

Allowing diocesan organisations to align with the broader purposes of the Diocese

(A report from the Standing Committee.)

Key Points

- Members of diocesan boards typically have a limited capacity to consider the broader purposes of the Diocese when making decisions in respect to their organisations due to the effect of narrowly worded objects clauses in their constituting ordinances.
- This limitation is compounded by -
 - their duties as members set out in *ACNC Governance Standard 5* and/or their constituting ordinance, and
 - the special conditions for income tax exemption that require a charity to comply with its objects clause and not apply its income and assets for other purposes.
- This limitation could be substantially alleviated by modifying or supplementing the objects and member duty clauses that apply to diocesan organisations in a manner analogous to the scheme that applies to the subsidiaries of a parent company under section 187 of the Corporations Act.
- Consistent with the approach taken in section 187 of the Corporations Act, the proposed changes allow board members to act in a manner which advances the broader charitable purposes of the Diocese but does not mandate such action.
- The *Diocesan Governance Policy for Diocesan Organisations* could be used as the policy vehicle for initiating these changes.
- A diocesan organisation acting in a trustee capacity is bound to apply its trust property in a manner that furthers the charitable purposes of the trust, notwithstanding that the organisation itself may have broader purposes. The trusts would need to be varied to incorporate the broader purposes.
- Additional limitations apply in the case of schools, and also organisations that are public benevolent institutions or operate public funds that have deductible gift recipient status.

Purpose

1. The purpose of this report is to propose amendments to the *Governance Policy for Diocesan Organisations* which address the limited opportunity that most diocesan boards have to consider the broader purposes of the Diocese when making decisions in respect to their organisations.

Recommendations

2. Synod receive this report.
3. Synod consider the following motion to be moved “by request of the Standing Committee” –

‘Synod agrees to amend the policy guidelines in Appendix 2 of the *Diocesan Governance Policy for Diocesan Organisations* by –

- (a) inserting a new paragraph 2 under the heading “Purpose” as follows (with consequential renumbering of existing paragraphs) –

“In recognition that the diocesan organisation is part of a network of parishes and organisations which is collectively seeking to advance the broader charitable purposes of the Diocese, the diocesan organisation should be expressly permitted to pursue its purposes in a manner which advances the broader charitable purposes of the Diocese, including

such purposes as are declared or recognised from time to time by the Synod. See also paragraph 32.”

- (b) inserting a new paragraph 32 under the heading “Duties, powers and limitations” as follows (with consequential renumbering of existing paragraphs) –

“A board member is taken to act in good faith in the best interests of the diocesan organisation and to further the purposes of the diocesan organisation for the purposes of paragraph 31(b) if:

- (a) the diocesan organisation is expressly permitted to pursue its purposes in the manner referred to in paragraph 2;
- (b) the board member acts in good faith in pursuing the purpose of the diocesan organisation in a manner which advances the broader charitable purposes of the Diocese; and
- (c) the diocesan organisation is not insolvent at the time the board member acts and does not become insolvent because of the board member's act.”

