Courage to move beyond the past: Common law and canonical structures for the governance of Australian congregational schools in the 21st century

Jane Power

University of Notre Dame Australia

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COURAGE TO MOVE BEYOND THE PAST: COMMON LAW AND CANONICAL STRUCTURES FOR THE GOVERNANCE OF AUSTRALIAN CONGREGATIONAL SCHOOLS IN THE 21ST CENTURY

Jane Marie Power

B Juris, LLB, Grad DipEd (Sec)

A Thesis Submitted in Fulfilment of the Requirements of the

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University of Notre Dame Australia

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ABSTRACT

The future governance and ownership of congregational schools has become a compelling question for many congregations still seeking to determine the future of their schools and education ministry. Some congregations have already made the transition to new legal structures, some are in a transitional phase, and still others are yet to make decisions.

The purpose of this thesis is to determine suitable common law and canon law structures for the future governance and ownership of congregational schools when the congregations are no longer willing or able to continue in their current roles. The following aspects determine the focus of the thesis:

1. The suitability of current common law and canon law structures in Catholic school governance and ownership;
2. The availability of any alternative common law and canon law structures for future governance and ownership of congregational schools; and
3. The impact of canonical requirements on the choice of any new common law structures.

In addressing these aspects, consideration is given to the possibility of future governance and ownership of congregational schools as diocesan schools and in so doing examines the corporation sole, the unincorporated association and agency. It then considers the current common law structures of the Presentation Sisters in WA and Qld and of the Christian Brothers in Oceania. In doing so it examines the incorporated association, the company limited by guarantee and the statutory corporation. The relevant canon law relating to temporal goods and public juridical persons is examined and explained.
The thesis reaches several conclusions relevant to a congregation’s decision-making of future governance and ownership of its schools. Firstly, it identifies the deficiencies in the legal capacity of diocesan schools. Secondly, it identifies the incorporated association, company limited by guarantee and the statutory corporation as the most viable options for future governance and ownership. Lastly, the thesis identifies the canonical requirements and implications on the choice of any new common law structure and ascertains that canon law is not necessarily an impediment to adopting new common law structures.
DECLARATION

This thesis contains no material previously published or written by another person except where due reference is made in the thesis, and it contains no work that the student has previously presented for an award of the University or any other educational institution.
ACKNOWLEDGEMENTS

For my parents Ken (dec’d) and Joan McKenna, for prioritising their children’s education.

And for the Presentation Sisters and Christian Brothers who have educated several generations of McKenna and Power children.

This thesis would not have been possible without the support and encouragement of my husband, Tony, and our children, Mick, Sarah Jane and Jim.

I must also thank many of my colleagues for their support and reassurance. Particular thanks goes to Associate Professor Joan Squelch, a wonderful supervisor without whose encouragement the last 12 months would have been unbearable. I thank my academic colleagues who provided feedback, advice and listened to my many ramblings as I tried out theories on them — the Honourable Professor Neville Owen, Chris Mulley, Brent Scafidas, Dr Lara Pratt, Dr Marilyn Krawitz, Professor Don Watts, Justine Howard and Mary McComish. The time my practitioner colleagues and canon law experts gave to me was priceless — Bernard Hill, Graeme Goerke, Mary Woodford, Sr Elizabeth Delaney (co-supervisor, canon law), Bishop Robert McGuckin, Fr Greg Carroll and Fr Stephen Ochola; and my education colleagues Professor Peter Tannock, Margaret Herley and Dennis Banks.

I have received professional editorial advice from Josephine Smith – WordSmith WA. In accordance with the Guidelines for editing research theses produced by the Institute of Professional Editors Ltd, the editorial intervention has been restricted to copyediting and proofreading. This type of advice is covered in Standards D and E of the Australian Standards for Editing Practice. Of course any and all errors remain my responsibility.
GLOSSARY

Commonly used terms are defined as follows for the purpose of this thesis.

Administration:

**Governance** — refers to the long-term decision-making, policy and procedures, and strategic and financial planning for the school. It considers the ‘bigger picture’; it is not involved in the daily operations of the school. CECWA/CEOWA conducts the governance of diocesan schools and the congregation conducts the governance of congregational schools. ‘Corporate governance is about the management of business enterprises organised in corporate form, and the mechanisms by which managers are supervised. Thus, the topic includes a study of corporate governance rules, a “static” study of the organisational structure of the company, and the duties of those involved in its management’.¹

**Management** — refers to the oversight of the implementation of the long-term decision-making, policy and procedures, strategic and financial planning, and the daily administration of the school. Management of diocesan schools occurs through the school board, which includes the principal and senior school staff members. Management in congregational schools varies depending on the school structure and level of involvement of the congregation; some congregations continue to play an active role in their schools while others delegate almost entirely to school boards.

Association of Christ’s Faithful — an association is a group of people with a particular purpose to carry out Catholic work, an activity done in the name of the Church by a Church entity.

Canonical Governance:

Canonical governance or administration — holds the same basic meaning as sponsorship; term more commonly used in Australian Catholic education.

Sponsorship — term more commonly used in the United States and Canada, although its usage is increasing in Australia particularly in relation to Catholic Health Care ministries. It means ‘[t]he relationship between the church that situates the canonical responsibility of a juridical person for incorporated apostolic works that are part of a church entity’. It is ‘the intimate relationship between a religious congregation and its ministry and it includes governance, management and organisation.’

Charism — ‘A specific gift or grace of the Holy Spirit which directly or indirectly benefits the Church, given in order to help a person live out the Christian life, or to serve the common good in building up the Church’.

Church — a group of people who have a common religious belief, founded on the person of Jesus Christ. The Church is not so much a ‘thing’ as a community of ‘people’.

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2 Mary Kathryn Grant, “‘Reframing’ Sponsorship” (2001) July-August Health Progress 38.
3 Carmel Leavey, School Governance Project for National Catholic Education Commission and Australian Conference of Leaders of Religious Institutes (2000) 13; Leavey’s emphasis.
4 Catechism of the Catholic Church (St Paul’s Publications, 2nd ed, 2000) 870.
**Congregation** — ‘a society in which members, according to proper law, pronounce public vows, either perpetual or temporary which are to be renewed, however, when the period of time has elapsed, and lead a life of brothers or sisters in common’.\(^6\)

**Formation** — ‘a process of preparation and ongoing reflection and development for the purpose of ensuring that individuals are appropriately self-aware and understand the meaning of their ministry at a depth beyond that of “a worker doing a job”’.\(^7\)

**Juridical person** — ‘is 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’.\(^8\) The terms juridic and juridical are both used in the research literature. Except where the word is in a quote, the thesis adopts the term ‘juridical’.

**Laity** — are ‘all the faithful except those in holy orders and those in a religious state sanctioned by the Church’.\(^9\) Those who are ordained as clerics (clergy) are not laity.

**Law:**

**Canon law** — is ‘a code of ecclesiastical laws governing the Catholic Church’.\(^10\)

**Common law** — is the *system* of law operative in Australia and therefore includes statute law.

---


Patrimonial condition or Patrimony — ‘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’.  

Reserve powers — refer to those powers that a congregation chooses to retain while they play an active but limited or shared role in governance of their schools. They usually include, as a minimum, the power to appoint and dismiss members of the board/council, the power to approve or veto any changes to the charism of their school, and the power to approve/veto financial transactions over a specified limit.

Schools:

Catholic schools — ‘[a] Catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority’. 

Congregational schools — are those owned and/or governed by a congregation.

Diocesan schools — are those owned by the diocesan bishop as a corporation sole and governed by the diocesan bishop through his delegated authority to the CECWA.

Independent schools — are non-government schools of any or no religious affiliation.

Stable patrimony — 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...

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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).\textsuperscript{13}

**Temporal goods** — ‘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’.\textsuperscript{14}

**Vatican Council II** — an ecumenical council held in four sessions between 1962 and 1965. Pope John XXIII announced both the calling of Vatican Council II and the revision of the 1917 Code on 25 January 1959. Vatican Council II, amongst other things, introduced reforms to the Church.

\textsuperscript{13} Kennedy, ‘Temporal Goods of the Church’, above n 11, 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.

\textsuperscript{14} Kennedy, ‘Temporal Goods of the Church’, above n 11, 1451.
# ACRONYMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACA</td>
<td>Association of Canonical Administrators</td>
</tr>
<tr>
<td>ACBC</td>
<td>Australian Catholic Bishops Conference</td>
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<tr>
<td>ACN</td>
<td>Australian Company Number</td>
</tr>
<tr>
<td>ACNC</td>
<td>Australian Charities and Not-For-Profits Commission</td>
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<tr>
<td>AISWA</td>
<td>Association of Independent Schools of Western Australia</td>
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<tr>
<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<tr>
<td>ASX</td>
<td>Australian Securities Exchange</td>
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<tr>
<td>CCCB</td>
<td>Canadian Conference of Catholic Bishops</td>
</tr>
<tr>
<td>CECWA</td>
<td>Catholic Education Commission of Western Australia</td>
</tr>
<tr>
<td>CEOWA</td>
<td>Catholic Education Office of Western Australia</td>
</tr>
<tr>
<td>CLT</td>
<td>Congregational Leadership Team</td>
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<tr>
<td>DBC</td>
<td>Diocesan Building Committee</td>
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<tr>
<td>EREA</td>
<td>Edmund Rice Education Australia</td>
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<tr>
<td>ISCA</td>
<td>Independent Schools’ Council of Australia</td>
</tr>
<tr>
<td>IFSA</td>
<td>Investment and Financial Services Association</td>
</tr>
<tr>
<td>PPG</td>
<td>Prudential Practice Guide</td>
</tr>
<tr>
<td>SAT</td>
<td>State Administrative Tribunal (WA)</td>
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CHAPTER 1
INTRODUCTION AND STATEMENT OF THE RESEARCH PROBLEM

1.1 IDENTIFYING THE RESEARCH PROBLEM

The reality of Catholic schools in the 21st century is very different from the schoolyards of the 1960s where the ‘lay’ teacher was the anomaly amongst the religious ‘uniforms’ of habits and white collars. In early Western Australian settlements, members of a congregation were solely responsible for teaching in their schools and their administration. Today, with the declining number of religious in these congregations, laity administer and staff their schools. The number of congregational members has declined leaving their position and roles in the governance of their schools in uncertainty. This raises questions of law. Firstly, whether the congregations’ current common law and canon law legal structures allow the continuation of their schools without their involvement. Secondly, and fundamentally, how the preservation of the congregations’ charisms can continue in their schools with the transfer of governance from the congregation to lay executives and staff.

Numerous significant, and sometimes general, factors have combined to leave the congregations in a fragile and uncertain position, challenging them as to how they will continue their involvement in Catholic education. Those factors include:

15 The first school opened in the Western Australian colony in 1830, the first Catholic schools in the 1840’s: Phillip Pendar, Continuity in Change (Perth, Victor Publishing, 2008) 2.
16 In canon law, religious are either cleric or members of the laity. A priest is a cleric, but religious Brothers and Sisters – not being ordained - are members of the laity. Therefore, there are religious and non-religious members of the laity. This thesis uses the term ‘laity’ for those who are neither clerics nor members of a congregation. See chapter 7.5 for the definition and a discussion on the role of the laity.
17 Charisms are defined and discussed in chapter 2.
• the declining number of people entering religious orders in Australia;
• the increasing diversity of ministries in which congregations engage;
• the increasing enrolments in schools;
• the demographic changes in society;
• the demands made on schools for ‘superior’ education in a competitive market
  place; and
• the increasing involvement of the state and federal governments in school
  funding and curriculum across Australia.

The number of men and women entering religious life has declined to the extent that
many congregations may have little or no effective membership in the next 15 to 20
years.\textsuperscript{18} This inevitably resulted in the decline of congregations involved in the various
roles of governance and management of their schools, which in turn poses challenges
in maintaining their charisms. This situation also raises significant issues regarding
legal ownership and governance of the schools in both common law and canon law.
New mechanisms for future legal ownership and governance of congregational schools
are essential if the individual charisms of the congregations are to survive without
them. The implementation of any new mechanisms during the period when there are
still members of the congregations will serve a more effective transfer of the
stewardship of their schools.

The crucial question for many of these congregations is whether any common law
business structures allow the ministry of their contribution to education to survive
beyond their own involvement. Particularly, what common law business structures

\textsuperscript{18} Some larger congregations may have the benefit of an extra decade or two; much depends on the
age and infirmity of their numbers, which will dictate their ability and/or desire to continue active
involvement in the congregation.
protect the charism of their congregation? An additional element of concern for the congregations is whether, having identified any common law governance structures that can both continue the ministry of their education and protect the charism associated with the congregation, canon law negates or restricts any of those common law structures. These questions, which some congregations have already raised as questions of concern, provide the rationale for this thesis. The primary purpose of this thesis is to demonstrate the importance of protecting a congregational school’s charism, and investigate the most suitable legal structures that can achieve this given any potential conflict between common law and canon law.

Against this background, it is the researcher’s thesis that new legal ownership and governance structures for congregational Catholic schools must be developed if their individual charisms are to be retained in their schools when the congregations are no longer in a position to continue in the governance and management of those schools. The thesis argues that canon law need not restrict the congregation’s ability to adopt new common law structures.

This thesis will explore the possible common law options and their acceptability according to canon law, and make recommendations as to the most suitable legal mechanisms to achieve these ends. The term ‘common law’ refers to the common law system applicable in Australia. Canon law refers to ‘civil law’ when describing secular law as opposed to Church law. In Australia, ‘civil law’ refers to the legal system of the European continent as opposed to the common law system in Australia, which was inherited from our English heritage. As this thesis relates to the secular law of Australia, but also considers canon law implications on Australian secular law, to
avoid confusion between the systems of common law and civil law, the term ‘common law’ in this thesis refers to the system and therefore includes statute law.\textsuperscript{19}

1.2 BACKGROUND

Before providing background context on congregational schools in Catholic education, it is relevant to clarify the use of terminology relating to congregations and their schools. The terminology commonly used to describe Catholic schools owned and governed by a congregation rather than the local bishop/diocese is ‘congregational schools’.\textsuperscript{20} ‘[I]ts usage is relatively recent, being applied after the implementation of the 1973 Report of the Interim Committee for the Australian Schools Commission’.\textsuperscript{21} Canon law uses the term ‘Religious Institutes’ when referring to the congregations. However, as the schools run by these congregations are referred to as ‘congregational schools’, for the purpose of this thesis the term ‘congregation’ will be used rather than Religious Institute.\textsuperscript{22}

In Western Australia (WA), the congregation or some other legal structure (eg an incorporated body) that gives effective ownership to the congregation, owns the

\textsuperscript{19} The thesis acknowledges that generally, in Australia common law is ‘the unwritten law derived from the traditional law of England as developed by judicial precedence, interpretation, expansion and modification’: Peter Butt, \textit{Butterworths Concise Australian Legal Dictionary} (Lexis Nexis Butterworths, 3\textsuperscript{rd} ed, 2004) 76. See also Rodger Austin, ‘The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications’ (Paper presented at Proceedings of the 41\textsuperscript{st} Annual Conference of the Canon Law Society of Australia and New Zealand, Christchurch New Zealand, 2007) 37 and Catriona Cooke et al, \textit{Laying Down the Law} (Lexis Nexis, 9\textsuperscript{th} ed, 2014) chapter 3.

\textsuperscript{20} In some Australian states, congregations own and operate their own schools, or may operate them on behalf of the diocese. This thesis focuses on the congregational schools in WA owned and governed by the congregation.

\textsuperscript{21} Commonwealth of Australia, \textit{Schools in Australia: Report of the Interim Committee for the Australian Schools Commission} (1973). This is commonly referred to as the ‘Karmel Report’ after the Chair of the Committee, Dr Peter Karmel, quoted from Dr Berenice Kerr rsm, \textit{The Congregational School: Its History and Significance in NSW and Australia} (Paper presented at Conference of Leaders of Religious Institutes in NSW, 2009) 9.

\textsuperscript{22} Throughout this thesis the common terminology will be adopted and the term ‘congregational schools’ will be used to refer to Catholic schools that are currently owned and governed by a Religious Institute and the Institutes will be referred to as ‘congregations’.
congregational schools and the land on which they are located. For the most part, the congregation also governs them, usually with the assistance of a school board or council. The relevant diocesan bishops own diocesan schools. Congregational and diocesan schools operate within the guidelines for Catholic education set by the Catholic Education Commission of Western Australia (CECWA) as endorsed by the bishops of the Province of Perth (in matters pertaining to education).\(^2^3\) They also relate to the CECWA by virtue of receiving state and federal funding; the Catholic Education Commission of Western Australia Trustees (CECWA Trustees) administer the funds.

One distinction between congregational schools and diocesan schools is the individual charism attributed to the founder of the congregation. That charism underpins the very essence of the school, as it is ‘lived’ and evidenced by the Sisters and Brothers of the particular congregation as a tangible reality. A charism is ‘a specific gift or grace of the Holy Spirit which directly or indirectly benefits the Church, given in order to help a person live out the Christian life, or to serve the common good in building up the Church’.\(^2^4\) These distinct charisms characterise individual schools, albeit all Catholic in spirit and content, offering a choice to parents when seeking a Catholic education for their children. Some diocesan schools also have a charism, often but not always adopted from a particular saint or founder of a religious congregation. The diocesan schools do not usually have members of the congregation present in the schools.


\(^2^4\) *Catechism of the Catholic Church*, above n 4, 870. ‘In particular, charisms ground religious congregations, provide them with distinctive “flavours” or cultures, and act as reference points and as guiding forces for their ministries…the particular charism of a religious community determines its identity, way of life, spirit and spirituality, structures, and mission’: Susan M Sanders, ‘Charisms, Congregational Sponsors and Catholic Higher Education’ (2010) 29(1) *Journal of Catholic Higher Education* 3, 5. Some diocesan schools commenced as such but were staffed almost entirely by religious (more usually nuns) and these diocesan schools adopted the charism of the congregation teaching in them.
Congregations’ charisms\textsuperscript{25} reflect their founder’s interpretation of the Gospels and provide diversity in assisting people to ‘live out the Christian life’\textsuperscript{26}. When explicit in congregational schools, the charism of a congregation provides diverse avenues for young Christians to interpret the Gospels and apply them in their own lives. The living example of the religious men and women themselves who taught in and were the administrators of the schools reflected the charisms in congregational schools.

Over the past few decades, the physical presence of the congregations in their schools has lessened as the member numbers have diminished (as advised by some congregations), but they are often still a powerful influence on the schools’ culture. Some congregations have already relinquished the governance of their schools as well as the administration and staffing to the diocese\textsuperscript{27}. Notwithstanding the absence of members of the congregation at the school, they have found that subsequent leadership and staff have focused greatly on the charism of the original founder to ensure its manifestation, exercise, development and survival within the existing school, and finding values in the charism that guide and enhance their Christian living. However, given that this is often just a choice made by a particular principal that may not be followed by a subsequent principal, there is no guarantee that in congregational schools that revert to diocesan schools the charism will continue to guide and govern them. The risk remains that these schools will lose their charism and thus the very foundation of their values and history. This raises the question directed to the thesis: ‘What legal options are available to congregational schools that will protect the

\textsuperscript{25} Charisms are discussed in chapter 2.
\textsuperscript{26} Catechism of the Catholic Church, above n 4, 870. In discussing unity and diversity generally, not specifically in relation to education, Archbishop Phillip Wilson commented that ‘[t]he aspiration to unity and the reality of diversity are part of Church life.’ Phillip Wilson, ‘Identity and Mission in Church Based Organisations: Nurturing Unity in Diversity’ (2010) 87(4) Australasian Catholic Record 387, 389.
\textsuperscript{27} La Salle College Midland is one of several examples.
charism of the congregation and most effectively continue the delivery of education in that charism?’. To provide any useful answer to this question, the current ownership and governance structures of the congregations, and those of their schools, requires identification. It is necessary to consider whether the existing structures will suffice in the future (discussed in chapters 3 and 4) or whether new options for legal governance and ownership need to be identified and adopted (discussed in chapter 5).

The 1983 Code of Canon Law (‘1983 Code’) bestows public juridical personality on congregations by virtue of the law itself. The 1983 Code endows the congregation with juridical personality:

As a social and visible unit, the church is composed of persons, subjects of rights and duties according to one’s legal status. Canon law recognises not only human beings but also other legal or juridic entities often called ‘juridic’ or ‘juridical’ persons. Personality is therefore, distinguished between natural (physical) and artificial (juridic) persons.

Canon 803 of the 1983 Code states:

§1. A Catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority.

§3. No school, even if it is in fact Catholic, may bear the title ‘Catholic school’ except by the consent of the competent ecclesiastical authority.

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28 This thesis 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.
29 There are two elements to the juridical requirement – approval and juridical personality: Canon 634 §1. Juridical persons – both public and private - are discussed in chapter 7.3 when considering the canon law requirements and its effect on common law options.
30 Lucas, Slack and d’Apice, above n 5, 65; See also Code of Canon Law 1983 canons 113 and 114.
In canon law the congregations are public juridical persons by virtue of canon 634 §1. The Archdiocese of Perth and the dioceses of Broome, Bunbury and Geraldton are public juridical persons\(^{31}\) for WA diocesan schools.\(^{32}\) When a congregation ceases to act as the public juridical person for their schools, another public juridical person is required for the school. The bishops may direct an existing or establish a new juridical person to continue to operate and govern the school in the place of the congregation.\(^{33}\)

### 1.3 Significance of the Research

The research is important for congregations yet to decide on their future governance options. It is also important for the Western Australian bishops, the Church, CECWA and the Catholic Education Office of Western Australia (‘CEOWA’) in relation to the status of their current legal structures. The thesis highlights the importance of canon law in Catholic school governance structures, identifying the most relevant canonical issues for them. The original contribution of the thesis is twofold. Firstly, it identifies options from which congregations can choose future governance structures for their school that can protect their charism whilst satisfying both common law and canon law requirements for a business operating as a Catholic school. Secondly, it identifies canonical issues essential for members of both the canonical and common law governance structures to acknowledge in the exercise of their governance.\(^{34}\) This is

\(^{31}\) *Code of Canon Law* canons 432 §2 and 116 §1.


\(^{33}\) In this thesis, the term ‘diocesan bishop’ describes the archbishop of Perth, and the bishops of Broome, Geraldton and Bunbury.

\(^{34}\) New structures may have the same people on both the common law and canonical boards. Others may choose to have some overlapping membership or completely different membership on the two boards. In all these situations, members of both the common law and canonical boards must be aware of the common law and canonical obligations relating to the structures.
particularly important where laity will increasingly undertake the canonical governance.

1.3.1 The Research Context

The thesis focuses on two congregations and their legal interests, current and future, in ownership and governance of their schools in Western Australia (‘WA’). The two congregations are the:

- Presentation Sisters, founded by Honora (Nano) Nagle in Ireland in 1793; and
- Christian Brothers, founded by Edmund Rice in Ireland in 1802.

Several reasons determined the focus on these two congregations: both required new governance structures for their schools; they share a similar history in their foundation in Ireland; and both have remained committed to the original charism of their founders, especially regarding education. In WA, the direction these congregations have taken in the past 50 years or so has been somewhat different from each other and so their current legal interests are different. Their preparation for the future of their schools has also taken different avenues. Enrolment numbers in the congregations’ schools and the number of schools they operate differ significantly, as does the scope of other educational interests. The similarities and differences between them allow for an interesting and instructive perspective and analysis when considering the thesis question.

35 However, in considering these two congregations reference is made to other congregations where necessary to explain and understand a particular issue. The prescribed length of the thesis does not allow for consideration of the current legal governance and ownership structures of all congregational schools currently operating in Western Australia. The Presentation schools in Queensland will also be considered.

36 Prior to October 2007, the Christian Brothers in Australia were ‘governed’ under separate Provinces within Australia. From 1 October 2007, the Brothers belong to one international Province, Oceania.
1.4 Defining the Research Problem

Against the preceding background, the main research question considers what legal options are available to congregational schools that will protect the charism of the congregation and most effectively continue the delivery of education in that charism. In order to address this core question the following sub-questions guide and direct the research:

1) Why is Catholic education in congregational schools, with their distinctive charisms, necessary or desirable within the Catholic education system?

2) What are the current legal ownership and governance structures in the Presentation Sisters and Christian Brothers Congregations?

3) What common law options are available for effective ownership and governance of congregational schools that will maintain their charism when the congregations are not present?

4) What changes have some congregations already made in their governance structures and how, if at all, do they protect the charism?

5) What current canon law structures exist, what structures are possible without the congregations’ involvement, and how do they impact on common law options?

The aims of this research are, therefore, to:

- provide an overview of Catholic education structures and the role and value of congregational schools;

- examine the current common law structures of the congregations and schools and determine if they can be used when the congregations have no involvement;
• determine possible future common law structures that will protect the congregations’ charisms without the congregations’ direct involvement;
• examine the current canon law structures of the congregations and determine possible future canon law structures for the schools; and
• make recommendations for future legal structures.

1.5 Methodology

Legal research is concerned with the formulation of legal ‘doctrines’ through the analysis of legal rules. Within the common law jurisdictions legal rules are to be found within statutes and cases (the sources of law) but it is important to appreciate that they cannot, in themselves, provide a complete statement of the law in any given situation. This can only be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration.37

The legal research in this thesis is literature based. It includes a comprehensive and systematic analysis of law as it relates to the ownership and governance of congregational schools. The research draws on primary and secondary sources and examines relevant aspects of canon law. Canon law is a distinct and comprehensive law. As described above, the term ‘common law’ refers to the common law system applicable in Australia, and hence both statutes and case law will be examined along with other relevant legal research. Canon law refers to the law of the Catholic Church. In addition to those detailed in the bibliography of this thesis, the primary and secondary sources obtained include unwritten historical information, Church records,

congregational documents that are not publicly available, and confidential documents\textsuperscript{38}

The legal research in this thesis requires a detailed explanation of the legal aspects of the various legal structures to determine their suitability when answering the thesis question. The researcher is not a canon lawyer but is a common law lawyer and so does not purport to engage the canon law on a doctrinal level. Rather, the thesis considers aspects and principles of canon law in their relationship with the common law and the extent that it is relevant to addressing the research question.

1.6 OUTLINE OF THE THESIS

The structure of the thesis accords to the following chapters.

\textit{Chapter 1: Introduction and Statement of the Research Problem}

Chapter 1 introduces the research topic and the rationale for the research. The research aims and questions were set out and key concepts explained.

\textit{Chapter 2: The Role of Congregational Schools and Charisms}

Chapter 2 considers the role of congregational schools in Catholic education. The argument is advanced that although an education system run by the CECWA exists, there is a continuing need for diversity within Catholic education and that such diversity will be enhanced by the continuing existence of congregational schools and their particular charisms. Consideration of the concept of the ‘charism’ provides the

\textsuperscript{38} Despite the researcher’s best efforts, the subscription access to many canonical journals restricted access to greater canon law sources. The University’s subscriptions to academic databases does not include those to many canonical journals such as \textit{Studia Canonica} restricting the ability to conduct research to locate and identify relevant journal articles. Although the thesis includes discussions on canon law issues, as the researcher is not a student of canon law, student access to some relevant canonical databases was not available.
context for the thesis question. Although the rehearsal of these arguments is not a lengthy part of the thesis, their inclusion provides an essential foundation to critically examine and assess the different structures.

Chapter 3: Current Legal Status and Structures of the Catholic Church and Diocesan and Congregational Schools

Chapter 3 considers the current governance structure of the CECWA and explores the current ownership and governance structures for diocesan, Christian Brothers and Presentation schools in WA from both a common law and a canon law perspective.

Catholic Education Commission of Western Australia

The current legal structures governing diocesan schools and the relationship between congregational schools and the CECWA is examined. Consideration is given to the possibility of a future governance role of the CECWA in congregational schools.

Presentation Sisters

The Presentation Sisters in WA have not incorporated a separate body to govern either of their schools; the Congregation remains legally responsible for the schools. However, in 1992 separate bodies were incorporated as companies limited by guarantee to run two Presentation schools in Queensland (‘Qld’) — St Rita’s College and St Ursula’s College — without the Congregation seeking to establish a new public juridical person. The thesis will consider these corporations to determine whether similar structures are desirable in WA and compare their effectiveness with the Edmund Rice Education Australia model.39

39 The leader of the Qld Congregation advised in March 2012 that ‘the Presentation Sisters’ Queensland would become a Steward of Mercy Partners’ a separate public juridical’ person, Sr
Christian Brothers

The Christian Brothers created a new civil body, the Trustees of Edmund Rice Education Australia (‘EREA Trustees’), to govern their schools throughout Australia. EREA Trustees is incorporated under the Roman Catholic Church Communities Lands Act 1942 (NSW) (‘NSW Act’). Detailed consideration is given to the NSW Act.

Chapter 4: The Suitability of Diocesan School Structures for Congregational Schools

Chapter 4 examines the current common law ownership and governance structures associated with diocesan schools in WA. It will consider whether any of these current structures are suitable for congregational schools. Corporation sole, unincorporated associations and agencies will be discussed.

Chapter 5: Corporate Structures in Future Governance

Chapter 5 examines several legal structures that are suitable for the governance and ownership of congregational schools, and importantly, afford legal protection to the charism. Incorporated associations under state legislation and companies limited by guarantee incorporated under the Corporations Act 2001 (Cth) are considered in detail. The real issue is which form or forms of ownership and governance available in common law are the most appropriate for congregational schools to ensure the continuation of the charism of the individual congregation in those schools when the congregations no longer have ownership or legal control of them.

Kathleen Tynan PBVM, Circular to Communities of St Rita’s College Clayfield and St Ursula’s College Yeppoon (March 2012) St Ursula’s College <http://www.stursulas.qld.edu.au/ourcommunity/Presentation%20Congregation%20Queensland.pdf>. Mercy Partners is discussed in the context of canonical governance.
Chapter 6: Canon Law

Chapter 6 introduces canon law. It will provide a definition of canon law then briefly discuss its sources and the hierarchical structure of the Church as it relates to the thesis question. Consideration is given as to how canon law and common law interact.

Chapter 7: Canon Law Implications for the Thesis Question

Chapter 7 considers relevant canon law provisions and its restrictions and effect on the common law with regard to both ownership and governance solutions. Canon law considerations focus largely on property and suitable canonical governance structures. Temporal goods and canon law restrictions on the alienation of stable patrimony may affect common law property transactions. The terms and the canons relating to them are examined. The need for a canonical administrator and the restrictions placed on the common law options by canon law may affect the charism exercised in a school. The thesis question arises because of declining numbers of congregational members and the future options discussed in the thesis involve greater, if not sole, participation of the laity. The role of the laity in canonical governance and their formation permitted by the Church is examined.

If the congregations must retreat from any involvement as the public juridical person in the educational bodies they now own, those educational bodies cannot properly continue to operate in the name of the Catholic Church according to canon law unless and until another public juridical person is approved for that purpose. In this context,

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40 For example, canons 805 and 806 illustrate the power of the local bishop to influence the charism of a school through the appointment of religious education teachers.
the potential utility of juridical persons and associations of Christ’s faithful and the need for formation of canonical administrators are relevant considerations.

Chapter 8: Conclusion

Chapter 8 concludes the thesis by proposing the best achievable legal option or options available to congregational schools within the context of the thesis question.

1.7 Conclusion

Chapter 1 has provided an overview of the structure of the thesis that will determine an answer to the thesis question. The purpose of the thesis is to consider and establish what common law structures are available to continue the charism of congregations in their schools when they no longer participate in the governance of them. It must then be determined whether any canon law provisions restrict or forbid the adoption of the common law options.

Chapter 2 will now examine the foundation of the need for an answer to the thesis question — the role of congregational schools in Catholic education. To do this it examines current Catholic education trends and the concept of the charism and its role in Catholic education. It considers the question ‘Why is Catholic education in congregational schools necessary within the Catholic education system?’. The central importance of both the charism and diversity in Catholic education validates the need for congregational schools to continue offering Catholic education without the active participation of the founding congregation.

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41 Code of Canon Law 1983 canons 113, 114 and 298 respectively.
CHAPTER 2

THE ROLE OF CONGREGATIONAL SCHOOLS AND CHARISMS

2.1 INTRODUCTION

Australians consider education a right rather than a privilege.\textsuperscript{42} Both federal and state governments provide a compulsory education system for all students.\textsuperscript{43} So important is education in Australian society that in WA the compulsory age for school attendance increased from 16 to 17 years old in 2007.\textsuperscript{44} Government schools, independent schools, home schooling and distance education meet this compulsory requirement.\textsuperscript{45}

Independent education,\textsuperscript{46} including Catholic education,\textsuperscript{47} has always formed an important part of the education system. Within the independent sector are Catholic diocesan schools and congregational schools. The Catholic education system plays a significant role in the Australian, and in particular the Western Australian, educational scene. This chapter discusses the role of Catholic education in the education system.

To provide a context for the thesis question, it explains the nature and role of

\textsuperscript{42} For example School Education Act 1999 (WA) s 3(1)(a) defines as one of the objects of the Act to ‘recognize the right of every child in the State to receive a school education’.


\textsuperscript{44} On 18 November 2005, the age increased to 16 years from 2006 and to 17 years from 2007 pursuant to s 6 School Education Act 1999.

\textsuperscript{45} School Education Act 1999 (WA) s 3(1)(b).

\textsuperscript{46} Independent education encompasses non-government education and includes independent schools of any or no religious affiliation.

\textsuperscript{47} ‘Catholic systemic schools are non-government schools administered by a Roman Catholic education authority for the State (State Grants (Schools) Act 1973 (Cth) s 3). They are governed by rules and regulations imposed by their diocese and are accountable to the Catholic Education Office for financial expenditure and school organisation.’ John Lessing, David Morrison and Maria Nicolae, ‘Educational Institutions, Corporate Governance and Not-For-Profits’ (2010) Corporate Governance eJournal 1, 5.
congregational schools and their place within the Catholic education system with particular reference to the significance of the charism of Catholic education.

2.2 THE ROLE OF AND NEED FOR CATHOLIC EDUCATION

Since colonial times, Catholic education has played a significant role in the provision of education. The comparison of the numbers of children enrolled in Catholic schools and non-Catholic schools highlights the significant proportion of children in Australia who receive a Catholic education. The percentage of enrolments in Australian schools in 2013, as presented by the Independent Schools’ Council of Australia (‘ISCA’), illustrates the number of children receiving a Catholic education, and when compared to enrolments in 1970, illustrates the growth in independent and Catholic school enrolment, as shown in Table 1.

Table 1 Percentage of Children Enrolled by School Type in Australia.

<table>
<thead>
<tr>
<th>School type</th>
<th>% enrolled in 2013</th>
<th>% enrolled in 1970</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government school</td>
<td>65.1</td>
<td>78.1</td>
</tr>
<tr>
<td>Catholic school</td>
<td>20.6</td>
<td>17.8</td>
</tr>
<tr>
<td>Non-Catholic independent school</td>
<td>14.3</td>
<td>4.1</td>
</tr>
</tbody>
</table>

The Catholic statistics include children currently enrolled in both diocesan and congregational schools. These percentages, when considered in the whole, are

48 For a detailed history of the role of Catholic education in WA, see Pendal, above n 15.
significant. There is no doubt that Catholic education plays a vital, expanding role in education in general, and in independent education in particular.

Carmel Leavey presented data in her ‘School Governance Project’ in 2000 showing that of the 47 Catholic schools in WA, 12 were congregational schools; a not insignificant percentage. The figures attest to the importance of Catholic education, of which congregational schools play an essential part.

The extent of Catholic education in WA becomes more obvious when the number of Catholic schools (diocesan and congregational) currently operating in the state are listed together in Table 2.

The number of children enrolled in Catholic secondary schools is lower than the number of children enrolled in Catholic primary schools. There is a trend for an increasing margin between primary and secondary school enrolment. Whilst there may be numerous reasons for this, in the absence of research data one (speculative) reason may rest in parents’ desire to have the ‘best’ secondary education for their children, which they perceive are present in non-Catholic independent schools. This increases the need for diversity and choice in Catholic schools to avoid an ‘exodus’ to other non-Catholic independent schools. The relevance of this to the thesis is that Catholic

51 Leavey, above n 3, 3 (Table 1.1).
53 Bishop Michael Putney also recognises this trend to other ‘private’ schools in ‘The Catholic School of the Future’ (2005) 82 The Australasian Catholic Record 387, 388 as did the Bishops of New South Wales and the Australian Capital Territory in their Pastoral Letter, Catholic Schools at a Crossroads (8 August 2007). The researcher also recognises that another speculative reason for parents not choosing Catholic secondary schools is that many Catholic schools lack the funding and resources available at other non-Catholic, private schools.
education must answer the demands made on it by parents in order to maintain enrolment numbers.

Table 2 Student Enrolment in WA Catholic Schools.

<table>
<thead>
<tr>
<th>Type of Enrolment</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
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<tr>
<td>Total All Schools</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Catholic Diocese</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kindergarten</td>
<td>2,314</td>
<td>2,310</td>
<td>4,624</td>
<td>2,377</td>
<td>2,270</td>
<td>4,647</td>
</tr>
<tr>
<td>Primary (PP-7)</td>
<td>18,465</td>
<td>18,211</td>
<td>36,666</td>
<td>19,625</td>
<td>18,515</td>
<td>38,140</td>
</tr>
<tr>
<td>Secondary</td>
<td>13,848</td>
<td>13,771</td>
<td>27,619</td>
<td>13,686</td>
<td>14,364</td>
<td>28,050</td>
</tr>
<tr>
<td>Total</td>
<td>34,617</td>
<td>34,292</td>
<td>68,909</td>
<td>34,755</td>
<td>35,085</td>
<td>69,847</td>
</tr>
</tbody>
</table>

Broome Diocese

<table>
<thead>
<tr>
<th>Type of Enrolment</th>
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<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Boys</td>
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Bunbury Diocese

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<th>Type of Enrolment</th>
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<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
<td>Boys</td>
<td>Girls</td>
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<td>Total</td>
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Geraldton Diocese

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<th>Type of Enrolment</th>
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<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
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<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
<td>Boys</td>
<td>Girls</td>
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<td>Total</td>
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Perth Archdiocese

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<th>Type of Enrolment</th>
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<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
<td>Boys</td>
<td>Girls</td>
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<td>Total</td>
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Group Funded

<table>
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<tr>
<th>Type of Enrolment</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
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<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
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</table>

Non-Group Funded

<table>
<thead>
<tr>
<th>Type of Enrolment</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Boys</td>
<td>Girls</td>
<td>Total</td>
<td>Boys</td>
<td>Girls</td>
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<td>Total</td>
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</table>

Special Schools

<table>
<thead>
<tr>
<th>Type of Enrolment</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
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<td></td>
<td>Boys</td>
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20
In March 2007, the then federal minister for education, the Honourable Julie Bishop, stated that there were three major criteria in assessing the quality of education in Australia in the 21st century: choice, standards and values. Real choice requires a range from which to choose and that choice must be available not only in education generally but within Catholic education specifically. The percentage of students in congregational secondary schools is significant, suggesting a demand that needs accommodating. Arguably, if congregational schools are no longer able to continue to function without the continued presence and involvement of the Brothers and Sisters of those congregations or their charism, then that demand may not be met. The continuation of the charism in the absence of the Brothers and Sisters depends on the commitment and formation of the schools’ leaders. This commitment and formation need protection, where possible, through legal mechanisms so that they are enforceable and enduring.

This thesis works on the premise that there is a continuing need for Catholic education in Australia and that need is illustrated in the enrolment figures of Catholic schools within Australia, and more particularly within WA. To establish that need from a Social Science perspective, rather than working from a presumption, would require a study extensive enough to provide a separate thesis; therefore, this thesis will not address this perspective.

55 Speech delivered to Association of Independent Schools of Western Australia (AISWA) ‘Briefing the Board Conference’ Hale School, Perth Western Australia, 24 March 2007.
57 To include that perspective in this thesis would not be possible within the word limit requirements of the thesis; further it would also not be consistent with the legal emphasis of this PhD.
2.3 Congregational Schools Within the Catholic Education System

The existence of congregational schools has a long history in the Church (see chapter 3) that has allowed a range of choice for Catholic parents when considering their children’s education. The congregational school ‘is a special place where the charism of the founder or foundress is fostered and promoted and where education is undertaken according to his or her particular style. This provides a school with its particular identity’. Kerr identifies the main characteristic of the congregational school:

Analysis of the respective characteristics of congregationally-owned and supported schools and diocesan or ‘systemic’ schools reveals that there are more similarities than differences between them. To begin with they all are Catholic. However, one characteristic of the congregational school which is distinctive is that each is a special place where the charism of the founder or foundress of a particular religious group is fostered and promoted and where education is undertaken according to his or her particular style.

‘[T]he mandate to carry on the apostolic work of education in a diocese is negotiated directly between the bishop and the congregation. The supervisory right of the diocesan bishop, affirmed and bestowed by canon 806 §1, is exercised in WA either by the diocesan bishop himself or through his delegation to the CECWA. The canon affords no assistance in determining the scope of the supervisory right, but the canon generally relates to Catholic education, for example, canon 806 §2 “reflects the ideals of Catholic education expressed in Gravissimum Educationis 8–9” by focusing on the

58 Kerr, above n 21, 21.
59 Ibid 5.
60 Ibid 6.
standard of education.\textsuperscript{61} Canon 803 §2 refers to education in Catholic schools being
‘based on the principles of catholic doctrine’ and ‘the teachers must be outstanding in
true doctrine and uprightness of life’, so the supervisory right of the diocesan bishop
would include at least a direction to the content of the religious education curriculum
and the standard of the teachers.

The diocesan bishop retains and exercises his supervisory role of congregational
schools through the CECWA.\textsuperscript{62} CECWA has two main roles:

1. the development and evaluation of Catholic school policy where the bishops
elect to adopt a joint policy in relation to Catholic education; and

2. action for each diocesan bishop in specified matters concerning the education
of Catholic children in his diocese.

\textsuperscript{61} Sharon A. Euart, ‘Title III Catholic Education’ in John. P Beal, James A Coriden and Thomas J
II, \textit{Gravissimum Educationis} (1965)
\textless http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-
ii_dec_19651028_gravissimum-educationis_en.html\textgreater . Documents issued by the Vatican apply
equally to all Catholic schools. For example see: Declaration on Christian Education, \textit{Gravissimum
Educationis} (1965), Vatican, [8]
\textless http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-
ii_dec_19651028_gravissimum-educationis_en.html\textgreater ; The Sacred Congregation for Catholic
Education, \textit{The Catholic School} (1977) Vatican, [45]
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_197
70319_catholic-school_en.html\textgreater ; The Sacred Congregation for Catholic Education, \textit{Lay Catholics in
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_198
21015_lay-catholics_en.html\textgreater ; The Sacred Congregation for Catholic Education \textit{The Religious
Dimension of Education in a Catholic School Guidelines For Reflection And Renewal} (1988) Vatican,
[66]
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_198
80407_catholic-school_en.html\textgreater ; The Sacred Congregation for Catholic Education, \textit{The Catholic
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_27
041998_school2000_en.html\textgreater ; Congregation for Catholic Education, \textit{Consecrated Persons and Their
Mission In Schools: Reflections And Guidelines}, (2002), Vatican, [38]
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_200
21028_conseccrated-persons_en.html\textgreater ; Congregation for Catholic Education (of Seminaries and
Educational Institutions), \textit{Educating Together in Catholic Schools: a Shared Mission between
\textless http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_200
70908_educare-insieme_en.html\textgreater ;
\textsuperscript{62} For discussion on the establishment of the CECWA see chapter 3.3.1.
These responsibilities are exercised through the CEOWA in Perth and its regional offices in Broome, Bunbury and Geraldton.63

Although congregational schools are subject to the supervision of the diocesan bishop, they also have a measure of autonomy within the Catholic school system. Canon 806 of the 1983 Code states:

§1. The diocesan bishop has the right to watch over and inspect the catholic schools situated in his territory, even those established or directed by members of religious institutes. He has also the right to issue directives concerning the general regulation of catholic schools; these directives apply also to schools conducted by members of a religious institute, although they retain their autonomy in the internal management of their schools.

§2. Those who are in charge of catholic schools are to ensure, under the supervision of the local Ordinary, that the instruction given in them is, in its academic standards, at least as distinguished as that in other schools in the region.

This autonomy is sometimes couched in terms of ‘independence’, which can be misleading64 and does not extend to issues relating to religious curriculum content as canon 803 §2 ensures Catholic education is ‘based on the principles of Catholic doctrine’. Kerr observes, when considering the ‘independence’ of congregational schools, that

… given that the existence of these schools is dependent on the agreement which exists between congregational authorities and the Bishop, no school can be said to be ‘independent’ without some further definition of terms. There is, however, a

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64 The independence usually refers to the degree of freedom in deciding whether to accept some decisions made by the relevant diocesan authorities in Australia. For example, when the CEOWA issued a directive to Catholic schools in WA relating to tuition fee reductions for parents who held a Health Care card, the directive was not accepted by some congregational schools who already heavily discounted those fees based on other financial criteria.
degree of independence with which trustees of religious institutes and through them, governing bodies of congregational schools, can make decisions concerning deployment of resources without the requirement to be accountable to systemic authorities. In their capacity of juridic persons, religious institutes can make commitments to the wider church and to future ministries; through their schools they can carry out this commitment.65

The CECWA, through the CEOWA, maintains the larger percentage of student enrolments within the Catholic education system. Yet governance from a central administration for all, or the majority of, Catholic education does not promote diversity as well as it does when there are more options available. A centralised overriding governance body of schools using the same generic board constitution on an immediate level with the particular school that provides no reference to the school’s charism does not encourage or support diversity in the character of the school. Lack of choice should not stymie the parental right, recognised by the Church, to determine their child’s education.66 Wilson comments that ‘among the Church’s members, there are different gifts, offices, conditions and ways of life … The great richness of such diversity is not opposed to the Church’s unity’67 — diversity aids choice. 68

65 Kerr, above n 21, 6.
68 Rogers notes the diversity of charisms as early as the Pauline Christian community that was ‘enriched by the Holy Spirit with multiple charisms…’and that the ‘exercise of these charismata by the faithful constitutes the dynamic centre of the Church’s life, and tends to produce true community in the Spirit.’: Patrick Rogers, ‘Pastoral Authority Then and Now’ (1981) 48 Irish Theological Quarterly 47, 56.
One of the most significant Church documents on diversity within Catholic education is *Gravissimum Educationis*. It acknowledges and defines the essential elements of a Catholic education, including parental responsibility and choice:

Parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools … [and should be] truly free to choose according to their conscience the schools they want for their children.\(^{69}\)

This statement expresses the rights of parents within their government systems to choose a religious education for their children if they so desire, where it is available. The Catholic education system should not diminish this right and duty; parents must be able to choose what style of Catholic education they wish for their children.

Paragraph 8 of *Gravissimum Educationis* explains that the function of the Catholic school has an ‘atmosphere animated by the Gospel’, which assists students to grow and ‘develop their own personalities’ through ‘news of salvation … illumined by faith’.\(^{70}\) Congregational schools offer diverse interpretations of the Gospel through the charisms adopted by their founders. An important aspect of congregational schools is therefore the diversity that they bring to the Catholic education system. They have provided communities and parents with choice in relation to their Catholic education, often within the tradition of a family where successive generations attend schools specifically because of the congregation associated with them. However, the necessary withdrawal of members of the congregations from their schools because of their diminishing and ageing membership threatens the continued diversity of Catholic education.

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\(^{69}\)Vatican Council II, *Gravissimum Educationis*, above n 61, [6].

\(^{70}\) Ibid.
education if new common law and canonical structures cannot replace the congregations in their role of ownership and governance of the schools.

The Church recognises the need for diversity within education:

The Church upholds the principle of a plurality of school systems in order to safeguard her objectives in the face of cultural pluralism. In other words, she encourages the co-existence and, if possible, the cooperation of diverse educational institutions which will allow young people to be formed by value judgments based on a specific view of the world and to be trained to take an active part in the construction of a community through which the building of society itself is promoted …

… precisely because the school endeavours to answer the needs of a society characterised by depersonalisation and a mass production mentality which so easily result from scientific and technological developments, it must develop into an authentically formational school, reducing such risks to a minimum.71

Whilst this passage relates to plurality of systems alongside which Catholic schools exist, there is no reason to limit it to a single Catholic system; the ‘diverse educational systems’ so essential to the quoted passage may also include those within the Catholic education system itself. The Church’s reliance on and support of congregational schools since Australian colonial times further supports this view.

There are diverse ways of experiencing that education through the Gospels, as evidenced by the differing charisms of individual founders of congregational schools existing in those schools today. Catholic education needs congregational schools to

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enable it to deliver diversity. ‘The charism of Catholic education has to do with unity rather than uniformity. There can be unity in diversity.’

Diversity of schools and the styles of education represented by distinct charisms also provides parents with choice that reflects their needs. Choice of education entails choice of school:

Among all educational instruments the school has a special importance. It is designed not only to develop with special care the intellectual faculties but also to form the ability to judge rightly, to hand on the cultural legacy of previous generations, to foster a sense of values, to prepare for professional life.

The Church declared the need for different types of Catholic schools ‘in keeping with local circumstance’. That ‘local circumstance’ can extend to the varied needs and challenges facing school students living in 21st century WA:

… the catholic school must be able to speak for itself effectively and convincingly. It is not merely a question of adaptation, but of missionary thrust, the fundamental duty to evangelise, to go toward men and women wherever they are, so that they may receive the gift of salvation.

Congregational schools have played an important part in Catholic education in Australia. Identification of legal mechanisms that allow congregational schools to continue is essential to provide that necessary diversity and range within Catholic education recognised by the Catholic Church:

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72 Timothy J Cook, ‘Discovering Charism: What is it and where can my School get One?’ (Presentation at the Fifth International Conference on Catholic Educational Leadership, Australian Catholic University, Sydney, Australia, August 2010).
73 Vatican Council II, Gravissimum Educationis, above n 61.
74 Ibid.
75 Sacred Congregation for Catholic Education, The Catholic School on the Threshold of the Third Millennium, above n 61, [3].
The place, the significance and the stature of the congregational school are enshrined securely in the Australian educational landscape. Irrespective of governance structures, charisms and funding mechanisms, its role is irreplaceable and the investment of human and material resources in [it] becomes a prophetic choice — a sign of the Kingdom.76

Congregational schools bring diversity within Catholic education, but a central governance of Catholic schools by the bishops through CECWA/CEOWA without congregational schools’ and their charisms undermines diversity, which is then lost if the school continues to operate but loses its distinct charism previously lived by the congregation.

The current legal structures that allow the congregations to own and govern their schools do not apply when the congregations either do not exist or have no participation in the schools. Central to this is the argument that congregational schools need to be able to protect and continue to live, maintain and transmit their charism. This is the core issue of this thesis, which seeks to identify ways in both common law and canon law to maintain the charism of the congregational schools when the members of the congregations cannot directly do it. An explanation of the charism is therefore required in order to identify what the thesis is seeking to protect.

76 Kerr, above n 21, 2; Sacred Congregation for Catholic Education, \textit{The Catholic School on the Threshold of the Third Millennium}, above n 61, [21].
As noted in Chapter 1, charism is essentially a specific gift or grace of the Holy Spirit that directly or indirectly benefits the Church, given in order to help a person live out the Christian life, or to serve the common good in building up the Church.\(^{77}\)

In general, charisms: (1) are special gifts that equip the faithful for a way of life or a specific ministry in the Church; (2) originate with the Holy Spirit; (3) are given to founders of religious congregations; (4) are subsequently transmitted from founders to followers; (5) are authenticated by the Church’s pastors, who share responsibility with religious congregations for preserving them; (6) are distinctive; and (7) should be used for the ongoing renewal of the Church.\(^{78}\)

The 1983 Code does not use the term ‘charism’.\(^{79}\) The charisms of the congregations reflect the religious dimension of Catholic education.\(^{80}\) A charism given to the founder

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\(^{77}\) *Catechism of the Catholic Church*, above n 4, 870. It is ‘understood as a grace of the Holy Spirit acting on and through the members of the Christian community, in order to receive and to preach the gospel for the service of the Kingdom of God’: Conor Francis Finn, *An exploration of How Identity Leaders Perceive and Institutionalise the Edmund Rice Charism* (PhD Thesis, Australian Catholic University, 2013) 6, referencing D. Dorsey Reverend William Howard Bishop: Toward an Understanding of his charism as Founder of the Glenmary Home Missioners (Institute of Spirituality Pontifical Gregorian University, 2003).


\(^{79}\) ‘The [Vatican] Council, which frequently refers to the presence of charisms in the Church, does not hesitate to regard the right to exercise charisms as one of the principle rights of the faithful; this right is completely neglected in the Code’: Eugene Corecco ‘Canon Law and Communio: Writings on the Constitutional Law of the Church’ [http://www.academia.edu/7719268/Eugenio_Corecco_Canon_Law_And_Communio_Writings_On_The_Constitutional_Law_Of_The_Church]. The term was first used by St Paul – see for example, Romans 12:3 – 8, Corinthians 12:4 – 11 and Ephesians 4:7 – 16: Michael Green, *Charisms* Monograph, (address given at the inaugural Australian Catholic Secondary Principals’ Conference, Melbourne, April 2000), 5. Terms used by the 1983 Code include gifts and grace (can 577), nature, purpose and spirit (can 578 and 587), discipline (can 586) and character and purpose (can 611).

\(^{80}\) For example, ‘[T]he charism of the founder and the spirit of the order are intended to be significant influences upon the culture and work of those Catholic schools derived from these traditions and
or foundress of an Order ‘is a gift of the Spirit to an individual for the good of others’ and is defined ‘as it is lived now’. The teaching, the values and the ethos of the school all reflect the charism, which ‘adds to school identity the dimension of school giftedness and contribution to Church and society’. It carries through to the way in which the school conducts itself, importantly through the governance of the school. ‘[M]aintaining the vitality and relevancy of the charism sharpens the focus and clarifies the distinctiveness and authenticity of the institution’s identity’. The governance structures, and the conduct of those in governance roles, are the ‘custodians’ of ensuring that the charism is present, maintained and continues to guide the school. Canon 578 provides that:

The mind of the founders and their dispositions concerning the nature, spirit and character of the institute which have been approved by the competent ecclesiastical authority, together with its sound traditions, all of which comprise the patrimony of the institute itself, are to be faithfully observed by all.

The charism directs the governance and management of the school. This would be lost if the congregational school is unable to retain its ‘autonomy’ and its charism. The relation of the charism to governance is described as follows:

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origins”: Gerald Grace, Catholic Schools: Missions, Markets and Morality (Routledge, 2002) 129 cited in Denis McLaughlin, ‘The Education Charism of Blessed Edmund Rice’ June (2006) Australian eJournal of Theology 1, 1. Likewise, ‘Charisms are distinctive ways of incarnating, of living, Christian faith – ways that may be incarnated in a particular person, a particular lifestyle, a particular ministry, or a particular tradition in the Church’: Michael Green, Charisms, above n 79, 5. 81 John Carroll Futrell, ‘Discovering the Founder’s Charism’ (1971) 14 The Way Supplement 62. 82 Cook and Simmonds, above n 66, 321. 83 Finn, above n 77, 8 referring to congregations. ‘The cultural mores of the school then become the ways in which the Gospel is incarnated, allowed to take flesh in time and place, as it must…If this cultural tradition remains faithful to its founding charism and to the Gospel, and if it proves it can be relevant for its present-day protagonists and circumstances, then a school could be said to have a “charismatic culture” – a place where the Gospel can be incarnated ’; Green, Charisms, above n 79, 7. 84 ‘Charisms are core spiritual forces and reference points that the Holy Spirit provides to stabilise and to change sponsored ministries such as Catholic colleges and universities’: Sanders, above n 27, 8.
GOVERNANCE is the framework which enables the

CHARISM – which is the gift – the living Gospel to be expressed in the

MINISTRY – which is the medium to achieve the

MISSION OF JESUS – which is the mission of the Church – the purpose to
be achieved.85

Charisms in congregational schools where the members of the Orders are no longer taking a controlling or any other role in the schools’ governance are essential because they give Catholic schools the diversity that the Church also sees as crucial. The active participation of the congregations’ members in governance currently protects the charisms. Can the charisms endure within any new legal governance frameworks without the members’ active participation? If not, then the continued survival of the congregational school in Catholic education is questionable.

Students replicate or imitate the values associated with the charism of any particular congregation:

… a school is not only a place where one is given a choice of intellectual values, but a place where one has presented an array of values which are actively lived. The school must be a community whose values are communicated through the interpersonal and sincere relationships of its members and through both individual and corporative adherence to the outlook on life that permeates the school.86

This ‘array of values’ is presented in congregational schools through the interpretation of Gospel living as it is evidenced in the charism of the congregation. Charisms are associated and identified with particular congregations but belong to the Church:

85 Catherine Clarke, rsj Charism and Spirituality (Paper presented at the Australian Conference of Leaders of Religious Institutes Conference June 2005) 3.
86 Sacred Congregation for Catholic Education, The Catholic School, above n 61, [32] and [27].
Whether extraordinary or simple and humble, charisms are graces of the Holy Spirit which directly or indirectly benefit the Church, ordered as they are to her building up, to the good of men, and to the needs of the world.87

Charism relates to the Gospels, Identity and Spirituality. The relationship between charism and the Gospels is of particular importance to education because [t]he connection of the charism to the Gospel story is fundamental. Charisms are distinctive ways of incarnating and living the Gospel. They are a particular igniting of the spirit of the Gospel … The different charisms of the followers of Christ are the many facets, the multidimensions and the different voices of the Gospel imperative.88

The cultural and spiritual legacies of previous generations in congregational schools are the individual interpretations of the Gospels by the founders, as exercised by members of the congregations since their foundation. Catholic education as a whole does not need to be standardised, creating homogenous school units across the world bearing little resemblance to the schools described in Gravissimum Educationis. How the education is imparted and the example with which it is lived is specific to certain orders — that example is a direct product of the charism of the congregation.

Legal mechanisms to protect the future of the charism have not been necessary while the congregations remained in active participation within the schools, and as a result, many schools have no separate structure or identity; they operate as a part of the canonical or legal entity that is the congregation. Many members of congregations

87 Catechism of the Catholic Church, above n 4, number 799, 212.
88 Clarke, above n 85, 2.
were themselves previously educated by that same congregation, so the learning of their charism was

... a quite insular and extraordinarily strong, consistent, and self-reinforcing process. There was consequently no need to articulate or expound a theory of [the congregation’s] education: it was learnt naturally and reinforced powerfully, by all the classic cultural mechanisms — heroes, stories, myths, customs, rituals, accepted practices, dress, sacred sites, cultural networks tribal/family language, bonds and loyalty. 89

The challenge for these congregations now is that few, if any, members are teaching in their schools; the charisms’ future lie in the hands of the lay teachers and leaders of their schools, many of whom were not educated by that congregation. 90 Common law mechanisms will need to be able to work alongside canonical obligations to ensure that the charisms continue in the congregational schools even when the congregations cease to have any, or any effective, governance of the schools.

The WA bishops’ Mandate states that ‘[t]he Commission will continue to recognise and make provision for Religious Institutes that operate Catholic schools in WA and will respect their particular charisms’. 91 This implies diversity in Catholic education through congregational schools. That ‘provision’ relates to funding and flexibility in funding. Congregational schools may choose funding from external sources but also from the CEOWA group funding. The CEOWA continues to recognise that governance of congregational schools remains with the congregations. 92

89 Michael Green, ‘A Future for Charisms in Education: Marist Schools as a Case Study’ in Keane, R and Riley, D (Eds), Quality Catholic Schools: Challenges for Leadership as Catholic education approaches the third millennium (Archdiocese of Brisbane Catholic Education, 2000) 97.
90 Ibid 96.
91 Mandate, Mandate Letter, Terms of Reference and Membership of the Catholic Education Commission of Western Australia 2009 - 2015, 3.
92 Some issues that may apply in diocesan schools may not apply in congregational schools, eg, professional development sessions, staff conditions, staff appointments etc.
Congregational schools appoint their own principals and deputy principals (usually with a member of the CEOWA on the interviewing panel), whereas CEOWA makes those appointments for diocesan schools.

The Mandate acknowledges respect for the charism of the congregation, recognising that the school has not just the Catholic ethos but also the ethos of the congregation. The congregational schools may also promote the charism of their founder in religious education classes in addition to the prescribed CEOWA curriculum.

The importance of this Mandate statement to the thesis is that the diocesan bishops openly recognise and accept the importance of the charisms of the congregational schools. Canon 576 speaks of the responsibility of the bishop to a congregation and Mutuae Relationes recognises that the bishops ‘are also entrusted with the duty of caring for religious charisms’. Canon 677 §2 bestows responsibilities on the congregation. The mutual relationship of bishops and congregations, and the congregations’ duties, currently protects charisms in congregational schools through the application of the Mandate. It can continue to protect the charisms in any future change of governance in the congregational schools. This protection, however, is not enforceable in common law.

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93 ‘It is the prerogative of the competent authority in the Church to interpret the evangelical counsels, to legislate for their practice and, by canonical approval, to constitute the stable forms of living which arise from them. The same authority has the responsibility to do what is in its power to ensure that institutes grow and flourish according to the spirit of the founders and to their sound traditions.’

94 It makes this statement after reinforcing that the bishops’ ministry is teaching, sanctifying and ruling.

95 Sacred Congregation for Religious and for Secular Institutes and Sacred Congregation for Bishops, Mutuae Relationes, above n 78, [9c]. The enhancement of mutual relations between the bishops and the congregations is essential to ‘building up the body of Christ’, [23].

96 Code of Canon Law 1983 canon 677 §1. ‘Superiors and members are faithfully to hold fast to the mission and works which are proper to the institute. According to the needs of time and place, however, they are prudently to adapt them, making use of new and appropriate means.’

97 The concept of mutual relations between the bishops and congregations is not canon law and therefore there is no recourse to the appeal procedures in the Code of Canon Law 1983.
2.5 CONCLUSION

Independent education, including Catholic education, is an important part of the Australian educational landscape. Catholic education is in demand, as endorsed by recent statistical data in enrolment figures; parents keenly seek and educators across Australia highly regard congregational schools. Although an education system run by the CECWA exists, there is a continuing need to preserve the diversity within Catholic education. A substantial reduction in that diversity will occur if the ownership and governance of all schools vests in the Catholic Church and CECWA respectively. It is argued that the loss of the congregations’ charisms will lead to a standardised Catholic education system. Congregational schools remain necessary in order to provide diversity within Catholic education. The individual charisms of the congregations make each of their schools a unique Catholic educational experience and choice. The nature and role of congregational schools and their place within the Catholic education system is essential because the charism in Catholic education has long been regarded by the Church as significant and therefore worthy of preservation and enhancement.

The questions remain as to whether protection of the charisms in congregational schools is possible without the congregations’ participation, or indeed, whether protection of the charisms in diocesan schools occurs through legally enforceable means and whether the common law can assist in achieving this highly desirable result. However, in order to identify an appropriate legal structure it is first necessary to identify the current legal status and governance structures of diocesan and congregational schools in order to determine whether they are suitable vehicles for continuing governance. Chapter 3 identifies these structures.
CHAPTER 3
CURRENT LEGAL STATUS AND STRUCTURES OF THE
CHURCH AND DIOCESAN AND CONGREGATIONAL
SCHOOLS

3.1 INTRODUCTION

Identification of current legal structures assists in determining whether new common law and/or canon law structures are required to protect and continue congregations’ charisms when they are no longer active in ownership or governance of their schools. The Catholic Church delivers Catholic education in WA through two avenues: the diocesan schools and congregational schools. The governance and ownership structures used by the congregational schools and diocesan schools vary greatly. In terms of diocesan schools, the local diocesan bishop is the registered proprietor, as a corporation sole, of the real estate of the schools and is the party in any legal action relating to the property.98 However, the bishops (other than as corporations sole for property matters), CECWA and CEOWA have no legal status. Congregations on the other hand, own and govern their schools through various legal structures, subject to the supervision of the religious curriculum in their schools by the diocesan bishop.99 The legal structures adopted by the congregations include the incorporated association, the company limited by guarantee and the statutory corporation.

This chapter will consider those diverse current governance and ownership structures of both the diocesan schools and the congregational schools of the Christian Brothers in Australia and the Presentation schools in WA and Qld to determine what, if any,

98 Contractual and tortious liability of the Church and the Dioceses are less clear and will be discussed in Chapter 4.
changes are required in those structures. In order to place the discussion on diocesan schools in context, the chapter first identifies the legal structure of the Catholic Church. It then explains and examines the role and legal status of the CECWA and CEOWA, which effectively govern the diocesan schools. Discussion then follows on the legal status of the current governance structures of the Presentation schools in WA and Qld, and of the Christian Brothers schools. This provides background for further analysis of the legal structures, considered in Chapter 4.

3.2 THE LEGAL STRUCTURE OF THE CATHOLIC CHURCH

‘In the Christian context, “the church” means a grouping of people who have a common religious belief, founded on the person of Jesus Christ. The Church then is not so much a physical “thing” as it is a community of “people”’.100 The ‘Church’ in canon law has no separate juridical personality,101 or identity as a ‘being’; therefore, in canonical terms the Church is not an entity. The juridical entity of the diocese or parish has relevance to the canon law aspects of this thesis. When discussing legal issues it is wrong in canon law to refer to the Church as an entity; rather the diocese or parish is the object of such discussion. However, in common law the Church is an unincorporated association, as are the diocese and parish.102

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100 Lucas, Slack and d’Apice, above n 5, 24.
101 Canon 1254 refers specifically to the Universal Church as being able to acquire property but in the local Australian context, the ‘Church’ does not have juridical personality. The Australian Catholic Bishops’ Conference, dioceses and parishes do have separate juridical personalities. Detailed discussion of juridical persons occurs in chapter 7.3. They are ‘an aggregate of persons or things’ (canon 113 §2) and in canon law are ‘subjects of obligations and rights which accord with their nature’ (canon 113 §1).
102 Further discussion occurs at chapter 4.3.
Within the Catholic Church in WA there is one archdiocese in Perth and three dioceses in Bunbury, Broome and Geraldton, each with an archbishop or bishop at its governance head. The dioceses of Perth, Bunbury, Geraldton and Broome together constitute the ecclesiastical province of Perth. The Archbishop of Perth is the Metropolitan of the Province. "The spirit of the law is to minimise the involvement of the metropolitan in the affairs of the suffragan dioceses".

The dioceses are part of the Church hierarchy. The dioceses represent the Church

‘Within the diocese the bishop has the responsibility for teaching and pastoral government’.

The dioceses are separate juridical persons and the diocesan bishops are the representative of the dioceses and may be, for common law purposes, the relevant legal entity in any legal proceeding. They are so in their personal capacity not their office, as the office does not have any separate common law identity. Confusion arises when issues in canon law and common law intersect, as the Church has no common law status other than as an unincorporated association, which is not a legal entity with

103 Dioceses are often created to coincide with geographical boundaries to easily interact with the civil government of the region: Lucas, Slack and d’Apice, above n 5, 130.
105 Ibid canons 435 and 436.
106 Ibid canons 381, 391 and 393.
107 Ibid canons 431 and 432. The powers of the position are set out in canon 436. Each diocesan bishop is a separate statutory corporation sole in relation to property and each has exclusive governance of his diocese. All four positions are ’equal’.
108 Lucas, Slack and d’Apice, above n 5, 133.
109 Ibid 39.
110 The diocese is defined in canon 369, it can only be created by the Pope and obtains juridical personality by law (canon 373). It is, by virtue of canon 372 §1, usually a defined territory and that is the case in WA. A diocese is divided into parishes (canon 374 §1), which are separate canonical entities (canon 515 §3) although in common law are recognised as an unincorporated association with no common law identity.
111 See also, Vatican Council II, Lumen Gentium, above n 9, [21] and [23].
112 Determining the correct parties to proceedings involving the Catholic Church is a difficult concept: see Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565 and Royal Commission into Institutional Responses to Child Sexual Abuse, Submission from the Truth Justice and Healing Council, Issues Paper No 5 Civil Litigation. The issue is discussed at length in Chapter 4.
rights and obligations. However, the diocese and parish have a clearly identifiable canon law identity as juridical persons.\footnote{The unincorporated association and its place in common law are discussed in detail in chapter 4.3.}

The office of each bishop in common law is a statutory corporation sole acting independently of each other. The Roman Catholic Bishop of Perth was originally established as a statutory corporation sole.\footnote{Roman Catholic Church Property Act 1911 (WA) s 4(1).} Subsequently, the term ‘archbishop’ was substituted for ‘bishop’ in 1916.\footnote{Roman Catholic Church Property Acts Amendment Act 1916 (WA) s 3; The corporation sole is known as ‘The Roman Catholic Archbishop of Perth’. Due to the growth of the Diocese of Perth, it became an Archdiocese hence the need for the change in the name of the corporation sole.} The bishops of Geraldton, Bunbury and Broome are also individual statutory corporations sole.\footnote{Roman Catholic Geraldton Church Property Act 1925 (WA) s 4; the corporation sole is known as ‘The Roman Catholic Bishop of Geraldton’. Roman Catholic Bunbury Church Property Act 1955 (WA) s 4; the corporation sole is known as ‘The Roman Catholic Bishop of Bunbury’. Roman Catholic Vicariate of the Kimberley’s Property Act 1957 (WA) s 4; the name of the Act changed pursuant to section 9 of the Roman Catholic Vicariate of the Kimberleys Property Act Amendment Act 1970 (WA). The corporation sole is known as ‘The Roman Catholic Bishop of Broome’. The Abbot of New Norcia (a Benedictine Monk Community) was also a corporation sole and known as ‘The Abbot Nullius of New Norcia’ pursuant to s 4 of the Roman Catholic New Norcia Church Property Act 1929 (WA). ‘The Abbey Nullius of New Norcia was suppressed and incorporated within the Archdiocese of Perth on 12 March 1982’ - Lucas, Slack and d’Apice, above n 5, 267.} This essentially means that the bishops hold any diocesan property in their name as the statutory corporation sole of the office of the diocese. The statutory corporation sole is a separate legal entity to the person who holds the office related to it (eg the bishop). The relevant statutes limit their status as corporations sole to legal issues relating to property only.\footnote{Discussion and definition of the corporation sole occurs in chapter 4.2.} In all other matters, unrelated to property, common law recognises that that the Roman Catholic Church is an unincorporated association\footnote{Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects & Planners [2005] NSWSC 381.} and not a statutory or common law corporation sole.\footnote{Archbishop of Perth v AA to JC Inclusive (1995) 18 ACSR 333. The office of the diocesan bishops in canon law is the representative of the juridical person that is the diocese. Canonically, the dioceses constitute separate public juridical persons. A corporation sole may be statutory – created by a specific statute, or a common law corporation sole – arising from common law without statutory recognition.}
The common law status of the diocesan bishops in non-property matters is uncertain. They could be either:

- a corporation sole at common law — this seems unlikely in light of *Archbishop of Perth v AA to JC Inclusive* (1995) 18 ACSR 333, which leaves open the possibility that the Church could be a corporation sole at common law, but dicta in the case suggests it is unlikely a court would decide this;
- personally liable — as in *Barry James Hickey Archbishop of Perth v Independent Schools Salaried Officers Association* [2003] WAIR Com 10127 (24/10/03); or
- an agent for an unincorporated association, that is, the bishops representing the Church as the heads of the dioceses.\(^{120}\)

An examination of the legal status and governance of diocesan schools and the role of the CECWA and CEOWA may assist in identifying which, if any, of these common law statutes applies to the Church in non-property matters relating to diocesan schools.

### 3.3 Legal Status and Governance of Diocesan Schools

This section discusses the legal status and governance of diocesan schools with reference to the role of the CECWA and CEOWA in the governance and management of diocesan schools.

#### 3.3.1 The Role of the Catholic Education Commission of Western Australia

In 1971, all four diocesan bishops collectively agreed to delegate matters pertaining to the management and delivery of education in Catholic schools to one central body —

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\(^{120}\) These possibilities are discussed in detail in chapter 4.
the CECWA. Prior to this, each diocesan bishop managed education within his own
diocese. Whilst the curriculum content of courses was similar in each diocese,
management was not. A central body provided the opportunity for more consistency,
particularly with the then increasing intervention of state and federal government
funding bodies and the decline in enrolment numbers in Catholic schools.121 The
CECWA ‘[p]rovides broad policy decisions and advisory and consultative services for
the Church and various government agencies’ and operates through its executive arm,
the CEOWA.122

The CECWA has no specific common law or canonical status. It was, and remains,
merely a group of people who serve the diocesan bishops by administering education
in Western Australian Catholic schools on behalf of the diocesan bishops. In practical
terms, it is an advisory body to the diocesan bishops on Catholic education in the state,
and assists in the management and administration of that education.

