

2 March 2004

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Our reference

PRM/CATH4300-6565281

Dear Michael

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

- 1 I refer to our telephone conversation of 12 February 2004, and to our advice regarding the Trustees for the Roman Catholic Archdiocese of Sydney ("Trustee") dated 29 January 2004 ("**primary advice**").
- 2 Please find below our response to the issues arising from our primary advice which you raised with me in our telephone conversation.
- 3 This advice refers to the provisions of the *Roman Catholic Church Trust Property Act 1936* (NSW) ("**the NSW Church Act**"), and where appropriate, the legislation under which the Roman Catholic Trust Corporation for the Diocese of Melbourne ("**RCTC**") was established, being the *Roman Catholic Trusts Act 1907* (Vic) ("**the Vic Church Act**").

Executive Summary

- 4 In summary we conclude that:
 - (a) In circumstances where the Trustee is simply holding property on trust, the Trustee:
 - (i) should be able to defeat any allegation of liability for, for instance, the acts of a teacher or priest, on the grounds that it is not an operating entity and that the clergy are not employees; and

2 March 2004
 Dr Michael Casey

Page 2

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

- (ii) is not the proper defendant, and should not be named as such.
- (b) In circumstances where the Trustee is engaged in “other activities”, it may be more difficult for the Trustee to argue that it is not the proper defendant.
- (c) Unlike the RCTC, the Trustee is not empowered to adopt an approach whereby it retrospectively ratifies acts every three months. It may be worthwhile considering whether to seek to have the NSW Church Act amended in this regard.
- (d) The effect of the Corporation Sole argument is that a plaintiff can only succeed against an Archbishop who is alive and who has himself committed a particular act. In our view, there is no successor in title as Archbishop. Accordingly, it is important not to place the Corporation Sole argument at risk, and it is possible that opening up the issue of the liability of the Archdiocese of Sydney (“Archdiocese”) generally, may do so.

Differences Between NSW And Victoria

- 5 In our primary advice we referred to the fact that the “*powers of the Trustee, as set out in the NSW Church Act are significantly broader than those of the RCTC as are contained in the Vic Church Act*”.¹ As a result of this we remarked that “*depending upon the specific powers which are exercised by the Trustee, it may be more difficult to argue in NSW than Victoria that the Trustee is not an operating entity*”.
- 6 In this regard we note that whereas the Vic Church Act establishes the RCTC “*for the purpose of holding managing and dealing with property within such diocese in trust for the benefit of the Church*”,² the Trustee was established to hold property on trust and to conduct “*other activities which are or may be for the benefit of the Roman Catholic Church...*”³ Furthermore, whereas the powers of RCTC are limited to powers

¹ At paragraph [45(a)].

² Section 3 of the Vic Church Act.

³ Preamble to the NSW Church Act.

2 March 2004

Page 3

Dr Michael Casey

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

associated with the holding of property on trust, the Trustee is given "*all of the powers of a natural person*",⁴ and a range of other powers including for example, the power to apply for and obtain, in certain defined circumstances, representation of any deceased person being an ordained clergyman of the Church.⁵

- 7 The practical effect of this difference is that the Trustee is empowered to do considerably more than hold property on Trust for the benefit or purposes of the Archdiocese. It is foreseeable that the Trustee may, for example, run a health or educational facility and in a case in which a tortious act is committed on the premises of such a facility it may be arguable that the Trustee is the proper defendant. Whether or not the Trustee is conducting "other activities" is a question of fact that will need to be assessed on a case-by-case basis.⁶
- 8 Where the Trustee is simply holding property on trust, the argument that applies in Victoria would also apply in New South Wales. Accordingly, in our view, in such circumstances claims could be defeated by a summary judgment application, and by arguing that the Trustee is not an "operating entity" but simply holds property on trust, and also by arguing that clergy are not employees.

