Rule 32, Directors must not vote in respect of any contract or proposed contract with the Company in which they are in any way whether directly or indirectly interested or in respect of any matter arising out of such a contract or proposed contract and must not be present when the Board votes in respect of such a matter and if they are present and vote in contravention of this clause their vote shall not be counted.

32 (a) Where any Director is directly or indirectly interested in a contract or proposed contract with the Company, the Board may in respect of that contract or proposed contract and/or a matter arising out of the contract or proposed contract ("the matter") pass a resolution that the interest should not disqualify the Director from considering or voting on the matter and which resolution:

(i) specifies the Director, the interest and the matter; and

(ii) states that the Directors voting for that resolution are satisfied that the interest should not disqualify the Director from
considering or voting on the matter, provided the specified Director is not present for and does not vote in respect of such resolution.

(b) A Director may, when exercising powers or performing duties as a Director, act in a manner which he or she believes is in the best interest of the Institute even though it may not be in the best interest of the Company.

33 At a meeting of the Board one half of the Directors constitutes a quorum. No business is to be transacted at any such meeting unless a quorum is present at the time the meeting proceeds to business.

34 In the event of a vacancy or vacancies in the office of a Director or offices of Directors the remaining Directors may act but if the number of remaining Directors is not sufficient to constitute a quorum at the meeting of the Board, the Member of the Company is to appoint a further Director or Directors.

35 If all the Directors have signed a document containing a statement that they are in favour of a resolution of the Board in the terms set out in the document, a resolution in those terms is deemed to have been passed at a meeting of the Board held on the day on which the document was signed and at the time at which the document was last signed by a Director or if the Directors signed the document on different days on the day on which and at the time at which the document was last signed by a Director.

36 The Chairperson or a majority of the Directors may request the attendance at any meeting of the Board of any person who in their opinion may be able to assist the Board in any matter under consideration.

37 Subject to this Constitution the procedure to be followed at a meeting of the Board will be as the Board determines.

PRINCIPAL

38 Subject to Rule 21 (for the avoidance of doubt, the Board must obtain the prior written approval of the Member before any decision of the Board in (a) or (b) becomes effective):

(a) the Board is to appoint a Principal who shall be the chief executive officer of the Company.

(b) the re-appointment, termination, suspension or resignation of the Principal is to be dealt with by the Board.

39 The Principal is responsible to the Board for the implementation of the policies adopted by the Board in conformity with the objects set out in this Constitution. The Principal is to be responsible to the Board for the leadership and management of the College.

40 The Board may entrust to and confer upon the Principal any of the powers exercisable by it upon such terms and conditions and with such restrictions as it may think fit and either collaterally with or to the exclusion of its own powers
and may from time to time revoke, withdraw, alter or vary all or any of those powers.

41 The Principal may appoint, engage and remove such employees, staff, agents, consultants and advisers as the Principal deems necessary or desirable for the purposes of the Company. Those personnel must at all times carry out their duties under the supervision and control of the Principal.

ESTABLISHMENT OF COMMITTEES

42 The Board may at any time appoint a Committee or Committees from amongst the Directors or persons co-opted by the Board and may prescribe the functions of any Committee and the constitution of each such Committee is to be approved by the Board. In addition to any other Committee or Committees appointed by the Board from time to time, the Board will appoint, subject to obtaining the Member’s approval, a Mission Committee. The Mission Committee will be entrusted with the responsibility to ensure that the Educational Philosophy of the Institute is effectively promoted and understood among the staff and students.

43 The Board may delegate any of its powers to a Committee or Committees consisting of such of its number as the Board thinks fit and may prescribe the functions and procedure of such Committee or Committees.

POLICIES

44 The Board has the power to make, vary and repeal policies from time to time for the proper conduct and management of the Company.

ACCOUNTS AND RECORDS

45 The Board must ensure that there are kept proper accounts and records of the transactions and affairs of the Company and such other records as sufficiently explain its financial operations and financial position.

46 The Board must do all things reasonably open to it to ensure that:

(a) the wellbeing of the College and the interests of its staff and Students are properly cared for;

(b) adequate control is maintained over assets owned by or in the custody of the Company;

(c) an adequate budgeting and accounting system is developed and maintained;

(d) copy of the Minutes of each Board meeting are submitted to the Member within seven days of each meeting;

(e) its own performance as a Board is reviewed annually in a manner approved by the Member.

AUDIT

47 The Board must ensure compliance with all statutory audit requirements.
AUDITOR

48 The Company is to appoint a properly qualified auditor whose duties are regulated in accordance with the Act.

SECRETARY

49 The Board is to appoint a Secretary of the Company who will hold office on such terms and conditions as the Board determines.

ANNUAL REPORT

50 The Board will in respect of each financial year present an Annual Report together with a budget for the ensuing year for the Member's approval. The Board will meet with the Member:

(a) to review the operations of the Company in the period covered by the Annual Report;

(b) to discuss with the Member the Company's progress in fulfilling its objects; and

(c) to discuss the proposed budget.

NOTICE TO DIRECTORS

51 Without prejudice to any other method of giving notice it is sufficient compliance with any provision of this Constitution requiring notice to be given to Directors if with the observance of the required time notice is given:

(a) in a document delivered to the Director in person; or

(b) in a pre-paid letter or other document addressed and posted to the Director at his or her last known address two days prior to the date by which notice must be given; or

(c) in a resolution of the Board made at a duly held meeting of the Board and which sufficiently specifies that which is required to be notified if the terms of that resolution as recorded in the confirmed proceedings of that meeting are delivered or posted as above to the Director.

52 Any such notice may be given in any manner of representing or reproducing words in visible and legible form and may give notice of either one or more than one matter or event.

INDEMNITY

53 Every person who is or has been a Director or other officer of the Company is indemnified, to the maximum extent permitted by law, out of the property of the Company against any liabilities for costs and expenses incurred by that person:

(a) in defending any proceedings relating to that person’s position with the Company whether civil or criminal, in which judgment is given in that person’s favour or in which that person is acquitted or which are withdrawn before judgment; or
(b) in connection with any administrative proceedings relating to that person's position with the Company, except proceedings which give rise to civil or criminal proceedings against that person in which judgment is not given in that person's favour or in which that person is not acquitted or which arise out of conduct involving that person's lack of good faith; or

(c) in connection with any application in relation to any proceedings relating to that person's position with the Company, whether civil or criminal, in which relief is granted to that person under the law by the Court.

54 Every person who is or has been a Director or other officer of the Company is indemnified, to the maximum extent permitted by law, out of the property of the Company against any liability to another person (other than the Company) as such an officer unless the liability arises out of conduct involving a lack of good faith.

55 Each of the indemnities contained in Rules 53 and 54 applies automatically to the persons referred to in those Rules unless the Board in its absolute discretion determines that the indemnity should not so apply in any particular case.

56 The Company is to pay a premium for a contract insuring a person who is or has been a director or other officer of the Company against:

(a) any liability incurred by that person as such an officer which does not arise out of conduct involving a wilful breach of duty in relation to the Company or a contravention of the Act; and

(b) any liability for costs and expenses incurred by that person in defending proceedings relating to that person's position with the Company whether civil or criminal, and whatever their outcome.

AMENDMENT OF CONSTITUTION

57 This Constitution may be amended from time to time by the Member in accordance with the Act.