The diocesan bishops delegated the administration of Catholic education to the
CECWA, not its governance. They did so at a critical time, when enrolments were
falling in Catholic schools. Bishop Peter Quinn later acknowledged the uniqueness of
the concept of delegating the administration of education to one body and the lack of
any need for a canon law requirement to do so:

... a key part was whether we should hand over administration to a Commission or
whether we should do it on a diocese-by-diocese basis. Although it was quite
unique it did not need to go to Rome.123

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121 Pendar, above n 15, 243. For most other States in Australia, ‘the 1972 Armidale Conference was
the springboard for action in the establishment of parish, diocesan, state and national groups to
systematis the delivery of Catholic education in Australia’. (WA was represented at the conference
by Peter Tannock): Casey, above n 32, 5.
122 Catholic Education Commission of WA,
123 An interview with Bishop Peter Quinn by Phillip Pendar quoted in Pendar, above n 15, 240.
3.3.1.1 The Mandate

When the diocesan bishops delegated the administration of education within their dioceses to one body, the CECWA, they each retained their corporation sole status in relation to property and simply created a ‘group’ to assist them in the administration of education, a group that had no separate common law structure. The diocesan bishops direct the apostolate of Catholic education through the ‘Mandate’, which is issued on a cyclical basis, usually every five years, through the CECWA. The most recent direction from the diocesan bishops to CECWA came within the 2009–2015 documents titled the ‘Mandate, Mandate Letter, Terms of Reference and Membership of the Catholic Education Commission of Western Australia’. The current Mandate’s introduction reads:

We, the bishops of Western Australia, mandate the Catholic Education Commission of Western Australia to foster the continuous development and improvement of Catholic schools and to act on behalf of the Catholic community for the benefit of all Catholic school-aged children, be they in Catholic schools or not.

The Commission is appointed by the bishops of Western Australia and is responsible to them. The Commission is to generate official state-wide policies and assist the individual bishops with Catholic schools in their own dioceses.

The Commission will continue to recognise and make provision for Religious Institutes that operate Catholic schools in Western Australia, and to respect their particular charisms.

124 The Bishops of Western Australia, Mandate of the Catholic Education Commission of Western Australia, Catholic Education Commission of Western Australia, 2009 – 2015, 5. The previous Mandate related to 2003 – 2007. The bishops deemed it to continue in its application until the 2009 – 2015 Mandate was completed and released.
This Mandate is given for seven years from the first of January 2009.\textsuperscript{125}

This does not suggest a new body responsible for Catholic education, in either common law or canon law, but rather a group to assist the diocesan bishops in their governance of that education. In a practical sense, this requires delegated authority to the CECWA to undertake activities on the diocesan bishops’ behalf. This leads to the contention that the Mandate is a tool of delegation only with all legal liability remaining with the diocesan bishops as representatives of the Catholic Church (an unincorporated association).

3.3.1.2 Legal Status of CECWA and CEOWA

Diocesan bishops employ Catholic school principals and are party to the Enterprise Bargaining Agreements.\textsuperscript{126} Principals sign contracts with their staff but do so with the delegated authority of the diocesan bishops. This delegated authority is contained in the standard deed between principals and bishops.

The employer in a diocesan school is the relevant diocesan bishop, not the CEOWA. Therefore, in any legal action relating to a diocesan school, the diocesan bishop is the actionable party either as an agent of the unincorporated association or in his personal capacity.\textsuperscript{127} However, over at least the past 15 years there has been inconsistency in the naming of the legal parties, for example, in industrial actions. These inconsistencies (highlighted in bold) include:

\textsuperscript{125} The four Bishops then signed the mandate, including Archbishop Hickey, and the auxiliary Bishop of Perth. (An auxiliary bishop is appointed where a diocese is too large and/or the work within it is too great, for one person (canon 403 §1). Bishop Donald Sproxton is currently auxiliary bishop of the Archdiocese of Perth.)

\textsuperscript{126} See Code of Canon Law 1983 canons 381, 391 and 393, which determine the Bishops’ governance powers. The Executive Director of CEOWA employs CEOWA employees.

\textsuperscript{127} An action arising in the Broome diocese is therefore between \textit{Jane Doe v. Roman Catholic Bishop of Broome}; if an action arose in Perth it would be \textit{Jane Doe v. Roman Catholic Archbishop of Perth}. 

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• Frances Holyoak v Roman Catholic Archbishop of Perth Incorporated [1989] WAIRC 437 (12/09/1989);

• Bianca Naso v The Roman Catholic Archbishop of Perth (Inc) and Our Lady of Mt Carmel School Board [2002] WAIRC 05136;

• The Most Reverend Barry B Hickey, Archbishop of Perth v The Independent School Salaried Officers’ Association of Western Australian, Industrial Union of Workers [2003] WAIRC 10127;¹²⁸ and

• Liquor, Hospitality and Miscellaneous Union, Western Australian Branch v The Roman Catholic Church of Bunbury and Ors [2006] WAIRC 05670.

It appears that the Church lawyers prefer not to challenge plaintiffs or applicants on the misuse of the nomenclature of the legal party required when joining the Church in actions as a defendant or respondent. Whilst the thesis cannot ascertain why this is so, it leads to the presumption that the Church will accept responsibility to be included in legal actions in most cases where it is relevant and obvious that they should be (such as in industrial matters relating to diocesan schools).

Whilst usually a respondent, in one example the Church has been the applicant in an industrial matter and commenced proceedings in the name of the archbishop’s office as Roman Catholic Archbishop of Perth v The Independent Education Union of Western Australia, Union of Employees [2007] WAIRC 00193. This does not explain or determine whether that office is in a personal capacity or as an agent of the Church. In both 2009 and 2012, the Church (as school employer) was referred to as ‘The

¹²⁸The archbishop is here named as the Appellant but the Plaintiff at first instance, to join the archbishop, used this party nomenclature.
Roman Catholic Archbishop of Perth’ in Enterprise Bargaining Agreements, 129 but again there is no indication whether that is in a personal or agency capacity. As the CEOWA has no legal status it cannot sue or be sued. 130

The CECWA’s policy binds all Catholic schools. 131 However, in practice the CECWA’s governance of the congregational schools does not extend to the management of the school as it does in diocesan schools where the CECWA’s policies centrally direct governance and management. Diocesan bishops delegate the management of choosing the final candidates to the CECWA who in turn delegate it to the CEOWA to appoint diocesan principals and deputy principals. This contrasts with the congregation, which appoints the principals in the congregational school (governance); the principals in turn appoint their own staff with delegated authority from the congregation (management). Depending on the congregation, this delegation may be in a written instrument or, like the CECWA, may be an historical practice. 132

The congregation in its common law capacity is the employer in congregational schools.

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130 Whilst the focus of this thesis is WA, it is instructive to note that other Australian states have different legal structures. For example, in Victoria, there is no centralised CEO, and each diocese manages the schools within it. See for example Catholic Education Melbourne, About Catholic Education, (2010) <http://www.ceomelb.catholic.edu.au/about-catholic-education/>. Parish priests are responsible for their parish schools. In New South Wales, the bishops are not corporations sole but body corporate trustees. This gives rise to further variants within Catholic education management in Australia that congregations may need to consider when determining any future form of federation or national amalgamation. For discussion on when the Catholic Education Commissions were established, and which model each state chose, see generally Casey, above n 32, and Leavey, above n 3.

131 Code of Canon Law 1983 canons 806 and 683 bestow on the bishops powers and duties in relation to Catholic schools. As the bishops delegate the administration of education to CECWA, the policy of CECWA is the policy of the bishops. In practice, the researcher has observed that there is rarely a clear distinction between all governance and management issues and this can be reflected in the governance and/or management documents.

132 Therefore, in any legal action relating to a congregational school such as Iona Presentation College the actionable party is The Congregation of the Presentation Sisters (WA) Inc – Jane Doe v The Congregation of the Presentation Sisters (WA) Inc.
The CECWA’s governance in relation to congregational schools extends to ensuring correct and appropriate religious education in the curriculum, and in some cases, the distribution of funding from government sources, and any other matters that the congregational school accepts as governed by the CECWA through the CEOWA. In the context of funding, the federal government divides schools into ‘levels’, which determines the amount of government financial assistance a school receives. If a school is group funded, the CEOWA receives the money from the government through the CECWA Trustees, who then distribute the funds to the schools.

Governance and management within the Church occurs in terms of dioceses and the diocesan bishops represent their diocese. The creation of the CECWA and the CEOWA in 1971 therefore required neither a new canonical nor a new common law entity. The CECWA Trustees was incorporated in 1988 and is used to receive and disburse government funding. The legal structures owning and governing diocesan schools that are relevant to this thesis are therefore the corporations sole comprising each of the four diocesan bishops in relation to property, and either the diocesan bishops in their personal capacity or as agents of the unincorporated association of the

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133 Within CEOWA schools there are several divisions – congregational group funded, diocesan group funded, congregational non-group funded. Greater detail of the funding systems used by the government is not within the scope or legal context of the thesis. It is highly relevant to a future choice of legal structure if the congregational school wishes to maintain maximum government funding as they must comply with government legal requirements for funding.


Representatives from the CECWA sit on the National Catholic Education Commission (NCEC). The NCEC has no common law or canon law identity. The Director of the CEOWA is accountable to CECWA (not the NCEC), and reports directly to the diocesan Bishops. Although it may be presumed that the CECWA is a part of a national governance structure in the NCEC, which may be involved with disbursing federal funds, it is not. The NCEC therefore has no relevance in the legal structures that are the focus of this thesis and will not be considered, though its existence is acknowledged.
dioceses/Church in all other legal matters. The use of an incorporated association, that is, the CECWA Trustees, although only used currently for funding arrangements, is also relevant.

3.3.2 Catholic Education Office of Western Australia

As noted above the CEOWA is the executive arm of the CECWA and has the daily running and operation of Catholic schools in the state. It is not a separate legal entity to CECWA. Neither the CECWA nor the CEOWA has a common law identity; both are mechanisms by which the bishops delegate management and administration of Catholic education for the dioceses, as shown in diagrammatical form in Figure 1.

![Diagram](image)

Figure 1 Management and Administration of Catholic Education.
3.3.2.1 Purpose

Under the terms of reference, CECWA fills two fundamental roles:

- the development and evaluation of Catholic school policy where the bishops elect to adopt a joint policy in relation to Catholic Education in WA; and
- action for each diocesan bishop in specified matters concerning the education of Catholic children in his diocese.

These responsibilities are exercised through the CEOWA in Perth and its regional offices in Broome, Bunbury and Geraldton.¹³⁵

This governance relates to both diocesan and congregational schools:

The key bodies involved with the governance of Catholic Education in WA are the CECWA and its six standing committees, which have overall responsibility for the strategic direction and effective management of Catholic Education in WA.

The CEOWA functions as the executive arm of the CECWA and is led by the Executive Director of Catholic Education in WA who is assisted by a Director of Religious Education, a Director of Teaching & Learning, a Director of Governance & Administrative Services, a Director of Finance, Planning & School Resources, a Director of Community Engagement & Employee Services and a Director of School Improvement. This group comprises the Executive.

The CEOWA’s structure is designed to support its strategic directions and its mission to facilitate the delivery of an authentic and empowering Catholic Education.

Education aimed at improving learning outcomes and life opportunities for the maximum possible number of children, families and communities across WA.  

3.3.2.2 Diocesan School Boards

The CECWA through the CEOWA assists the diocesan bishops in the administration of Catholic schools in a general perspective. School boards assist in more specific governance of diocesan schools, adding yet another layer of complexity to the governance and administration of the diocesan school. School boards in turn assist the schools in their immediate administration. Neither the schools nor their boards have any legal identity. They are part of the subsidiarity of the Church and therefore of the unincorporated association.  

The generic Catholic school board constitution applies to all diocesan schools. The governance model of the CECWA uses diocesan school boards as management boards in relation to finances, as specified in cl 1.4. The diocesan boards have a less defined range of powers than those of some congregational schools: ‘5. Powers — The Board shall be deemed to have the power necessary to carry out any function authorised in this Constitution’. Clauses 4 and 7 respectively clearly state the objects and functions of the board, establishing them as financial management boards confined to

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137 ‘The principle of subsidiarity means that decisions should be made at the most appropriate level. This means not necessarily the lowest level but it does mean that unnecessary centralisation is inappropriate, and is often destructive of appropriate decision-making and governance. In the Church, Pope Pius XI explicitly formulated the principle of subsidiarity in 1931 in the encyclical letter *Quadragesimo anno*, and it has been part of Catholic teaching ever since then.’: I.B. Waters, ‘The Canon Law of Governance in Victorian Catholic Primary Schools, Appendix 2 in Institute of Legal Studies, ‘Governance in Victorian Primary Schools’ (July 2006) Australian Catholic University <http://web.cecv.catholic.edu.au/reseminar/ils_govern.pdf> 2.

management within the policies of the CECWA. It is in all other respects an advisory board to the extent that:

14.1 Although the Board has no authority in the internal operation of the School, it is a legitimate function of the board to provide an Advisory service to the Principal and staff with respect to the formulation and review of School policy.

14.2 In exercising this Advisory function Board members are required to be mindful of the responsibility which belongs to the Principal and staff to make decisions in accordance with CECWA policy and guidelines, on all such matters as curriculum, pastoral care and methods of teaching and learning.

Membership of several positions on the board are by election and members are required to attend training and information courses in their first year of membership, pursuant to cl 10, in order to maintain the Catholic nature of the board. Whilst these sessions may provide formation in the charism of the school for board members — if the board’s school has an individual charism — there is no provision in the constitution for the expression of any individual charism or its protection, or importantly for continued formation of the board members. 139

3.3.2.3 The CECWA Trustees

The CEOWA is the executive arm of the CECWA and assists it on a daily basis in administering Catholic education. The federal government requires that any capital grants given to schools must go to a legally recognised body that can receive and then disburse the funds to individual schools, and that can be held legally responsible for those funds. As neither the CECWA nor the CEOWA have any common law status, in

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139 Schools should ensure that there are annual appraisals of school board performance and that the appraisal tools include Key Performance Indicators (KPI) relating to the charism of the school particularly in relation to any clauses of the constitution/rules relating to the charism.
order to receive government funding for the Catholic schools the diocesan bishops established the CECWA Trustees. It was incorporated in April 1988 as The Catholic Education Commission of Western Australia Trustees under the *Associations Incorporation Act 1987* (WA) and changed its name on 4 November 2009 to The Catholic Education Commission of Western Australia Trustees Incorporated. The CECWA Trustees and the CECWA are two distinct bodies — the former with a legal identity, the latter without one.\(^{140}\) The CECWA Trustees’ basic function is to receive and dispense funds, although the objects in the constitution of the CECWA Trustees are wider, for example, in paragraph 2.1, the purpose of the trustees is:

- to establish and maintain Catholic education services and ancillary activities in WA on behalf of the bishops of WA; and
- to receive monies from the state and federal governments on behalf of Catholic schools in WA and to disburse such monies to Catholic schools in the manner prescribed by the Catholic Education Commission of Western Australia and the respective governments.

The powers of the CECWA Trustees, as set out in paragraph 2.2 of its constitution, include:

- receiving funds from state and federal governments;

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\(^{140}\) In contrast, ‘[f]rom July 1 2006, the CECV [Catholic Education Commission of Victoria] was established as a public company under the *Corporations Act*. It comprises eight non-executive directors and four Executive Directors (the Directors of Catholic Education in the Archdiocese of Melbourne and the dioceses of Ballarat, Sandhurst and Sale). The Preamble to the Bishops’ Directions Statement for the CECV Ltd states that the Commission will act on behalf of the Catholic community in matters which reach ‘beyond the competence of the local authority and with due regard for the autonomy of the dioceses and Religious Institutes’. The CECV operates with a delegated authority from the Archbishop and the Bishops to the CECV Board, and from the Board to the Executive ‘Catholic Education Commission of Victoria Ltd (Bishops’) Directions Statement (2006)’; Institute of Legal Studies, Australian Catholic University, ‘Governance in Victorian Primary Schools’ (July 2006) 38 <http://web.cecv.catholic.edu.au/reseminar/ils_govern.pdf>. Other dioceses around Australia have different structures again; there is no uniformity in the legal structure of Catholic dioceses in Australia.
disbursing those funds to Catholic schools; and

to ‘invest and deal with monies of the Trustees not immediately required upon such securities and in such manner as may from time to time be determined by the Catholic Education Commission of Western Australia.’\(^{141}\)

Paragraph 6 of the constitution limits membership of the CECWA Trustees to:

- the chair of CECWA;
- the director of the CEOWA;
- the financial administrator of the Roman Catholic Archdiocese of Perth;
- the deputy director of the CEOWA;
- a diocesan bishop nominee of the Catholic bishops of WA; and
- the chair of the parent advisory committee.

The diocesan bishops’ nominee rotates amongst the diocesan bishops every three years. As paragraph 6 names office holders as the members, the trustees can maintain continuous membership so long as there is an office-bearer and without the need for any formal legal changes to the constitution by naming individuals. By including a diocesan bishop in the membership in paragraph 6, they remain closely involved with Catholic education in the state despite delegating its administration; they retain a role in ‘active’ governance.

3.3.3 Relevance to the Thesis Question

One obvious option for congregations considering the future of their schools is to transfer the ownership and governance of them to the diocesan bishops thus making them diocesan schools. The common law and canonical status of diocesan schools is

\(^{141}\) Constitution of the Trustees of the Catholic Education Commission of WA Inc, paragraph 2.2.3.
therefore relevant to the thesis question. Diocesan schools have no canon law or common law status. The bishops are the relevant person, or office, in relation to ownership and governance of diocesan schools. The ‘office’ of diocesan bishop continues even though the individual holding that office will change. The legal significance of the ‘office’ as a corporation sole is that it continues to exist despite the death, retirement or otherwise of an individual holding that office thus allowing a continuing legal entity.142

The bishops hold all diocesan property as a corporation sole. The bishops in all other legal matters have no status other than in their personal capacity, through which they delegate the governance of Catholic schools in WA to the CECWA, which operates through its executive arm the CEOWA. Neither the CECWA nor the CEOWA have legal status. The CECWA Trustees is an incorporated association and has the power to administer Catholic education, but currently the CEOWA uses it to receive and distribute government funding. The delegations and the existence of some legal structures but the absence of others highlights the complexity of the legal status of diocesan schools in WA.

3.4 LEGAL STATUS AND GOVERNANCE OF CONGREGATIONAL SCHOOLS

A religious congregation is described in canon 607 §2 as ‘a society in which, in accordance with their own law, the members pronounce public vows and live a fraternal life in common’, such as the Presentation Sisters and Christian Brothers. As already noted, congregational schools are those owned and governed by a congregation rather than by the diocesan bishop. The legal form of that ownership and governance

142 Butt, above n 19, 98.
differs between congregations, but they are neither corporations sole nor unincorporated associations.143

Congregational schools are subject to CEOWA governance in the sense that they can only carry on trading as a ‘Catholic’ school with canonical approval.144 Therefore they are ultimately answerable to, but not governed by, the diocesan bishops who have delegated educational administration to CECWA. Most congregational schools have a school board to assist in the governance of the school, particularly in relation to strategic planning. These boards have their own distinct and varying constitutions.145

Congregational school boards differ in their purpose and vary from purely advisory boards to a mixture of advisory/management boards; they generally have no separate legal identity.146 They assist in managing and/or governing the schools (to varying degrees), but generally congregations retain more control of financial issues than is exercised in diocesan schools.147 Conversely, the intention of diocesan school boards is to assist the CEOWA in financially managing the schools independently and educationally within CEOWA policy and guidelines.

The section that follows discusses and compares the status and governance of Presentation and Christian Brothers congregational schools, and in particular critically examines the extent to which current structures are adequate for maintaining

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143 The legal entities relevant to several congregational schools are considered in detail in chapter 3.4 below.
144 Code of Canon Law 1983 canons 803 and 806. There are currently two schools operating in Western Australia that have not received authority to conduct themselves as ‘Catholic’ schools by a competent ecclesiastical authority – Divine Mercy Yangebup and Immaculate Heart College Lower Chittering. As such, neither school comes under the authority of the CEO or CECWA but of the WA State Education Department.
146 John Twenty Third College Council is an incorporated association and discussed in chapters 5 and 7.
147 This will be illustrated in the sections below in this chapter when discussing board constitutions.
autonomy, protecting the charism and ensuring continued existence as a congregational school. It identifies the current legal structures that govern the schools, the extent that school boards play a role in governance, and whether these structures can continue in governing the schools without the involvement of the congregations.

3.4.1 Presentation Schools

When the Presentation Sisters arrived in different parts of early Australia it was necessary to adapt to local needs and conditions, particularly the vast distances between settlements, so each Congregation retained a certain amount of autonomy and continued their ministries as separate groups in both canon law and common law across Australia. In 1946, the six congregations at that time\(^{148}\) agreed to a common constitution, which received approval from Pope Pius XII in January 1958. Though canonically recognised as the Australian Congregation of The Presentation of the Blessed Virgin Mary (‘Society’), that body is not a separate and overriding public juridical person — each state-based Congregation retained its canonical autonomy and identity and its common law identity, but with a common ‘constitution’.\(^{149}\) Today the Society is a ‘federation of six autonomous Presentation Congregations in Australia and a group of Melanesian and Australian Presentation Sisters in Papua New Guinea’.\(^{150}\)

\(^{148}\) The six Congregations included Tasmania, Victoria, Wagga Wagga, Queensland, Lismore, and Geraldton. Perth joined in 1965. For details of each Congregation see: Society of Australian Congregations of the Presentation of the Blessed Virgin Mary (PBVM), Congregations \(<\text{http://presentationsociety.org.au/congregations/}\>.

\(^{149}\) The main reasons for remaining separate congregations included the vast distances between them in the state and the lack of communication and travel between them due to the prohibitive distances.

\(^{150}\) Society of Australian Congregations of the Presentation of the Blessed Virgin Mary (PBVM), About \(<\text{http://presentationsociety.org.au/}\>.
3.4.1.1 The Presentation Sisters in Western Australia

The Presentation Sisters first arrived in WA at the behest of the local bishop seeking assistance in the country areas of the state, initially Geraldton. For the most part, the schools were parish schools owned by the diocese and staffed by the Presentation Sisters, hence the Sisters’ property interests today are small. Originally, there were two separate groups of Sisters in WA, both here at the request of Bishop Matthew Gibney who needed assistance in tending to the education and pastoral care of people in the geographically vast state. The Presentation Sisters arrived first in Geraldton from Ireland in July 1891 and in the next 78 years they staffed schools in the North West, many of which came under the legal governance and ownership of the diocesan bishop. Because of the discontinuation of government aid for Catholic schools in 1895, the Church was financially unable to support all the education ministries required. Bishop Gibney once again turned to the Sisters and another group came to the Goldfields from Hay; the Perth and Geraldton groups were canonically separate. A union of the Geraldton and the Perth congregations occurred on 21 November 1969 as a new Congregation of Pontifical Right known as the Congregation of the Presentation of the Blessed Virgin Mary, Western Australia:

The decree [to erect a new pontifical right], and the accompanying letter from Cardinal Antoniutti, were appropriately dated Presentation Day 21 November 1969. The Decree was promulgated in the presence of a Special General Chapter of the two congregations held at Iona, Mosman Park, on 29 December 1969.\(^{153}\)

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\(^{151}\) Details of the WA foundations can be found in Ruth Marchant James, *Cork to Capricorn, A History of the Presentation Sisters in Western Australia 1891–1991* (The Congregation of the Presentation Sisters of Western Australia, 1996).

\(^{152}\) The congregations were canonically separate because they had different origins – one group came directly from Ireland the other already established in Australia in Wagga. They did not consider becoming one canonical body due the vast geographical distances in Australia, and particularly in WA, which made communication between the groups extremely difficult.

\(^{153}\) Marchant James, above n 151, 587.
The two congregations owned and governed Stella Maris College and Primary School in Geraldton, and Iona Presentation Primary School and Iona Presentation College both situated in Mosman Park but on separate campuses. The Sisters who originally came to the north of the state established Stella Maris College in Geraldton in 1891. They had the legal governance of the school and owned the land on which it stood. In late 1980 the governance and ownership of Stella Maris Primary School was transferred to the diocesan bishop and was renamed St Francis Xavier primary school. In 1994, Stella Maris College amalgamated with the Christian Brothers school of St Patrick’s and formed Nagle Catholic College. Both congregations transferred the legal governance and ownership of their schools to the Geraldton diocese. The bishop of Geraldton commissioned Nagle Catholic College on 11 February 1994 as a diocesan school. The property is registered in the name of the Roman Catholic Bishop of Geraldton; as a diocesan school, the bishop through the CECWA and CEOWA now governs Nagle College. This transaction is an example of one option for congregational schools — relinquishing the governance and ownership of the schools by directly transferring them to the bishop and the CECWA. In 2014, the Sisters still own and govern the two Mosman Park schools.

In 1960, the Congregation had approximately 110 Sisters in WA. Today that number is about 60. With a rapid decline in the number of religious in the congregation, the Sisters need to consider future governance options for the schools. Philosophically the Congregation remains unchanged and wishes to remain unchanged in being committed to the mission and charism of the Venerable Nano Nagle.

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154 Both Iona College and Iona Primary School had advisory boards from the early 1990’s. They are registered as separate schools with the Western Australian government. The information in the balance of this paragraph was provided by some of the Presentation Sisters to the researcher and confirmed by Sr Kathleen Laffan, Congregational Leader, in October 2014.

155 Numbers are estimates given by the Sisters.
The legal structure of the Congregation in WA today remains very similar to the structure in March 1936 when the ‘southern’ group of Sisters first incorporated as the Congregation of Presentation Nuns under *The Associations Incorporation Act 1895*. In June 1981, amendments to the constitution acknowledged the canonical union of the two groups and confirmed the union in common law within the incorporated body.\(^{156}\) The name then changed to the Congregation of the Presentation Sisters (WA) Inc.

### 3.4.2 Current Legal Structure of the Presentation Sisters in Western Australia

The Presentation Sisters in WA today have an affiliation with other Australian Presentation Congregations. All six remaining\(^{157}\) congregations in Australia are members of the Society but remain separate in both canon law and common law. The Sisters share a canonical ‘constitution’ for this national body. The constitution is described as a ‘living book that give[s] common expression and focus to our Presentation history, hopes and ideal’.\(^{158}\) This gives each Presentation Congregation in Australia uniformity of purpose and governance. However, the common law governance and ownership structures of the Presentation schools in different states are very diverse.\(^{159}\)

The constitution of the Sisters’ common law entity, though a common law document, relies in part on canonical approval. Clause 1.11 of the common law constitution

\(^{156}\) Details were provided by the WA Presentation Sisters.

\(^{157}\) Perth and Geraldton amalgamated canonically in 1969.


\(^{159}\) Though the Apostolates of the Congregations may also be diverse, this thesis only addresses the apostolate of education.
(under the *Associations Incorporations Act 1987* (WA)) of the WA Congregation identifies the common law structure as ‘complementary’ to canon law:

The inspiration for the work and mission of the Congregation and its function as a member Congregation of the Society of Australian Congregations of the Presentation of the Blessed Virgin Mary will be governed by the Constitutions from time to time of the Society and the tenets of Canon Law. In the spirit of community applying that work and mission this constitution should be regarded as complementary to the canonical Constitution and to the tenets of Canon Law.

The purpose of the Congregation is not limited to educational activities, but includes through cl 3.1.1 the power ‘to establish and/or carry on religious and charitable works of all kinds in accordance with the religious charism and tradition of the congregation’ — illustrating the diversity of their apostolate. The Sisters can withdraw from the legal governance (and ownership) of the schools and still have an active purpose (apostolate) under their common law constitution. Clause 4 of the constitution confers the usual powers attributed to incorporated bodies running a business, including the power to engage and dismiss staff. Clause 8.1 states that all ‘property and income of the Congregation must be applied solely to the promotion of the objects or purposes of the Congregation’. No part of that money or property is to be used as payment to members except in their capacity as employees or to other employees or officers of the Congregation (ie staff in the schools). Dissolution of the Congregation may occur pursuant to cl 13, but only after a resolution to do so has been ratified by the Holy See.

Clause 5.1 vests control, direction and management of the Congregation ... in the Chapter and in
the Superior General and Council for the time being PROVIDED THAT the Superior General and the Council may, as they consider expedient delegate any of their powers, duties and responsibilities in accordance with the provisions of the
Canonical Constitutions and of Canon Law, to one or more members of the Congregation.

The constitution is in all other respects a very standard and relatively short (17 clauses) legal document.

3.4.2.1 Property Ownership

The legal ownership and governance of the Sisters’ schools in WA today remains vested in the Congregation of the Presentation Sisters (WA) Inc.\(^\text{160}\)

The principal is a co-signatory to loan documents and seeks permission from the Superior General before considering any loans or property and capital works development. The principal is an employee of the legal entity of the congregation. The Superior General appoints the principal pursuant to the power conferred in cl 4.1.1 of the common law constitution. The principal appoints all other staff with the delegated authority of the Superior General on behalf of the congregation. The delegation is contained in a written document from the Superior General to the principal, as advised by the current Superior General.

3.4.2.2 The Board

The legal complexity of the organisation of the Sisters in WA and their constitution has increased as time passed. Student enrolment increased and external factors, such as government funding and curriculum requirements, added to the complexity. As a result, the Sisters established separate Advisory School Boards for Stella Maris, Iona Presentation College and Iona Presentation Primary School in the early 1990s. These boards were advisory, not management boards, as experienced by the researcher who

\(^{160}\) See Appendix A for the governance and ownership of WA Presentation Schools.
was a Board member. Their function was to assist the Sisters and the principals by advising on the strategic planning and direction of the schools. The boards’ membership initially included the Superior General, and two other members of the congregation, thus ensuring the Sisters’ representation.

The Congregation is an incorporated association but the boards are not and neither are the schools. The schools and boards are merely the tools by which the incorporated association currently carries out its apostolate of education. Neither the schools nor the school boards are separate legal entities.\textsuperscript{161} For the purpose of this thesis, the common law governance of the schools therefore lies with the Congregation of the Presentation Sisters (WA) Inc.

Both Iona Presentation Primary School and Iona Presentation College have separate school boards, which in turn have separate school board constitutions. Today, ‘Guidelines’ replace both board constitutions, and are relatively simplistic in their content and directions to the boards, particularly in comparison to the CECWA board constitution and the Christian Brothers document, the Design.\textsuperscript{162} The College and Primary School Guidelines share the same template but with minor differences mainly relating to the terms given to certain officers, and the College Guidelines hold no provision for honorary board members. The Guidelines do not specify the legal role of the board members, but from the content an assumption arises that they are volunteers acting to assist the Congregation and the principal. Unlike the diocesan structure, the board members’ legal status is more identifiable though not explicitly expressed — the Congregation employs the principal and other staff and the board members are

\textsuperscript{161} \textit{Roman Catholic Trusts Corporation v Van Driel Ltd & Ors} [2001] VSC 310 (‘\text{Emmaus College}’).

\textsuperscript{162} The Guidelines, without attachments, are only 6 ½ pages long. The Design is discussed at 3.4.4.2.2. It is a form of constitution for the EREA School Boards.
volunteers assisting both the Congregation and the principal. The Guidelines do not include any form of indemnity for board members for legal actions that may arise against the lawful activities undertaken by them as board members.

Clause 2 of the Guidelines refers to the Presentation charism explaining how members assist the Congregation in ‘realising the mission and vision of the College’ ‘in accordance with: ... the principles of the Charism Statement and Mission Statement of the Presentation Sisters and the Mission Statement of Iona Presentation College’.

Clause 3.3 only requires members to be ‘guided’ by the Charism and Mission Statements, not bound by them. The Charism Statement itself is not a part of the Guidelines, but is on a separate page at the end. Membership of the board ‘shall be at the invitation of the Governing Body, in consultation with the principal, and may comprise’ the Congregation leader, a member of the governing body and a Presentation Sister or layperson chosen by the governing body amongst others. When vacancies arise on the board, cl 5.2 requires that expressions of interest be sought and that the ‘Principal, the Chairperson of the College Board and/or a member of the Governing Body’ interviews candidates from a short list. Having Congregational members on the board continues to promote the charism; if a member of the Congregation is not a member of the board, the Guidelines only indirectly consider the Presentation charism through the board. Neither the school nor the board have any

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163 Although the Guidelines have no legal enforceability, the inclusion of the Charism Statement as what appears to be an addendum may be construed by some as diminishing its centrality to the purpose of the school. It could be included as an appendix, referred to in clause 2 or more specifically included as a clause.

164 The Governing Body is a small group of members of the Congregation voted on a 5-year cyclical basis by the general body of the members of the Congregation.

165 The method for seeking expressions of interest is not detailed, but extends to the Iona Community that includes parents and alumni.
legal status and the Guidelines are only a statement of how the board fits into the scheme of the administration of the schools.

The common law constitution of the Congregation protects the Presentation charism above the school board level. Clause 3.1.1 states: ‘to establish and/or carry on religious and charitable works of all kinds in accordance with the religious charism and tradition of the congregation’. Definition of the charism is not specific beyond this, but cl 3.1.2 lists characteristics. If formulated clearly, a clause dealing specifically with the articulation of the Congregation’s charism could be included in the common law constitution and the boards’ Guidelines.

3.4.2.3 Future Requirements

Clause 10 of the constitution of the Congregation of the Presentation Sisters (WA) Inc defines the membership of the incorporated association as ‘[a]ll finally professed members in good standing of the Congregation will without more be members of the Congregation.’ Section 5 of the Associations Incorporation Act 1987 (WA) requires a minimum of five members for a body to be eligible for incorporation. The Associations Incorporations Bill 2014 (WA) increases that minimum number to six members. When there are less than six ‘finally professed members’ of the congregation, the legal entity can no longer exist. In order to avoid this end, whilst there are still six finally professed members they may attempt to amend the constitution to include non-professed members. It is unlikely that canonical approval would be given for the Congregation to include non-professed members, or that the Sisters would want to, as it would allow non-professed members of a legal entity known and defined as a religious congregation. The incorporated association may well be an appropriate legal mechanism for continuing the schools when there are no longer any Sisters willing or
able to be involved, but it could not be the current incorporated association known as the Congregation of the Presentation Sisters (WA) Inc.

In summary, the current legal status of the Presentation Sisters Congregation in WA is an incorporated association. When there are less than six professed members of the Congregation remaining, the incorporated association will cease to exist. Because the congregation’s schools and their boards have no legal status, when the Congregation ceases to exist, or chooses to play no role in the active governance of the schools, new canonical and common law structures are required to continue the congregation’s schools.

3.4.3 Queensland Presentation Schools

Congregations own and govern their schools subject to the supervision of the diocesan bishop, as required by canon 806 §1 of the 1983 Code. The form of ownership and governance varies between congregations. As considered above, the WA Presentation Sisters are an incorporated association but their schools have no separate legal status. The Queensland (‘Qld’) Presentation Sisters are a body corporate,\(^{166}\) and two separate companies limited by guarantee own and govern their two schools — St Rita’s College, Clayfield and St Ursula’s College, Yeppoon. It is instructive to compare the WA position with the very different path followed by the Qld Presentation Congregation in the governance and ownership of their schools.

As early as the late 1980s the Qld Presentation Sisters considered the future governance of the colleges and in 1992 registered two companies limited by guarantee

\(^{166}\) The Corporation of the Trustees of the Order of the Sisters of the Presentation in Queensland ABN 12 850 816 238.
under the *Corporations Act 1989* (Cth), now the *Corporations Act 2001* (Cth) (*Corporations Act*).

3.4.3.1 Companies Limited by Guarantee

The schools and the companies are separate entities — the company runs the school. Both companies list as:

- **Company type:** Australian Public Company
- **Class:** Limited by Guarantee
- **Subclass:** Unlisted Public Company — non-profit company.\(^\text{167}\)

The company constitutions of the two schools are identical except in two minor aspects — St Ursula’s constitution refers to the provision of boarding at the school and has a different length of term for the chair of the board of the company. The constitutions are far more complex and descriptive documents than those of the incorporated association of the WA congregation, where the Congregation has less direct common law governance of the schools; the constitutions come under the *Corporations Act*, which imposes more requirements on the legal body.\(^\text{168}\) St Ursula’s College Ltd has eleven directors and one secretary. St Rita’s College Ltd also has eleven directors and one secretary but also has a named auditor.

There are two categories of membership to the companies: Class A and Class B.\(^\text{169}\) Class A members must be members of the Qld Congregational Leadership Team

\(^{167}\) Current Company Extracts of St Rita’s College Limited ACN 054 678 349 and St Ursula’s College Limited ACN 054 678 358.

\(^{168}\) The constitutions of a company limited by guarantee are discussed in chapter 5.3.2.3.

\(^{169}\) Although not referring to companies but governance generally, Leavey notes that this two-tier model of governance was emerging in the late 1990’s: Leavey, above n 3, 17. The Institute for Legal Studies Report for the Catholic Education Commission of Victoria refers to several authors who deal with governance structures and notes a lack of uniformity in structures currently used: Institute of Legal Studies, above n 140, 3.
CLT) pursuant to cl 5.2 (a), and Class B members can be anyone, pursuant to cl 5.2(b). None of the directors are appointed to both companies, making the common link between the schools the company constitutions and the Class A membership.

Clause 3.1 of the constitution states the objects of the companies:

a) to manage, conduct and carry on the College at Clayfield in the State of Queensland;
b) to manage all income coming directly in connection with the College including fees and government grants and to accept subscriptions and donations and bequests for all or any of the purposes aforesaid;
c) to conduct and manage, with the prior consent of the Members in general meeting, the business and affairs of any other company, corporation, co-partnership or person whether such business be manufacturing, mercantile, commercial, financial, insurance or otherwise;
d) to do all such things and exercise all or any of the powers contained in the Act as if the same had been set forth at length as a separate object or power as the case may be; and
e) to do all such other things as may be deemed incidental or conducive to the attainment of the objects of the Company or any of them, in accordance with:
   i. canon law (and subject to the reservations, restrictions, and consents imposed thereby);
   ii. the Philosophy of the Congregation as interpreted by the Congregation from time to time; and
   iii. the Presentation Educational Vision (by whatever name the Vision may be known from time to time).

The company has no power to issue shares,\textsuperscript{170} cl 4.1 confirming the non-profit nature of it. Complexity extends to membership of the company, with the two different classes of membership available under cl 5. Admission to membership is by

\textsuperscript{170} Constitution of St Rita’s College Limited, cl 3; Corporations Act 2001 (Cth) s 124.
application accepted by the congregation, but in cl 5.4 the Sisters make provision for their ceased existence as a congregation by delegating that power of acceptance to the local bishop, the Bishop of Rockhampton. The governance of the school resides with the directors of the company, who must be elected in a general meeting and who must qualify to be a director pursuant to cl 11.3. The principal of the school is the chief executive officer of the college but is not a director — they may attend meetings but hold no voting rights, in accordance with cl 15.12. The governance is at ‘arm’s length’ from those engaged in staffing the college. The general governance of the company lies with the directors, including their ability to make regulations and by-laws.\footnote{Constitution of St Rita’s College Limited, cl 16.1.} However, that governance is limited in relation to matters concerning the mission and charism of the Presentation congregation:

16.4 Consent of A Class Members

In respect of any of the following matters:

(a) any major change of the College’s philosophy and Mission Statement;

(b) any major new undertaking which:

i. is contrary to the Presentation Education Vision;

ii. changes the educational direction or operation of the College; or

iii. demands a financial expenditure of more than $500 000;

iv. acquisition and disposal of land or buildings; or

v. long term debts, alienation of assets, mortgages, loans, leases or encumbrances;
(c) any decision of the Board of Directors shall require the written consent of all A Class Members to be first had and obtained in order for it to be binding on the Company.

This clause allows the Congregation to retain a strong role in the common law governance of the schools, most particularly in retaining the congregation’s charism through the ‘control’ of the college’s philosophy, Mission Statement and Presentation Education Vision. Though the objects in cl 3.1 do not specifically mention the charism, cl 16.4 adequately protects it. However, as Class A members are members of the CLT, if there were no longer any Sisters in Qld, then the definition of ‘membership’ in the constitution requires change. Austin notes that the Sisters faced ‘the challenge as to how the spirit of Nano Nagle and the traditions of the Presentations Sisters can, under the guidance of the Holy Spirit, continue to enliven and enrich the Church through the two colleges which the Congregation established’.\(^\text{172}\) Watts and Hanley believe that the ‘original ethos and identity of a religious institution can continue when the religious order or congregation is no longer directly involved in the governance or management of that institution’\(^\text{173}\) and use the Qld Presentation Sisters as a case study to support that conclusion.\(^\text{174}\)

There was no approval of a separate or new public juridical person when the schools’ governance transferred to the companies; the canon law governance remained with the

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\(^{173}\) Watts and Hanley, above n 172, 36.

\(^{174}\) Watts and Hanley make 4 recommendations to ensure the Congregation’s ethos and identity is maintained: 1) professional development (formation, discussed in chapter 7.6), 2) adopting a common law governance model that can facilitate the charisms’ continuation, 3) regular evaluations of the school and its governance (though no indication is given as to the frequency of ‘regular’) and 4) including the ‘relevant history and the life and values of its founder’ in ‘public documentation’: Ibid 21.
Qld Congregation through the ‘sponsorship’ of the companies. Sponsorship ‘refers to the responsibility that a Religious Institute [congregation] Parish or diocese has in Canon Law for ministries conducted as an apostolate of the Church.’

The members of the company are responsible for ensuring compliance with any canon law requirements through the inclusion in the common law constitution of canon law reserve powers. An indemnity provided by cl 22 removes a possible barrier or disincentive to being involved in a non-profit company. The companies limited by guarantee own the property of their respective schools. Advisory (or management) school boards, such as operate in the WA schools (both diocesan and congregational), are not necessary under this model of governance as they would be superfluous to the role of the directors.

The Qld Presentation Sisters chose an alternative model of common law governance for their schools that allows them to continue to participate in that governance. The congregation also chose an alternative public juridical person, Mercy Partners, to their own congregation to be the canonical body responsible for the schools.

3.4.3.2 Mercy Partners

In March 2012 the Qld congregation leader, Sister Kathleen Tynan PBVM, advised another change in the governance of the Qld Presentation schools: ‘the Presentation Sisters’ Queensland would become a Steward of Mercy Partners’.

Transfer of St Rita’s College to Mercy Partners occurred on 27 May 2014 and that of St Ursula’s

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175 Tynan, above n 39. Sponsorship, more usually referred to as canonical governance or administration in Australia, is discussed in detail in chapter 7.3.2.

176 Reserve powers are discussed in more detail in chapter 7.3.2.2.

177 Before the canonical governance of the schools was transferred to Mercy Partners, the property was transferred to the relevant company. Whilst the Sisters retained governance of the schools, they retained ownership of the property; the company leased the property from the Congregation on a quarterly basis providing a source of income for the Sisters.

178 Tynan, above n 39.
College on 12 June 2014. This change in governance involved both a change to the current common law and canon law arrangements of the Qld congregation and their schools. Mercy Partners

... is a Public Juridic Person, i.e. it has a legal identity within the Church in accordance with Church (canon) law. It is also incorporated in civil law under the Roman Catholic Church (Incorporation of Church Entities) Act 1994 Qld. Thus Mercy Partners has legal status, both in civil law and Church law, in accordance with its Statutes and Constitution. It is currently structured with a governing Council of seven.\textsuperscript{179}

Canonical approval of Mercy Partners occurred in November 2008,\textsuperscript{180} establishing a new public juridical person. As it is a separate public juridical person, it is a separate entity in canon law to the Sisters of Mercy congregations. Several Qld congregations of the Mercy Sisters who engaged in ministries as diverse as health, aged care and education found that their increasing inability to engage in sponsorship in their ministries led them to seek a new governance structure. That governance structure, Mercy Partners, has new canon law status and a separate common law status as a body incorporated under the Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld). This public juridical person is not limited to membership of the one congregation but to any other existing public juridical person that the stewards accept,\textsuperscript{181} allowing other congregations to join Mercy Partners and to retain their own charism and identity within the new public juridical person.

Consequently, the Presentation Sisters in Qld sought membership of Mercy Partners. The Qld Presentation congregation is now a steward of Mercy Partners, so the

\textsuperscript{180} Canonical Statute Mercy Partners approved November 2008.
\textsuperscript{181} Constitution Mercy Partners cls 6.1(e) and 6.2.
congregation’s role is within the structures of Mercy Partners. Currently there is an appointment of a Presentation Sister as a director on each company board; however, all future appointments of directors are the responsibility of the Mercy Partners council. The ownership of the schools transferred from the Presentation Sisters to the companies limited by guarantee.\textsuperscript{182} The public juridical person of the Qld Presentation congregation will remain but canonical governance of the schools vests in Mercy Partners. The schools will remain the current companies limited by guarantee, but with some changes to their constitutions relating to the canonical governance by Mercy Partners rather than the Presentation Sisters.\textsuperscript{183}

The change of governance does not weaken the protection previously afforded to the schools’ Presentation charism; the constitutions will ensure that the companies continue to carry on the charism of Nano Nagle. Becoming a steward of Mercy Partners will not make the schools ‘Mercy’ schools; they will retain their identity as Presentation schools and they will retain their Presentation charism. Article 2.3 of the canonical statute of Mercy Partners states: ‘Mercy Partners will continue to build on the charism and sound traditions of the Sisters of Mercy and other Stewards within the tradition of the Roman Catholic Church’. Charism is a part of the service of mission. The mission of Mercy Partners does not contradict that of the Presentation Sisters. Consequently, the new canonical administrator does not affect the ability of the company structures to protect the Presentation charism and mission. The canonical statutes state that ‘Mercy Partners continues the mission of Jesus Christ and assumes responsibility to further the aged care, religious, health, education, charitable and community service ministries entrusted to it within the ministries of the Roman

\textsuperscript{182} Email from Sr Kathleen Tynan to Jane Power, 25 June 2014.
\textsuperscript{183} Canonical governance requirements are discussed in chapter 7.
In comparison, the mission of the Presentation Sisters in Qld states:

As Queensland Presentation Sisters
we are the Presentation face
of God’s mission.
In the spirit of Nano Nagle
in union with Presentation people
around the world
we search for and celebrate
God’s emerging presence.

We immerse ourselves
in a profound and intimate relationship
with God in the Sacred Universe Story.

The canonical statutes of Mercy Partners, and the common law constitutions of both Mercy Partners and of the companies limited by guarantee of the two schools, assure the continuation of the Presentation charism.

The advantages for a congregation joining Mercy Partners is that acceptable canonical governance of the congregation can continue even when the number of members of a congregation are declining. The congregation continues under the canonical

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184 Mercy Partners Canonical Statutes Article 2.1.
185 Society of Australian Congregations of the Presentation of the Blessed Virgin Mary, <http://presentationsociety.org.au/congregations/queensland/>; each Chapter has its own Mission Statement and whilst they are different they are in essence the same and based on the continuing role of the charism of Nano Nagle.
administration of a larger group of congregations under the ‘umbrella’ of Mercy Partners.

3.4.3.3 Future Requirements

The Presentation Sisters in WA may also choose to adopt the structure of a company limited by guarantee for their schools. The Corporations Act 2001 (Cth) is a federal statute and applies equally to WA. However, membership of the company must extend beyond the Sisters, or this structure is no more useful than the incorporated association that already exists when there are no longer any Sisters.

In summary, the WA Presentation schools have no legal entity and are therefore not capable of protecting the Presentation charism through legal mechanisms when the congregation is no longer a part of any school governance structure. The Qld schools, however, are companies limited by guarantee under the Corporations Act. The constitution of the companies secures the continuation and centrality of the Presentation charism in the schools. The canonical governance of the schools will transfer to the newly approved public juridical person, Mercy Partners, thus securing compliance with canonical requirements when the congregation is not engaged in the governance. Chapter 5.3.4 considers the merits and shortcomings of the company limited by guarantee and Chapter 7.3 considers requirements of the public juridical person.
3.4.4 Christian Brothers Schools

In 1960 there were 131 Brothers in the province; by 2010 that number was reduced to 75.\(^{186}\) Notwithstanding the canonical and common law changes made after October 2007, philosophically the congregation remains unchanged, continues to operate in the ‘Edmund Rice tradition’ and intends to remain so in any further common law and/or canon law developments. Until October 2007, WA and South Australia (‘SA’) together formed, in canon law, the Holy Spirit Province of the Christian Brothers. In October 2007, Edmund Rice Education Australia (‘EREA’) was established:

the Christian Brothers decided to amalgamate separate Christian Brothers provinces in Australia, New Zealand and Papua New Guinea to form one Oceania Province focused on the social justice mission of the Christian Brothers.

Separately, Edmund Rice Education Australia was established with the intention of independently implementing the educational mission of the Christian Brothers.

Both these entities commenced on 1 October 2007.\(^{187}\)

The Holy Spirit Province was originally incorporated in WA as the ‘Trustees of the Christian Brothers in Western Australia Incorporated’ and in SA as ‘The Christian Brothers Incorporated’; the one canonical province therefore had two registrations of incorporation that were distinct from each other in a common law sense. They were bodies incorporated separately in each state as the relevant legislation under which they were incorporated only had state jurisdiction. The incorporated associations’ constitutions relating to the two states do not have identical terms but are similar and

\(^{186}\) Numbers are estimates given by the Congregation. For statistics of world wide membership of the Christian Brothers see Table 1.1 in Finn, above n 77, 4.

consistent with each other. Although the Holy Spirit Province no longer exists in canon law, the incorporated common law bodies remain.\textsuperscript{188} The congregation has a corporate entity but the schools do not.\textsuperscript{189}

3.4.4.1 EREA

For several years leading up to 2007, the Brothers had a National Planning Committee for Schools’ Governance looking at the future of Australian Christian Brothers schools and preparing for new common law and canon law structures. Pontifical canonical approval established EREA in April 2013 as a public juridical person separate to the public juridical person that is the Christian Brothers Oceania Province.\textsuperscript{190} EREA initially formed in October 2007, but without a new canonical identity; the canonical governance of the Christian Brothers schools in WA and SA between 2007 and 2013 remained with the Christian Brothers Oceania Province:

EREA is made up of forty schools and two entities located in all states of Australia and the Australian Capital Territory. They are governed nationally by the Edmund Rice Education Australia Board, through a National Executive and staff based in Richmond, Melbourne. There are Regional Centres in Brisbane, Sydney, Melbourne and Perth that support the schools and entities within their regional context. The forty schools operate within a framework of common values and are linked through their commitment to the Charter for Catholic Schools in the Edmund Rice Tradition.\textsuperscript{191}

Today there are two separate pontifical public juridical persons — that of EREA and that of the Christian Brothers Oceania Province.

\textsuperscript{188} As several school properties are registered in the name of the incorporated associations, they must continue to exist at least until a decision is made relating to future property ownership.

\textsuperscript{189} This is the same as the Presentation Congregation and schools in WA.

\textsuperscript{190} See \textit{Code of Canon Law 1983} canons 113 and 114.

\textsuperscript{191} Edmund Rice Education Australia, \textit{EREA Review February 2012}, 3.
The national federated group of the Presentation Sisters is not a public juridical person on a national level, as was the Oceania Province, so it lacks the ability to move the canonical boundaries of the state congregations in the same way that the Brothers amalgamated their provinces. This model of seeking a new public juridical person is therefore not available to the Sisters or any other congregation governed by a public juridical person only approved within a diocese or province. The Sisters would require canonical approval of a new ‘national’ public juridical person.

3.4.4.2 EREA Trustees

From October 2007 to April 2013, EREA Trustees was merely an ‘entity’ without any common law status used by the Christian Brothers to continue its mission of Catholic education in accordance with the charism of the Blessed Edmund Rice in partnership with the Oceania Province of the Christian Brothers and the wider Catholic Church:

For the first five years of EREA’s story, it acted on delegated authority from the Brothers to conduct, govern and manage their schools. At the end of 2012, after an application to Rome EREA was granted Public Juridic Person status; its own identity in the Catholic Church. In early 2013, EREA was also recognised in civil law as a separately incorporated body.

As a result of this recognition, and because of the forward thinking of the Christian Brothers, EREA now has full stewardship and governance of the majority of its schools and educational facilities across Australia. At this time, some schools remain under the ownership of the Christian Brothers with stewardship and governance continuing to be fully delegated to EREA.

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In addition, EREA obtained separate common law status with the incorporation of the Trustees of Edmund Rice Education Australia (‘EREA Trustees’) pursuant to the Roman Catholic Church Communities Lands Act 1942 (NSW) (‘NSW Act’). The separate common law structure of EREA Trustees was finalised in April 2013 when the EREA Trustees incorporated under the NSW Act. EREA Trustees was added to the NSW Act on 6 February 2013 by the Roman Catholic Church Communities Lands Amendment (Edmund Rice Education Australia) Proclamation 2013 pursuant to s 2(2) of the NSW Act. EREA Trustees has several levels of ‘governance’:

A Council, with the responsibility of governance of the schools to ensure the continuance of the charism of Blessed Edmund Rice. The Council is appointed by the Congregational Leader of the Christian Brothers …

A Board, appointed by the EREA Council, with responsibility for oversight of the administration of EREA Schools and Educational Entities …

An Executive Director, with the responsibility for the management of EREA Schools and Educational Entities …

A Leadership Team, with the responsibility for oversight of the management of EREA Schools and Educational Entities.

Schedule 2 of the NSW Act was amended to include the canonical body of ‘Edmund Rice Education Australia’ and the common law body of the ‘Trustees of Edmund Rice Education Australia’. The recognition of dual bodies provides governance structures that satisfy both the common law and canonical requirements.

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194 In this thesis EREA refers to the canonical body and EREA Trustees refers to the common law body.
195 Further discussion of the statutory body and its powers are discussed below in chapter 5.4.
3.4.4.2.1 The Constitution of EREA Trustees

The common law constitution of the incorporated body of EREA Trustees, registered with the Australian Securities and Investments Commission (‘ASIC’) on 4 April 2013, is a comprehensive document that makes repeated reference to the charism of Edmund Rice. The preamble briefly, but clearly, states in cls 1.2–1.5 the background to the change in legal ownership and need for the creation of EREA Trustees, and cls 1.3 and 1.5 specifically refer to the ‘charism of Edmund Rice’. The definitions clause, 3.1, includes the Charter and the Foundations, both annexed to the constitution. ‘All schools and educational entities in the Edmund Rice tradition across Australia are bound by a Charter which identifies four touchstones authentically linked with the Charism of Blessed Edmund Rice and which underpin the ministry in our schools and educational endeavors.’\(^{196}\) The Foundations define charism as

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\text{a response to the Gospel; a ministry of outreach to the community. It is exercised on behalf of the Christian community to a grace from God. Edmund's charism has lived among us for two centuries, not only in his Brothers, but in colleagues who have witnessed it through ministry.}\]

The Foundations ‘articulate the basis for the interdependence among Church, the associated networks of the Congregation of Christian Brothers and the wider community.\(^{198}\) Foundations complement the Charter for Catholic Schools in the Edmund Rice tradition’.\(^{199}\) Clause 3.1 also defines ‘formation’ as ‘the response

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\(^{198}\) The Foundations are simply a document written by the Brothers to articulate the purpose, ethos etc of the congregation.

\(^{199}\) Edmund Rice Education Australia, *Foundations for Schools’ Ministry as Church Mission*, above n 197.
through baptism to nurturing spirituality, mission and ministry within the context of EREA’ and annexes to the constitution a policy for implementation. By including these documents in the common law constitution, compliance with them is enforceable in law.

Clause 4.1 clearly articulates the purpose of EREA Trustees: ‘to own, govern, manage and conduct educational institutions and associated activities, in fulfilment of the mission of Jesus Christ in the Catholic tradition’. Clause 4.2 embeds the charism in the purpose by stating that EREA’s work ‘shall build on the sound traditions of the Congregation of Christian Brothers and ensure the continuation of the charism of Edmund Rice in school ministry as Church Mission’. Additionally, cl 4.5 expands the purpose to include:

4.5.1 To own, manage and conduct educational entities and services in accord with the Statutes.

4.5.2 To carry on, in conformity with the beliefs, teaching, discipline and laws of the Catholic Church, the ministry of Catholic education as an integral element of the mission of the Catholic Church.

4.5.3 To assist in the carrying on of the contemporary expression of the charism of Edmund Rice through links and relationships with relevant ministries of the Oceania Province and with the Edmund Rice Network.

4.5.4 To define the conditions by which the school or educational entity is defined as a Member, Associate or Affiliate.  

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200 For a full discussion on the institutionalisation - ‘the process of translating the Edmund Rice charism into reality in the school’s operations, organisation, programs, policies, goals and purposes’ of the Edmund Rice charism see Finn, above n 77.

201 Clause 3.1 defines the Edmund Rice ‘Network’, ‘Associate’ and ‘Affiliate’ ‘groups, institutions, and people’ that are not directly governed by EREA Trustees. They seek however to be involved, connected or inspired by the Edmund Rice Tradition. A Member is ‘a school or educational entity owned, governed, managed and conducted’ by EREA Trustees.

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The purposes clauses leave no doubt that EREA Trustees is a Christian Brothers entity and that the expression and protection of the charism of Edmund Rice is paramount.

Clause 6 reflects the tiered governance of EREA Trustees — ‘Roles and Relationships between the President, Councillors and Board members’. The complexity of governance is greater than that adopted by the Qld Congregation of Presentation Sisters, reflecting the more complex nature of a structure with schools in a national presence. The congregational leader of the Christian Brothers, with his council’s consent, appoints and dismisses the councillors of EREA Trustees who constitute the council of EREA Trustees,202 and the council appoints a president, deputy president and treasurer by majority vote.203 The council then appoints board members to ‘conduct and manage the educational entities and services of’204 EREA Trustees who will ‘have suitable qualifications and experience, and who are considered by the council to be competent to participate in the continuation of the charism of Edmund Rice’.205 The council therefore plays a crucial role in overseeing and maintaining the charism in the schools. The board provides recommendations for appointment to the council. Consultation with the board occurs before the council appoints a chair and deputy chair to the board.

The constitution does not limit the number of people who may be councillors or the length of their appointment. Board membership however, is limited to between five and ten members206 and to a five-year appointment (with provision for re-appointment once and retirement after ten consecutive years in office).207 The president of the

202 Constitution of Trustees of Edmund Rice Education Australia cl 6.1.
203 Ibid cl 6.4.
204 Ibid cl 6.2.
205 Ibid cl 7.2.
206 Ibid cl 7.1.
207 Ibid cl 7.3.
council may remove a board member on the request of the board. The constitution is silent on the length of time a president of the council may hold that position; however, a board chair is restricted to holding office for three years but is eligible for re-appointment.\(^\text{208}\) Clause 7.13 prohibits an employee of EREA Trustees from being a board member, nor may a person serve as both a councillor and board member at the same time.\(^\text{209}\) Board members are eligible for reimbursement for ‘expenses including travelling expenses’ but do not otherwise receive any form of remuneration.\(^\text{210}\)

The functions and powers of the board establish it as the management vehicle for EREA Trustees. Clause 8.1 subjects the board to both canon law and common law. It otherwise ‘oversee[s] the management of’ EREA Trustees, including the ability to ‘borrow money, buy and sell property, to charge any property or business ... or give any other security for debt, liability or obligation’ or appoint attorneys,\(^\text{211}\) but any of these powers are subject to limitations the council may impose at any time. The board maintains contact and communication with the council by providing the council with minutes of its meetings, financial reports and any proposed or settled strategic plans.\(^\text{212}\)

Notwithstanding the wide powers provided to the board, there are reserve powers specifically detailed in cl 9.1, that the board can only exercise with council approval. The reserve powers include the usual matters pertaining to financial and property interests, but importantly commence by protecting the charism of Edmund Rice and the purpose of EREA Trustees:

\[^{208}\] Ibid cl 7.5.
\[^{209}\] Ibid cl 6.3.
\[^{211}\] Ibid cls 8.3 and 8.4.
\[^{212}\] Ibid cl 8.6.
9.1.1 Review of, or change to the Charter, Formation, Renewal and Foundations
documents and other core policies as determined by the Council.

9.1.2 Where the decision concerned requires changes in the core purpose of the
services provided by [EREA Trustees] ...

9.1.5 A decision to end a relationship with a Ministry of the Oceania Province ...

Therefore, whilst the board may discuss and formulate changes to the charism or its
application, or anything to do with other Christian Brothers ministries, it may not make
a decision in relation to them without the express approval of the council. Clause 9.3
extends the approval requirement to anything that is ‘of such a nature that it touches
upon the philosophy of the Religious Institute or upon the purposes, policies or
practices of the [EREA Trustees]’. Additionally, the Director of Identity of EREA is
very involved in the mission of the school and the practical exercise of the charism
adopted by the Christian Brothers and present within the EREA schools within the
Oceania Province.

The EREA Trustees’ constitution provides procedures for management of the board
and the council, including the frequency of meetings, the required quorum, records of
meetings, codes of conduct and the annual general meeting of the council.\textsuperscript{213} The
constitution clearly enunciates the delegation powers of the board and the ability to
establish board committees, including a mandatory finance committee.\textsuperscript{214} The council
is given the right in general meeting to determine policy issues for the board to follow,
including issues relating to the ‘philosophy, Catholicity and ethos’ of the EREA
Trustees, and ‘formation for mission effectiveness’\textsuperscript{215} retaining a focus on the charism

\begin{itemize}
\item \textsuperscript{213} Ibid cls 10, and 13 and 14 respectively.
\item \textsuperscript{214} Ibid cls 11 and 12.
\item \textsuperscript{215} Ibid cl 13.
\end{itemize}
of Edmund Rice within the management structure, and ultimately the schools. Due to the national structure of the EREA Trustees, the constitution adequately allows for meetings of both the council and board using relevant technology.\textsuperscript{216} The constitution also allows for the usual clauses relating to a common seal, accounts, auditing and indemnities for board members and councillors.\textsuperscript{217}

The board may make recommendations to the council for changes to the constitution, but only the council has the power to make changes. Any changes relating to the termination of a councillor’s appointment in cl 6.1, the number required to change a reserve power of the council in cl 9.5, or changing the constitution pursuant to cl 19.1 must have the consent of the congregational leader. Any proposed changes are subject to the canonical statutes of EREA.\textsuperscript{218} If it is necessary to wind-up EREA Trustees, then after payment of all debts and liabilities, its property will be ‘given or transferred to an association or institution nominated by the council in accordance with canon law which has similar objects’ to EREA Trustees and which ‘has been granted income tax exempt status pursuant to the Tax Act’.\textsuperscript{219} There are no ‘objects’ titled as such in the constitution, but the purposes, in addition to referring to education in the charism of Edmund Rice, also refers in several places more generally to education in the Catholic tradition. Any other legal entity conducting Catholic education would therefore qualify to be the recipient under cl 20.1.

Although the constitution does not mandate the council to include members of the Congregation, of the five current councillors two are Brothers, including the president.

\textsuperscript{216} Ibid cl 18.
\textsuperscript{217} Ibid cls 15, 16 and 17 respectively.
\textsuperscript{218} Ibid cl 19.
\textsuperscript{219} Ibid cl 20.1.
This ensures the active involvement of the Congregation whilst it is still possible. One of the current board members is also a member of the Christian Brothers.\footnote{Edmund Rice Education Australia, \textit{EREA Board} \url{http://erea.edu.au/about-us/erea-board}.}

3.4.4.2.2 \textit{The Design}

Prior to the establishment of EREA Trustees, the various schools in WA had separate (but identical)\footnote{There was one generic constitution used by all the WA Christian Brothers’ Schools.} school board constitutions and operated independently of each other, but all were governed by the Christian Brothers. The school board constitutions clearly set out the managerial responsibilities of the boards and defined the ‘trustees’ who had both legal ownership and governance of the schools. The ‘Design’\footnote{Edmund Rice Education Australia, \textit{The Design}, above n 145.} replaces those previous school board constitutions and now applies to all Christian Brothers schools in the Oceania Province.\footnote{Regions within the Oceania Province include Australia, New Zealand, East Timor, Philippines and Papua New Guinea: Edmund Rice Network Oceania \url{http://www.edmundrice.org.au/cbop/new-home}.} The Design has

\ldots been developed to provide clarity for EREA School Board members on the role of EREA School Boards. It further outlines the responsibilities of EREA School Boards; appointment processes; as well as providing information pertaining to size and composition of EREA School Boards, committees and working parties, and the EREA School Board Handbook.

The DESIGN has been developed to acknowledge, guide and support those who serve on an EREA School Board in the realisation of Edmund’s dream through making clear the authority, responsibilities and accountabilities of those involved in the ministry of governance.\footnote{Edmund Rice Education Australia, \textit{The Design}, above n 145.}

The Design continues to apply to all schools after the incorporation of EREA Trustees. The individual school boards remain as they existed prior to October 2007. They are
essentially advisory in nature, but they exercise considerable influence in the management of the school in conjunction with its principal, effectively making them a combination of advisory and management boards. The Design, combined with the governance structure created by the EREA Trustees constitution, affords a uniform governance of schools that still allows for flexibility in the running of individual schools across the Oceania Province. The Design is a comprehensive document and specifically addresses issues such as school board membership, and the powers, duties and role of the boards. It also specifically recognises that the school boards have no legal identity:

EREA is the legal entity, and as a consequence, individual Schools shall not take out loans, sell or buy land, engage in legal action or perform any action that must be performed by a legal entity without the authority of the EREA Executive Director ...225

Clause 1.10 of the Design requires board members to undertake ‘regular reflection and review processes’ (not just in the first year); cl 2.1.1.3 ensures ‘that the School culture reflects the values and educational vision of Edmund Rice, with particular emphasis for the poor, marginalised and disadvantaged’. Clause 2.1.1.5 ensures ‘that there is an authentic expression of the charism of Edmund Rice. This includes confirming that review processes and strategic plans are in place, implemented and monitored in accordance with EREA Policies.’

The Design serves as a school board ‘constitution’, but pursuant to cl 6.4.1 it is also a part of the EREA Governance Framework.226 By incorporating the Design into this Framework, the Charter, specifically recording the charism of Edmund Rice, becomes

225 Ibid 5.
226 The Framework includes a Council, Board, Executive Director and Leadership Team: Design cl 3.4.3.3.
a part of the overall governance structure of EREA. It is highly unlikely under this model that the charism of the Christian Brothers will be lost or overlooked. Change of the Design is only permissible with the approval of the Brothers.227

3.4.4.3 Property Ownership

Historically the Brothers owned more of the schools in which they taught than the Presentation Sisters, who more usually answered the call of the local bishop to teach in diocesan schools. Consequently, the Brothers’ proprietary interests today are more extensive than the Sisters’ property holdings. The ownership and governance of the Christian Brothers schools, illustrating the changes made, are attached as Appendix B.228

The lands on which the schools are situated are registered in the name of the incorporated associations. Two Western Australian properties are registered in the names of the Christian Brothers, Strathfield, New South Wales (‘NSW’).229 This is an historical anomaly. Prior to October 2007, the governance and ownership of property in WA and SA were otherwise separate from other Christian Brothers’ interests within Australia. The Christian Brothers are determining changes in ownership of the properties in Australia, but it is likely that registration of some property will be in the name of EREA Trustees. The Trustees of the Christian Brothers Western Australia Inc governed the WA schools prior to 2013. The purpose of this legal entity now is to hold

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227 The Design is undergoing a review that may be completed in 2014/15.
228 Although Clontarf was owned by the Christian Brothers, and they retained some connection to it, the governance was more ‘autonomous’ than the other schools. Clontarf Aboriginal College is a co-educational Catholic school in the Edmund Rice tradition that caters for Indigenous students in Years 7 to 12. Clontarf is not included in the thesis discussion; in 2013, the Christian Brothers’ gifted Clontarf to an Aboriginal Trust that is now the registered proprietor.
229 Christian Brothers Agricultural College Tardun and CBC Fremantle.
the land registered in its name until the Brothers determine future ownership of the properties.

3.4.4.4 Summary

Under the former governance structure in WA, the Trustees of the Christian Brothers in Western Australia Inc, the constitution of the incorporated association defined the members generally as members of the congregation. This structure relied for its continued existence on there being sufficient Brothers in WA capable of continuing as members. In 2009, amendments were made to Rule 1.8 of the Rules of the Trustees of the Christian Brothers in WA to define a member as ‘any person who is qualified to be admitted as a member of the Association under Rule 5 herein’. Rule 5 states that ‘[a] person is qualified to be a member of the Association only if the person is a natural person and such person is a member of the Province Leadership team’. Clause 1.7 defines the Province Leadership team as ‘the Province Leader and other members of the Province Leadership team for the Province as appointed by the Congregation leader’. Clause 1.6 defines the Province as the Oceania Province. The Brothers retain this legal structure as a mechanism for ownership of land in WA, the incorporated association requires no Brothers to be resident in WA. It is a useful tool for ownership of land for the province, but no longer for the governance of the schools.

Membership of EREA Trustees provides greater opportunity for the common law structure to continue even in light of the congregation’s diminishing numbers in Australia. Membership under the constitution of EREA Trustees requires appointment of a council and board, but there is no requirement for either councillors or board members to be members of the Congregation. The congregational leader determines the appointment of councillors, however, so the legal structure depends indirectly on
the existence of a Christian Brothers Congregation within Oceania Province. The former Australian provinces and ‘St Joseph’s Province, New Zealand and Edmund Rice Region Papua New Guinea’ constitute Oceania Province.\textsuperscript{230} Such a large geographical area can ensure that the province retains members for the foreseeable future allowing the common law structure to continue with its present membership requirements in the long term. It is unlikely that the Christian Brothers will consider a canonical and common law structure such as Mercy Partners, as EREA Trustees focuses solely on education at a national level whereas the Mercy Partners legal structure encompasses several ministries and is a state-based entity.

In February 2012, the Australian Catholic University conducted a review of the practical governance of EREA and its effect on its schools making several recommendations, mainly relating to communication of purpose and the structure of school governance.\textsuperscript{231} Regular and forthright independent reviews will be essential to any effective change in legal governance for congregational schools.

3.5 CONCLUSION

The above discussion illustrates the fact that there is a need to consider other more appropriate structures for some congregations than they currently have to conduct their schools in the future. Several common law and canon law issues face congregations contemplating their future in school governance.

\textsuperscript{230} Constitution of Trustees of Edmund Rice Education Australia, cl 1.5.

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3.5.1 Whether Current Legal Structures Can Continue to Operate Without Members of the Congregation

The Congregation of the Presentation Sisters in WA is an incorporated association established pursuant to the *Associations Incorporation Act 1987* (WA). Membership of the incorporated association is limited to members of the congregation. Section 4 of the *Associations Incorporation Act 1987* (WA) requires the association to have five members; less than five members and the association will cease to exist. The Associations Incorporation Bill 2014 (WA) requires six members to constitute an incorporated association.\(^{232}\) The congregational schools have no legal entity. Therefore, a legal structure separate from the Congregation is required to govern the schools when there are less than six professed members of the congregation. Christian Brothers schools are now effectively governed by EREA Trustees, incorporated under the *Roman Catholic Church Communities Land Act 1942* (NSW).

3.5.2 Determining Who Will Have Decision-Making Powers; Can They be Shared?

Congregations need to determine if they will have any future participation in the governance of the schools and the nature of the participation. The Christian Brothers chose a structure that permits shared participation between the Congregation and the laity, but retained control of appointments to the governance structures. EREA and EREA Trustees envisage long-term participation by the Brothers in the governance of their schools. The Qld Presentation Sisters chose a shared participation between the Congregation and the laity, but transferred control of future governance of the schools to the companies and transferred canonical governance of the schools to Mercy Partners. Both common law and canon law governance of the WA Presentation schools

\(^{232}\) The Associations Incorporation Bill 2014 (WA) is discussed in chapter 5.2.
currently resides with the congregation, although laity participate in assisting the Congregation with governance through their advisory role on school boards.

3.5.3 Whether the Current Governance Mechanisms for Schools are Sufficient for the Future

The Christian Brothers created a far more complex common law governance structure for the future of their schools than existed prior to 2007. The complexity suited the change from state based to a national governance structure. The statutory corporation protects the governance of the schools, but most importantly for the thesis question, it adequately protects the charism of Blessed Edmund Rice within the schools in law. The approval of EREA as a new public juridical person met canonical requirements. The Qld Presentation Sisters continued using the company limited by guarantee for the common law ownership and governance of their schools; the constitutions of the companies protect the Presentation charism. The WA Congregation governs WA Presentation schools, but as the schools have no legal identity, there is no legal mechanism to protect the charism of the school. Diocesan schools have no legal status and are not a suitable governance model to protect the charism of the school in their current structure.

3.5.4 Whether There is Legal Protection for the Charism of a Congregation in Their Schools

Both EREA Trustees and the Qld Presentation schools have used the constitutions of their common law entities to protect their charisms. How effectively that is done depends on the drafting of the constitutions. EREA Trustees’ constitution explicitly refers to the charism. It also refers to and annexes documents to the constitution that assist in defining not only the charism of Blessed Edmund Rice but also its reception
in the EREA schools and in common law governance. The constitution provides for ongoing formation for those in governance positions, including those in schools and the governance structure of EREA Trustees (the board and council). Inclusion of these provisions in the constitution of the corporate bodies ensures legal protection of the charism and mission. As neither the schools nor the schools boards of the WA Presentation Sisters have any legal identity, they cannot, and do not, protect their charism. Diocesan schools have no legal status, nor do the CEOWA or CECWA. The CEOWA board constitutions provide no legal protection for the charism of diocesan schools. If CECWA Trustees was the legal entity governing the diocesan schools, amendments to its constitution could protect the charisms of individual diocesan schools.

