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CORPORATE AND CANONICAL GOVERNANCE: UNDERSTANDING CHURCH PROPERTY

JANE POWER*

ABSTRACT

The Royal Commission into Institutional Responses to Child Sexual Abuse has highlighted a long-term problem with the Catholic Church's position in civil law – that it has no legal identity. Catholic religious institutions on the other hand have long been required to adopt both a canon law and a civil law structure. What has often been overlooked however, is the need to acknowledge the canon law requirements pertaining to property 'owned' in civil law by the religious congregation and/or its institutions such as schools and hospitals. Requirements placed on canonical structures by Book V of the Code of Canon Law 1983 determine what canonical structures must do to ensure compliance for both legal systems. This article explains important aspects for any lawyers, and/or directors or other corporate administrators, dealing with property of Catholic Institutions.

I INTRODUCTION

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) addresses consequences of the Catholic Church (the Church) in Australia lacking a civil law entity, recommending that it adopt a corporate structure, and considers the Church's organisational and governance structure.¹ In contradiction of the lack of any civil law structure for the Church, religious congregations within Australia have been required to adopt a corporate structure in order to operate. However, the diminishing membership of religious congregations in Australia affects their ability to continue using the Australian civil law governance and ownership structures under which many currently operate. The need to consider and choose new governance and ownership structures without the congregations' major, or any, involvement requires compliance with civil law relevant to any newly adopted corporate governance structure, and an increased involvement of laity in new civil law governance structures. Both the Church and religious congregations, when considering adopting new corporate structures in civil law, must also recognise that there are relevant canonical requirements to which they must adhere. This article considers relevant aspects of canon law that directly impact the ability to deal with the property of Catholic institutions within civil

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¹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) 509 – 511 <<https://www.childabuseroyalcommission.gov.au/final-report>> and Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 16* (2017) 44, respectively.

law.² These aspects may also relate to the Church's future engagement with the National Redress Scheme:

On 19 October 2018, Australian Catholic Redress Ltd was registered as a company that will oversee Catholic dioceses' engagement with the National Redress Scheme. Australian Catholic Redress Limited provides a single access point for interaction between the Scheme and dioceses – and the approximately 5,000 Catholic sites for which they are (or have been) responsible.

Australian Catholic Redress is the formal representative of Church authorities in the Scheme. The company will also help ensure all diocesan obligations under the Scheme are met, including the delivery of a personal direct response (if requested). Social Services Minister Paul Fletcher announced in December 2018 that 27 archdioceses, dioceses and eparchies had formally entered the Scheme.

As of 1 February 2019, 34 of the 35 Australian Catholic archdioceses, dioceses and eparchies are now participating institutions in the Scheme, under the purview of Australian Catholic Redress Ltd. More than 99.8 per cent of the parishes, diocesan schools and diocesan agencies across the country are covered by those 34 dioceses.³

Currently the governance of Australian congregations is exercised by a body relating to a civil law structure *and* a separate canon law body; this model has also been adopted successfully by several Catholic Health Institutions, as noted by the Royal Commission.⁴ Although this is the most effective governance model, the Church itself in Australia does not have any civil law identity other than as an unincorporated association which has no legal rights and cannot sue or be sued.⁵ Civil law does not mandate that a corporate structure be adopted – hence the current status of the Church in civil law; it *may* however include an appropriate choice of corporate structure. Canon law however *requires* a canonical body for governance and that body is known as a public juridical person.⁶ The discussion on relevant corporate structures that the Church may adopt is outside the scope of this article; although not discussed in depth the most obvious

² The discussion on canon law in this article is largely aimed at those people without canonical expertise or qualifications who are, or may be considering, involvement in Catholic governance. It also raises awareness of canon law issues that may affect decisions for civil law issues. Neither the writer nor the article purport to present an expert canon law consideration of these issues. Access to several canon law sources was unavailable to the writer.

³ Australian Catholic Bishops Conference, 'The Catholic Church and the National Redress Scheme' (2019) <<https://www.catholic.org.au/redress>>; Australian Government, National Redress Scheme, Department of Social Services (4 May 2018) <<https://www.dss.gov.au/national-redress-scheme-for-people-who-have-experienced-institutional-child-sexual-abuse>>.

⁴ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) 51 – 55 (n 1).

⁵ *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

⁶ The terms juridic and juridical are both used in the research literature. Except where the word is in a quote, this article adopts the term 'juridical'.

structures include the incorporated association, for example under the *Associations Incorporation Act 2015* (WA), *Associations Incorporation Act 2009* (NSW) or the *Associations Incorporation Reform Act 2012* (Vic); the company limited by guarantee *Corporations Act 2001* (Cth), s112 or a statutory corporation e.g. *Roman Catholic Church Trust Property Act 1936* (NSW) or the *Roman Catholic Trusts Act 1907* (Vic).

Requirements placed on canonical structures by Book V of the *Code of Canon Law 1983 (1983 Code)*⁷ determine what canonical structures must do to ensure compliance with both legal systems. The main legal question relevant to this article relates to what canon law permits in relation to dealings with property in civil law, including real and personal property of a Catholic institution. Underlying this legal question is the theological question, outside the scope of this article, which relates to the proper role of the laity in canonical governance.⁸

A Public Juridical Persons

Canonical governance requires a public juridical person, ‘...an artificial person, distinct from all natural persons or material goods, constituted by competent ecclesial authority for an apostolic purpose, with a capacity for continuous existence and with canonical rights and duties’.⁹ The competent ecclesial authority is generally the diocesan bishop although the Pope is for international structures.¹⁰ It plays the same basic role as, for example, the Board of Directors of a company. Even if the members of a civil law body (the directors or management/committee members) are the same as for the public juridical person (canonical administrators - members of the public juridical person whose duties include administration and responsibility of the property) there must be the two distinct and separate bodies. Juridical persons may be public or private. Book V of the *1983 Code* does not apply to private juridical persons, which are subject to their own statutes, and do not apply to the discussion in this article. The canonical administrators are bound by canon law when dealing with the body’s property and must ensure canonical compliance when undertaking civil law property transactions. The

⁷ This article uses the translation of the Code prepared by the Canon Law Society of Great Britain, & Ireland in association with the Canon Law Society of Australia and New Zealand and the Canadian Canon Law Society.

⁸ John Henry Thornber and Michael Gaffney, *Governing in Faith* (Connor Court Publishing, 2014), 35.

⁹ Robert. T Kennedy, ‘Juridic Persons’ in John P Beal, James A Coriden and Thomas J Green (eds) *New Commentary on the Code of Canon Law* (Paulist Press, 2000) 155.