- 9 The key relevant provisions of the NSW Church Act and Vic Church Act are:

(a) NSW Church Act

(i) Preamble

"WHEREAS lands held on trust for or for the use or benefit or for purposes of the Roman Catholic Church in New South Wales are 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

⁴ Section 4 of the NSW Church Act.

⁵ Section 9A(1) of the NSW Church Act.

⁶ It is of significance to note that the fact that the Trustee is engaged in "other activities" will be by no means determinative of liability.

2 March 2004

Page 4

Dr Michael Casey

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

dealing with lands so held, that provision be made for the vesting in bodies corporate to be created by this Act of lands so held, that conveyancing transactions in respect of lands 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 may be conducted by those bodies corporate:...** [our emphasis]"

(ii) Section 4

"The trustees of Church trust property for each Diocese shall, by virtue of this Act, be a body corporate, having perpetual succession and a common seal, and being capable of acquiring, holding and disposing of any property, real or personal, and of suing and being sued in its corporate name, **and of doing and suffering all such acts and things as bodies corporate may by law do or suffer:** Provided that this subsection shall not operate to incorporate the trustees of Church trust property in any diocese created after the commencement of this Act until the publication in the Gazette of the notification required by section 5. [our emphasis]"

(iii) Section 9 – Powers of Bodies Corporate

"A body corporate created by this Act has **all the powers of a natural person**, including (without limiting the scope of those powers) the power:

- (a) to purchase, take on lease, or acquire by gift, devise, bequest, exchange or otherwise any real or personal property,
- (b) in relation to any Church trust property at any time vested in it:
 - (i) to sell it, and to exchange it for other land, and to transfer or convey Church trust property so sold or exchanged to the purchaser or person taking in exchange, freed and discharged from all trusts affecting the same in the hands of the body corporate, and
 - (ii) to demise or let it for such term at such rent and with or without taking a premium, fine or foregift and subject to such provisions as to the body corporate shall appear desirable, and

2 March 2004
 Dr Michael Casey

Page 5

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

- (iii) to accept surrender of leases, upon such terms and subject to such conditions as to the body corporate shall appear desirable, and
 - (iv) to raise money on the security of it on such terms and conditions as to the body corporate shall appear desirable, and
 - (v) to declare trusts of it or of any estate or interest in it created by the body corporate for any Order or Community of the Church or for any association of members of the Church or for the use or benefit of or for any purpose of any such Order, Community or association, and either to retain the property in relation to which trusts are so declared, or to vest it, or any estate or interest so created, in other trustees upon the trusts so declared, and
- (c) to execute any document and to do any other thing the execution or doing of which, in its opinion, is necessary or convenient to achieve its objects.”
- (iv) **Section 9A – Additional Powers of Bodies Corporate**
- “(1) Every body corporate created by this Act shall have power from time to time:
- (a) to apply for and obtain representation of the estate of any deceased person being an ordained clergyman of the Church of whose will such body corporate is the executor, or being a person under whose will the Church or any part thereof (not being a body corporate constituted by or under the Roman Catholic Church Communities’ Lands Act 1942, as amended by subsequent Acts) or such body corporate is a beneficiary, and
 - (b) to accept appointment and act as trustee under and in pursuance of any trust created wholly or partially for the benefit of the Church or any such part thereof or such body corporate over or in respect of any property real or personal, and to do all things necessary to administer such estate or trust.

2 March 2004
 Dr Michael Casey

Page 6

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

- (2) Any officer authorised for the purpose by the body corporate may on behalf of the body corporate swear affidavits, make declarations, statements of defence or other statements, give security and do any other act or thing required by any Charter, Act of Parliament or rule of court to be made by persons making application for probate or letters of administration or administering any trust.
- (3) Whenever the body corporate shall have been appointed executor, administrator or trustee it shall be subject in all respects to the same control and to removal or restraint from acting and generally to the jurisdiction of the courts in the same manner as any other executor, administrator or trustee and all the property real and personal of the body corporate and the members thereof and their respective estates shall be liable for the proper discharge of the duties of such office."