Background

4. During the course of providing secretarial support to a range of diocesan organisations, Sydney Diocesan Services (**SDS**) has become increasingly aware of the conflicts of interest that can arise between such organisations as they pursue their respective objectives. The increased awareness of conflicts of interest and the proper management of such conflicts is reflected in the important reforms that have taken place since the GFC in relation to the composition and functioning of diocesan boards. It also reflects the increasing emphasis placed by the Australian Charities and Not-for-profits Commission (**ACNC**) on the management of conflicts of interest.¹ In most cases such conflicts of interest are able to be resolved in a mutually beneficial and appropriate manner consistent with the objectives of the organisations concerned.
5. However, some conflicts of interest are not capable of easy resolution. Some recent and/or ongoing examples are –
 - (a) The work undertaken by the ACPT and GAB in developing a strategy for diocesan investments. Despite the best efforts of both bodies, it was ultimately not possible to present to the Standing Committee a joint recommended way forward.
 - (b) The choice faced by some diocesan organisations between maintaining all their cash investments in the Diocesan Cash Investment Fund (with the effect of mutually benefiting all investors in the fund) and withdrawing a portion of such investments from the DCIF to earn slightly higher returns via direct term deposits (with the effect of mutually reducing the benefit of the fund for all investors).
 - (c) The decision by some diocesan schools to engage with providers other than the Anglican Education Commission (even prior to the issues raised under section 83C of the Education Act).
6. A key reason for these difficulties appears to be an understandable reluctance of board members to pursue solutions which may be inconsistent with the objects of the organisation. The particular problem is that the objects for many diocesan organisations have been narrowly drafted in a way which treats them as stand-alone undertakings rather than as part of a network of churches and organisations. In such circumstances, diocesan boards and their members may have only a limited opportunity to consider the broader purposes of the Diocese when making decisions in respect to their organisations.
7. This paper sets out the proposed amendments to the *Governance Policy for Diocesan Organisations*.

¹ See <https://www.acnc.gov.au/tools/topic-guides/conflict-interest>

Discussion

Analogy of a corporate group structure

8. The relationship between the Synod and the diocesan organisations it constitutes under the *Anglican Church of Australia Bodies Corporate Act 1938* is, in many respects, analogous to the relationship between a parent company and its subsidiaries under the *Corporations Act 2001 (Cth)* (particularly where the Synod or the Standing Committee can appoint a majority of the board members of a Diocesan organisation).
9. Under section 187 of the *Corporations Act*, a director of a corporation that is a wholly-owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if –
 - (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company, and
 - (b) the director acts in good faith in the best interests of the holding company, and
 - (c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.
10. The policy reasons given for including section 187 in the *Corporations Law* in 1998 were as follows –
 - The section is designed to give directors some certainty in the performance of their obligations as corporate structures are becoming increasingly complex.
 - The rise of corporate groups means that more potential conflicts of interest could arise.
 - There is also a limited pool of people from which directors are drawn in Australia and many directors of public companies are taking on multiple directorships, increasing the likelihood of conflicts of interest.
11. Section 187 reflects the common law in this area. For example, in the 1976 High Court decision of *Walker v Wimbourne* it was suggested that if a company (Company A) pays money to another company (Company B), this may have derivative benefits for Company A, if Company B “is enabled to trade profitably or realises its assets to advantage.” However the decision to benefit Company B must still be made “from the standpoint of Company A and judged according to the criterion of the interests of that [Company A].”²
12. In a 1993 decision of the NSW Court of Appeal, the court upheld a director’s use of company funds to repay a bank loan owed by another company in the group. The director did this so the bank would continue to support the group as a whole. The Court held that the payment could legitimately be viewed as being of benefit to the individual companies. The director had “considered with justification that the welfare of the group was intimately tied up with the welfare of the individual companies.”³
13. While the relationships between the Synod and diocesan organisations may be analogous to the relationship between a parent company and its subsidiaries, there are some important differences which mean section 187 does not apply to the Synod and diocesan organisations. Firstly, diocesan organisations are not subsidiaries of the Synod as a parent entity because, among other reasons, the Synod is not a body corporate.⁴ Secondly, the duty to act in good faith in the best interests of the company in the *Corporations Act 2001*⁵ does not apply to the director of a charity that is registered with the ACNC⁶, though there is an equivalent duty in the ACNC Governance Standards (which apply to charities that are not Basic Religious Charities).
14. Despite these differences, the capacity of a wholly-owned subsidiary to act in the best interest of its holding company and for such actions to be taken to be an act in good faith and in the best interests of the subsidiary, provides a helpful model which could be adopted for the purposes of the Synod and the diocesan organisations it constitutes.