¹⁰ Edmund Rice Education Australia, (2018) <<http://www.erea.edu.au/>>.

directors or committee members of a body corporate are similarly bound by civil law. The relevance of the public juridical body to property is that

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...

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.¹¹

B *Temporal Goods*

Examining key issues relating to property dealings necessitates consideration of the central role of Church property, that is, temporal goods and the transfer of such goods including administration and alienation. Any such discussion also requires an understanding of the role of the public juridical person, that is, the relevant canonical body.¹² 'Whilst such phrases as 'real and personal property' and 'intellectual property' are used in the secular legal system, the Church has traditionally used the term 'temporal goods' to embrace all possessions owned within the Church'.¹³ Book V of the *1983 Code* repeatedly refers to 'temporal goods' without defining them. Temporal goods have however been described as 'all non-spiritual assets, tangible or intangible, that are instrumental in fulfilling the mission of the Church: land, buildings, furnishings, liturgical vessels and vestments, works of art, vehicles, securities, cash, and other categories of real or personal property'.¹⁴ Temporal goods are either ecclesiastical — owned by the Apostolic See or a public juridical person, and subject to the *1983 Code*, or non-ecclesiastical — owned by a private juridical person, and subject to its statutes rather than to the *1983 Code*, unless its statutes provide otherwise.¹⁵

¹¹ John E Date, 'Implications of Canon Law for Church Organisations Operating in Australia' (LLM Thesis, University of Melbourne, 2008), Abstract.

¹² A full discussion of public juridical persons is outside of the scope of this article.

¹³ Rodger Austin, 'Temporal Goods Within the Church - Some Canonical Reflections' (1992) 69 *Australasian Catholic Record* 147, 148.

¹⁴ Robert T. Kennedy, 'Temporal Goods of the Church', in John. P Beal, James A Coriden and Thomas J Green (eds) *New Commentary on the Code of Canon Law* (Paulist Press, 2000), 1451.

¹⁵ *Code of Canon Law 1983* canon 1257 §2.

1 *Temporal Goods and Book V of the 1983 Code*

Book V of the *1983 Code* relates to ownership of property and its alienation. A basic understanding and acknowledgment of Book V is therefore essential in determining what members of the canonical body and the civil law entity can and cannot do with property when exercising their respective governance. All proposed property alienations that come within the ambit of canon 1291 must have the approval of the competent authority. The requirement for a just reason in canon 1293 §1 where an alienation exceeds a determined minimum sum ensures that the alienation of property does not harm the stable patrimony¹⁶ of the public juridical person. Book V of the *1983 Code* ‘protect[s] the economic viability and stability of each public juridic person by guarding against imprudent loss of temporal goods by any individual public juridic person in the Church.’¹⁷ Transparency and accountability are essential,¹⁸ reflecting the basic purpose of corporate legislation.¹⁹

Canon law has significant implications for the property of Church entities and commercial dealings with that property. In addition to the canons in Book V, the *1983 Code* also provides for administration of temporal goods for Religious Institutes (canons 634 – 40), secular institutes (canon 718) and societies of apostolic life (canon 741). The discussion in this article only relates to Book V. The canons are ‘connected’ to, and should be considered in light of, other conciliar documents.²⁰ Canon 1254 §1 confers on the Church an ‘inherent right, independent of any secular power, to acquire, retain, administer and alienate temporal goods, in pursuit of its proper objectives.’ Canon 1255 extends the same rights to public juridical persons, ‘in accordance with the law.’ The ability to acquire, retain, administer *and* alienate the property is required to establish canonical ownership and is subject to administrators using the property for the ‘proper objectives’ of the Church, which are broadly listed in canon 1254 §2. The text of canon 1254 §2 originates in *Presbyterorum Ordinis*: ‘the carrying out of divine worship, for the procuring of honest sustenance for the clergy, and for the exercise of the works of the holy apostolate or works of charity, especially on behalf of the needy’.²¹ These canonical

¹⁶ Stable patrimony is defined and discussed below at page 8.

¹⁷ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1495.

¹⁸ Thomas J. Green, ‘The Players in the Church’s Temporal Goods World’ (2012) 72 *The Jurist* 53, 55.

¹⁹ See, eg, *Corporations Act 2001* (Cth), *Associations Incorporation Act 2015* (WA).

²⁰ For example: *Lumen Gentium*, *Gaudium et spes*, *Perfectae caritatis*, *Christus Dominus*, *Dignitatis humanae* and *Gravissimum educationis*: Velasio De Paolis, ‘Temporal Goods of the Church in the New Code with Particular Reference to Institutes of Consecrated Life’ (1983) 42 *Jurist* 343, 349.

²¹ Vatican Council II *Presbyterorum Ordinis* (December 7 1965)

requirements exist over and above civil law requirements. If a juridical person holds goods without the civil law ability to alienate them, it does not own the goods in civil law but merely holds them on trust for another person or body. True ownership in civil law requires the ability to alienate the property.

Canons 1254 §1 and 1255 recognise the innate power of the Church and public juridical persons to acquire, retain, administer and alienate temporal goods. However, canons 1282, 1284 §2 2° and 1284 §2 3° and 1290 refer to canon law recognising the *civil law rights and obligations* that exist in relation to property:

It is evident from the text that canon 1284§2 2° it is not a canonising norm. In other words it does not remit to the civil law the determination of the canonical ownership of ecclesiastical goods. That ownership is determined by the norm of law in canon 1256...the purpose of canon 1284§2 2° is to safeguard in the civil law the already established canonical ownership of temporal goods... canon 1284§2 3° is neither a canonising norm nor a reference norm. It constitutes a statement of general principle, obliging all administrators of ecclesiastical goods to observe any norms of the civil law that impact in any way upon the public juridic person.²²

But property rights remain subject to the ‘supreme authority of the Roman Pontiff’ who is ‘supreme administrator and steward of all ecclesiastical goods’;²³ canon 1273 reinforces canon 1256. In practice the diocesan bishop undertakes the supervisory role. Individuals do not own Church property, the public juridical persons whom they represent hold property and, on the proviso, that the goods are ‘lawfully acquired’.²⁴ The Church recognises this canonical right to ownership of property without the need of any civil law authority. However, as civil law does not recognise public juridical persons as civil law entities per se, property must be held and alienated pursuant to relevant civil law requirements, and thus also receive civil law protection.

Book V of the *1983 Code* regulates a public juridical person’s ability to deal with the property acquired by it; the provisions are not meant to be obstacles to property administration but are

< http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651207_presbyterorum-ordinis_en.html>. See also Vatican Council II, *Apostolicam Actuositatem* (November 18th 1965) Vatican, [8]

<http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651118_apostolicam-actuositatem_en.html> and Vatican Council II, *Gaudium et Spes* (7 December 1965) Vatican <http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html> [42].