3.5.5 Whether Current Property Ownership Needs to Change

The Christian Brothers are determining new ownership for their school properties but recognise that some must be transferred from the existing incorporated associations to EREA Trustees. The Qld Presentation Sisters transferred the property of their schools to the companies limited by guarantee that govern the schools. The property of the WA Presentation schools is registered in the name of the Congregation. Diocesan school property is not registered in the name of the school but in that of the bishop as a corporation sole. Unless the bishop holds it in trust for the school, the diocesan school has no legal rights to the property, except possibly in some circumstances through a constructive trust. A congregation that is the registered proprietor of their schools, and that is considering transferring the governance and ownership of those schools to another body, will need to consider changes to all or some of their current property ownership.
3.5.6 Whether the Current Public Juridical Person is the Appropriate Canonical Entity in Any New Structure

The Christian Brothers and Qld Presentation Sisters required new public juridical persons for the canonical governance of their schools in the new common law structures. The Holy See granted approval of a new public juridical person for the Brothers, EREA, for the governance of their education ministry in Oceania Province. The Qld Presentation Sisters sought, and received, approval to transfer their schools to the canonical governance of an already existing public juridical person, Mercy Partners, which includes a variety of ministries and congregations.

The relevant public juridical person for diocesan schools is the diocese. A congregation that is the public juridical person relating to their schools, and that is considering transferring the common law and canonical governance and ownership of those schools to another body, will need a public juridical person other than the congregation, under the new governance and ownership. This ensures compliance with canonical requirements for a public juridical person.233

3.5.7 Conclusion

The diversity of common law structures and the use of canon law structures that govern the schools is a reflection of the different approaches used in the past and currently used by the diocese, the Presentation Sisters and the Christian Brothers. It is also a reflection of the diversity of the congregations themselves and how different legal structures will need to be considered for congregations to determine what options may

233 Book V of the Code of Canon Law 1983 governs property of a public juridical person including requirements of a change in ownership of the property. Property requirements and the public juridical person and are discussed in chapters 7.2 and 7.3 respectively.
be most suitable for them. Congregations considering their future in the governance of their schools must consider each of the questions 1 to 5 in Chapter 1 to determine what is required for them to achieve the desired level of participation in their schools.

This chapter identified the current legal structures of the Church, diocesan schools, Presentation schools in WA and Qld, and Christian Brothers schools. Chapter 4 discusses details of the current legal structures identified in this chapter. In particular, it considers and determines whether any of these structures can provide a positive answer to the thesis question.
CHAPTER 4

THE SUITABILITY OF DIOCESAN SCHOOL STRUCTURES FOR CONGREGATIONAL SCHOOLS

4.1 INTRODUCTION

Chapter 3 provided an overview of the current legal status and structures of diocesan schools, Christian Brothers schools and Presentation schools in WA and Qld. It was evident from the discussion that diocesan schools have no legal identity, but the congregation schools have a diverse range of legal structures for their governance and ownership. The purpose of this chapter is to consider the suitability of the governance and ownership structures of diocesan schools to determine how well, if at all, they can protect the charism of a congregational school. The legal structures relevant to diocesan schools include the corporation sole, as currently exercised by the diocesan bishops in WA; unincorporated associations (the diocese); and agency as a corollary to the unincorporated association.

Consideration of each legal structure will ascertain how they operate in the context of the thesis question, namely the extent to which the legal structures provide for the ongoing promotion and protection of the charism, which is central to the nature of the school and the education provided in the school.

Diocesan schools are relevant to the thesis question, as one option available to congregational schools is to transfer the ownership and governance of their schools to the local bishop, thus becoming a diocesan school. Discussion of the current legal structures of diocesan schools will determine whether they provide an answer to the thesis question: whether they are a mechanism for a congregational school to transfer...
ownership and governance but still retain the congregation’s identity and charism in the future.

4.2 THE CORPORATION SOLE

A corporation is an artificial person in law. Corporations developed through common law for centuries, with Sir William Blackstone describing the need for them:

As all personal rights die with the person; and as the necessary forms of investing a series of individuals, one after another, with the same individual rights, would be very inconvenient if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (corpora corporate) or corporations.

Corporations sole are created by statute or recognised in common law. It is a body corporate but has no members or shareholders. It ‘consists of an individual who holds a particular office (e.g. a bishop) and each holder of that office constitutes the corporation sole whilst ever in that office’:

The corporation sole consists therefore of only one person and that person’s successors to a particular position, where that person constitutes an artificial legal person in which title to property could be vested ... A corporation sole is meant to give those individuals who hold an office or station some legal capacities and advantages, particularly that of perpetuity, which they could not have in their capacity as natural persons.

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234 Butt, above n 19, 98.
236 The Western Australian Acts relevant to this thesis are discussed in chapter 3.2.1.
237 Lucas, Slack and d’Apice, above n 5, 240.
238 Butt, above n 19, 98.
The corporation sole therefore has a separate legal identity to the person who holds the office or title. It does not require the formal transfer of the powers, duties and ownership of property that is usually required when a person leaves an office or dies.\footnote{Crouch v Commissioner for Railways (Qld) (1985) 159 CLR 22.}

The corporation sole is an historical entity that was created to accommodate situations where the main office holder of the corporation was an ‘office’ rather than an individual; it is ‘the incorporation of an office’\footnote{James B O’Hara, ‘The Modern Corporation Sole’ (1988 -1989) 93 Dickinson Law Review 23, 25.} and finds its origins in ecclesiastical law. Historically, the corporation sole was particularly useful for ecclesiastical bodies where the bishop or other head held that office, usually until their death. Prior to the creation of the corporation sole, the church had to transfer the ownership of temporal goods into the name of the person succeeding the deceased officeholder. This was an expensive and time-consuming procedure, and it often left the church unable to deal with their property for a considerable period until the transfer was completed.\footnote{Although it was initially a legal entity adopted and developed to accommodate property transfer within the church, in the 17th century the Crown was also recognised as a corporation sole: Austin and Ramsay, above n 1, 35.}

Although very much an historical entity, it was adopted as the common way to incorporate church bodies in several common law countries, including England, the United States (‘US’)\footnote{The first American provision for a corporation sole was in Maryland in 1833 – Francis J Weber, ‘Corporation Sole in California’ (1965) The Jurist 330.} and Australia.

Commentators have suggested that the corporation sole is not a corporation at all but an anomaly.\footnote{See Robert L Raymond, ‘The Genesis of the Corporation’ (1905 – 1906) Harvard Law Review 350, 361.} It is not a corporation pursuant to s 57A of the Corporations Act 2001 (Cth). Nonetheless, the corporation sole has the main features of a corporation, summarised as follows:

\footnote{Crouch v Commissioner for Railways (Qld) (1985) 159 CLR 22.}
• it has perpetual succession;
• it can hold property;
• it can sue and be sued;
• both the property and the powers of the corporation sole are transferable on the
death of the office holder to their successors in the particular office (not to their
heirs, executors or administrators); and
• there is no board of directors or shareholders — only the present, serving office
holder.244

From the 17th century in England, the Church of England was the established church,
with the monarch as the Head of the Church. On the colonisation of Australia,
ecclesiastical law was not received with other common law as there was no established
church as in England. Consequently, the common law corporation sole is not the legal
entity of any church in Australia, though several cases argued that in recent years.245
Only statutory corporations sole are currently recognised in Australia.246

4.2.1 The Corporation Sole and the Roman Catholic Church in Australia

As discussed in chapter 3, the Church in Australia is not a legal entity; in most states
the dioceses are the focus of legal status but that status varies between the states. In
WA, the diocesan bishops as statutory corporations sole hold the property of all four
Roman Catholic dioceses. In other states, the Catholic Church has opted for other legal

244 O’Hara, above n 240, 25 -26; Austin and Ramsay, above n 1, 35.
245 Trustees for the Roman Catholic Church for the Archdiocese of Sydney v Ellis [2007] NSWCA
117; Archbishop of Perth v AA (1995) 18 ACSR 333; Hubbard Association of Scientologists
the Church of England was ever the ‘established’ church of Australia see Renae Barker, The Changing
Relationship Between the State and Religion in Australia: 1788 to Modern Australia. What has
246 For example (in addition to the corporations sole of the Catholic bishops in WA) the Public Trustee
in Queensland and NSW are statutory corporations sole: s 8 Public Trustee Act 1978 (Qld) s 8 and
Public Trustee Act 1913 (NSW) s 7.
entities. In NSW, the Trustees for the Roman Catholic Church for the Archdiocese of Sydney (‘Sydney Trustees’), a statutory body corporate with perpetual succession, was established under the *Roman Catholic Church Trust Property Act 1936* (NSW). In Victoria, the Roman Catholic Trusts Corporation incorporated pursuant to the *Roman Catholic Trusts Act 1907* (Vic). The relevant statutes in NSW and Victoria also restrict the purpose of the relevant body to proprietary interests and rights. The only legal entities relating to the Church are in relation to property.

Section 4 of the *Roman Catholic Church Property Acts Amendment Act 1916* (WA), which creates the office of corporation sole, specifically states the powers of the archbishop in relation to selling, leasing and mortgaging church property.247 Those powers include the ability to purchase, sell, exchange, lease or ‘dispose of [property] in any other manner’. The bishop may ‘mortgage whether legally or equitably’ (including equitable charges),248 enter into a guarantee249 or partnership,250 or become a member of a company.251 He may ‘compound, release or settle claims by or against him in his corporate name’.252 However, s 4(4) restricts these powers so that they do not apply to ‘lands which have been granted by the Crown to or for the use of the Roman Catholic Church and which are vested in the Archbishop, except with the prior approval of the Governor’. Contractual and tortious claims are limited to actions relating to the property.253 These statutory corporations sole therefore only relate to property and cannot be used as governance or management mechanisms.

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247 The other relevant statutes referred to in chapter 3.2.1 above, provide identical or very similar powers.
249 Ibid s 4(2)(d).
250 Ibid s 4(2)(e).
251 Ibid s 4(2)(f).
252 Ibid s 4(2)(g).
253 Ibid s 4(2)(g).
Whilst useful for ownership of diocesan schools, the corporation sole is not suitable for their governance. It only has relevance to congregations if they wish to relinquish and transfer ownership of their properties to the diocesan bishops, but they must seek a separate governance mechanism in another legal entity. The corporation sole does not apply to the governance of Catholic education in WA. As such, this legal entity is not available as a common law option for future governance structures because the relevant statutes limit its application to property matters. This is not a recommended option for congregations seeking new governance and property ownership structures. Any new structure will require property to effectively continue their schools and too much uncertainty arises if the school property is owned by another entity.

4.2.2 Conclusion

The Australian courts have held that the corporation sole, limited by statute to existing for the purposes of dealings in property only, cannot sue or be sued in relation to tortious and contractual matters that do not pertain to property issues.\(^{254}\) It is not a suitable legal tool for governance of schools, only for ownership of school land. The corporation sole holds the land for the diocese, not the individual school, unless registration to the title to the land is in the name of the corporation sole held on trust for that individual school. The provisions of the statutes, although useful for protecting diocesan property, cannot assist in governing congregational schools or maintaining their charisms. It cannot accommodate the involvement of anyone other than the relevant bishop. Any attempt to amend the statutes creating the corporations sole so that the powers extend beyond property matters is unlikely to succeed. Its purpose has

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always been solely in relation to property. The proposed amendments would be attempting to duplicate the powers already available to other corporate bodies for which statutory provision already exists in the Associations Incorporation Act 1987 (WA) (in the Associations Incorporation Bill 2014 (WA)) and the Corporations Act 2001 (Cth).

4.3 THE UNINCORPORATED ASSOCIATION

The unincorporated association is a business structure typically found in not-for-profit organisations, social and sporting clubs, and voluntary associations. Dioceses and parishes in Australia are unincorporated associations. The Church has no common law identity; it is not a public juridical person. Dioceses however, are separate public juridical persons (with the diocesan bishops as the representative of their respective dioceses) and are unincorporated associations in common law. Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565 (‘Ellis’) recognised parishes as unincorporated associations and the parties, and judges, acknowledged that the Catholic Archdiocese of Sydney was an unincorporated association (and therefore dioceses in general). The unincorporated association is therefore relevant when considering the current legal rights, obligations and powers of diocesan schools. This section will analyse the legal nature of unincorporated associations with particular application to the Church and diocesan schools, and assess their ability to protect the charism of a school. This section will commence with an

explanation of the legal nature of the unincorporated association and then focus specifically on legal rights and liabilities in relation to contracts, torts and property.

4.3.1 General

The unincorporated association has long been a problematic legal concept due to its lack of legal status, though its definition has been relatively clear for some time. 257 There are no statutory requirements relating to the formation or administration of an unincorporated body; it is governed by case law. Cameron v Hogan, the leading Australian case on unincorporated associations, defines them as follows:

They are for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage. Such associations are established upon a consensual basis, but, unless there were some clear positive indication that the members contemplated the creation of legal relations inter se, the rules adopted for their governance would not be treated as amounting to an enforceable contract. 258

This very wide common law definition contains no provision for any formal requirements relating to the establishment of an unincorporated association. Nor is there provision for its administration, such as a constitution, contractual liability between members, property ownership or management of the unincorporated association. 259 The only common factor appears to be the not-for-profit status of these bodies. Establishing an unincorporated association is, therefore, very simple: a group of people (members) with a common not-for-profit interest voluntarily establish a

257 Many of the cases considering unincorporated associations including those discussed in this chapter demonstrate their problematic nature arising from the lack of legal status.
group and name it. They may or may not draft and adopt rules or a constitution, they
will generally choose a committee from the members, but are not required to, and they
may or may not own property held on trust. Today the *Cameron v Hogan* definition
remains the current law and it is accepted that

> [v]oluntary non-profit associations are associations, clubs, societies or other
groups of persons that are formed or carried on for any lawful purpose which does
not result in the association’s members making any profit from its activities or
dividing its property among themselves while the association remains in existence.

Characteristics of the unincorporated association include that it: 261

- is formed for a common purpose;
- is a not-for-profit group;
- is not regulated by statute and is therefore subject to common law principles;
- does not necessarily have a fixed or finite membership; 262
- may or may not hold property (but only pursuant to a trust);
- cannot sue or be sued; and
- may or may not have rules or a constitution (though it is now rare that they do
not).

The unincorporated association’s lack of legal status causes problems for its members
and those dealing with it. These include the relationship between its members, and the

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261 These are common characteristics identified from relevant cases and commentary. See generally
*Cameron v Hogan* (1934) 51 CLR 358; *Trustees of the Roman Catholic Church for the Archdiocese of
Zealand*, above n 260.
262 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR
ability of such an association to sue and be sued, to enter into contracts, to be held liable for tortious acts, and to own and insure property — all concepts likely to arise in a school. Uncertainty in legal relationships is increased by the ‘nature’ of an unincorporated association as it can be so diverse as to include the groups listed by the court in *Cameron v Hogan*\(^{263}\) with such widely varying activities, purposes and membership numbers.

Generally, the written rules\(^{264}\) govern the appointment or election of the unincorporated association’s committee. If the unincorporated association has no written rules it is still likely to have a committee but have a very small membership that informally agrees to the appointment of committee members. It is the scope of the powers and duties of the committee members, and identifying just who or what to join in legal proceedings, that have been the focus of much of the case law relating to unincorporated associations. These powers and duties should be in the association’s rules to provide clarity and to make them enforceable in law. Often those rules do not include everything required to allow the members and committee to administer the association efficiently, or they include issues beyond the power of an unincorporated association.\(^{265}\) In order to provide some degree of protection to members of an unincorporated association and for it to function properly, its written rules should at least include:

- the name and objects of the association;
- a procedure for amending the rules;

\(^{263}\) *Cameron v Hogan* (1934) 51 CLR 358.

\(^{264}\) For the purpose of this thesis, the term ‘rules’ will be used in relation to the unincorporated association.

\(^{265}\) For example, the courts have had to determine the identification of the correct parties to join in legal proceedings and ascertaining liability of the unincorporated association in contract, tort and property issues.
• any qualifications for membership;
• the subscription and any other fees to be paid;
• the management of the association;
• meetings;
• control of its funds and other financial and accounting matters;
• the procedure to be followed if the association is dissolved; and
• the distribution of any surplus property after dissolution.  

The members of an unincorporated association must have a mutual purpose in that association and need ‘to comply with the mutual rights and obligations which are stated in the rules of the association’.  

Members may amend the rules, but where the procedure for doing so is not included in them, it is not clear from the case law whether a majority or unanimous agreement of the membership is required.  

The members are not bound to remain in the association but may resign in accordance with procedure and/or process expressed in the rules. This was originally established by Lindley, Kay and Smith LJJ in Finch v Oake [1896] 1 Ch 409, where all agreed that in the absence of anything in the rules of a voluntary association, a member may choose to withdraw his membership at any time. However, in Redhead Grange Inc v Davidson (2002) 55 NSWLR 14, Brownie AJ said that if the rules explicitly state that membership may not be resigned then a member must remain a member unless they fall within any exceptions stated in the rules. The rules must explicitly state if members

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266 Sievers, Associations and Club Law in Australia and New Zealand, above n 260, 12.
267 Conservative and Unionist Central Office v Burrell [1980] 3 All ER 42, 58.
268 The traditional view has been a unanimous requirement Theliusson v Valentia [1907] 2 Ch 1; Clarke v Australian Labour Party (SA Branch) [1999] SASC 365 per Mullighan J, [137] – [138]. But some courts have taken a more relaxed and practical view and accepted a majority decision: Abbatt v Treasury Solicitor [1969] 3 All ER 1175; Master Grocers’ Association of Victoria v Northern District Grocers Co-operative [1983] VR 195, 201 (Brooking J).
269 Finch v Oake [1896] 1 Ch 409, 415 (Lindley LJ), 416 (Kay LJ) and 417 (Smith LJ).
can control membership to the extent of prohibiting resignation or insisting that a committee must decide whether to accept a resignation.

4.3.1.1 Application to the Church

The rules of the dioceses in Australia as unincorporated associations are not easily identifiable. The CECWA Trustees’ constitution only relates to it as the incorporated association and it is limited to education; the dioceses have many interests other than education. The Mandate from the bishops is unlikely to be the dioceses’ rules, as they do not adequately define the powers or purpose of the diocese and once again only relate to Catholic education. The generic CEOWA school board constitution is also unlikely to be the dioceses’ rules as it only pertains to education in diocesan schools. It is arguable that the dioceses are unincorporated associations without any written rules. Protection of the charisms of diocesan schools is not possible, particularly in the long term, where there are no rules that are explicitly stated or directed to maintaining the school’s charism rather than relying on chance or the goodwill of board members and school staff. Owing to the complex structure of, and relationship between, the dioceses, CECWA Trustees, CECWA, CEOWA and school boards it is difficult to ascertain the committee members of the unincorporated association who would be responsible for administering the rules, if there were any.

4.3.1.2 Identity in Legal Proceedings

As the unincorporated association is not a legal entity it follows that it cannot sue or be sued, and therefore has no legal standing to commence, or join other parties to, court

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270 See Chapter 3.3.2.2 Diocesan School Boards, for a discussion of the status of the diocesan board constitution.
actions. This raises various issues and difficulties in relation to legal rights and liabilities in contract or tort.

4.3.1.3 Who to Sue?

*Ellis* demonstrates the difficulty of identifying the correct parties to join in legal proceedings involving an unincorporated association. The plaintiff originally commenced proceedings 271 in relation to alleged sexual abuse by a Catholic priest in the 1970s. In addition to the priest, the plaintiff eventually sued:

- His Eminence George Cardinal Pell Archbishop of Sydney for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney; and
- the Sydney Trustees.

It was never the plaintiff’s contention that Cardinal Pell was personally responsible; Cardinal Pell was not a Cardinal 272 nor even in the relevant diocese at the time of the alleged offences. The plaintiff joined him in the proceedings as representing the Church at the time of commencing the action. The *Roman Catholic Church Trust Property Act 1936 (NSW)* established the Sydney Trustees to administer the property of the Church. The court needed to determine whether either, or both, of those defendants were capable of being party to the particular proceedings, which related to torts and fiduciary duty. The parties, and judges, acknowledged that the Catholic Archdiocese of Sydney was an unincorporated association and as such could not be sued.

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272 Which may have been relevant to whether he was the appropriate ‘officer’ in the Church to join in the action.
The difficulty the plaintiff had in determining the correct defendants was that ‘the Catholic Church’ had no clear legal identity and the ‘membership’ of the Church changed constantly. Unchallenged canon law expert evidence at the trial explained the division of each diocese into distinct parishes. Mason P referring to these parishes stated that ‘[t]he body fluctuates as members depart through death or other reasons and are added through birth (or baptism), arrival within the ecclesiastical jurisdiction or other reasons’. He acknowledged that Cardinal Pell was not a member of the unincorporated association at the time of the alleged offences and that it was difficult to identify ‘how membership of that body was to be determined’. The court recognised that the membership was difficult to establish but that this uncertainty did not preclude the church being an unincorporated association. None of the parties joined were capable of being liable in tort or fiduciary duty.

The plaintiff in Ellis joined the Sydney Trustees and alleged liability on the basis that the Sydney Trustees had the care, control and management of the parish and therefore of the priest. Where the unincorporated association holds property on trust on behalf of its members, the trustees may be sued in relation to actions relating to the property; identification of the legal entity holding the property (the trustees) is clear. The Sydney Trustees was created pursuant to the Roman Catholic Church Property Act 1936 (NSW), which strictly limited its scope to property matters (fulfilling the same role as the corporations sole of the diocesan bishops in WA). The court accepted that the diocese was an unincorporated association and the Sydney Trustees was a legal

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273 Code of Canon Law 1917 canon 216 §1 and §3; as the allegations of abuse related to a period prior to the 1983 amendments to the Code the 1917 Code is cited. The corresponding canon in the Code of Canon Law 1983 is canon 374 §1. The expert was Dr Rodger Austin.


275 Wise v Perpetual Trustee Co Ltd [1903] AC 139.
entity that could sue and be sued. The court, however, rejected the notion that Sydney Trustees was liable for all the business of the unincorporated association or that it could be sued for issues beyond its own scope and powers, which were limited to property. The unincorporated association had no legal status and the Sydney Trustees could not be liable in tort, or owe a fiduciary duty for the acts of the priest.276

Similar issues of identifying parties for the purposes of legal action also arose in Carlton Cricket & Football Social Club v Joseph277 (‘Carlton Cricket & Football’). A lease, to which the plaintiff club was a party, covered a period of 21 years. Membership of the club, including the committee members, was difficult to determine for the purposes of legal action due to the length of time and the changing memberships within the 21-year period.278 In both Ellis and Carlton Cricket & Football the courts concluded that difficulty in determining membership did not preclude the organisations from being unincorporated associations, but acknowledged that the changing membership made it very difficult to attribute liability to individuals.

4.3.1.4 Statutory Considerations

Some Australian courts have considered the lack of legal status of the unincorporated association as merely a ‘detail’ in court proceedings, particularly where there was legislative support for doing so. Bailey v Victorian Soccer Federation [1976] VR 13 considered a workers’ compensation claim by the widow and son of an ‘employee’ of a Soccer Federation that was an unincorporated association. Gillard J said:

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276 Sydney Trustees were the correct party in another case relating to a lease as the dispute related to property rights: Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architect & Planners [2005] NSWSC 381.
278 Carlton Cricket & Football [1970] VR 489 is discussed more fully later in this chapter when considering property issues.
It is my opinion that in order to overcome the difficulties ... raised by the common law, the extensive definition of “employer” was adopted in the Workers Compensation Act for the purposes of arbitration proceedings ... It was the legislative intention that by the use of the enlarged definition, any person employed by an unincorporated body, like a club, or an association, or a society under its collective name, could make a claim for workers compensation from such unincorporated body in its collective name, even though the constituent membership of the “employer” might alter from period to period: at 22.

Gillard J specifically accepted the common law doctrine that an unincorporated body cannot be sued but applied the overriding statutory provision contained in the Workers Compensation Act 1958 (Vic) under which the action was brought. WA has a similar definition of worker in s 5 of the Workers’ Compensation and Injury Management Act 1981 (WA) where a ‘worker’

... means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing ...

The same definitional section specifies that an employer ‘includes any body of persons, corporate or unincorporate’. Owing to the similarity in legislation, it is highly likely that a Western Australian court would follow the same reasoning as Gillard J in Victoria in relation to workers’ compensation matters and any other legal action where a statute has provided such a wide and encompassing definition. Mr Ellis had no relevant legislation upon which he could rely to join a relevant party.

In Re Independent Schools’ Staff Association (ACT) Ex parte Hubert and Others (1986) 65 ALR 673, Gibbs CJ, Mason and Dawson JJ held that unincorporated bodies (other than clubs) may not be employers for the purposes of the Conciliation and
Arbitration Act 1904 (Cth). The distinction was made between the board as an unincorporated association not being capable of being an employer, and the ‘members of the Board for the time being’ who were capable of being an employer: at 675. Therefore, a diocese as an unincorporated association cannot be an employer in diocesan schools. The diocesan bishop is the employer, but in his personal capacity.\(^\text{279}\)

As the diocesan bishop usually holds little or no personal property, a judgment against him as a defendant is impractical. However, the ‘Church’ is likely to meet any judgment against the diocesan bishop. How they would do this — through Catholic Church Insurances or diocesan property, including diocesan school property — remains untested and a definitive answer is therefore unavailable. It is open to a court to determine that any property registered in the diocesan bishop’s name as a corporation sole is property for the purposes of any judgment made against the diocese. This leads to the conclusion that congregational schools should not transfer the ownership of their property to the archbishop whilst the Church remains an unincorporated association, unless he holds the property on trust for the specified school. If the archbishop holds it simply as a corporation sole, then any court judgment against the diocese may be met by diocesan property formerly belonging to a congregation even if that judgment did not involve the former congregational school or property. Better protection for the school property arises where the bishop holds the property on trust for the school (even if it becomes a diocesan school).

Cases departing from the common law rule that an unincorporated association cannot sue or be sued have been rare and usually involve trade unions or political parties. As the unincorporated association cannot sue or be sued it is unable to protect the clauses

\(^{279}\) His other legal capacity is as a corporation sole but as seen above in chapter 3 and this chapter a corporation sole only relates to issues concerning property, not employment.
of its rules relating to the school’s charism through legal mechanisms. In limited circumstances, however, a representative action may overcome the limitation of not being able to sue or be sued as an unincorporated association and attempt to protect the charism in a school.

4.3.1.5 The Representative Action

Where all members of the association have the same legal interest in the cause of action, a representative action may apply whereby one or more persons represent the group, pursuant to Order 18 Rule 12 of the Rules of the Supreme Court of Western Australia.\(^{280}\)

Any judgment made in a representative action is made against all members of the association and therefore enforceable against them.\(^{281}\) The requirement that all members have the same interest in the issue makes it unlikely that a representative action is useful for a matter in contract or tort;\(^{282}\) in cases relating to unincorporated associations it has only been used in relation to trade unions. In Ellis, Mason P could find no causal connection between the Cardinal and the members of the Church that was sufficient to render them all liable for the alleged actions of the priest. He said that ‘[a] plaintiff cannot, by means of a procedural mechanism, such as a representative proceeding, sue defendants against whom he or she has no cause of action’: at 582. It is arguable that a court would draw the same conclusion in relation to a representative action in which the members of a diocese were liable for the actions of someone acting in a diocesan school. It would only be useful if a causal connection between the

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\(^{280}\) There are similar provisions in other States and Territories.

\(^{281}\) *Supreme Court Rules 1971 (WA) Order 18 Rule 12(3).*

members and the legal action can be clearly determined, which is unlikely to occur for the same reasons determined in *Ellis*.

Use of the representative action in cases concerning unincorporated associations is rare, and is likely to remain so in the future. It was successfully used in a racial discrimination case in the Federal Court in *Executive Council of Australian Jewry and Another v Scully and Another* (1998) 160 ALR 137, but was interpreted there in relation to a particular section of the *Racial Discrimination Act 1975* (Cth).\(^{283}\) The representative action was rejected in *Serbian Orthodox Ecclesiastical School Community “St Nikolas” Queensland v Vlaislavljevic* [1970] Qd R 386 where Campbell J held, following *Attorney General (Vic) v Brighton* [1964] VR 59, that parties in a representative action should have the same interest and only the same defence: at 391, severely restricting the application of the action. The existence of separate defences will generally defeat the common interest requirement of the representative action. The similarities in the statutory definitions of a representative action in these two jurisdictions and in WA make it likely that the Western Australian courts would follow these cases, rendering the representative action inapplicable to a plaintiff wishing to sue a diocese or a diocesan bishop.

The representative action may be useful in resolving internal issues affecting an unincorporated association (such as resolution of internal disagreement pertaining to the charism) as the members would all have the same interest in the matter — that it be resolved. The High Court took a liberal approach to the definition of ‘same interest’\(^{284}\) in *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398 although the

\(^{283}\) *Racial Discrimination Act 1975* (Cth) s 22(1).

\(^{284}\) *Supreme Court Rules 1970* (NSW) Pt 8 r 13(1), considered in this case, are couched in similar but not identical, terms to O18 r 12(1) of the *WA Supreme Court Rules.*
case did not involve an unincorporated association. Brennan J stated that the ‘same interest’ did not limit it to the same cause of action but to whether there was ‘a community of interest in the determination of some substantial issue of law or fact’.

It is uncertain whether a Western Australian court would accept a representative action in relation to diocesan schools unless the party using the representative action could establish that all members had the same interest. It is arguable that any action relating to a breach of any mechanism that was intended to protect a charism of a school or schools may be considered a ‘determination of some substantial issue of law or fact’; a great deal of uncertainty surrounds the issue though. The representative action is unlikely to be able to assist in protecting a charism of a school that is part of an unincorporated association.

4.3.1.6 Application to the Church

The plaintiff in Ellis did not submit that all members of the Catholic Church at the relevant time were personally liable to him for the alleged acts of the priest, but that was the legal effect of the unincorporated association. The court ultimately held that the unincorporated association could not be sued, but that

persons or groups within an unincorporated association can be held in tort or contract as principals provided they assumed an active or managerial role in which they exercised palpable control over an activity at the relevant time. However, the liability of such persons is personal, not representative in nature.

An action can be brought personally against members of an unincorporated association if they are in ‘an active or managerial role’, which means they are ‘exercising palpable

control over an activity’; it is not limited to committee members of the unincorporated association. It is therefore arguable that any members of the unincorporated association that is the Catholic Church who are in an active or managerial role and so exercising palpable control over an activity in the church, including a diocesan school, may be held personally liable for any tortious or contractual liability that arises in that school. CECWA is in an active and managerial role, exercising palpable control over diocesan schools, as is the CEOWA acting as its executive arm. The diocesan bishops are in an active and managerial role and exercising control over the diocesan school, through the CECWA. Diocesan school board members, under the current generic constitution, are arguably in an active and managerial role and exercising control over the diocesan school. As such, it is conceivable that the diocesan bishops, members of CECWA and members of diocesan school boards may be personally liable for legal actions arising from activities in diocesan schools over which they exercise an active and managerial role.

Ascertaining the legal responsibility of an unincorporated association remains one of its greatest problems and creates severe limitations for those seeking legal recompense against or for an unincorporated association. It is even more problematic when considering the complexity of Western Australian diocesan school governance. Personal contractual and tortious liability arising from membership of an unincorporated association may restrict the willingness of relevant and qualified people to act as members for the association, or restrict the amount of normal risk taking and decision making required in business and governance. How and to what extent members may be held liable in contract and tort will now be considered.

287 The law relating to Agency and ostensible authority relating to this ‘palpable control’ is considered in detail below at chapter 4.4.1.3.
The potential liability of members of diocesan school boards, CECWA and CEOWA in contractual issues relating to their respective bodies is an important issue when attracting laity to accept positions voluntarily, usually without remuneration, in any school governance legal structures. Justice Linley confirmed the general rule regarding contractual liability of members of unincorporated associations in *Wise v Perpetual Trustee Company* [1903] AC 139:

No member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised: at 149.

An unincorporated association has no capacity to enter into a legally binding contract. The courts have been reluctant, however, to allow an agreement freely entered into by parties where all the parties had the express intention to create legal relations to fail simply on the grounds that one party to the agreement was an unincorporated association and thus had no legal identity.288

4.3.2.1 Who to Sue?

In *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378 (‘Bradley Egg Farm’) the plaintiff entered into an agreement to send his chickens to an unincorporated poultry society for disease testing, where his poultry died as a result of the alleged negligence of one of the society’s employees. The council, or committee, who had made the agreement with the plaintiff to test the poultry, administered the society. The council

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288 *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378.
contended that as they were not a legal entity they were not liable. The majority of the court considered that as the plaintiffs had intended to enter into contractual relations then someone had to be legally responsible, and determined that the council members — not all the members of the society — were liable. It was the council ‘whom the law must regard as pledging their own credit in order to perform the duties which they voluntarily undertake for their so called “society”; just as do the committee men of a club’.\(^{289}\) Herron CJ did note that this might not seem ‘logical’, but that someone had to be held liable to ensure justice was done: at 415.

*Bradley Egg Farm* has been considered and followed in most of the Australian cases considering the contractual liability of the unincorporated association. Gowans J in *Carlton Cricket & Football*\(^ {290}\) made the clear distinction between *Bradley Egg Farm*, where there was one single transaction contemporary in time with an identifiable council membership, and the case before him. In *Carlton Cricket & Football*, the unincorporated association purported to contract a lease for a period of 21 years, during which time both the general membership and committee membership changed many times. The Carlton Cricket & Football Club entered into an agreement with the Fitzroy Football Club, an unincorporated association, to play home games on the Carlton ground. The constitution and rules of the Fitzroy Football Club provided for management of the club through an elected management committee. The committee, pursuant to cl 9 of the rules, had

> sole management of the affairs and concerns of the club providing such acts do not conflict with the constitution of the club and shall have power to perform all

\(^{289}\) Ibid 378, 386 (Scott LJ).

such acts and deeds as shall appear necessary or essential for the management of
the club.

The agreement was made in February 1967 and by cl 12(a) was for a term of 21 years.
Gowans J stated that ‘[i]t is easier to achieve a binding legal result in the case of a
single transaction having an immediate final and complete effect, like the purchase of
a parcel of goods, than in the case of a transaction operating over a long period, such
as a lease’: at 497. The current committee members were not liable in relation to the
agreement, as they were not party to the agreement in 1967.

The Australian case law291 established that a contract could not bind an unincorporated
association because it had no legal capacity to enter into it, but the members or
committee members of that unincorporated association might be personally liable. The
courts have been unwilling to attribute liability to general membership when the
contract covers a significant period.292 For general members of the unincorporated
association to be liable on a valid contract it will be necessary to show that either:

- there has been no change of membership in the unincorporated association
during the relevant period of the contract; or

- whenever there has been a change of membership in the relevant period of the
contract, there has been a novation to that effect.293

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291 For example see Ward v Eltherington [1982]Qd R 561; M&M Civil Engineering Pty Ltd v
Sunshine Coast Turf Club [1987] 2 Qd R 401; Trustees of the Roman Catholic Church v Ellis [2007]
NSWCA 117.

292 See particularly Carlton Cricket & Football Social Club v Joseph [1970] VR 487 and City of

293 Carlton Cricket & Football Social Club v Joseph [1970] VR 487, 498 (Gowans J); Sievers,
‘Associations and Club Law in Australia and New Zealand’, above n 260, 32.
The contractual liability of the members of an unincorporated association relies heavily on any written agreement for creating rules that the members may have entered into with each other:

Such rules may be derived from, for example, a written constitution or otherwise agreed in writing; they may be accepted by inference as the result of the practice of the members; and in some cases they may be enacted or affected by statute.²⁹⁴

The parties to the rules must also have had an intention that those rules would create rights and obligations,²⁹⁵ though this is more easily inferred when there are written rules directing the members, and particularly the office-bearers, how to act in relation to the unincorporated association. The mere fact that there is a written document does not automatically render members liable. Likewise, just because the rules direct that the association is conducted by a committee does not make that committee or the general members liable, unless they have impliedly or expressly authorised any contract. Liability will be determined by the wording of the rules and the intention originally placed on that wording, where the intention is ascertainable.²⁹⁶ Where liability arises, the committee members are personally liable.

4.3.2.2 Indemnities

Unless the general members of the association give their express authority for the committee to enter a contract on their behalf, general members are not liable on the contract. The position for committee members is less appealing. The Bradley Egg Farm case established that where committee members (or those acting on their behalf)

²⁹⁴ Scandrett v Dowling (1992) 27 NSWLR 483, 491 (Mahoney J).
²⁹⁵ Cameron v Hogan (1934) 51 CLR 358.
entered into a contract, they were personally liable on that contract.\textsuperscript{297} Indemnity for committee members may come from the association’s funds. This was supported (in dicta) by Hutley J in \textit{Peckham v Moore} [1975] 1 NSWLR 353 at 360–1. An indemnity may be expressed in a specific contract and only apply to that contract, or in the rules giving a general indemnity for all matters within the authority of the committee. The Design of EREA for Christian Brothers schools contains a general indemnity for board members.\textsuperscript{298} Diocesan bishops provide a general indemnity to board members in the diocesan schools. The Iona Guidelines contain no reference to indemnities. In the absence of any expressed indemnity, it is unclear what the courts may determine in relation to indemnifying committee members from the unincorporated association’s funds. Rowland J in \textit{City of Gosnells v Roberts} (1994) 12 WAR 437 (‘\textit{Roberts}’) considered the issue briefly where he stated that it was possible that an indemnity applied to committee members: at 444–5. As the issue did not need to be determined in the circumstances of that case, he did not resolve it.\textsuperscript{299}

Whether an indemnity for contractual liability of the unincorporated association applies to committee members remains undetermined unless there is an expressed and clear written indemnity contained in either the constitution of the association or in a separate document. The breadth of the indemnity depends on the specific words of the written document in which it is contained.

\textsuperscript{297} \textit{Bradley Egg Farm Ltd v Clifford} [1943] 2 All ER 378.

\textsuperscript{298} Edmund Rice Education Australia, \textit{The Design}, above n 145, cl 3.3.2.

\textsuperscript{299} Directors and officers of associations and companies may take out ‘D&O’ Insurance (Directors and Officers) which may provide some protection if a claim is made against them for breach of duty. The extent of the protection will be determined by the specific/particular insurance contract terms.
4.3.2.3 Application to the Church

Usually the diocesan bishops enter into contracts in their personal capacity. The principal of the relevant school, on behalf of the diocesan bishop, enters into employment contracts between the diocesan bishops and diocesan schoolteachers.\(^{300}\) The delegation from the diocesan bishops is contained in the standard employment deed between diocesan bishops and principals:

4. The Employer and Delegated Employing Authorities.

diocesan-accountable schools operate under the leadership and co-ordination of the Catholic Education Commission of Western Australia and the Catholic Education Office of Western Australia. These bodies act on behalf of the bishop of the diocese.

4.1 The bishop is the employer of the principal of a diocesan-accountable school.

4.2 The Director of Catholic Education is the delegated employing authority of principals in diocesan accountable schools.

4.3 As employer, the bishop of the diocese has delegated his employing authority to the Director of Catholic Education to employ Principals on the bishop’s behalf. This employing authority is then further delegated to appropriately employed Principals to enable them to employ staff in diocesan-accountable schools on the bishop’s behalf.\(^{301}\)

The relevant Enterprise Bargaining Agreements repeat this delegation.\(^{302}\) As previously discussed, there are no written rules or a clearly identifiable committee of the dioceses. Whether there is a legally binding contract between the diocese and the

\(^{300}\) The law of Agency as it relates to the diocesan Bishops is discussed at chapter 4.4.4 below.

\(^{301}\) Preamble, Standard Deed entered into between the diocesan Bishops and a Principal of a diocesan school on the appointment of the Principal.

\(^{302}\) For example, Roman Catholic Archbishop of Perth Teachers Enterprise Bargaining Agreement 2012, Agreement No 33 of 2012, clause 24.
diocesan schools may, therefore, be difficult to determine. Any contract appears to be with the bishops in their personal capacity.

4.3.3 Liability in Tort

The personal tortious liability of members of diocesan school boards, CEOWA and CECWA may be, as with contractual liability, a disincentive for laity to act as members of them or for other members of the public to engage with the diocesan schools, rendering them less effective as future governance structures. Membership of an unincorporated association does not create a special duty of care towards other members, as, for example, the special duty of care that exists between teachers and students. Members’ tortious liability with respect to each other is determined on the usual principles of general tort law, unless otherwise expressly provided for in the rules of their unincorporated association.

Where a third party takes an action in tort against a member or members of an unincorporated association, that member or members, if liable, will be personally liable. Ellis makes it unlikely that members of the Catholic Church, or even a diocese, are liable for tortious liability of an individual within the Church where there is no causal connection between the person and the tortious deed. Where an individual is liable in a tortious action they are personally liable — a daunting prospect.

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303 The duty of care owed by teachers to students is established wherever the teacher/student relationship exists and is a non-delegable duty. It does not need to be ‘proved’ in each case as it does with members of a society trying to establish a duty to each other generally: Geyer v Downs (1978) 138 CLR 91; McHale v Watson (1966) 115 CLR 192; Richards v State of Victoria [1969] VR 136.

304 Prole v Allen [1950] 1 All ER 476, 477.

305 City of Gosnells v Roberts (1994) 12 WAR 437.

306 See also, Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers [2008] NSWSC 1354; PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors [2011] NSWSC 1216.
for members of CECWA and diocesan school boards who volunteer their time and expertise.

4.3.3.1 Who to sue?

The tortious liability of an unincorporated association was considered in *Smith v Yarnold* [1969] 2 NSWR 410 where committee members were held liable for breaches of occupiers’ liability. Smith attended a greyhound race meet conducted by a greyhound racing club that was an unincorporated association. Management of the club vested in a committee constituted by some of the members of the club. Yarnold was neither a committee member nor a member of the association, but a paid official attending the meet. Smith, who had paid to enter the meet, sustained an injury when the grandstand in which he was sitting collapsed. He sued both the committee members at the time of the incident and Yarnold in contract and occupiers’ liability. The court held that *Bradley Egg Farm* established the liability of the committee members of an unincorporated association in both contract and tort. They applied *Bradley Egg Farm*, rendering the committee members liable. As Yarnold was merely a paid servant of the association, he incurred no such liability.

Later Australian decisions, including *Roberts*, have followed *Smith v Yarnold*. In *Roberts*, the plaintiff brothers were riding a motorcycle when it struck a horse that had wandered on to the road. The horse was owned by a member of the Gosnells Polocrosse Club who agisted the horse out of the polo season on the property from which it had escaped; the club leased the land on which the horse should have been securely agisted from the City of Gosnells. The court determined that the club was an unincorporated association as it had all the characteristics of one, including office holders, but lacked written rules. The informality of the club made it necessary for the
court to determine initially that it was in fact an unincorporated association. 307 The plaintiffs sought extensive damages for the serious injuries they suffered and sought to sue:

- the City of Gosnells as the owners of the land;
- the owner of the horse; and
- the office-bearers (the president and the secretary) of the club both at the time of the accident and at the time of commencing proceedings (to be able to access the assets of the club for any payment of damages).

When considering the liability of the president and secretary, the court discussed the liability of committee members of unincorporated associations generally, they accepted Smith v Yarnold but distinguished it from the case before them on the facts. 308 The decision in Smith v Yarnold depended on there being a contractual arrangement between the plaintiff and the members of the relevant club; that was not required in Roberts as the plaintiffs had no connection to any of the defendants. In Roberts the plaintiffs claimed that the cause of the accident was the horse escaping from the property and that the club was responsible by allowing the owner of the horse to agist it when the fences were in disrepair. The court determined, however, that the agistment was not an activity of the club and as such the committee members who had made the decision to allow the member to agist his horse did not make a material decision in relation to the club itself — it was the decision of the horse’s owner. 309 Had the horse escaped onto the road during a polo match, the liability of the committee members

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307 Anderson, J determined that it was not an incorporated association, Rowland and Pidgeon JJ determined that it was. This is similar to the Church and Dioceses who do not have a clearly identifiable set of rules or constitution; however, in Roberts there was a clearly identifiable committee of the unincorporated association.

308 City of Gosnells v Roberts (1994) 12 WAR 437, 443 (Pidgeon J) and 445 (Rowland J).

309 This approach to determining whether a duty was owed by the committee was applied in Agar v Hyde; Agar v Worsley (2000) 201 CLR 552.
may have been different; the decision was not that committee members were never liable but that they were not liable on the facts of this case — they owed no duty of care to the plaintiffs. The owner of the horse was held liable but as the owner of the horse, not as a member of the club.\(^{310}\)

More recently, the NSW Court of Appeal in *Hybynyuk v Mazur* [2004] NSWCA 374 considered the tortious liability of members of unincorporated associations. Mr Hybynyuk was a member of the Russian Club (an unincorporated association with a committee to which the members had delegated administration of the club) and Mr Mazur was the club’s president. Mr Hybynyuk attended a busy bee at the club with other members and injured himself when he fell from the roof of the shed that he was demolishing. The court considered two relevant liability issues: that of members of an unincorporated association to each other, and that of the members to a volunteer. It was determined that a duty of care between members did not exist solely on the basis that they were fellow members, as ‘it needs to be established on ordinary principles of negligence that a duty of care is owed in the particular circumstances’.\(^{311}\) The court also followed *Smith v Yarnold*, noting that a breach of duty renders committee members personally liable. There was otherwise no distinction between committee members and ordinary members in determining whether a duty of care existed. The demolition of the shed was a ‘risky’ activity for Mr Hybynyuk who had no experience in this type of manual labour. Mr Mazur had personally undertaken to organise the busy bee and in particular the demolition of the shed. He owed a duty of care to Mr Hybynyuk. The court held there was no breach of that duty.

\(^{310}\) The Council was also liable but on grounds unrelated to the law of unincorporated associations.

The court also considered whether Mr Mazur, as a member of the club, owed a duty of care to Mr Hybnyuk in the capacity of a volunteer — a member of the association volunteering to help that association, as parents often do at school busy bees and as do members of CECWA and school boards. Generally, a person who seeks assistance from a volunteer owes them a duty of care and may be liable if there is a breach of that duty. The court determined that

[i]f there is a duty of care, it is a duty that arises on the ordinary principles of negligence. The factors relevant to liability were common and co-extensive regardless of whether the case is considered under the construct of a duty of care owed by Mr Mazur as a committee member or a duty owed to Mr Hybnyuk as a volunteer. On either basis a duty of care is owed: at 24.

The Australian cases have established that generally, where a third party incurs loss or damage as the result of an activity of an unincorporated association, the committee members, or office-bearers, of that association may be responsible.312

4.3.3.2 Indemnities

Whether indemnity for tortious liability of committee members draws from the association’s funds is less clear, or judicially considered, than indemnity for contractual liability. If committee members are indemnified it is only to the extent of ‘liabilities properly incurred for the objects of the club, and to the extent of the funds, unless the members have resolved otherwise.’313

312 The degree of control over the property that an association does not own was considered in Voli v Inglewood Shire Council (1963) 110 CLR 74 where the control was limited but this did not relieve them of liability. Although not a case relating to unincorporated associations it is likely that the general principle would be applied to an action relating to them.

Rowland J in Roberts said ‘[i]t may be that, to the extent that those elected carried out the functions and objects of the collegiate body, they would be indemnified by the members’: at 444–5. As he did not find the committee liable, it was not necessary for him to decide that matter conclusively and it remains unresolved.

Section 3(1) of the Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA) (‘Volunteers Act’) determines that the Volunteers Act does not apply to unincorporated associations and so provides no indemnity to either members or volunteers of such an association. It applies to incorporated associations and other bodies corporate.

The existence and extent of any indemnity for a member of an unincorporated association in tortious liability remains unresolved. It follows then that unincorporated associations must have adequate risk management procedures and ought to have insurance to limit their own personal exposure to claims in tort.\(^{314}\) If an indemnity is applicable, it is, unless otherwise stated in the constitution, generally only an indemnity to the extent of the association’s funds.

4.3.3.3 Application to the Church

The ‘committee’ of the diocese is not clearly identifiable and many potential issues relating to tortious liability of the unincorporated association’s committee and members remain unresolved. Case law determines that committee members may be liable for injury to a third party. If an individual is the cause of the tortious breach, they too are liable, which may include CECWA and school board members in relation to tortious acts that occur in relation to their role in a diocesan school. Diocesan school

\(^{314}\) The dioceses have insurance but the researcher has not seen any insurance contract or insurance documents, and is unaware of their contents.
board members are volunteers but the *Volunteers Act* does not apply to unincorporated associations.\(^{315}\)

### 4.3.4 Property — Ownership and Leases

Because an unincorporated association is not a legal entity it cannot own, buy, sell or lease property, real or personal, in its own name:

As long as an association’s property is not held on trust for charitable purposes or is held subject to a resulting or constructive trust, the only persons who have any interest in property which is acquired by an association to be used for its purposes are the current members or trustees acting on their behalf.\(^{316}\)

The interest in any property that members acquire must be for the purposes and objects of the unincorporated association and be clearly set out in the rules. Members have a legally enforceable right to ensure that use of the property is only for those purposes or objects.\(^{317}\) The legal right relates only to a member’s interest in the property as a member, unlike the usual ownership in a joint tenancy or tenancy in common, a member cannot transfer their interest in the property. They hold it as, and only as, a member and their ownership ceases when they leave the unincorporated association (either voluntarily or involuntarily) or upon their death. They receive no monetary gain from the property when they leave except possibly upon dissolution of the association.

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\(^{315}\) The previous archbishop, the Rev Barry Hickey, provided an indemnity to diocesan board members acknowledging their advisory role and indemnifying them for liability incurred in relation to their role as board members.

\(^{316}\) Sievers, *Associations and Club Law in Australia and New Zealand*, above n 260, 18; see also *Bacon v O’Dea* (1989) 88 ALR 486, 493 (per curiam).

\(^{317}\) *Stevens v Keogh* (1946) 72 CLR 1.
4.3.4.1 Who to Sue?

*Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects & Planners* [2005] NSWSC 381 considered the question of who was the party to a lease in an unincorporated association. The defendant was an architect company who had leased a portion of the plaintiff’s premises since August 1995. In all previous written leases, the lessor was the ‘Trustees of the Roman Catholic Church for the Archdiocese of Sydney’. However, the practice when paying rent did not involve the plaintiffs directly but involved the parish office where the property was situated. The ‘Catholic Parish of St Benedict’ generated an invoice for the rent due and ‘St Benedict’s Catholic Church’ issued a receipt on payment signed by a third party for ‘the parish priest’. When renegotiation of the lease commenced, the exchanges were between the parish priest and the company, but the previous leases were between the Sydney Trustees and the company.

In early 2004, the parish priest was negotiating with the company for an extension on the lease. In April 2004, the Cardinal’s office advised that there would be no extension of the lease as they were using the premises for other purposes. The court had to determine, amongst other things, who or what was capable of entering the lease on behalf of the Church. Campbell J confirmed that churches were unincorporated associations in common law and therefore not capable of entering into a lease: at 22.

The administration of Church property in the Archdiocese of Sydney is conducted through, and property is held in the name of, the Sydney Trustees. Any lease relating

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318 The Court also considered at [14] – [25] what power the parish priest had in relation to the Church. Whilst this is not relevant in Western Australia in relation to this thesis as the parish schools are all administered by the CEOWA, it is relevant for other states where some Parishes are responsible for their own schools.
to Church property must therefore be in the name of the Sydney Trustees, not the parish priest.

When the property is not held by trustees, difficulties arise with the ‘member’ ownership when members either leave, or join, the association; each time they do, a new transfer must be completed to ensure the current and correct ownership is registered, and a new lease is also required. For associations with a small membership this requirement is, although impractical and potentially expensive, still workable. For larger memberships, the impracticality is immense and it is better to hold the property in trust for the association on behalf of all current members.\(^3\) Section 7 (2)(a) of the *Trustee Act 1962* (WA) limits the number of trustees who can hold property to four. An indemnity for the trustees will only be to the extent of the unincorporated association’s property, with no claim against individual members, as espoused by Linley J in *Wise v Perpetual Trustee Co Ltd*.

**4.3.4.2 Insurance**

Insuring property of an unincorporated association is also problematic unless trustees hold that property on the association’s behalf. Generally, when there are trustees and the property is substantial the unincorporated association will incorporate under the *Incorporation Associations Act 1987* (WA), or similar legislation in other states. For the insurance contract with an unincorporated association to be valid, it must be on behalf of all persons with an interest in the property, that is, all members of the association. That does not necessarily require identification of all members if the committee members have the power to insure on behalf of the association; but the common law is not clear and no case has yet determined a precedent. It is likely that a

court would apply the same principles relating to the contractual obligations of unincorporated associations applied in *Carlton Cricket & Football* and consider that a new insurance contract was necessary every time there was a change in membership; an onerous and costly exercise particularly for schools where various types of insurance are required.\(^{320}\)

4.3.4.3 Application to the Church

The diocesan bishops hold all diocesan property as corporations sole. The CECWA Trustees as an incorporated association administers the funds received from government grants and funding. The dioceses hold no property as unincorporated associations. In WA, the diocesan bishop conducts the administration of Church property in his capacity as a statutory corporation sole and so all leases (and other property transactions including insurance of property) must be in the name of the relevant diocesan bishop.

4.3.5 Reviewing Internal Decisions of Unincorporated Associations

The courts have been very reluctant to intervene in the internal affairs of unincorporated associations. They will only do so in limited circumstances where the proprietary interests of the members are at issue\(^ {321}\) or where the association’s rules intended to create legal relations between the members themselves. If the unincorporated association has no property or if its members have no rights in any property it holds, the courts prefer not to intervene in internal affairs. There have been several instances though where contemporary courts have taken a more liberal

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\(^{320}\) A discussion of the requirements of relevant insurance is outside the scope of this thesis but an issue of which all schools must be aware and comply with any legal requirements.

\(^{321}\) *Cameron v Hogan* (1934) 51 CLR 358, 370 – 71; *Scandrett v Dowling* (1992) 27 NSWLR 483, 505.
approach to the authorities, particularly to Cameron v Hogan. This is limited to cases where, although not related to the proprietary rights of a member or members, it concerned the livelihood of a member that related to their employment, or ‘right to work’. Such instances have included membership of an association;\(^{322}\) the granting or refusal of a licence;\(^{323}\) and restraints of trade.\(^{324}\)

In Buckley v Tutty the respondent was a professional footballer and the appellants were the president and secretary of a football league, which was an unincorporated association. The rules of the league, inter alia, made it impossible for the respondent to transfer clubs. The league owned property but the appellants contended that the respondent member had no proprietary rights. The court\(^{325}\) did not accept that Cameron v Hogan applied in its entirety. They accepted the relevant part of the judgment relating to proprietary rights and internal review, but stated that the ‘only relevance of Cameron v Hogan ... to the present case is in relation to the question whether the rules of the League have contractual force as between its members.’\(^{326}\) The focus of the court therefore was whether the rules of the unincorporated association intended to bind the members contractually, and if so whether the rules of the unincorporated association imposed a restraint of trade. They determined both positively.

As with Buckley v Tutty, Cameron v Hogan has been distinguished in several cases,\(^{327}\) but it remains a ‘major barrier to judicial review by Australian courts especially in

\(^{322}\) McInnes v Onslow-Fane [1978] 3 All ER 211.

\(^{323}\) Buckley v Tutty (1971) 125 CLR 353.

\(^{324}\) Ibid.

\(^{325}\) Ibid [14] (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ).

\(^{326}\) Ibid [14]; the Court distinguished the facts of the case and therefore did not feel obliged to follow the High Court authority.

\(^{327}\) Including Carter v NSW Netball Association [2004] NSWCA 737, [107].
matters concerning the rights of the members of an association’. To date, the courts have not extended the breadth of internal matters that they may consider and it is uncertain if they will do so in the near future. The scope of any possible extension is also unknown; the issue of reviewing internal decisions remains unclear and unresolved.

The right of judicial review in an internal matter of an unincorporated body is therefore currently extremely limited. Depending on the circumstances of any particular internal issue, this may be advantageous or disadvantageous to the members of an unincorporated association. This leads to the conclusion that this approach may be detrimental to unincorporated associations who need to resolve internal issues not relating to property where there are no written rules or the rules do not clearly show an intention to create legal relations between members. This situation includes members of a diocesan school board or CECWA disagreeing on issues relating to the application or interpretation of a charism in a particular school. If the board’s constitution is not specific about articulating or defining the charism, or how it applies in the curriculum or in any other matter relating to the charism, differences of opinion may escalate to conflict. Where there is internal disagreement about the charism of a school, in a diocesan school it is doubtful that legal assistance from the courts to resolve the issue is available, leaving the charism unprotected in law.

4.3.6 How the Unincorporated Association Relates to the Church and the Diocesan Schools

In *Marshall v Graham*, Phillimore J confirmed the historical case law that the Church of England is the established Church in England and therefore a part of the ecclesiastical law of England, which in turn is accepted as a part of English common law. Section 116 of the Australian Constitution forbids an established Church:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religion test shall be required as a qualification for any office or public trust under the Commonwealth.

4.3.6.1 Common Law Status

Generally speaking, ‘churches and parishes are voluntary unincorporated associations in the eyes of civil law’. Most Catholic schools aim to make a profit that is enough to provide at least for the continued sustainability of the school. Making a profit in itself does not preclude a group from being properly classified as an unincorporated association, but any profit ‘must be used for the purposes of the association’ and not distributed to the members of it unless and until its dissolution. Diocesan schools do not distribute profit to members of the diocese but reinvest it, generally in capital works or expanded staff employment opportunities. The common law status of the dioceses and the layers of governance in Catholic education in WA create a complexity.

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330 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architect & Planners* [2005] NSWSC 381, [22] (Campbell J); see also *Fielding v Houison* (1908) 7 CLR 393.


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that complicates the clear identification of the legal liabilities and responsibilities of local diocesan schools.\footnote{332 As identified previously, this is because the dioceses are unincorporated associations. The dioceses, through the diocesan bishops, delegate the governance of Catholic education to the CECWA assisted by the CEOWA; neither has any legal identity. The CECWA Trustees receives and disburses funds on behalf of the CECWA and is an incorporated association but plays no role in the governance of the diocesan schools.}

4.3.6.2 Identifying the Committee

The committee of the diocese as an unincorporated association is difficult to determine. Canon law does not assist in identifying the committee as only the diocesan bishop represents the diocese in canon law. The diocesan bishops delegate governance of Catholic education to CECWA, assisted by its executive arm the CEOWA. CECWA has an identifiable committee/membership, but they are only responsible for education, no other matters within the diocese. It is possible that courts would determine that there is no committee for these unincorporated associations. To add to the uncertainty of these bodies, s 9 of the Education and Care Services National Regulations 2012 recognises the CECWA as a ‘prescribed entity’ for the purposes of the definition of ‘person’. The Regulations are subsidiary legislation to the Education and Care Services National Law (WA) Act 2012. It is arguable that the CECWA committee for the purposes of this Act and regulations could be the relevant committee of the diocese for any legal actions relating to Catholic schools, but they have never been joined as a party in any legal action.

Individual school boards assist the CEOWA in its governance of diocesan schools. Clause 8.2 of the CEOWA’s generic board constitution defines membership of a diocesan school board committee. Clause 11.1 refers to the election of a chairman, secretary and treasurer. All CEOWA schools are required to have a school board and
to apply the generic board constitution. As has been argued above, the diocesan schools and their boards are merely another level of subsidiarity in the diocese with no legal identity of their own. It is highly unlikely that the diocesan school board is the committee of the diocese.

The constitution of the CECWA Trustees identifies its committee and relates to Catholic education in WA. Its constitution defines the power of the CECWA to include education, not just the receipt and disbursement of funding for which it is currently used; it plays no role in the governance of the diocesan schools but could do so. The CECWA Trustees committee, with a legal entity and identifiable committee, could be the actionable party in legal proceedings relating to diocesan schools.

4.3.6.3 Legal Status of Diocesan Schools

In *Roman Catholic Trusts Corporation v Van Driel Ltd & Ors* [2001] VSC 310 (‘Emmaus College’), the Roman Catholic Trusts Corporation (‘RCT Corporation’) was incorporated pursuant to the *Roman Catholic Trusts Act 1907* (Vic) and owned the land on which the school called Emmaus College stood. Emmaus College wanted to build a school hall and make other improvements on the property. In August 1990, Van Driel Ltd (the builder) and, on the face of the document, Emmaus College as ‘the Proprietor’ for the building works entered into a written contract. Emmaus College also engaged an architect. By September 1991, there were obvious flaws in the work carried out and the RCT Corporation instituted proceedings against the architect and builder for breach of contract and negligence. The builder argued that it did not contract with the RCT Corporation but with the board members of the college or with the Association of Canonical Administrators of the College. His Honour stated that ‘Emmaus College is not a corporate body or an unincorporated association and it is
not a registered business name; it is merely the name of the school conducted on the site’; at 1. Further, ‘Emmaus College itself is not a legal entity; rather it is the name of a school.’\textsuperscript{333} The parties did not dispute any of this. It is the same situation with diocesan schools in WA.

All parties accepted that although Bishop Matthys signed the contract as ‘proprietor’, it was not in his personal capacity or as the bishop.\textsuperscript{334} The question before the court of relevance to this thesis was ‘Who was the party on whose behalf bishop Matthys signed the contract?’. His Honour went into detail as to the structure of the school and the board. The archbishop ratified the board constitution and the board had, pursuant to cl 5(c), ‘executive power to act under the authority of the Archbishop and within the terms of diocesan regulations regarding the establishment and conduct of schools’. The constitution further provided for membership of the board and an executive committee. The constitution did not refer to any contract making power. Therefore, the board had no power to enter into a contract. This is very similar to the power granted to school boards in the generic CEOWA constitution.

To further complicate the matter, in the relevant Victorian diocese there was a Diocesan Building Committee (‘DBC’) and a Diocesan Building Advisory Service. ‘The DBC was established by the Archbishop of Melbourne to provide advice and recommendations to the Corporation in relation to capital works over $15 000 proposed to be undertaken at parishes and schools owned by the Corporation.’\textsuperscript{335} The Association of Canonical Administrators of Emmaus College (‘ACA’) was a new

\textsuperscript{333} Roman Catholic Trusts Corporation v Van Driel Ltd & Ors [2001] VSC 310 [77] (Hansen J).
\textsuperscript{334} Ibid [71].
\textsuperscript{335} Ibid [43].
public juridical person. Bishop Matthys was its first president. The decree establishing the ACA expressly referred to the college as being ‘governed’ by it.

At the time of making the contract, the ACA had the power to sign contracts for financial arrangements of the college. In May 1991, amendments to the college’s board constitution recognised the role of the ACA, but it still did not include express contract making power. His Honour concluded that

... the Corporation is the legal owner of not just the land on which Emmaus College is conducted, but all the property (real and otherwise) of the Church. It is readily to be understood that, for practical reasons, correspondence will be conducted in the College’s name, separate accounts will be kept in relation to the College, there will be a bank account in the College’s name etc. The College has a measure of independence in its operations, but this is within the confines of constitutions and decrees made by, or with the authority of, the Archbishop; whatever other authority the Archbishop may have, the relevant capacity in which he acts is as a trustee of the Corporation. The College’s limited independence of action is in no way an indication that it has independent legal personality ...

... the correct analysis of the operations of the College is that it is part of the Church, all of whose property is held by the Corporation for the benefit of the members of the Church: at [77].

Although in Victoria the dioceses hold property through Trust Corporations, it is comparable to the Church in WA holding its property through the bishops as corporations sole. The CECWA is not a public juridical person like the ACA but their roles appear relatively similar. The school boards in both states have constitutions ratified by the archbishop. It is therefore arguable that the conclusion of Hansen J in *Emmaus College* is applicable to the diocesan schools in WA. They have no legal identity and are not separate unincorporated associations. For ‘practical purposes’ they
operate under separate school names but remain a part of the Church and diocese. The Supreme Court of Victoria’s Commercial & Equity Division, Building Cases List determined *Emmaus College*. How a WA court will view the identity of a diocesan school, when it is required to, remains unclear. No relevant case has been determined in WA, but as Emmaus College’s position within the Victorian Catholic education system is similar to that of diocesan schools in WA, it is likely that a WA court will follow *Emmaus College* to the extent that neither the schools nor their boards have any legal identity. The appropriate party to any legal action relating to diocesan schools is therefore most likely to be the bishops in their personal capacity, except in property matters where it is the bishops as corporations sole (see paragraph 4.2.2). The complexity of the church administration of diocesan schools makes it difficult to say with any certainty what the legal obligations and safeguards are for members of the church, members of the diocesan schools and diocesan schools’ charisms.

Almost all the case law relating to unincorporated associations deals with clubs and associations where there is one obvious body and either an obvious committee where either the rules define the committee, or one can be identified by the members’ roles, as in *Roberts* where there were no rules but there were identifiable office holders. The diocesan school framework provides no such clarity.

4.3.6.4 CECWA’s Role

The legal identity of the CECWA and their role in the unincorporated association, that is, the Church, raises further confusion by the fact that the state government recognises the CECWA as a party that can enter legal relations. Pursuant to s 173 of the *School Education Act 1999* (WA), the Minister of Education entered into a Non-Government School System Agreement (‘Agreement’) in 2009 for a five-year period. The Catholic
schools at the time that were within the CEOWA are listed in the published Government Gazette,\(^{336}\) pursuant to s 169 (1) of the *School Education Act 1999* (WA). It listed Catholic schools as being a ‘recognised school system’ for the purposes of that section. The published Gazette entry in cl 2(2) names the governing body of this recognised school system as the CECWA and includes the congregational schools. Section 150 states that:

> governing body means —

(a) in relation to a proposed school, the person or body of persons that has the ownership, management or control of the proposed school; and

(ba) in relation to a registered school, the person or body of persons that is recorded in the register as the governing body of the school; and

(b) in relation to a system of non-government schools, the person or body of persons that is specified as the governing body of the system in an order made under section 169;

It is arguable that the roles of the CECWA and CEOWA are supervisory as both bodies act on behalf of the bishops, and for the purposes of the Gazette the CECWA is properly named as the governing body. The agreement entered into pursuant to s 173 at cl 1(2) recognises that ‘[t]he responsibilities of the Commission are exercised through the Director of Catholic Education in WA and the Catholic Education Office of Western Australia’ thus accepting that the Agreement is with the CECWA but that all the requirements of the Agreement will be undertaken by CEOWA. The Agreement, however, remains between the Western Australian State Government and a body with no legal identity.

If the diocesan bishops can delegate within their capacity as representatives of the unincorporated bodies (the dioceses) to the CECWA so that it too is operating as an

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unincorporated association, then it still does not have the legal capacity to enter into an agreement with the government. The Agreement can bind CECWA if a court accepts that all members of the Commission intended to enter into legal relations, and it would not be difficult to do that as the members are a small group and clearly intended to enter into a binding agreement. However, although the CECWA Trustees currently operate only to receive and dispense funds, ‘[t]he purpose of the Trustees is: (i) [t]o establish and maintain Catholic education services and ancillary activities in Western Australia on behalf of the bishops of Western Australia’. The CECWA Trustees are a recognised legal entity and would seem to be the more appropriate legal entity to enter into this Agreement with the government.

Clause 1(1) of the Agreement states the responsibilities of the Commission:

1. GOVERNING BODY

1) The Commission as the governing body of the school system is responsible for supervising the determination, implementation and monitoring of —

   a) the standard of educational instruction in schools in the system; and

   b) the standard of care provided to students in those schools.

This delegation to the CECWA adds another layer of complexity to possible legal rights and responsibilities. If the government have delegated to the CECWA, and

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337 Bradley Egg Farm Ltd v Clifford [1943] 2 All ER 378.
338 Constitution of the Catholic Education Commission of Western Australia Trustees cl 1.1 (i) .
CECWA breach any duty of care under cl 1(1)(b) (above), then can the government also be held responsible vicariously?

### 4.3.7 Conclusion

The unincorporated association has no legal status;\(^{339}\) legal issues relating to unincorporated associations are problematic and in many instances legal ramifications are ill defined. The Catholic Church is an unincorporated association and numerous matters arise because of this status including:

1. the dioceses and individual parishes are also separate unincorporated associations — in WA the diocesan schools are under the management and administration of CECWA, which has no legal identity;
2. the unincorporated associations of the dioceses, rather than the Catholic Church as a whole, are the most appropriate bodies to identify as relating to the legal rights and obligations of people in, or dealing with, diocesan school education;
3. the bishops as statutory corporations sole are the appropriate legal entity in proprietary rights;
4. the property held by the corporations sole is not property of the unincorporated association; and
5. as there is no identifiable committee of the dioceses, the bishop in his personal capacity is the most appropriate individual to be personally liable for the legal actions of the diocese.

\(^{339}\) *Cameron v Hogan* (1934) 51 CLR 358.
The bishops delegate their responsibility in the administration of education in the state to the CECWA who uses the CEOWA (merely a group of people with no separate legal identity) to carry out the administrative and management functions of the CECWA. CECWA and CEOWA have no legal identity. The Victorian Enquiry into child sex abuse\textsuperscript{340} recommended that the Victorian State Government require any bodies who receive government funding to have a recognised legal status. The CECWA Trustees is a legal identity established for the purpose of receiving and administering government funds. Though they have the scope of power to administer education, they currently only administer funds — mainly those received as grants by the state and federal governments. The Victorian Enquiry also recommended that ‘the Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures’.\textsuperscript{341} It is highly likely that the current Royal Commission into Institutional Responses to Child Sexual Abuse\textsuperscript{342} will make similar recommendations. The Truth Justice and Healing Council also made submissions to the Royal Commission suggesting national legislative change to impose

\begin{quote}
  a requirement on all unincorporated associations that appoint or supervise people working with children to establish an incorporated entity as a person against whom any victim of alleged abuse who wishes to take civil proceedings against the association may proceed.\textsuperscript{343}
\end{quote}

\textsuperscript{340} Family And Community Development Committee, Parliament of Victoria, \textit{Inquiry Into The Handling Of Child Sex Abuse By Religious And Other Non-Government Organisations} (2013) Executive Summary xxxix.

\textsuperscript{341} Ibid.


\textsuperscript{343} Royal Commission into Institutional Responses to Child Sexual Abuse, Submission from the Truth Justice and Healing Council, Issues Paper No 5 Civil Litigation, 3.9 Law Reform.
These recommendations lead to the conclusion that the bishops should amend the CECWA Trustees constitution to ensure it administers all matters pertaining to Catholic education in WA, or transfer incorporation of it to a company limited by guarantee under the Corporations Act.\textsuperscript{344} A two or three level governance structure in the incorporated body can include the current functions of CECWA and CEOWA.

The main difficulties that arise with the unincorporated association include that:

1. There is no statutory protection or direction for unincorporated associations; they have no legal personality.
2. The funds of the unincorporated association belong to all members and the membership of any one association is not always easily identifiable.
3. If, like the Church or one of its dioceses, it has a large membership, a representative action may be necessary to take legal action and that requires that all members of the association have a ‘common interest’ in the action that is difficult to establish when the membership is large.
4. If a contract with members of an unincorporated association exists it is generally, but not always, accepted as being a contract with the committee not the entire membership. The committee should be easily identifiable as that of the unincorporated association, but it is not clear what the committee is for a diocese and therefore for a diocesan school.
5. An indemnity for liability of members relating to contractual issues will normally, but not always, be given but only to the extent of the funds of the association and not necessarily the extent of any claim if it be greater than the available funds.

\textsuperscript{344} Either an incorporated association or company limited by guarantee are suitable. Both structures are discussed in chapter 5.
6. The ‘moving’ membership of an association can make it difficult to determine with whom any agreement was made.

7. Tortious liability is the same as in any torts claim and indemnity for liability of a member from the association’s funds in tort is undetermined unless it is contained expressly in a written document.

8. There is no statutory or common law requirement for an unincorporated association to have rules.

9. The association cannot hold property, but may do so through trustees.

10. Having regard to all the above, the unincorporated association leaves members, particularly committee members, exposed to legal liability and protection of the charism tenuous.

In the case of the unincorporated associations that are the Catholic Church and the local dioceses, it is additionally problematic accurately identifying the role and legal liability of bodies associated with them, such as the CECWA, CEOWA and diocesan school boards. The uncertainty of the legal status of the diocesan school board and its constitution mean that it is not a strong tool to use to protect the charism of the school. Although the CEOWA generic school board constitution could include a clause defining any school’s specific charism and how it is to be witnessed by members, it could not be ‘protected’ as the school board has no legal identity. Even if the diocesan school board is part of the diocese, the charism is not a proprietary interest, or one of livelihood, and the courts’ decisions have excluded review of any other type of internal issue generating from an unincorporated association.
This legal structure is not capable of protecting the congregation’s charism within a school and is a highly unsatisfactory legal option for any congregational school to revert to in the future from the perspective of both governance and property ownership.

4.4 AGENCY

This section considers whether any agency relationship exists within the governance structure of Catholic education in WA. The existence of an agency may assist a third party in seeking legal recompense or protection when dealing with the Church or diocesan schools, including protection of the charism. ‘The general rule is that what a person may do himself or herself, he or she may do by an agent’. The power to enter contracts remains with persons or bodies that have contractual capacity. As the dioceses, CECWA, CEOWA and school boards have no such capacity, they cannot be parties to an agency.