² (1976) 137 CLR 1, 11 (per Mason J)

³ *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 11 ACLC 952

⁴ Part 1.2, Division 6 *Corporations Act 2001 (Cth)*

⁵ Section 181. This duty is qualified for directors of wholly-owned subsidiaries who can act in the best interests of a holding company in certain circumstances - section 187, *Corporations Act 2001 (Cth)*.

⁶ Section 111L, *Corporations Act 2001 (Cth)*

ACNC Governance Standards

15. Registered charities are required to take reasonable steps to ensure that their responsible persons are subject to, understand and carry out the duties in *ACNC Governance Standard 5*.
16. This Standard includes Duty 2 To act honestly in the best interests of the charity and for its charitable purposes.⁷ The ACNC explain this duty as follows in the Guidance Notes –

Responsible persons make decisions by honestly considering what would be in the best interests of the charity, and would further its charitable purposes (as set out in the charity's governing documents). For example, this duty is breached if a responsible person uses the charity's property to benefit another organisation, where there was no real benefit to the charity or it didn't further its charitable purposes.
17. *ACNC Governance Standard 5* also includes duties that are relevant to members who sit on multiple boards, which may prevent that member from acting to further broader diocesan interests in certain circumstances. These include –
 - (a) Duty 4 Not to misuse information you gain as a responsible person – which could be breached if information obtained as a member of one board was confidential and was shared by the member in the course of their membership of another board.
 - (b) Duty 5 To disclose any actual or perceived conflicts of interest – which may include a situation where a member has a conflict of loyalties. Generally such conflicts can be resolved through disclosure. However disclosure does not absolve the members of the duty to act in the best interests of the organisation when making a decision for that organisation.
18. Basic Religious Charities, including most central diocesan organisations, are not subject to the ACNC Governance Standards.
19. However even if a diocesan organisation is not subject to the ACNC Governance Standards as a BRC, the *Diocesan Governance Policy for Diocesan Organisations* replicates for inclusion in the constituting Ordinances of incorporated diocesan organisations the ACNC duties (including the duty to act in good faith in the best interests of the organisation and to further the purpose of the organisation). It is therefore common for the constituting ordinance of such organisations to set out duties that are applicable to the members.

Special conditions for income tax exemption

20. In order to maintain exemption from income tax, all charities must meet the following conditions on an ongoing basis –
 - (a) comply with all the substantive requirements in its governing rules; and
 - (b) apply its income and assets solely for the purpose for which the entity is established.⁸
21. One effect of these conditions is that a charity must comply with its objects clause and cannot apply its income and assets for other purposes.⁹

Provisions of the Governance Policy for Diocesan Organisations

22. The policy guidelines in Appendix 2 of the *Diocesan Governance Policy for Diocesan Organisations* set out various matters with which the constituting ordinance of a diocesan organisation should “usually conform”. These include a requirement that –

⁷ The ACNC Governance Standards do not have a similar qualification to that contained in section 187 of the Corporations Act.

⁸ Section 50-50(2), *Income Tax Assessment Act 1997 (Cth)*

⁹ There are also some specific considerations in respect to schools given section 83C of the *Education Act 1990 (NSW)*. Any application of assets and income to further broader diocesan interests would need to be “for the operation of the school” and constitute market value for the benefit to the school. The Second Reading speech for the legislation that introduced section 83C included a statement that: “We will not restrict the capacity of non-government schools to meet the needs and expectations of their communities, and to follow their particular mission or ethos”. This implies that “the operation of the school” includes furthering the purposes of the school as an Anglican school.

The purpose of the diocesan organisation should be clearly expressed. Such purpose must align with the religious, educational or other charitable purposes of the Diocese whether such purposes are within or beyond the Diocese or the State and must ultimately promote the kingdom of Christ and give glory to God.