²² Rodger Austin, ‘The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications’, (Paper, Proceedings of the 41st Annual Conference of the Canon Law Society of Australia and New Zealand, Christchurch New Zealand, 2007) 50, 56.

²³ *Code of Canon Law 1983* canon 1273.

²⁴ *Code of Canon Law 1983* canon 1256.

‘positive efforts to provide proper use of the patrimony and to ensure honest and open administration.’²⁵ Patrimony (or patrimonial condition) relates to ‘all property destined to remain in the possession of its owner for a long or indefinite period of time and, hence, property on which the financial future of a public juridic person depends’.²⁶ ‘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 two years at the most).²⁷

2 Why Temporal Goods?

Temporal goods ‘are used for the work of the Church.’²⁸ Although canon 1255 permits the universal Church to own property, in practice juridical persons do.²⁹ Canon 1258, by extending the definition of Church to ‘any public juridical person’, allows the public juridical person to conduct their mission with sufficient financial resources.³⁰ Civil law distinguishes between a legal and an equitable owner (beneficiary), canon law does not. ‘Consequently, the money invested with [an] Arch/Diocesan Fund (however called Investment, Provident, Development etc) does not become the property of the public juridical person that is the diocese and therefore is not ecclesiastical property’.³¹ The ‘proper objectives’ of the mission are numerous because the use of ‘principally’ in canon 1254 §2 extends its application. They include, but are not limited to, regulation of divine worship, provision of fitting support for the clergy and other ministers, carrying out of works of the sacred apostolate and engaging in works of charity, particularly for the needy. ‘The acquisition and the administration of temporal goods should never exceed or transgress the purposes’³² or mission of the public juridical person.

The provisions of Book V protect the public juridical person’s property from unlawful or bad administration, just as the *Corporations Act 2001* (Cth) or the various State *Incorporated*

²⁵ Garrett J. Roche, ‘The Poor and Temporal Goods in Book V of the Code’ (1995) 55 *The Jurist* 299, 332.

²⁶ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1502.

²⁷ Ibid 1495. For similar definitions from several international canonists, see the discussion of John A. Renken in ‘The Stable Patrimony of Public Juridic Persons’ (2010) 70 *The Jurist* 131, 144 – 147.

²⁸ Brian Lucas, Peter Slack and William d’Apice, *Church Administration Handbook* (St Paul’s Publications, 2008), 200.

²⁹ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1452.

³⁰ Austin, ‘Temporal Goods within the Church - Some Canonical Reflections’ (n 13), 154.

³¹ Ibid 153.

³² Roche (n 25) 317.

Associations Acts provide the same protection for property of the civil law entity. Book V of the *1983 Code* is essential to the mission of Catholic institutions because

that mission needs the support and assistance of carefully drafted and faithfully observed laws of the Church designed to guard against improper acquisition, excessive accumulation, and imprudent administration, and to ensure the protection, faithful use, and wise disposition of the things of this world which have been placed in the service of a kingdom that is not of this world ... and that should be the motivation for careful study and faithful observance of its provisions.³³

This is like the motivation for many provisions in the *Corporations Act 2001* (Cth) and various State *Incorporated Associations Acts*: protecting the entities' property. Compliance with Book V of the *1983 Code* is essential in any transaction that has the potential to endanger the value of the ecclesiastical property.³⁴ A religious congregation transferring ownership and governance of, for example, its schools to a new body requires the competent authority's permission before it can transfer all or any of its property and that permission must be granted before the completion of any civil law transaction to effect the transfer. The same may be true for religious congregations who opt into the Australian Catholic Redress Ltd or directly into the National Redress Scheme.

II CANONICAL ADMINISTRATION

Responsibility for managing temporal goods lies with canonical administrators whose duties include administration and responsibility of the property but who must not alienate any of it without approval of the competent authority. '[C]anon law provides the tools for improving accountability and transparency in the administration of the Church's temporal goods.'³⁵

Canons 1259–61 address general principles and canons 1262–72 address the regulatory norms relating to both unsolicited and solicited contributions to property. These canons may be relevant to a religious congregation when transferring governance and ownership in the future, or participating in the Redress Scheme, if that transfer includes consolidation, division or

³³ Kennedy, 'Temporal Goods of the Church' (n 14) 1452.

³⁴ *Code of Canon Law 1983* canon 1295; in addition to the canons in Book V the following canons are also relevant to the alienation of temporal goods and may be relevant to a congregation transferring property – for Institutes of Consecrated Life and Societies of Apostolic Life canons 634 – 635, 718 and 741, for Associations of Christian Faithful canons 310, 319 and 325 and for juridical persons on their division, suppression or merger canons 121 – 3.

³⁵ John P. Beal, 'Ordinary, Extraordinary and Something in between: Administration of the Temporal Goods of Dioceses and Parishes' (2012) 72 *The Jurist* 109, 129.

dissolution of their congregation or of some other relevant public juridical person. In addition, the following canons may also be relevant:

- a) canon 121 – where public juridical persons amalgamate the wishes of the founders or of any benefactors relating to their property or gifts bestowed must be safeguarded;
- b) canon 122 – where a public juridical person is divided and part of it becomes joined to another public juridical person, the wishes of the founders or of any benefactors relating to their property or gifts bestowed must be safeguarded;
- c) canon 123 – where a public juridical person is extinguished, its property is distributed according to its statutes and law.

Canon 1259 relates to the acquisition of goods in ‘either natural or positive law’, recognising both ecclesiastical law and civil law.³⁶ The usual forms of civil law acquisition such as purchase, possession, copyright, forfeiture, gift, improvements to existing property, court orders, and intestacy are all included in forms of acquisition although not specifically mentioned in the *1983 Code*. Forms of acquisition that are available in civil law and specifically in canon law include donations (canon 1261), taxation (canon 1263), fund raising (canon 1265), special collections (canon 1266), prescription (canon 1268), income from property owned (canons 1271, 1274 and 1284) and purchase contracts (sales; canon 1290).

A Supervision of Canonical Administrators

The Pope is the supreme authority in relation to ecclesiastical goods including property owned by public juridical persons; the administration of temporal goods relates to governance, with clerics or laity exercising that governance as administrators.³⁷ Canonical administrators are accountable to the members of the public juridical person, to any donors of property and patrons, and to the relevant competent authority but they do not act alone - they must have a finance council or at least two counsellors.³⁸ This is analogous to civil law requirements: Australian companies must also have more than one director and incorporated associations have more than one committee member.³⁹ Canons relating to dioceses (canon 492) and parishes

³⁶ Francis Morrissey, OMI ‘Acquiring Temporal Goods for the Church’s Mission’ (1996) 56 *The Jurist* 586, 593.