Agency is ‘a word used in law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.’ Agency ‘responds to the principal’s need or desire to use another person (the agent) to accomplish some business objective.’ The High Court qualified its definition of agency in the International Harvester case to suggest that the term

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345 Not all aspects of the law of agency are relevant to the thesis question. Some aspects of the law of agency relate to specific categories of agents that deal with property transactions, maritime issues, travel agents, etc. Consideration in this chapter is only given to those aspects that generally relate to the thesis question.
346 Lexis Nexis, Halsbury’s Laws of Australia (at 11 May 2010) ‘Agency’ [15-10]; Bevan v Webb [1901] 2Ch 59, 77 (Sturling J). There are two exceptions to this general rule: 1) where statute prescribes that the act be done by the principal, and 2) where the Principal’s power derives from a personal duty or power.
347 Roman Catholic Trusts Corporation v Van Driel Ltd & Ors [2001] VSC 310.
348 International Harvester Co of Australia Pty Ltd v Carrigan’s Hazeldene Pastoral Co (‘International Harvester’) (1958) 100 CLR 644, 652 (per curiam); Smith v Stallard and French (1919) 21 WALR 19, 20 (McMillan CJ).
‘agency’ is, in a broader sense, used in commercial transactions. Just because the term was used did not ensure that an agency existed at law; conversely, an agency may exist in the absence of the terminology being used by the parties. The purpose of an agency is to allow the principal to perform an act through their agent that creates legal relations between the principal and the third party. This is usually required or desired for ease of business in commercial transactions. The agent has implied authority to act in accordance with the customs and usage of the place or business relating to the agency. A court determines in each case what is customs and usage in a particular place or business.

4.4.1 Types of Agency

There are three types of agents: special, general and universal and four categories of agency: by agreement, by ratification, by ostensible authority (estoppel) and by operation of law.

4.4.1.1 Agency by Agreement

The most relevant forms of agency by agreement are words or conduct that fall short of creating a contract, written contract, deed or written agreement other than a contract or deed.

In Heytesbury Pty Ltd v Kelly, Ipp J acknowledged that the principal and agent must consent to an agreement arising between them but that it was not essential for them to

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350 South Sydney District Rugby League Football Club Ltd v News Ltd (2000) 177 ALR 611, 612, 646 - 647 (Finn J). The misleading use of the term agency was recognised earlier in Petersen v Moloney (1951) 84 CLR 91, 94 – 5.
351 There is no ‘special legal significance’ in this categorisation other than being illustrative of different and varying scopes of agency: Clive Turner, Australian Commercial Law (Lawbook Co, 29th ed, 2013) 205.
352 Ibid 205.
353 Simon Fisher, above n 349, 52.
have the intention to create the binding legal relationship that was required for a contract. The parties only need to agree that the agent will have the principal’s authority to bind the principal in a relationship with a third party for an agency to exist. That authority is actual authority, as evidenced by the parties’ consent to enter the agency, and it may be construed either expressly by written agreement or reasonably implied by the conduct of the parties.

The delegation by the diocesan bishops to the Executive Director of CEOWA in relation to the employment of staff in diocesan schools may be either a written agency or a delegation of powers between the bishops and the Executive Director of CEOWA. The lack of the use of the word ‘agency’ does not preclude it from being one. However, it is more likely that this arrangement is a delegation of the diocesan bishops’ power to the Executive Director of CEOWA to employ staff in Catholic schools. An agency by agreement between the bishops and the Executive Director of CEOWA may be implied where the diocesan bishops have allowed the Executive Director of CEOWA to be a party named in the Non-Government Schools’ System Agreement 2012. However, again it is just as likely to be interpreted as a delegation of power rather than an agency. The intention is not clear. There is no specific written agency by agreement that arises in relation to the bishops, the CECWA Trustees, the CECWA members or the Executive Director of CEOWA.

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354 ‘I use “agreement” in this sense as meaning consensus as to terms; ie the term “agreement” is used in contradistinction to “contract” which is an agreement entered into with intent to form a legally binding relationship, and supported by consideration’: Heytesbury Pty Ltd v Kelly Heytesbury Pty Ltd v Kelly (1993) SCWA 1629 (15 April 1993) [45 – 46] (Ipp J).

355 Chapple v Moss (1920) 22 WALR 74.

356 Equiticorp Finance Ltd (in liq) v Bank of New Zealand Ltd (1993) 32 NSWLR 50 [132] (Clarke and Cripps JJ). See also Pegrum v Fatherly (1996) 14 WAR 9 – that the acts and conduct of the parties may be enough to indicate on the facts whether or not an agency agreement exists.
4.4.1.2 Agency by Ratification

Dillon LJ explained agency by ratification in *Presentaciones Musicales SA v Secunda*:357

in the agency context, ratification is where an agent does an act without the authority of the principal, but because of the subsequent conduct of the principal, that unauthorised act becomes ratified and made as effectively as if the principal had previously authorised it; in other words, the ratification cures the original defect.

The key element in ratification is that the agent did not originally have the consent of the principal to act in the way he subsequently did, and to bind the principal to the third party. The consent that the principal provides comes after the act of the agent.

Agency by ratification does not relate to a series of activities but to a particular act; ratification is of the specific act of the agent and may be express or implied.358 The principal must individually ratify each excess of authority by the agent in future dealings to be binding on the principal. Several elements must be present for the ratification to be valid, including that:

- the agent must have purported to act for the principal;359
- at the time of the act the agent must have had a principal legally capable of doing the act that is sought to be ratified;360

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357 *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737, 743.
358 *Suncorp Finance & Insurance Corp v Milano Assicurazione Spa* [1993] 2 Lloyds Rep 225, 234 (Waller J) cited with approval in *Learn & Play (Rhodes No 1) Pty Ltd as Trustee for Rhodes 1 Childcare Centre Unit Trust v Lombe* [2011] NSWSC 1506. See also generally *Davison v Vickery’s Motors Ltd (in liq)* (1925) 37 CLR 1, 19.
359 *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68.
360 There is an exception contained in s 131(1) *Corporations Act 2001* (Cth) relating to a non-existent company that is subsequently formed in a reasonable time frame.
• ratification ought to take place within a ‘reasonable’ time period after the act is done; \(^{361}\)
• the whole contract must be ratified;\(^{362}\) and
• ‘ratification must be with full knowledge of what has been done ... (Marsh v Joseph [1897] 1 Ch 213).’\(^{363}\)

In agency by ratification, the agent must acknowledge that he acts on behalf of the principal.\(^{364}\) He does not need to name the principal personally so long as the latter is easily identifiable. An agent acting for the archbishop as principal need not specifically refer to Archbishop Timothy Costelloe; if he purports to act for the Archbishop of Perth or the local Catholic Church then the latter is reasonably identifiable for the purposes of agency, and he must then have the capacity to perform the act to which the agent has committed him. The bishops have created no agencies by ratification. It would not be difficult for them to do so, but it would be more commercially sound to have a written agency agreement upon which they, and third parties, could rely. It would also afford more legal protection to both parties.

\(^{361}\)Simon Fisher, above n 349, 60; what is reasonable is determined in the circumstances of each case.

\(^{362}\) Cox v Mosman [1909] QSR 45; Howard Smith and Co Ltd v Varawa (1907) 5 CLR 68, 82 (Griffith CJ).

\(^{363}\) Turner, above n 351, 207. If the act to which the agent has committed the principal is in a written form that specifies a period within which the principal must ratify the act, the principal must ratify it within that specified period. If there is no specified period, ratification ought to occur within a reasonable time; what is reasonable will be determined on the circumstances of each case: Lifesavers (Australasia) Ltd v Frigmobile Pty Ltd [1983] 1 NSWLR 431. The retrospective effect of ratification of a contract gives rise to numerous issues relating to the validity of a contract when one or other party has withdrawn from the agreement or sought to vary it prior to ratification. These issues are outside the scope of this thesis but may be relevant should such an issue arise where an agency relates to the Church in WA.

4.4.1.3 Agency by Ostensible Authority (Estoppel)

The ostensible, or apparent, authority that a principal gives the agent creates agency by estoppel. The notion of providing justice where otherwise an injustice would occur provides the basis for the common law doctrine of estoppel:365

The fundamental basis on which agency by estoppel operates is consonant with the basis of estoppel at general law, and that is to remedy the injustice that would flow if one person who represented something to another were able to resile from that representation with impunity or immunity. 366

Ostensible authority negates actual authority. ‘Ostensible authority comes in to play as a separate issue only when the agent appears to have exceeded his or her actual authority.’367 If a principal wants to enforce a contract where the agent has acted beyond his original authority, the principal is required to ratify the agreement thereby creating an agency by ratification.368 Three elements are required to establish an agency by estoppel: representation, reliance and detriment.369

4.4.1.3.1 Representation

If the principal represents a person as his agent who has authority to act on his behalf, he cannot later suggest that the agent was either not his agent or did not have the

365 ‘It is the injustice which would flow to the third party if the principal were able to resile from the representation made, which, in the ultimate sense, causes detriment. Holding the principal to the estoppel which results seeks to minimise adverse effects of resiling from the representation’: Fisher, above n 349, 78; see also Thompson v Palmer (1933) 49 CLR 507, 547 (Dixon CJ).
366 Simon Fisher, above n 349, 70. Ostensible authority does not create a contractual relationship between the principal and third party – it prevents the principal from arguing that there was no authority and therefore no agency. A principal may not rely on ostensible authority to enforce a contract with a third party; the doctrine of estoppel prevents him from denying ostensible authority, thus acknowledging the agreement entered into by the agent.
368 Ibid 514.
authority to act as agent in that particular situation. It is the authority that an agent appears to have from the conduct of the principal that forms the agency.\textsuperscript{370} It is not ostensible authority where the agent has falsely represented the alleged authority that he has from the principal; it is the principal’s conduct that is relevant.\textsuperscript{371} The principal may have authorised the agent either expressly or impliedly to act with authority, and even if that authority does not exist, then the action of the principal in representing that it did will bind him in agency.\textsuperscript{372} The extent to which the ostensible authority binds the principal is the same as for an actual authority.\textsuperscript{373} Whether the principal has made a representation that amounts to ostensible authority is a question of fact to be determined on the circumstances of each individual case.\textsuperscript{374} Keith J in \textit{Armagas Ltd v Mundogas SA} said:

Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.\textsuperscript{375}

\textsuperscript{370} Having held out the agent as his agent to make contracts of that kind, he cannot set up, against a person dealing innocently with the agent on the faith of the holding out, that the agent has in fact gone beyond the limits of his authority': \textit{Lysaght Bros & Co Ltd v Falk} (1905) 2 CLR 421, 428 (Griffith CJ).

\textsuperscript{371} \textit{Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd} (1975) 133 CLR 72 [13] (per curiam).


\textsuperscript{373} \textit{Magripilis v Baird} [1926] ST R Qd 89, 92 (Isaacs J).


\textsuperscript{375} \textit{Armagas Ltd v Mundogas SA} [1986] 1 AC 717, 777 (‘Armagas’).
Australian case law is unclear as to the difference between implied authority and ostensible authority. The distinction, though academic, may lead to confusion as to when, and to what extent, an ostensible authority will exist. In *Klement v Pancoal Ltd*, Derrington J highlighted the lack of distinction and clarity when he referred to relevant cases that ‘mostly refer to the act of an agent who has a status where the ostensible authority to perform the act is held out by implication because it ordinarily applies to such a status’.376 The diocesan bishops have delegated the administration of Catholic education in WA to the CECWA; the CECWA operates through its executive body the CEOWA. Their titles alone suggest authority relating to Catholic education in WA. In *Clarey v Permanent Trustee Co Ltd*, the court accepted that ostensible authority may be given by providing the agent with a title, status, facilities (such as email access) or documents for signing/completion.377 The diocesan bishops have provided all of these to CECWA members and/or the Executive Director of the CEOWA; however, the use of business cards, emails, company stationery etc do not of themselves necessarily lead to a reasonable belief on the part of the third party in the agent’s authority. Cumulatively they may have more effect or where the person using them has a senior role in the principal’s company or business, but generally determination of the issue occurs on the circumstances of each case.378 Where a principal holds out his agent as having authority as a general agent then the agent will have the ostensible authority of a general agent.379

376 *Klement v Pancoal Ltd* [1999] QSC 90 [46].
377 *Clarey v Permanent Trustee Co Ltd* [2005] VSCA 128 [107].
378 In *British Bank of the Middle East v Sun Life Assurance of Canada (UK) Ltd* the court considered circumstances where the principal had given its agent the title ‘branch manager’. It was held that the third party could reasonably rely on the representations that ‘the person in question has the powers normally or usually enjoyed by a branch manager’: *British Bank of the Middle East v Sun Life Assurance of Canada (UK) Ltd* [1983] 2 Lloyd’s Rep 9; see also *NCR Australia Pty Ltd v Credit Connection Pty Ltd (in liq)* [2004] NSWSC 1.
379 *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, 184 (Lord Atkinson).
In *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, the court suggested\(^{380}\) that internal procedures relating to authority in commercial transactions should be in writing to clarify officers’ actual authority. It would be commercially prudent that diocesan bishops ensure written internal procedures and authorities for the members of CECWA and CEOWA. If a principal knows that an agent is claiming more authority than he has but the principal does not correct him, the principal is estopped from claiming the agent was acting outside their authority.\(^{381}\)

Any case involving Catholic education in WA would need to consider the usual authority of officers in the CEOWA and CECWA, particularly the Director of the CEOWA, to ascertain whether ostensible authority created an agency between them and the relevant diocesan bishop. It is reasonable to conclude that most agreements entered into by the Director that relate to Catholic education in the state would be within his usual authority and that in so agreeing he may be joining the relevant bishop to an agency agreement created by ostensible authority.

There is no document clearly stating the extent of the bishops’ delegated authority to CECWA; the Mandate expresses a delegation of sorts but not as clearly as the courts suggest is required or desired. In applying Keith J’s definition of ostensible authority, it is arguable that the diocesan bishops have created an agency by estoppel in allowing the CECWA and CEOWA to operate generally in relation to all matters relating to Catholic education in the WA since the 1970s. Someone who has the power to make that representation must make the representation of authority;\(^{382}\) the diocesan bishops

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380 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [40].
381 *Essington Investments Pty Ltd v Regency Property Pty Ltd* [2004] NSWCA375 [45] (Hodgson JA with whom Shellar JA concurred). The ostensible authority was not established in this case because the document upon which the third party relied to establish the agent’s authority was a copy, not an original, and that document had not in any event been executed in the usual manner.
have that power, given by canon law as the diocese’s representative. The proposition that the Executive Director of the CEOWA acts as an agent of the diocesan bishops in a way that ‘in the outside world is generally regarded as carrying authority’ is supported by:

- being a party in Enterprise Bargaining Agreements;
- all Catholic education queries being directed to the Executive Director of the CEOWA rather than the diocesan bishops; and
- the Executive Director of the CEOWA previously having dealings on behalf of the diocesan bishops.\(^{383}\)

The diocesan bishops have not indicated in any circumstance since the establishment of the CECWA and CEOWA that those bodies do not have authority to act in matters pertaining to Catholic education in the state. The written delegation in some matters (such as principals’ power to employ staff) does not preclude an ostensible authority in other matters where it is a reasonable conclusion that the diocesan bishops are representing the CECWA members or that the Executive Director of the CEOWA has authority to act on their behalf. That authority is limited to matters arising within Catholic education in the state (their dioceses). There are sufficient facts to infer that the bishops ‘represent’ the CECWA and CEOWA, through the Executive Director, as having their authority to act in Catholic education in their dioceses.

4.4.1.3.2 Reliance and Detriment

An agency by estoppel does not occur simply by confirming that a principal has represented that the agent has authority. It is essential that the third party then rely on

\(^{383}\) Ibid 78.
the actual representation.\textsuperscript{384} Courts must determine whether the reliance of the third party was reasonable in the circumstances of each case.\textsuperscript{385} It is not reasonable if the third party:

- knew, or ought to have known, the agent was acting beyond their authority;\textsuperscript{386}
- knew, or ought to have known, the agent was not acting in the best interests of the principal;\textsuperscript{387}
- entered the contract for reasons other than the principal’s representations;\textsuperscript{388} or
- the principal was unknown.\textsuperscript{389}

The third party may rely on the authority that the principal would normally give.\textsuperscript{390} The third party must prove that the reliance they placed on the representation of the principal was detrimental to them,\textsuperscript{391} but they only need to establish the detriment, not quantify it;\textsuperscript{392} quantifying the detriment will occur when seeking damages.

4.4.1.4 Agency by Operation of Law

Although the law of agency relies on there being consent between the principal and agent to create the legal relationship, there is a limited scope for agency to arise by operation of law. The most relevant form of agency by operation of law is that of

\textsuperscript{384}If the third party knows that there is no real authority, that the agent is not acting in the interests of the principal, and/or is acting outside the scope of his actual authority, then the third party is not relying on the representation and cannot then rely on the doctrine of estoppel to assist them. As early as 1905 the Australian High Court invoked the notion of ‘good faith’ on the part of the third party: \textit{Lysaght Bros & Co Lid v Falk} (1905) 2 CLR 421, 431 (Griffith CJ), 439 (O’Connor J).

\textsuperscript{385}It is not enough that the third party merely shows that they entered a contract with the principal; they must show that they relied on the principal’s representation and for that reason entered the contract.

\textsuperscript{386} \textit{Lysaght Bros & Co Lid v Falk} (1905) 2 CLR 421.

\textsuperscript{387}Ibid.

\textsuperscript{388} \textit{Ruben v Great Fingall Consolidated} [1906] AC 439, 446 (Lord Davey).

\textsuperscript{389} Dal Pont, above n 367, 538.

\textsuperscript{390} Reynolds, above n 372, 21.

\textsuperscript{391} \textit{Commonwealth v Verwayen} (1990) 170 CLR 394, 413 (Mason CJ) and 444-6 (Deane J).

\textsuperscript{392} Dal Pont, above n 367, 519.
Agency of necessity arises from action in circumstances of necessity and not from any real or presumed agreement between the person who becomes an “agent of necessity” and the person in whose interest he has acted. There are four elements required to establish an agency of necessity:

1) the agent was unable to obtain instructions from the principal;
2) the agent must have nevertheless acted reasonably and in good faith for the principal;
3) the agent’s acts must have been reasonable and prudent; and
4) there must be a necessity, or emergency, that led to the agent acting on behalf of the principal.

It is difficult to envisage a situation where these elements might all occur in relation to the diocesan bishops and the CECWA Trustees, the CECWA members or the Executive Director of the CEOWA. It is doubtful that an agency of necessity exists in relation to Catholic education in WA.

4.4.2 Delegation of Powers by Agent

Generally, an agent may not delegate a power or duty they possess as an agent without the express authority of the principal, or of statute. General exceptions exist that are

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393 The other commonly recognised form of agency by operation of law in Australia is agency created by cohabitation, and holds no relevance to the thesis and will not be discussed. See also s 21(1) Sale of Goods Act 1895 (WA) where there is statutory recognition of the common law doctrine of ostensible authority. ‘Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.’
396 Simon Fisher, above n 349, 82 - 83.
397 Most of the cases considered by the courts concern commercial transactions in sea and land carriage where the necessity lies in minimising or preventing loss of or damage to goods.
398 Pursuant to the maxim delegates non potest delegare – A delegate cannot delegate.
relevant to the chair of CECWA Trustees and the Executive Director of the CEOWA as possible agents of the diocesan bishops, including reasonable custom of trade/usage and where the business situation requires delegation in part or completely. It is arguable that the very nature of the education system in WA, and particularly the Catholic education system, requires delegation of many of the required tasks at various levels of the administrative structure.

A principal is bound by the acts of a sub-agent where the principal authorised, expressly or impliedly, the appointment of the sub-agent. For the sub-agent to have the rights, duties and liabilities of the agent, the principal must have had an active role in the appointment of a sub-agent or subsequently ratified their acts within a reasonable time. The parties must also have intended there be privity between them and if it does not exist then the agent is liable for the acts of the sub-agent. Liability is tiered: the sub-agent is responsible to the agent who is in turn responsible to the principal. For a third party dealing with a sub-agent this may not always be the most efficient or effective structure with which to deal.

An ostensible authority is not delegable. ‘A person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority.’ If the relationship between the diocesan bishops and the CECWA Trustees, CECWA members or the Executive Director of CEOWA is an agency by estoppel and arises through the ostensible authority interpreted by the principal’s conduct, there can be no ‘sub-

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399 Australian Encyclopaedia of Forms & Precedents, *Clauses of Agents*, [1540]; Dal Pont, above n 367, 211.
401 *WA Coombs Ltd v Brown* [1940] SASR 211, 213 (Angas Parsons J) citing *De Bussche v Alt*, (1878) 8 Ch D, 286, 310.
402 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72, 80 (per curiam).
agency’ emanating from any of them. If the CECWA Trustees or CECWA are in an agency by estoppel, they cannot delegate the authority given to them by the diocesan bishops to the CEOWA.

4.4.3 Agency and the Church

The law of agency requires that both the principal (‘P’) and agent (‘A’) be legal entities, as they must have contractual capacity. The Church, dioceses and parishes are unincorporated associations therefore they have no recognised legal identity; CECWA, CEOWA and diocesan school boards are not legal entities.403 The CECWA Trustees is an incorporated association and is capable of being party to an agency. Any agency that may arise in issues relating to Catholic education in WA may occur between:

- the diocesan bishop in his personal capacity as a principal;
- the CECWA Trustees (an incorporated association) as a principal or agent;
- the chair and members of the CECWA in their personal capacity as a principal or agent; or
- the Executive Director of CEOWA in their personal capacity as a principal or agent.

Whenever a possible agency arises that involves CECWA or CEOWA it is in relation to the chair, members or Executive Director in their personal capacity. In this respect, possible agencies may exist between:

- the diocesan bishop (P) and the CECWA Trustees (A);

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• the diocesan bishop (P) and the chair and/or members of the CECWA (A);
• the diocesan bishop (P) and the Executive Director of the CEOWA (A);
• the diocesan bishop (P) and any other party (A);
• the CECWA Trustees (P) and any other party (A);
• the chair and/or members of the CECWA (P) and any other party (A); or
• the Executive Director of the CEOWA (P) and any other party (A).

There is no evidence of a specific written or oral agency agreement between any of these parties. There is little or no likelihood of an agency by operation of law (necessity). If any agency agreement exists with any of these parties, it is likely to be created either through ratification by the principal or by ostensible authority. The most likely agency to exist, because of the operational realities of Catholic education governance, is agency created by ostensible authority between the diocesan bishops (P) and the Executive Director of the CEOWA (A).

A sub-agency cannot exist where ostensible authority creates the agency. In the absence of any agency by agreement or ratification, there is no sub-agency existing in the Catholic education system. The onus of proving that an agency exists lies on the party who is seeking to enforce the obligation that has arisen. The principal may revoke an ostensible authority by ensuring that the representation with which the agent

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404 There is possibly an unintended agency between the bishops and Executive Director of the CEOWA in relation to the Non Government Schools’ System Agreement 2012.
405 Although this is the most likely agency, agency may also arise between the diocesan bishops, the CECWA members and the CECWA Trustees.
406 “…there is no privity of contract between the principal and the subagent unless the principal is a party to the appointment of the subagent, or has subsequently adopted the acts of the subagent and further that it is the intention of the parties that the privity of contract is established between the principal and the subagent”: Simon Fisher, above n 359, 49; De Bussche v Alt 8ChD 286 at 311, approved in SA Joseph and Rickard Ltd v Lindley (1905) 3 CLR 280, 291 (Griffith CJ).
acts is no longer effective or operational. Communication of the revocation to the third party must be clear.

It is unlikely that the church or diocesan bishops intended that the chair and members of CECWA or the Executive Director of the CEOWA were personally liable in legal matters pertaining to Catholic education, but that may be the unintended result of the current structure of the Church and its education bodies if an agency exists. The researcher is unaware of any cases arguing an agency with the Church in educational matters, but presumes that in the event of any successful argument the Church would indemnify the individuals held liable for any damages that arose because of the agency.

4.4.4 Summary

The existence of agency agreements with identifiable legal entities may have corrected the lack of legal protection for diocesan schools and their charisms created by the dioceses being unincorporated associations.408 However, there is little clarity surrounding the possible agency agreements that may exist or arise in Catholic education in WA, and any such agencies have to be with the individuals rather than the offices, other than the CECWA Trustees. Most agency agreements relate to commercial transactions, which may be relevant to congregational schools.409

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408 This section has only dealt with the categories of agency and whether they exist within the context of the thesis question. The duties, rights and liabilities of agents and principals, and how agencies may be terminated, have not been included but are relevant to any agency that may exist.

409 Most cases dealt with by the courts that have established the law of agency, deal with specific commercial transactions that have not involved schools or are specific agency categories such as real estate agents, travel agents, brokers etc.
4.5 CONCLUSION

This chapter examined the legal status and nature of the corporation sole and unincorporated associations, and examined how the law of agency applies to the organisation and governance of diocesan schools. The discussion provided important insights into the complexities and limitations of these structures as well as the doctrine of agency and its possible application to diocesan schools.

4.5.1 Corporations Sole

Common law recognises the bishops as corporations sole in property issues and in their personal capacity in all other legal matters. Any agency that arises with a bishop as principal can only be in his personal capacity. It is highly likely that the Church would cover any damages that a court orders against the bishop in this capacity, but it is not legally required. As a corporation sole, the bishop has the capacity to own land and to hold it on trust for another entity, such as a specific diocesan school. If a congregation wants to ensure protection for the property of its schools, as well as its governance and charism, it should not simply transfer ownership to the bishop but to the bishop to hold it on trust for the school. Congregations should not rely on an oral agreement at the time of transfer, which may create a constructive trust, as it raises issues of uncertainty and may in the future require resolution of ‘true’ ownership of the property. This is avoided by ensuring that the trust document explicitly states that the archbishop holds the title to any land in trust for the school and the land is then registered in the name of the bishop ‘on trust for’ the school; this provides the greatest legal protection for the future of the property.

The corporation sole is only relevant to property issues; it is not applicable to the governance of schools and therefore provides no protection for the charism of the
school and for the continuation of a congregational school in the context of the thesis question.

4.5.2  Unincorporated Associations and Agency

CECWA, CEOWA, diocesan schools and diocesan school boards have no legal identity; the dioceses are unincorporated associations. They cannot sue or be sued. They cannot own property except through a trust. Any liability that arises from dealings with them is through personal liability of the members. The law of agency provides no assistance in correcting the lack of legal status of the unincorporated association in the case of diocesan schools. The lack of legal status and the personal liability of members is problematic for those involved in diocesan schools. More importantly for the thesis question, diocesan schools in their current structure afford no legal protection to the charism of a school.

The CECWA Trustees is an incorporated association. It is recognised in law, can sue and be sued, own property in its own right or on trust for others, and enter into contractual relations and agencies as both principal and agent. It could provide the services currently provided by CEOWA and do so as a recognised legal entity because its purposes include ‘[t]o establish and maintain Catholic education services and ancillary activities in Western Australia on behalf of the bishops of Western Australia’. Amendments to its constitution can specifically protect individual charisms in specific diocesan schools.

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410 Constitution CECWA Trustees cl 2.1(i).
4.5.3 Conclusion

The legal structures, or lack thereof, that currently exist in the diocesan school does not provide a satisfactory answer to the thesis question. The best governance and ownership options for a congregational school transferring its schools to another body lie in entities that have legal standing. The lack of legal status of diocesan schools creates the following main limitations for them as a suitable entity:

- it cannot sue or be sued;
- it cannot own property in its own right (except on trust);
- it provides no legal protection to the charism of the school;
- the members attract personal liability; and
- it creates uncertainty in the legal standing of business dealings.

Chapter 5 examines common law structures that provide viable options for governance and ownership that are capable of providing the protection sought in the thesis question. The Catholic education system in WA currently does not do that because the diocesan school is not a recognised legal entity and the congregational schools are seeking alternatives.
CHAPTER 5

CORPORATE STRUCTURES IN FUTURE GOVERNANCE

5.1 INTRODUCTION

Chapter 4 examined current legal structures pertaining to diocesan schools and the extent to which such structures may assist congregations in legally structuring, governing and managing their schools with a view to preserving and maintaining their charism and unique place in the Catholic education system in WA. To this end, Chapter 4 focused on the corporation sole, unincorporated association and agency. In this chapter alternative incorporated legal structures are examined, namely the incorporated association, companies limited by guarantee and statutory corporations. As with Chapter 4, the purpose of this chapter is to analyse the legal nature of these particular structures and their suitability for the ownership and governance of congregational schools and, importantly, the future preservation of congregational schools and their charism. This chapter also examines these structures in light of the background context provided in Chapter 3 in relation to the current ownership and governance of congregational schools and the issues they face in terms of future governance.

5.2 THE INCORPORATED ASSOCIATION

The incorporated association is a legal entity for not-for-profit organisations and recognised in all Australian jurisdictions.\textsuperscript{411} This section assesses the suitability of an

\textsuperscript{411} Associations Incorporation Act 1991 (ACT); Associations Incorporation Act 2009 (NSW); Associations Act 2003 (NT); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1987 (WA) [but note: Associations Incorporation Bill 2014 (WA) that intends repealing and replacing the 1987 Act].
incorporated association as the legal entity for a congregational school and for the protection of the school’s charism.

### 5.2.1 Relevant Legislation

The current and relevant legislation in WA is the *Associations Incorporation Act 1987* (WA) (‘*AI Act*’) and the *Associations Incorporation Regulations 1988* (WA) (‘*AI Regulations*’), administered by the Consumer Protection Division of the Western Australian Department of Commerce.\(^\text{412}\) The Associations Incorporation Bill 2014 (WA) (‘*AI Bill*’) intends to repeal and replace the *AI Act*, and the AI Regulations will be replaced with new ones drafted and released after the assent of the AI Bill. The Bill was presented to the Legislative Assembly on 11 September 2014 and is currently waiting to proceed through the parliamentary process. The Bill was drafted after extensive consultation and feedback from existing associations and the wider community and it is likely that it will be assented to in its present form.\(^\text{413}\) The new Regulations will not be drafted until after assent of the Bill. The main purposes of the AI Bill, which differ from or expand on the *AI Act* and which have a bearing on the resolution of the thesis question, include:

- removing trading restrictions to allow for trading conditional upon the profits used to further objects of the association and which is not distributed to members (cl 5);
- the introduction of model rules, prescribed by the AI Regulations, as a minimum standard of governance (cl 26);


\(^{413}\) At the date of submission of this thesis the legislation had not yet completed the parliamentary process. The Regulations are to be drafted at a later date and the model rules are not yet finalised. As such, although it is likely that the Act will pass without objection or alteration, it is not yet law and the thesis therefore considers both the current and the proposed legislation.
• codifying the general law duties of committee members and officers of the association, aligned to those required by directors of companies under the Corporations Act (cls 44–9);

• acknowledging the desire for personal privacy by limiting the requirement of personal details of members by which they can be contacted, including use of post box and email addresses (cl 53(2)(d));

• introducing a three-tier structure similar to that adopted in the Australian Charities and Not-for-Profits Commission Act 2012 and Australian Charities and Not-for-Profits Commission Regulation 2013,414 which introduces a classification of financial accountability that corresponds to the size and resources of an association (cls 62–5);

• providing a process for the appointment of a statutory manager for associations not functioning well (cls 109–19);

• introducing alternatives to winding up an association (cls 120–1); and

• providing compulsory internal dispute resolution processes in an association’s rules (sch 1 div 1 item 19) and the hearing of unresolved disputes by the State Administrative Tribunal (‘SAT’) (cl 182).

These, and other aspects of the new legislation, will be discussed in relevant parts of this section415 along with the current provisions of the AI Act.

5.2.1.1 Definition of an Incorporated Association

Section 4(a) of the AI Act defines the incorporated association as:

414 Australian Charities and Not-for-Profits Commission Act 2012 paragraph 40-5(1)(g) and Australian Charities and Not-for-Profits Commission Regulation 2013 40.1.

415 The thesis does not attempt to address every clause of the AI Bill but considers provisions generally (for example, Part 10 relates to the Cancellation of incorporation and contains clauses 128 – 151 but the separate clauses are not considered).
4. Associations which are eligible for incorporation

(1) Subject to this Act, an association is eligible to be incorporated under this Act if it has more than 5 members and is formed —

   (a) for a religious, educational, charitable or benevolent purpose; or ...

(2) Notwithstanding subsection (1), an association for the purpose of trading or securing pecuniary profit to the members from the transactions of the association is not eligible to be incorporated under this Act ...

Clause 4 of the AI Bill retains associations formed for a ‘religious, educational, charitable or benevolent purpose’.\(^{416}\) Clause 4(b) of the AI Bill, however, extends the minimum number of members to six, all of whom must have full voting rights. The AI Bill also requires the incorporated association to continue at all times after its incorporation to have a minimum of six members, maintain its basis for eligible status, and ‘not secure pecuniary profit for its members’.\(^{417}\) The clause was added to the proposed legislation ‘to place a positive obligation on associations incorporated under the Act [Bill] to continue to satisfy certain essential requirements’.\(^{418}\)

A distinguishing feature of incorporation is that it creates a new legal entity separate from its members. A school or school council\(^{419}\) conducting business for educational pursuits whose ‘purpose’ for trading is not profit making and that has the minimum

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\(^{416}\) Clauses 4(a)(iii), (vi) and (ix) of the AI Bill respectively extend the categories to include some relevant to medical treatment, environmental issues and common interest groups.

\(^{417}\) Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) cl 17(1).

\(^{418}\) Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 8.

\(^{419}\) Either the school or the school council may choose to incorporate under the AI Act. In this thesis the term ‘school’ is used to denote either the school or the school council as the incorporated body.
Congregational schools qualify within this definition. Although schools may make a profit, that is not their purpose and the profits are not distributed to members of the incorporated association nor are the schools operating for ‘the purpose of gaining by trading or otherwise pecuniary profit for the members.’; The proscription on direct pecuniary gain has long been reinforced by the courts.\(^{421}\)

Although the \textit{AI Act} defined what was not pecuniary, not only does cl 5 of the AI Bill retain that, it further defines what \textit{is} pecuniary. The section emphasises the not-for-profit nature of the incorporated association. Any profit or trading by a Catholic school is ancillary to the main purpose of providing Catholic education and members would receive no profit. Schools incorporating must simply ensure that the not-for-profit identity continues.\(^{422}\)

\textit{5.2.2 Incorporating an Association}

Section 4 of the \textit{AI Act} and cl 4 of the AI Bill refer to eligibility of an association to incorporate, suggesting that they apply to associations already in existence and that are defined in s 3 of both documents as including a ‘society, club, institution or body’. A school is an ‘institution or body’. The committee of the existing body must resolve to apply for incorporation.\(^{423}\) It is doubtful that the existing congregational school board membership is the appropriate body to make the application for incorporated status,

\(^{420}\) Clause 6 of the AI Bill provides the Commissioner with a new power to declare an association ineligible if it is prescribed as ineligible – a school does not come within that prescription.

\(^{421}\) Associations Incorporation Act 1987 (WA) ss 4(4)(a), (5). See also Associations Incorporation Bill 2014 (WA) clause 5; \textit{Ex p Western Australian National Football League} (1979) 143 CLR 190, 198-9 (Barwick CJ).

\(^{422}\) If a school did lose its not-for-profit status it would also affect its eligibility for tax and other financial exemptions under various relevant legislation.

\(^{423}\) Associations Incorporation Act 1987 (WA) s 5(1); Associations Incorporation Bill 2014 (WA) cl 7(1).
but rather the congregation should do so. The congregational leader must submit a notice of intention to the Commissioner to apply for the incorporation of a congregational school and advertise that intention in the local newspaper. The AI Bill does not include the requirement for advertising — though the Commissioner may require public notice of it — but requires compliance with aspects of the model rules, including a clear statement of the objects or purposes of the association, quorums for general meetings and committee member meetings, and the identification of the first financial year of the association. How a person is ‘authorised’ by the existing body to make the application is unclear from the AI Act or the AI Bill, but that body’s existing rules, if they have any, may be more specific. If there is no specified ‘authorised’ person, for the congregation to retain a degree of control over the transfer of the legal status of the school either the congregational leader or a majority agreement of the members of the proposed incorporated association should be required to authorise someone for the purposes of making the application for incorporation.

The application under the AI Act to incorporate must be made no earlier than one month before, but no more than three months after, the publication of the advertisement. The AI Bill contains no time restrictions except in relation to the Commissioner not granting the application until after any time period relating to a request to refuse incorporation pursuant to cl 9. Anyone may request that the Commissioner decline the application, including their reasons for that request, but it is unlikely that anyone would do so in relation to an already existing school or that a Commissioner would have grounds for approving such a request. The application for incorporation under

424 Associations Incorporation Act 1987 (WA) s 6.
425 Associations Incorporation Bill 2014 (WA) cl 8.
426 Ibid cls 7(3) and (4).
427 Associations Incorporation Act 1987 (WA) s 6.
428 Ibid s 7(1); Associations Incorporation Bill 2014 (WA) cl 9.
the AI Act must be made in the prescribed manner and include rules that comply with the AI Regulations. An application under the AI Bill must comply with cl 7 details, which are based on the model rules as a best practice (minimum standard) model for governance. The Commissioner must not approve an application if:

- it is more appropriate that the incorporated association be incorporated under the Corporations Act 2001 (Cth), or
- it is not in the public interest to allow the incorporation.429

As discussed in chapter 2, it is in the public interest to have private schools; however, the Commissioner may consider that incorporation under the Corporations Act is more appropriate for a particular school or group of congregational schools.430 The grounds upon which the Commissioner determines which form of incorporation is more suitable include:

a) the likely scale or nature of the activities of the association;

b) the likely value or nature of the property of the association;

c) the extent or nature of the dealings the association is likely to have with the public; or

d) any other matter the Commissioner considers relevant.431

Congregations considering incorporation as an option for future governance and property ownership would therefore need to seek legal advice on which is the more

429 Associations Incorporation Act 1987 (WA) s 9; Associations Incorporation Bill 2014 (WA) cl 11(1).
430 Associations Incorporation Act 1987 (WA) s 9(2)(b); Associations Incorporation Bill 2014 (WA) cl 11(1)(b). Generally speaking, incorporated associations are not suitable vehicles for large organisations. If a school’s annual turnover and size is sufficiently large, it may not be registered as an incorporated association. However, JTC has conducted itself as an incorporated association without any queries from the Commissioner in this regard.
431 Associations Incorporation Bill 2014 (WA) cl 11.
appropriate form for their particular circumstances. The larger the school, or group of schools, the more likely it is that incorporation under the *Corporations Act* will be appropriate rather than under the *AI Act* or AI Bill.

All forms required for the application for incorporation are set out in sch 1 of the AI Regulations. Schedule 1 of the AI Bill also sets out requirements for the model rules that contain more detail than is required by the AI Regulations. The name of an incorporated association must be approved by the Commissioner and conclude with the term ‘Incorporated’ or ‘Inc’.\(^\text{432}\) A name will not be approved if it is misleading in any way. In *Catholic Church of the Diocese of Darwin Property Trust v Monteiro* (1987) 87 FLR 427, a splinter group of an unincorporated association sought to incorporate under the relevant Northern Territory legislation with a name that was too close to the existing unincorporated association. Nalder J held that this would lead to confusion between the two bodies, which in the circumstances of the case would not be in the public interest. Iona Presentation College and Iona Presentation Primary School have operated without any such confusion in the past using those respective names. Approval for an application for incorporation by these schools using their current names is very likely and the same would apply to any congregation that currently operates multiple schools with similar names.\(^\text{433}\)

\(^{432}\) *Associations Incorporation Act 1987* (WA) ss 8, 9 and 10(b); *Associations Incorporation Bill (WA)* cls 10, 12 and 13(1)(b).

\(^{433}\) All decisions of the Commissioner in relation to incorporation are appealable to the State Administrative Tribunal: *Associations Incorporation Act 1987* (WA) ss 4(6), 7(2), 8(2), 9(3), 10C, 10F, 18(4), 19(3). The AI Bill also allows for appeals to the State Administrative Tribunal but requires internal dispute resolution mechanisms be adopted and unresolved issues may then proceed to SAT: *Associations Incorporation Bill 2014* (WA) cl 182 and Schedule 1 Division 1 Item 19.
5.2.3 Rules of the Incorporated Association

The rules of the incorporated association define its purpose and regulate management aspects of it. Under the AI Bill, an incorporated association must either have its own rules or adopt the model rules. If it chooses to have its own rules, they must contain at least the provisions of the model rules. Existing incorporated associations have three years from the date of the commencement of the Bill as an Act to change their rules to comply with the new provisions. The model rules will be prescribed by the AI Regulations, not as yet drafted. Division 1 pt 3 of the AI Bill contains provisions relating to the association’s rules. The AI Bill provides more comprehensive requirements for an association’s rules, ‘which are considered essential to the proper functioning of an association’. Under the AI Bill, model rules will be compulsory as a minimum requirement for best practice governance. Associations may choose to adopt their own rules, but they must contain at least those in the model rules. Those model rules are currently in draft form and have been open for wide consultation from local associations and the wider community. Consultation responses closed on 3 November 2014. The association’s rules are required as part of the application process and must be available to all members on request, thus protecting their rights and interests and again ensuring transparency within the association. As a public document, they are available for inspection by anyone on

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434 In this thesis the term ‘rules’ will be used to mean both rules and constitutions when referring to incorporated associations, except where the latter term is used in a quote.
435 Associations Incorporation Bill 2014 (WA) cls 26 and 28 and 29.
436 Ibid cl 26(1).
437 Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 22.
439 Ibid.
440 Associations Incorporation Act 1987 (WA) s 5(2); Associations Incorporation Bill (WA) cl 7.
441 Associations Incorporation Act 1987 (WA) s 28; Associations Incorporation Bill 2014 (WA) cl 36(3).
payment of a prescribed fee.\(^{442}\) Clause 36 of the AI Bill not only requires that the rules are available to any member but that each member receive a copy at the commencement of their membership and carries a $2750 penalty for non-compliance. The rules provide a transparent and, under the model rules, a comprehensive management model for the incorporated association.

5.2.3.1 The Association’s Purpose

The purpose, or objects, of the incorporated association must be included in the rules, providing a mechanism for schools to safeguard the charism of a congregation’s founder. In WA, s 16 of the \textit{AI Act}, and cls 21–9 of the AI Bill prescribe some content listed in sch 1 to the \textit{AI Act} and the AI Bill, including the name and objects of the association. The objects must include

\begin{quote}
... a provision in, or substantially in, the following terms —
\end{quote}

The property and income of the association shall be applied solely towards the promotion of the objects or purposes of the association and no part of that property or income may be paid or otherwise distributed, directly or indirectly, to members of the association, except in good faith in the promotion of those objects or purposes.\(^{443}\)

Clause 22(2) of the AI Bill moves this clause from sch 1 (where it is in the \textit{AI Act}) to the body of the legislation, highlighting its importance in identifying the association as a not-for-profit organisation, a status essential for a Catholic school.

\(^{442}\textit{Associations Incorporation Act 1987 (WA) s 37(2); Associations Incorporation Bill 2014 (WA) cl 162(1).}\)

\(^{443}\textit{Associations Incorporation Act 1987 (WA) cl 2 Schedule 1; Associations Incorporation Bill 2014 (WA) cl 22(2).}\)
There is no differentiation in the *AI Act* or the AI Bill between the objects and purposes of the association; they are the same thing.\textsuperscript{444} Neither sch 1 to the *AI Act* nor the model rules limit what may be included; they act as a minimum requirement. Members of the incorporated association may determine to include other issues that further clarify the powers of the incorporated association and stipulate that it may engage in any lawful act that assists it to carry on its business, including reserve powers and clauses that specifically relate to the charism of the congregation and school, and any relevant canonical references.

The powers granted to an association in order to carry out its objects or purposes include the power to:

(a) acquire, hold, deal with, and dispose of any real or personal property;
(b) open and operate bank accounts;
(c) invest its money —
   (i) as trust funds may be invested under Part III of the *Trustees Act 1962*; or
   (ii) in any other manner authorised by the rules of the association;
(d) borrow money upon such terms and conditions as the association thinks fit;
(e) give such security for the discharge of liabilities incurred by the association as the association thinks fit;
(f) appoint agents to transact any business of the association on its behalf; and
(g) enter into any other contract it considers necessary or desirable.\textsuperscript{445}

An incorporated association may also act as a trustee but cannot contravene the AI Act in doing so.\textsuperscript{446}

\textsuperscript{444} See for example *Associations Incorporation Act 1987* (WA) s 19(1); *Associations Incorporation Bill* (WA) cl 33(1)(a).
\textsuperscript{445} *Associations Incorporation Act 1987* (WA) s 13(1); *Associations Incorporation Bill 2014* (WA) cl 14(1).
\textsuperscript{446} *Associations Incorporation Act 1987* (WA) s 13(2); *Associations Incorporation Bill 2014* (WA) cl 14(2).
5.2.3.2 Amending the Rules

When required the rules may be altered by a special resolution of the incorporated association.\textsuperscript{447} A special resolution requires a majority of ‘not less than three-fourths of the members of the association’ who are entitled to vote.\textsuperscript{448} Any resolution passed that changes the objects or purposes of the incorporated association must receive approval of the Commissioner.\textsuperscript{449}

The rules provide an opportunity to ensure that the objects of the school, including those relating to the charism, are clearly articulated. They reflect the basis for the ethos of the school and the principles underlying the governance and management of the school. To protect and monitor changes to any provision relating to the school’s charism, the congregation should include in the object clauses details of the charism, its application, and how it is to be taught or evidenced within the school. Any change to such clauses would require, as a minimum, the approval of a majority of the members, and then of the Commissioner. A clause may be included that reserves approval to changes relating to the charism by specific persons only, such as congregational members and/or members of the canonical body.\textsuperscript{450} An absolute prohibition on changing clauses relating to the charism would protect the charism as it stood at the date of the approval of the incorporated association, but the charism applies to the present, the ‘now’,\textsuperscript{451} and some flexibility must exist to allow for its application and interpretation in the future. The legislative requirements for changing

\textsuperscript{447} Associations Incorporation Act 1987 (WA) s 17(1); Associations Incorporation Bill 2014 (WA) cl 30(1).
\textsuperscript{448} Associations Incorporation Act 1987 (WA) s 24(1); Associations Incorporation Bill 2014 (WA) cl 51(1).
\textsuperscript{449} Associations Incorporation Act 1987 (WA) s 19(1); Associations Incorporation Bill 2014 (WA) cl 33(1).
\textsuperscript{450} Such a clause is discussed when considering the rules of JTC at chapter 5.2.7.4.
\textsuperscript{451} Futrell, above n 81, 62.
rules (including one pertaining to a charism) are sufficient to protect the charism to a relatively high standard. The rules may also include the process for altering the rules (including adding and rescinding rules) to safeguard even further the clauses relating to the charism.\textsuperscript{452}

5.2.3.3 Membership

Qualifications for membership, and any requirement for membership dues if there are to be any, must be included in the rules of the incorporated association.\textsuperscript{453} None are prescribed and it is for the foundation membership to decide whether to initially include membership criteria or not.\textsuperscript{454}

Under the \textit{AI Act} the rules may provide grounds for a member’s disqualification, expulsion or suspension. The grounds for disqualification either may be in the rules or based on the general discretion of the committee. Exercise of such discretion must be in good faith and the conduct of the member must be harmful to the association.\textsuperscript{455}

Good governance includes clear processes and schools should not leave the disqualification of a member to the discretion of the committee. The rules may provide a clear, practical process and procedure for the grounds required for any removal from office.

The \textit{AI Bill} requires, pursuant to sch 1 div 1 rule 7(c), that the rules include ‘the grounds on which, or reasons for which, the office of a member of the committee shall

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\textsuperscript{452} A further safeguard for protecting clauses relating to the charism is discussed when considering the current rules of JTC at chapter 5.2.7 and of EREA schools at chapter 3.4.4.2.
\textsuperscript{453} \textit{Associations Incorporation Act 1987} (WA) Schedule 1cls 3 and 5 respectively; \textit{Associations Incorporation Bill 2014} (WA) cls 3 and 6 respectively.
\textsuperscript{454} Membership fees are common in sporting and social clubs where they are the main source of income for the club but are usually inappropriate in the context of the Catholic school where the members are generally volunteers.
\textsuperscript{455} \textit{Ethell v Whalan} [1971] 1 NSWLR 416, 428 (Hope J).
\end{flushright}
become vacant’. Model rule 3 of the schedule requires provision for when ‘membership commences and when it ceases’. Model rule 6.3, pursuant to sch 1 item 3(c), provides a clear process. This removes any doubt that the committee has the power to consider a suspension or disqualification and ensures they comply with the stipulated process.\textsuperscript{456} Courts will generally not intervene to overturn a decision to disqualify a member when there is compliance in good faith with the process and procedure. The onus for proving that a decision was made in bad faith rests with the plaintiff.\textsuperscript{457}

Items 6 to 8 in sch 1 of the \textit{A I Act} prescribe that the following must be included in the association’s rules:

- provision for the election or appointment of members;
- their terms of office;
- grounds on which the offices may be vacated;
- filling casual vacancies;
- quorum numbers, procedural requirements of meetings; and
- the form for notices of meetings and related actions.

The schedule does not prescribe the process for any of these; that is for the members and/or congregation to determine when drafting the foundation rules.


\textsuperscript{457} \textit{Dixon v Esperance Bay Turf Club (Inc)} [2002] WASC 110 [147] (Roberts-Smith J). The rules of natural justice apply to any procedure determining whether a member should be suspended or disqualified: \textit{Rush v WA Amateur Football League (Inc)} (2007) 35 WAR 10. An effective and useful process for removal of members is discussed when considering JTC at chapter 5.2.7.
5.2.4 Governance of the Incorporated Association

The nature of governance and management of incorporated associations may vary depending on the size and annual turnover of the association. The AI Act provides for a management committee and the AI Bill has additional provisions for a statutory manager, where required.

5.2.4.1 The Management Committee

The legislation affords a certain amount of flexibility in creating the governance structure of an incorporated association. Section 20 of the AI Act suggests that there will be a committee as a part of the governance structure, but it does not appear to be mandatory. The rules determine which persons have the governance of the incorporated association and they constitute its committee, should it choose to operate with one. Most incorporated associations will adopt a committee structure and schools choosing to operate as incorporated associations should do so in order to govern the school properly. Division 1 pt 4 of the AI Bill includes new provisions relating to the management committee and cl 38 of the AI Bill determines that the ‘persons who under the rules of the incorporated association have the power to manage the affairs of the association constitute the management committee of the association for the purposes of this Act’. The committee does not need to use the term ‘management committee’ and in most incorporated schools the terms ‘council’ or ‘board’ are used. The nomenclature is unimportant; the powers and responsibilities of the management committee are what matters.\textsuperscript{458}

\textsuperscript{458} In this thesis, the term ‘committee’ is used to refer to the committee of the incorporated association.
Clause 39 of the AI Bill creates a new provision that details persons who are not eligible to be members of the management committee. It includes a person who is bankrupt or ‘whose affairs are under insolvency laws’, convicted of an indictable offence relating to a body corporate or of an offence ‘involving fraud or dishonesty punishable by imprisonment for a period of not less than 3 months’, or of an offence under div 3 or s 127459 of the Bill. The provision carries a penalty of $10 000 for non-compliance. The purpose of this new provision is to ‘minimise the risk of appointing inappropriate persons to the management committee’ without unduly restricting the ‘pool of suitable persons’.460 Upon ceasing to be a member of the management committee, the outgoing member must deliver ‘all relevant documents and records’ to a current management committee member with a $10 000 penalty for non-compliance. The records include hard copies and/or electronic copies.461

Management committee members are also required to disclose any material personal interest they have in matters considered by the committee.462 The clause extends the requirement to pecuniary and non-pecuniary interests whereas the current AI Act only refers to pecuniary interests in relation to a contract considered by the management committee. The new clause increases the penalty for non-compliance from $500 to $10 000 and recognises that ‘conflicts of interest may also arise in numerous situations where the committee member has no financial interest in the matter’.463 Whereas s 22(1) of the AI Act disqualifies a member with a pecuniary interest from participating in any ‘deliberations or decision of the committee’, cl 43 of the AI Bill disqualifies a

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459 Breaching general duties of officers and duties relating to debt of the association, respectively.
460 Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 14. Clause 39 applies only for a period of 5 years after the person’s conviction: Associations Incorporation Bill 2014 (WA) cl 40.
461 Associations Incorporation Bill 2014 (WA) cl 41(3).
462 Ibid cl 42(1).
463 Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 15.
member with a material personal interest from even being present at the meeting while
the matter is being discussed, and from voting on the matter. Once again, the new
clause increases the penalty for non-compliance from $500 to $10 000. The committee
normally includes a chair, deputy chair, secretary and treasurer, but these positions are
not mandatory under the Al Act or the AI Bill. The incorporated association must
maintain a record of all the ‘names and residential or postal addresses’ of office
holders, and trustees if there are any, which is available to any member upon request.\(^{464}\)
The school’s website, or school office, can record the committee membership. A
register of members must also be maintained and available to other members on
request.\(^ {465}\) Any person may inspect, on payment of a prescribed fee, a document of an
incorporated association that the Commissioner holds.\(^ {466}\)

5.2.4.2 Statutory Manager

Another innovative addition to the AI Bill is the ability of the Commissioner to apply
to SAT ‘for the appointment of a statutory manager to administer the affairs of an
incorporated association’.\(^ {467}\) The purpose of pt 8 of the AI Bill is

… to provide a mechanism for intervention as a last resort. It is anticipated that
the Commissioner would only exercise these powers if all other avenues had been
exhausted, including the exercise of the Commissioner’s powers’ under the Act.

A primary objective of these provisions is to enable the Commissioner to take
some action, on behalf of members of an association, as early as possible. The

\(^{464}\) Associations Incorporation Act 1987 (WA) s 29. Clause 59 of the AI Bill further provides for the
commissioner to request particulars from a person whom the commissioner believes is an ‘apparent’
office holder.

\(^{465}\) Ibid s 27; Associations Incorporation Bill 2014 (WA) cls 53 – 54. Where the membership of an
incorporated association is large, this is a useful requirement. It has little effect or no bearing on the
relatively small membership of the incorporated school. JTC’s Council members are the only
members of the association.

\(^{466}\) Associations Incorporation Act 1987 (WA) s 37; Associations Incorporation Bill 2014 (WA) cl 162.

\(^{467}\) Associations Incorporation Bill 2014 (WA) cl 109.
intention would be to temporarily replace the management committee of the
association where the committee has become dysfunctional and/or has significant
negative working relationship with the association’s members.\footnote{Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 37.}

The relevant clauses are drafted broadly and provide the Commissioner with flexibility
to intervene only where necessary and with the aim of ‘improving the functioning of
the association’.\footnote{Ibid 38.} Part 8 further provides a process for an application by the
Commissioner and the terms of appointment of the statutory manager.

5.2.4.3 Record Keeping and Accountability

The schedule under the \textit{AI Act} requires that there be an annual general meeting,\footnote{Associations Incorporation Act 1987 (WA) s 23; Associations Incorporation Bill 2014 (WA) cl 50 which introduces a penalty of $5 000 for non-compliance.} that
a record of accounts be maintained,\footnote{Associations Incorporation Act 1987 (WA) s 25; Associations Incorporation Bill 2014 (WA) Part 5.} and that the accounts be presented to the
members at an annual general meeting that must be held each year.\footnote{Associations Incorporation Act 1987 (WA) s 26; Associations Incorporation Bill 2014 (WA) Part 5.}

The AI Bill also provides for record keeping and financial accountability is more
extensive than under the \textit{AI Act}. Part 5 of the AI Bill, ‘Financial Records, reporting
and accountability’, introduces a swathe of new provisions aimed at making
accountability of associations not only more transparent but also to reflect the size and
nature of the association. Associations will be categorised into three tiers, which have
been ‘set with a view to balancing the reporting burden on associations commensurate
with their size and the need to be accountable to members’.\footnote{Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 24.} Clause 64 provides for
three tiers:
• tier 1 — incorporated associations whose revenue is less than $250 000 in a financial year;

• tier 2 — incorporated associations whose revenue is between $250 000 and $1 000 000 in a financial year; and

• tier 3 — incorporated associations whose revenue is greater than $1 000 000 in a financial year.

Revenue is defined in cl 64(4) and is ‘income that arises in the course of the ordinary activities of an entity and is referred to by a variety of different names including sales, fees, interest, dividends, royalties and rent’ but does not include revenue ‘collected on behalf of third parties’. Most, if not all, schools will qualify as tier 3 associations. However, should an association have ‘unusual or non-recurring circumstances that cause [its] revenue to temporarily exceed the tier 1 or 3 thresholds’, the Commissioner may, pursuant to cl 65, declare it to be a tier 1 or 2 association despite exceeding its revenue for that financial year. This allows the tier 1 or 2 association to avoid the more stringent reporting requirements when the increased revenue is not likely to reoccur.

Clauses 74–6 detail the reporting and accounting requirements for tier 3 associations. Within six months of the end of each financial year, the tier 3 association must prepare a financial report that includes notes on the financial statements in the report and which must give a true and fair view of the financial position and performance of the association; and comply with the accounting

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474 Ibid.
475 Ibid.
476 Clauses 68 – 70 detail the reporting and accounting requirements for tier 1 associations and clauses 71 – 73 detail the reporting and accounting requirements for tier 2 associations. As most schools will qualify as tier 3 schools only tier 3 reporting and accounting requirements are discussed.
477 Associations Incorporation Bill 2014 (WA) cl 74(1).
standards.\textsuperscript{478} Non-compliance carries a penalty of $2 750.\textsuperscript{479} A tier 3 association is also required to audit its financial report annually\textsuperscript{480} and must present both the financial report and the auditor’s report at its annual general meeting, with a $5 500 penalty for non-compliance.\textsuperscript{481} ‘The auditor’s report must state whether the association’s financial records have been properly kept and give a true and fair view of the association’s affairs’.\textsuperscript{482} These new provisions provide a level of accountability that protects not only the association itself, but those dealing with it. The requirements for financial reporting and auditing of a business whose revenue is in excess of $1 000 000 is sound business practice and not an onerous task under the legislation.

5.2.4.4 Governance Structures

The governance structure of the incorporated association may include a two-level approach with an executive committee and a board committee rather than just one committee. The executive committee oversees and promotes the purpose and/or objectives of the association and its strategic direction, which may include matters pertaining to the charism if an incorporated school adopts this structure. In the governance structure, the board are the management arm of the incorporated association and ensures that it meets its objectives. This approach to governance and management in an incorporated Catholic school provides the school with a level (executive) that supervises the application of the charism from a position at arms’

\textsuperscript{478} Ibid cl 74(2). The accounting standards are defined in clause 62 as those ‘issued by the Auditing and Assurance Standards Board, as in force for the timer being, and including any modifications prescribed by the regulations’.
\textsuperscript{479} Ibid cl 74(1).
\textsuperscript{480} Ibid cl 75. Financial reports must be audited in accordance with Divisions 5, 6 and 7 of Part 5 of the Bill that relates to audits, auditors and reviewers.
\textsuperscript{481} Ibid cl 76.
\textsuperscript{482} Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 27.
length and a level (board) that supervises the management\textsuperscript{483} of the school, providing a further protection to the charism through the two-fold supervision.

The \textit{AI Act} and the AI Bill direct the duties and responsibilities of the incorporated association to one committee,\textsuperscript{484} so it is essential that if a two-level approach is taken then the rules clearly delineate the differences between the tiers and identify which one is the ‘management’ committee (which is generally responsible for day-to-day operations). Clause 38 of the AI Bill determines that the management committee are those who, under the rules, ‘have the power to manage the affairs of the association’. The duties assigned to each of the committees will determine whether the executive or board level are the management committee for the purposes of the Act or Bill. The rules must clearly name and define the management committee. The two-level governance structure provides a level of oversight in the adherence to requirements of the constitution not afforded in a one-level model. Whether an association adopts a one-level or two-level governance structure will depend on the size of the school.\textsuperscript{485}

5.2.5 Rights, Duties and Liabilities Arising From an Incorporated Association

An incorporated body has perpetual succession, can enter into contracts, may sue or be sued, and its members attract limited liability.\textsuperscript{486} All rights and liabilities of the association prior to incorporation transfer to the incorporated body.\textsuperscript{487} The liability of any members, officers and trustees is limited so costs associated with winding up or insolvency are not generally met by the members. Liability is limited to the annual

\textsuperscript{483} This does not refer to the management of the school as the daily operations of it (conducted by the principal and their staff) but to management within the governance structure.
\textsuperscript{484} \textit{Associations Incorporation Act 1987} (WA) s 20; \textit{Associations Incorporation Bill 2014} (WA) cl 38.
\textsuperscript{485} JTC has operated efficiently and effectively over a number of decades with a single level structure. EREA, with numerous schools across Oceania, has opted for a multi-level structure.
\textsuperscript{486} \textit{Associations Incorporation Act 1987} (WA) s 10; \textit{Associations Incorporation Bill 2014} (WA) cl 13.
\textsuperscript{487} \textit{Associations Incorporation Act 1987} (WA) s 10(c); \textit{Associations Incorporation Bill 2014} (WA) cl 13(c).
subscription fee if there is one or some other amount as provided by the rules, but this does not apply to liabilities incurred prior to incorporation.\textsuperscript{488}

5.2.5.1 Rights of Members to Resolution of Internal Disputes

The rules of the incorporated association create the rights of members. Those rights vis-a-vis each other can generally be resolved between the members because of the nature of the not-for-profit association, which also contributes to the lack of case law in this area:

Incorporated associations are non-profit organisations with volunteers drawn from across the community as the committee members. There is little, if any, pecuniary benefit for those involved as members or committee members. In this economic context it is highly unlikely that disputes involving the committee members of an incorporated association would reach the courts for adjudication and subsequently contribute to the development of the law in this area.\textsuperscript{489}

5.2.5.1.1 Resolution of Internal Disputes Under the AI Act

Courts have always been reluctant to intervene in internal disputes and the \textit{AI Act} does not deem the rules to have a contractual relationship for members that would create a reason for courts to intervene. Unless a member can show that there has been some fraudulent activity affecting the minority of members or contravention of the processes set out in the rules, the courts are unlikely to assist in an internal dispute arising under the \textit{AI Act}. Except for the limited liability relating to the incorporated association’s debts, the members are ‘in a very similar position to the members of an unincorporated association’\textsuperscript{490} when seeking resolution of internal disputes. However, courts have

\begin{flushright}
\textsuperscript{488} Associations Incorporation Act 1987 (WA) s 12; Associations Incorporation Bill 2014 (WA) cl 19.
\textsuperscript{489} Robert Arnold Fisher, ‘Duties of company directors and committee members of incorporated associations: Have the paths divided?’ (2001) 13 \textit{Australian Journal of Corporate Law} 1, 2.
\textsuperscript{490} Sievers, \textit{Associations and Club Law in Australia and New Zealand}, above n 260, 155.
\end{flushright}
increasingly intervened in internal disputes in the eastern states jurisdictions\textsuperscript{491} and are more likely to intervene where there are allegations of dishonesty or where the internal dispute relates to the livelihood or employment of a member. Courts are less likely to intervene where:

- the association is a social club or a body disconnected with members’ employment;
- the rules specify that members have no proprietary interest in the incorporated association’s property; or
- the rules do not create a contract between the members.\textsuperscript{492}

In \textit{Rush v WA Amateur Football League (Inc)} [2007] WASCA 190, the appellant was a player and coach in the Western Australian amateur football league. Whilst coaching a game he knowingly allowed several unregistered players to participate in the game rather than forfeit it. He was charged with contravening the relevant by-laws of the defendant incorporated association and was suspended from playing or coaching for a period after a hearing convened under the by-laws/rules of the association. He appealed to the court against his suspension on several grounds but his appeal was dismissed. When considering whether a court should be hearing the matter, Pullin JA said:

> In Skelton’s case, Chesterman J noted that there were many cases in which courts have intervened where exclusion or suspension from membership of a club or association had occurred in breach of the organisation’s rules or of natural justice. However, as his Honour noted, all of those cases were predicated upon the person involved suffering some diminution of rights of property, livelihood or trade. To that category of case may be added cases where a person’s reputation is damaged:

\textsuperscript{491} For example, see \textit{Carter v NSW Netball Association} [2004] NSWSC 737.
\textsuperscript{492} Sievers, \textit{Associations and Club Law in Australia and New Zealand}, above n 260, 163.
see Starke J in *Cameron v Hogan* at 383, *Plenty v Seventh Day Adventists Church of Port Pirie* (1986) 43 SASR 121 at 124 and *Carter v NSW Netball Association* [2004] NSWSC 737 at [107]: at [30].

Pullin JA further noted that ‘in the absence of any property, income or reputational interests, this Court has no jurisdiction to decide issues arising out of the consensual but non-contractual relationship between the parties’: at [37]. This case was heard in the Court of Appeal of the Supreme Court of Western Australia and it is likely that it will be followed in the future. Roberts-Smith J in *Dixon v Esperance Bay Turf Club (Inc)* stated that the *AI Act* did not contain ‘any provision making the rules of an incorporated association binding on its members by virtue of the statute.’ He also commented that where there was enough evidence for a committee to make a decision it was not for him ‘to substitute my opinion for that of the committee’.

In the absence of the statutory protections in the *AI Act* afforded in other jurisdictions, which explicitly make the membership of the incorporated association a contractual agreement, congregations considering incorporation of schools should include clear instructions for resolution of internal issues within their rules. This ensures that matters are dealt with expeditiously without recourse to lengthy, and probably unsuccessful, court proceedings. This may be particularly important where members of a school need to resolve a dispute relating to the interpretation or application of the charism of the school. A clause specifically stating that the rules of the incorporated association create a contract between the members will provide certainty to the members and ensure that rights and obligations are enforceable, particularly those relating to the charism adopted by the school.

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493 *Skelton v Australian Rugby Union Ltd* [2002] QSC 193.
495 Ibid 110 [165].
5.2.5.1.2 Resolution of Internal Disputes Under the AI Bill

Clause 22 of the AI Bill provides the minimum requirements for the content of an association’s rules. Specifically, cl 26(2)(a) stipulates that the rules must ‘address each of the matters set out in Schedule 1 Division 1’. Rule 19 of that schedule requires:

A procedure for dealing with any dispute under or relating to the rules —

(a) between members; or

(b) between members and the incorporated association.

Clause 182 additionally permits the resolution of a dispute to be considered and determined by SAT, providing a further option for dispute resolution after the internal procedure has failed, but been engaged. The SAT may refer the dispute for mediation,\textsuperscript{496} make orders that require observation of the association’s rules,\textsuperscript{497} declare and/or enforce members’ rights as between themselves,\textsuperscript{498} or declare and/or enforce rights between members and third parties.\textsuperscript{499} The power invoked by this clause requires a clear and effective process for dispute resolution that was not available under the AI Act.

5.2.5.2 Officers’ Duties Under the AI Act

Apart from the duties outlined in the AI Act, there are few statutory requirements defining the duties of officers of an incorporated association. The officers are those people who hold a place on the committee.\textsuperscript{500} If the only members of the incorporated association are the committee members then they are all office holders. The AI Act

\textsuperscript{496} Associations Incorporation Bill 2014 (WA) cl 182(2).
\textsuperscript{497} Ibid cl 182(3)(a).
\textsuperscript{498} Ibid cl 182(3)(b).
\textsuperscript{499} Ibid cl 182(3)(c).
\textsuperscript{500} Associations Incorporation Act 1987 (WA) s 3(1).
imposes obligations on committee members to disclose any pecuniary interests they have in a current or proposed contract and ‘disclose the nature and extent of his interest to the committee’.\(^{501}\) The penalty for non-disclosure is only $500, which is arguably not an effective deterrent for non-compliance. In addition to declaring any interest, the \textit{AI Act} precludes a member from participating ‘in any deliberations or decision of the committee with respect to that contract’.\(^{502}\) Again, the penalty for non-compliance is only a $500 fine. The only other statutory duty is for a committee member to ensure they ‘take all reasonable steps to secure compliance by the association with its obligations under [the] Act\(^{503}\) and not to make false or misleading statements or omissions in required documents.\(^{504}\)

In the absence of further statutory requirements, the general duties of members of an incorporated association derive from case law and are generally analogous to the directors in a company. Owen J in \textit{Haselhurst v Wright}\(^{505}\) determined that committee members of a building society, which was not a company and therefore not governed by the relevant companies’ legislation, nonetheless owed the same duties to the building society as directors do to a company. In doing so, he equated the fiduciary duties of directors to committee members of an incorporated association; the duties owed by the members of an incorporated association ‘are to be found in the common law’.\(^{506}\) More recently, and after the introduction of the \textit{Corporations Act 2001} (Cth), Johnson J in \textit{Lai v Tiao} when considering an incorporated association, recognised that although it was not clearly ‘established by authority, it is probable that committee

\(^{501}\) Ibid ss 21, 22.
\(^{502}\) Ibid ss 22(1).
\(^{503}\) Ibid s 42.
\(^{504}\) Ibid ss 43(a) and (b).
\(^{505}\) \textit{Haselhurst v Wright} (1991) 4 ACSR 527.
\(^{506}\) Ibid 531 [25]
members owe in the same measure, the common law and equitable duties which law and equity have imposed on company directors’. As both of these cases are Western Australian decisions it is highly likely any future cases will follow them. The officers of an incorporated association would therefore owe quite specific and extensive duties to members of the association, including the duty of care and diligence, and the duty of loyalty and good faith.

It is not conclusive that courts would equate the duties of committee members of an incorporated association to those of directors of a company, though it is highly likely. The latter reflect good business standards and though they may initially appear onerous, it is recommended that committee members of schools that incorporate under the AI Act adopt the duties required of directors under the Corporations Act and that they be included specifically in the rules of the incorporated association.

5.2.5.2.1 Officers’ Duties Under the AI Bill

Perhaps one of the most comprehensive changes, and arguably most required, under the AI Bill is the introduction of statutory officers’ duties. Clauses 44–9 codify the general law duties discussed in the previous section and espoused by Owen and Johnson JJ in Haselhurst v Wright and Lai v Tiao respectively. Clause 44 imposes the duty of care and diligence on an officer of the association and by doing so reflects those decisions of the Supreme Court of Western Australia that

507 Lai v Tiao (No 2) [2009] WASC 22 [84].
508 These duties will be considered in more detail below when discussing the company as a governance option.
509 Robert Arnold Fisher, above n 489, 5. See also sections 180 and 181 of the Corporations Act 2001 (Cth).
510 A more detailed discussion of why the duties of directors should be adopted by the committee members, as suggested by Owen and Johnson, JJ in Haselhurst v Wright and Lai v Tiao (No 2) [2009] WASC 22 other than to say that it is good business practice is beyond the scope of this thesis.
consider that ‘it is probable that committee members owe in the same measure, the 
common law and equitable duties which law and equity have imposed on company 
directors.’\(^{511}\) It is based on s 180 of the \textit{Corporations Act} and imposes a penalty of 
$10 000. Clause 44(2) repeats and cls 44(3) and (4) define the business judgment rule 
defence contained in s 180 of the \textit{Corporations Act}.

Clause 45 imposes the duty of good faith and proper purpose, again reflecting the 
decisions of the Supreme Court and of s 181 of the \textit{Corporations Act} and also carries 
a $10 000 fine for non-compliance. It ‘captures all three elements of the general duty 
i.e. a director or officer is to exercise their powers and discharge their duties in “good 
faith” in the “best interests” of the corporation/association and for a “proper 
purpose”.’\(^{512}\)

The same principles and reasoning apply to include in cl 46 of the AI Bill the provision 
that an officer of an association must not use their position for any improper purpose. 
It reflects s 182 of the \textit{Corporations Act} and carries a $10 000 penalty for non-
compliance. Clause 47 of the AI Bill similarly prohibits misuse of information gained 
in the position of officer, and is based on s 138 of the \textit{Corporations Act} and carries a 
$10 000 penalty.

Clause 49 provides a defence for a breach of any statutory, common law or equitable 
duty in circumstances where the action of the officer was reasonable in relying on any 
advice sought and received. It too finds it origins in the Supreme Court decisions and 
in s 189 of the \textit{Corporations Act}.

\(^{511}\) Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 16. 
\(^{512}\) Ibid.
The insertion of ‘Division 3 – Duties of officers’ into the AI Bill clarifies and confirms the decisions of the state court when considering those duties as they arose under the \( AI\ Act \). The seriousness with which those duties are considered is reflected in the use of the language from the \( Corporations\ Act \) in corresponding sections, and the new imposition of significant monetary penalties in relation to associations.

5.2.5.3 Rights and Liabilities

The principles that apply to individuals also determine the general liability of an incorporated association. Specific rights and liabilities may be included in the association’s rules. The liability of members is limited subject to the \( AI\ Act \) and anything specified in the rules,\(^{513}\) providing an incentive for relevant and qualified community members to serve as committee members. This is particularly so where the members are volunteers, as they generally are in school governance.

If the incorporated association and the members incur any breach of contract, then ‘acting on the association’s behalf will not incur personal liability. Unless modified by statute the normal common law rules of agency will apply in situations where any question arises as to the authority of those persons.’\(^{514}\)

Section 14 of the \( AI\ Act \) and cl 15 of the AI Bill specifically outline the parameters of an incorporated association’s power to enter contracts:

\[
(1) \text{Contracts may be made by or on behalf of an incorporated association as follows —}
\]

\(^{513}\) \textit{Associations Incorporation Act }1987\ (WA) s 12; \textit{Associations Incorporation Bill }2014\ (WA) cl 19.