23. However if broader diocesan purposes are to be considered, it is insufficient that the purposes are merely “aligned”, so that the organisation advances the purposes of the Diocese through its particular sphere of responsibility.¹⁰ Following the model offered by section 187 of the Corporations Act, the organisation would also need the ability to pursue its particular purposes in a manner which advances the broader purposes of the Diocese.
24. Provided such a change is reflected in the constituting ordinance of a diocesan organisation, its board members would (all else being equal) be regarded as fulfilling their duties as members by considering the broader purposes of the Diocese in their decision-making.¹¹
25. To this end, it is proposed that the following new paragraph 2 be inserted under the heading “Purpose” in the policy guidelines in Appendix 2 of the *Diocesan Governance Policy for Diocesan Organisations* –

In recognition that the diocesan organisation is part of a network of parishes and organisations which is collectively seeking to advance the broader charitable purposes of the Diocese, the diocesan organisation should be expressly permitted to pursue its purposes in a manner which advances the broader charitable purposes of the Diocese, including such purposes as are declared or recognised from time to time by the Synod. See also paragraph 32.

26. It is also recommended that the following new paragraph 32 be inserted under the heading “Duties, powers and limitations” in the policy guidelines in Appendix 2 of the *Diocesan Governance Policy for Diocesan Organisations* –

‘A board member is taken to act in good faith in the best interests of the diocesan organisation and to further the purposes of the diocesan organisation for the purposes of paragraph 31(b) if:

- (a) the diocesan organisation is expressly permitted to pursue its purposes in the manner referred to in paragraph 2;
- (b) the board member acts in good faith in pursuing the purpose of the diocesan organisation in a manner which advances the broader charitable purposes of the Diocese; and
- (c) the diocesan organisation is not insolvent at the time the board member acts and does not become insolvent because of the board member’s act.’

27. This formulation closely follows the approach taken in section 187 of the *Corporations Act 2001 (Cth)* for the directors of wholly-owned subsidiaries and allows board members to act in a manner which advances the broader charitable purposes of the Diocese but does not mandate such action.

Schools – section 83C of the Education Act 1990

28. The situation is a little more complicated for diocesan schools.
29. Section 83C of the *Education Act 1990* prevents the NSW Minister for Education providing funding for the benefit of a school that operates for profit. A school operates for profit if the Minister is satisfied that –
 - (a) any part of the assets or income of the school are used for any purpose other than the operation of the school, or
 - (b) any payment is made by the school to a related entity for property, goods or services:

¹⁰ For example, the *Glebe Administration Board Ordinance 1930* states that its purpose is “to advance the purposes of the Anglican Church of Australia in the Diocese” by managing and controlling the property of Diocesan Endowment, and any other property of which it is trustee in accordance with the terms of those trusts (clause 4).

¹¹ Some limitations apply in the case of public benevolent institutions (e.g. Anglicare) and other entities that operate public funds that have deductible gift recipient status (e.g. Anglican Aid).

- (i) at more than reasonable market value,
- (ii) that are not required for the operation of the school, or
- (iii) in any other way that is unreasonable in the circumstances having regard to the government funding provided to the school.

30. Therefore to the extent any acts to advance the broader charitable purposes of the Diocese involve the application of any part of the assets or income of a school, the application must be consistent with the school's obligations under section 83C.

Trusts – breach of trust and fiduciary duties

- 31. There are also some complexities in relation to diocesan organisations that are acting in a trustee capacity.
- 32. Amending the objects and member duty provisions of a diocesan organisation will not have the effect of varying the trusts of property of which the organisation is trustee. The trustee will be bound to apply the trust property in a manner that furthers the charitable purposes of the trust.
- 33. Trustees also have fiduciary obligations, which include avoiding conflicts of interest and not gaining a personal benefit or a benefit for a third party.
- 34. However, while amending the objects and member duty provisions of a diocesan organisation would not give the organisation liberty to act contrary to the trusts of any property of which it is trustee, it would require the organisation to further these broader interests to the extent doing so is consistent with the trusts and its fiduciary duties.

For and on behalf of the Standing Committee.

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Diocesan Secretary

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