³⁷ *Code of Canon Law* canons 1282 and 1287.

³⁸ *Ibid* canon 1280.

³⁹ A proprietary company must have at least one director (*Corporations Act 2001* (Cth) s 201A(1)) and a public company must have at least three directors (*Corporations Act 2001* (Cth) s 201A(2)); an incorporated association in Western Australia must have at least six members ‘with full voting rights’ (*Incorporated Associations Act 2015* (WA) s 4(b)).

(canon 537) specifically refer to a finance council. Kennedy suggests that for making decisions the diocesan finance council serves as a model for other public juridical persons because of its ‘composition and functions’, referring to canons 492 -2, 1277 and 1292.⁴⁰ The person directly governing a public juridical person is the canonical administrator/s unless the statutes provide otherwise.⁴¹

The Pope technically supervises the administration of a public juridical person, though realistically the competent authority more generally exercises it. The diocesan bishop is most commonly the relevant competent authority and exercises his supervisory role to ‘ensure the observance of all laws of the Church by those whose responsibility it is to administer ecclesiastical goods, and to ensure that abuses do not creep into such administration. In this regard, canon 1276 is a specification of the general norms found in canon 392’.⁴² The supervisory role is capable of delegation to the diocesan finance administrator.⁴³ Additional specific and relevant supervisory issues exist for the diocesan bishop: granting written consent for acts of extraordinary administration,⁴⁴ receiving the oath from administrators,⁴⁵ giving consent for the investment of the surplus,⁴⁶ receiving annual reports⁴⁷ and giving permission to litigate in the civil courts....⁴⁸ An open and current relationship between the diocesan bishop and the canonical administrator/s is essential for the proper administration of ecclesiastical property. ‘[A]dministrators must respect not only the legitimate supervisory role of ordinaries but also the competence of ecclesiastical authority to regulate the exercise of rights, including the rights of administrators, in the interests of the common good (see c. 223, §2).’⁴⁹

B Duties of Canonical Administrators

Just as directors of companies have fiduciary and legislative duties so too do canonical administrators owe duties to the public juridical person they represent. If the one person occupies both roles, then they maintain those duties in both civil law and canon law, *but*

⁴⁰ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1482; Kennedy refers to the relevant canons: 492 -2, 1277 and 1292.

⁴¹ *Code of Canon Law 1983* canon 1279 §1.

⁴² Kennedy, ‘Temporal Goods of the Church’ (n 14) 1477.

⁴³ *Code of Canon Law 1983* canon 1278.

⁴⁴ *Ibid* canon 1281.

⁴⁵ *Ibid* canon 1283 1°.

⁴⁶ *Ibid* canon 1284 §2 6°.

⁴⁷ *Ibid* canon 1287 §1.

⁴⁸ *Ibid* canon 1288; Lucas, Slack and d’Apice (n 28) 209.

⁴⁹ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1481.

separately. Canons 1282–84 determine the administrator’s role and duties including that ‘[a]ll persons, whether clerics or laity, who faithfully take part in the administration of ecclesiastical goods, are bound to fulfil their duties in the name of the Church, in accordance with law.’⁵⁰ Although not immediately apparent that laity acts in the name of the Church, they do so as canonical administrators of a public juridical person because their ultimate aim is to pursue the missions bestowed by canon 116 to that canonical body, and of the Church. The duty to act in accordance with Church law is therefore the principal duty of any member of the laity participating in canonical governance.

Canonical administrators are accountable in both canon law and civil law to protect Church property,⁵¹ ensuring that the only use of temporal goods of the public juridical person is for Church purposes and ‘not in the spirit and logic of profit and accumulation.’⁵² This also reflects the purpose of the civil law not-for-profit corporate governance structures.

Canon 1283 introduces preparatory requirements for a new administrator, including a) taking an oath ‘to well and truly perform their office’, b) drafting an accurate inventory of all goods, and c) keeping a copy of the inventory and providing one to the ‘curial archive’,⁵³ all reflecting good governance in civil law. Canonical administrators must ‘fulfil their function with the diligence of a good householder’,⁵⁴ including provisions to ensure the protection of the property in civil law (insurance coverage where necessary), obtaining relevant approvals of the diocesan bishop⁵⁵ and otherwise reflecting some of the good governance practices imposed by the *Corporations Act 2001* (Cth). When entering employment contracts, canonical administrators must observe ‘...the civil laws relating to labour and social life...’⁵⁶ in addition to relevant provisions of the *1983 Code*.

Canon 1284 §3 ‘earnestly recommend[s] that administrators draw up each year a budget of income and expenditure’; the form of budget analysis complies with local customs and requirements. Canonical administrators are accountable to their diocesan bishop with annual reports detailing income and expenditure⁵⁷ because transparency and accountability are

⁵⁰ *Code of Canon Law* 1983 canon 1282.

⁵¹ *Ibid* canon 1287; De Paolis (n 20) 347.

⁵² De Paolis (n 20) 352.

⁵³ *Code of Canon Law* 1983 canon 1283 3°.

⁵⁴ *Ibid* canon 1284 §1.

⁵⁵ *Ibid* canon 1284 §2.

⁵⁶ *Ibid* canon 1286 §1.

⁵⁷ *Ibid* canon 1287 §1.

essential,⁵⁸ and with the approval of the diocesan finance council. The diocesan bishop, through his finance council, must complete annual projected budget reports for the diocese.⁵⁹ Canon 1287 §2 requires accountability to ‘the faithful’ but does not specify the form or content of the account reports; ‘[a]dministrators are to render accounts to the faithful concerning the goods which the faithful have given to the Church, in accordance with the norms to be laid down by particular law’.⁶⁰

The norms vary in practice, but two effective means that Australian law could adopt include posting annual financial and related reports on the websites of the canonical body and its affiliated civil law body, and on the website of the relevant competent ecclesiastical authority, which in most cases will be the diocesan bishop. Some Australian congregations in education have chosen a national approach⁶¹ to their governance, rather than a state based one so an effective form of transparency, accountability and ease of reference is to provide the financial reports on a dedicated link available on the Australian Catholic Bishops’ Conference (‘ACBC’) website. The ACBC is the logical point of information gathering as the peak body in the Church hierarchical structure in Australia, and as a convenient point of reference for Catholic schools and Health Institutions, many of which are increasingly national based, rather than diocesan. The dedicated link could then list the name of every Catholic institution and its corresponding public juridical person. Each of those two names would then provide a further link that gave access to the civil law constitution and canonical statutes, and the respective financial accounts (which in many cases will be identical). Civil law already requires the accessibility of the civil law constitution and financial documents.⁶² The accountability required by the canons occurs when the accounts of any Church entities are *readily and easily* available to the faithful in the same way relevant legislation requires civil law entities to make their financial records accessible. These requirements are no more onerous, and arguably less so, than the *Corporations Act* places on companies in Australia.