\(^{514}\) Sievers, \textit{Associations and Club Law in Australia and New Zealand} above n 260, 131.
(a) a contract which, if made between natural persons, would be required to be in writing under seal may be made by the incorporated association under its common seal; and

(b) a contract which, if made between natural persons, would be required to be in writing signed by the parties may be made on behalf of the association in writing by any person acting under its express or implied authority; and

(c) a contract which, if made between natural persons, would be valid although not in writing signed by the parties may be made orally on behalf of the association by any person acting under its express or implied authority.

(2) A contract may be varied or rescinded by or on behalf of an incorporated association in the same manner as it is authorised to be made.

A contract is valid unless the persons contracting with the incorporated association are aware that the incorporated association is contracting outside its powers. A new incorporated body may ratify a contract entered into prior to its incorporation, making it the party to the contract. Therefore, schools that incorporate under the AI Act or AI Bill should ratify all relevant contracts made prior to the incorporation, including staff employment contracts and contracts with external third parties, to ensure that the contracts previously entered into remain valid and enforceable.

5.2.5.3.1 Liability in Contract: Contracts Arising Between the Members - AI Act

Whilst it is clear that an incorporated association can enter into a contract with a third party, it is less clear under the AI Act whether there is a contractual relationship

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515 Associations Incorporation Act 1987 (WA) s 15; Associations Incorporation Bill 2014 (WA) cl 16.
516 The AI Act does not include a provision for this as do the NSW, Victorian and ACT Acts. The general law rules applicable to ratification of contracts will therefore apply.
between the members themselves, which would give rise to the contractual rights and obligations between them. These rights and obligations are important in determining how members act in relation to each other and to the incorporated association. They serve as an additional protection to the incorporated association as members are bound to the duties and obligations contained in the rules. This protection in turn extends to the charism adopted by the school where its articulation is in the rules. Incorporation of itself is only one factor for consideration; it is not determinative in itself.517 The High Court acknowledged in *Ermogenous v Greek Orthodox Community of SA Inc* (‘*Ermogenous*’) that the assessment of whether the members intended there to be contractual relations between them was an objective assessment. As such, it relied on the facts of each case, precluding the court from forming any prescriptive rules that would assist members to determine whether a contract existed between them.518

In *Farrell v King’s Park Tennis Club (Inc)*,519 Johnson J considered both the contractual status of the relevant incorporated association’s rules and whether they contained implied terms. The plaintiff was a member of the defendant club incorporated under the *AI Act*, who joined the club to play pennant squash. However, for three successive seasons the club did not choose her to play pennants for them, despite her being well qualified to do so. She claimed that the club had treated her unfairly and that the rules implied a term that members would receive fair treatment. Johnson J acknowledged McKechnie J’s decision in *Zusman v Royal Western Australian Bowling Assn (Inc)*520 that ‘an incorporated body stands in a contractual

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518 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 [25] and [27] (Gaudron, McHugh, Hayne and Callinan JJ); and followed in *Hopcroft & Edwards v Edmunds & Ors* [2013] SASFC 38.
519 *Farrell v King’s Park Tennis Club (Inc)* [2006] WASC 51.
520 *Zusman v Royal Western Australian Bowling Assn (Inc)* [1999] WASC 86.
relationship with its members’.

Further, that Henderson v Kane & Anor \(^{522}\) ‘stands as authority for the proposition that a contractual relationship exists between an incorporated association and a member of that association and that the rules of the club operate as the terms of the contract.’ \(^{523}\)

In these cases, the rules were clear in their terms and the clubs charged a subscription fee; in these circumstances, a contract will exist between the members. No subscription fees were paid in *Ermogenous*, as would be expected in a church related organisation.

Subscription fees were also recognised as a significant factor in determining whether a contract existed between the members in *Bagga v The Sikh Association of Western Australia Inc.* \(^{524}\) The executive committee of the defendant sought to replace rather than extend the contract of the incumbent priest, as desired by a number of the members of the association. No subscription fees were due for members. Le Miere J noted five factors that, together, led him to determine there was a contractual relationship between the members:

1. the association was incorporated;
2. it was not a church itself but was concerned with the spiritual and religious issues of the members, and relationship between the members;
3. the members agreed to abide by the constitution and evidenced this by signing a declaration on initiating membership (the declaration was contained in a schedule to the association’s constitution);

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\(^{521}\) *Farrell v Royal King’s Park Tennis Club (Inc) [2006] WASC 51 [53].*

\(^{522}\) *Henderson v Kane & Anor [1924] NZR 1073.*

\(^{523}\) *Farrell v Royal King’s Park Tennis Club (Inc) [2006] WASC 51 [60].*

\(^{524}\) *Bagga v The Sikh Association of Western Australia Inc [2012] WASC 193.*
4. the powers of the association included property rights and membership subscription fees; and

5. the constitution contained ‘detailed provisions relating to the membership of the association, management of its affairs and control of its funds and property’ and that these provisions were ‘expressed in a way that is consistent with a document intended to have legal effect.’

It would not be appropriate for an incorporated Catholic school to introduce subscription fees as members of the association are volunteers giving their time and expertise without remuneration. Subscription fees were the most important factor for Le Miere J in deciding a contract existed between the members. To avoid any confusion as to the status of members vis-a-vis the association, the rules should explicitly state there is a contract and ensure a procedure in the rules for all members to have notice of that. It is not unreasonable for members to sign a declaration accepting the rules and agreeing to abide by them and by any additional regulations (by-laws, standing orders etc) the association may have at any time. Reference to the declaration in the rules and annexed as a schedule assists clarity of purpose.

5.2.5.3.2 Liability in Contract: Contracts Arising Between the Members - AI Bill

The confusion caused under the AI Act has been resolved in cl 21 of the AI Bill:

21. Effect of rules

(1) The rules of an incorporated association bind the association and the members of the association as if —

525 Ibid 193 [12].
(a) they contained an agreement on the part of each member to be bound by and observe all the provisions of the rules; and

(b) that agreement were duly executed by each member.

(2) Subsection (1) has effect only so far as the rules are consistent with this Act.

(3) The application of this section extends to an association that is, or is deemed to be, an incorporated association immediately before the commencement of this section.

‘The purpose of this subclause is to give the rules of an association a legal status. The rules constitute the terms of a contract between the association and its members’. 526

Associations incorporating after the commencement of the AI Bill will not need to include clauses in their rules explicitly creating a contract as the new legislation does that. This also applies to existing associations adopting new rules (either the model rules or their own which must contain at least the requirements of the model rules). 527

5.2.5.3.3 Liability in Contract: Implied Contractual Terms

When considering whether a term is implied in an incorporated association’s rules, it is necessary to first consider whether that term is contrary to any of the relevant provisions in Pt V of the AI Act or Pt 4 of the AI Bill. If they are not, implied terms may arise ‘between the incorporated association and a member of the incorporated association.’ 528 Whether the term is implied depends on the circumstances of each case. The significance of this to a school incorporating under the AI Act or AI Bill after

526 Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 9.
527 Associations Incorporation Bill 2014 (WA) cl 21(3). All existing associations must comply with the new rules within three years of the Bill’s assent.
528 Farrell v Royal King’s Park Tennis Club (Inc) [2006] WASC 51 [69].
it becomes operational is the possibility of implied terms in the rules, should they be silent on relevant matters. To avoid implied terms, the rules of incorporating schools should include all relevant issues, including the charism of the founders, so there is no requirement to imply any terms; they are all included as express terms, therefore avoiding any confusion or unintended consequences relating to the school’s governance. Details of the charism should include what it is, a process for amending the relevant clauses, how it is to be included in the school curriculum, and how it plays a part in the induction of general and professional staff and ongoing activities of members. Specific and clear clauses in the rules that protect the charism and clauses relating to it are enforceable in law.

5.2.5.4 Tort

The courts have not considered many cases of tortious actions concerning incorporated associations. Why there are so few is not known but as incorporated associations are not-for-profit enterprises engaged in charitable or community works it follows that there may be either a tendency not to sue for that reason, or that incorporated associations have little or no property from which an award of damages may be paid. Despite the lack of cases, those that do consider the issue accept that the incorporated association owes the same duties that arise in the law of torts as are owed by any natural person.

In *Queensland Gymnastics Association Inc v Wight*,\(^{529}\) the appellant association was incorporated under the relevant Queensland legislation. The court did not refer to the fact that the appellant was an incorporated association but simply considered the duty of care as it applied between the appellant and the respondent where the appellant

\(^{529}\) *Queensland Gymnastics Association Inc v Wight* [2000] QCA 466.
asked the respondent to perform a gymnastic manoeuvre at an accreditation session
required by the appellant, which resulted in his injury. In *Club Italia (Geelong) Inc v
Ritchie*, the court was considering the duty of care owed to a police officer severely
injured when called to a brawl that occurred at the appellant’s premises. There was no
doubt that there was a duty of care owed by the incorporated association. The case
turned on whether a duty of the association extended to prevent harm to third parties.

The *Volunteers Act* is an Act:

- to protect certain volunteers from incurring liability when doing community
  work on a voluntary basis;
- to provide that community organisations that organise community work to
  be done by volunteers may incur the civil liability from which the volunteers
  are protected when doing that work ...

Pursuant to s 3(1)(b) of the *Volunteers Act*, the definition of ‘community organisation’
includes ‘an incorporated association under the *Associations Incorporation Act 1987*
(WA), a local government or other body corporate.’ Clause 232 of the AI Bill
acknowledges that various sections of the *Volunteers Act* require amendment to refer
to the *Associations Incorporation Act 2014* (WA) when it is enacted, rather than
*Associations Incorporation Act 1987* (WA). An incorporated school falls within this
definition.

Section 3(1) of the *Volunteer Act* defines community work as ‘work organised by a
community organisation to be done — (a) for a religious, educational, charitable or
benevolent purpose; ... (j) for any other purpose approved under section 4(1)(f) of the

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530 *Club Italia (Geelong) Inc v Ritchie* [2001] VSCA 180.
531 *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA), Long Title.
Section 4(1) of the Volunteer Act defines a volunteer as including someone ‘performing a function prescribed by the regulations’. A volunteer must not receive remuneration for their community work unless it is in relation to payment he would have received in any event or remuneration of reasonable expenses that are no greater than the regulations allow.\(^{532}\)

Committee members of the incorporated school fall within these definitions and are afforded protection from liability arising from acts done ‘in good faith’\(^{533}\) in their role as committee members. The legislation only extends to civil liability, however, not criminal liability. The work the committee member does must not be ‘outside the scope’ of his duties, ‘contrary to instructions’ given by the school board or carried out under the influence of alcohol or drugs.\(^{534}\) Protection from civil liability is an effective mechanism to entice properly qualified people to volunteer as members of the school management committee. Persons volunteering with the school receive protection as the incorporated association generally incurs the civil liability of the individual doing the community work.\(^{535}\)

5.2.5.5 Property

The incorporated association may have property vested in its own name, subject to any trusts relating to the property.\(^{536}\) The association, not its members unless otherwise provided by the rules, has an interest in its property. The real or personal property previously held by a person or persons for the previous unincorporated association

\(^{532}\) Ibid ss 4(2)(a)(i)-(ii), 4(2)(b).
\(^{533}\) Ibid s 6(1).
\(^{534}\) Ibid ss 6(3)(a)(i)-(ii), 6(3)(b).
\(^{535}\) Ibid s 7(1).
\(^{536}\) Associations Incorporation Act 1987 (WA) s 11; Associations Incorporation Bill 2014 (WA) cl 18 (the section is slightly reworded but is a change in ‘form rather than substance’: Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 8.
vests automatically in the new incorporated association subject to any trust holding property for the previous body.\textsuperscript{537} In \textit{Metropolitan Petar v Mitreski}, Hamilton J considered property originally held on trust by an unincorporated association that then became incorporated under the \textit{Associations Incorporations Act 1984} (NSW) and determined that ‘the subsequent vesting of the property in the incorporated Association did not affect the subsistence of the trust.’\textsuperscript{538}

If the congregation owns the property on which a school stands, that land will not automatically vest in the incorporated school. Congregations will need to determine what property they wish to transfer to the new incorporated body. Any property currently held on trust by a different body will remain held on trust but by the new incorporated association for the same purposes as the original trust. If some other vesting of the property is required, the congregations should seek legal advice in relation to the existing trusts.

The powers of the incorporated association in property matters are quite extensive, enabling a school to carry out all its usual functions. They include being able to:

(a) acquire, hold, deal with, and dispose of any real or personal property; and

(b) open and operate bank accounts; and

(c) invest its money —

(i) as trust funds may be invested under Part III of the \textit{Trustees Act 1962}; or

(ii) in any other manner authorised by the rules of the association; and

(d) borrow money upon such terms and conditions as the association thinks fit; and

(e) give such security for the discharge of liabilities incurred by the association as the association thinks fit; and

\textsuperscript{537} \textit{Associations Incorporation Act 1987} (WA) s 11; Associations Incorporation Bill 2014 (WA) cl 18 (the section is slightly reworded but is a change in ‘form rather than substance’: Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 8.

\textsuperscript{538} \textit{Metropolitan Petar v Mitreski} [2003] NSWSC 262, [96].
(f) appoint agents to transact any business of the association on its behalf; and

(g) enter into any other contract it considers necessary or desirable.

An incorporated association may, unless its rules otherwise provide, act as trustee and accept and hold real and personal property upon trust. However an incorporated association does not have power to do any act or thing as a trustee that, if done otherwise than as a trustee, would contravene this Act or the rules of the association.\(^{539}\)

Section 13(1)(c) of the \textit{AI Act} and cl 14(1)(c) of the AI Bill limit investment to trustee investments unless the rules provide otherwise to extend the investment power. If an incorporated association wants to invest and become profit making, they must transfer incorporation of the school to a body corporate under the \textit{Corporations Act}. This would not be appropriate for a school as its primary purpose is education, not profit; if it loses its non-profit status it will also affect its government funding and other related charitable statuses.\(^{540}\)

5.2.5.6 Insurance

Incorporated associations have the legal capacity to enter insurance contracts. There is no statutory requirement in WA for the committee to ensure there is adequate insurance,\(^{541}\) but it is judicious business practice to have adequate insurance and annually review the insurance coverage of the incorporated association to ensure it remains appropriate. Although not required under the \textit{AI Act}, to have public liability

\(^{539}\) \textit{Associations Incorporation Act 1987} (WA) s 13; \textit{Associations Incorporation Bill 2014} (WA) cl 14.

\(^{540}\) It would also affect any tax exemptions they receive due to their not for profit and religious status.

\(^{541}\) In Queensland, s 70 of the \textit{Associations Incorporations Act 1981} requires the committee to consider annually the need to take out public liability insurance and convey their decision whether or not to do so to the members. They are compelled to have this insurance cover should the incorporated association own or lease land.
and other relevant insurance is good business practice and protects the school’s property, as is current practice.

5.2.6 Transferring From an Incorporated Association

The Commissioner may direct an incorporated association to transfer from incorporation under a relevant state Act to a body corporate\(^{542}\) when the ‘scale or nature of the activities’, ‘the value and nature of the property’ or the ‘extent and nature of the dealings’\(^{543}\) of the association warrant it.\(^{544}\) Therefore, if a congregational school initially incorporates under state legislation but grows substantially it may transfer to incorporation under the \textit{Corporations Act}. The Commissioner may direct it to do so or a special resolution of the association directs it to do so.\(^{545}\) The Commissioner must approve the special resolution.\(^{546}\) There is no case law determining whether the amount of annual turnover of an incorporated association influences the Commissioner’s decision.\(^{547}\) Sections 9(2)(a) and 10D of the \textit{AI Act} and cl 95 of the AI Bill provide no detail on annual turnover that the Commissioner should consider inappropriate. If it is only the financial ‘wealth’ that is considered, then a single school incorporated under the \textit{AI Act}, whose purpose is clearly educational with no profit-making ability or incentive, is unlikely to be directed by the Commissioner to transfer to incorporation

\(^{542}\) Such as a company limited by guarantee.

\(^{543}\) \textit{Associations Incorporation Act 1987} (WA) s 10D(b)(i)-(iii); \textit{Associations Incorporation Bill 2014} (WA) cl 95.

\(^{544}\) \textit{Associations Incorporation Act 1987} (WA) s 34; \textit{Associations Incorporation Bill 2014} (WA) cl 95(1).

\(^{545}\) \textit{Associations Incorporation Act 1987} (WA) s 10B(1); \textit{Associations Incorporation Bill 2014} (WA) cl 93.

\(^{546}\) \textit{Associations Incorporation Act 1987} (WA) s 10B; \textit{Associations Incorporation Bill 2014} (WA) cl 93. Sections 10A – 10I were inserted in 2010. Prior to their enactment a transfer could only be made on the Commissioner’s authorisation, not on the application of the association: \textit{ASIC v Medical Defence Association (WA) Inc} [2005] FCAFC 173. It was held, per curiam, that the defendants could only apply to transfer from an incorporated association to a company limited by guarantee if the legislation was reformed, which it was in 2010.

\(^{547}\) Refer to discussion above regarding the lack of information on what a Commissioner will consider when determining this question.
under the *Corporations Act*. They would fall within the purpose set out in s 4 of the *AI Act* and cl 4 of the AI Bill, although a school may choose to incorporate as a company.\(^5\)\(^4\)\(^8\) The fact that s 4(1)(a) of the *AI Act* and cl l4(a)(i) of the AI Bill specifically refer to associations eligible for incorporation under the Act as including those ‘for a religious, educational, charitable or benevolent purpose’, suggests the incorporated association is not only a desirable legal structure for a school, it is appropriate in WA.\(^5\)\(^4\)\(^9\)

5.2.6.1 Amalgamation of Associations

Amalgamation of incorporated associations is possible in other states but not under the *AI Act*. If a congregation conducts several schools it may initially choose to incorporate each one separately or incorporate several schools into one association. Part 7 of the AI Bill introduces the ability to amalgamate associations in WA. Clause 102 provides for an application to the Commissioner to amalgamate two or more existing associations into one ‘new body’. The amalgamation cannot be contrary to the rules of any of the existing associations seeking to be part of the amalgamation.\(^5\)\(^5\)\(^0\) The terms of the amalgamation, the name, objects or purposes and rules of the new body require a successful special resolution from each existing association.\(^5\)\(^5\)\(^1\)

\(^5\)\(^4\)\(^8\) *Associations Incorporation Act 1987* (WA) s 10B; *Associations Incorporation Bill 2014* (WA) cls 93 – 94. Where the commissioner directs an incorporated association to transfer from an incorporated body to another body corporate, the provisions of clauses 96 – 100 of the AI Bill provide the process and requirements for doing so.

\(^5\)\(^4\)\(^9\) Some WA schools incorporated under the *AI Act* include St Mary’s Anglican Girls School, Guilford Grammar, Perth College, Christ Church Grammar School and Great Southern Grammar School. Section 3 of the *Associations Incorporation Act 2009* (NSW) targets associations whose purpose is ‘small, non-profit and non-commercial activities’. Hence, more schools in NSW are incorporated as companies limited by guarantee.

\(^5\)\(^5\)\(^0\) *Associations Incorporation Bill 2014* (WA) cl 102(3).

\(^5\)\(^5\)\(^1\) Ibid cl 102(4).
As with any other application for incorporation, the Commissioner may require public notice of the amalgamation before he gives approval\(^{552}\) and any person may make a request for refusal of the amalgamation.\(^{553}\) The properties and liabilities of the former associations vest in the new body pursuant to sch 2 of the Bill.

However, it is necessary for congregations to consider the size of the association, particularly of its business dealings. As schools can have a high annual business turnover, the combination of two or more schools into one corporate body may be more appropriate incorporating under the *Corporations Act*.

### 5.2.6.2 Winding Up of Associations

The *AI Act* provides the procedure for an incorporated association to wind up voluntarily or by the Supreme Court.\(^ {554}\) Prior to winding up members may draft a distribution plan for surplus property, so an incorporated school that wishes to cancel their incorporation may do so and determine where the surplus property will go. The distribution plan is subject to the requirement in s 33(2)(a) that property not be distributed to members past or present and in s 33(2)(b) that it be distributed to ‘another incorporated association or for charitable purposes’. This provides sufficient provision for transfer of the surplus property to another Catholic school or charitable enterprise (including the CECWA Trustees).\(^ {555}\) The AI Bill retains these powers but introduces new provisions for voluntary winding up pursuant to pts 5.5 and 5.6 of the *Corporations Act*. This provides ‘a more formal winding up process for those associations that have more complicated affairs. In these cases, a liquidator will

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\(^{552}\) Ibid cl 104.

\(^{553}\) Ibid cl 105.

\(^{554}\) *Associations Incorporation Act 1987* (WA), Part VI; Associations Incorporation Bill 2014 (WA) Part 9.

\(^{555}\) This would also comply with canon law requirements for temporal goods, discussed in chapter 7.
provide for a structured and orderly finalisation of the associations affairs, including
the realisation of assets and satisfaction of debts and liabilities.\textsuperscript{556} In addition, cl 24
introduces the implied rule that on winding up, surplus property be distributed to a
body with a not-for-profit status\textsuperscript{557} or whose rules ‘prevent the distribution of property
to its members’.\textsuperscript{558} The Commissioner retains the power to vary the restrictions in cl
24.\textsuperscript{559}

An incorporated association may also be wound up by application to the Supreme
Court.\textsuperscript{560} Clause 127 imposes duties on management committee members not to incur
debt whilst the company is insolvent, or it is reasonable to believe that it will become
insolvent due to the accrual of debt, with a penalty of $5 000. Part 10 of the AI Bill
also provides for the distribution of property when cancellation of incorporation
occurs, including the use of a distribution plan.\textsuperscript{561}

\subsection*{5.2.7 John Twenty Third College as an Incorporated Association\textsuperscript{562}}

As an example of the governance of a school as an incorporated association, Loreto
Convent Claremont and St Louis School (both congregational schools of the Loreto
Sisters and the Jesuits respectively) merged in 1977 to become a co-educational
Catholic school. The College Council is now an incorporated association, John Twenty
Third College Inc (‘JTC’). The land on which the school sits in Mount Claremont is

\textsuperscript{556} Explanatory Memorandum, Associations Incorporation Bill 2014 (WA) 41.
\textsuperscript{557} This includes those licensed or registered under the Charitable Collections Act 1946 or the
Australian Charities and Not-for-profits Commission Act 2012.
\textsuperscript{558} Including co-operatives registered under the Co-operatives Act 2009.
\textsuperscript{559} Associations Incorporation Bill 2014 (WA) cl 25.
\textsuperscript{560} Associations Incorporation Act 1987 (WA) s 31; Associations Incorporation Bill 2014 (WA) cl
123.
\textsuperscript{561} Associations Incorporation Act 1987 (WA) ss 33(7)(b) and 33(10); Associations Incorporation Bill
2014 (WA) cls 130 – 139.
\textsuperscript{562} The researcher is grateful to the Chair of JTC, Mr Julius Matthys, for discussing the practical
aspects of the Council.
registered in the name of the Roman Catholic Archbishop of Perth. How JTC operates in local Catholic education is considered to ascertain the effectiveness of the incorporated association to serve as a governance model that will protect the charism of the congregation and most effectively continue the delivery of education in that charism.

JTC’s constitution\textsuperscript{563} complies with the AI Act but does not refer specifically to the charisms of the founders of Loreto or St Louis or to a charism specifically adopted for JTC upon its commencement in 1977 or subsequently. The school’s website refers to the ‘Mission and objectives as stated in the Constitution’. The objects are in cl 2: ‘to carry on, subject to the authority of the Archbishop ... a Roman Catholic college or colleges for boys and girls.’ There is however, no mention of the mission or charism of the school in the rules. Definition of both the mission and charism could occur in sub-clauses of the objects clause and their advancement included as an object.

The objects are, pursuant to cl 2, ‘subject to the authority of the Archbishop’. In real terms, the archbishop does not play an active or controlling role in the incorporated association. He has a representative who attends meetings and contributes on his behalf to the council. The archbishop would intervene personally if there were any proposed major changes to the constitution or school.

Despite its absence in the legal document, the charism of JTC is very important to the school and the council sees it as an important part of their work to ensure the school community knows and practices the charism. As advised by the Chair of the council, the council acknowledges that the exercise and protection of the charism is their

\textsuperscript{563} Although the researcher has adopted the term ‘rules’ for the section on incorporated associations, JTC refers to their rules as a constitution.
responsibility. Initial council member induction and annual retreats focus on the religious history and tradition of the congregations and include Ignation and Loreto spirituality. The council has three religious members, representing the archbishop, and the Loreto and Jesuit Congregations. The mission and work of the council supports the school’s charism — though articulation of that charism is not in the constitution. Although traditions can be difficult to codify in a document such as a constitution, reference to them assists its expression, as the Christian Brothers have done with reference to their Charter and Foundations in EREA’s constitution, and attached them to the constitution.

Membership of JTC’s incorporated school is limited — members of the council are the only members of the incorporated association; the constitution provides through Recital F that all members will comprise the committee. There are no qualifications for membership specifically referred to as such in the constitution, but cl 5.6 sets out matters for consideration when assessing a nomination to membership, which may be interpreted as qualifications for membership. Membership must remain between 8 and 14 members and must include:

- two nominees of the archbishop;\textsuperscript{564}
- one nominee of the provincial\textsuperscript{565} of the Loreto Sisters;
- the provincial;
- the principal;
- two current parents; and

\textsuperscript{564} The Archbishop’s relationship with JTC is as the public juridical person appointed to allow the school to continue to operate as a Catholic school without the WA Congregation of either the Loreto Sisters or Jesuits who were the previous public juridical persons for Loreto Claremont and St Louis respectively.

\textsuperscript{565} Some congregations refer to their heads with different titles such as Superiors, Superior General, Congregational Leader or Provincials etc.
• a past student.\textsuperscript{566}

The definition of offices of chair, deputy chair and secretary are in the interpretation section in cl 3; there is no mention of the office of treasurer but the school business manager conducts the duties and requirements relating to that office. A clearer definition of governance transpires if the constitution provided for the treasurer to be the school business manager or some other person.

A nominations committee pursuant to cl 5.6 makes the appointments of parent, past student and representative members. The members of that committee include, pursuant to cl 5.6(a), the chair, one of the archbishop’s members and the provincial’s member. This provides an avenue for the congregation to retain an active, but not onerous, role in determining those who have responsibility for the governance of the school, including the exercise and practice of the charism. Clause 5.6(e) determines the aspects considered important for determining membership at any time and includes:

• the need for ‘a balance of skills and backgrounds’ amongst members;
• the principal’s views;
• a proposed member’s ‘reputation, expertise and experience’;
• a proposed member’s suitability for membership;
• the ability to commit the necessary time to the council’s business; and
• any other factors considered relevant.\textsuperscript{567}

Clauses 5.3–5.5 provide for the archbishop and provincial to ‘confer’ with the council’s chair when considering appointments. The term suggests nothing more than a discussion. In practice, the nominations committee and sub-committee decide

\textsuperscript{566} Constitution John Twenty Third College Inc cl 5.1.
\textsuperscript{567} Constitution John Twenty Third College Inc, cls 5.6(e)(i) - (vi) respectively.
appointments and the archbishop and provincial have representatives on the nominations committee. Both the archbishop and provincial have the power to disapprove or remove a member pursuant to cls 5.6(f)(ii) and 5.7(d) respectively.\textsuperscript{568}

Recital B provides that ‘the Sister Provincial in Australia for the time being of the Institute of the Blessed Virgin Mary retains residual rights and powers with respect to the College’. The constitution does not specifically state what those residual rights and powers are but they include the power to disapprove a proposed member. If a congregation wants to include reserve powers,\textsuperscript{569} the constitution can clearly specify them to avoid confusion in the event that they do wish to intervene in an issue. This is pertinent to the protection of the charism as the congregation may choose to have reserve powers relating to any proposed changes to the charism, which should be included in the constitution.

The constitution clearly sets out the role of the council and that of the principal within the school (rather than their position as a council member).\textsuperscript{570} The council members are clearly responsible as the ‘committee’ for the purposes of the \textit{AI Act}. \textsuperscript{571} The powers of the council all relate to the governance and business of the school and are more detailed than those contained in s 13 of the \textit{AI Act}, providing clear guidance to the council.\textsuperscript{572}

\textsuperscript{568} It is unknown whether either power has been used in the more distant past. All matters pertaining to appointments are, and in the recent past have been, exercised by the Nominations Committee.

\textsuperscript{569} Reserve powers refer to those powers that a congregation chooses to retain while the play an active, but limited role in governance of their schools. They usually include, as a minimum, the power to appoint and dismiss members of the board/council, the power to approve or veto any changes to the charism in their school, and the power to approve/veto financial transactions over a specified limit. These powers are discussed again in chapter 7.3.2.2.

\textsuperscript{570} \textit{Constitution John Twenty Third College Inc} cl 21.

\textsuperscript{571} Ibid cl 4.

\textsuperscript{572} Ibid cl 6 – 7.
Amendment of the constitution is possible pursuant to cl 26 by a special resolution, but only with the approval of the archbishop and the provincial. If a clause was added relating to the charism it could be protected not only by the special resolution requirement of a two-thirds majority, but by the additional approval of the archbishop and the provincial. The archbishop is included in JTC because of his relationship with the school as the representative of the public juridical person under which it operates as a Catholic school. Schools using a different public juridical person may choose to use just the congregational leader and/or the representative of the relevant public juridical person. Alternatively, instead of the archbishop’s nominee being a member of the council, the committee member may be a nominee of the CECWA or the CEOWA. A third layer of protection is then afforded by s 19(1) of the AI Act as approval of the Commissioner is also required when the rules are being altered.

5.2.8 Summary

Incorporation under the AI Act, and the AI Bill when enacted, endows a school with a recognisable legal entity and is a suitable option for congregations seeking a new legal structure for their schools. ‘[T]he practical difficulties faced by unincorporated associations provide a strong incentive for an association to incorporate once it acquires substantial assets or its activities affect persons other than its members.’ An incorporated association:

- has perpetual succession;
- can sue and be sued (and so be held accountable);

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573 Public juridical persons will be discussed in Chapter 7.3.
574 Detailed discussion of relevant people or institutions that may serve as public juridical persons or representatives of interest groups, will occur in chapter 7.3.
• has an identifiable committee responsible for the governance and/or management of the association;

• provides protection to committee members acting in good faith by providing limited liability;

• can hold property in its own name or on trust;

• can specifically provide for the charism of the school’s founder in its rules which rules are enforceable in law (thus protecting the charism in law); and

• under the AI Bill provides for proper accounting and record keeping procedures.

The rules of an incorporated association under the AI Act may adopt the model rules, and under the AI Bill must adopt them or adopt their contents as a minimum requirement in its rules. In addition, the rules may:

• articulate the charism adopted by the school;

• state how the charism is to be taught and/or evidenced in the school;

• provide compulsory member induction, and continued formation, relating to the founder and the charism;

• ensure a change to the rules relating to the charism can only be implemented by a special resolution approved by the relevant congregational leader and a representative of the relevant public juridical person; and

• include reserve powers of the congregation.

Having regard to the discussion in this section, it follows that the incorporated school should have a management committee including at least one congregational representative, a representative of the public juridical person, the school’s principal,
past students, current parents, parties with specific and relevant expertise (who may have no other affiliation with the school), and an independent educational expert.576

The Consumer Protection Division of the Department of Commerce produces INC. – *A Guide for Incorporated Associations in Western Australia*. Its purpose is ‘to be used by members of associations as a reference source on good governance practices’.577 It provides basic and clear guidance on what is required in an incorporated association and is a useful tool for members and committee members to familiarise themselves with the legal governance aspects of their entity and would be convenient to include in the committee handbook. The specific reference in s 4(1)(a) of the *AI Act* and cl 4(a)(i) of the *AI Bill* to bodies whose purpose is educational makes it an appropriate legal entity for a school in WA.

The only disadvantage of the incorporated association as a legal structure for congregational schools is that the statutory basis for them is state jurisdictional; a national scheme is preferable but not yet achieved despite requests for it. Congregations that have schools in different states but seek one governing body will not presently find the incorporated association a possible legal mechanism for governance of their schools.578 The incorporated association provides an effective legal structure for congregational schools operating in WA.

The incorporated association provides a suitable entity for the congregational school to choose as a governance structure. It answers the thesis question by providing a legal

576 Too much parental involvement on a Council may raise issues of conflict in what they want for their children’s school, and what is actually best for the school.
578 The discussion on the benefits of a national regulatory scheme for incorporated associations, though supported by the researcher, is beyond the scope of this paper.
structure for congregational schools that can protect, through the rules, the charism of the founder in the school’s governance. It provides a mechanism for the school to own property and allows a congregation the flexibility to continue in the school’s governance in varying degrees, should they wish to do so.

At the time of an application for incorporation, the Commissioner may, pursuant to s 9(2)(a) of the AI Act or cl 11 of the AI Bill, determine that the association is more appropriately incorporated under the Corporations Act 2001 (Cth). The size of the incorporated body and its annual financial turnover usually determine the type of incorporation. Neither the AI Act nor the AI Bill provide direction as to the grounds upon which a Commissioner might make such a decision, other than considering the nature, scale, value and extent of the association’s activities, property and dealings with the public, but there are no details as to what they might include. Nor are there any cases or SAT decisions addressing the matter.

If the Commissioner decides it is more appropriate for a body to incorporate under a different Act, the body may then consider incorporation under the Corporations Act or under some state legislation relating to corporate bodies. This chapter will now consider incorporation under such legislation.

579 Associations Incorporation Act 1987 (WA) s 10D(1)(b) and Associations Incorporation Bill 2014 (WA) cl 11(2). The Bill includes the term ‘likely’ when referring to the scale, value, extent and nature of dealings and property.

580 Similarly, s 7(2)(c) of the Associations Incorporation Act 2009 (NSW) only lists several general factors the Commissioner should consider including the likely nature and extent of the associations proposed activities and dealings with the public. Section 7(3) of the Associations Incorporation Reform Act 2012 (Vic) lists similar factors including the ‘value and nature of the property’ of the association.
5.3 INCORPORATED ENTITIES UNDER THE CORPORATIONS ACT

'A corporation … is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person.' One of the main benefits of the corporation for a congregational school is the ability to conduct business through a separate legal personality, therefore reducing exposure to personal liability. Incorporation under the Corporations Act provides security and protection for bodies registered under it and carrying on business and for those dealing with the companies. Companies may be established for any lawful purpose. Section 112(1) of the Corporations Act provides for the registration of the following different types of companies:

- Proprietary companies
  - Limited by shares
  - Unlimited with share capital
- Public companies
  - Limited by shares
  - Limited by guarantee
  - Unlimited with share capital
  - Unlimited with share capital

Note: Other types of companies that were previously allowed continue to exist under the pt 10.1 transitionals.

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581 Austin and Ramsay, above n 1, 5.
582 Ibid.
The company limited by guarantee is the most appropriate and relevant for a congregational school considering incorporation because it is the appropriate vehicle for a not-for-profit body.

The *Corporations Act* contains extensive provisions, 583 but the company’s rules or constitution 584 allows a company to adopt a certain ‘identity’ within the statutory requirements, allowing the *Corporations Act* to regulate the large corporate company, the small family owned business or the independent school under the same provisions.

The *Corporations Act* imposes specific duties and responsibilities on officers of the company. The relevance, advantages and disadvantages to professional associations of the company limited by guarantee, including schools, who are not engaged in trading and do not wish to distribute profits to their members, will be discussed. 585 Consideration will be given to whether, and how, the company limited by guarantee may be a useful governance option for congregational schools.

A company is an artificially created separate legal entity that has the capacity of an individual pursuant to s 124 of the *Corporations Act*. The main benefits of a company include that:

- it is a separate legal entity;
- it provides protection for members of the company from personal liability;
- very small or very large numbers of people may participate; and
- where required, it can raise large amounts of capital.

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583 Academic debate on whether these extensive provisions are prescriptive or facultative remains unresolved but discussion of the debate is outside the scope of this thesis.
584 In this section of the thesis the rules or constitution will be referred to with the term ‘constitution’.
585 Corporations law is extensive and a full discussion of it is beyond the scope of this thesis. Issues concerning the company limited by guarantee as it applies to a school registering as such will be discussed. The Presentation schools in Queensland, previously discussed in chapter three, are companies limited by guarantee under the *Corporations Act*. 
‘A company has the legal capacity and powers of an individual both in and outside this jurisdiction’.\footnote{Corporations Act 2001 (Cth) s 124(1).} Therefore it may sue and be sued, has perpetual succession, and can buy, sell and hold property. It is a legal identity, separate from its members. There is no specific legislative provision for perpetual succession but the Corporations Act implies it because a company registered under the Corporations Act remains in existence until it is deregistered. It may have a common seal, but it is not mandatory.\footnote{Ibid s 123.}

Broadly speaking, companies are either proprietary or public companies. Proprietary companies must have share capital, and distribute profits and share dividends to its members.\footnote{The distribution of profits is a tax law issue, not a corporation’s issue. The relevance for the thesis is that the company limited by guarantee cannot issue shares or distribute profits.} ‘A proprietary company is a private company designed for a relatively small group of persons who do not wish the company to be able to invite the public to subscribe for its share capital or to lend money to it.’\footnote{Austin and Ramsay, above n 1, 170.} This is not a suitable form of company for the not-for-profit school, which is not a trading company.\footnote{Proprietary companies will not be considered in this thesis. It is defined in s 45A(1) of the Corporations Act and s113 of the Corporations Act lists the requirements for a proprietary company.}

A public company ‘means a company other than a proprietary company’.\footnote{Corporations Act 2001 (Cth) s 9.}

Essentially, this means that a public company has unlimited membership and greater access to raise funds from the public. Given that public companies are generally reliant on the public for its funding and that the investing public is at risk, parliament has considered it necessary to subject such companies to financial disclosure and more regulation (such as auditing and reporting requirements) than proprietary companies.\footnote{Jason Harris, Anil Hargovan and Michael Adams, Australian Corporate Law (Lexis Nexis Butterworths, 2nd ed, 2009) 80.}
Four types of public company are possible pursuant to s 112 of the *Corporations Act*, including the company limited by guarantee that by virtue of s 124 of the *Corporations Act* has no power to issue shares. Pursuant to s 314(1AAA), the reporting requirements of s 314 of the *Corporations Act* do not apply to companies limited by guarantee; they are not required to provide an annual financial report, directors’ report or auditors report on the financial report unless they are requested to do so by a member of the company. The *Corporations Amendment (Corporate Reporting Reform) Act 2010* introduced a three-tier structure for reporting requirements of companies limited by guarantee. Most school companies would fall within the third tier where the revenue for the company for a financial year is $1 million or greater. Third tier companies ‘must prepare a financial report under s 292(1) of the *Corporations Act*. “A director’s” report is also required but this can contain less detail than is required for other companies … The annual financial report must be audited: ss 285A and 301.’ Members receive reports if they request them.

5.3.1 Application for Registration as a Company

Only ASIC may register a company applying for registration. The *Corporations Act* is a federal Act and applies to all states and territories; registration will be noted by ASIC in one state but the company then has the power to conduct business either in that state alone or in other states or territories should it wish to do so. ASIC provides a certificate on registration that specifies the state or territory in which the company is registered.

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593 *Corporations Act 2001* (Cth) ss 285A and 316A(1).
594 Ibid s 285A.
595 Austin and Ramsay, above n 1, 793.
596 *Corporations Act 2001* (Cth) ss 285A and 316A(1).
597 Ibid s 118(1)(c).
This is a useful option for congregations who have schools operating in multiple Australian jurisdictions.

A person may apply for registration of a company by lodging an application with ASIC. 598 The applicant must have the consent of all proposed directors, and lodge their consents upon its registration. The application must be in the prescribed form and comply with the requirements of s 117(2) of the Corporations Act, including the type of company; the proposed company’s name and address; the names and addresses of proposed members, directors and company secretary; proposed opening hours of its office; and the proposed amount of the guarantee of the members. The application is not onerous and allows people dealing with the company to identify persons related to its management. Section 201A of the Corporations Act requires a public company to have at least three directors, two of whom ordinarily reside in Australia, and one member. 599 The appropriate number of directors for a school company will vary depending on the size of the school, which is best decided after consideration of the school’s current governance model and membership needs.

Following a successful application, ASIC will issue a certificate of registration under s 118 of the Corporations Act, which is proof of compliance with all registration requirements, the company’s registration and its date of registration. 600 The registered office of the company receives all communication with the company, 601 but it is not necessary for the registered office to be open to the public 602 as long as it makes certain documents available on request. 603 A school office would be an appropriate registered

598 Ibid s 117(1).
599 ‘So far as company law and the Corporations Act are concerned, a company can have any lawful restrictions on membership’: Austin and Ramsay, above n 1, 216.
600 Corporations Act 2001 (Cth) s 1274(7A).
601 Ibid s 142.
602 Ibid s 145.
603 Ibid s 173 (eg., the company’s register) and s1300 (dates and times for inspection).
office. The most appropriate type of company for a not for profit school is the company limited by guarantee, which is discussed in the following section.

5.3.2 *The Company Limited by Guarantee*

Distinguishing features of a company limited by guarantee include its inability to issue shares; its prohibition on paying dividends to its members; its limit on any liability of its members when it is wound up as determined by its constitution (the guarantee); and its not-for-profit status. A not-for-profit organisation … is an organisation that is not operating for the profit or gain of its individual members, whether these gains would have been direct or indirect. This applies both while the organisation is operating and when it winds up.

Any profit made by the organisation goes back into the operation of the organisation to carry out its purposes and is not distributed to any of its members.608

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604 Ibid s 124; A shareholder is someone who holds shares in the company and who are members of the company: *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353 at 363; *Kingston v Keprose Pty Ltd* (1987) 12 ACLR 323, 329. A shareholder is therefore a member of the company but a member does not need to be a shareholder. Members of a company limited by guarantee cannot be shareholders.

605 *Corporations Act 2001* (Cth) s 254SA.

606 *Corporations Act 2001* (Cth) s 517.


608 Australian Taxation Office, *Getting started for non-profit organisations,* (25 June 2014), Australian Government <https://www.ato.gov.au/Non-profit/Getting-started-for-non-profit-organisations/Is-your-organisation-non-profit/>; Many not-for-profit organisations are also eligible for charitable status, including schools and should register with the Australian Charities and Not-For-Profits Commission (ACNC), which is the independent national regulator of charities. The ACNC has been set up to achieve the following objects:

- maintain, protect and enhance public trust and confidence in the sector through increased accountability and transparency
- support and sustain a robust, vibrant, independent and innovative not-for-profit sector
- promote the reduction of unnecessary regulatory obligations on the sector.

See also, A.S. Sievers, ‘The Honorary Director: The Obligations of Directors and Committee Members of NFP Companies and Associations’ (1990) 8 *Companies and Securities Law Journal* 87, 89.
Section 124 of the Corporations Act prohibits a company limited by guarantee from issuing shares or paying dividends to its members. However, it may earn profit so long as there is no distribution of it to its members. Any profit made by a school is incidental to the running of its business; any such profits are generally reinvested in the school. This structure suits the purposes of the Catholic school. The amount of the guarantee, once expressed in the application for registration of the company, is unchangeable even with the agreement of all members.

Of the four types of possible public company provided by s 112 of the Corporations Act, only the company limited by guarantee is a suitable option for a school that wants to remain a not-for-profit organisation; wants to provide protection from legal liability for its members; and does not wish to distribute shares to its members. Members may be individual persons or other bodies corporate, including private or government companies.

The process for registering as a company limited by guarantee is relatively simple and straightforward and the duties imposed on members and directors is not so onerous as to deter them from volunteering to assist the school in that capacity. It provides greater statutory safeguards for members and directors than is currently available for committee members of incorporated associations.

5.3.2.1 The Guarantee

In companies limited by guarantee, ‘a member need not contribute more than the amount the member has undertaken to contribute to the company’s property if the company is wound up’. There are no joint or several liabilities. The amount of the

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609 Corporations Act 2001 (Cth) s 254SA.
610 Hennessy v National Agricultural and Industrial Development Assn [1947] IR 159.
611 Corporations Act 2001 (Cth) ss 9, 231.
612 Ibid s 517.
guarantee may be a nominal amount.\textsuperscript{613} If the company is wound up and there are not enough assets to meet the existing debts then the members must only pay the specified amount to which they committed at the time of becoming a member. This form of company is particularly appealing to members who are not seeking to invest financially in the company but who merely wish to act as members and/or directors; they can do this in a voluntary capacity without fear of undetermined future financial liability or loss. People willing to act on a school board and bring their expertise to it are more likely to engage on a voluntary basis if they incur no financial risk.

5.3.2.2 Business Name

ASIC will allocate an Australian Company Number (‘ACN’) to the company upon registration. The ACN must appear on the following company documents to ensure that the company is easily identifiable:

- any documents lodged with ASIC;
- statements of account, including invoices and receipts;
- orders for goods and services;
- company letterhead and other company documents; and
- brochures advertising goods or services.\textsuperscript{614}

It is usual for the company to conduct business under a separate name rather than just the ACN\textsuperscript{615} and register that name. Should the company then conduct itself under a different name again, then that different name must be registered under the Business Names Registration Act 2011 (Cth). In context, this may occur where there are several

\textsuperscript{613} The nominal amount is usually no more than $100: QCOSS, Company Limited by Guarantee, \url{http://communitydoor.org.au/establish-a-community-service-organisation/company-limited-by-guarantee}.

\textsuperscript{614} Austin and Ramsay, above n 1, 180.

\textsuperscript{615} The ACN may be used as the name of the corporation - Corporations Act 2001 (Cth) s 148.
schools registered as one company that formerly belonged to a single congregation, but each school necessarily has a different name. If, for example, the Presentation Sisters chose to register both the Iona secondary and primary schools as one company but retained their separate existing names, then the company must register a name (eg Presentation Schools WA) and then formally register each school in their individual names (eg Iona Presentation College and Iona Presentation Primary School).

The business name must be reserved pursuant to s 152 of the Corporations Act and is only disallowed where the name is already registered or reserved under the Corporations Act, under ASIC’s Business Names Register or if it is ‘unacceptable for registration’ under the regulations. It is unlikely that a school’s name would already be registered by another entity or unacceptable for registration and the current school name will be appropriate as the registered business name under the Corporations Act.

The business name of a limited liability company should include the word ‘Limited’ unless the company is:

- ‘registered under the Australian Charities and Not--for-Profits Commission Act 2012 as the type of entity mentioned in column 1 of item 1 of the table in subsection 25-5(5) of that Act (charity)’,
- where the company’s constitution explicitly proscribes fees to directors and that any other type of payment to a director must have the approval of all directors.

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616 Corporations Act 2001 (Cth) s 147(1), Reg 2B.6.01, Sch 6 Corporation Regulations; Little v Australian Securities Commission (1996) 22 ACSR 226 (if ASIC believes the name is undesirable or offensive to members of the public).
617 Corporations Act 2001 (Cth) s 150(a).
618 Ibid s 150(b).
It is most likely that Catholic schools will register with the Australian Charities and Not-for-profits Commission (‘ACNC’)\textsuperscript{619} and their constitutions proscribe the payment of fees to the directors who will be volunteers approached by the company to sit on the school board. The title ‘Limited’ in these circumstances will not need to be included in the school’s name.

Unlike unincorporated associations (discussed in chapter 4) and associations incorporated under the AI Act, a company limited by guarantee must display its name clearly outside its place of business\textsuperscript{620} with the notation ‘registered office’. \textsuperscript{621} If its registered office is elsewhere than the school property, then that office must also have the signage; but generally, the company’s office would be located at the school unless there is more than one school that is a part of the company. The name and ACN must appear on all public documents, instruments and company seal if it has one. None of these obligations is onerous and compliance is easy and affordable.

When ASIC has determined compliance with all registration requirements and the registered name is available, they will issue a certificate that includes the company’s name, ACN, type, state and date of registration.\textsuperscript{622} The company then exists from the...
date of registration and under the name stated in the certificate. Registration is in the state in which the application is lodged.

5.3.2.3 The Constitution

‘A company’s internal management may be governed by provisions of [the Corporations] Act that apply to the company as replaceable rules, by a constitution or by a combination of both.’ Internal management directs decision making in a company. A company is not required to draft a constitution, but if it chooses to do so, they may adopt one before, or after, registration of the company. If it chooses not to have a constitution, the replaceable rules in the Corporations Act automatically apply as the rules for internal management.

To ensure that a school registering as a company limited by guarantee commences with relevant and adequate governance, it should agree and adopt a constitution before registration, and lodge that constitution with ASIC when it makes its application for registration. The proposed members of the company merely have to agree in writing to adopt the constitution. Adoption of a constitution after registration occurs by special resolution of the members. The constitution may contain some or all of the replaceable rules and, in addition, have rules that specifically cater to the company’s purpose and business activities, such as the articulation and protection of a charism adopted by a school, or reserve powers maintained by a congregation in relation to the

623 Ibid s 119.
624 Ibid s 119A.
625 Ibid s 134.
626 Ibid s 134.
627 Ibid s 136(1)(a).
628 Ibid s 136(1)(b).
governance of the school and its charism. In addition to the contents of the constitution, there are additional mandatory statutory governance requirements.

Section 141 of the *Corporations Act* provides a table of the replaceable rules. The most suitable model for a school is to have a combination of the replaceable rules and custom rules to ensure the constitution accommodates the protection of the charism and clearly states the purpose, objects and mission of the school and, where relevant, contains reserve powers maintained by a congregation. The company’s constitution may include reference to the canonical statutes of a relevant public juridical person and annex them to it, thereby ensuring consistency in the constitution between common law and canonical issues where relevant to governance.

Section 140(1) of the *Corporations Act* states that the company’s constitution creates a contract:

- between the company and each member;
- between the company and each director and company secretary; and
- between a member and each other member.

Under this contract each person agrees to observe and perform the constitution and rules so far as they apply to that person, thereby removing any of the confusion as to whether or not there is an intention to create legal relations between the members that

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629 As for example EREA Trustees Constitution cl3.1. In addition to the replaceable rules and any specifically drafted rules, a constitution may also include the power for directors to make by-laws or subsidiary rules. Whether by-laws or subsidiary laws are also a part of the statutory contract created by the constitution is not determined. In *Wilcox v Kogarah Golf Club Ltd* (1996) 14 ACLC 421, it was held that the by-laws (in that case, of a golf club) do not form part of the statutory contract. The court recognised that *Scandrett v Dowling* (1992) NSWLR 483 (where the by-laws related to the Anglican Church) suggested that the by-laws in each case needed to be considered to determine whether there was an intention between the parties for those by-laws to have contractual effect. This confusion is avoided by provision in the constitution that by-laws are prohibited; it is doubtful that a school would require by-laws in any event.
surrounds unincorporated and incorporated associations. 630 Dixon v Australian Society of Accountants held that the decision in Cameron v Hogan did not apply to a company limited by guarantee. 631 The statutory contract relates to members in their capacity as members and likewise to directors in their capacity as directors. 632 The contract contains the express terms within the constitution and possibly implied terms; whether any terms are implied is to be resolved according to the general law of contract, 633 which is also the approach taken by courts in construing clauses and terms including the clauses of the constitution. 634 It is good practice to include a clause in the company’s constitution that accepts s 46(1) of the Acts Interpretation Act 1901 (Cth). Any terms used in the Corporations Act and in the constitution then have the same meaning. This eliminates any confusion of the meaning and intent of the original authors of the company constitution. 635

The statutory contractual nature of the constitution allows members to seek an injunction or declaration if they believe the company has breached a term or terms of the constitution. 636 A member can therefore seek the court’s assistance for breach of a clause relating to the charism adopted by the school. Including charism in an objects

630 See Rickus v Motor Trades Association of Australia Superannuation Fund Pty Ltd (2010) 265 ALR 112 (per curiam), where the Full Court of the Federal Court held a director able to enforce the contract created by s 140(1) against the company.
631 Dixon v Australian Society of Accountants (1989) 87 ACTR 1; Cameron v Hogan (1934) 51 CLR 358.
633 The tests for whether there are implied terms in a contract can be found in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 16 ALR 363. A discussion of those tests for implied terms is beyond the scope of this thesis and not particularly helpful without reference to a specific constitution/contract.
634 Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd (2006) 156 FCR 1 – business contracts should be construed objectively and afforded business efficacy.
635 For example, the term ‘special resolution’: Austin and Ramsay, above n 1, [6.081]. See also Bluebottle UK Ltd v Deputy Commissioner of Taxation (2007) 232 CLR 598 where the court held that a clause in a constitution that was ‘almost identical’ to s 254U of the Corporations Act 2001 (Cth) actually had a different meaning to the section.
636 Damages are not an available remedy, as ‘a member cannot be allowed to have a claim as a member elevated to the level of a claim in competition with creditors’: Austin and Ramsay, above n 1, 208. For a full discussion on the current status of members’ claims for damages see Sons of Gwalia Ltd (admin apptd) v Margaretic (2007) 60 ACSR 292 and Austin and Ramsay, above n 1, 1599.
clause to which the ultra vires doctrine does not apply protects the charism, as any breach of the constitution may be addressed through the disputes process of the company. The EREA Trustees constitution is a good example of the charism and the congregation’s history being included in the objects clause.

Amendment or alteration of a constitution occurs by special resolution in a general meeting; the special resolution requires that all members receive notice of the special resolution and attain 75% of the members supporting the special resolution. A constitution cannot provide a clause that forbids any other clauses to be changed, but it may provide that more than the 75% be required to support a special resolution to alter a particular clause. This provision assists a congregation to ensure that clauses relating to the charism adopted by the school company are not too easily changed. While they retain some participation, a reserve power may be included stipulating that any change to clauses relating to the charism are only possible with the consent of the congregational members and/or company members who are also members of the public juridical person. Other limitations on the ability to change a constitution include changes that are beyond the originally intended scope of the

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637 Corporations Act 2001 (Cth) s125(2): ‘If a company has a constitution, it may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution.’

638 See Constitution of EREA Trustees, Preamble, cls 2.1, 3.1, 4.3 – 4.5, 8.1, and 9.1.1 – 9.1.2.

639 Corporations Act 2001 (Cth) s 136(2).

640 Ibid s 9 and s 249L. A copy of the special resolution and the modified constitution must be lodged with ASIC within 14 days of the resolution being passed and the changes take effect on the date the resolution was passed, unless the resolution specifies a later date: Corporations Act 2001 (Cth) ss 136(5), s 137.

641 Ibid s 136(3).

642 This is effective even when the congregation no longer participate in the school’s governance.

643 Changes to clauses relating to the charism should not be made too difficult though as there may be future instances where it is appropriate to alter them.
clause, or where the change is oppressive, unfair or prejudicial to a member or members.

5.3.3 People of the Company

This section discusses the legislative provisions dealing with key people in a company namely, members, directors and company secretaries, and how these roles relate and apply to congregational schools.

5.3.3.1 Members

In terms of s 231 of the Corporations Act, members of a company:

(a) Are a member of a company on its registration;

(b) Agree to become a member of the company after its registration and their name is entered on the register of members; or

(c) Become a member of the company from one limited by guarantee to one limited by shares.

A person agrees to be a member of a company either at its registration or later and becomes a member when their name appears on the register of members. A member’s name must not be entered on the register unless and until they have satisfied any lawful conditions imposed in the constitution for membership. There is no stipulation that members must be resident in or citizens of Australia. They must be 18 years of age. A member ceases to be a member if:

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645 Corporations Act 2001 (Cth) s 232, s 233(1)(b).
646 Ibid s 231.
647 Ibid s 231(b); Kopilovic v Gatley (2005) 53 ACSR 64 [78].
648 Corporations Act 2001 (Cth) s 114.
649 Ibid s 201B(1); Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd (1996) 20 ACSR 67. A school company should not have minors as members as it raises issues of contractual capacity and possibly conflicts of interest if the minor is also a student of the school. Any student representation should remain in a subsidiary body such as a school student/teacher council.
1) they resign;
2) have their membership terminated pursuant to the constitution;
3) the contract creating the membership is rescinded;
4) they die; or
5) if the company ceases to exist.  

Classification of the membership into different classes can occur, determined by what the particular company requires or desires. For example, the Qld Presentation schools have Class A and Class B members. Clause 5.2(a) of St Rita’s constitution provides for Class A members, who must be members of the CLT, and cl 5.2(b) provides for Class B members, who can be anyone else. If a congregation believes they will have members of the congregation, resident in WA, Australia or anywhere in the world, then classified membership ensures continued involvement and connection to the school. The clause relating to changes to the constitution can then stipulate the requirement of the approval of the Class A members to any change to the clauses pertaining to the charism or other reserve powers. Whether that approval has to be unanimous or a majority (for example, 75% in favour of the proposed change) is for the congregation to determine when drafting the constitution. If the rights of the Class A members to control the changes to the charism is to be altered, the constitution should specifically state the procedure for altering those rights. If the constitution is silent on the procedure then the special resolution requirements for changes to the constitution apply. It is wise, therefore, to ensure that a school company limited by guarantee provides for the different classes of members to ensure the rights of the

650 Additional grounds for managing companies relate to companies with share capital, see Corporations Act 2001 (Cth) s 206B.
651 Ibid s 246B.
congregation and/or representatives of the public juridical person are maintained in order to protect the charism.

5.3.3.2 The Company Directors

‘Director’ is defined in s 9 of the Corporations Act as someone who ‘is appointed to the position of a director’. Appointment of directors of school companies occurs in the ordinary course of business; however, the congregation and/or public juridical person may reserve the right to appoint directors through reserve powers in the constitution.

A company limited by guarantee must have at least three directors, two of whom are normally resident in Australia. This positive stipulation of two directors being normally resident in Australia allows for additional directors who are neither residents nor citizens. As the Corporations Act is a federal Act, a member of the congregation may be resident in a state other than the one in which the school is located and still accept appointment as a director of the company. This allows a congregation that no longer has members in the same state in which the school is located to appoint a member of the congregation from another state to be a director of the company. So if, for example, a member of the WA Congregation of the Presentation Sisters is no longer willing or able to participate as a director, a member of a Presentation Congregation in another Australian state who is eligible to be a director may do so. This continues the immediate involvement of a member of the Presentation Congregation from within Australia.

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652 As defined in s 9(a)(i) Corporations Act 2001 (Cth) rather than as an alternate director as defined in s 9(a)(ii).
653 Corporations Act 2001 (Cth) s 201A.
If at any time there are no Presentation Congregation members in Australia available for appointment as a director of the company, the Corporations Act allows a director to be resident overseas. A member of the Presentation Congregation in any other country may be a director with reserve powers relating to clauses concerning the charism. A congregation may retain a tangible relationship with the school or company by appointing directors that are congregational members from overseas, should they wish to do so. This possibility, coupled with the requirement of the reserve power of the congregation to assent to any resolution affecting the charism exercised by the school, allows the congregation to maintain an active role in the protection of the charism. The constitution may, and should, state that the directors must be committed to the objects of the company to ensure the protection of those objects.

A person may be both a member of a company and a director as well; there is no statutory requirement that a director must be a member. The constitution specifies the maximum number of directors appointed to a company. To qualify as a director a person must:

- be over 18 years of age;
- be an individual;
- not be disqualified from holding office as a director; and
- satisfy any other requirements in the constitution for appointment as a director.

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654 Ibid s 201B; it allows it indirectly by positive stipulation that only two directors must ordinarily be resident in Australia – allowing any other directors to reside overseas.
655 It is obviously less expensive for non-local directors to attend meetings via electronic formats. The time differences in the localities of directors may however, be inconvenient for them to meet. The suggestion that directors may be appointed from overseas is not necessarily the best option but remains an option for a congregation wishing to retain a more tangible connection with a school than just the retention of the charism.
656 Corporations Act 2001 (Cth) s 201B(1).
657 Ibid s 201B(2). Categories of disqualification are contained in ss 206A – 206G.
The constitution may therefore stipulate that a certain number of directors must be members of the congregation or relevant public juridical person. Directors may not receive remuneration unless the constitution explicitly states that they will. An employee of the company may be a director of it, and is an executive director; therefore, the school principal, bursar or other relevant position may be executive directors of the company. To avoid conflicts of interest, no employees of the school should be members or directors of the company. The board may allow attendance of relevant employees such as the principal and bursar at meetings, ex officio, with no voting powers. Other directors, not employed by the company but appointed for their expertise in an area relevant to the company, are non-executive directors. Members of the relevant congregation, representatives of the public juridical person, a representative of the CECWA and/or the CEOWA, and persons with expertise in law, business, taxation, building, education, local government or other relevant expertise that adds to the effective governance of the school may be considered as non-executive directors of the school incorporated as a company.

Depending on the size of the school company, the school may adopt a one, two or multi-tiered governance structure. The constitution of the company should clearly define the duties of the different tiers to avoid unnecessary overlap and confusion. The

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658 If a director believes that disclosure of his or her personal address will cause harm or distress to him or his family an application may be made to ASIC to provide an alternative address: Ibid, s 205D(2).
659 ‘ex officio - by means of one’s office; arising by reason of one’s position. Ex officio is usually used with reference to the automatic appointment of a person to a committee without election’: Butt, above n 19, 157.
660 For example: St Rita’s College Ltd Constitution cl 11.3(b) ‘No Director may hold an office of profit, be an employee of the company, or be a parent of a current student or be a current student of the College’.
661 Jung opines that ‘[t]he corporate structure must be designed so as not only to facilitate efficiency 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’: 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, 102. The stable patrimony is discussed in chapter 7.2.3.3.
size and needs of the school company determine the role of each level of governance.662

5.3.3.2.1 Appointment of Directors

Initially, the appointment of directors takes place when the company is registered.663 The provisions of the company’s constitution determine subsequent appointments. A proposed director must provide written consent to act as a director664 and the company retain the written consent in their records.665 The replaceable rule contained in s 201G of the Corporations Act provides for the appointment of directors by resolution passed in a general meeting, and the replaceable rule in s 201H of the Corporations Act allows directors to appoint other directors. Specific requirements, and reserve powers,666 for the management committee of the incorporated association (and adopted by JTC in its nominations committee),667 ensure members of the congregation and public juridical person have a direct influence over choosing the directors who are to manage the company. The specific process can be clearly articulated in the constitution rather than merely relying on the replaceable rule.

A congregation can maintain a more active role in the company by appointing one or more members of the congregation as directors. Appointment of new directors

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662 Detailed discussion of the merits and structures of single or multi layered governance is beyond the scope of this thesis. Congregational schools considering incorporation options should seek legal advice on the model or structure best suited to their individual needs. EREA Trustees is an example of a multi layered governance structure. There are many resources dealing with company and Board governance including Richard P. Chait, William P. Ryan and Barbara E. Taylor, Governance as Leadership, Reframing the Work of Nonprofit Boards (John Wiley & Sons Inc, 2005); Maureen K. Robinson, Nonprofit Boards that Work, The End of One-Size-Fits-All-Governance (John Wiley & Sons Inc, 2001); John Carver, Boards That Make A Difference (Jossey-Bass, 3rd ed, 2006); David Fishel, The Book of the Board (Federation Press, 3rd ed, 2014).
663 Corporations Act 2001 (Cth) s 117(2)(f).
664 Ibid, s 201D. These details must be lodged with ASIC within 28 days, as must any change to the details (change of address, name etc) s 205B.
665 Ibid s 201D(2).
666 Including reserve powers suggested in chapter 7.3.2.2.
667 Constitution John Twenty Third College Inc cls 5.3 – 5.7.
otherwise occurs at the invitation of the board chair on behalf of the existing directors after following the process for choosing a new director as contained in the company’s constitution. Practicalities for the congregation may suggest that instead of retaining the right to appoint directors on their own, they and a representative of the relevant public juridical person and the board chair jointly hold the power to appoint new directors, similar to the nominations committee of JTC. In this instance, the constitution must clearly state the process for reaching agreement on any appointment and the term of office of each director. A term of three to five years with an option of a second term allows the director to contribute their expertise to the company and to ensure consistency in the management of it. A constitution may also provide an increase, or decrease, in the number of directors appointed. Only the ‘provisions of the Corporations Act and the ASX Listing Rules, and fiduciary principles’ curtail the diverse options for appointing directors. Most of the statutory requirements do not relate to the company limited by guarantee, allowing the congregation to determine when drafting the initial constitution how to appoint directors.

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668 If a congregation wants this flexibility to accommodate future requirements for the school, a clause providing flexibility should be included in the original constitution lodged with the application to register as a company. If the power to appoint new directors is limited to those directors who are members of the congregation and/or public juridical person, then they will determine whether to alter the number of directors. If this provision is not included in the original constitution it may be added later as an alteration to the constitution, the process for which will also be contained in the constitution. If the congregation and/or public juridical person wish to retain control over this issue, the process for making the change to appointment of directors should be specifically included in the constitution. It otherwise requires a special resolution of a general meeting and therefore must attain a 75% majority approval. Provision can exist to appoint directors to casual vacancies where the need arises and not just at the end of their appointment. Once again, any specific requirements for doing so should be in the constitution.

669 Austin and Ramsay, above n 1, 243; eg., Corporations Act 2001 (Cth) s201E which relates to voting by ballot or poll and ASX LR 14.3 and 14.4 in relation to listed companies. Pt 2D.3 of the Corporations Act regarding appointment of directors to public companies where the constitution allows directors to limit the number of directors appointed as a number less than the maximum allowed by the constitution. A corporate school should not allow the setting of the limit to be anything else than the maximum required by the constitution and Pt 2D.3 will not be further considered in the thesis.
It is essential that directors know their purpose and the parameters of their appointment to govern effectively. The Corporate Governance Council of the Australian Securities Exchange (‘ASX’) recommends that when offering someone an appointment as a director, the company provide a letter that includes the terms of the appointment; projected time commitment required, including committee work; details of fellow directors; powers and duties as a director; induction training requirements; any special duties attached to the position; board policies and an organisational chart. Catholic schools offering the position of director should also include details of the canonical structure and formation requirements.

5.3.3.2.2 Removal of Directors

Section 203D of the Corporations Act allows shareholders of a public company to pass a resolution removing a director from office in certain limited circumstances. The purpose of the section is that ‘the ideal of shareholder control is thought to require that members should have power to remove directors’. That purpose is not relevant to a company limited by guarantee that has no shareholders. In 2004, ASIC issued an information release titled Removal of Directors of Public Companies, which confirmed that the power to remove directors remains with the members or shareholders and not with other directors. Further, it suggests that clear assessment for the performance

671 Austin and Ramsay, above n 1, 271.
672 Judicial debate has centred on whether s 203D (2) – (6) is mandatory or not – can provisions of a company’s constitution override s203D? Debate remains unresolved although cases suggest that where the company’s constitution provides for removal of a director by the members/shareholders then it is the members/shareholders decision as to whether they will adopt the constitution’s provisions or those of s203D – what is important is their right to remove a director.
of directors and the requirements and process for assessment should be set out in the company’s constitution.

A company limited by guarantee has the power to remove a director from office by resolution despite any contrary clause in the constitution.\textsuperscript{674} Section 203E of the \textit{Corporations Act}, however, does not allow removal of directors in a public company by other directors. ‘A resolution of a board in exercise of a power to expel a person from membership of a company limited by guarantee is not prevented by s 203E even if cessation of membership can lead to vacating of office’.\textsuperscript{675} Nor does s 203E prevent clauses in a constitution to the effect that removal of a director occur upon a specified event such as failure to attend a specific number of meetings in a year.\textsuperscript{676}

5.3.3.2.3 \textit{Duties and Obligations}

The perception of the extent of the duties and obligations of a company director may affect the willingness of a person to volunteer their expertise on the board of an incorporated school. The duties and obligations are not as onerous as may be perceived. Directors owe a fiduciary duty to the company: \textsuperscript{677}

\begin{quote}
The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations … The critical feature of these
\end{quote}

\begin{footnotesize}
\textsuperscript{674} \textit{Corporations Act} 2001 (Cth) s 203D(1)(a).
\textsuperscript{675} \textit{Maloney v NSW National Coursing Assn Ltd (No2) [1978] 1 NSWLR 161} but see \textit{Re EPHS Ltd} (1984) 2 ACLC 101, distinguished on its facts. For a discussion of the cases and the effect of current wording of s 203E see McConvill, above n 673, 191. A detailed discussion of the relevant sections of the \textit{Corporations Act} pertaining to removal of directors is outside the scope of this thesis.
\textsuperscript{676} Austin and Ramsay, above n 1, 277. In the interests of fairness and for clarity of practice, it is wise to adopt the same process for appointment of directors as for their removal and specify criteria for the removal.
\textsuperscript{677} \textit{Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd} (1987) 78 ALR 193. ‘A director of any company must comply with a common law duty of care, skill and diligence and a statutory duty of care and diligence in carrying out his or her duties.’: Sievers, ‘The Honorary Director: The Obligations of Directors and Committee Members of NFP Companies and Associations’, above n 608, 94.
\end{footnotesize}
relationships is that the fiduciary undertakes or agrees to act for or on behalf or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. 678

Directors owe a high standard of loyalty to the company through their duties. The general position is that directors do not owe duties to the members of the company but to the company. 679 Special circumstances may exist where the uniqueness of the particular relationship renders it fiduciary between the directors and members, but cases are decided on individual circumstances. 680 Whether a fiduciary duty arises between directors and a member because of the importance of the canonical considerations relevant to the particular member is untested. Although directors owe fiduciary duties, they are not, on that alone, considered a trustee. Directors are accountable for their business decisions and actions relating to the company, within a business environment that necessarily involves some risk. ‘[W]hile the duty of a trustee is to exercise a degree of restraint and conservatism in investment judgments, the duty of a director may be to display the entrepreneurial flair and accept commercial risks to produce a sufficient return on the capital invested’. 681

Directors’ duties assist in achieving a balance between the risk taking and the loyalty to the company and members. The business judgment rule is also applicable. 682 A director owes duties under both general law and statute law; whilst they include common law and equitable duties they are not all fiduciary duties. ‘[N]ot every

678 Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 96 – 7 (Mason J).
681 Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson (1995) 37 NSWLR 438, 494 (Clarke and Shellar JJA).
682 Section 180(2) of the Corporations Act provides a statutory business judgment rule. A common law business judgement rule has also been developed: Australian Securities and Investments Commission v Rich (2009) 75 ASCR 1; Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL (1968) 121 CLR 483.
instance of a person having an obligation to act in the interests of another will result in fiduciary duties … [t]he mere fact that there is a fiduciary relationship does not mean that all of the duties and obligations attendant on the relationship are fiduciary in nature’. 683

The directors and officers owe duties to the company. ‘Officer’ includes, by virtue of s 9 of the Corporations Act:

(a) a director or secretary of the corporation; or
(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation …

Section 198A(1) of the Corporations Act, which is also a replaceable rule, stipulates that the directors should manage the business of the company The ‘Corporations Act contemplates that management, in the absence of contrary provision in the company’s constitution, will be vested in a board of directors consisting of natural persons’.684 The company’s constitution or its replaceable rules determine the extent of the board of directors’ power.685

From a practical perspective directors act jointly, but statutory and common law (including equitable) duties are owed by the directors to the company individually. The three sources of a director’s duties are the terms of appointment of the director, the general law and the relevant legislation. These sources of duties often overlap; the statutory duties complement general law duties.686 Section 185 of the Corporations

684 Austin and Ramsay, above n 1, 224.
685 Corporations Act 2001 (Cth) ss 198A and 198A(2).
686 Lessing, Morrison and Nicolae, above n 47, 10.
Act stipulates that the statutory duties apply in addition to the general law, rather than in place of it. Broadly speaking, the duties include ‘to act in good faith in the best interests of the company, to act for a proper purpose, and to act with reasonable care and diligence’, and to avoid conflicts of interest. Much of the legislative changes to corporations law in the last few decades resulted from the duties owed by directors to very large companies where they were unable to oversee their large corporations and/or the immense profit of those companies, or they were inadequately equipped to do so. Reforms concentrated on directors’ responsibilities and liabilities. Directors’ obligations in these large corporations are no less applicable just because of the size of the company and its business turnover and profit, but it may be more difficult for such companies to attract directors who act on a voluntary and part-time basis, as is preferable in a school.

The school incorporating as a company limited by guarantee will rarely be so large as to find the governance of the school difficult due to its complex and extensive business dealings. Its main business remains that of education with profit making a subsidiary, though welcome, purpose. The problems facing companies and directors of large national/multi-national companies rarely, if ever, apply to the average school seeking to incorporate. The same obligations apply to directors of all companies; it is easier to meet those obligations in a smaller enterprise. The Daniels case established that

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688 Even in a school context, a comparatively small corporation, the conflict of interest duty has practical significance.
691 The thesis will not consider the difficulties of directors’ obligations and duties in large national/multi-national companies as those difficulties rarely if ever relate to the incorporated school. They are addressed in Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson (1995) 37
although the obligations imposed will vary depending on the size and business of the particular company, a person accepting the position of director of a company is taken to have understood the nature and duties inherent to such an appointment … The minimum standard of care required of board members according to the Daniels case is that directors are expected to become familiar with the business organisation of the companies on whose boards they sit. Although the courts recognised that not all members of the board will have the same level of skill and experience, nonetheless directors are under a continuing obligation to make enquiries and keep themselves apprised of the activities of the business.692

A director’s term of appointment may include duties included in a contract (if there is one) or letter of appointment, the replaceable rules, and/or the company’s constitution. The duties may arise from one, two or all three of these documents.

