



Who are we?

Legal identity issues
for Church agencies
and organisations

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Are we a charity? A PBI? A DGR?

“Only a limited number of Church organisations/agencies would be eligible for endorsement as PBIs”

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

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

In particular, many individuals who work for Church agencies and organisations struggle to understand the technical differences between a charity, as compared with a public benevolent institution (PBI), and

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

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

What is a charity?

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

Charities include most religious institutions, aged person homes, homeless hostels, organisations relieving the special

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needs of people with disabilities, and societies that promote the fine arts.

The characteristics of a charity are:

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

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

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

The advancement of religion

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

- spreading of religious doctrine;
- mission work;
- provision of facilities for worship;
- preaching of the gospel;
- Christian work;
- assistance in poor parishes;
- Holding of Church services;
- burial grounds associated with churches; and
- gifts for the provision and maintenance of clergy/ministers/pastors etc.

Endorsement

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

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

What is a public benevolent institution (PBI)?

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

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

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

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

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

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

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

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

What is a deductible gift recipient (DGR)?

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

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

DGRs are also a subset of charities. Subdivision 30-B of the *Income Tax Assessment Act 1997* contains tables that identify general

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

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

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

What is a business name?

A business name is a title under which a person or other legal entity may conduct its business. Business names are registered under the *Business Names Act 2002* (in NSW, but there is similar legislation in each State and Territory in Australia), which is administered by the Office of Fair Trading (or its equivalent) in each State. The purpose of

registering a business name is to simply provide a means of finding out the details of the proprietor of a trading entity where the entity is not trading under the proprietor’s name. For example, if John Smith owns a business in NSW, but is trading under ‘John Smith Patisserie’, then the registration of that name becomes compulsory with the NSW Office of Fair Trading.

Who owns a business name?

Beware that registering a business name does not give your entity ownership of that name. Registering a particular name will not stop another person or Church entity/agency from registering a similar name. For example, if a Church entity/agency registers the name ‘Australian Church’, there is nothing to stop another Church from registering the name ‘Church of Australia’.

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

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

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

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What is a trade mark?

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

As mentioned above, the best way for a Church entity/agency to protect the registration of its business name is with a trade mark registration. A trade mark registration will provide the owner with the exclusive right to use that name throughout Australia and to prevent others from using a similar name in relation to the registered goods or services. Trade marks are

also relevant for company names (which is different from a business name), company logos and domain names. Each of these serve to distinguish the entity from its competitors and each, therefore, function as trade marks. Trade mark registration is Australia wide, as opposed to a business name registration where it is limited to the state/territory only.

A final word

The bottom line is that if two separate Church entities/agencies have the same names registered, one as a business name and the other as a trade mark, the latter will effectively have priority and may sue the former for infringing its trade mark, if the business name owner

uses the same name for goods or services similar to those covered by the trade mark owner.

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

Jacob Bozdas is a solicitor at Makinson & d'Apice.

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and specific recipients of deductible gifts in the following areas:

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

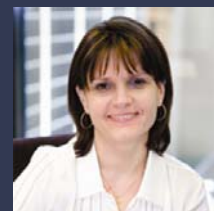
To obtain DGR endorsement, entities need to be endorsed by the ATO or specifically named in the relevant table in subdivision 30-B.

An example of a recipient specifically named in the table is the St Patrick's Cathedral Restoration Fund.

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

Conclusion

For those Church organisations/agencies which do not enjoy all or any of the above endorsements from the ATO, it is a worthwhile exercise to periodically review your entitlement as the laws surrounding



Vera Visevic is a partner of Makinson & d'Apice with 16 years experience in advising clients on property and church matters.

+61 2 9233 9083
visevic@makdap.com.au

charities, PBIs and DGRs are amended from time to time, and so therefore an entitlement may arise where it did not exist before. This is especially the case with the DGR categories, which continue to gradually expand. ■

Public ancillary funds crackdown!