(b) Vic Church Act

(i) Section 3 – Powers Of Council To Pass Resolution to Form Body Corporate to Hold Church Property

"A council may if it thinks fit pass a resolution expressing its desire—

- (a) 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;**... [our emphasis]"

(ii) Section 6 – Incorporation of Trustees of Church Property

"After the registration of any resolution passed under the provisions of section three hereof the Registrar-General shall notify the same in the Government Gazette and thereupon the trustees named in such notice and their successors to be appointed as hereinafter provided shall be a body corporate by the name stated in such notice and shall have perpetual succession and a common seal and may sue and be sued in their corporate name and may acquire take hold manage and deal with any property in trust for the Church within the diocese in which such resolution shall have been passed or for any person holding for the time being any office therein and may receive any moneys which have been or shall be given contributed or bequeathed by any person to be

2 March 2004
Dr Michael Casey

Page 7

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

applied to any of the purposes of the Church and may take over any securities for money held by any person on behalf of the Church and may take in the name of such corporate body any securities for money belonging to the Church which shall be lent or advanced on account thereof and shall deal with all such property and securities so as to give effect to the trusts to which they shall be specially subject or when not subject to any express trust in such manner as a council of such diocese may from time to time by resolution direct but so as not to interfere with the jurisdiction of the Supreme Court in the enforcement of trusts.”

Is The Trustee the Proper Defendant?

10 There are a number of cases which have proceeded on the assumption that the Trustee is the correct defendant.⁷ However, given paragraphs [45(a)] and [45(b)] of our primary advice, and the matters discussed in paragraphs [5] to [8] above, this appears to be a matter of convention rather than an obligation of law. In our view, in cases where the Trustee is simply holding land on trust for the use or benefit or for the purposes of the Roman Catholic Church in New South Wales, they are not the proper defendant, and accordingly, should not be named as such.

11 This position is consistent with the remarks of Powel JA in *Nobrega v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (No 1)*,⁸ (“*Nobrega*”). In *Nobrega*, the plaintiff was a student at the De La Salle College, Ashfield who was injured while using a waterslide on a school outing. The De La Salle College was run by the Trustees of the De La Salle Brothers (“*De La Salle Brothers*”), a body corporate established pursuant to the *Roman Catholic Church Communities Lands Act 1942* (NSW). The Act charged the De La Salle Brothers with, amongst other things, “*the operation and conduct of educational, welfare and health institutions, organisations or other bodies...*”. The Trustee was sued as representative.

12 Powel JA in obiter stated:⁹

⁷ see, for example, *Hogan v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2003] NSWSC 264; *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308, [2001] ACL Rep 300 NSW 81.

⁸ [1999] NSWCA 75.

⁹ At para [10].

2 March 2004
Dr Michael Casey

Page 8

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

“I would take leave to doubt that the Trustees - a body corporate constituted pursuant to the provisions of the Roman Catholic Church Property Trust 1936 - was properly sued as such representative. Rather, I would have thought that, if - which I doubt - any such body corporate were properly to be sued as such representative, it would have been the Trustees of the De La Salle Brothers which is constituted pursuant to the provisions of the *Roman Catholic Church Communities Lands Act 1942* as the trustee of community land for the Brothers of the Christian Schools. However, when the question was raised on the hearing of the appeal, Mr. S.A. Woods, who appeared for the Trustees, inform [sic] the Court that he was instructed not to take any point and to seek to have the matter determined on its merits.” [our emphasis]

- 13 Consistent with what we have said in paragraphs [5] to [7] above however, in circumstances where the Trustee is engaged in activities which go beyond simply holding land on trust, and is in, for example, the position of the De La Salle Brothers, the Trustee may well be the correct defendant.