(a) General Law Duties

Many of the general law duties arise from the fiduciary relationship that exists between directors and the company. A director as fiduciary holds a position of trust and confidence and is obligated to act for the benefit of the company rather than personal gain. A director appointed to a school company limited by guarantee who takes the position voluntarily is unlikely to (and should not) have a personal financial interest in the company,693 making compliance with fiduciary duties easier. The general duties are derived from the contract of employment or service (if there is one), equitable obligations that may apply and the tortious duty of care. The four main general law duties a director owes as fiduciary to the company are:

NSWLR 438 including the challenges faced by directors in very large companies and the extent to which those directors must act to fulfil their obligations.
692 Lessing, Morrison and Nicolae, above n 47, 8.
693 He or she may, as a director have a personal interest in a contract with the company (eg a director who is a builder and his building company wants a contract with the school). In these circumstances, the director must declare the conflict of interest and not act or vote in any way in relation to the proposed contract.
1) to act bona fide in the interests of the company;
2) to exercise the directors’ powers for a proper purpose;
3) to retain discretion; and
4) to avoid any conflict of interest.694

Under general law there is also a duty on all company officers to exercise reasonable care and diligence, a breach of which may result in liability in negligence.695 Acting with proper purpose may also include the duty to act in accordance with the company’s constitution, thereby safeguarding what the constitution protects, which in the case of the congregational school will include the charism.

(b) Statutory Duties

Part 2D.1 of the Corporations Act imposes duties on directors and officers696 of the company. These include the duty to:

1) act with care and diligence,697 including ‘a duty to find out what is involved before either approving a proposal or allowing a company to take part in an activity’;698
2) act in good faith in the best interests of the company for proper purpose;699

694 Austin and Ramsay, above n 1, ch 8.
696 Corporations Act 2001 (Cth) s 179; including the company secretary, discussed below.
699 Corporations Act 2001 (Cth) ss181 and s184 (1); breach of s181 invokes civil liability, breach of s184 invokes criminal liability; Howard Smith Ltd v AMPOL Petroleum Ltd (1974) 3 ALR 448.
3) not improperly use their position as a director or information gained in that position;  
4) prevent insolvent trading; and  
5) not be present or vote on a resolution in which he has a personal interest unless he has the express permission of the other directors or ASIC to do so.

A director retains these duties even where he has delegated a power to another person. The statutory provisions are in addition to other duties owed by directors:

An important element of [the statutory] provisions, stated in s 185, is that they do not replace the general law duties (including fiduciary duties) to which directors and officers are subjected. Nor do they replace other state or Commonwealth statutory provisions which may create liability for a director or officer, such as legislation with respect to environmental protection and occupational health and safety. The operation of state legislation is generally preserved by Pt1.1A.

The standard in relation to these duties of care and diligence is the same whether they are imposed by statute or general law and is set out in s 180(1) of the Corporations Act, which also includes the business judgment rule. Where a director of a company

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700 Corporations Act 2001 (Cth) s 182(1) and s 184 (2); breach of s 182(1) invokes civil liability, breach of s 184 invokes criminal liability; ASIC v Adler (2002) 41 ASCR 72.  
701 Corporations Act 2001 (Cth) s 183(1) and s 184(3); breach of s 184(3) invokes criminal liability; Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291.  
703 Corporations Act 2001 (Cth) s 195(1).  
704 Ibid s 195(2) and s 195(3).  
705 Ibid s 190(1).  
706 Austin & Black’s Annotations to the Corporations Act Lexis Nexis [2D.179].  
707 Austin and Ramsay, above n 1, 469; Re HIH Insurance Ltd (in prov liq); ASIC v Adler (2002) 41 ASCR 72.  
708 The business judgement rule also exists at common law. Austin, J discusses the general law and statutory rules in Australian Securities & Investments Commission v Rich (2009) 75 ASCR 1. Although sometimes it is seen as such by directors, the business judgement rule is not a cure all for all issues relating to directors’ decisions.
limited by guarantee breaches any of his duties, the company brings the action for breach against the director.\textsuperscript{709}

The directors’ duties are very important and the legislation provides for both remedies for those adversely affected by a director’s breach and for penalties for the director who breaches his duty. Section 206C of the \textit{Corporations Act} enables a court to disqualify a person from managing a company for breach of a civil provision.\textsuperscript{710} A person may not receive a penalty under both the civil and criminal provisions for breaches that are substantially the same conduct.\textsuperscript{711} Criminal action will take precedence over any civil proceedings.\textsuperscript{712} These duties are not onerous, however, and seek to ensure directors and officers exercise the care of a reasonable person having regard to the type, size and nature of the company.\textsuperscript{713} For the average sized school (compared to the large companies where most breaches have historically occurred)\textsuperscript{714} it is unlikely directors will breach these duties.\textsuperscript{715} There are many publications relating to duties that are useful tools for directors.\textsuperscript{716} Directors of a school board should also consider annual sessions from professional corporate governance bodies to guide them in their duties and consider subscriptions to relevant corporate governance literature.

\textsuperscript{709} There are four main remedies for a breach: a) damages and compensation, b) account of profits, c) rescission of contract, and d) return of property and constructive trust. In addition, ‘an officer or member who seeks to assert the company’s right to compensation for contravention of a civil penalty provision may bring a statutory derivate action under Pt 2F.1A’ of the \textit{Corporations Act}: Lexis Nexis, Ford’s \textit{Principles of Corporations Law}, (December 2013) [3.410.3].

\textsuperscript{710} Civil consequences of contravention of civil penalty provisions are detailed in Part 9.4B of the \textit{Corporations Act}. Details of the powers of the Courts to grant relief are in Part 9.5 of the \textit{Corporations Act}.

\textsuperscript{711} \textit{Corporations Act 2001} (Cth) ss1317M.

\textsuperscript{712} Ibid ss 1317N and 1317P. If civil proceedings have commenced when a criminal proceeding is initiated, the civil proceeding is stayed.

\textsuperscript{713} \textit{Australian Securities and Investments Commission v Maxwell} (2006) 59 ACSR 373, 397 (Brereton J).


\textsuperscript{715} For discussion on causation in relation to breaches see \textit{Permanent Building Society (in liq) v Wheeler} (1994) 14 ACSR 109.

\textsuperscript{716} Examples of some of the material relating to Boards and Directors duties can be found on the ASIC website and the Australian Institute of Company Directors website. In addition, there are numerous publications from Thomson and Lexis Nexis including textbooks and loose-leaf services.
Depending on the size of the school and the complexity of its functions, the constitution may determine that the directors manage the company school or that the management of the company school occur under the supervision of the directors. In deciding which approach to take it is essential to determine in each case if only directors can in fact manage the school or if it is better business management to allow others to manage the school under the supervision of the directors. In most instances relating to schools, the latter approach will be more effective and appropriate. Either way, it is essential that the constitution clearly define the powers of the directors. Any other issues relating to the separation of duties and power of directors and members should also be contained in the company’s constitution. The constitution may specifically state that the directors exercise all powers and functions of the company, but statutory requirements prevail over constitutional ones.

A useful and effective clause relating to the powers of the directors may be taken, and modified where relevant, from the former corporations law Table A Regulation 66:

1) Subject to the Law and to any other provision of these regulation, the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and forming the company, and may exercise all such powers of the company as are not, by the Law or by these regulations, required to be exercised by the company in general meeting.

2) Without limiting the generality of sub-regulation(1), the directors may exercise all the powers of the company to borrow money, to charge any property or business of the company or all or any of its uncalled capital and to issue debentures or give

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717 For example, the school may conduct a residential boarding school on its premises in addition to educational classes.

718 Corporations Act 2001 (Cth) s 198A(2).
any other security for a debt, liability or obligation of the company or of any other
person. 719

Such a clause provides exclusive powers to the directors, including those in a not-for-
profit company such as a school.720

Directors owe fiduciary duties to the company.721 The duty of care and skill ‘is a duty
owed to the company by both executive and non-executive directors. However, the
nature of the duty will not necessarily be the same … non-executive directors are not
bound to give their continuous attention to the affairs of the corporation.’722

Directors may rely on advice when making decisions for the company but cannot
abrogate their duties relating to due diligence, acting in good faith and acting in the
best interests of the company, on the basis that they acted on the advice of another.
Section 189 of the Corporations Act provides statutory authority to rely on advice
sought, but directors need to make a formal assessment of the advice.

Courts have interpreted the section to suggest that where an issue is particularly
complicated, the directors should seek independent expert advice. Where a director
has delegated a power under s 198D of the Corporations Act, he is ‘responsible for the
exercise of the power by the delegate as if the power had been exercised by the
directors themselves.’723 The director is not responsible under s 190(1) if he believes
on reasonable grounds that his delegate will exercise the power in compliance with the

719 Austin and Ramsay, above n 1, 232.
721 The interests of members are contained in Part 2F.1 of the Corporations Act 2001 (Cth).
722 Edelman, ‘Directors and Fiduciary Duties’, above n 697, 2; AWA v Daniels (1992) 7 ACSC 395
approved in Vrisakis v Australian Securities Commission (1993) 9 WAR 390, 452 (Ipp J); Streeter v
Western Areas Exploration Pty Ltd (No 2) [2011] WASCA 17 [451] (Murphy J).
For a discussion of the liability of non-executive directors, see Australian Securities and Investments
723 Corporations Act 2001 (Cth) s 190(1).
Corporations Act and the company’s constitution, and that he believed on reasonable grounds, after due inquiry, that the delegate was ‘reliable and competent’. In standard issues, courts will consider the complexity of the company and the issue to determine if the reliance on the advice was reasonable in the circumstances. Independent judgement by directors when making decisions means ‘no more than that they, having listened to and assessed what their colleagues have to say, must bring their own mind to bear on the issue using such skill and judgment as they may possess’. It is anticipated, and recommended, that schools will appoint directors who bring to the board not only their individual expertise but have the ‘skill and judgement’ to consider issues outside that expertise.

Directors may delegate their powers to any other person pursuant to s 198D of the Corporations Act. Although not a replaceable rule, this section applies only if the constitution does not provide otherwise. The school’s corporate constitution should contain clear clauses relating to whether or not a director may transfer their powers, and if so, to whom and in what circumstances the transfer of power may occur. It would be appropriate for the board to delegate some of their powers to the school management committee, including the principal, deputy principal and bursar, so that the corporate board is not conducting the day-to-day management of the school, which is more appropriately left to the school principal and school management team.

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724 Ibid s 190(2).
725 Southern Resources Ltd v Residues Treatment & Trading Co Ltd (1990) 3 ACSR 207, 225 (per curiam).
726 Totterdell v Fareham Blue Brick and Tile Co Ltd (1886) LR 1 CP 674.
5.3.3.2.4 Resignation and Disqualification

A director may resign his office by simply giving proper notice to the company, unless there is a specific provision providing otherwise in the company’s constitution. The constitution should contain a clause clearly defining what proper notice is required.\textsuperscript{727} Unless provided for in the constitution, acceptance of the resignation by the board of directors is not required; the mere act of resigning is sufficient for the resignation to be effective.\textsuperscript{728}

Part 2D.6 of the \textit{Corporations Act} provides several grounds for disqualifying directors from managing a company and addresses concerns about directors who are not performing their functions and duties properly.\textsuperscript{729} The legislation provides protection for the company to ensure that directors may resign when they wish to do so, or effect their removal when it is necessary.\textsuperscript{730} These safeguards are far clearer than those relating to removal of committee members from an unincorporated or incorporated association. It is judicious for the school incorporating as a company limited by guarantee to ensure that the company’s constitution clearly identifies the process for the removal of any of the directors and prohibits the removal of directors appointed from the congregation and public juridical person except under exceptional circumstances, such as loss of mental capacity. A clear process, including criteria, for

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\textsuperscript{727} \textit{Corporations Act 2001} (Cth) s 203A contains a Replaceable Rule providing a requirement for written notice if a director is resigning.

\textsuperscript{728} \textit{Marks v Commonwealth} (1964) 111 CLR 549, 571.

\textsuperscript{729} Management of the company extends beyond a managing director and includes any decisions relating to the company including its future direction: \textit{Cullen v Corporate Affairs Commission (NSW)} (1988) 14 ACLR 789. See also \textit{Corporations Act 2001} (Cth) s 206A.

\textsuperscript{730} ASIC is required to keep an index of people disqualified from holding office as a director: \textit{Corporations Act 2001} (Cth) s 1274AA. A full discussion of the circumstances under which a director may be disqualified, ASIC’s powers and recent court decisions relating to disqualification of directors are outside the scope of this thesis.
the annual assessment of directors’ performances assists effective governance of the company.

5.3.3.2.5 Meetings of the Board of Directors

The purpose of the board of directors is to manage the company either directly or through another management body. Generally the board’s functions, exercised through their meetings, include:

- to appoint and reward the company’s chief executive (the managing director);
- to set goals, formulate strategy and approve business plans for the company;
- to approve annual budgets and key management decisions (such as decisions on major capital expenditure, business acquisitions, restructuring and refinancing);
- to monitor management performance and business results; and
- to set and review budgetary control and conformance strategies. 731

The directors’ meetings are therefore very important, as they are central in enabling the directors to exercise their functions. These functions are very similar to those currently exercised by schools boards, regardless of their legal structure and are therefore not an increased onus imposed by the fact of incorporation under the Corporations Act.

“A directors’ meeting may be called by a director giving reasonable notice individually to every other director.”732 It may be called or held using technology if all directors agree and that may be a standing agreement rather than requiring unanimous consent.

731 Austin and Ramsay, above n 1, 225.
732 Corporations Act 2001 (Cth) s 248C.
at every meeting and/or included in the company’s constitution. This allows a school board to meet at regular intervals (eg nine or ten times per year) in person and by tele/videoconference and so allowing non-resident directors to participate actively in meetings.

The directors may elect a chair for a specified period, or the process for the appointment of a chair may be contained in the constitution and reserved to the congregation and/or public juridical person. In order for the congregational members and/or representatives of the public juridical person to retain active governance in the school, the power and process to appoint and remove the chair and other office holders should be a reserve power clause. The constitution determines the length of the term that a person holds the position of chair. The chair is usually spokesperson for the company. The chair of the meeting may have a casting vote, but the constitution may provide that the casting vote in any resolution relating to the charism be given to either one of or both the congregational members and public juridical person members.

The constitution should include the quorum for a directors’ meeting with at least half of the directors constituting a quorum, rather than just two directors as contained in the replaceable rule in s 249T of the Corporations Act. Proxies (individual or body corporate) are mandatory for public companies under s 249X of the Corporations Act.

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733 Ibid s 248D.
734 This also applies to general meetings pursuant to s 249S of the Corporations Act.
735 Corporations Act 2001 (Cth) s 248E(1), but as a replaceable rule may be altered by the constitution.
736 It is recommended that the term not exceed more than 4 years, with an option to extend for one additional term thus providing continuity within the Board but without the appearance or practice of one person representing the company.
737 If the quorum is not explicitly stated in the constitution Corporations Act 2001 (Cth) s 248F requires 2 directors to be present. Any resolution passed where there is not a quorum is void: Clamp v Fairway Investments Pty Ltd (1971 – 73) CLC 40 – 077.
and proxies cannot be restricted to being a member of the company. They have voting rights to the extent allowed by their appointment as a proxy. However, the company’s constitution may provide that a proxy cannot vote on a show of hands pursuant to s 249Y(2) of the Corporations Act. If the constitution then also provides that voting occur by a show of hands, the proxy is impotent to have any influence on the meeting’s decisions. This is important where the congregation wants to ensure that only the people they have appointed to the company may be involved in direct decision making.

A resolution may be passed without a directors’ meeting if all directors agree to the resolution and sign a document to this effect. Approval for a resolution relating to the charism should not occur without a formal meeting of the directors, even if the congregation and/or public juridical person have the right to make decisions relating to the charism, and the constitution should explicitly state so in order to protect the charism. Written records of all resolutions and proceedings of meetings of both directors’ meetings and general meetings should be maintained in a minute book and signed within a month of the meeting or making of the resolution by the chair of the meeting or a director if it relates to a resolution.

5.3.3.2.6 The Board of Directors and the General Meeting

There are two categories of required meetings — the annual general meeting and other general meetings:

In law a company ... is an association of persons. The collective will of the company is primarily expressed by the company in general meeting. Courts recognise the rights of members, acting lawfully with due regard for the

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739 Corporations Act 2001 (Cth) s 251A.
Public companies must have an annual general meeting and the constitution determines the meeting’s business. Both annual general meetings and ordinary general meetings should occur at a reasonable time and place, for a proper purpose and with a reasonable length of time between the notice and the proposed meeting. The company’s constitution should contain details of when, how and by whom meetings are called. They must be convened by notice in writing pursuant to s 249J of the Corporations Act, which may include electronic written medium such as emails.

The constitution generally determines the appointment of a chair for any general meeting; to protect the congregation and/or the canonical administrators’ interests, the constitution should provide that the congregational member and/or the public juridical person member hold the power to appoint a chair for the annual general meeting and other general meetings. The main functions of the chair at a meeting are to:

- preserve order;
- take care that the proceedings are conducted in a proper manner; and
- ensure the sense of the meeting is properly ascertained with regard to any question before the meeting ...

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740 Austin and Ramsay, above n 1, 306.
741 Corporations Act 2001 (Cth) s 250R lists several items that may be conducted at an annual general meeting including the financial report, election of directors (where they are elected), appointment of an auditor and the auditor’s remuneration.
742 Ibid s 249R, s 249Q and s 249H(1) respectively. Section 249L details the contents of any notice of a meeting.
744 The replaceable rule contained in s 249U(1) Corporations Act 2001 (Cth) allows the directors to elect a chair for meetings and is another alternative for the appointment but it gives the congregation less power over who will conduct the meetings.
745 Austin and Ramsay, above n 1, 335.
The board and the general meeting hold the power to conduct the company. The board cannot act alone:

... company law vests in certain groups of people an original authority to commit the company to delegate others. For a normal solvent company, this original authority is vested in:

- The members in general meeting, deciding by a majority of votes permitted by law and the company’s constitution; and

- The board of directors, deciding in accordance with law and the company’s constitution. 746

The following issues must be determined by a general meeting of a company limited by guarantee:747 altering the constitution;748 altering the company’s status;749 and removing a director.750 Notice of each meeting can be given in advance in the same current practice often adopted by school boards that are not yet companies: a schedule of meetings for each calendar year is determined and agreed in December of each year with the first meeting held in February of the following year. Nine to ten meetings per year allows for sufficient oversight of the school for directors to comply with their duties as directors. The requirement for a quorum and the appointment of a chair for the general meeting are then the same as those in the constitution relating to the directors’ meetings.

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746 Ibid 230.
747 Other requirements for general meeting determination include several relating to shares.
748 Corporations Act 2001 (Cth) s 136.
749 Ibid Pt2 B.7.
750 Ibid s 203D; Austin and Ramsay, above n 1, 230.
5.3.3.2.7 Directors and Record Keeping

Section 292 of the *Corporations Act* requires companies to lodge financial statements and reports. The company must keep records of financial transactions, including a clear explanation of each transaction and the company’s financial position. Documents recording the financial status of the company include:

- a general ledger recording transactions (expenses, liabilities, assets etc);
- cash records;
- a register of property owned by the company, investment records;
- tax returns; and
- legal documents including deeds, contracts etc.

Any changes to the company’s details, including new members and directors, must be reported on the appropriate forms to ASIC. Minutes of all meetings must be maintained.\(^{751}\)

Corporate governance issues stemming from the collapse of several major companies in the 1990s were attributed to poor management, particularly at the board level. Substantial statutory reform to the *Corporations Act* occurred because of the litigation following the collapses with a resultant focus on the duties of directors, accountability and proper record keeping. Section 14 of the *Corporations Amendment (Corporate Reporting Reform) Act 2010* (Cth) inserted s 285A into the *Corporations Act*, which

sets out reporting requirements for companies limited by guarantee. It divides the requirements, which increase with the size of the annual revenue, into three categories:

- small companies limited by guarantee,
- company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of less than $1 million; and
- company limited by guarantee with annual revenue or, if part of a consolidated entity, annual consolidated revenue of $1 million or more.

In addition to the statutory changes, publication of the ASX Corporate Governance Council’s *Corporate Governance Principles and Recommendations* 752 and the Investment and Financial Services Association’s (‘IFSA’) 18 Guidelines assist company members and officers, 753 and make for sound governance and business. In themselves, they are obviously not a disadvantage to the company. The disadvantage for a not-for-profit school incorporating under the *Corporations Act* lies in the weight of responsibility and the record keeping for directors and members complying with the principles and guidelines, who are only volunteers; the record keeping particularly may be more onerous than board members currently experience in the unincorporated school board. 754 The ASX Corporate Governance Council’s documents are only two of countless guides and principles relating to different aspects of the board’s management. Other examples include the Prudential Practice Guide (‘PPG’) 511 755

754 Despite this being a perceived disadvantage, it is good business practice and directly benefits the company – the school.
and the Best Practice Remuneration Principles. Some of the reporting requirements are not necessary if the company registers with the ACNC, and this will apply to most Catholic schools.

5.3.3.3 The Company Secretary

Companies limited by guarantee must have at least one company secretary, ordinarily resident in Australia, and initially nominated at the time of registration with the same details as directors. In a school company, it is only necessary to have one company secretary due to the relatively small number of members and directors. Subsequently, directors appoint the secretary pursuant to s 204D of the Corporations Act. Anyone holding the position of secretary must be over the age of 18 years, consent to the appointment and not be disqualified from managing a company.

The company secretary is bound to ensure the company executes specific statutory responsibilities, which include:

- to maintain a registered office (s 142);
- in the case of a public company, to keep its registered office open to the public during certain hours (s 145);
- to lodge notices about the personal details of the company’s directors and secretaries with ASIC (s 205B);

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757 Corporations Act 2001 (Cth) s 204A(2).
758 Ibid s 117(2).
759 Ibid s 204B(1).
760 Ibid s 204C.
761 Ibid s 204B(2).
762 Ibid s 188(1).
• to respond to an extract of any particulars (containing certain details about the company) sent to the company by ASIC if not correct (s 346C);
• to notify ASIC of a change of the address of the company’s principal place of business (s 146);
• to notify ASIC of the issue of shares by the company (s 254X); and
• to lodge the company’s annual financial report with ASIC if the company is required to prepare such a report (s 319).\textsuperscript{763}

Although none of these obligations is particularly onerous, nor require particular expertise in a professional area, they do differ to the duties of secretaries of incorporated associations, or of simple school boards as currently exist in the diocesan school system. This should not be a deterrent to finding suitable candidates for the position, but a school incorporating under the \textit{Corporations Act} should ensure that a thorough induction (including a practical manual of duties and obligations) occur for anyone accepting the position.

\textbf{5.3.4 Transferring from an Incorporated Association to a Company}

After incorporating under state legislation, a congregation may alter that decision and seek to incorporate as a company limited by guarantee under the \textit{Corporations Act} by application to ASIC, pursuant to s 601BC(8) and s 34 of the \textit{AI Act}.\textsuperscript{764} The following documents are also required with the application:

• a certified copy of a current certificate of the body’s incorporation in its place of origin, or of a document that has a similar effect;

\textsuperscript{763} Austin and Ramsay, above n 1, 306.
\textsuperscript{764} Section 34 of the \textit{Associations Incorporation Act 1987} (WA) includes the extent of the restriction on liability.
• a certified printed copy of the body’s constitution (if any);
• any other documents that are prescribed; and
• any other documents that ASIC requires by written notice given to the body.\textsuperscript{765}

As an incorporated association, a school would already have the certificate of incorporation under the state legislation and a copy of the constitution. Other ‘prescribed’ documents include:

• the current and proposed name of the body;
• names and details of directors, officeholders and members;
• satisfactory evidence that the body is not administered externally, is not the subject of an application to wind it up, is not the subject of an agreement between it and another body/person; and
• a copy of the special resolution to change to a company limited by guarantee as a statement by the director or secretary that authorises the transfer to a company.\textsuperscript{766}

These are substantially the same requirements of a company if initially registered as one under the \textit{Corporations Act}. They also do not appear to be onerous requirements and can easily be complied with when a school decides that its business is better run as a company.

The transfer to a company does not create a new legal entity. As such, the new registration does not frustrate any incomplete legal proceedings brought by or on behalf of the former incorporated association nor does it ‘affect the body’s existing

\textsuperscript{765} \textit{Corporations Act 2001} (Cth) s 601BC(6).
property, rights or obligations (except as against the members of the body in their
capacity as members)’.\footnote{Ibid s 601BM(b)}

A company limited by guarantee may also change, by a special resolution,\footnote{Ibid s 162(1).} to
become a proprietary company.\footnote{It may become unlimited or limited by shares, or a public company. The unlimited liability is
unlikely to attract volunteers to be members of the company making it extremely difficult for the
school to attract board members. The issuing of shares raises the level of complexity of the company
and of the record keeping and pushes it into the profit-making sphere.} Although it is possible for a school conducting
business as a company limited by guarantee to change to another type of company
under the Corporations Act, it is not appropriate. The school would not be able to
register as a charitable entity if it intends to make a profit, and many benefits of being
a charity would be lost. It would not lessen the legal protection available to the school
as an incorporated body, especially clauses directly regarding the charism. However,
it would change the not-for-profit nature of the school and its objects and purpose and
therefore indirectly affect the charism.\footnote{The requirements for changing are set out in the Corporations Act 2001 (Cth) ss 162 and 163 but
as this change is not recommended, the requirements and the ramifications for existing members will
not be discussed in the thesis.}

\section*{5.3.5 Summary}

When considering whether to incorporate as a company limited by guarantee, the
Catholic school and congregation must consider several issues relating to suitability
and practicality of their specific situation. There are several factors to consider when
deciding whether to incorporate as a company limited by guarantee, which also
constitute the advantages and disadvantages of the entity.
5.3.5.1 Advantages

The advantages of incorporating the not-for-profit school as a company limited by guarantee include the following:

- The protection afforded to it by those same obligations and requirements that may be seen as a disadvantage because of their onerous nature on a volunteer.
- An issue faced by many large corporations is the lack of diversity in board membership, including gender, skills and age. This is rarely an issue for the school board as the school community, including parents, alumni and other supporters, is itself a pool of diversity. The male to female gender balance in board members, and a wide range of skills and expertise, are represented in that community by the lawyers, accountants, project managers, educators and a myriad of other occupations. The wealth of expertise adds to the school’s rich heritage and long-term development.
- The federal nature of the Corporations Act allows a company to operate in any Australian jurisdiction rather than limiting it to one state or territory jurisdiction, as is the case with incorporated associations and some statutory corporations. A congregation with schools throughout the country may prefer one governance body for those schools.
- The Corporations Act also allows appointment of directors located interstate and overseas, facilitating representation by a congregational member from outside Australia. This may be useful for a congregation with diminishing numbers of professed members in Australia.

771 Australian Government, Diversity on Boards of Directors (March 2009) Corporations and Markets Advisory Committee
• The constitution of the company can bestow extra powers in relation to the charism on the congregational members, thus providing an avenue for the congregation to maintain a direct link with the school.

5.3.5.2 Disadvantages

The disadvantages associated with registering a company as one limited by guarantee include the following:

• Attracting well-educated, ethical, suitable volunteers to participate in the company may be more difficult than it is for schools that simply have a school board structure that has no legal status or is an incorporated body with less stringent reporting requirements and obligations.

• Whilst many of the disclosure and reporting requirements currently only apply to companies listed on the ASX\(^{772}\) and therefore not to the company limited by guarantee, the legislation may change in the future as corporate governance is constantly reviewed and further regulated.

• Some of the disclosure and reporting requirements are not applicable as they relate to board members remuneration and other personal details of a board member’s financial relationship (if any) with the company. Board members of an incorporated school should not receive remuneration for that position as most, if not all, positions within the company would be voluntary (as board members currently are on congregational school boards).

• Directors must still adhere to reporting requirements.

• If one of the aims of a congregation in choosing incorporation under the \textit{Corporations Act} is to protect the charism, then the reporting and disclosure

\footnote{\textit{Corporations Act} 2001 (Cth) s 300A.}
requirements of incorporation do not directly achieve that aim. The tool most useful to that end is the constitution of the company as this enables the school to protect its charism; incorporated associations and statutory corporations can provide that protection but without the more onerous requirements of the 

*Corporations Act.*

5.3.5.3 Application to Congregational Schools

The company limited by guarantee may be an appropriate option for a school wishing to incorporate. The size of the school in student enrolment, staff numbers and annual revenue, as well as geographical location may be the determining factor in deciding whether to incorporate under the *Corporations Act* or a state based Incorporated Associations Act. The reporting requirements of the company, though more stringent and demanding than those of an incorporated association, may be preferred by a congregation; this again will depend on the size of the school’s business and operations. The officers of the company and the incorporated association are similar, though the *Corporations Act* provides more statutory duties and rights for members and directors than do any of the Incorporated Associations Acts. The company’s constitution contains more detail, though the clauses relating to the protection of the charism can be identical in both a company and an incorporated association.

The nature of the company limited by guarantee is in essence congruent with the Catholic school’s desire for a not-for-profit existence. It is particularly useful for congregations that have schools in separate states but wish to govern them under one body. The company limited by guarantee is therefore capable of positively answering the thesis question by providing a legal structure that can protect the charism of a
congregation when they are no longer participating in active governance of the school, and one that is capable of owning property.

5.4 STATUTORY BODIES

Some states provide legislation under which religious bodies may incorporate. The Christian Brothers sought to establish both a new canonical body and a new common law body for its schools and other educational pursuits. It chose to incorporate under a NSW statute that provides for both governance of the Christian Brothers Schools in Australia and for the ownership of property. Schedule 2 of the NSW Act contains canonical and corporate names of certain Roman Catholic orders, congregations, communities, associations and societies. By virtue of being listed in that schedule, each organisation is a community as defined in the NSW Act and, by virtue of that Act, the trustees of the community land for each community become a body corporate and acquire the powers conferred by the Act in relation to property held by them. The originating power of the statutory body therefore derives from the NSW Act. This section will explain this legal structure and its applicability to other congregations.

A statutory corporation is one that is ‘created by, or pursuant to, a statute.’ A company established by statute is limited in its purpose and powers by the very purpose of its creation. The statute will contain the purpose and powers of companies

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773 As discussed in chapter 3.4.4, the separate common law structure of EREA was finalised in April 2013 when the Trustees of Edmund Rice Education Australia incorporated under the NSW Act. EREA was included in the NSW Act on 6 February 2013 by the Roman Catholic Church Communities Lands Amendment (Edmund Rice Education Australia) Proclamation 2013 pursuant to s 2(2) of the NSW Act. The Explanatory Note to the Proclamation explains the relevance of EREA incorporating under the Act.

774 Butt, above n 19, 410. There are numerous instances of these corporations including The Commonwealth Bank (Commonwealth Bank Act 1959 (Cth)) and EREA (which was included in the Roman Catholic Church Communities’ Lands Act 1942 (NSW) (the NSW Act) by the Roman Catholic Church Communities’ Lands Amendment (Edmund Rice Education Australia Proclamation 2013)).
incorporated under it, but some statutes allow the company to have powers with a wider capacity than is obvious from those stated in the company’s constitution. The school company should not require any wider powers, but rely instead on the legislation and a well-drafted constitution. The constitution should be comparable to one for an incorporated association or company and clearly articulate:

- the purpose of the school/company as the delivery of a Catholic education in the tradition of a specific founder;
- the charism adopted by the school;
- how the charism is to be taught; and/or evidenced in the school;
- compulsory director/member induction and continuing formation relating to the founder and charism;
- the reserve powers of the congregation;
- its officeholders and members;
- the powers of its officeholders in relation to the school and, in particular, in relation to the charism adopted by the school; and
- that a change to the any clauses relating to the charism can only be implemented by a special resolution approved by the relevant congregational leader and/or a member of the relevant public juridical person.

EREA Trustees has a constitution that includes, or refers to documents that include, the history of the congregation, the relevant documents that attest to and evidence the charism of the founder of the congregation, and the more contemporary Design that clearly articulates how the school is run on a day-to-day basis.

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775 Preamble (1.3 – 1.7), and various definitions in cls 3.1, 4.2, 4.5, 9.1.1, 9.2.1 and 13.5.
776 Edmund Rice Education Australia, *The Design*, above n, 145.
5.4.1  *The Roman Catholic Church Communities’ Lands Act 1942 (NSW)*

The *NSW Act* includes in its definition section the Catholic congregations, referred to as ‘communities’, which have a company constituted under the Act.\(^{777}\) The term ‘community’ includes ‘orders, congregations, communities and associations of the Church’, which are then listed.\(^{778}\) Section 3 of the *NSW Act* requires that ‘[t]here shall be, for each community, trustees of community land, who shall be the provincial and the community consultors of that community.’ A congregation therefore must still exist to come within the ambit of the legislation. The company obtains its existence as a legal entity pursuant to s 4(1) of the *NSW Act*:

The trustees of community land for each community shall, by virtue of this Act, be a body corporate, having perpetual succession and 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.

The objects of each of the bodies corporate created under the *NSW Act* are detailed in s 4(3) as:

(a) the operation and conduct of educational, welfare and health institutions, organisations and other bodies, and

(b) the performance of all such acts, matters and things of any nature (which may include, without limiting the scope of this paragraph, borrowing money) as, in its opinion, are or may be for its benefit or for the benefit of the community to which it relates.

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\(^{777}\) EREA Trustees was created pursuant to the *NSW Act*; for a full discussion of EREA and EREA Trustees see chapter 3.4.3.

\(^{778}\) Edmund Rice Education Australia is included in Schedule 2 as are the Congregation of the Presentation Sisters of Lismore and the Congregation of the Presentation Sisters, Wagga.
Property previously owned by the congregation, or purchased after incorporation under the *NSW Act*, may vest in the body corporate created by the *NSW Act*, without affecting any existing encumbrances. Section 10 articulates the powers of the bodies corporate, which includes:

- purchasing, selling, leasing or accepting real or personal property through sale, gift or bequest;
- dealing with promissory notes, bills of exchange, choses in action and possession;
- executing any necessary documents for the purpose of dealing with property; and
- dealing with any land held by the congregation as community land for the purposes of the *NSW Act*, including borrowing against it.

This section provides the congregation with the powers associated with conducting their own business in all aspects relating to property. The *NSW Act* also provides detailed instructions for trust funds and property distribution if the body corporate is wound up.

‘Community land’ in the definition section of the *NSW Act* refers to ‘land situated in New South Wales’. However, s 10(1)(b) refers to the powers of the body corporate ‘in relation to any community land at any time vested in it or in relation to any other land (being land, situated outside New South Wales ...) at any time vested in it’. Therefore, a body corporate incorporated under the *NSW Act* may also own land situated outside

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779 *Roman Catholic Church Communities’ Lands Act 1942 (NSW) s 8.*
780 Ibid ss 20 – 24.
NSW. This allows EREA to vest school properties in other states in the body corporate created in NSW.

The constitution adopted by a congregation pursuant to the NSW Act provides detailed instructions relating to objects and powers, to more clearly define those provided in the statute and specifically tailored for the individual congregation’s needs. The EREA Trustees’ constitution includes, or refers to, the history of the congregation and its founder, the canonical constitution of the congregation, EREA as a public juridical person, and the Foundations, a statement relating to the charism adopted by the congregation.781

5.4.2 Western Australian Statutes

There are no statutes in WA equivalent to the NSW Act. The Preamble to the NSW Act refers to the problem faced in many places; that of the cumbersome legal requirements for ownership of the church land when registered in a person’s name, such as the bishop or congregational leader, and the need for a legal mechanism to alleviate the transfer of property every time the office holder changed. In WA, the bishops adopted the legal identity of the corporation sole and the congregations for the most part incorporated under relevant state incorporations associations’ legislation.

The Roman Catholic Church Lands Act 1895 (WA) (‘1895 Act’) was ‘[a]n Act to empower the bishop of the Roman Catholic Church in Western Australia, and his successors in office, to lease and raise money by way of mortgage on, Church lands,

781 The Design is not included in the constitution not even by reference, but as it relates to the schools’ management, rather than their governance, it is not an essential element of the constitution and if the Design’s name or purpose changed, the constitution would require alteration.
and to sell certain of such lands in certain cases.’ The reason for its enactment, as stated in the preamble, was that

... whereas the Right Reverend Matthew Gibney is at present the holder of the said office, and is desirous of improving and turning to better account certain of the said lands vested in him as such bishop as aforesaid, and for such purposes of obtaining the powers and authorities hereinafter mentioned.

WA has several pieces of legislation that relate to Catholic Church lands, but they do so only in relation to the bishops and diocesan land. The Roman Catholic Church Lands Amendment Act 1902 (WA) recognised the expansion from one diocese in the colony in 1895, to two by 1902: Perth and Geraldton. It adopted the powers granted by the 1895 Act and simply acknowledged that land in each diocese was vested in the bishop of the respective diocese. The Roman Catholic Church Property Act 1911 (WA) (‘1911 Act’) created the office of corporation sole for the diocese of Perth and recognises the bishop of the diocese as ‘archbishop’. The Roman Catholic Church Property Act Amendment Act 1912 (WA) provides for the Archbishop of Perth to appoint attorneys to act on his behalf in relation to powers granted in the 1911 Act and for an administrator to be appointed on his death. The Roman Catholic Church Property Act Amendment Act 1916 (WA) acknowledges the diocese of Perth’s transition to an archdiocese and ensures the powers relating to land remain with the archbishop despite the ecclesiastical change. His powers to sell, lease and mortgage land are more specifically detailed. The Roman Catholic Geraldton Church Property Act 1925 (WA) and the Roman Catholic New Norcia Church Property Act 1929 (WA) create the entity of the corporation sole for the bishop of Geraldton and the Abbott Nullius of New Norcia respectively, and vest the powers to lease, mortgage and sell land in their ecclesiastical territory. The Roman Catholic Bunbury Church Property
Act 1955 (WA) and the Roman Catholic Bishop of Broome Property Act 1957 (WA) have similar effect in their dioceses. All the legislation relates solely to property of the Church, not the congregations. The only legal entities they create are the respective corporations sole. These Acts do not, and cannot, assist the congregations in adopting a new legal entity that will provide governance for their schools or ownership of the schools’ land other than in the name of the relevant bishop.

5.4.2.1 Summary

A congregation that has a national presence, such as the Christian Brothers, or that operates and owns land in NSW may choose to incorporate as a statutory body and register its land under the NSW Act. For a congregation whose legal entity and the land it owns are only in WA, the NSW Act affords no assistance. There is no similar Act in WA. A congregation would therefore need to decide whether to follow the path of the Christian Brothers and reconfigure itself in canon law and then to redefine itself in common law under the NSW Act.

The NSW Act includes corporate bodies relating to the Congregation of Presentation Sisters, Lismore and the Congregation of Presentation Sisters, Wagga — two separate canonical entities. The Presentation Congregation in WA might consider reconfiguring to become a part of either of these two Congregations thereby including the schools and their land in the NSW Act. Alternatively, they may transfer the property of the WA schools to either the Wagga or Lismore Congregation who may then own and govern the schools under the NSW Act. For a WA Congregation, where the AI Act or the Corporations Act provides a suitable option for incorporating the school and for holding the property of the school, it would not warrant the legal and canonical work required incorporating under the NSW Act, but it is a possibility.
The main advantages of the statutory corporation include that:

- it provides for less onerous record keeping and other work as required by the *Corporations Act* for the company limited by guarantee;

- it allows for registration of a corporate body that can hold land under the *NSW Act* but is situated in other states, which the various state based incorporations associations legislation does not; and

- it provides the best of both the incorporated association and the company limited by guarantee, without the restrictions or more onerous reporting requirements of them.

5.5 CONCLUSION

This chapter considered the incorporated association, the company and the statutory corporation as possible structures for future governance of congregational schools. Their main advantages are that:

- they are recognisable separate legal entities;

- they can sue and be sued;

- they require a constitution, which is capable of including clauses for the protection of the charism and reserve powers for the congregation;

- they are capable of owning property;

- they require, in differing degrees, record keeping and duties and obligations on members that assist the business of the school; and

- they allow volunteers to hold governance positions.

All three structures are capable of positively answering the thesis question and provide a vehicle for the effective ownership and governance of congregational schools in the
future. Which structure is most suitable for any given congregation depends on the size of the school (including staff and students) and its operational business. Incorporated associations generally have far less reporting requirements than companies.

Having identified these three structures as suitable for the common law governance of congregational schools, Chapter 6 introduces the canon law before Chapter 7 discusses relevant canonical requirements that may affect the ability of a congregational school to adopt any one of these incorporated structures.

\[^{782}\text{A comparative table of main issues relating to the incorporated association and the company limited by guarantee is annexed as Appendix C.}\]
CHAPTER 6
CANON LAW

6.1 INTRODUCTION

This thesis has considered the current involvement of several Western Australian congregation owned schools in Catholic education. It reflected on the role of the congregational school in Catholic education and of charisms. It discussed the legal status of diocesan schools and their boards, CECWA Trustees, CECWA and CEOWA. It has identified the current common law structures of some congregations and their schools that include active involvement of the religious members of the congregation. It has proposed future common law structures for congregational schools both where there is no continued involvement of those congregations and where the congregation maintains some involvement in the schools. The latter may be as part of a new common law structure and in collaboration with a public juridical person to whom they will relinquish all governance involvement after a transition period, or by way of continued but less active involvement in the governance than they currently exercise.

Canon law requirements may influence or even determine decisions regarding the adoption of any new common law structure. Chapter 6 will introduce canon law\(^{783}\) and Chapter 7 will determine the relevant concepts of canon law in Catholic school governance, in particular how they might affect decisions relating to common law structures. As background, this chapter will briefly discuss the historical foundation of canon law, consider how canon law and common law interact and, importantly, their

\(^{783}\) The researcher is not a canonist and holds no canon law qualifications. The discussion on canon law in this chapter is for those people also 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 common law issues. Access to many canon law sources was unavailable to the researcher.
relevance to the thesis. The historical foundation of canon law provides a context of
canon law’s relevance. The chapter then considers the interaction between canon law
and common law in order to ascertain what effect, if any, canon law has on decisions
relating to common law structures.

6.2 CANON LAW

The Code of Canon law is

... the principal legislative document of the Church, founded on the juridical -
legislative heritage of Revelation and Tradition, is to be regarded as an
indispensable instrument to ensure order both in individual and social life, and also
in the Church's activity itself. Therefore, besides containing the fundamental
elements of the hierarchical and organic structure of the Church as willed by her
divine Founder, or as based upon apostolic, or in any case most ancient, tradition,
and besides the fundamental principles which govern the exercise of the threefold
office entrusted to the Church itself, the Code must also lay down certain rules and
norms of behavior.784

The 1983 Code of Canon Law (‘1983 Code’) only applies to the Latin Church.785 In
1904, Pope Pius X (1903–1914) declared that the canons of the Church be collated
into one codified document.786 That document issued in 1917 as the Code of Canon

784 Pope John Paul II, Sacrae Disciplines Leges (January 25th 1983) Vatican
http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-
ii_apc_25011983_sacrae-disciplinae-leges_en.html; >; reasoning in the development of the 1983 Code
from Vatican Council II can be found in the Communications, the publication of the Pontifical
Commission for the Revision of the Code of Canon Law; ‘Authentic canon law...is a necessary human
instrument in a divinely founded community to bring good balances into the operations of the group.’
The Jurist 15, 20; ‘Canon law finds its fundamental rules in the experience of a society based on faith
and having as its primary purpose the proclamation of the Gospel and the salvation of souls’; Albert
The thesis is only considering the 1983 Code as it applies to the congregations under consideration in
the thesis.
786 Although the Church operated with canons from early in its history, they were not collected
together in a coherent or organised form or manner. Pope John XXII attempted a collection in 1317, in
Law (‘1917 Code’). In 1959, Pope John XXIII requested that the 1917 Code be updated and the task was eventually completed with the promulgation of the 1983 Code, which... contains the following elements: it is a set of norms created by reason enlightened through faith, it intends to bring order into the life of the ecclesial community, it is articulated and promulgated by those who are entrusted with the community’s care, and its purpose is to serve the common good. Thus canon law imposes obligations: that is, it establishes legal bonds from which rights and duties flow ... Canon law, in its essence and existence, depends on a pre-existing theological reality.787

One reason for the delay in completing the update of the 1917 Code was the intervening Second Vatican Council (‘Vatican II’), an ecumenical council held in four sessions between 1962 and 1965.788 Pope John Paul II in Sacrae Disciplinae Leges, the apostolic constitution promulgating the 1983 Code, acknowledges that both the 1983 Code and Vatican II ‘derives from one and the same intention, which is that of the renewal of the Christian life’:789

The purpose of the Code is not to substitute for faith, grace, charisms, and especially charity in the life of the Church or of the Christian faithful. On the contrary, its very purpose is to create an order in the ecclesial society so that, while giving propriety to love, grace and charism, their ordered development is facilitated in the life of the ecclesial society as well as in the lives of the individuals who belong to it.790

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788 Pope John XXIII announced both the calling of the Vatican Council II and the revision of the 1917 Code on 25 January 1959. Vatican Council II, amongst other things, introduced reforms to the Church that included a greater participation of the laity in Church matters.
789 Pope John Paul II, Sacrae Disciplinae Leges, above n 784.
790 Ibid.
The 1983 Code requires reading in light of Vatican II’s deliberations and relevant associated documents because it debated, determined and finally introduced the reform in the 1983 Code. In addition to reading the 1983 Code in light of Vatican II, Pope John Paul II also identified the ‘character of complementarity which the Code presents in relation to the teaching of the Second Vatican Council, with particular reference to the two constitutions, the Dogmatic Constitution Lumen Gentium and the Pastoral Constitution Gaudium et Spes.’

6.2.1 Sources of Canon Law

The content of the 1983 Code guides and determines actions and conduct, not beliefs and faith; the latter belong to theology. The majority of canons are ecclesiastical and originate from the Church not ‘directly from God (“divine law”)’, nor, according to canon 2, do they ‘determine the rites to be observed in the celebration of liturgical actions’. Canon law refers to ‘church order and discipline rather than doctrine and dogma’. Canons formulate Church law to ensure its adequate organisation, to regulate relationships in the community of the Church and to clearly identify and determine their rights and responsibilities. The canons foster ‘Christian life’ and are ‘based on a solid juridical, canonical and theological foundation’. The 1983 Code...

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791 “The Code, not only because of its content but also because of its very origin, manifests the spirit of this Council, in the documents of which the Church, the universal "sacrament of salvation" (cf. Dogmatic Constitution on the Church, Lumen gentium, nos. 1, 9, 48), is presented as the People of God and its hierarchical constitution appears based on the College of bishops united with its Head”: Pope John Paul II, Sacrae Disciplinae Leges, above n 784; 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>.

792 Ibid. Common law commands, forbids, permits and punishes whereas canon law exhorts, distinguishes, urges, informs, specifies and defines.


794 Coriden, above n 786, 4.

795 Pope John Paul II, Sacrae Disciplinae Leges, above n 784. There are three types of law in the 1983 Code: divine, positive and natural; a law is a binding norm: John M. Huels, OSM ‘Ecclesiastical
‘binds natural persons and juridical persons in communion with the bishop of Rome’.796 It holds the internal laws of the Church but only binds those in common law who submit to the Catholic Church.797

6.2.2 Books of the Code

The Code divides into seven books. Of these, only five are relevant to the thesis.798 Those people involved in canonical governance (canonical administrators) should have a basic understanding of the 1983 Code, appreciating which parts are relevant to their role in governance and how it relates to canonical governance generally. The following five books, though relevant to the thesis question, have varying degrees of significance to it.

6.2.2.1 Book I General Norms

Book I contains the norms, which includes the definitions of relevant people, powers and structures in the 1983 Code, and also the principles that guide canon lawyers in interpreting it. Coriden likens it to the definitional section of a statute,799 though it is more than a list of definitions as it also includes the concepts and foundations of governance. Definitions and concepts contained in Book I and relevant to the thesis include persons, acts and offices. Persons are categorised either as physical, by canons 204 and 205, which include the Christian faithful and the full communion of the


796 Peter McFarlane and Simon Fisher, Churches, Clergy and the Law (Federation Press, 1996) 25; see canons 1, 96, 113 – 123. Juridical persons are discussed in chapter 7.3.


798 Book IV The Sanctifying Office of the Church and Book VI Sanctions in the Church do not have direct relevance to the thesis question. Book VI is currently being reviewed; it is indirectly relevant to the thesis in the power it gives to the bishops to sanction those canonical administrators who are guilty of financial misfeasance or dereliction of their canonical duties to the temporal goods of the public juridical person to whom they are administrator: canon 1341.

799 Coriden, above n 786, 157.
Church, or as juridical, as defined by canons 113 and 114. Juridical persons are perpetual in nature, are established by the Church authority for public good, must have approved statutes, and a physical person (such as a congregational leader or a bishop) to represent them. Juridical acts ‘are those human actions which the law recognises as having juridical effects, ie, effects related to rights and obligations.’

The exercise of juridical acts occurs in consultation with the relevant advisory group, which may be a bishop, congregation or some other body of canonical administrators.

Governance in the Church is conducted through various offices, which have individual rights and obligations attached to them. Canon 228 permits laity to hold some offices within the Church:

§1. Lay persons who are found to be suitable are capable of being admitted by the sacred Pastors to those ecclesiastical offices and functions which, in accordance with the provisions of law, they can discharge.

§2. Lay persons who are outstanding in the requisite knowledge, prudence and integrity are capable of being experts or advisors, even in councils in accordance with the law, in order to provide assistance to Pastors of the Church.

Canon 149 requires any person holding an office to be in communion with the Church and to be suitable for the position according to universal and particular law.

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800 Code of Canon Law 1983 canon 120.
801 Ibid canons 116 and 117 respectively. Public juridical persons and their statutes are considered in chapter 7.3.1.
802 Coriden, above n 786, 159; juridical acts are governed by Code of Canon Law 1983 canons 124 – 8.
804 ‘The teaching of the Catholic Church is that the Church is a communion of particular Churches. The Church is to be understood with her double dimension and reality: universal and particular…The universal Church is the community of all Catholics throughout the world…A particular Church is a portion of the People of God entrusted to a bishop to be shepherded by him with the cooperation of the priests…The universal Church comprises twenty-one Eastern Churches and the one Latin or Roman Church.’ Rodger Austin, ‘Report of Dr Rodger Joseph Austin JCD STL Canon Lawyer for the Attention of The Commissioner Ms Margaret Cuneen SC’ Special Commission of Enquiry Into Matters Relating to Police Investigation of Certain Child Sexual Abuse Allegations In the Catholic Diocese of Maitland-Newcastle, 16 January 2014, 2.
requirement restricts the membership of any layperson in office or in canonical governance to those in communion with the Church. \textsuperscript{805} Canon 1331 §2 4\textdegree. prohibits someone excommunicated from the Church to hold office, and canon 194 §1 2 prohibits someone who has ‘publicly abandoned the Catholic faith’ to hold office. James Provost presumes that ‘being in communion’ entails ‘more than the mere fact of being baptised ... [and] must have a positive commitment to the Church.’ \textsuperscript{806}

Free conferral\textsuperscript{807} is the most common form of appointment to ecclesiastical office. An appointed person must be the best suited to the position and the ‘diocesan bishop [is] to provide for ecclesial offices in his own particular church by free conferral.’ \textsuperscript{808} Any nominee position of a canonical administrator where the nominee is the bishop is therefore an appointment by free conferral. Office holders exercise the governance of the Church and governance is a ministry of the Church. ‘Those who have received sacred orders are eligible to receive the power of governance, and lay members of the Christian faithful can cooperate in its exercise.’ \textsuperscript{809}

\textsuperscript{805} Canon 149 §1. ‘To be promoted to an ecclesiastical office, a person must be in the communion of the Church as well as suitable, that is, endowed with those qualities which are required for that office by universal or particular law or by the law of the foundation.’ When approving the Statutes of a public juridical person the competent authority authorises those statutes and thereafter has a limited role in the public juridical person. He rarely has to approve the position of members of the governing body of the public juridical person but may – and often does – ensure the statutes reserve his right to approve one or more members of the public juridical person. The question of whether the laity can be involved in ecclesiastical office and the interpretation of canon 129 is an unresolved but ongoing issue.


\textsuperscript{807} \textit{Code of Canon Law 1983} canon 147; free conferral occurs where the same person who nominates the candidate also appoints them. Election and postulation are two other less common forms of conferral of office and is the most likely form of appointment for canonical administrators in Catholic schools.

\textsuperscript{808} Ibid canon 157.

\textsuperscript{809} Coriden, above n 786, 164; \textit{Code of Canon Law 1983} canon 129 §2. The meaning and effect of the words ‘can cooperate’ in canon 129 are discussed in chapter 7.5.
Delegated.\textsuperscript{810} Debate continues as to whether Catholic school governance positions are ecclesiastical offices.\textsuperscript{811}

6.2.2.2 Book II The People of God

There are two categories of church members: clergy and laity.\textsuperscript{812} The laity comprises laypersons living in the secular world and members of religious institutes (that are not clergy).\textsuperscript{813}

6.2.2.2.1 The Hierarchical Structure of the Church

The Catholic Church is a hierarchical church; ‘hierarchy’\textsuperscript{814} derived from the Greek words hieros and arche meaning ‘sacred power’.\textsuperscript{815} It is a collegial structure, and the Pope has supreme authority within it. ‘The concept of collegiate responsibility for the church at its highest level is key because of its biblical warrant and because it reflects the nature of the universal church as a communion of churches’.\textsuperscript{816} The collegial structure is essential in understanding how the Church operates and governs at a practical and local level and therefore it is essential to the governance of Catholic schools in a diocese. The hierarchical structure of the Church\textsuperscript{817} has the Pope at its apex and includes bishops, cardinals, and priests. It also includes groups such as the College of Bishops and the Roman Curia (see appendix D).

\textsuperscript{810} Code of Canon Law\textsuperscript{1983} canons 143 and 131 respectively. Ordinary is that which is joined to a certain office by the law itself; delegated is ‘that which is granted to a person other than through an office’: 131 §1 Code of Canon Law\textsuperscript{1983} canon 131 §1.
\textsuperscript{811} See chapter 6.2.3.1 and 7.5.1.2.2 for a discussion on the role of the laity in governance.
\textsuperscript{812} ‘Book II, implementing the insight of LG 10 (which the Council itself was unable to follow up fully), begins its entire treatment of the juridical constitution of the people of God with a broad set of norms covering the status common to all the faithful (can. 204 – 223)’: Corecco, above n 79.
\textsuperscript{813} Code of Canon Law\textsuperscript{1983} canon 207 §2 acknowledges that members of congregations can be ‘drawn from both’ clerics and laity.
\textsuperscript{814} Vatican Council II, Lumen Gentium, above n 9, [18].
\textsuperscript{815} Coriden, above n 786, 71.
\textsuperscript{816} Ibid.
\textsuperscript{817} Detail of the hierarchical structure is attached as Appendix D.
Members of the laity involved in canonical governance require an appropriate understanding of this hierarchical structure of the Church in order to properly understand and therefore execute their role and responsibilities in both canon and common law.

6.2.2.2.2  Consecrated Life

Religious in the Church are ‘consecrated to God’ but they are not a part of the Church’s hierarchical structure. The Code divides the groups to which religious persons belong into three categories:

1. **Religious Institutes** — live in community and take public vows.

2. **Societies of Apostolic Life**— ‘committed to an area of the apostolate or mission of the church’. They resemble Institutes of Consecrated Life, live in community, but do not take religious vows; and

3. **Secular Institutes** — members may live in community with each other but more often do not. They are ‘living in the world’.

Religious Institutes and Societies of Apostolic Life are gender based in their membership, governed by the same canonical norms in canon 606, and given ecclesiastical status recognised by Church authority, either by a bishop or by the Pope. They are also public juridical persons as are all provinces and religious houses. The Presentation Sisters in WA and the Christian Brothers in Oceania are Pontifical Institutes. They are therefore subject to the Pope who is the only authority that can

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819 Ibid canon 607 §2. For example, the Christian Brothers and Presentation Sisters.
820 Ibid canon 731; for example, the Daughters of Charity.
821 Ibid canons 710 - 14.
822 Ibid Religious institutes – canon 634 §1; Societies of Consecrated Life canon 741 §1.
823 Congregations and public juridical persons generally, may be pontifical or diocesan ie given ecclesiastical status either by the Pope or by the diocesan bishop.
suppress an Institute.\textsuperscript{824} The congregations are public juridical persons that own and administer their own property, unless its constitution states otherwise.\textsuperscript{825} The property is ecclesiastical property, governed by Book V of the \textit{1983 Code}.\textsuperscript{826} Although the congregations are autonomous, they are subject to the bishop on apostolic works including ‘the care of souls [and] the public exercise of divine worship’.\textsuperscript{827} Canon 683 §1 provides the bishop with some supervision of Catholic schools within their diocese and should, therefore, be consulted in any decision a congregation makes in reassigning their schools to new common law and/or canonical structures.

6.2.2.3 Book III The Teaching Function

The Church claims the right to teach\textsuperscript{828} and the purpose of Catholic education is to ‘impart knowledge within the context of faith’.\textsuperscript{829} Since Vatican II, a greater emphasis applies to participation of the laity in the Church,\textsuperscript{830} including school governance. The \textit{1983 Code} ‘assign[s] specific responsibilities to designated groups of people within the church. That is the principal purpose of the canons of Book Three.’\textsuperscript{831} The teaching ministry applies to six groups, the last of which relates to the laity who administer by word and example but can also ‘be invited to exercise the ministry of the word’\textsuperscript{832} and ‘[e]very available means is to be used to proclaim Christian teaching.’\textsuperscript{833} The Church has control over Catholic schools, including congregational schools, exercised by the bishops in four ways:

\begin{footnotes}
\item[824] Code of Canon Law 1983 canons 590; 574.
\item[825] Ibid canon 634 § 1.
\item[826] Ibid canons 653 § 1.
\item[827] Ibid canons 678 and 681 and canons 804 – 806 relating to Catholic education.
\item[828] Ibid canon 794; Vatican Council II, \textit{Gravissimum Educationis}, above n 61. See also all the documents listed in above n 61.
\item[830] Details of this greater emphasis and participation of laity is discussed in chapter 7.5.
\item[831] Coriden, above n 786, 109.
\item[832] Ibid 111. Code of Canon Law 1983 canon 759.
\item[833] Coriden, above n 786, 111.
\end{footnotes}
1. canon 803 specifies that Church authority (usually the local bishop) must officially recognise schools as ‘Catholic’ in order for them to use that term;

2. canon 804 defines Catholic religious instruction as subject to the supervision of the local bishop, and local ordinaries;

3. canon 805 empowers the diocesan bishop to appoint and dismiss religion teachers; and

4. canon 806 empowers the diocesan bishop with the right of ‘vigilance and visitation’ in Catholic schools.

The direct involvement of the diocesan bishop in appointing and dismissing religion teachers and in school vigilance and visitation is less with congregational schools than in diocesan schools. The bishops govern diocesan schools through CECWA and CEOWA; the congregation governs congregational schools. However, the bishop still plays an active role in congregational schools either directly or through the CECWA and CEOWA.

6.2.2.4 Book V Temporal Goods

Temporal goods that are part of the patrimony of a congregation are a crucial factor for the congregational schools because canon 1284 in Book V requires the approval of the relevant competent authority for the alienation of temporal goods, including where there is any change in legal structure for the governance or ownership of the congregational schools. The Church has an inherent right, independent from any common law property rights, to deal with the property (owning, buying, selling and
administering), but it must comply with common law requirements for validity of property transactions.

6.2.2.5 Book VII Processes

Just as statutory interpretation is essential in common law so too is canon law interpretation based on numerous factors. Coriden writes that canonical administrators should recognise the following when considering or interpreting canon law:

- as rules of the Church, canons must always serve the Church and its religious purpose;
- the application of rules must be driven by ‘saving faith … the first bond that unites the Church’;
- the canons must be considered in the light of Vatican II and its relevant and related documents;
- ecclesial law is always interpreted in the context and proper meaning of words;
- the end purpose of a canon must be considered when trying to interpret and apply it;
- custom is important; consideration should always be given to the way the law is ‘regarded and followed by the people’;
- discretion should be applied where relevant when applying canonical rules; and
- prudent management is essential.

834 Code of Canon Law canon 1254.
835 Chapter 7.2 considers the concept of temporal goods and the rights and obligations imposed by Book V on them, and on those who administer them.
836 Coriden, above n 786, 201 - 3.
838 Coriden, above n 786, 203.
6.2.3  Relevance of Canon Law to the Thesis Question

Canon law plays a central part in the governance of congregation owned schools. Canon 596 specifies the governance of congregations; canon 596 §3 refers to canons 131, 133 and 137–44, thereby extending that governance to include ordinary and delegated power. These canons refer to the governance of the congregation and only indirectly to the governance of the congregation’s ministries.

6.2.3.1  Current Congregational Schools and Governance

The basis by which congregations are able to exercise the governance of their own schools is found in the 1983 Code. Canon 596 §1 states that ‘Superiors and chapters of institutes have that authority over the members which is defined in the universal law and in the constitution’. Canon 129 §1 states that ‘[t]hose who are in sacred orders are, in accordance with the provisions of law, capable of the power of governance, which in fact belongs to the Church by divine institution. This power is also called the power of jurisdiction.’ Since the promulgation of the 1983 Code, canonical debate has centred on the interpretation of canon 129 §2: ‘[L]ay members of the Christian faithful can cooperate in the exercise of this same power according to the norm of law’. This canon lacks clarity on the definition of ‘cooperate’ and the extent of lay participation in canonical governance. Must any laity exercising canonical governance only do it in conjunction with someone who has received sacred orders? In other words, must laity and some members of the congregation always share the governance of a public juridical person? Alternatively, may the laity exercise that governance in their own right and on their own? If the laity cannot exercise governance in their own right and on their own, can someone who can exercise it delegate it to them? Wijlens discusses the requirement of canon law to ascertain the ‘theological insights into concrete
canonical norms’. Currently there are two schools of thought that diverge on the interpretation of canon 129 §2: the Roman School (that accepts laity’s involvement in governance) and the German school (that believes governance can only be exercised by those who are ordained).

Many, if not all, congregational schools have had laity sharing governance in common law structures for many years. The next logical progression is for that governance to extend from common law governance to canonical governance. An underlying question is whether governance of Catholic schools is included in the governance referred to in canon 129.

There is no apparent reason why the changes made in Catholic health care governance should not also apply to governance in Catholic education. Canon 17 refers to ‘parallel places’ and understanding ecclesiastical laws ‘in their text and context’. Using this principle, the governance of Catholic schools has much to learn from the governance of Catholic health care institutions. The interpretation of ‘cooperate’ in canon 129 §2 has not been settled by canon lawyers, and it is open to Church authorities to interpret it to allow laity-only membership in canonical governance where that is necessary. This should include holding office in governance and representation of a public juridical person; the question in unresolved, but in the process of resolution.

6.2.3.2 Canonical Governance in New Structures

Although canonists have not yet provided a definite answer to the interpretation of canon 129 §2, the 1983 Code provides examples where members of the laity can hold

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840 Ibid. Some Catholic health institutions in Australia and the US have already commenced canonical governance involving a partnership of religious and laity.
positions relating to governance in Church institutions. Some of these examples include canons 494 and 636 — finance officer of a diocese and of a religious institute respectively; canon 1279 — administrator of ecclesiastical goods; and canon 517 §2 — directing the pastoral care of a parish. These roles are very similar to the duties required in the canonical governance of a congregation owned school; and in a school governed with a new public juridical person after a congregation has withdrawn from governance of its school. The 1983 Code not only omits to define ‘cooperate’, it is silent on how congregations may pass the governance they currently exercise to another public juridical person whose members include laity because at the time of promulgation of the Code the situation facing many congregations today regarding their future was not envisaged. Current provision for lay governance roles and the coupled need for common law and canonical governance structures that involve majority, or eventually sole, involvement of the laity requires new thinking within the Church regarding the practical application of the acknowledgment of the role of laity as described, for example, in The Catholic School [70] – [71] and The Religious Dimension of Education in Catholic Schools [32]. It is essential that Church authorities ensure the laity can continue the mission of congregations when the congregations withdraw from governance of their schools.

6.2.3.3 Relevant Parts of the 1983 Code

Those parts of the 1983 Code relating to the laity, temporal goods, juridical persons and associations of Christ’s faithful require further attention. When congregations withdraw from governance of their schools, lay participation is essential to continue their education ministry. Canon law requires that the public juridical person owning or administering temporal goods (ecclesiastical property) must protect those goods. The
congregations must therefore ensure that there is no alienation of their property (which is ecclesiastical property) without appropriate approval when they transfer the canonical and common law governance and ownership of their schools to other bodies. Public juridical persons and associations of Christ’s faithful may serve as instruments to allow lay participation in canonical governance.  

6.3 THE RELATIONSHIP BETWEEN CANON LAW AND COMMON LAW

‘The intersection of Church canon law and aspects of [common] law is a fundamental aspect of school governance.’ 842 Canon law defers to common law where no conflict exists between them. 843 ‘The remittance to the [common] law is referred to as the canonisation of the [common] law’ and accepts the common law into the ‘juridical order of the Church.’ 844 After several cases 845 in the US involving parishes applying for bankruptcy as a result of claims against them in sexual assault cases, the relevant courts considered whether canon law was relevant in common law cases. The parishes in the US are mostly corporations sole as opposed to Australia where they are unincorporated associations. Some US statutes that create those corporations sole specifically refer to canon law as part of the entity and US courts will then consider relevant canon law. In Australia, there is some degree of legal recognition of the 1983

841 Chapter 7.3 considers public juridical persons and chapter 7.4 considers associations of Christ’s faithful in detail.
842 Institute of Legal Studies, Australian Catholic University, ‘Governance in Victorian Primary Schools’, above n 123, 16.
843 Code of Canon Law canon 22; McKenna, above n 793, 24.
844 Austin, ‘The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications’, above n 19, 42. Austin considers each of the 23 canons that specifically mention the ‘civil’ law.
('Queensland Act') though reference in Australian statutes to canon law is not common. The Roman Catholic Church Property Act 1911 (WA), and all other WA Acts creating the bishops as corporations sole, contain no reference to canon law generally or specifically; nor does the NSW Act. Australian courts are very reluctant to intervene in matters involving the Church, especially where common law documents do not refer to the canon law.

Western Australian courts can consider legislative provisions in other states, even where the terms of the legislation are not identical, when determining issues before them. Although no Western Australian legislation invokes canon law, the Queensland Act does and a local court may consider it. Section 4 of the Queensland Act not only refers to canon law; it requires interpretation by Church authorities in accordance with Church law of any referenced canonical provisions. ‘For the purpose of applying the Code of Canon Law to matters under this Act, the Code must be interpreted and applied in a way consistent with decisions about the matters by Church authorities who ordinarily decide them’ and s 3 defines canon law. This reference to incorporation of canon law in the common law statute is not tokenism. Eleven of the 43 sections of the Queensland Act refer to the 1983 Code, ranging from administrative detail to restrictions on powers of bodies incorporated under the Queensland Act. The general powers and legal capacity of a body incorporated under the Queensland Act and granted pursuant to s 25 are subject to anything in their ‘constituent documents and the Code of Canon Law’, both of which define the objects and functions of the incorporated body. Dissolution of the incorporated body may only occur where

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846 Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld) ss 3, 4, 8, 11(1), 13, 18(1), 20, 27(1 – 2), 28(3)(a), 33(3), and 33(4)(e).
847 Ibid ss 27(1) and 27(2)(b).
dissolution ‘accords with the Code of Canon Law’ and the request for common law
dissolution must state that it does so accord.848

Generally, in Australia common law courts will not intervene in Church matters that
relate to dogma or theology.849 The Church may intervene in Church matters in the
following situations:

(a) at the suit of the Attorney-General where church trust property is involved; (b)
where there is expulsion from an office or from membership; or (c) where there is
no ready and practicable alternative way of resolving a dispute which is affecting
the peace of the community.850

The courts have also considered a situation where damage to reputation of Church
members was a ground for intervention.851 In the Ellis case, the judges accepted expert
canonical evidence on the hierarchical structure of the Church.852 Courts will not hear
appeals from disciplinary tribunals of voluntary associations, which include
churches.853 It may consider an issue to the extent (if any) that a constitution allows
any consideration. The Catholic Church, its dioceses and parishes are unincorporated
associations and as such have no written constitution (see chapter 3). However, there
is no reason to suspect that prohibition on hearing disciplinary tribunal appeals would
not extend to appeals from other church tribunals unrelated to discipline (such as the
Marriage Tribunal) as these hearings deal with theological issues for which the 1983

848 Ibid ss 33(3) and 33(4)(e). Any dissolution would therefore have to comply with the requirements
849 Wyde v Attorney-General (NSW) (Ex rel Ashelford) (1948) 78 CLR 224 at 282 per Rich, J;
Scandrett v Dowling (1992) 27 NSWLR 483 at 508, 554, 564, and 566.
850 McFarlane and Fisher, above n 796, iii; AG ex rel; Elisha v Holy Apostolic Catholic Church of the
851 Plenty v Seventh Day Adventist Church of Port Pirie (1986) 43SASR 121.
852 Dr Rodger Austin, Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis
[2007] NSWCA 117.
853 Smith v South Australian Hockey Association Inc 48 SASR 263, 264 (Cox, J); Nurses Memorial
Centre of South Australia Inc v Beaumont (1987) 44 SASR 454, 467.
Code provides the process for resolution.\textsuperscript{854} Canonical administrators are not to engage in litigation without the written consent of the diocesan bishop.\textsuperscript{855}

\textbf{6.3.1 Canon Law Relevant to Common Law}

Governance in canon law is, like common law, divided into the three arms: executive,\textsuperscript{856} legislative\textsuperscript{857} and judicial.\textsuperscript{858} However, the two systems of law differ considerably and must be approached and interpreted in different ways using different methods.\textsuperscript{859} In canon law, these three arms are not separate as they are in common law: ‘in the church it means a distinction among three kinds of authority, not a division into three branches of government’.\textsuperscript{860} Canon 136 permits delegation of executive power but there are no provisions to delegate legislative and judicial powers. Judicial decisions do not create precedents as they do in common law.\textsuperscript{861}

Laws ‘regard the future, not the past’\textsuperscript{862} and bind Catholics who have ‘reached the age of reason ... unless the law expressly provides otherwise’.\textsuperscript{863} The legislator interprets the law and in doing so considers the following:

\textsuperscript{854} Book VII Processes.
\textsuperscript{855} Code of Canon Law 1983 canon 1288. As previously discussed in chapter 4 above, civil litigation in Australia against church bodies has been problematic due to the lack of a recognised legal entity.
\textsuperscript{856} Ibid canons 135 - 6.
\textsuperscript{857} Ibid canons 7 – 22; 135.
\textsuperscript{859} ‘Within a diocese, the diocesan bishop alone can legislate (although he is able to be assisted and advised by institutes such as the diocesan synod). As regards judicial power, this is exercised in ecclesiastical courts by the judicial vicar and judge appointed by the diocesan bishop. However, with the executive power of governance, whether day to day administration of governance of more major significance, the diocesan bishop can and normally does associate with himself many persons, both clerical and lay…Others – both cleric and lay – have the power of executive governance delegated to them.’: Waters, above n 139, 149.
\textsuperscript{860} Coriden, above n 786, 165.
\textsuperscript{861} Code of Canon Law 1983 canon 16.
\textsuperscript{862} McKenna, above n 793, 22; Code of Canon Law 1983 canon 9.
\textsuperscript{863} Code of Canon Law 1983 canon 11.
1. both the text and the context in which the law appears;
2. other similar laws;
3. the purpose of the law; and
4. the mind of the legislator.\textsuperscript{864 }

In common law, statutory interpretation considers legislative intent and relevant case law. Likewise, canonical interpretation does not occur in isolation of a particular canon. When interpreting canon law, the legislator must also identify and consider numerous canonical principles and documents relevant to interpreting canon law, which include universal law, particular laws, customs, general decrees, norms, general executor decrees, instructions, singular decrees, precepts, rescripts, privileges and dispensations.\textsuperscript{865 }Canonical governors should be aware of these canonical traditions in legislative interpretation.

\textit{6.3.2 How Canon Law May Impact on Common Law Structures}

Where a statute such as the \textit{Queensland Act} exists, common law constitutions of any bodies incorporated under such a statute must ensure they comply with the \textit{1983 Code}. For bodies working in the name of the Church, such as congregational schools, this is a sensible approach to avoid contradictions in common law and canon law provisions. Where matters require redress through the common law court system, judges in that system may then intervene in such matters where they are otherwise reluctant to do so. The statute requires them to do so by binding the common law structure to issues relevant to the \textit{1983 Code}. In WA, there is no similar statute. It is therefore prudent for the congregational school’s common law constitution to specify clearly that the

\textsuperscript{864} McKenna, above n 793, 23.
\textsuperscript{865} Coriden, above n 786, 167 – 171.
provisions of the 1983 Code apply to it, in much the same way it does in the
Queensland Act. ‘Both systems of law recognising the same norms governing a public
juridic person avoids the confusion which occurs when a transaction is civilly valid
but canonically invalid (see c1 296), and vice versa’.866

Canon law determines that church bodies should adopt legal structures relevant to their
territorial jurisdiction, particularly in relation to common law structures that protect
Church property.867 Many Australian congregations have done this and have usually
incorporated under relevant state incorporated association legislation. Dioceses and
parishes in Australia are yet to adopt a formal common law structure.