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

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

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

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

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

What are public ancillary funds?

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

To whom can public ancillary funds distribute moneys?

Public ancillary funds that are endorsed as DGRs can only distribute moneys to other DGRs which are identified in item 1 of section 30-15 of the *Income Tax*



Bill d'Apice is a partner of Makinson & d'Apice with 33 years experience in advising clients on property and church matters.
+61 2 9233 9013
wdapice@makdap.com.au

Assessment Act 1997 (the Act). The recipient must also be an entity whose ordinary and statutory income are exempt from tax under Division 50 of the Act or under other Commonwealth legislation.

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

Many parishes/congregations/church entities have established ancillary funds. Many dioceses/state based Church entities in which such parishes/congregations are situated may have also established an ancillary fund (eg a charitable works fund).

A parish ancillary fund, say, cannot make a distribution to a diocesan ancillary fund, for example, because one ancillary fund cannot distribute moneys to a second ancillary fund. However, a parish ancillary fund could distribute money to other entities within the parish/diocese which were endorsed DGRs under item 1 of section 30-15 of the Act (eg school building fund, scholarship fund, Anglicare NSW etc).

Some other requirements of a public ancillary fund

- A public ancillary fund is not entitled to accumulate investment income excessively. The ATO regards distribution of a substantial part of the fund's income (but not necessarily capital gains) as essential, but accepts that a fund may use some of its income to acquire assets

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Public ancillary funds crackdown!

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which, in the future, would produce more income for charitable purposes. A fund may accumulate some of its income for later distribution.

- A public ancillary fund must distribute its income **solely** for permitted purposes. The use of the term "solely" means that a public ancillary fund would cease to qualify as a DGR as soon as the fund made a distribution that was not in accordance with permitted purposes.

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

If you are operating a public ancillary fund, it is appropriate to review its activities to ensure that it is not breaching trust obligations and therefore putting at risk its DGR status and its entitlement to give donors tax deductible receipts.



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

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

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

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

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community.

In this case, Aid/Watch, a small charity that monitored Australia's

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

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

This decision indicates that while a charity is permitted to have

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

Allan Mortel, director and James Robson, manager

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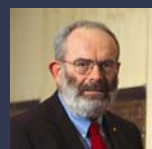
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Assisting in the administration of your ministry

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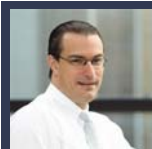
Richard d'Apice AM
+61 2 9233 9011
rdapice@makdap.com.au



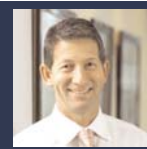
Bill d'Apice
+61 2 9233 9013
wdapice@makdap.com.au



Vera Visevic
+61 2 9233 9083
visevic@makdap.com.au

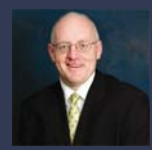


John Baxter
+61 2 9233 9037
jbaxter@makdap.com.au



Alex Kohn
+61 2 9233 9036
akohn@makdap.com.au

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Joe Shannon
+61 2 8236 7700
jshannon@moorestephens.com.au



Allan Mortel
+61 2 8236 7700
amortel@moorestephens.com.au

Back issues

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

Issue 5, November 2009

- Setting up a church
- Likely developments in financial reporting obligations for charities
- The ever present problem of bullying in schools
- Gaining access to available tax concessions
- Land use and liability for taxes

Issue 4, September 2009


- Are your school uniform agreements in order?
- Financial reporting requirements for Church entities
- Incorporation options
- Cemetery conservation and care

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Disclaimer: This publication is a non-comprehensive general outline of the law as at 28 February 2010. You should not act upon or rely on any information contained in this newsletter without obtaining specific legal advice.

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Level 12 135 King Street Sydney NSW 2000 • GPO Box 495 Sydney 2001 • DX 296 Sydney
Telephone 02 9233 7788 • Facsimile 02 9233 1550 • Email mail@makdap.com.au • www.makdap.com.au