PRACTICE OF RATIFICATION

- 14 You suggested that the RCTC has a practice whereby it retrospectively ratifies acts done on behalf of the RCTC every three months, and asked us to consider whether the Trustee could adopt such an approach in New South Wales.
- 15 We can see nothing in the Vic Church Act which specifically empowers the RCTC to approach the administration of its affairs in this manner. Indeed, the Vic Church Act does not mention delegation at all. However, section 14 of the Vic Church Act empowers the RCTC to make such rules and regulations as may be necessary or expedient for its own guidance and management and for carrying out its powers and duties. In this regard, section 14 provides that:

“Every body corporate constituted under the provisions of this Act may if it thinks fit from time to time change its name or its seal and may make such rules and regulations as may be necessary or expedient for its own guidance and management and for carrying out its powers and duties hereunder, and may execute any deed and sign any document or any instrument under the Transfer of Land Act 1890 or any statutory modification thereof by affixing its seal thereto in the presence of any three of the members of such corporate body, of whom if he is a member of such corporate body the bishop or a member appointed by him from time to time to act in his stead shall be one.”

2 March 2004

Page 9

Dr Michael Casey

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

- 16 In our view, it is likely that if the RCTC's practice was challenged, the RCTC would rely on section 14 of the Vic Church Act to argue that it is so empowered.
- 17 We can find no comparative provision in the NSW Church Act, and can therefore not advise that the Trustee adopt this approach. However, the Trustee could consider whether it should take steps to have the NSW Church Act amended in this regard. We note that unlike the Vic Church Act, the NSW Church Act already makes provision for delegation,¹⁰ although only to the Bishop,¹¹ and therefore any legislative amendment would need to reflect and accommodate this fact.

CORPORATION SOLE

- 18 You also asked us to expand upon what we meant by our reference to the Corporation Sole argument in paragraph [51] of our primary advice.
- 19 The Corporation Sole argument is an argument that plaintiffs seek to run, we say wrongly, that the office of Archbishop is a Corporation Sole, that is, that the office of Archbishop is a legal entity capable of being sued, separately and distinctly from the individual who happens to be Archbishop at the time. In our view, the Archbishop of Sydney is not a Corporation Sole because there is no legislation which establishes the office of Archbishop, and there is no relevant case law on this point.¹² In addition, there is legislation in Western Australia which establishes the Archbishop of Perth as a Corporation Sole. We say that this also supports the argument that at common law a Catholic Bishop is not a Corporation Sole.
- 20 This distinction is of particular significance in cases where a plaintiff attempts to commence proceedings for abuse that occurred twenty years ago, and alleges that the then Archbishop knew but failed to stop the

¹⁰ See section 9B of the NSW Church Act.

¹¹ Section 2 of the NSW Church Act defines "Bishop" as "the person for the time being administering a diocese, whether as Archbishop or Bishop, Coadjutor Archbishop or Coadjutor Bishop, Vicar Capitular or Administrator".

¹² See *Roman Catholic Archbishop of Perth v AA to JC inclusive; DJ v Trustee of the Christian Brothers* (1995) 18 ACSR 333.

2 March 2004

Page 10

Dr Michael Casey

THE TRUSTEES FOR THE ROMAN CATHOLIC ARCHDIOCESE OF SYDNEY - ADVICE

alleged abuse. Assuming that the Archbishop of twenty years ago is now deceased, we would argue that you cannot sue the present day Archbishop on the basis that he is the Archbishop now. Clearly, this argument is of some significance as it means that a plaintiff can only succeed against an Archbishop who is alive and who has himself committed a particular act.

- 21 The concern to which we referred in our primary advice is that any amendment of the NSW Church Act by Parliament may prompt a broader review of the issue of the liability of the Archdiocese. This may in turn have implications for the continued existence of the Corporation Sole argument. In our view, it is important not to place the Corporation Sole argument at risk, and the Archdiocese should be mindful that it does not do so.
- 22 If you have any further questions, or wish to discuss, please do not hesitate to contact me on (02) 9210 6232.

Kind regards

Paul McCann
Partner