It is possible that new school structures will comply with common law, but at the same
time contravene canon law.868 It is essential that any new canonical and common law
structures adopted by a congregation to continue their work without them reflect each
other. This can be done by ensuring that the constitution of the common law body
(whether it be an incorporated association, a corporation or statutory corporation) does
not contravene any requirement of canon law or of the constitution of the canonical
body (whether it be a congregation, new public juridical person or association of
Christ’s faithful). If canon lawyers and common lawyers work together when creating
these new structures and drafting the relevant documentation for both the state and the
Church, the task to ensure alignment between the two legal systems is not necessarily
a difficult one.

866 John Anthony Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application
867 Code of Canon Law canon 1284 §2 2 °.
868 For example, by alienating Church property without appropriate approval.
6.4 CONCLUSION

The purpose of this chapter was to introduce the concept of canon law, identify the relevant aspects of it to the thesis question and consider the relationship between canon law and common law. ‘[T]he ecclesiology of communio indicates the unique nature of law in the Church, distinguishing it from [common] law due to its Trinitarian and sacramental basis. Canon law exists to serve the Church’s mission: the salvation of souls (c1 752).’\(^{869}\) Canon law is fundamental to the governance and ownership of Catholic schools. It is essential that canonical administrators and members of common law governance are aware of the canonical requirements in their governance and ownership in order to comply with them. A basic understanding of the hierarchical structure of the Church and of the relevant Books of the 1983 Code assists in the awareness of canonical issues. Canon law can work in harmony with common law requirements for school ownership and governance to ensure the continued education ministry of the congregation and the mission of the Church. Cooperation between the two systems will assist in ensuring any conflict between the two legal systems has a minimum effect on the ownership and governance of previously owned congregational schools.

Canon law requirements pertaining to temporal goods affect the nature of the common law and canonical bodies required for school governance and ownership. Chapter 7 discusses the concept of temporal goods and the canon law relating to them. How these

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requirements impact on common law governance and the choice of canonical structures to replace the congregations as public juridical persons will be identified. The chapter will also consider the relevant canonical structures of the juridical person and the association of Christ’s faithful, reflect on some current models of canonical governance, and discuss the role of the laity in canonical governance. It also discusses the importance of continual formation of canonical administrators.
CHAPTER 7

CANON LAW IMPLICATIONS FOR COMMON LAW OPTIONS

7.1 INTRODUCTION

Chapter 6 introduced canon law generally and identified its importance and relevant aspects to the question of choosing new common law structures and its interface with common law. This chapter will consider the aspects of canon law that directly affect solutions for congregations seeking new governance and ownership options for their current schools. The canons governing the use of temporal goods, particularly those relating to alienation, are a crucial factor in the availability of any canon law options for future governance structures. Requirements placed on canonical structures by Book V of the 1983 Code determine what common law and canonical structures must do to answer the thesis question. Relevant options for canonical governance structures include juridical persons and associations of Christ’s faithful.

Any new governance structures require the laity’s participation in place of congregation members therefore the role of the laity in Church governance is considered. Formation requirements in common law and canonical constitutions will be crucial in protecting the charism of the congregation into the future. Attention is given to several models of current canonical governance to provide comparisons and ascertain suitability for congregations trying to determine future ownership and governance of their schools. The chapter will explain these issues, consider their relevance to the thesis question, determine the options that are available in canon law and determine whether they preclude the adoption of any of the proposed common law
changes. The scope of the discussion will not consider doctrinal aspects of canon law, but is restricted to those that relate to Catholic school governance.\textsuperscript{870}

The main legal question relevant to this chapter relates to what canon law permits in relation to common law structures and in particular, its relevance to the transfer of governance and property ownership. Underlying this legal question is the theological question that relates to the proper role of the laity in canonical governance. Both of these questions should recognise that the laity already plays an important and active role in that governance.\textsuperscript{871}

7.2 TEMPORAL GOODS

In order to examine key issues relating to the transfer of ownership and governance it is essential to consider the central role of temporal goods and the necessary transfer of such goods in the event of the adoption of a new common law structure. The discussion of temporal goods in the thesis precedes that on the discussion of public juridical persons so that the concepts of administration and alienation are introduced and understood before the discussion of the possible canonical structures (church entity) that are responsible for the property. Canonical requirements relating to property transactions are an important issue that public juridical persons encounter (in relation to the thesis question) and are more complex than the discussion on public juridical status.

\textsuperscript{870} The chapter intends to raise awareness of canon law issues that may affect decisions for common law matters. It does not attempt to be anything more than an introduction to the relevant concepts of canon law in Catholic school governance and their relationship to common law. It does not attempt to present the canon law at doctrinal level.

\textsuperscript{871} Thornber and Gaffney, above n 7, 35.
7.2.1 Temporal Goods and Book V of the 1983 Code

Book V of the 1983 Code contains canonical requirements relating to ownership of property and its alienation. Any transfer of congregational property to a common law structure without appropriate approval contravenes parts of Book V. An understanding of Book V is therefore essential in determining which canonical structures will be suitable for congregations to transfer ownership and governance of schools that include ownership of real and personal property.

Canon law has significant implications for the ownership of property by Church entities and commercial dealings with that property.\(^{872}\) 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.’ All four factors must be present for a juridical person to establish ownership, that is, the ability to acquire, retain, administer and alienate the property.\(^{873}\) This inherent right is subject to administrators using the property for the ‘proper objectives’ of the Church, which are broadly listed in canon 1254 §2.\(^{874}\)

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\(^{872}\) 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 chapter only relates to Book V. The canons are ‘connected’ to, and should be considered in light of, other conciliar documents such as 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.

\(^{873}\) If a juridical person holds goods without the common law ability to alienate them, it does not own the goods but merely holds them on trust for another person or body. True ownership in common law requires the ability to alienate the property.

\(^{874}\) The text of canon 1254 §2 is taken from 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’: Vatican Council II Presbyterorum Ordinis (December 7 1965) <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-
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 common law rights and obligations that exist in relation to property. Ownership of property does not belong to individuals in the Church but to the public juridical persons whom they represent and on the proviso that the goods are ‘lawfully acquired’. The Church recognises this canonical right to ownership of property without the need of any common law authority. However, as common law does not recognise public juridical persons as common law entities per se, registering property in accordance with common law requirements for ownership and alienation will afford it protection in common law. Property rights remain subject to the ‘supreme authority of the Roman Pontiff’ who is ‘supreme administrator and steward of all ecclesiastical goods’, though in practice, and pertaining to a local congregation, the diocesan bishop undertakes the supervisory role.

There are several ‘fundamental principles’ pertaining to canonical administration of property that include the ‘principle of trust ... respect for the intention of donors ... respect for accountability and appropriate reporting mechanisms ... recognising the requirement to seek approval for “major transactions” … respect for both canon law

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875 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’: Austin, ‘The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications’, above n 19, 50, 56.


and common law requirements'. Book V of the 1983 Code contains provisions that regulate a public juridical person’s ability to deal with the property acquired by it; the provisions are not meant to be obstacles to administration of property but are ‘positive efforts to provide proper use of the patrimony and to ensure honest and open administration.’ The law regulating the alienation of property and endangering the value of property is of particular relevance to the thesis question as either may occur when a congregation considers changes in governance and ownership.

7.2.1.1 What are Temporal Goods?

Book V repeatedly refers to ‘temporal goods’ without providing a definition of them. However, elsewhere the term has 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’. Temporal goods are either:

- ecclesiastical — owned by the Apostolic See or a public juridical person, and subject to the 1983 Code, particularly Book V; or

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880 Code of Canon Law 1983 canon 1257 §2; De Paolis, above n 872, 347. The distinction between private and public juridical persons, and their suitability for the thesis question, is discussed in chapter 7.3.1.1. Book V does not apply to private juridical persons, which are subject to their own statutes.
881 ‘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’: Rodger Austin, ‘Temporal Goods Within the Church - Some Canonical Reflections’ (1992) 69 Australasian Catholic Record 147, 148.
• non-ecclesiastical — owned by a private juridical person, and subject to its statutes rather than to the 1983 Code, unless its statutes provide otherwise.\textsuperscript{884}

They are temporal goods of the Church because ‘they are used for the work of the Church.’\textsuperscript{885} Canon 1258 extends the definition of Church to ‘any public juridical person’, thus allowing public juridical persons to carry on their mission with the assistance of adequate economic means.\textsuperscript{886} The ‘proper objectives’ of the mission for which property is required include, but because of the use of ‘principally’ in canon 1254 §2, are not limited to:

1) regulation of divine worship;
2) provision of fitting support for the clergy and other ministers;
3) carrying out of works of the sacred apostolate; and
4) engaging in works of charity, particularly for the needy.

The third objective relates to the thesis question. Canon 298 §1 refers to works of the apostolate including ‘Christian teaching’, which comprises Catholic schools. Therefore, ‘[t]he acquisition and the administration of temporal goods should never exceed or transgress the purposes\textsuperscript{887} or mission of the public juridical person.

The purpose of Book V is to ensure protection of the property of public juridical persons from unlawful or bad administration. Kennedy espouses the rationale for the

\textsuperscript{884} Ibid canon 1257 §2.
\textsuperscript{885} Lucas, Slack and d’Apice, above n 5, 200; although canon 1255 permits the universal Church to own property it in fact does not, juridical persons do - Kennedy, “Temporal Goods of the Church”, above n 11, 1452.
\textsuperscript{886} Austin, ‘Temporal Goods within the Church - Some Canonical Reflections’, above n 882, 154. The common law system distinguishes between a legal and an equitable owner (beneficiary), but canon law does not: ‘Consequently, the money invested with the 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’, 153.
\textsuperscript{887} Roche, above n 879, 317.
inclusion of Book V and its canons in the 1983 Code as being required for the mission of ministries and

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.  

It is the very observance of these provisions that is a central issue to the thesis question. Compliance with the relevant provisions of Book V is essential in any alienation (including transfer) of a congregation’s ecclesiastical goods to a new or existing juridical person, or to any common law structure, or any transaction that has the potential to endanger the value of any ecclesiastical property.  

A congregation requires the competent authority’s approval before it can transfer all or any of its property to a new public juridical person.

7.2.2 Canonical Administrators

The responsibility for administering the temporal goods lies with canonical administrators; members of the church entity whose duties include administration of the property. Canonical administrators are responsible for the property. They administer them, but in administering the property, they must not alienate any of it

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888 Kennedy, ‘Temporal Goods of the Church’, above n 11, 1452. This is similar to the motivation for many provisions in the Corporations Act 2001 (Cth).
890 Ibid, 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.
without approval of the competent authority. These concepts of the canonical administrator, acts of administration and alienation will now be considered.

7.2.2.1 General

‘[C]anon law provides the tools for improving accountability and transparency in the administration of the Church’s temporal goods.’\textsuperscript{891} Titles I–III of Book V of the 1983 \textit{Code} deal with the acquisition, retention, alienation and administration of property and bear the most relevance to the thesis question, though it is the alienation and administration in relation to both the current congregation and any potential new juridical person with which the thesis question is most concerned. In Title I, 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 congregation when transferring governance and ownership in the future, if that transfer includes consolidation, division or dissolution of their congregation or of some other relevant public juridical person.\textsuperscript{892} Canon 1259 relates to the acquisition of goods in ‘either natural or positive law’, recognising both ecclesiastical law and common law highlighting the relationship between the two systems.\textsuperscript{893}


\textsuperscript{892} In addition, the following canons may also be relevant: 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; canon 122 – where a public juridical person is divided and part of it becomes joined to another public juridic person, the wishes of the founders or of any benefactors relating to their property or gifts bestowed must be safeguarded; canon 123 – where a public juridical person is extinguished, its property is distributed according to its statutes and law.

\textsuperscript{893} The usual forms of acquisition in common law 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 \textit{Code}. Forms of acquisition that are available in common 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); see also Morrisey, ‘Acquiring Temporal Goods for the Church’s Mission’, above n 878, 593.
7.2.2.2 Supervision of Canonical Administrators

Title II commences with canon 1273, reinforcing canon 1256 empowering the Pope as the supreme authority in relation to ecclesiastical goods, and applies to property owned by public juridical persons. The wording of canon 1273 relates the administration of temporal goods to governance, and clerics or laity may exercise that governance as administrators.  

The person directly governing a public juridical person is its canonical administrator unless the statutes provide otherwise, and is accountable to the members of the public juridical person, to any donors of property and patrons, and to the relevant competent authority. The canonical administrator does not act alone in matters pertaining to ecclesiastical property; they must have a finance council or at least two counsellors and 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’.

The Pope technically supervises the administration of a public juridical person, though it is more generally exercised by the competent authority — for most congregations. In fulfilment of canon 1276 the diocesan bishop 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’. The supervisory role is capable of delegation to the diocesan finance council or at least two counsellors.

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894 Code of Canon Law canons 1282 and 1287. Canon 1273: ‘The Roman Pontiff, by virtue of his primacy of governance, is the supreme administrator and steward of all ecclesiastical goods.’
895 Ibid canon 1279 §1.
896 Ibid canon 1280; canons relating to dioceses (canon 492) and parishes (canon 537) specifically refer to a finance council.
897 Kennedy, ‘Temporal Goods of the Church’, above n 11, 1482; Kennedy refers to the relevant canons: 492-2, 1277 and 1292.
898 Ibid 1477.
In addition to the general role of supervision in canon 1276, the following specific supervisory issues, relevant to the thesis question, exist for the diocesan bishop:

- granting written consent for acts of extraordinary administration;\(^{900}\)
- receiving the oath from administrators;\(^{901}\)
- giving consent for the investment of the surplus;\(^{902}\)
- receiving annual reports;\(^{903}\)
- giving permission to litigate in the civil courts ...\(^{904}\)

An open and current relationship between the diocesan bishop and the canonical administrator is essential for the proper administration of ecclesiastical property. ‘[A]dmninistrators 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).\(^{905}\)

7.2.2.3 Duties of Canonical Administrators

Just as directors of companies have fiduciary and legislative duties (as noted in Chapter 5), so too do canonical administrators owe duties to the public juridical person they represent. If the same person occupies both roles, then they maintain those duties in both common law and canon law. Canons 1282–84 contain provisions determining the role and duties of the administrator and include that ‘[a]ll persons, whether clerics or laity, who faithfully take part in the administration of ecclesiastical goods, are bound

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\(^{899}\) Code of Canon Law 1983 canon 1278.
\(^{900}\) Ibid canon 1281.
\(^{901}\) Ibid canon 1283 1°.
\(^{902}\) Ibid canon 1284 §2 6°.
\(^{903}\) Ibid canon 1287 §1.
\(^{904}\) Ibid canon 1288; Lucas, Slack and d’Apice, above n 5, 209.
to fulfil their duties in the name of the Church, in accordance with law. Although it may not be apparent that laity acts in the name of the Church, they do so in their role as canonical administrators of a public juridical person, as their ultimate aim is to pursue the mission bestowed by canon 116 to that canonical body, and to pursue the mission 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, including that of a Catholic school. Canonical administrators are accountable in both canon law and common law to protect Church property. They must ensure 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.’

Canon 1283 introduces requirements as a prelude to the administrator taking on his responsibilities. Canon 1284 §1 requires all canonical administrators ‘to fulfil their function with the diligence of a good householder’. Canon 1284 §2 then lists the nine functions they must heed and exercise, which include provisions to ensure that the property is protected in common law, including insurance coverage where necessary, obtaining relevant approvals of the diocesan bishop and otherwise reflecting some of the good governance practices imposed by the Corporations Act (as discussed in chapter 5).

Canon 1284 §3 ‘earnestly recommend[s] that administrators draw up each year a budget of income and expenditure.’ Particular law of each diocese determines the form of that budget analysis, to take into account local customs and requirements. Canonical

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907 Ibid canon 1287; De Paolis, above n 872, 347.  
908 De Paolis, above n 872, 352. This also reflects the purpose of the common law not-for-profit structures recommended in chapter 5 as the common law structure of the schools.  
909 Code of Canon Law 1983 canon 1283 3°. These requirements include 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’.
administrators are accountable to their diocesan bishop with annual reports on the past year detailing income and expenditure;\textsuperscript{910} the diocesan finance council is to examine such reports.\textsuperscript{911} Canon 1287 §2 requires accountability to ‘the faithful’ but does not specify the form or content of the account reports:\textsuperscript{912} ‘[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.’

The norms vary in practice, but two effective means that could be adopted in Australia include posting such annual financial and other reports (and the diocesan council comments should there be any) on the website of the canonical body and its affiliated common law body, and on the website of the relevant competent ecclesiastical authority, which in most cases will be the bishop. However, national bodies such as EREA have a national profile and administration and some schools may have a presence in more than one state. 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.\textsuperscript{913} 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

\textsuperscript{911} Code of Canon Law 1983 canon 493 also compels the diocesan bishop, through his finance council, to complete annual projected budget reports for the diocese.
\textsuperscript{912} Ibid canon 1286 contains a requirement for canonical administrators to observe common law labour law and the Church’s teachings on social justice in addition to relevant provisions of Code of Canon Law 1983. Further discussion of this requirement is not directly relevant to the thesis question but some discussion by Kennedy on the relevant church teachings and other relevant canons are to be found in Kennedy, ‘Temporal Goods of the Church’, above n 11, 1488 – 1490.
\textsuperscript{913} The ACBC is the logical point of information gathering as the peak body in the hierarchical structure in Australia, and as a convenient point for 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 congregational school (and health institution) and its corresponding public juridical person. Each of those two names would then provide a further link that gave access to the common law constitution and canonical statutes, and the respective financial accounts (which in many cases will be identical). The accessibility of the common law constitution and financial documents are already required by common law as discussed in chapters 4 and 5.
common 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.

The final canon in Title II relates to the duty of canonical administrators to retain their positions:

the Church seeks in Canon 1289 to remind all administrators, including unofficial ones, that once they have undertaken to fulfil administrative responsibilities, they have an obligation not to abandon them suddenly without affording appropriate authorities ample opportunity to arrange for others to assume the responsibilities.914

The requirement protects Church property from any damage caused by the sudden absence of an administrator. There is no definition of ‘ample opportunity’, but the canonical statutes of a public juridical person should clearly state the period of notice required when any member of the canonical governance team intends retiring from a position (as should the common law constitution).915

7.2.3 Administration and Alienation of Temporal Goods

Book V contains laws for canonical administrators of church property relating to acts of:

- ordinary administration;916
- greater importance;917

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915 Good business practice also determines that there would be provision for sudden resignation due to illness or other personal emergency or circumstance and the mechanisms for appointment of an acting canonical administrator should be included in the canonical statutes.
916 As canon 1277 refers to acts of greater importance and acts of extraordinary administration, it presupposes that there are acts of ordinary administration, in order for other acts to be of greater importance or extraordinary. See chapter 7.2.3.1.
• extraordinary administration;\textsuperscript{918}

• greater importance that affects the patrimonial condition;\textsuperscript{919} and

• alienation.\textsuperscript{920}

Administration includes those acts required to ‘preserve, maintain, repair and improve a juridical person’s property’\textsuperscript{921} for the proper purposes of the Church, which includes the mission entrusted to them as juridical persons upon their creation. Alienation, on the other hand, is defined in the strict sense as ‘transferring full ownership of goods to a third party by an “inter vivos” act, onerously (by sale) or gratuitously (a donation)’.\textsuperscript{922}

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 into the ambit of canon 1295 by potentially affecting the ‘patrimonial condition’\textsuperscript{923} of the property and are thereby subject to canons 1291–94.\textsuperscript{924} 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

\textsuperscript{918} Ibid canons 1277 and 1281.

\textsuperscript{919} Ibid canon 1295.

\textsuperscript{920} Ibid canons 1291 to 1294.

\textsuperscript{921} Beal, above n 891, 109; these acts allow canonical administrators to exercise a power of governance by virtue of their office.

\textsuperscript{922} Exegetical Commentary on the Code of Canon Law, Vol IV/1, 130 cited in Lucas, Slack and d’Apice above n 5, 214. An inter vivos act is one done during the actor’s lifetime. For a detailed discussion on what may or may not constitute alienation of stable patrimony see Francis Morrisey, ‘The Alienation of Temporal Goods in Contemporary Practice’ (1995) 29 Studia Canonica 293.

\textsuperscript{923} Patrimonial condition and stable patrimony are discussed below at chapter 7.2.3.3.

\textsuperscript{924} They may also be acts of extraordinary administration and require compliance with relevant canons: Code of Canon Law 1983 canons 1291 to 1294.‘…the 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): Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’, above n 866, 502.
another person or entity. 925 ‘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’. 926

7.2.3.1 Administration

Canon 1277 makes a distinction between acts of major importance and acts of extraordinary administration but it does not define them; ‘this twofold division presupposes a third one: acts of ordinary administration’. 927 The significance of the distinction is that the diocesan bishop must approve acts of major importance for the diocese; for acts of extraordinary administration, he requires the consent of the finance committee and college of consulters before making a determination. 928 Acts of ordinary administration require no special authority.

7.2.3.1.1 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. 929 Acts of ordinary administration include the routine acts required to maintain an effective business and

925 Canons 1291 – 4, 1296 and 1298 relate to contracts of alienation; canon 1295 relates to contracts that are not alienation but which may worsen the patrimonial condition; canons 1297 – 8 relate to leases.
928 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.
929 Lucas, Slack and d’Apice, above n 5, 211.
therefore canon law ‘poses few major difficulties to those entrusted with the office of financial administrator’, making the position less daunting for members of the laity involved in Catholic school governance.

7.2.3.1.2 Acts of Extraordinary Administration

The Bishops’ Conference of a country is to determine acts of extraordinary administration for the diocese. The statutes of the public juridical person should state those extraordinary acts that are relevant to them to determine what acts ‘go beyond the limits and manner of ordinary administration’ to avoid canonical administrators acting invalidly, without written permission. 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. Canonical administrators in Catholic schools should be able to recognise 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;

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902 Morrisey, ‘Ordinary and Extraordinary Administration: Canon 1277’, above n 927, 716.
931 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: 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>. The Canadian and French Conferences have also defined some acts of extraordinary administration, see Beal, above n 891, 118. The Conferences in Switzerland and Scotland have also published lists: Morrisey, ‘Ordinary and Extraordinary Administration: Canon 1277’, above n 927, 718 – 721. The ACBC has not yet published similar lists categorising specific acts except in the second issue of The Canonist in each calendar year, which is only accessible with a paid subscription.
932 Code of Canon Law canon 1281 §1 and §2.
933 The ACBC achieves consistency across Australia if it provides a list of extraordinary acts, and publishes them on its website. If they do publish a list of extraordinary acts, the canonical statutes of public juridical persons may refer to the list published by the Bishops’ Conference, instead of specifying relevant acts.
- 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
- to commence or respond to, a common law suit. 934

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. 935

Acts of extraordinary administration also include acts that involve property transactions exceeding the maximum sum for alienation, which the ACBC determines on an annual basis. 936 In 2014 the ACBC set the annual minimum for alienation at $28,488 and the maximum amount at $5,697,674. 937 This range applies to public juridical persons other than congregations, to whom a maximum only relates. 938 In the current economic climate and considering the monies provided by state and federal governments for education, school fees and investment returns on some property holdings, it is feasible that a canonical administrator of a public juridical person governing a school will face transactions and dealings that exceed the maximum amount, and such an act requires the diocesan bishop’s approval. Transactions defined

934 Sacred Congregation for the Propagation of the Faith, 21 July 1856 referenced in Lucas, Slack and d’Apice, above n 5, 212; this list that became a part of canonical tradition pre-dates both the 1917 Code and the 1983 Code.
935 Under the 1983 Code however, any transfer of ownership is an act of alienation.
936 In 2007 the minimum sum was $23,578.00 and the maximum sum was $4,715,569.00: Lucas, Slack and d’Apice, above n 5, Appendix D ‘The Approved Amounts for Alienation of Temporal Goods of the Church (Canon 1292 §1).
938 Code of Canon Law 1983 canon 638 §3.
as acts of extraordinary administration warrant inclusion in the canonical statutes and the common law constitution. The public juridical person is not canonically liable for the invalid acts of its administrator, but they may be in common law.\(^{939}\)

7.2.3.1.3 Acts that Affect the Patrimonial Condition

Canon 1295 requires that the canonical statutes of the public juridical person conform to canons 1291–94.\(^{940}\) The purpose of the requirement for conformity is ‘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’.\(^{941}\) The most effective way to ensure that occurs is to incorporate the canons into the common law constitution by specific reference, thus providing the greatest protection to the temporal goods.\(^{942}\) Canon 1295 then directs canonical administrators to consider not only acts of alienation but also ‘any transaction by which the patrimonial condition of the juridical person could be adversely affected.’ Canon 1295 does not include every financial transaction a public juridical person may consider. The crucial factor in the canon is the requirement that the transaction adversely affects the patrimonial condition; it does not refer to any specific property but to property as a whole — ‘the patrimonial condition’. Kennedy explains the meaning of ‘patrimonial condition’ as follows:

> From the canonical point of view, economic well-being is rooted in stable patrimony, namely, in all property destined to remain in the possession of its

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\(^{939}\) 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 common law: *Code of Canon Law* canons 1281 §3 and 128.

\(^{940}\) Canon 1295 ‘refers to the economic condition (not the juridical condition) of the Church’: Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’, above n 866, 503.


owner for a long or indefinite period of time and, hence, property on which the financial future of a public juridic person depends...

‘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.’ Therefore, it may include mortgages, leases, easements, investments, loans and guarantees, restructuring the common law entity, settlement of litigation, bankruptcy protection, and acquiring or selling property lower than the minimum amount set by the ACBC. The canonical statutes and the common law constitution should refer to canon 1295 and ‘indicate that the norms of canons 1291–1294 are to be observed’.

What is financially astute in any particular situation will vary depending on where and when a transaction occurs. Canonical administrators must be aware of the potential affect a transaction will have on the patrimonial condition of the public juridical person. 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 1295, and/or the

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944 Ibid 1505; Beal, above n 891, 126.
945 Beal, above n 891, 127. 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’: Roche, above n 897, 343. The USCCB’s ‘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: United States Conference of Catholic Bishops, 12 November 2013, <http://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines.cfm>.
946 Renken, ‘Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295’, above n 866, 513. 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. See also generally Jung, above n 661, 85.
947 Jung, above n 661, 86.
canonical administrator seeks expert advice on the transaction’s likely effect on the overall financial condition of the stable patrimony.

7.2.3.2 Alienation

Title III of Book V, *Contracts and Especially Alienation*, commences with canon 1290 observing relevant contract law in issues relating to the alienation of property. Kennedy explains this ‘canonising’ of common 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 [common] law applicable in the territory, except where such provisions are contrary to divine law or canon law provides otherwise.\(^948\)

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. It contains three components:

1. there be a lawful assignment;
2. it constitutes the stable patrimony of the public juridical person; and

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\(^948\) Kennedy, ‘Temporal Goods of the Church’, above n 11, 1493. In Catholic schools, it is unlikely there will be provisions of a contract that are contrary to divine law except perhaps in provisions of an employment contract relating to lifestyle. 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 common law but rather add further requirements to those of common 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*’. Austin, ‘The Interface of the Code of Canon Law and the Civil Law – Interpretations, Applications, Implications’, above n 19, 65.
3. the value of the alienated property exceeds ‘the sum determined by law’.  

7.2.3.3 Stable Patrimony

The *1983 Code* introduced the term ‘stable patrimony’ to Book V but did not define it. However, elsewhere stable patrimony has been defined as

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

Kennedy distinguishes four categories of stable patrimony:

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).

These four categories constitute property designated for long-term use or gain and in so doing allow the public juridical person to fulfil their mission. Canons 1254§1, 1285, 1291 and 1295, consistent with canon 114 §2, suggest that every public juridical

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949 The maximum amount prescribed in Australia by the Australian Catholic Bishops’ Conference currently is $5,697,674 and the minimum sum is $28,488.
950 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’, above n 13, 135 – 143. The main reason for the inclusion was to protect the property of the public juridical person from incompetent or dishonest administrators.
951 Kennedy, ‘Temporal Goods of the Church’, above n 11, 1495. For similar definitions from several international canonists, see the discussion of Renken in ‘The Stable Patrimony of Public Juridic Persons’, above n 13, 144 – 147.
person must possess patrimony.\textsuperscript{953} Not all property is stable patrimony; canon 1291 requires its designation as such.\textsuperscript{954} 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 \textit{1983 Code} to determine the stable patrimony of a public juridical person, but the canons do not specify which competent authority designates it.

It seems appropriate that in most cases, for the purposes of the thesis question, the competent authority directly responsible for the public juridical person that is governing the school (usually the diocesan bishop) should be the designating competent authority. To alleviate some of the uncertainty of what property constitutes stable patrimony, and thereby provide better protection for the property in both canon and common law,\textsuperscript{955} the canonical statutes and common law constitution should clearly state:

- which is the relevant competent authority designating the stable patrimony;
- define ‘stable patrimony’; and

\textsuperscript{953} 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’: De Paolis, above n 872, 356.
\textsuperscript{954} ‘Temporal goods which are not part of stable patrimony are liquid or free capital’: John A. Renken, ‘The Principles Guiding the Care of Church Property’ (2008) 68 \textit{The Jurist} 136, 175.
\textsuperscript{955} If the property is first designated as stable patrimony in the statutes and constitutions, it may be designated non-stable patrimony with the approval of the competent authority. When this occurs, amendment of the statutes and constitution is necessary. If that act of redesignating the property involves an alienation of the property then the norms of canons 1291 – 1294 apply to the change. \textit{Any} act relating to the stable patrimony that does, or may, involve an act of alienation or an act that will devalue the patrimonial condition of the public juridical person, are subject to canons 1291 – 1294. Gifts received by a public juridical person may also be designated as stable patrimony and subject then to the norms of canons 1291 – 1294 but they would also be acts of extraordinary administration and both require the approval of the competent authority.
• incorporate a section that defines types of property that are stable patrimony for that public juridical person.\footnote{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; these can be included as such in the statutes and constitution. The act of defining property as stable patrimony may be an act of extraordinary administration. If it is, then the norms of extraordinary administration, discussed above in the thesis, also apply: Renken, ‘The Stable Patrimony of Public Juridic Persons’, above n 13, 154.}

Canon 1291 restricts alienation of stable patrimony to ensure that the stability, and therefore the mission, of the public juridical person is not threatened. Clear definitions in the statutes and constitution will assist that purpose.

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 cause’ for alienation of stable patrimony in canon 1293 give the competent authority relatively wide discretion in determining whether to grant approval. If after consideration of a request it is determined that the overall stable patrimony is secure, approval for the alienation will normally be given,\footnote{For a detailed discussion of types of alienation, including aggregated alienation see the discussion of Kennedy, ‘Temporal Goods of the Church’, above n 11, 1497 – 1499.} 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.\footnote{\textit{Code of Canon Law 1983} canon 1292 §2.} 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 common law but is canonically invalid, canon 1296 permits the competent authority\(^{959}\) to take action to ‘vindicate the rights of the Church’; it is not a mandatory requirement that he take action.

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;
- a written valuation;\(^{960}\)
- 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
- written evidence that [common] law has been observed.\(^{961}\)

It follows that as written appraisals of the value of the property are required, it is to ensure that the property not be alienated for less than it is worth.\(^{962}\)

\(^{959}\) 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’: Kennedy, ‘Temporal Goods of the Church’, above n 11, 1506.

\(^{960}\) ‘Just clause’ includes ‘urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason’: Code of Canon Law canon 1293 §1 2°. Canons 1293 §1 1 and §1 2 require just cause for the alienation and a written valuation.

\(^{961}\) Lucas, Slack and d’Apice, above n 5, 216.

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. 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.’\textsuperscript{963} If there are excess proceeds from the alienation, they must return to 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’,\textsuperscript{964} 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. Any lease affecting ecclesiastical goods must comply with the norms determined by the ACBC; include the need to comply with common 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 of less than nine years duration.\textsuperscript{965}

7.2.3.4 Principles of Canonical Administration

Renken lists ten principles that relate to the proper administration of ecclesiastical property (which includes temporal goods),\textsuperscript{966} which canonical administrators should recognise, identify, and understand:\textsuperscript{967}

\textsuperscript{963} Code of Canon Law 1983 canon 1294 §2.
\textsuperscript{964} Ibid canon 1295.
\textsuperscript{965} Lucas, Slack and d’Apice, above n 5, 217.
\textsuperscript{966} Renken, ‘The Principles Guiding the Care of Church Property’, above n 954, 136.
\textsuperscript{967} This is no less true for canonical administrators of Catholic schools; it would also be wise for the governance body of the common law structure of the school to adopt so they are able to seek canonical guidance when relevant.
1. *Communio* — the Church is a communion of peoples and entities including private and public juridical persons;

2. subsidiarity — expressed in law by requiring the establishment of particular law and local authorities determining what are extraordinary administrative acts and minimum and maximum limits relating to approvals for alienation of stable patrimony;

3. proper purposes of temporal goods — as stated in canon 1254 §2 and which canonical administrators must ensure are used appropriately ‘with the diligence of a good householder’ and ‘in accordance with the law’; 968

4. collaboration — canonical administrators must act wisely and in collaboration with experts and others in relation to subsidiarity 969 to protect the Church’s temporal goods;

5. vigilance — the diocesan bishop has a duty of vigilance over public juridical persons and may intervene where necessary; 970

6. justice in employment — in compensation and employment issues;

7. respecting the intention of donors — canonical administrators must honour the purpose of the donor and the founder of the public juridical person; 971

8. observance of common law — canon 1290 ‘canonises’ common law; 972

968 Code of Canon Law 1983 canons 1284§1 and 1282 respectively.

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

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


972 Examples 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 common law structures); canon 1284§2 3° (administrators must observe common law requirements to avoid harm to Church property); canon 1286 1° (observance of common law relating to social policy and employment); canon 1293§3 (observing precautions ‘drawn up by lawful authority’ which includes both canon and common law).
9. transparency and accountability — canon 1282 directs canonical administrators to be accountable for their actions;\textsuperscript{973} and

10. protection for future generations — the norms of Book V are to protect the temporal goods of a juridical person in order to achieve their mission. That directive and legislative intent necessarily considers that the mission will continue into the future. 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.

7.2.4 Summary

The preceding discussion considered the requirements of Book V of the 1983 Code. This section summarises those parts of Book V that relate to the congregational school when considering new common law structures for the governance and ownership of their schools.

7.2.4.1 The Purpose of Book V

The purpose of the canons relating to alienation and stability of patrimonial property are to ‘protect the economic viability and stability of each public juridic person by guarding against imprudent loss of temporal goods by any individual public juridic

\textsuperscript{973} For example, 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 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 form 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) canons 1307§1 and §2 (writing a document of ‘obligations arising from pious foundations’ and displaying it in ‘a conspicuous place’).
person in the Church. Transparency and accountability are essential. The requirement for a just reason in canon 1293 §1 is to ensure that the alienation of any property does not harm the stable patrimony of the public juridical person. All proposed alienations that come within the ambit of canon 1291 must have the approval of the competent authority. There are many instances where alienation does not have a negative impact on the value of the patrimonial goods — it increases the value, for example, in real estate investment. ‘Church temporal administration is in principle a highly diversified reality and a particularly fruitful area for lay involvement’.

The Church has an opportunity to realise this fruitful lay involvement by approving the alienation of temporal goods of a congregation that is no longer willing or able to continue their mission of Catholic education. This would ensure the continuation of the congregational schools with laity taking governance roles. The alienation transfers ownership of the school to a new public juridical person established to continue the congregation’s existing mission of education. Book V must be adhered to when alienating property, alongside the common law requirements.

7.2.4.2 Change of Ownership of Temporal Goods

Canon 1291 restricts, rather than forbids, alienation of stable patrimony. It is therefore possible for an existing congregation to transfer not only the governance of some or all of their existing schools to a new or existing public juridical person, but also to transfer all or part of their stable patrimony to that public juridical person with the approval of the competent authority. The competent authority must consider the

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975 Green, above n 910, 55.
976 Ibid 55 Green’s emphasis.
977 Code of Canon Law 1983 canon 121. The Supreme Tribunal of the Apostolic Signature decreed on May 7th 2010 that ‘the goods of the suppressed parish or juridic person do not go to the juridic person immediately superior (cf cannon 123), but, in accord with the norm of cannon 121 to the parish or juridic
norms of Book V when considering such a request, whilst acknowledging that the congregation, remaining as a public juridical person albeit without its education mission, or with limited involvement in it, must retain enough property to protect its own viability and stability. The competent authority must bear in mind not only the approval and procedures for alienation, but also the motivation\textsuperscript{978} for the request in the first place.\textsuperscript{979}

7.2.4.3 Canonical Administrator Duties

Lay canonical administrators must remember above all that their duty is to the Church, which includes observance of canon law. Therefore, the lay administrators have an actual responsibility to discharge their canonical duties relevant to common law legal structures that might apply to the operation of a congregational school. De Paolis stated at the time of the promulgation of the 1983 Code:

\begin{quote}
the norms of Book V ... remind us that public juridical persons in the Church have the right to goods because they share in the purposes of the Church and in the mission of the Church, live in communion with the Church, and act in the name of the Church, and are therefore in communion with the Roman Pontiff, the visible sign of Church unity and its guarantor. Precisely these requirements of unity and communion demand the observance of the canonical norms on the administration of church goods.\textsuperscript{980}
\end{quote}

Jung notes that:

\begin{quote}
\end{quote}

\begin{flushright}
\textsuperscript{978} Code of Canon Law 1983 canon 1293 § 1 1° defines just cause: ‘… urgent necessity, evident advantage, or a religious, charitable or other grave pastoral reason’.
\textsuperscript{979} Ibid canons 1299 – 1310 refer to the pious dispositions and pious foundations. These may be relevant to a congregational school.
\textsuperscript{980} Velasio, above n 872, 354.
\end{flushright}
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.\textsuperscript{981}

The structure should be able to reflect that canonical administrators are responsible for the economic viability and stability of the public juridical person, or other Church entity, established by the competent ecclesiastical authority. That responsibility is exercised in accordance with the canons discussed above in this section.

7.3 JURIDICAL PERSONS

One option for canonical governance is the public juridical person. In this section, the categories and relevant aspects of juridical persons that relate to Catholic school governance are examined.

7.3.1 Categories of Juridical Persons

The congregations are public juridical persons\textsuperscript{982} currently providing the canonical governance to own and administer their schools as Catholic schools. The temporal goods of the congregation are Church property and as discussed above alienation of the stable patrimony must not devalue it. Transferring temporal goods to another public juridical person is not always alienation. This section considers the purpose and powers of the public juridical person to determine whether this is a viable option for congregations seeking new canonical governance for their schools.

\textsuperscript{981} Jung, above n 661, 102.
\textsuperscript{982} Code of Canon Law 1983 canon 634 §1.
7.3.1.1 Private Juridical Persons

Juridical persons may be private or public. A private juridical person has the following elements:

- it operates in its own name rather than in the name of the Catholic Church;
- its property is not ecclesiastical;
- it is only governed by its statutes (not the 1983 Code unless and except where specified); and
- it is often associated with private associations of Christ’s faithful.\(^983\)

Book V of the 1983 Code does not apply to private juridical persons;\(^984\) there is, therefore, no protection afforded to the property through either the regulation of transactions in property or the control of canonical administrators. As the property of private juridical persons is not ecclesial property, the Holy See is reluctant to allow a congregation (which is a public juridical person) to transfer their property to a private juridical person as the transfer would contravene the canons relating to alienation of temporal goods.\(^985\) The competent authority may give approval, but it is unlikely where the value of the school property is substantial or the major part of the congregation’s stable patrimony. Church law distinguishes between public and private juridical persons on the basis that private juridical persons can only be established by decree and do not act in the name of the Church.\(^986\) A private juridical person does not carry out its work in the name of the Church and it is essential by its very nature that Catholic

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\(^983\) Francis G Morrisey, OMI ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’ in Maureen Cleary (ed), Public Juridic Persons in the Church, Conference Presentations, Sydney 2009, 18.

\(^984\) Code of Canon Law 1983 canon 1257 §1.

\(^985\) Ibid canons 1284, 1291-1296; the transfer is not forbidden as the Holy See has the discretion to allow an alienation to take place.

education is not only seen to be ‘Catholic’, but that it is exercised in the name of the Church. The private juridical person is, therefore, an unsatisfactory canonical body for the purposes of the thesis question. Further discussion in the chapter relates only to public juridical persons.

7.3.1.2 Public Juridical Persons

A public juridical person ‘carries on the apostolate for which it was established’ in the name of the Church (eg the continued mission of Catholic education through particular schools), and those who carry out that mission should ‘faithfully reflect the ideas, purposes, and values of the church’. 987 A public juridical person operates in the name of the Catholic Church. Its property is ecclesiastical property and subject to the requirement to protect the property and its value. A congregation transferring the ownership and governance of its schools may transfer the property 988 to another Church body, such as another existing or a new public juridical person, without loss of value to that property. Its statutes and canon law govern it, particularly in relation to accountability and its finances, including those relating to its property. 989 All public juridical persons have, in addition to rights and obligations, 990 the following elements in common:

- statutes approved by the relevant ecclesiastical authority; 991
- physical persons who represent the juridical person; 992

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988 This includes the transfer of common law ownership of property associated with the school to any new common law or juridical person body that was part of the canonical stable patrimony.
991 Ibid canon 117.
992 Physical persons represent a juridical person, and they may include laity. The rights and obligations of the laity are contained in canons 224 – 231. Laity (and their rights and obligations) are relevant to the juridical person as laity represent the juridical person just as directors represent a company in common law. The role of the laity is considered at chapter 7.5.
• some provision for accountability (usually reporting to the relevant competent authority);
• a name that corresponds to its nature, for example, Iona Presentation College;
• a specified purpose,\(^993\) such as education;
• perpetuity;\(^994\) and
• decision making powers.\(^995\)

Although by its very nature a public juridical person has perpetuity, a competent authority may suppress it; alternatively, suppression may occur by virtue of the fact that it has ceased to exist for a period of 100 years.\(^996\)

The 1983 Code created new possibilities for public juridical persons. The 1917 Code included parishes, dioceses and congregations\(^997\) as juridical persons, but the new terminology introduced in the 1983 Code in canons 114–17 extended it to include members of the laity. A public juridical person acts in the name of the Church and is therefore capable of governance in Church institutions, such as Catholic schools, previously governed and administered by congregations. The Church has the potential to establish new public juridical persons to allow for innovative and effective continuation of Catholic ministries, including education, which will preserve the current mission and charism of a congregation and ensure that diversity within the Church continues.\(^998\)

\(^{993}\) Code of Canon Law 1983 canon 114.
\(^{994}\) Ibid canon 120.
\(^{995}\) Ibid canon 119; Morrisey, ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’, above n 983, 19.
\(^{996}\) Code of Canon Law 1983 canon 120.
\(^{997}\) Thornber and Gaffney, above n 7, 3.
\(^{998}\) ‘[juridic persons] receive a mission. It is within the limits of their mission that they act in the name of the Church’: Gauthier, above n 784, 91.
7.3.1.3 Canon Law Relevant to Public Juridical Persons

Canons 113 §2 and 114 recognise three types of people in the Church: physical, moral and juridical. A physical person is as it says — physical individuals. A moral person is a group or succession of natural persons who are united by a common purpose and, hence, who have a particular relationship to each other and who, because of that relationship, may be conceived of as a single entity. A moral person is what we refer to when we speak of a team, a university class, an association.

A juridical person ‘is 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’. All three categories interrelate when considering a juridical person. Physical persons represent the juridical person; usually a moral person exists prior to the creation or conferment of a new juridical person. There should be ‘either a group of natural persons committed to some apostolic purpose, or an accumulation of material goods set aside for an apostolic purpose — to serve as the substratum or basis in reality for the artificial personality of the juridic person.’

Public juridical persons are constituted as such by either the law itself (eg as parishes, dioceses, congregations) or by a decree of the competent authority; the 1983 Code does not specify the competent authority. Generally, ‘international public juridic persons are the province of the Holy See, national public juridic persons are supervised by the Conference of Bishops, and diocesan public juridic persons are the responsibility of the diocesan bishop.’ Any new public juridical person created to

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1000 Ibid 155. This is analogous to the separate legal entity in common law.
replace a congregation’s work could reflect the canonical (and often geographical) boundaries of the ministry. For example, EREA extends to several countries in Oceania and therefore the Holy See was an appropriate ecclesial authority to create it. The Holy See considers requests to transfer a ministry to create a union with another federation or confederation with other congregations.1003 If a congregation is a pontifical congregation, it requires pontifical permission to transfer the governance and ownership of its schools; the diocesan bishop however, may create any new canonical body established for the future governance and ownership of the school. If a former congregational school only operates within a state, does not intend to diversify further within Australia, and as the diocesan bishop is the relevant competent authority for the purpose of Book V and of supervision of a Catholic school, it seems appropriate that its new canonical status relate to that diocesan boundary.

7.3.1.4 Statutes

Largely, its statutes govern a public juridical person. Just as the constitution of a common law structure is essential in defining the proper and appropriate governance of that structure, the statutes of the public juridical person hold the same purpose. Both the canonical statutes and common law constitutions should specifically articulate that the school is to continue with the charism of the original founder, which transcends every aspect of the school’s operation. The common law constitution of EREA Trustees, discussed in chapter 5, exemplifies how the charism and history of Edmund Rice is articulated and continually developed within EREA schools.1004

1003 Code of Canon Law 1983 canon 582.
1004 For example, EREA Trustees Constitution Preamble (1.3 – 1.7), and various definitions in clauses 3.1, 4.2, 4.5, 9.1.1, 9.2.1 and 13.5
To provide clarity in the governance structures and the roles of the respective members, the statutes should clearly articulate the governance of both the public juridical person and the common law structure and how the two bodies and their members interrelate. ‘Cohesion in descriptions of the ecclesial identity of the work, the observance of canonical norms, the competent authority for certain decisions, and the norms for suppression’\(^{1005}\) is of utmost importance. The canonical statutes should therefore include, but not necessarily be limited to:

- the name of the public juridical person and the authorising authority;
- the commencing date of the public juridical person and the reasons for its establishment, eg ‘to ensure the continuity of Catholic education in the tradition of [Venerable Nano Nagle and] the commitment to operate in the teachings, discipline and law of the Catholic Church’;\(^{1006}\)
- articulation that the schools are to continue with the charism of the original founder, which should transcend every aspect of the schools’ operation;
- a definition section;
- the relationship of the public juridical person to the common law corporate structure;
- the name and place of operation of the public juridical person, but generalised to the diocese rather than a physical street address (in the event that it may change and the statutes would need to be altered to reflect that);
- the purpose of the public juridical person in general terms, eg education of children from K–12 in the context of Catholic faith in the tradition of [the

\(^{1005}\) Holland, ‘Sponsorship and the Vatican’, above n 987, 36.

Venerable Nano Nagle and] with special regard given to educating the poor and needy;

- a ‘description of the relationship of the public juridical person with the Church’ both at a universal and a particular level;\textsuperscript{1007}
- the relationship of the public juridical person to the relevant ecclesial authority, which in the case of Catholic schools must recognise the role of the diocesan bishop provided by canons 394, 397 and 804–6;
- details of temporal goods, which include an annexed inventory of all temporal goods and their current values;
- the process and requirements relating to financial issues of ordinary and extraordinary acts;
- the officers of the public juridical person, including chairperson, treasurer and secretary and ‘director’ of formation;
- the process by which officers are appointed and the maximum number of officers;
- the process by which members are appointed and the maximum numbers of members;
- the category or categories of members if any, including any conditions of membership of the public juridical person;\textsuperscript{1008}
- the process for recognition of acknowledgement of membership when it commences, such as a requirement for the prospective member to sign and return a form of acceptance to the public juridical person and the relevant

\textsuperscript{1007} Holland, ‘Sponsorship and the Vatican’, above n 987, 36.
\textsuperscript{1008} Canon 306, though referring to Associations of the Faithful can draw, by canon 17, a parallel to public juridical persons, states that valid membership acknowledges that the person becoming a member must be able legitimately to hold that position which may include any necessary academic qualifications or general skills.
competent authority. In addition, if it is decided that only practising Catholics may be members of the public juridical person that must be explicitly stated in the statutes;\textsuperscript{1009}

- the reserve powers of the congregation (where relevant);
- the powers, rights, and duties of the members.\textsuperscript{1010} Canon 1284 provides a non-exhaustive list of responsibilities of members in relation to the property of the public juridical person. In addition members should be specifically empowered to:
  a. uphold the purpose of the public juridical person;
  b. uphold the teachings of the Catholic church;
  c. recommend any necessary changes to the statutes;
  d. approve changes to the existing by-laws; and
  e. approve specific financial transactions;\textsuperscript{1011}
- details of meetings, including how many meetings are to be held per annum, what technological methods may be used to conduct and attend meetings, and the proper preparation for meetings;
- the quorum required at meetings;
- the process for passing resolutions;
- how many votes a member has, and details of any different voting rights;
- the process for how voting is conducted;

\textsuperscript{1009} ‘...canon law neither forbids nor invalidates the membership of non-Catholics in public associations of the Christian Faithful’, Amos, above n 1002, 35; and by parallel, canon 17 permits this to extend to public juridical persons.

\textsuperscript{1010} These must also include the line of accountability in relation to those powers, rights, and duties which accountability should ultimately rest with the relevant competent authority especially in relation to ecclesiastical property owned by the public juridical person.

\textsuperscript{1011} Holland, ‘Vatican Expert Unpacks Canonical Public Juridic Person Process’, above n 1006, 57.
• the mechanisms for altering the statutes and reference to any by-laws that are
drafted to accompany the statutes;¹⁰¹² and
• the circumstances where suppression of the public juridical person may occur
including to whom or what there may be a transfer of the ecclesiastical
property upon suppression.

Canonical statutes are similar in form, purpose and content to constitutions of common
law structures. In practice there are differing approaches to the drafting of the statutes
with some being very detailed and others far less so. Where they have less content, the
remaining issues are generally included in by-laws of the public juridical person. For
the sake of clarity and direction for lay canonical administrators, it follows that the
above list be contained either in the statutes or in the statutes and by-laws of the public
juridical person. The ‘competent authority’ must approve the statutes of a prospective
public juridical person.¹⁰¹³

Canon 1284 requires that administrators of ecclesiastical property remain ‘good
stewards’. Canon 1280 requires a public juridical person to have a finance council on
which sit at least two counsellors in addition to the administrator. The canon also refers
to the ‘norms of the statutes’ of the public juridical person, which must be adhered to
by the finance council. The statutes therefore should include clear instructions of the
process and requirements relating to financial issues pertaining to the public juridical
person. Although canon 1280 does not mandate any specific form that the council must
take, the model provided for diocesan finance councils in canons 492, 1277 and 1292

¹⁰¹² Morrisey, ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’, above
n 983, 22; Amos, above n 1002, 35.
provides a workable model for the public juridical person’s finance council in most instances.

If the canonical statutes are detailed enough to provide, among other things, a clear process for the public juridical person to function and for the continued identity and protection of the charism, they may also work in harmony with the common law constitution. The common law constitution may also incorporate, or at the very least refer to, the canonical statutes, so any breach of the canonical statutes is also a breach of the common law statutes, providing a safeguard in common law to ensure the canonical requirements are adequately met.¹⁰¹⁴

The statutes should not be rigid, but flexible enough to adapt to the development of the public juridical person; a fine balance between generalisation and specific detailing is desirable. Any by-laws of the public juridical person are more likely to be, and are more easily, amended than the statutes. These should include as a minimum:¹⁰¹⁵

- a clear explanation of the relationship of the public juridical person to the common law structure;
- details of eligibility of membership and of the roles of members and of the officers of the public juridical person;

¹⁰¹⁴ Russo notes in relation to contracts between church entities and others in the United States that ‘courts have allowed documents that were not part of the contracts themselves, such as The Catechism of the Catholic Church (1994) to be incorporated into agreements by reference, meaning that although they were not explicitly included as part of the agreements, the parties were expected to comply with their terms’: Charles J Russo, ‘Canon Law, American Law, and Governance of Catholic Schools: A Healthy Partnership’ (2009) 13 (2) Journal of Catholic Education 185, 193. It is possible Australian courts would do the same with contractual arrangements. It is not certain whether this would extend to inferring Church documents by reference into constitutions; any relevant Church documents should be specifically mentioned in the common law constitution thus protecting Church ‘rights’.

¹⁰¹⁵ By-laws generally provide more detail than the canonical statutes. The statutes state the general norms and the by-laws provide the details to those norms so the two documents should share a similar structure.
• details of any committees of the public juridical person, including their names, role, terms of reference and eligibility for membership;

• a clear mechanism for amendment of the statutes and the by-laws; and

• which church organisation assumes responsibility for the public juridical person (eg the Holy See, the diocesan bishop).1016

Two aspects are of utmost importance in the canonical and common law structures: communication between the bodies and those responsible for the governance in each, and formation of those not only responsible for the governance but for the management and daily running of the school. Achievement of the communication aspect is easier where the canonical administrators and members of the common law governance are largely the same people. Ensuring canonical administrators are aware of common law issues and conversely common law governors are aware of canonical issues requires special attention. Formation must commence prior to appointment as a canonical administrator and continue whilst holding that position.1017 Its purpose is to ‘develop within the ... people, particularly ... leaders, an understanding of our mission, Vision and Values, our origins, traditions and history, and its grounding within the Catholic faith tradition’.1018 As it relates to identity and mission, it also encapsulates charism.1019 A requirement for continual formation of canonical administrators expressed in the statutes ensures the inclusion and exercise of relevant formation.


1017 The Institute for Legal Studies Report identified that in their study ‘School boards tend to be strongest in [the diocese of] Sandhurst where considerable efforts are put into formation of members of school boards’: Institute of Legal Studies, above n 140, 5. Formation is considered at chapter 7.6.


1019 Formation and a suggested Framework for it in public juridic persons will be discussed in more detail at chapter 7.6.
The public juridical person should report annually to the competent authority,\textsuperscript{1020} including:

- a list of formation programs held that strengthened the Catholic identity, charism and mission of the congregation that was formerly the sole sponsor of the school;
- a statement of temporal goods, including specified stable patrimony;
- a financial statement of the common law structure;
- a set of goals or challenges for the following year;\textsuperscript{1021} and
- any other issues of relevance or importance to the Catholic mission of the institution.

7.3.1.5 Application for Public Juridical Person Status

Public juridical persons are accountable to a higher competent authority, usually the one that created them. They are established to ‘give continuity’ to activities that include ‘works of piety, of the apostolate, or of charity, whether spiritual or temporal’.\textsuperscript{1022} The public juridical person transferring its ministry to another public juridical person must make an application for new public juridical person status to the relevant competent authority after consultation with the diocesan bishop to whom the application is made. The competent authority may also be the diocesan bishop. Accompanying the formal request is:

1. an explanation by the congregation explaining their decision to make the request and any impact it will have on the congregation, including a copy of

\textsuperscript{1020} \textit{Code of Canon Law 1983} canon 1287 §1.
\textsuperscript{1022} Morrisey, ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’, above n 983, 18.
the minutes of the Chapter or other meeting of the congregation that approved the request and a brief history of the congregation in the diocese;
2. a list of the specific ministries that the congregation is seeking to transfer, particularly where the congregation engages in more than one ministry;
3. the name of the intended canonical body;
4. the financial status of the congregation with a list of all ecclesiastical property they intend to transfer and that they intend to keep in order to comply with canon 1284 regarding the protection of ecclesiastical property;
5. a statement of assets in order to demonstrate that the ‘new’ venture is financially viable, a prudent step in light of canon 114 §3, which requires the competent authority not to confer public juridical personality unless it possesses ‘the means which are foreseen to be sufficient to achieve their designated purpose’;
6. a copy of the canonical statutes and by-laws;
7. notification of the diocesan bishop’s approval (even if the request is being made to him); and
8. the name, constitution and certificate of incorporation of the common law body and its relationship to the intended public juridical person.1023

It is not necessary that the congregation transfers all their property to the new public juridical person but congregations must consider their own financial needs relating to an ageing population of members. Canon 610 requires that a house not be ‘erected unless it can be judged prudently that the needs of the members can be suitably provided for.’ Whilst canon 610 relates to congregations seeking to erect a house, the spirit and purpose of canon 610 §2 suggests that it applies where the congregation is

transferring part or all of their ministry. Any congregation considering transferring its ministry to a new public juridical person must therefore retain enough assets to ensure this provision, which applies to both the congregation and to the new public juridical person. Proper determination of which entity owns which property on the transfer of canonical governance is crucial.

Open communication is essential and to be encouraged between the public juridical person and the diocesan bishop; adopting the same accountability reporting process for both the canonical and common law governance structures will assist effective communication. In matters relating to education in WA, this communication with the diocesan bishops is possible through the CECWA and CEOWA, who already represent the bishops in the administration of Catholic education.

7.3.2 Sponsorship/Canonical Governance

The central aspect of administration of the canonical body is its governance. The public juridical person is the ‘mechanism’ for canonical governance (or sponsorship). Public juridical persons are artificial entities in that they are the aggregate of the persons who form them. The administration of the public juridical person and its temporal goods requires canonical governance by physical persons entrusted to ‘preserve and foster the expressed mission of the public juridical person’ and safeguard its property. To that end, the notion of ‘sponsorship’ has developed, with an increasing participation of the laity. The last section discussed the public juridical person and its role in

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1024 Code of Canon Law 1983 canon 114 §3.

1025 Holland, ‘Sponsorship and the Vatican’, above n 987, 32; in research sources those physical persons that administer the public juridical person are sometimes referred to as sponsors, trustees or members.
Catholic governance. This section considers the role of the people who form the public juridical person.

7.3.2.1 What is Sponsorship?

The term ‘sponsorship’ in the context of canon law issues is most widely used in the US in relation to Catholic health care ministries, but this is not its primary use in Australia. It has, in the context of the Church, no theological, canon law or common law basis. First coined in 1968 in the ‘McGrath’ thesis, it raised what became a controversial discussion surrounding governance in the Church. Since then ministries in the US have attempted to define what sponsorship actually is and in doing so have created a certain amount of confusion. What they do agree is that it does not relate to ownership, but rather administration. It is a call to the apostolate, a ministry ‘in the name of the Church’ just as the congregations answered the call to the ministry of teaching in their schools; it is a ‘relationship with the Catholic Church’. The term suggests a ‘responsibility of trust, of attending to something sacred’. Sponsorship is ‘[t]he relationship between the church that situates the canonical responsibility of a juridic person for incorporated apostolic works that are part of a church entity.’

When a congregation transfers its canonical governance to a new public juridical person, that new body ‘assumes the sponsorship responsibilities previously assumed

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1026 John J McGrath, Catholic Institutions in the United States: Canonical and Civil law status (1968). McGrath’s thesis can be summarised in his own words, at 33: If anyone owns the assets of the charitable or educational institution, it is the general public. Failure to appreciate this fact has led to the mistaken idea that the property of the institution is the property of the sponsoring body’. Acceptance of his thesis had significant ramifications on the alienation of Church property in the United States when congregations transferred the sponsorship of their activities to new entities and did not consider the requirements of Book V of the 1983 Code.
1027 Holland, ‘Sponsorship and the Vatican’, above n 987, 32.
1029 Mary Kathryn Grant and Margaret Mary Kopish, ASC ‘Sponsorship: Current Challenges and Future Directions’ (2001) July August Health Progress 19.
1030 Grant, “Reframing” Sponsorship’, above n 2, 38.
by the congregation’. The term ‘sponsorship’ is not used, let alone defined, in the 1983 Code, but it describes the work done by a group or person that are done in the name of the Catholic Church — they are Catholic works. The term carries with it obligations, rights and duties in relation to that group or person. Sponsorship in a Catholic context reflects the ‘mission and ministry of the church’ and the mission is to teach, sanctify and ‘to serve through governance’. The congregation has sponsorship of a congregational school. Where a congregation seeks to withdraw from the responsibilities of the school and hand it over to another juridical person, they are also transferring the sponsorship.

Most of the literature discussing sponsorship relates to US health care ministries where the founding congregation of the facilities retain some involvement in the hospitals. Australia has not adopted the term ‘sponsorship’ in relation to congregational responsibilities (although its use is becoming more frequent in relation to Catholic health care ministries), as it is more usually reserved and used in the context of supporting an event or organisation, usually in a financial capacity. The term ‘governance’ is used in Australia when discussing issues relating to the future of

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1032 Francis G Morrisey, OMI ‘Toward Juridic Personality’ (2001) July-Aug Health Progress 27. It ‘(in a canonical sense) is the fiduciary relationship which exists between a canonical entity…and its ministries’ and the canonical administrators have ‘both faith obligations (ensuring the maintenance of Catholic identity) and administrative obligations (ensuring right procedures’; Leavey, above n 3, 22.
Catholic schools and education. In this thesis, the terms ‘canonical governance’ and ‘canonical administrator’ replace the term sponsorship and sponsors. Generally speaking, for a work to be considered ‘Catholic’ it is conducted through a juridical person; canon 803 §1 enjoins schools using the name ‘Catholic’ to obtain the approval of the diocesan bishop (or other relevant authority). Canonical governance entails doing Catholic works in the name of the Church, which must:

- be for a spiritual purpose;
- answer a need (be for a genuinely useful purpose);
- have sufficient means to achieve its purpose;
- have perpetuity;
- be entrusted to good stewards; and
- be a work of quality.

As already discussed, the laity have had an increasing involvement in Catholic governance since Vatican II, but that involvement has traditionally been in partnership with the congregations. Laity are increasingly ‘replacing’ religious in governance positions. Because the congregations are withdrawing from these ministries, the

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1034 Leavey recognises that it was ‘a relatively new term in Catholic education circles’ used in Australia from the late 1990’s: Leavey, above n 3; National Catholic Education Commission Catholic School Governance (May 2002), 11. The term ‘sponsorship’ is used more in relation to the health care institutions such as St John of God Health Care, but rarely in educational institutions.
1035 The term canonical governance relates well to the discussion in previous chapters relating to common law governance. In addition, it is the term adopted by Australians Thornber and Gaffney, above n 7.
1036 Except where it appears in a direct quotation as the term sponsorship is in current use in the United States, and in some Australian health care ministries.
1038 Ibid canon 114.
1039 Ibid canon 114.
1040 Ibid canons 114 §3 and 610.
1041 Ibid canon 116.
1042 Ibid canon 806; Morrisey, ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’, above n 984, 14.
theology currently based on religious life must be replaced by one relating to the laity who are taking their place — the theology of baptism. This requires application of a different set of canons in the 1983 Code and as such the canon law applying to the congregational schools will shift in some respects when the laity assumes a more active and responsible role in canonical governance of them, without the congregations.

7.3.2.2 Combined Canonical Governance Transition and Reserve Powers

Some congregations have already considered their future in Catholic education and have chosen to work in partnership during a transition period with the laity in the governance of their schools through a new public juridical person. After the transition period, the laity will continue the governance of the schools without the participation of the congregation. It is very effective when the transition occurs with a new public juridical person as it allows the congregation time to withdraw gradually from governance while at the same time assisting in the formation of the new canonical governors and the development of the new public juridical person.

When congregations engage in joint governance they should retain reserve powers within the canonical and common law statutes in order to retain an amount of influence and control over matters that remain important to them, such as the charism, and to protect that influence and control in canon law and common law. As the congregation’s involvement in governance lessens, the reserve powers can reduce.

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Daniel C. Conlin, ‘Sponsorship at the Crossroads’ (2001) July-August Health Progress, 21. The theology of baptism is an essential part of ecclesiology and canon law. Due to the word limitations of the thesis and its common law emphasis, a discussion of the theology of baptism is not within the scope of the thesis. It is essential concept and an understanding of it should be included in the formation of canonical governors. The theology of baptism warrants discussion in its own right but the scope of the thesis, and its nature as a common law thesis, precludes that discussion here.
These reserve powers may include the power to:

- appoint the board/council chairperson;
- retain rights to approve any changes in the canonical statutes or common law constitution;\(^{1045}\)
- retain rights to approve any changes in the public juridical person’s mission and/or philosophy;\(^{1046}\)
- ‘[e]xercise vigilance over the fidelity to the norms of the Church’;\(^{1047}\)
- approve alienation of temporal goods according to the requirements of Book V of the *1983 Code*;\(^{1048}\)
- approve or appoint the board of trustees or directors of the common law structure;\(^{1049}\)
- deal with property that exceeds the approved sum; and
- retain the power to merge or dissolve the common law structure.\(^{1050}\)

In addition, they may also initially retain some rights in relation to temporal goods and maintain a seat on the board or council of the common law structure.

‘The reserved powers fix and focus the ownership of the [school] in the canonical juridic person’.\(^{1051}\) The congregation can seek approval for amendment to the statutes when they feel they are no longer able to continue a role in the canonical governance of the schools. Inclusion in both the canonical statutes and in the common law

\(^{1044}\) A selection of draft clauses for inclusion in a common law constitution that addresses reserve powers and related terms is attached as *Appendix E*.

\(^{1045}\) *Code of Canon Law 1983* canon 94.

\(^{1046}\) Ibid canon 298 §1; Holland, ‘Sponsorship and the Vatican’, above n 987, 32.

\(^{1047}\) Holland, ‘Sponsorship and the Vatican’, above n 987, 36.

\(^{1048}\) Ibid.


\(^{1050}\) Ibid canons 1290 – 8, 121 – 3 and 320; Conlin, above n 1043, 22.

\(^{1051}\) Conlin, above n 1043, 22.
constitution provides the best protection for the reserve powers. Their omission will not affect any sanctions in canon law, but their inclusion will reinforce the nature and origin of the canonical governance while the congregation is still able to participate.

As seen in the discussion above in chapters 3 and 5, many school boards of congregational schools are already sharing a varied amount of governance with the congregations, ranging from merely advisory roles to co-management. The experience of that involvement may be crucial in any new governance structure. There is a great deal of overlap between canon law and common law and where possible they should respect and reflect each other in relevant constitutions/statutes, including the use of reserve powers.

The appointment of a new public juridical person to govern congregational schools provides a strong basis for congregations to protect their charism and continue their schools when they are no longer actively involved. The public juridical person then continues the governance of the school, in place of the congregation, and its statutes may include clauses relating to the charism of the congregation and its continuing relevance to the school. The following section considers the place of ‘associations of Christ’s faithful’ in congregational schools as a possible alternative to directly seeking a new public juridical person. Congregations could raise it as a possibility however, as explained below it is the least likely option for new canonical governance.

7.4 ASSOCIATIONS OF CHRIST’S FAITHFUL

Laity play a greater active role in church matters post Vatican II. The 1917 Code did not provide for private associations; the 1983 Code expands the right to all the faithful,
including priests and religious, to establish associations either within their own groups or together. Christ’s faithful are

… those who, since they are incorporated into Christ through baptism, are constituted the people of God. For this reason they participate in their own way in the priestly, prophetic and kingly office of Christ. They are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfil in the world.\textsuperscript{1052}

They may ‘freely establish and direct associations which serve charitable or pious purposes or which foster the Christian vocation in the world’\textsuperscript{1053} and ‘promote and support apostolic action, by their own initiative’.\textsuperscript{1054} The competent authorities may regulate the exercise of these rights in light of the ‘common good’\textsuperscript{1055} of the Church, which also includes protecting other rights granted by the 1983 Code.\textsuperscript{1056} The competent authority must intervene where the common good of the Church is jeopardised. The purpose of the supervision is to ‘ensure that integrity of faith and morals is maintained in them and that abuses in ecclesiastical discipline do not creep in’.\textsuperscript{1057}

As many of these canons were new in 1983, discussion and interpretation of them by canonical scholars continues, particularly in regards to the extent of the ministry of the

\textsuperscript{1052} Code of Canon Law 1983 canon 204 §1.
\textsuperscript{1053} Ibid canon 215.
\textsuperscript{1054} Ibid canon 216.
\textsuperscript{1055} Ibid canon 223 §2. Paragraph 18 of Vatican Council II, Apostolicam Actuositatem, above n 875, confirms that associations are intimately connected to the ‘divine will of the Church’; Robert W. Oliver ‘Canonical Requisites for Establishing Associations of the Faithful’ (2001) 61 The Jurist 213, 226, and paragraph 24 confirms that associations belong to the life and mission of the Church.
\textsuperscript{1056} For example canon 212 – the right to express an opinion; canon 213 – the right to receive spiritual goods; canon 214 – the right to worship God; canon 217 – the right to a Christian education; canon 218 – freedom to research, canon 219 – right to immunity of coercion to choose a state of life; canon 220 – the right to a good reputation; canon 221 – the right to vindicate their rights in the Church.
\textsuperscript{1057} Code of Canon Law 1983 canon 305 §1.
laity\textsuperscript{1058} and the degree of their involvement in governance. For example, canons 208–31 are a ‘charter’ of the obligations and rights of the lay members of Christ’s faithful.\textsuperscript{1059} Canons 298–329 provide the laws for associations of Christ’s faithful, and provide a legal framework for them to establish the juridical status of associations of Christ’s faithful in the Church.\textsuperscript{1060}

An association is a Catholic work, an activity done in the name of the Church by a Church entity. A Catholic work may be one of piety, teaching or charity; \textsuperscript{1061} and hence the relevance of considering them in light of the thesis question. Associations have four elements: a collectivity of people; free choice of a canonically circumscribed objective; internal order with a freely chosen purpose; and free belonging.\textsuperscript{1062}

There are four categories of associations, briefly explained below:

1. de facto;\textsuperscript{1063}
2. private, without juridical personality;\textsuperscript{1064}
3. private, with juridical personality;\textsuperscript{1065} and
4. public (which is a public juridical person).\textsuperscript{1066}

\textsuperscript{1059} Canadian Conference of Catholic Bishops, \textit{Recognition of National Catholic Associations – Guidelines for the CCCB and Associations of the Faithful} (1993) \textless http://www.ccb.ca/site/Files/Recognition_of_Associations.pdf\textgreater , 7; \textit{Code of Canon Law} 1983 Title II; it should be noted that whilst canons 208 – 223 apply to lay members they are directed to all Christ’s faithful, not just the laity.
\textsuperscript{1061} \textit{Code of Canon Law} 1983 canon 298 §1; Morrisey, ‘Public Juridic Persons in the Church and the Sponsorship of Charitable Works’, above n 983, 13.
\textsuperscript{1062} Libero Gerosa, \textit{Canon Law} (Continuum, 2004) 224.
\textsuperscript{1063} \textit{Code of Canon Law} 1983 canon 215.
\textsuperscript{1064} Ibid canons 298 -9, 305, 310, 323.
\textsuperscript{1065} Ibid canons 113 – 123, 322.
\textsuperscript{1066} Ibid canons 312 – 15, 317 – 20, 322.
No association within these categories may call itself ‘Catholic’ without the express permission of the competent authority.\textsuperscript{1067} Within these categories, there may be associations of:

- laity only;\textsuperscript{1068}
- clerical — ‘under the direction of clerics [and] imply the exercise of sacred orders’; that is, the members of the association are clerics;\textsuperscript{1069}
- clerics and laity together;\textsuperscript{1070} or
- third orders — ‘[a]ssociations whose members live in the world but share in the spirit of some religious institute, under the overall direction of the same institute’.\textsuperscript{1071}

Only associations whose members are solely laity, recognised under canon 298 §1, are relevant to the thesis question which seeks to identify options for future Catholic school governance that will by necessity eventually only involve laity.

Similar to public juridical persons and any common law form of governance, to function effectively the associations’ members have rights and obligations. Canons 224–31 contain the rights and obligations specifically relating to the laity, who have contributed to the increase in lay participation in associations since the promulgation of the 1983 Code. They present in three clusters:

1. the rights and duties proper to the lay state, that is, the laity’s unique witness ‘in the world’;\textsuperscript{1072}

\textsuperscript{1067} Ibid canons 300, 803.
\textsuperscript{1068} Ibid canon 298 §1.
\textsuperscript{1069} Ibid canon 302.
\textsuperscript{1070} Ibid canon 298 §1.
\textsuperscript{1071} Ibid canon 303.
\textsuperscript{1072} Ibid canons 225 – 7.
2. the rights and duties related to offices, functions and ministries within the Church;¹⁰⁷³ and

3. the rights and duties related to the knowledge and teaching of Christian doctrine.¹⁰⁷⁴

7.4.1 Categories of Associations

The essential features of the four categories of associations of the faithful mentioned above are briefly described.

7.4.1.1 De Facto Associations

Non-canonical associations are those that arise from canon 215 and the general right to associate for ‘charitable and pious purposes’. Such an association has no juridical personality therefore it is not subject to the provisions of the 1983 Code relating to juridical persons, including those in Book V regarding temporal goods of the Church. The property of a de facto association is not ecclesiastical property. Any transfer of a congregation’s ecclesiastical property to a de facto association will be in contravention of Book V of the 1983 Code as such a transfer alienates that ecclesiastical property.¹⁰⁷⁵ The de facto association is not a suitable option for a Catholic school as it does not have juridical status; therefore, it is not relevant for the purpose of the thesis question and there will be no further consideration of it.