⁵⁸ Green (n 18) 55.

⁵⁹ *Code of Canon Law 1983* canon 493.

⁶⁰ *Ibid* canon 1287 §2.

⁶¹ For example the Christian Brothers.

⁶² See, eg, *Incorporations Act 2015* (WA) ss 66 - 76 and *Corporations Act 2001* (Cth) ss 286 - 289.

C Principles of Canonical Administration

Renken lists ten principles that relate to the proper administration of ecclesiastical property (including temporal goods)⁶³ which canonical administrators should recognise and understand:

1. *Communio*, the Church as a communion of peoples and entities;
2. subsidiarity;
3. proper purposes of temporal goods;⁶⁴
4. collaboration;⁶⁵
5. vigilance;⁶⁶
6. justice in employment issues;
7. respecting the intention of donors;⁶⁷
8. observance of civil law;⁶⁸
9. transparency and accountability;⁶⁹ and
10. protection for future generations.

Examples of the observance of civil law can be found in canons 1274 §3 and §4, and 1275§5 (holding funds for clergy); canon 1299 §2 (gifts by wills); canon 1284 §2 2° (protection of the ownership of ecclesiastical goods through civil law structures); canon 1284 §2 3° (administrators must observe civil law requirements to avoid harm to Church property); canon 1286 1° (observance of civil law relating to social policy and employment contracts); canon 1293 §3 (observing precautions ‘drawn up by lawful authority’ which includes both canon and civil law). Examples of transparency and accountability can be found in the following canons: canon 1281§1 and §2 (obtain written permission for acts of extraordinary administration); canon 1281 §3 (invalid acts of administrators are the responsibility of the administrator and not

⁶³ John A. Renken, ‘The Principles Guiding the Care of Church Property’ (2008) 68 *The Jurist* 136, 136.

⁶⁴ *Code of Canon Law 1983* canons 1254 §2, 1284§1 and 1282.

⁶⁵ This includes, depending on the circumstances, the Roman Pontiff, the Conference of Bishops, the Diocesan Bishop etc and other administrators of public juridical persons.

⁶⁶ *Code of Canon Law 1983* canons 392 §2, 1276 and 1279 §1.

⁶⁷ *Ibid* canon 1267 §3, 1284 §2 4°.

⁶⁸ *Ibid* canon 1290.

⁶⁹ *Ibid* canon 1282.

the public juridical person); canon 1284 §2 2° and 3° (maintaining accurate records of the property of the public juridical person and presenting a copy to the diocesan bishop); canon 1284 §2 8° (prepare annual reports of their administration which canon 1284§4 7° provides must be well organised); canon 1287§1 (preparing an annual report for the competent authority); canon 1287§2 (presenting an account of ‘the goods which the faithful have given to the Church’); canon 1289 (administrators that withdraw without warning or excuse from their position may be asked to make restitution for any loss caused by their withdrawal); canon 1291 (obtain approval for the alienation of the stable patrimony for the public juridical person); and canons 1307§1 and §2 (writing a document of ‘obligations arising from pious foundations’ and displaying it in ‘a conspicuous place’.

Administrators must also consider the long-term protection and administration of the property hence the ‘earnest’ recommendation in canon 1284 §3 that administrators prepare annual budgets of projected income and expenditure. It would also be wise for the relevant civil law entity to adopt the ten principles, so they are able to seek canonical guidance when relevant.

III ADMINISTRATION AND ALIENATION OF TEMPORAL GOODS

With the principles of canonical administration in mind, what limitations does canon law place on the property transactions allowed by civil law? Book V of the *1983 Code* contains laws for canonical administrators of church property relating to acts of:

- ordinary administration;
- greater importance;⁷⁰
- extraordinary administration;⁷¹
- greater importance that affects the patrimonial condition;⁷² and
- alienation.⁷³

As canon 1277 refers to acts of greater importance and acts of extraordinary administration, it presupposes that there are acts of ordinary administration, for other acts to be of *greater*

⁷⁰ *Code of Canon Law 1983* canon 1277.

⁷¹ *Ibid* canons 1277 and 1281.

⁷² *Ibid* canon 1295.

⁷³ *Ibid* canons 1291 to 1294.

importance or *extraordinary*. Administration includes those acts required to ‘preserve, maintain, repair and improve a juridical person’s property’⁷⁴ for the proper purposes of the Church including the mission entrusted to them as juridical persons upon their creation; these acts allow canonical administrators to exercise a power of governance by their office. Alienation, on the other hand, is in the strict sense ‘transferring full ownership of goods to a third party by an “inter vivos” act, onerously (by sale) or gratuitously (a donation)’.⁷⁵ An inter vivos act is one done during the actor’s lifetime. It may be a partial or full transfer of ownership and most generally involves a sale. Although mortgages and encumbrances on a property do not affect a transfer of ownership, and so do not activate the requirements of canon 1292 through alienation, they are likely to fall within the ambit of canon 1295 by potentially affecting the ‘patrimonial condition’ of the property and are thereby subject to canons 1291–94. They may also be acts of extraordinary administration and require compliance with relevant canons.⁷⁶ Further, ‘...[T]he discipline of canon 1295 is also applied to religious institutes (canon 638 §3), secular institutes (canon 718) and societies of apostolic life (canon 741 §1)’.⁷⁷ The main difference between acts of administration and acts of alienation is that the former focus on actively dealing with the property through ownership, and the latter relates to transferring the ownership; they do not and cannot overlap as the former necessitates retaining ownership and the latter necessitates divesting it in another person or entity. Canons 1291 – 4, 1296 and 1298 relate to contracts of alienation; canon 1295 relates to contracts that do not create alienation, but which may worsen the patrimonial condition; canons 1297 – 8 relate to leases. ‘Alienation focuses *ad extra* — on passing an ecclesiastical good to another; a transaction governed by canon 1295 focuses *ad intra* — on protecting ecclesiastical goods which one wishes to retain as stable patrimony’.⁷⁸

⁷⁴ Beal (n 35) 109.

⁷⁵ *Exegetical Commentary on the Code of Canon Law*, Vol IV/1, 130 cited in Lucas, Slack and d’Apice (n 28) 214. For a detailed discussion on what may or may not constitute alienation of stable patrimony see Francis Morrissey, ‘The Alienation of Temporal Goods in Contemporary Practice’ (1995) 29 *Studia Canonica* 293.

⁷⁶ *Code of Canon Law 1983* canons 1291 to 1294.

⁷⁷ John Anthony Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’ (2011) 45 *Studia Canonica* 501, 502.

⁷⁸ John Anthony Renken, *Church Property: A commentary in Canon Law Governing Temporal Goods in the United States and Canada* (NY, 2009) 283 cited in Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’ (n 77) 507.

A Administration

Canon 1277 makes a distinction between acts of major importance and acts of extraordinary administration but it does not define either; ‘this twofold division presupposes a third one: acts of ordinary administration’.⁷⁹ The significance of the distinction is that the diocesan bishop must approve acts of major importance for the diocese but for acts of extraordinary administration, he requires the consent of the finance committee and college of consulters before making a determination. Although civil law may impose no requirement for special permission from a diocesan bishop for these acts, canon law does, and that permission must be sought before a property transaction in civil law occurs. Acts of ordinary administration require no special authority.

The diocesan bishop’s responsibilities as the canonical administrator of his diocese are greater than his supervisory role over other public juridical persons. Canon 1277 sets out his responsibilities as an administrator of the diocese.

1 Acts of Ordinary Administration

The canonical administrator deals with acts of ordinary administration such as banking of money, debt collection, collection of annual income from stocks, shares etc, buying and selling items for daily maintenance of property, acceptance of donations, payment of salaries, short-term leases, and administration of money.⁸⁰ Acts of ordinary administration include the routine acts required to maintain an effective business and comply with civil law, therefore canon law ‘poses few major difficulties to those entrusted with the office of financial administrator’.⁸¹

2 Acts of Extraordinary Administration

The Bishops’ Conference (a group of bishops) of a country determines acts of extraordinary administration for the diocese. The United States Conference of Catholic Bishops published norms that are complimentary to canon 1277 and which list some transactions considered to be extraordinary acts of administration.⁸² The Canadian and French Conferences have also defined

⁷⁹ Francis G. Morrissey, ‘Ordinary and Extraordinary Administration: Canon 1277’ (1988) 48 *The Jurist* 709, 710.

⁸⁰ Lucas, Slack and d’Apice (n 28) 211.

⁸¹ Morrissey, ‘Ordinary and Extraordinary Administration: Canon 1277’ (n 79) 716.

⁸² United States Conference of Catholic Bishops, (3 March 2010) ‘Decree of Promulgation: Canon 1277’ <<http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1277-acts-of-extraordinary-administration-by-diocesan-bishop.cfm>>.

some acts of extraordinary administration.⁸³ The Conferences in Switzerland and Scotland have also published lists.⁸⁴ The ACBC has not yet published similar public lists categorising specific acts.⁸⁵

The statutes of a public juridical person should explicitly state relevant extraordinary acts that ‘go beyond the limits and manner of ordinary administration’ and so avoid invalid acts, without written permission.⁸⁶ When extraordinary acts are not included in the canonical statutes and not approved by the Bishops’ Conference, it is the diocesan bishop’s responsibility to define them, after consultation with his finance committee. The ACBC will achieve consistency across Australia if it provides a list of extraordinary acts and publishes them on its website. The canonical statutes of public juridical persons may then simply refer to the list published by the Bishops’ Conference, instead of themselves specifying relevant acts. Canonical administrators in Catholic institutions should be able to identify acts of greater importance and of extraordinary administration to ensure compliance with canon 1281. Acts of extraordinary administration ‘in canonical tradition’ include, to:

- accept or renounce a conditional inheritance, legacy or donation;
- purchase immovable goods;
- sell, exchange or mortgage goods of historical, artistic or other importance;
- sell, exchange or mortgage immovable property or lease it for a period longer than approved by the Bishops’ Conference;
- borrow large sums of money for short term loans;
- build, raze or rebuild or make extraordinary repairs to property; and

⁸³ Beal (n 35) 118.

⁸⁴ Morrisey, ‘Ordinary and Extraordinary Administration: Canon 1277’ (n 79) 718 – 721.

⁸⁵ A list is published in the second issue of *The Canonist* in each calendar year, which is only accessible with a paid subscription. Complimentary legislation for Australia is provided in the Bishop’s handbook: Rev BJ Lucas, *Complementary legislation for Australia pertaining to Acts of Extraordinary Administration and Alienation*, Australian Catholic Bishops’ Conference (8 August 2014).

<<https://www.catholic.org.au/all-downloads/bishops-1/handbook-1/1400-alienation-and-extraordinary-administration-1/file>>.

⁸⁶ *Code of Canon Law* canon 1281 §1 and §2.

- to commence or respond to, a civil lawsuit.⁸⁷

This list that became a part of canonical tradition pre-dates both the *1917 Code* and the *1983 Code*.

The size of a transaction should not determine whether the act is one of ordinary or extraordinary administration; what may have significant impact to one public juridical person may have little to no impact at all on another. However, the *1983 Code* determines that any transfer of ownership is an act of alienation. Acts of extraordinary administration also include acts that involve property transactions exceeding the maximum sum for alienation, which the ACBC determines. In 2014 the ACBC set the annual minimum for alienation at \$28 488 and the maximum amount at \$5 697 674.⁸⁸ This range applies to public juridical persons other than congregations, to whom a maximum only relates. In the current economic climate and considering the monies provided by state and federal governments for education, health and investment returns on some property holdings, it is feasible that a Catholic school or hospital will face transactions and dealings that exceed the maximum amount, requiring the diocesan bishop's approval before any transactions in civil law happen.⁸⁹ Transactions defined as acts of extraordinary administration warrant inclusion in the canonical statutes and the civil law constitution. The public juridical person is not canonically liable for the invalid acts of its administrator, but they may be liable in civil law. A canonical administrator may be personally liable for any unlawful, malicious or culpable act that causes harm to a public juridical person even if that act is permissible in civil law.⁹⁰

3 *Acts that Affect the Patrimonial Condition*

Canon 1295 requires that the canonical statutes of the public juridical person conform to canons 1291–94, 'to ensure that failure to fulfil any of the invalidating requirements will render an attempted alienation not only canonically invalid but civilly invalid as well'.⁹¹ Canon 1295 'refers to the *economic* condition (not the juridical condition) of the Church'.⁹² The most effective way to ensure that occurs is to incorporate the canons into the civil law constitution

⁸⁷ Sacred Congregation for the Propagation of the Faith (21 July 1856) referenced in Lucas, Slack and d'Apice, (n 28) 212.

⁸⁸ Rev Brian Lucas, 'Australian Catholic Bishops' Conference' (2014) 5(2) *The Canonist*.

⁸⁹ *Code of Canon Law 1983* canon 638 §3.

⁹⁰ *Code of Canon Law* canons 1281 §3 and 128.

⁹¹ Kennedy, 'Temporal Goods of the Church' (n 14) 1502.

⁹² Renken, 'Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295' (n 77) 503.

by specific reference, providing the greatest protection to the temporal goods.⁹³ Canonical administrators must also consider ‘any transaction by which the patrimonial condition of the juridical person could be adversely affected.’⁹⁴ It does not include every financial transaction a public juridical person may consider, the crucial factor is the requirement that the transaction *adversely* affects the patrimonial condition. ‘A canon 1295 transaction ... leaves unchanged the quantity and identity of stable patrimony owned by a public juridic person, but nonetheless entails a risk to its future financial stability.’⁹⁵ It may include mortgages, leases, easements, investments, loans and guarantees, restructuring the civil law entity, settlement of litigation, bankruptcy protection, and acquiring or selling property lower than the ACBC minimum.⁹⁶ The canonical statutes and the civil law constitution should refer to canon 1295 and ‘indicate that the norms of canons 1291–1294 are to be observed’.⁹⁷ Renken notes that ‘commentators identify specific kinds of contracts which require observance of the discipline of canon 1295’ and then lists them (at 515 – 517) noting that it applies to these transactions if the threat exceeds the minimum value set by the Conference of Bishops.⁹⁸ The only direct reference to investments is contained in canon 1284 §2 6° where excess income should be invested. ‘Ethical principles apply also to investments. The decision to invest in one place or another is always a moral choice’.⁹⁹ The United States Conference of Catholic Bishops’ ‘Socially Responsible Investment Guidelines’ provide an outline of good practice for investment which can be used for canonical governors investing part of the stable patrimony.¹⁰⁰

What is financially astute in any situation will vary depending on where and when a transaction occurs. Canonical administrators must be aware of the potential effect a transaction will have on the patrimonial condition of the public juridical person.¹⁰¹ This is not necessarily an onerous burden if the membership of the public juridical person’s governance body includes people with business qualifications and experience who may raise the possibility of a contravention of canon

⁹³ Ibid 508.

⁹⁴ *Code of Canon Law* canon 1295.

⁹⁵ Ibid 1505; Beal (n 35) 126.

⁹⁶ Beal (n 35) 127.

⁹⁷ Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’ (n 77) 513, 515-7.

⁹⁸ Ibid. See also generally Jerome L. Jung, ‘Property Transactions That May Jeopardise the Patrimonial Condition of the Public Juridic Persons in the Church’ (2001 – 2002) 41 *Catholic Lawyer* 85.

⁹⁹ Roche (n 25) 343.

¹⁰⁰ United States Conference of Catholic Bishops, 12 November 2003, < <http://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines.cfm>>.

¹⁰¹ Jung (n 98) 86.

1295, and/or the canonical administrator/s seeks expert advice on the transaction's likely effect on the overall financial condition of the stable patrimony.

4 *Alienation*

Canon 1290 observes relevant contract law in issues relating to the alienation of property. Kennedy explains this 'canonising' of civil law:

Rather than enact its own norms regarding capacity to contract, mutuality of obligations, requisite formalities, and other aspects of contractual transactions, the Church elects to adopt (canonise) the provisions of civil law applicable in the territory, except where such provisions are contrary to divine law or canon law provides otherwise.¹⁰²

Specific canons that provide otherwise include canons 1277 and 1281 relating to acts of extraordinary administration, canons 1291 – 1294 relating to alienation of property, canon 1295 relating to transactions affecting or arising from alienation and canon 1297 relating to leasing of property. These provisions do not contradict civil law but rather add further requirements to those of civil law. Canon 1296 (canonically invalid alienation) 'is neither a canonising norm nor a reference norm. Rather it acknowledges the separation and independence of the applicable civil law and the *ius Ecclesiae*'.¹⁰³

Whilst the canonical requirements may at first seem burdensome, not all dealings with property are an alienation of temporal goods. It is *only those that either alienate property over the maximum value permitted or possibly devalue property* that are cause for concern for canonical administrators. Canon 1291 does not prohibit alienation per se — it requires 'the permission of the authority competent by law' for a valid alienation; canonical or civil law administrators must obtain that permission before completing a transaction. It contains three components:

1. there be a lawful assignment;
2. it constitutes the stable patrimony of the public juridical person; and
3. the value of the alienated property exceeds 'the sum determined by law'.

¹⁰² Kennedy, 'Temporal Goods of the Church' (n 14) 1493.

¹⁰³ Austin, 'The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications' (n 22) 65.

5 *Stable Patrimony*

The *1983 Code* introduced the term ‘stable patrimony’ to Book V but did not define it. The main reason for the inclusion was to protect the property of the public juridical person from incompetent or dishonest administrators.¹⁰⁴ Kennedy distinguishes four categories of stable patrimony which constitute property designated for long-term use or gain and in so doing allow the public juridical person to fulfil their mission:¹⁰⁵

1. real estate;
2. non-fungible personality (not consumed in its use, eg cars and furniture);
3. long term investments (over two years); and
4. restricted funds (set aside for specific purposes).

Canons 1254§1, 1285, 1291 and 1295, consistent with canon 114 §2, suggest that every public juridical person must possess patrimony. De Paolis stated, when addressing Congregations in May 1983 on the new provisions of Book V, that ‘[o]ne thing is certain: the new code presupposes that every juridical person has a stable patrimony that can be made up of either movable or immovable goods’.¹⁰⁶ Not all property is stable patrimony though; canon 1291 requires its designation as such.¹⁰⁷ Initial designation occurs on the creation of the public juridical person by the competent authority; thereafter the canonical administrator should update the inventory of stable patrimony annually. This designation of goods as stable patrimony appears to be the only method in the *1983 Code* to determine what the stable patrimony of a public juridical person is, but the canons do not specify which competent authority designates it. If the property is initially stable patrimony in the canonical statutes and civil law constitutions of relevant corresponding bodies, it may later be designated non-stable patrimony with the approval of the competent authority, necessitating of course amendment of the statutes and constitution. If that act of redesignating the property involves an alienation of the property then the norms of canons 1291 – 1294 apply to the change. Gifts received by a public juridical person may also be designated as stable patrimony and subject then to the norms

¹⁰⁴ For a discussion of the history and motivations for including the term in the *1983 Code* see Renken ‘The Stable Patrimony of Public Juridic Persons’ (n 27) 135 – 143.

¹⁰⁵ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1495.

¹⁰⁶ De Paolis (n 20) 356.

¹⁰⁷ John A. Renken, ‘The Principles Guiding the Care of Church Property’ (n 63) 175.

of canons 1291 – 1294 but they would also be acts of extraordinary administration and both require the approval of the competent authority. To alleviate some of the uncertainty of what property does constitute stable patrimony of a body, and thereby provide better protection for the property in both canon and civil law, both the canonical statutes and civil law constitution should clearly:

- define ‘stable patrimony’;
- define types of property that are stable patrimony for *that* public juridical person; and
- state which relevant competent authority designated the stable patrimony as such.

For example, it may be determined that all real estate, investment funds from sold real estate or other property and some investment portfolios should be stable patrimony; the statutes and constitution can define these as stable patrimony. The act of defining property as stable patrimony may be an act of extraordinary administration. If it is, then the norms of extraordinary administration also apply.¹⁰⁸ Clear definitions in both the canonical statutes and civil law constitution will assist that purpose; including them in both documents, canonical and civil law, maximises the property’s protection.

The inventory that the canonical administrators maintain with the stable patrimony of the public juridical person is crucial in determining whether any property constitutes stable patrimony. An application to a competent authority to determine what stable patrimony is should include:

- an explanation of the just cause;
- written evaluations;
- written evidence that the requirements of particular (diocesan) law have been fulfilled...;
- a statement regarding divisible goods;
- an offer of purchase;
- a statement of what is to be done with the proceeds; and

¹⁰⁸ Renken, ‘The Stable Patrimony of Public Juridic Persons’ (n 27) 154.

- written evidence that civil law has been observed.¹⁰⁹

Canon 1293 §1 2° of the *1983 Code* determines that ‘just cause’ or just reason includes ‘urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason’. Canons 1293 §1 1 and §1 2 require just cause for the alienation and a written valuation.

A requirement for written appraisals of the value of the property ensures that the property is not alienated for less than it is worth.¹¹⁰ Where the alienation is for a charitable purpose and the value is not a consideration, the written appraisal will allow the canonical administrator to include the alienation, and its worth, in the public juridical person’s annual report and inventory of stable patrimony. Canon 1294 §2 of the *1983 Code* requires that the ‘money obtained from alienation must be carefully invested for the benefit of the Church, or prudently expended according to the purposes of the alienation.’ If there are excess proceeds from the alienation, they must return to be a part of the stable patrimony of the public juridical person.

These principles apply to ‘any transaction whereby the patrimonial condition of the juridical person could be adversely affected’,¹¹¹ such as transactions of leasing or mortgaging. Transferring the ownership or leasing all, or some, of the congregational property to another juridical person falls within the scope of these canons, as may the contribution of a religious congregation to the National Redress Scheme. Any lease affecting ecclesiastical goods must

- comply with the norms determined by the ACBC;
- include the need to comply with civil law relating to leases;
- ensure the ‘monetary consideration is to approximate the ruling market value’; and
- obtain the consent of the relevant competent authority for leases exceeding nine years duration.¹¹²

Canon 1291 restricts alienation of stable patrimony to ensure that there is not a threat to the stability, and therefore the mission, of the public juridical person. The canons do not forbid alienation – they require approval for it to ensure proper consideration of business transactions before conducting them. The examples of ‘just reason’ for alienation of stable patrimony in

¹⁰⁹ Lucas, Slack and d’Apice (n 28) 216.

¹¹⁰ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1501.

¹¹¹ Ibid canon 1295.

¹¹² Lucas, Slack and d’Apice (n 28) 217; canons 1297 and 1292 §1.

canon 1293, including ‘...urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason;...’ give the competent authority relatively wide discretion in determining whether to grant approval. If it is determined that the overall stable patrimony is secure, approval for the alienation will normally be given,¹¹³ but the monies obtained from an alienation must be used to either acquire more property or be invested for the public juridical person.

When determining approval of an alienation, the competent authority will consider whether the value of the proposed alienation falls within the maximum and minimum amounts set by the ACBC and if so seek the advice of the relevant diocesan finance committee for the alienation. The Holy See must approve any proposed alienations where the value of the property exceeds the maximum value or it is of historical or artistic value.¹¹⁴ If the property does not exceed the maximum sum, or it is not a part of the stable patrimony of the public juridical person, the alienation does not require permission of the competent authority.

In circumstances where an alienation of property occurs that is valid in civil law but is canonically invalid, canon 1296 permits the competent authority to act to ‘vindicate the rights of the Church’; it is not a mandatory requirement that he act. Who the appropriate competent authority is for the purposes of canon 1296 is not clear from the canon itself. Kennedy argues that it should be ‘the immediate canonical superior of the person responsible for the canonically invalid alienation’.¹¹⁵

IV CONCLUSION

Governance and ownership of Catholic institutions such as schools and hospitals require two structures – the canonical public juridical person and an appropriate civil law corporate structure. Usually the membership of these bodies is not identical, although there may be some overlap. Canonical administrators must consider relevant civil law when, in exercising their powers of governance, they engage in property transactions. Members of corporate governance must acknowledge and adhere to canonical requirements before any property transactions in civil law are conducted.

¹¹³ For a detailed discussion of types of alienation, including aggregated alienation see the discussion of Kennedy, ‘Temporal Goods of the Church’ (n 14) 1497 – 1499.

¹¹⁴ *Code of Canon Law 1983* canon 1292 §2.

¹¹⁵ Kennedy, ‘Temporal Goods of the Church’ (n 14) 1506.

Canon 1291 *restricts*, rather than forbids, alienation of stable patrimony. Canonical administrators must remember above all that their duty is to the Church. They have a responsibility to discharge their canonical duties relevant to civil law legal structures. Jung notes that:

The corporate structure must be designed so as not only to facilitate by granting adequate management authority to those with the requisite expertise, but also to preserve the authority that the canonical stewards must have with respect to basic decisions relating to stable patrimony.¹¹⁶

This can be achieved by ensuring it is written into the civil law constitution. The corporate structure should reflect the responsibility that canonical administrators have for the economic viability and stability of the public juridical person, or other Church entity, established by the competent ecclesiastical authority and exercised in accordance with Book V of the *1983 Code*. There is no suggestion that canonical administrators should have law degrees nor that corporate administrators have canon law qualifications. What is required on the part of both administrators is acknowledgment that the other entity exists, and an understanding that there are requirements of the other entity that they must observe, and where necessary seek appropriate advice. Both entities should work together and seek advice on the other's requirements where relevant. This provides the best opportunity for good governance – both canonical and corporate.

¹¹⁶ Jung (n 98) 102.