¹⁰⁷⁴ Ibid canon 229; Coriden, above n 786, 63.
¹⁰⁷⁵ Code of Canon Law 1983 canons 1291 and 1295; it is not an alienation of ecclesiastical goods if the competent authority authorises the transfer. It is unlikely to do so where there is a loss in the value of the property.
Private associations were a new addition to the 1983 Code. The minimum requirement to obtain private status is the recognition only (not approval) of its statutes by the competent authority. Private associations enjoy considerable freedom on several very important points such as the choice of juridic personality, the designation of officers and spiritual counsellor, and the administration of goods. However this does not eliminate the responsibility of the competent authority ... common to all associations of the faithful.1076

Private associations are established when its proposed members enter into a private agreement to conduct an association for one or more of the purposes set out in canon 298 §11077 or where the competent authority thinks it necessary.1078 It attains the status of a private association when the competent authority reviews (not approves) its statutes,1079 thus suggesting that to be a private association it must have statutes; canon 304 §1 specifically states that statutes are required. The review of the statutes does not bestow it with juridical personality though a private association may seek that status (thus allowing for private associations with or without juridical personality). Associations with canonical status have both rights and obligations. A private association obtains juridical personality through the competent authority only upon request for that personality, and after obtaining a formal decree upon approval of its statutes.1080 A private association with no juridical personality is not an ecclesiastical

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1076 Page, above n 1060, 415.
1078 Ibid canon 301 §2.
1079 Ibid canon 299 §3.
1080 Ibid canons 322 and 117. Associations with canonical status have both rights and obligations. ‘The law gives greater autonomy and places fewer expectations on private associations than on public ones: Vere and Trueman, above n 829, 17. Because the private association has ‘a greater autonomy in relation to the ecclesiastical authority’ it ‘depend[s] to a lesser extent on common Canon Law’: Gerosa, above n 1062, 222.
body; therefore, it is not subject to the 1983 Code provisions relating to juridical persons, including those in Book V relating to temporal goods of the Church. The property of a private association is not ecclesiastical property. Therefore, an attempt by a congregation to transfer any of its property to a private association with private juridical personality contravenes the 1983 Code as it alienates ecclesiastical property unless it has approval for the alienation. The private association is not a suitable option for a Catholic school because of the uncertainty of its juridical status; the Church does not use this entity for Catholic schools and the thesis will not consider it further.

7.4.1.3 Public Associations

Competent authorities may establish public associations and grant them juridical status. Competent authorities relate to the regional and geographical range of the association and include the Holy See for universal and international associations; the Conference of Bishops for a national association; and the diocesan bishop for diocesan associations. Written diocesan approval is also required. A public association has its statutes both reviewed and approved and ‘thereby receives its mission to pursue, in the name of the Church, those ends which it proposes for itself’. By the decree of approval the competent authority establishes the public juridical person; that approval is granted under canon 312 §1. For a congregation owned school, the

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1081 The group/individuals belonging to a private association own the property of their association, unless they register it in the name of the common law entity through which the association operates in common law. Either way, it is not ecclesiastical property.
1082 A private association may seek juridic status: Code of Canon Law 1983 canon 322 §1.
1083 Ibid canon 313.
1084 Ibid canon 312 §1.
1085 Ibid canon 312 §2.
1086 Ibid canon 313.
competent authority is usually the diocesan bishop, who is responsible for approval of the initial statutes and any modifications to them.\textsuperscript{1087}

7.4.1.3.1 \textit{Purpose of the Public Association}\textsuperscript{1088}

Canon 215 states three generic purposes for the association: charity, piety and promotion of the Christian vocation in the world. This is repeated in canon 298 §1, which distinguishes between associations of consecrated life, societies of apostolic life and associations of Christ’s faithful, but it expands on what might be considered within the ambit of those three generic purposes to include:

- fostering a more perfect life;
- promoting public worship;
- promoting Christian teaching; and
- exercising other apostolic activities, such as:
  a. initiatives of evangelisation;
  b. works of piety or charity; and
  c. those animating the temporal order with the Christian spirit.

The reference in this canon to ‘other apostolic activities’ provides for a relatively broad reading and interpretation of the precise activity that a public association may adopt, but it could include conducting a Catholic school.

\textsuperscript{1087} Ibid canon 314.
\textsuperscript{1088} Canons 312 – 320 specifically apply to the public association; canons 298 – 311 are norms common to all associations but in the context of the thesis question, the thesis only considers them for the public association.
7.4.1.3.2 Statutes of the Public Association

Canon 304 requires that written statutes regulate associations, whether private or public. The competent authority must approve the statutes and members of a public association must adhere to them.\textsuperscript{1089} An association

... is a place where rights are exercised, where obligations are acquired, and where a common end or common good is pursued. As with any society, an association therefore needs a modicum of organisation in order to be for its members the most effective means possible for promoting the purposes for which they are pursuing.\textsuperscript{1090}

The ‘modicum of organisation’ and their own norms are in the associations’ statutes. The repeated reference to the statutes in canons\textsuperscript{1091} emphasises the importance of the statutes to the association and to the competent authority who has the supervision of the association. The statutes are ‘a source of reference for all members with regard to their rights and their obligations’; they contain the ‘objectives and purpose’ of the association.\textsuperscript{1092}

The statutes may include:

- a statement of purpose or social objective;\textsuperscript{1093}
- its centre;\textsuperscript{1094}
- rules and criteria for membership including admission and dismissal;\textsuperscript{1095}

\textsuperscript{1089} Code of Canon Law 1983 canon 314.
\textsuperscript{1090} Page, above n 1060, 405.
\textsuperscript{1091} Code of Canon Law 1983 canon 309. The repetition occurs in canons 299 §3, 304 §1, 305 §1, 306, 307 §1, 308, 309, 314, 316 §2, 317 §1, 317 §2, 317 §3, 318 §2 and 319 §1.
\textsuperscript{1093} Code of Canon Law 1983 canon 304 §1.
\textsuperscript{1094} Ibid canon 304 §1.
\textsuperscript{1095} Ibid canon 307 §1; 304 §1.
governance structures;\textsuperscript{1096}

- selection process of a moderator and chaplain;\textsuperscript{1097} and
- ownership and administration of property.\textsuperscript{1098}

The statutes of a public association that carries on the business of a Catholic school should be as detailed as that for a public juridical person (as discussed above) and include mechanisms to protect a congregation’s charism and allow the new public association to continue the tradition of the congregation in its schools. In addition, the norms set out in canon 94 (purpose, constitution, governance and manner of acting), canon 451 (Bishops’ Conference statutes), canon 506 (Chapters’ statutes), canon 587 (Institutes of Consecrated Life constitutions/statutes) and canon 1232 (statutes of a Shrine) should act as a guide to the contents of an association’s statutes.\textsuperscript{1099}

7.4.1.3.3 Membership of the Public Association

Membership of associations is voluntary. The members are the most important factor as they have come together in order to fulfil the purpose of the association. The two main factors relating to membership of a public association are enunciated in canon 306 §1: that a person is ‘validly received into it and has not been legitimately dismissed from it’. In addition to these fundamental canonical requirements for membership, the statutes can include details of any other membership criteria, including members’ rights and obligations.\textsuperscript{1100} A person may be a member of more than one association.\textsuperscript{1101}

Members of a congregation may also be members of an association, but they must

\textsuperscript{1096} Ibid canon 304 §1.
\textsuperscript{1097} Ibid canon 317.
\textsuperscript{1098} Ibid canon 319.
\textsuperscript{1099} Canadian Conference of Catholic Bishops, above 1092, 18.
\textsuperscript{1100} Code of Canon Law 1983 canons 304 §1, 307 §1.
\textsuperscript{1101} Ibid canon 307 §2; but if that association is conducting a Catholic school their commitment to it will be onerous enough to warrant their full attention in addition to any other employment in which they may be engaged.
obtain the permission of their Superior to join it.\(^\text{1102}\) This is a particularly useful provision for a congregation that wishes to transition the transfer of its education ministry in its schools to a lay body.

The *1983 Code* only addresses two main criteria for exclusion of membership of associations:\(^\text{1103}\) if they have ‘rejected the Catholic faith ... defected from ecclesiastical communion, or ... been punished by an imposed or declared excommunication’.\(^\text{1104}\) Other criteria for membership will depend on the nature and purpose of the association’s work (eg education or health care). Clear articulation in the statutes of the criteria and process for dismissal of members of an association ensures fair and effective governance. However, the statutes must recognise that dismissal of a member cannot occur ‘except for a just reason, in accordance with the law and the statutes’.\(^\text{1105}\) The *1983 Code* does not address the definition of ‘just reason’.\(^\text{1106}\)

### 7.4.1.3.4 Property of the Public Association

The public association owns its temporal goods.\(^\text{1107}\) They are ecclesiastical goods for the purpose of Book V of the *1983 Code*, including the prohibition on alienating goods without approval of the competent authority and the requirement for annual reports.\(^\text{1108}\) The relevant competent authority may suppress associations, but not without hearing

\(^{1102}\) Ibid canon 307 §3.

\(^{1103}\) The two issues are criteria drawn from a ‘negative’ perspective, that is, when you cannot be a member.

\(^{1104}\) *Code of Canon Law* 1983 canons 316 and canon 1331. Canon 316 refers to prohibitions relating to Catholics; it is silent on non-Catholics suggesting that they are eligible for membership of an association.

\(^{1105}\) Ibid canon 308.

\(^{1106}\) Any person who has a grievance about not being accepted as a member, or being dismissed as a member, may ‘...lawfully vindicate and defend the rights they enjoy in the Church before the competent ecclesiastical forum...’.\(^\text{1108}\) The processes set out in canons 1732 – 39 will apply to any such forum.

\(^{1107}\) *Code of Canon Law* 1983 canon 1265.

\(^{1108}\) Ibid canons 1291 and 1287 respectively.
from the moderator or other relevant officials.\textsuperscript{1109} An association may appeal its suppression through hierarchical recourse\textsuperscript{1110} or jurisdictional recourse.\textsuperscript{1111} Distribution of the association’s property upon suppression or dissolution occurs according to its statutes (always in compliance with the requirements of Book V); if the statutes are silent on the matter then the property transfers to the ‘next higher juridical person’,\textsuperscript{1112} which is normally the competent authority that approved them.

7.4.2 Summary

The public association is a possible vehicle for a congregation to transfer its governance, and some of the property, of its schools to a new body that is also a juridical person. This allows the congregation to effect the transfer to a body capable of continuing its ministry of education within its existing schools, and through the canonical statutes and common law constitution protect the charism and tradition of the congregation within its schools.\textsuperscript{1113}

The Canadian Conference of Catholic Bishops (‘CCCB’) espouses a four-step approach to seeking status as a public association with each step operating for a five-year period as:

1. a de facto association;
2. continuing as a de facto association with pastoral recognition;
3. operating as a private association; and

\textsuperscript{1109} Ibid canon 320
\textsuperscript{1110} Ibid canons 1732 – 39.
\textsuperscript{1111} Ibid canons 1445 §2; Canadian Conference of Catholic Bishops, above n 1092, 34.
\textsuperscript{1112} Canadian Conference of Catholic Bishops, above n 1092, 34.
\textsuperscript{1113} The ‘Australian Catholic Directory’ is an annual publication that includes, inter alia, all Associations of Christ's Faithful, Societies of Apostolic Life and Institutes of Consecrated Life. The association and the bishop will generally be the only ones to know their precise canonical status (private/public). The Australian Catholic Directory (National Council of Priests of Australia, 2013/14).
4. requesting establishment as a public association.\textsuperscript{1114}  

The rationale for this approach is that it allows ‘the association to assess its own development, as well as to improve its functioning and the manner of pursuing its activities, and so to acquire even greater stability’.\textsuperscript{1115} For an association that is forming for the first time in any ecclesiastical form, and addressing its purpose and objectives for the first time, this framework provides a sensible, cautious and responsible approach to ensure the activities undertaken by the new association are sustainable and that it has sufficient property to achieve its purposes.

The association that may be relevant for catholic school governance is the public association with public juridical status – that is, it is a public juridical person but has come to be so through its existence as an association. The association comes to be a public juridical person through a longer process than a direct application for a new public juridical person. Although there seems to be no canonical reason preventing the use of this entity in Catholic school governance, for a congregation seeking a new canonical body to continue the governance of its schools, a direct application for a new public juridical person seems more appropriate. Such a direct pathway to new canonical governance has a precedence as some congregations in Australia such as the Christian Brothers, Qld Presentation Sisters and Qld Mercy Sisters have already taken it.

A new public juridical person is required for the canonical governance of a Catholic school when the congregation no longer has any, or enough active, members who are

\begin{footnotesize}
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\item \textsuperscript{1114} Canadian Conference of Catholic Bishops, above 1092, 43. Page in ‘Associations of the Faithful in the Church’ (1987) 47 The Jurist 165, 302 also acknowledges the need for a probation period so the competent authority can assess the stability and evolution of the association. If the association is a school that has a lengthy history, that probation period should be waived or substantially reduced.
\item \textsuperscript{1115} Canadian Conference of Catholic Bishops, above n 1092, 43.
\end{itemize}
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able to continue governance of their schools. Any new public juridical person must therefore, include members who are not all members of a congregation, but are members of the laity. The following section considers the role of the laity in Catholic school governance.

7.5 **The Role of the Laity in Catholic Governance**

Laity has increasingly participated, directly and indirectly, in Catholic school governance over the past three decades.\(^{1116}\) With the decreasing number of religious actively involved in their congregational schools, direct participation of the laity in management boards will necessarily increase. The thesis question considers Catholic school governance by laity, either on their own or with members of a congregation. This section seeks to determine the canonical role of laity permitted in Catholic school governance.

7.5.1 **Definition**

There are no definitions for the terms ‘laity’ and ‘layperson’\(^{1117}\) in the *1983 Code*. Canon 207 §1 provides a ‘negative’ definition in that it says what they are not: ‘[b]y divine institution, among Christ’s faithful there are in the Church sacred ministers, who in law are also called clerics; the others are called lay people’. This definition therefore includes as laypersons those who are non-clerical members of congregations. Canon 207 §2 acknowledges that members of congregations can be ‘drawn from both’ clerics and laity.\(^{1118}\) Paragraph 31 of *Lumen Gentium* defines laity as

\(^{1116}\) Direct participation occurred with appointments to school boards that are a mixture of advisory and management or purely management. Indirect participation occurred with appointments to school advisory boards that make no decisions but assist others in governance in making decisions.

\(^{1117}\) The terms are interchangeable. Except where quoting, the thesis uses the term laity.

\(^{1118}\) Pope John Paul II in *Christifideles Laici* (Christ’s faithful people) uses the imagery of Matthew’s gospel to ‘define’ laity as ‘...those who form that part of the People of God which might be likened to
... understood to mean all the faithful except those in holy orders and those in a religious state sanctioned by the Church. These faithful are by baptism made one body with Christ and are established among the People of God. They are in their own way made sharers in the priestly, prophetic, and kingly functions of Christ. They carry out their own part in the mission of the whole Christian people with respect to the Church and the world. A secular quality is proper and special to laymen.

Provost defines laity simply as ‘baptised Christian faithful; lay persons have a secular quality; the functions of laity differ from those of the ordained.’\(^{1119}\) The thesis question arises because of the declining number of religious members of congregations and thus necessitates their eventual withdrawal from the ministry of education bestowed on them when they were established.

7.5.2 The Role of Laity Pre and Post Vatican Council II

Prior to the commencement of Vatican II, active participation of the laity in liturgical and administrative functions was rare and usually restricted to men. The 1917 Code contained only two general references to the laity\(^{1120}\) but it was very clear that laity could not undertake any acts of jurisdiction or order,\(^{1121}\) making ‘a clear demarcation

the labourers in the vineyard...’"For the Kingdom of heaven is like a householder who went out early in the morning to hire labourers for his vineyard. After agreeing with the labourers for a denarius a day, he sent them into his vineyard.’ (Mt 20:1-2)’: Pope John Paul II, *Christifideles Laici*, (30th December 1988) Vatican, [1]


\(^{1119}\) James H. Provost, ‘The Obligations and Rights of the Lay Christian Faithful’ *The Code of Canon Law: A Text and Commentary* (Paulist, 1985) cited in Anne Prew – Winters, ‘Who is a Lay Person’ (1987) 47 *The Jurist* 51. As the thesis considers alternatives to Catholic school governance that acknowledge the absence of religious in governance, for the purposes of this thesis the term laity will refer only to those living in the secular world, that is, neither clergy nor members of religious congregations.

\(^{1120}\) *Code of Canon Law* 1983 canons 682 and 683.

\(^{1121}\) Ibid canon 948.
between the clergy and the laity’. The concept of ministry only related to the ordained; there was no general active role for laity in the Church.

One of the greatest achievements of Vatican II was its inclusion of the laity in the active participation and administration of the Church. It did this by defining the laity as equal members of the Church through their baptism. Lumen Gentium is ‘a key text for any discussion of the description of the laity proposed by Vatican II’ and Christifideles Laici is the most comprehensive papal consideration of the laity since Vatican II. Both documents, in addition to the relevant canons, provide an important insight into how the Church sees the inclusion of the laity in Church matters.

Neither provides direct reference to the role of laity in the context of the thesis question. However, the process of including the laity in the governance of schools ‘began in the decades following the Second Vatican Council and the fostering of

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1123 In 1976, the Congregation of the Doctrine of the Faith responded to a request for clarification of which offices laity could hold. The response included the statement that ‘(1) Dogmatically lay persons are excluded only from holy offices that are intrinsically hierarchical, the capacity for which is tied to the reception of the sacrament of orders. The concrete determination of such offices according to the norm of law belongs to the organisms established ad hoc by the Holy See.’ The Congregation for the Doctrine of the Faith is a department of the Roman Curia ‘to promote and safeguard the doctrine on the faith and morals throughout the Catholic world: for this reason everything which in any way touches such matter falls within its competence...[and] promotes in a collegial fashion encounters and initiatives to «spread sound doctrine and defend those points of Christian tradition which seem in danger because of new and unacceptable doctrines»: Congregation for the Doctrine of the Faith, (December 7th 1965) <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_en.html>, The Cardinal President of the coetus made the request. The coetus refers to the group of bishops who worked on the revisions to the 1917 Code of Canon Law to complete the 1983 Code of Canon Law.
1124 Although at the time of Vatican II most schools still had a majority of religious teaching in their schools, the role of the laity was seen as important; it is doubtful that those attending Vatican Council II envisaged the rapid decline in those numbers of religious at the commencement of the 21st century. The discussion relating to inclusion of the laity in Vatican II deliberations was fortuitous given the severe decline in numbers of religious today that has led to the need for the thesis question to be asked, and answered.
1125 Prew-Winters, above n 1119, 51.
1126 Pope John Paul II directs us to read the law within the broader context of conciliar documents: Pope John Paul II, Sacrae Discipline Leges, above n 784. In addition to the documents cited, ‘We are fortunate in possessing extraordinary materials from the legislative history of the re-codification, especially in Communicationes and the successive schemata’: Frederick R. McManus, ‘Laity in Church Law: New Code, New Focus’ (1987) 47 The Jurist 11, 13.
principles of subsidiarity and further participation of the laity. The Church sought to develop partnerships between schools and parents according to these principles’.

7.5.2.1.1 Laity in the 1983 Code

The canons in the 1983 Code reflected Vatican II’s direction to acknowledge the ‘equality’ of the laity; clerics are no longer considered superior to the laity but retain a special role in relation to sacramental mission and administration. The laity joins in the mission of the Church because of their baptism, which includes ‘the right to promote and support apostolic action’. The mission is Trinitarian in nature as all baptised in communion with the Church participate in the three functions (munera) of Christ as priest, prophet and ruler. Laity contribute to the mission ‘each according to his or her own condition and office.’ The Church is ‘established and ordered in this world as a society, subsists in the catholic Church’, and so includes all baptised. The ecclesiology of communio is especially important: the concept of the Church being a communion of people uniting all — clerics, religious and laity.

In Lumen Gentium (a conciliar source for canon 207), Pope Paul VI stated that ‘[n]ow the laity are called in a special way to make the Church present and operative in those

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1127 Institute of Legal Studies, above n 123, 24.
1129 The introductory canons 204 – 207 describe the laity and Church. In Sacrae Disciplinae Leges Pope John Paul II states that these canons ‘characterise the true image of the Church’: Pope John Paul II, Sacrae Disciplinae Leges, above n 784.
1130 Code of Canon Law 1983 canon 216; other aspects of mission include contributing to ‘the building up of the Body of Christ (canon 208) and promoting the growth of the Church (canon 210).
1131 This is reiterated in Lumen Gentium - laity ‘are in their own way made sharers in the priestly, prophetic, and kingly functions of Christ; and they carry out for their own part the mission of the whole Christian people in the Church and in the world’; Vatican Council II, Lumen Gentium, above n 9, [31]. It is also reiterated in Apostolicum Actuositatem para 2 - ‘But the laity likewise share in the priestly, prophetic, and royal office of Christ and therefore have their own share in the mission of the whole people of God in the Church and in the world’ Vatican Council II, Apostolicam Actuositatem, above n 875.
1133 Ibid canon 204 §2.
places and circumstances where only through them can it become the salt of the earth'.  

Where congregations have no members to continue the mission of Catholic education, laity, conducting that governance in the spirit of the charism of the congregation’s founder, contribute to the salvific mission referred to in *Lumen Gentium*. It is for this mission that the 1983 *Code* bestow rights and obligations on the Christian faithful, the exercise of which rights ‘must take account of the common good of the Church’. The laity’s participation in Catholic school governance is part of that common good.

Laity have a role in both the world and the Church’s governance structure, but their ‘primary task is the transformation of the secular world.’ This suggests that participating in Church governance and living in the secular world are mutually exclusive. However, the rapid decline in active members of religious congregations in their ministries and the corresponding increase in the participation of the laity in those roles left by the congregations suggests that laity can be involved in Church governance and yet be living in the world and transforming the secular world through their example of governance.

### 7.5.2.1.2 Subsequent Interpretation of the 1983 *Code*

There is no doubt that the laity has an active role in the Church in liturgical functions, including as lector, acolytes and musicians etc. Laity may administer temporal

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1134 Vatican Council II, *Lumen Gentium*, above n 9, [33].  
1136 Ibid canon 223 §1.  
1137 Barr, above n 1058, 292; Vatican Council II, *Apostolicum Actuositatem*, above n 1131. Canons 224–31 provide additional obligations and rights specifically for the laity, providing the context for the Church’s recognition of the laity as actively participating members of the Church.  
goods, be ecclesiastical judges, act as auditor, be a diocesan finance officer or member of the finance council, or govern lay religious institutes with public ecclesiastical power. Many functions already conducted by laity in conjunction with congregations or other public juridical persons are ecclesiastical in nature. They are functions not related to clerical roles ‘but are the fruit of the dynamism of baptism’ and include educational activities such as governance of Catholic schools.

The interpretation of the canons relating to laity and the extent of their involvement in Church governance remains a largely unresolved topic. Beal argues that while Vatican II did not explicitly state that laity could participate in sacra potesta (sacred power), it also did not explicitly forbid it. There have been many discussions since the promulgation of the 1983 Code on the role of the laity in other liturgical and clerical functions.

Governance of Catholic schools is an active part of the apostolate of the laity. *Apostolicam Actuositatem* states:

> The hierarchy should promote the apostolate of the laity, provide it with spiritual principles and support, direct the conduct of this apostolate to the common good of the Church, and attend to the preservation of doctrine and order.

Indeed, the lay apostolate admits of different types of relationships with the hierarchy in accordance with the various forms and objects of this apostolate. For

\[^{1139}\] Ibid canon 1279.
\[^{1140}\] Ibid canon 1421 §2.
\[^{1141}\] Ibid canon 1428.
\[^{1142}\] Ibid canons 492, 494, 1278.
\[^{1143}\] Ibid canon 596.
\[^{1145}\] There are two main schools of thought – the German and the Roman schools; they do not consider the role of the laity in Catholic governance but consider the clerical and/or sacramental functions. For discussion on these schools see a detailed consideration by Beal, ‘The Exercise of the Power of Governance by Lay People: State of the Question’, above n 1144; and Elizabeth McDonough, OP ‘Lay and the Inner Working of the Church’ (1987) 47 *The Jurist* 228.
in the Church there are many apostolic undertakings which are established by the
free choice of the laity and regulated by their prudent judgment. The mission of
the Church can be better accomplished in certain circumstances by undertakings
of this kind, and therefore they are frequently praised or recommended by the
hierarchy.\textsuperscript{1146}

The mission of the Church includes Catholic education in schools. The mission of the
Church, through the charisms of existing congregational schools, ‘can be better
accomplished’ by allowing laity an active role in governance of those schools thus
providing diversity in Catholic education. This may be without the continued presence
or involvement of the congregation. Laity engages in the mission of the Church by
participating and sharing in the threefold mission of Christ, which includes the mission
of salvation,\textsuperscript{1147} on an individual basis or as a part of a group.\textsuperscript{1148} The \textit{1983 Code}
defines the term ‘apostolate’ as ‘an all-encompassing term which names the mission
of the whole Church’.\textsuperscript{1149} \textit{Apostolicam Actuositatem} provides a more specific
definition of apostolate:

> The Church was founded for the purpose of spreading the kingdom of Christ
throughout the earth for the glory of God the Father, to enable all men to share in
His saving redemption, and that through them the whole world might enter into a
relationship with Christ. All activity of the Mystical Body directed to the
attainment of this goal is called the apostolate, which the Church carries on in
various ways through all her members. For the Christian vocation by its very
nature is also a vocation to the apostolate.\textsuperscript{1150}

\textsuperscript{1146} Vatican Council II, \textit{Apostolicum Actuositatem}, above n 875, [24].
\textsuperscript{1148} Michael D. Place ‘“In the Manner of Leaven” The Lay Mission to the Secular World’ (1987) \textit{47 The Jurist} 86, 97.
\textsuperscript{1149} Elissa Rinere, C.P, ‘Conciliar and Canonical Applications of ‘Ministry’ to Laity’ (1987) \textit{47 The Jurist} 204, 222.
\textsuperscript{1150} Vatican Council II, \textit{Apostolicam Actuositatem}, above n 875, [2].
Apostolate, as used in the 1983 Code, includes the activity of laity. Apostolate is the duty and right of all Christ’s faithful. Participating in the governance of Catholic schools is an activity ‘directed to the attainment’ of the goal of salvific mission. Lay governance of Catholic schools is, therefore, an apostolate. In Christifideles Laici, Pope John Paul II approved of the rich diversity of activities in the Church undertaken by the laity, so there is no reason why these diverse activities should not include lay governance of Catholic schools. Indeed, for many years laity has contributed to Church activities. McDonough draws a distinction between laity engaged with the ‘inner working’ of the Church (which are restricted ecclesiastical roles) and engaged with the ‘internal institution’ (where there is greater flexibility for lay participation). Lay governance of Catholic schools engages laity with the ‘internal institution’ therefore subjecting them to canonical jurisdiction.

7.5.3 Summary

Lumen Gentium provides a wide view of the apostolate of governance:

Besides this apostolate which certainly pertains to all Christians, the laity can also be called in various ways to a more direct form of cooperation in the apostolate of the Hierarchy. Further, they have the capacity to assume from the Hierarchy certain ecclesiastical functions, which are to be performed for a spiritual purpose.

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1151 Rinere, above n 1149, 226.
1153 Vatican Council II, Apostolicum Actuositatem, above n 875, [2].
1154 Pope John Paul II, Christifideles Laici, above n 1118, [29].
1155 McDonough notes that ‘there is almost no position, role, function, office or status in the Church that is open to laity which is not either heavily conditioned (cc204§1; 208;210;216), carefully qualified (cc212§3; 218), institutionally circumscribed (cc 226§2; 229§1;230) or hierarchically controlled (cc223§2; 228)...from the legal perspective it is entirely within the aegis of the hierarchy, and not the laity, to set the requirements, substantive content, and limits of offices in the Church.’: McDonough, above n 1145, 240 -1.
1156 Vatican Council II, Lumen Gentium, above 9 [33].
It is arguable that the governance of Catholic schools, particularly if under the supervision of the diocesan bishop as is required by canon 806 §1, is an appropriate form of ecclesiastical governance for laity. If it is not ecclesiastical governance, then the various conciliar documents and even the *1983 Code* itself suggest that there is a role, a very important role, in allowing laity a strong presence in Catholic school governance. Laity’s involvement in Catholic school governance is an act of *communio* and ‘the Church’s hierarchical structure exists to serve and foster *communio*, to build up the Church as the Body of Christ, and to ensure the active participation of each of the faithful in the Church’s mission’.\textsuperscript{1157} *Communio* and its relationship to the Church’s mission are important because

\[
\begin{align*}
\text{… communion and mission are profoundly connected with each other; they penetrate and mutually imply each other, to the point that communion represents both the source and the fruit of the mission: communion gives rise to mission and mission is accomplished in communion.} & \text{\textsuperscript{1158}}
\end{align*}
\]

Laity’s participation in Catholic school governance has increased remarkably over the past three decades; that it is necessary to continue providing diversity in Catholic education through the continued delivery of congregational schools is self-evident. Charisms are central to the life of the Church\textsuperscript{1159} and diversity in those charisms is desirable and beneficial. Relevant and adequate theological and secular expertise is essential for lay governance.\textsuperscript{1160} Lay participation in governance engages the laity with the mission of the Church through Catholic education. The *1983 Code* defines laity as being those who are not clerics, and therefore includes members of congregations; it

\textsuperscript{1157} Kaslyn, above n 869, 244.
\textsuperscript{1158} Pope John Paul II, *Christifideles Laici*, above n 1118, [32].
\textsuperscript{1159} Vatican Council II, *Lumen Gentium*, above n 9, [12] and [30].
\textsuperscript{1160} The requirement and understanding of Formation for laity and religious alike is discussed later in this chapter.
is arguable therefore that those congregational members have been canonical governors in their role as laity and that any laity should participate in that governance. To participate fully in that role, canonical administrators need to be aware of their duties, the canonical requirements of their governance, and the history and charism of the founder of the congregation. The following section discusses formation generally and discusses a framework for effective formation.

7.6 FORMATION

Through the involvement of the laity in canonical structures such as public juridical persons and associations of Christ’s faithful, the past few decades have seen an increased involvement of the laity in Church governance as seen by the increasing number of laity on school boards and in positions of leadership in Catholic school administration. Although the roles and responsibilities of the laity in Catholic schools have increased, amongst them there are ‘varying degrees of familiarity with particular’1161 traditions and the charism of the congregation affiliated with the school for which they serve or ‘spiritual preparation’1162 for their role. Regardless of the governance model adopted by a school, formation of canonical administrators, both laity and religious, is the key aspect to ensuring the continued mission of the congregations’ ministry in education1163 and a proper understanding of the canonical

1161 Thornber and Gaffney, above n 7, 18.
1162 Ibid 33.
issues relevant to their apostolate (including the charism).\textsuperscript{1164} Formation is ‘a process of preparation and ongoing reflection and development for the purpose of ensuring that individuals are appropriately self-aware and understand the meaning of their ministry at a depth beyond that of “a worker doing a job”’.\textsuperscript{1165} Formation in the context of this thesis relates to:

1. the Catholic Church;
2. the religious congregation generally;
3. the theology of sponsorship, leadership and governance; and
4. the tradition and charism of the relevant congregation.\textsuperscript{1166}

Formation is an ecclesiastical process that relates to the identity of the individuals of the canonical and common law structures, within the public juridical person itself and within the contemporary church.\textsuperscript{1167} Those with ultimate responsibility for the governance must be accountable for the property of the public juridical person and for the mission and for the ministry of the schools, which includes the charism. Formation on these aspects is therefore critical for all canonical administrators to ensure they can fulfil these responsibilities. Governance includes ‘three components of the Christian tradition that must be publicly relevant: its vision, its ethos, and the Christian persons who bear that vision and ethos’.\textsuperscript{1168} To achieve these three components, the canonical administrators must engage in continuing formation. Whilst common law governance

\textsuperscript{1164} Lydon notes that his, and others’, studies suggest ‘modelling or emulation constitutes the most effective means of maintaining a distinctive charism and therefore ‘transmission of the charism to lay people takes on a greater urgency’: John Lydon, ‘Transmission of the Charism: a Major Challenge for Catholic Education’ (2009) 1 (1) \textit{International Studies in Catholic Education} 42, 53.
\textsuperscript{1165} Thornber and Gaffney, above n 7, 69.
\textsuperscript{1167} Monkivitch, above n 1018, 17.
\textsuperscript{1168} Watts and Hanley, above n 172, 21.
may include strategic management of the school, it is essential to remember that canonical governance is not management.\(^{1169}\) Acknowledgement of formation requirements should occur in both the canonical statutes or by-laws and common law constitution to ensure effective engagement and be legally enforceable. This provides legal protection for the charism by ensuring that canonical governors are well educated in both the charism and their related canonical responsibilities. What those requirements involve depends on the relevant body, but a general set of guidelines and framework are a useful basis.

### 7.6.1 Elements Required of Those in Canonical Governance

Those answering the call to the ministry of lay canonical governance must prepare for the responsibility of the role. Essential characteristics or competencies of canonical administrators include that they be mission oriented, animated (in the mission), theologically grounded, collaborative, Church related and accountable.\(^{1170}\) The strength of each of these characteristics will vary between canonical governors. The characteristics may be included in the public juridical person’s statutes,\(^{1171}\) which are theological, personal and technical.\(^{1172}\)

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\(^{1169}\) ‘Governance is a decision making process designed to transform the values of those who have a stake in the organisation into performance, whereas management relates more to the execution of those decisions’: Thornber and Gaffney, above n 7, 39.

\(^{1170}\) Stanley, above n 1028, 13.

\(^{1171}\) Structures and policies assist in identifying these characteristics and ensuring that canonical administrators share them. Reflection should be on the qualities of the Board rather than just its individual members.

\(^{1172}\) Mary Kelly, RSM and Mary Mollison, CSA ‘Journey into Sponsorship’s Future’ (2005) March-April *Health Progress* 50, 52.
7.6.1.1 A Framework\textsuperscript{1173}

Thornber and Gaffney\textsuperscript{1174} propose a framework for formation programs for canonical governors based on four dimensions: human,\textsuperscript{1175} spiritual,\textsuperscript{1176} intellectual\textsuperscript{1177} and pastoral.\textsuperscript{1178} These dimensions draw from Church documents, including Pope John Paul II’s Apostolic Exhortation \textit{Pastores Dabo Vobis},\textsuperscript{1179} and \textit{Co-workers in the Vineyard of the Lord}, a publication of the United States Conference of Catholic Bishops.\textsuperscript{1180} They also reflect the Church’s desire to include the laity more in Church governance as identified in \textit{Lumen Gentium},\textsuperscript{1181} \textit{Christifideles Laici}\textsuperscript{1182} and \textit{Vita Consecrate}.\textsuperscript{1183}

\textsuperscript{1173} A detailed discussion of Thornber and Gaffney’s framework is not within the scope or common law emphasis of the thesis. Formation is, however, a crucial factor for effective canonical governance. Thornber and Gaffney’s text relates to all Catholic ministries including health and education. Discussion in this thesis relates to schools and education ministry in those schools. The human dimension includes a need to identify and develop the qualities of ‘human maturity, justice, respect for persons, compassion and self awareness’ and ‘foster the emergence of insights’ into the mission and ministry of their school. This introspection allows laity to recognise the associations between Catholic values and the decisions and actions they must make as canonical governors and equip them with the skills required to make better decisions in their ministry: Thornber and Gaffney, above n 7, 49, 103.

\textsuperscript{1176} The spiritual dimension addresses formation based on ‘reflections of life experiences’ and should be regarded as a ‘quest for meaning and relationship with God’: Thornber and Gaffney, above n 7, 53. It is the spiritual dimension that marks the greatest difference between corporate governors and canonical governors ‘….[c]anonical governors acknowledge and engage with the spiritual aspects of their role and work ’ and see their role as a vocation’: Thornber and Gaffney, above n 7, 105, 109.


\textsuperscript{1178} The pastoral dimension encapsulates the Catholic identity, mission, charisma, discernment of the signs of the times, spirituality and canonical responsibilities relating to the school and therefore to their role as a canonical governor – the mission of both the Church and their ministry. Canonical governors need a better understanding of missiology – ‘the relationship of their ministry to the “mission” and of ecclesiology – the study of the church and its structure and processes: Thornber and Gaffney, above n 7, 168, 193, 154.


\textsuperscript{1181} Vatican Council II, \textit{Lumen Gentium}, above n 9.

\textsuperscript{1182} Pope John Paul II, \textit{Christifideles Laici}, above n 1118.

\textsuperscript{1183} Pope John Paul II, \textit{Vita Consecrate}, above n 78.
To ensure effective canonical governance, all dimensions should be a requirement for all canonical governors (not just laity) and prepare them to adequately articulate, and defend where necessary, the mission of their school and the reasons for their ministry and actions within that ministry.\textsuperscript{1184} Formation should enable canonical administrators to ‘familiarise themselves with the appropriate dimensions of the ways in which the Code of Canon Law and [common] law interact’\textsuperscript{1185} and to recognise the role of the relevant bishop and to acknowledge that the bishops and canonical governors must work together. Most importantly, the formation program should assure that canonical governors understand and embrace the mission of baptism that empowers them to participate actively in the Church.

The framework of formation delivery to canonical governors, devised by Thornber and Gaffney, requires:

- a definition of formation and its foundations in the ecclesiastical literature on canonical governance;
- the means of identifying formation needs based on the idea of determining differences between what is desired and what is currently evidenced in terms of the traits of those engaged in, or invited to roles as canonical governors; and
- the principles that should underpin the process of formation and the design of formation programs.\textsuperscript{1186}

7.6.2 Summary

Formation requirements for canonical governors can be included in the common law constitution and the canonical statutes thus providing canonical and common law

\textsuperscript{1184} Thornber and Gaffney, above n 7, 157, 167.
\textsuperscript{1185} Russo, above n 1014, 201.
\textsuperscript{1186} Thornber and Gaffney, above n 7, 194.
protection to the charism and mission of the school. The delivery of formation is for people at different stages of their ministry of governance, with varying needs among them. Details of the formation programs should not be included in the constitution or statutes, except to the extent of the framework that includes reference to the human, spiritual, intellectual and pastoral dimensions; more detail than that will necessitate changes to the relevant documents when the formation programs are changed or updated. Relevant board handbooks can provide more detail. Schools’ canonical bodies should appoint a specific formation officer to ensure compliance with the formation requirements.1187 EREA emphasises the importance of formation for canonical and corporate governors; it also extends formation to teachers and administrators in the EREA schools.1188 Formation programs may include introductions to canon law, theology, ethics, mission, spirituality, common law and human resources.1189 Adoption of an adequate formation program is the responsibility of the canonical administrators and of the relevant bishop. Formation of canonical administrators is essential to understanding the charism and therefore ensuring its active presence in the school.

As discussed previously, the new canonical structure adopted by the Christian Brothers, Qld Presentation Sisters and JTC was the public juridical person (EREA, Mercy Partners and the archdiocese respectively). The following sections briefly

1187 A larger School or group of schools such as EREA may create an office, rather than appoint one officer.
1188 Stanley refers to several models adopted in America by health care institutions that vary from a 4 x weekend retreat conducted over 18 months, to 2 and 3 year programmes facilitated by universities or seminaries. Stanley, above n 1028, 14.
1189 Kelly and Mollison, above n 1172, 51. WA and NSW could use the resources of its Catholic University – The University of Notre Dame Australia (UNDA) – for the development and delivery of formation in canonical governance. Formation programmes should be developed and directed to specific ministries such as education and health. UNDA provides an excellent opportunity for development of such programmes with inter-faculty involvement from the Schools of Theology & Philosophy, Law, Medicine, Nursing, Physiotherapy, Education and Business. In addition, UNDA may provide units on the ‘nature and relationship between canon law and [common] law: Russo, above n 1014, 201.
considers possible options for appropriate public juridical persons for the future canonical governance.

7.7 MODELS FOR CANONICAL GOVERNANCE

This section considers juridical persons and associations of Christ’s faithful and their suitability for congregational schools in WA.

7.7.1 Current Public Juridical Persons Relevant to the Thesis

Some congregations have already effected the future governance of their schools or hospitals. They include joint governance with active participation of the congregation, joint governance with participation limited to use of reserve powers and membership of the board, and some (though few and usually smaller congregations) relinquishing all participation in governance. What each congregation decides is an individual and unique decision taking into consideration their size, resources and history in the diocese. Below are examples of common law and canonical governance options already adopted in WA as potential models for other congregations and schools.

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1190 For example, in health care - SJOG hospitals and Mercy Hospitals; in education – JTC, Presentation Sisters WA in relation to Stella Maris schools in Geraldton.

1191 As already discussed in chapter 3, the Presentation Sisters in Queensland have adopted the common law structure of a company limited by guarantee for each of their schools and have joined the new public juridic person of Mercy Partners as the canonical body to which the schools are subject. The Christian Brothers Oceania has adopted a statutory company under the NSW Act as a new common law structure and the Holy See has canonically recognised a new public juridic body. At least one WA congregation has transferred governance and ownership of their school to the Archbishop through a Deed of Agreement but the details are confidential.
7.7.1.1 John Twenty Third College

In the late 1970s, the council of John Twenty Third College (‘JTC’), rather than the school itself, became an incorporated association, with the Archbishop of Perth owning the property as a corporation sole. The common law constitution of the incorporated association requires one of the board member positions to be a representative of the archbishop. It also contains reserve powers for the Congregation of the Institute of the Blessed Virgin Mary (the Loreto Sisters) and the archbishop in the appointment and removal of members. The accompanying rules, not the constitution, refer to formation of council members. The common law structure adopted by JTC is sufficient and effective enough to allow it operate as a successful business; the constitution of the incorporated association includes some aspects of the founding Congregations, including reserve powers, but does not define or seek to ‘protect’ the charisms of Mary Ward or Ignatius Loyola, but it could do so.

The public juridical person to whom the incorporated association is responsible is the archdiocese of Perth; the archbishop as the representative of the diocese provides the necessary canonical approvals and supervision. The transfer of the property from the Sisters and the Jesuits to the archbishop as a corporation sole did not devalue the property nor did it endanger the value of the stable patrimony overall as the transfer was between public juridical persons. The council could not hold property to the

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1192 JTC uses the term Council for its governing body; other schools have used the term Board.
1193 See chapter 5.2.7.
1194 ‘Due to her historical connection with the College, the Sister Provincial in Australia for the time being of the Institute of the Blessed Virgin Mary retains residual rights and powers with respect to the College’: Recital C of the Constitution. No such reserve power clause relates to the Jesuits, nor do they retain reserve powers in the appointment and removal of members.
1195 The researcher has not seen the canonical statutes of JTC.
1196 There is some discussion between JTC and the Archdiocese as to whether the property is held on constructive trust for the school. Either way, as ecclesiastical property there was no devaluation in the transfer.
title without being a public juridical person itself or alienation of the property occurs, in contravention of the 1983 Code.

7.7.1.2 The University of Notre Dame Australia

The University of Notre Dame Australia (‘UNDA’) is a tertiary institute ‘established as a statutory body corporate by the University of Notre Dame Australia Act 1989’ with campuses in Fremantle, Broome and Sydney. It was ‘established under canon law as a public collegial juridical person known as Notre Dame Australia by a proclamation of the Administrator of the Archdiocese of Perth’ on 2 July 1991.\(^\text{1197}\) The trustees of the canonical body are the same people who fill the position of trustees in the common law structure.

UNDA has a tri-level governance structure including trustees, governors and directors. Its governance documents include the University of Notre Dame Australia Act 1989 (WA) (‘UNDA Act’); statutes (pursuant to s 20 UNDA Act); trustees rules (pursuant to s 21(2) UNDA Act); trustees standing orders; and regulations (general, school etc pursuant to s 21(3) UNDA Act). Detailed provisions for the appointment, removal, purpose, functions and duties of the respective levels of governance are contained in the UNDA Act. It is usual for an Act of Parliament to establish universities,\(^\text{1198}\) it is not relevant for schools and no schools in WA are established by statute.\(^\text{1199}\) UNDA’s tri-level structure is similar to that of EREA, which also operates on a national scale. A two-level governance structure is more suitable for smaller incorporated schools.

\(^{1197}\) Background, Statutes of the University of Notre Dame Australia.

\(^{1198}\) Curtin University of Technology Act 1966 (WA); Edith Cowan University Act 1984 (WA); Murdoch University Act 1973 (WA); University of Western Australia Act 1911 (WA).

\(^{1199}\) The usual form of legal entity adopted by Independent schools in WA is the incorporated association or the company limited by guarantee.
UNDA was also established as a separate public juridical person in the name of Notre Dame Australia (NDA), distinguished from the common law entity. Establishing a primary or secondary school as a public juridical person still requires supervision from the diocesan bishop and requires it to be accountable to him in relation to financial issues. To create multiple but individual schools as public juridical persons is a possible but ineffective way to conduct Catholic education in the state where diocesan bishops (representing the public juridical persons of the dioceses) have already delegated Catholic education to the CECWA.

7.7.1.3 Mercy Partners

Mercy Partners is a relatively new public juridical person that relates not to just one congregation, but to any congregation that qualifies within its statutes. It provides an opportunity for different congregations with differing common law structures to fall within the same canonical governance.\(^{1200}\)

7.7.1.4 Reconfiguration of Congregations

Some smaller congregations in Australia and overseas who wish to continue in their ministries have chosen to ‘reconfigure’. Essentially, reconfiguration means a congregation ceases to exist when subsumed by another congregation, or they join with another congregation to establish a new congregation.\(^{1201}\) The intention of most congregations in reconfiguring is to allow members of the congregations to continue in their ministries when the congregation alone does not have the human or financial resources to continue. In either instance, after canonical approval is granted, canon 634

\(^{1200}\) Mercy Partners was discussed at chapter 3.4.3.2.

§1 provides that the new religious institute is a public juridical person. Reconfiguration concerns the life of the congregation but that life includes its ministries.

Reconfiguration of congregations as an option for new or continued governance of congregational schools is only useful where the members of the congregations are willing and able to continue in active governance of their schools, even if the governance is in partnership with laity.1202

7.7.2 New Public Juridical Persons

As congregations consider their future involvement in the governance of their schools, the identity of a suitable public juridical person to replace them is an essential element in decision-making. Several options are permissible in canon law.

7.7.2.1 The Dioceses

The Archdiocese of Perth is the public juridical person for JTC. Dioceses are appropriate and possible options as ‘replacement’ public juridical persons for the governance of congregational schools, and are capable of holding the property on trust for the schools. This ensures compliance with Book V of the 1983 Code approving alienation of property and retaining enough financial resources to conduct the apostolate and mission of the school. Canonical statutes specifically drafted for each school are essential to retain the charism associated with the original congregational founder within any new public juridical person.

1202 For detailed discussions on reconfiguration see: Grant, Mary K and Patricia Vandenberge, csc, After We’re Gone: Creating Sustainable Sponsorships (Ministry Development Resources, 1998); Maureen Cleary (ed) To Tangle or to Tango: The Reconfiguration of Religious Institutes, Conference Presentations (2009); Schweickert, Jeanne, sssf, Standing at the Crossroads: Religious Orders and Reconfiguration (Convergence, 2002).
7.7.2.2 CECWA

Neither CECWA nor CEOWA have common law identity and therefore provide no protection to the charism associated with the original congregational founder, or any protection in law; they do not exist in the eyes of the common law. The CECWA Trustees is an incorporated association established to receive and disburse monies from the state and federal governments for Catholic schools in WA. Its constitution already contains the authority for governance of Catholic schools. It is a recognised legal identity that can sue and be sued and its constitution can protect the charism associated with the original congregational founder.

Diocesan bishops can approve the canonical status of CECWA Trustees as a public juridical person. Its canonical statutes can provide for membership of any former congregational schools that in turn will have by-laws that pertain specifically to the school, including provisions for the protection of the charism associated with the original congregational founder. This provides one canonical body for congregational schools when the congregations must withdraw from their education ministries. CECWA Trustees can hold the school’s property on trust for a specific school. It then complies with both canon law and common law requirements for ownership of property.

7.7.2.3 A New Body

Diocesan bishops may approve new public juridical persons to complement each new common law structure of former congregational schools or they may approve one new public juridical person to serve all former congregational schools.\(^\text{1203}\) However, as the

\(^{1203}\) ‘A public juridic person may operate through more than one [common] law corporation’: Jung, above n 661, 96.
CECWA Trustees already exists and can adopt that role with juridical status, establishing a new public juridical person does not present the most appropriate option to adopt in WA.

7.7.3 Summary

Several options exist, with varying degrees of suitability, to provide the requisite public juridical person for congregational schools that no longer operate within the canonical governance of the congregation. Some exist but others will require new canonical approval. The options are:

- the dioceses;
- the CECWA Trustees;
- a new body similar to Mercy Partners; or
- the individual schools.

7.8 Conclusion

There is no doubt that Vatican II was the most significant event in the Church’s life in the 20th century. It sought an ‘alternative ecclesiology’, 1204 which entailed a new and broader understanding of the Church and its processes that in turn allowed for a greater involvement of the laity. This involvement had its origins in the baptismal sacrament and recognised all baptised as People of God (the mission of baptism). The spirit of Vatican II continues today as interpretations of canons evolve to apply to contemporary issues. The significance of it for the thesis question is that the Church can and should remain open to new ideas and ways of understanding the Church’s

1204 Thornber and Gaffney, above n 7. 3.
processes, reflecting the ‘signs of the time’. The processes can allow laity to
exercise canonical governance enabling the continuation of the mission of
congregations no longer able to carry on in their schools. Those missions belong to the
Church too and are worth maintaining. Members of the laity already hold significant
positions in governance of congregational affiliated health and education
organisations.

The mission of most congregations has been to provide a service to the poor and
disenfranchised, often in relation to education and health care. The focus of that
mission has not changed but the ‘need’ has undergone a transformation. When the
Venerable Nano Nagle responded to a need for Catholic education of poor children in
Ireland, she was doing so in the face of the Penal Laws, which forbade education in
the Catholic faith and made it impossible for any but the wealthy to receive an
education. Whilst there are needs in today’s Australian society those needs are
different, as education is now compulsory. The need lies with educating those who
desire a Catholic education in an increasingly secular society; not all who share that
desire have the same financial needs as those originally taught by the Presentation
Sisters and Christian Brothers in Ireland, but the apostolate of education, ‘especially
for the needy’, remains a ‘proper objective’ of the Church today.

1205 In Mater et Magistra, Pope John XXIII picked up Pius XII’s expression the ‘signs of the times’
and used the phrase to call the church to renewal in its own life and in its involvement in the world by
‘reading the signs of the times’: Australian Catholic Social Justice Council, Reading the Signs of the
Times (2011) <http://www.socialjustice.catholic.org.au/files/Social-
Teaching/Reading_the_Signs_of_the_Times.pdf>.
1206 An Act to Restrain foreign Education 7 Will III c.4 (1695):
Sec. 9. Whereas it has been found by experience that tolerating at papists keeping schools or
instructing youth in literature is one great reason of many of the natives continuing ignorant of the
principles of the true religion, and strangers to the scriptures, and of their neglecting to conform
themselves to the laws of this realm, and of their not using the English habit and language, no person
of the popish religion shall publicly teach school or instruct youth, or in private houses teach youth,
except only the children of the master or mistress of the private house, upon pain of twenty pounds,
and prison for three months for every such offence.
7.8.1 The Legal Question - What Does Canon Law Allow?

In the context of the thesis question, canon law permits public juridical persons\textsuperscript{1208} and associations of Christ’s faithful.\textsuperscript{1209} Both the canonical statutes of either of those bodies and the constitution of the corporate structure adopted for the school can contain provisions that protect the charism associated with the original congregational founder. Canon law permits approval of alienation of a congregation’s property\textsuperscript{1210} and does not preclude the adoption of the common law structures. However, the transfer of property in common law transactions requires canonical approval in certain circumstances;\textsuperscript{1211} approval is unlikely where the transfer adversely affects the patrimonial condition of the ecclesiastical property. Transferring property from one public juridical person to another new or pre-existing one in the context of the thesis question is unlikely to adversely affect the patrimonial condition.

7.8.2 The Theological Question - What is the Role of the Laity in Catholic School Governance?

The concept of governance in the Church is evolving, but not always with clarity. The need to ask and answer the thesis question is an opportunity to clarify and define the position of the laity in Catholic school governance, which requires flexibility from both the Church authorities and the laity. Vatican II empowered the Church to increase the role and participation of the laity in Church issues, including Catholic school governance. It is the Church’s task to ensure that laity continues in the governance

\textsuperscript{1208} Ibid canon 113.
\textsuperscript{1209} Ibid canon 298. As discussed in the thesis above, private associations of Christ’s faithful are not appropriate entities for Catholic school governance. Public associations with public juridical personality may be a possibility but directly seeking a new public juridic person, such as EREA, is the more appropriate option.
\textsuperscript{1210} Ibid canons 1291 and 1295.
\textsuperscript{1211} Discussed in chapter 7.2.3.
roles they have increasingly undertaken in congregational schools. Clearer definition of those roles is required as are continuous formation programs for all canonical administrators, laity and clerics alike. Canonical and corporate constitutions can include these requirements.

7.8.3 Transitional Governance

An alternative public juridical person is required to adopt the current work of the congregation\textsuperscript{1212} in providing Catholic education in the tradition of their founder when the congregation withdraws from governance of its schools. The transition of canonical governance from a congregation to predominantly laity is a major step in the history of both bodies. It is critical that the transition occurs with the current congregation.\textsuperscript{1213} A transition with reserve powers in the canonical and common law governance documents is preferable to a congregation handing over their school with no continued involvement at all.\textsuperscript{1214} Whilst there are different models of transitional governance (some of which do not include reserve powers), it is recommended that the congregation initially retain reserve powers in order to maintain some influence and involvement with the new entity, that are enforceable in law; if they are not, the law affords no protection for them. The continued involvement may only be at a canonical governance level, but the continued presence and contribution by the congregation is essential to the new entity fully understanding and respecting the past while at the same time looking to new and challenging developments without the congregation’s

\textsuperscript{1212} Holland, above n 987, 37.

\textsuperscript{1213} Clarke likens it to an evolutionary process and Kelly and Mollison identify three stages to the transference of canonical governance - 1) permission from the congregation, 2) preparation including adequate formation of the future canonical governors including an identified list of competencies they should possess and 3) praxis – the action: Clarke, above n 1033, 47 and Kelly and Mollison, above n 1172, 50.

\textsuperscript{1214} As the congregation draws closer to withdrawing fully from the new entity the reserve powers can be lessened until they no longer exist.
involvement. All those involved in both the new canonical and common law governance structures should be fully prepared for their apostolate.

### 7.8.4 Conclusion

Possible canon law options (in no particular order) for future governance of congregational schools where the congregation withdraws from active governance of their schools and seeks new canonical governance include:

- approval for a new association of Christ’s faithful with public juridical status, for each congregational school;
- approval for a new association of Christ’s faithful with public juridical status, to act for all congregational schools;
- approval for a new public juridical person (other than an association of Christ’s faithful), for each congregational school;
- approval for a new public juridical person (other than an association of Christ’s faithful), to act for all congregational schools;
- approval for a new public juridical person, to act for any congregation governed (or formerly governed) school, health or other ministry (similar to Mercy Partners);
- conferral of public juridical person status on CECWA Trustees; or
- approval of the relevant diocese.

An effective and efficient option if there are only a few congregations in a state that need to withdraw from their teaching ministry, is to appoint a new public juridical person for each school or group of schools belonging to a congregation. Alternatively, as with Mercy Partners, a new public juridical person may be appointed for the few remaining congregations. If there are several congregations transferring their teaching
ministry in the next decade or so, the more appropriate option is to confer public juridical person status on the CECWA Trustees. Like UNDA (a common law entity) and NDA (a canonical entity), CECWA Trustees (a common law entity) would have a canon law structure where the canonical administrators are also the highest level of common law governance.

The option of establishing a public juridical person complementary to the CECWA Trustees is a new concept but within the power of the competent authorities. In contrast to common law, canon law does not readily change with the needs of its society. One of the purposes of law is to provide stability to society, but maintenance of that stability requires a fundamental flexibility to adapt to society’s needs. Vatican II attempted to renew the Church and was ‘future-oriented’ but did not provide a mechanism for continuous review of the canon law; review occurs but the process is slower than that in common law. Interpretation of the canons relevant to this thesis should be in light of the signs of the times — the needs of the 21st century:

…the deep upheavals of situations, the growth of human values, and the manifold needs of the world today (cfGS 43–44), press ever more insistently on the one hand for the renewal of many traditional pastoral forms of activity, and on the other for the search for new forms of apostolic presence.

When considering new canonical governance structures for what were once congregational schools, ‘the pressing pastoral task of the new evangelisation calls for

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1215 If the Church adopts common law structures for CECWA with a constitution detailing CEOWA as its operative structure (eg Board of Directors) similar to the structure of UNDA, then creating a complementary public juridic person to CECWA is also appropriate.
1216 Orsy, above n 784, 28.
1217 Sacred Congregation for Bishops, Mutuae Relationes, above n 78, [19].
involvement of the entire people of God, and requires a new fervor, new methods and a new expression for the announcing and witnessing of the Gospel.\textsuperscript{1218}

Preceding chapters have identified, discussed and determined the current role of congregational schools in Catholic education; current common law and canonical structures used by those congregational schools; future possibilities for common law governance; and introduced the role of canon law in Catholic education. This chapter has considered the relevant forms of canonical governance that congregational schools may seek to adopt when they continue their mission of education without the active participation of the congregation. The final chapter will present the thesis question and a rationale for its answer and overall conclusions.

\textsuperscript{1218} Pope John Paul II, \textit{Pastores Dabo Vobis}, above n 1179, [18]. See also Pope John Paul II, \textit{Redemptoris Missio}, above n 57, on the need for evangelisation and Engebretson, above n 57, for a discussion on the role of the Catholic school in evangelisation.
CHAPTER 8
CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

This thesis addressed the question of what legal options are available to congregational schools that will protect the charism of the congregation and most effectively continue the delivery of education in that charism. The question arises as congregations across Australia, and indeed the western world, consider the viability of their continued involvement in the governance of their congregational schools in the light of dwindling membership in those congregations. Resolution of the thesis question involves consideration of several related questions, namely:

1. Why is Catholic education in congregational schools, and the significance of their charism, necessary or desirable within the Catholic education system?
2. What are the current legal ownership and governance structures in the Presentation Sisters and Christian Brothers Congregations?
3. What common law options are available for effective ownership and governance of congregational schools that will maintain their charism when the congregations are not present?
4. What changes have some congregations already made in their governance structures and how, if at all, do they protect the charism?
5. What current canon law structures exist, what structures are possible without the congregations’ involvement, and how do they impact on common law options?

In addressing these questions, the thesis provided an overview of Catholic education and the role and value of congregational schools. It critically examined current
common law structures of the diocesan and congregational schools. It considered common law structures that could be used to protect the congregations’ charisms without their direct involvement. The thesis also examined the current and future canon law structures relevant to congregational schools, and considered the interplay between common law and canon law structures.

8.2 OVERVIEW OF THE THESIS

A concise overview of the key issues and findings from each chapter is presented below.

8.2.1 Chapter 1 - Introduction and Statement of the Research Problem

Chapter 1 introduced the thesis question and set the parameters for the discussion and the issues that were to determine a possible answer to the thesis question and the research approach. It identified the research problem and set it in the context of two congregations: the Presentation Sisters and the Christian Brothers. The distinction was made between congregational schools, where a congregation has responsibility for the governance of the school and owns the property of the school, and diocesan schools, where the CECWA has delegated authority from the bishops for the governance of the schools and the bishops own the school properties as corporations sole. The concept of the congregations’ charisms was introduced and the canonical requirement of a public juridical person for governance of Catholic schools was identified.

8.2.2 Chapter 2 - The Role of Congregational Schools and Charisms

Without a need for congregational schools in Catholic education, the thesis question does not elicit either discussion or a response. Statistics collected by ISCA illustrate the vital contribution independent schools, and Catholic independent schools
specifically, make to education in Australia. In 2013, 20.6% of students attending school in Australia attended Catholic schools. Of the 47 Catholic schools in WA in 2000, 12 were congregational schools. The continuation of education offered through a congregational school is therefore worth considering; viable options for the continuation of congregational schools after the congregations have no active role in the governance of their schools must be identified.

The Church itself has identified the rights and need of all Catholic parents to give their children a Catholic education. Diversity in offering that education is possible through congregational schools and as such provides a compelling reason for congregational schools to continue. It is acknowledged that the bishop has a supervisory role in all Catholic schools, as is the measure of autonomy in the management of congregational schools.

This chapter discussed the governance of diocesan schools and, in particular, the complex legal relationships that exist between the Church, CECWA, CEOWA and diocesan schools. It highlights the potential compound issues facing congregational schools seeking to protect and maintain their charisms in the face of declining numbers in the congregations.

1220 Leavey, above n 3, 5 (Table 1.1).
The thesis question directs itself to the charism. Legal mechanisms to protect the future of the charism have not been necessary while the congregations remained in active participation in the schools’ governance, but with the dwindling numbers of professed members of many congregations, they are not able to continue in the active governance of their schools. The charism in Catholic education has long been regarded by the Church as significant and therefore worthy of preservation and enhancement.

8.2.3 Chapter 3 - Current Legal Status and Structures of the Church and Diocesan and Congregational Schools

Chapter 3 examined the current legal structures of the Catholic Church, diocesan schools, Presentation Sisters and Christian Brothers, which include the corporation sole, unincorporated association, incorporated association, statutory corporation and company limited by guarantee. The chapter sought to identify key elements of the structures in relation to governance and property ownership. The analysis of the current legal structures demonstrated the diverse ways in which Catholic schools operate.

The Catholic Church delivers Catholic education in WA through two avenues: the diocesan schools and congregational schools. Some diocesan schools have a charism directly related to a congregation, but the congregation has no part in the governance or ownership of that diocesan school. For the most part, the diocesan schools do not identify with specific charisms. Whether diocesan schools as a structure are capable of legally protecting the charism of a former congregational school is important in determining whether they are a model that provides a suitable answer to the thesis question.
The Catholic Church is an unincorporated association, as are the dioceses.\textsuperscript{1223} Diocesan land vests in the name of the relevant bishop as a statutory corporation sole.\textsuperscript{1224} The bishops have no other legal status other than in their personal capacity. The CECWA acts through its executive arm, the CEOWA. Neither body has any legal status. The diocesan schools have no legal status.\textsuperscript{1225} In April 1988, the bishops approved the application for incorporation of the CECWA Trustees, an incorporated association established for the purpose of receiving and distributing state and federal funding to Catholic schools. CECWA Trustees does not govern Catholic schools, but if it did, its constitution would be capable of protecting the charism of a congregation in a particular school under its governance.

The Congregation of the Presentation Sisters in WA is an incorporated association. Their schools have no separate legal status. The Congregation is the public juridical person for the school. The Congregation owns the school property. The Congregation of the Presentation Sisters in Qld have established two separate companies limited by guarantee to govern and own their two schools. This provides an effective form of governance capable of protecting the charism, through its constitution, and provides flexibility for the Congregation to maintain an active role (in varying degrees of involvement) in the governance of the schools whilst they choose to do so. Canonical governance of the schools resides in Mercy Partners.

Prior to October 2007, the Congregation of the Christian Brothers WA, an incorporated association, governed the Christian Brothers schools in WA. The public juridical

\textsuperscript{1223} Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565.

\textsuperscript{1224} Roman Catholic Church Property Act 1911 (WA); Roman Catholic Church Property Acts Amendment Act 1916 (WA); Roman Catholic Geraldton Church Property Act 1925 (WA); Roman Catholic Bunbury Church Property Act 1925 (WA); Roman Catholic Bishop of Broome Property Act 1957 (WA); Roman Catholic Vicariate of Kimberleys Property Act Amendment Act 1970 (WA).

\textsuperscript{1225} Roman Catholic Trusts Corporation v Van Driel Ltd & Ors [2001] VSC 310.
person responsible for the schools was the Holy Spirit Province (covering both WA and SA). In October 2007, the legal governance remained with that incorporated association but changed to a more centralised administrative format, which included all Christian Brothers schools in Oceania under the Province of Oceania, a public juridical person. This governance model was an interim measure while the Christian Brothers sought a new common law and canonical structure for their schools in Australia. In 2013 EREA Trustees, a statutory company, was incorporated under the NSW Act and EREA obtained pontifical status as a public juridical person. Ownership of the school properties is not yet settled but it is envisaged that some will be registered in the name of this new common law body. This provides an effective form of governance that is capable of protecting the charism, through its constitution, and provides flexibility for the Congregation to maintain an active role in the governance of the schools. The Christian Brothers have maintained a very active role in that governance.

8.2.4 Chapter 4 - The Suitability of Diocesan School Structures for Congregational Schools

Diocesan school land is registered in the name of the bishop as a corporation sole. It is not held in trust for the particular diocesan school and as such the actual property on which a diocesan school is situated is not, in law, owned by or in trust for the school. Diocesan schools, the CECWA and the CEOWA are not recognised legal bodies.\textsuperscript{1226} The Catholic Church is an unincorporated association. It is not a suitable option for the governance of a Catholic school as it affords no legal protection to the charism (or

\textsuperscript{1226} Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis (2007) 70 NSWLR 565.
the school). As it has no legal personality, membership may be difficult to determine, it is not capable of entering into contracts, its committee members are personally liable to the association, and it is not required to have rules.

The unincorporated association leaves members, particularly committee members, exposed to legal liability and protection of the charism is tenuous.

The existence of an agency may assist a third party in seeking legal recompense or protection when dealing with the Church or diocesan schools, including protection of the charism. However, there is no written or oral agency agreement between the bishops and any other relevant party in Catholic education in WA. The most likely agency to exist, because of the operational realities of Catholic education governance, is agency created by ostensible authority between the diocesan bishops as principals and the Executive Director of the CEOWA as the agent. The uncertainty of the agency renders it unlikely that it is useful in providing some legal protection in the governance of diocesan schools.

The legal structures, or lack thereof, that currently exist in the diocesan school does not provide a satisfactory answer to the thesis question. The best governance and ownership options for a congregational school transferring its schools to another body lie in entities that have legal standing. The lack of legal status of diocesan schools creates the following main limitations as a suitable entity:

1. it cannot sue or be sued;
2. it cannot own property in its own right (except in trust);
3. it provides no legal protection to the charism of the school;
4. its members attract personal liability; and
5. it creates uncertainty in the legal standing of business dealings.
As the best governance and ownership options for a congregational school transferring its schools to another body lie in entities that have legal standing, the most suitable options for those legal structures include those already used in congregational school governance, namely the incorporated association, the company limited by guarantee and the statutory corporation.

Relevant legislation in all Australian states provides for incorporation of a body as an incorporated association. The current AI Act adequately addresses the ownership and governance of a congregational school and protection of the charism in the context of the thesis question. The AI Bill extends the protection afforded currently by introducing more transparent record keeping and accountability, recognising that there is a contract between the members and providing a better dispute resolution process, giving statutory recognition to the common law duties of officers of the association and creating new options when an association decides to wind up.

The Corporations Act provides legislative governance of companies across Australia. A company is a legal entity that can sue and be sued, hold property and has the protection afforded to it by reporting requirements and directors’ duties. The Corporations Act also allows appointment of directors located interstate and overseas, facilitating representation by a congregational member from outside Australia. Reserve powers in the constitution of the company, particularly in relation to the

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1227 JTC is an incorporated association.
1228 St Rita’s College Ltd and St Ursula’s College Ltd are companies limited by guarantee.
1229 EREA schools are governed by EREA Trustees – a statutory corporation.
1230 Associations Incorporation Act 1991 (ACT); Associations Incorporation Act 2009 (NSW); Associations Act 2003 (NT); Associations Incorporation Act 1981 (Qld); Associations Incorporation Act 1985 (SA); Associations Incorporation Act 1964 (Tas); Associations Incorporation Act 1981 (Vic); Associations Incorporation Act 1987 (WA) [but note: Associations Incorporation Bill 2014 (WA) which intends repealing and replacing the 1987 Act].
charism, allow the congregation to maintain a direct link with the school should they wish to do so.

A statutory corporation is ‘created by, or pursuant to, a statute.’ A company established by statute is limited in its purpose and powers by the very purpose of its creation. The statute will contain the purpose and powers of companies incorporated under it within the constitution, which should be comparable to one for an incorporated association or company. NSW and Qld have Acts suitable for this purpose but WA does not.

Chapter 5 considered the corporate structures, legally recognised, that are currently used in the governance and ownership of some congregational schools and assessed their suitability for future governance of other congregational schools. The main advantages of these corporate structures are that they:

- are recognisable legal entities;
- can sue and be sued;
- require a constitution, which is capable of including clauses for the protection of the charism and reserve powers for the congregation;
- are capable of owning property;
- require, in differing degrees, record keeping and duties and obligations on members that assist the business of the school; and
- allow volunteers to hold governance positions.

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1231 Butt, above n 19, 410.
1232 Roman Catholic Church Communities Land Act 1942 (NSW); Roman Catholic Church (Incorporation of Church Entities) Act 1994 (Qld).
Chapters 4 and 5 considered the common law structures of the unincorporated association, the corporation sole, the incorporated association, the company limited by guarantee and statutory corporations. However, these structures need to be further examined in the context of what is permissible pursuant to canon law and hence the intersection of common law and canon law. Therefore, chapter 6 provided a background to canon law, its interpretation and its application in Catholic schools. It provided an historical context in light of Vatican II and acknowledged the sources of canon law as deriving from the Code of Canon Law 1983, ecclesiastical law and divine law. In order to fully understand the nature and scope of canon law structures as discussed in Chapter 7, Chapter 6 then looked briefly at the relevant Books of the 1983 Code and identified those that relate to Catholic school governance, namely, the General Norms, the People of God, the Teaching Function, Temporal Goods, and Processes. The chapter also noted the intersection between canon law and common law, and the relevance of it for school governance and ownership.

8.2.7 Chapter 7 - Canon Law Implications for the Thesis Question

A serious canonical aspect for congregations considering the governance and ownership of their schools to another body lies in the need to protect the stable patrimony of the congregation. To this end, the thesis considered canons relating to temporal goods, including administrative acts. It considered the duties of canonical administrators concerning property. It then considered the relevant bodies that may own the stable patrimony, namely the public juridical person and the association of Christ’s faithful. Canon law has significant implications for the ownership of property
by Church entities and commercial dealings with that property. The statutes of these bodies and their relevance to the common law constitutions and rules were discussed. The chapter considered the role of the laity since Vatican II in the governance of these canonical bodies, along with the need for the formation of canonical governors.

Several canon law issues relate to the thesis question. Requirements placed on canonical structures by Book V of the 1983 Code determine what common law and canonical structures must do to answer the thesis question. Relevant options for canonical governance structures include juridical persons and associations of Christ’s faithful. Any new governance structures require the laity’s participation in place of congregation members, and the formation of those laity in the charism and tradition of the congregation’s founder are critical to the success of any new governance structure.

8.3 KEY FINDINGS OF THE RESEARCH

In answering the thesis question, the research summarised above identified several key findings that either address the question or raise issues relating to it that remain unresolved.

8.3.1 The Complexities of the Catholic Church

Two main issues arise in relation to this finding. Firstly, the unsatisfactory legal status of the Catholic Church extends to the dioceses, CECWA, CEOWA and therefore to diocesan schools. Without a recognised legal entity, none of these structures is suitable

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1233 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). This discussion in this chapter only relates to Book V. The canons are ‘connected’ to, and should be considered in light of, other conciliar documents such as Lumen Gentium, Gaudium et spes, Perfectae caritatis, Christus Dominus, Dignitatis humanae and Gravissimum educationis: De Paolis, above n 872, 349.
to protect the charism of a congregation in the continuing governance of congregational schools. Secondly, the complexity of the canon law and its different entities (such as the public juridical person and associations of Christ’s faithful) contributes to a lack of clarity in some relevant matters, which results in unresolved issues. Some of the unresolved issues include the interpretation of canon 129 and the role of the laity in canonical governance.

8.3.2 The Fundamental Role of Canon Law in Catholic School Governance

A Catholic school may not operate as such without canonical approval and governance.\textsuperscript{1234} A public juridical person usually exercises that canonical governance. Congregations act as the public juridical person for congregational schools, and the diocese for diocesan schools. The canonical governance structure is in addition to any common law governance structure. It follows, therefore, that a congregation cannot transfer the common law governance of their schools to another body or entity without ensuring there is also a canonical governance structure, approved by the competent authority, to replace them.

8.3.3 Canonical Property Issues in Catholic School Governance

The property of the congregation belongs to it as a public juridical person\textsuperscript{1235} and is ecclesiastical property.\textsuperscript{1236} As such, any acts that ‘acquire, retain, administer and alienate’\textsuperscript{1237} temporal goods of the public juridical person are subject to Book V of the 1983 Code. Relevant and appropriate permission is required from the competent authority in relation to alienation of stable patrimony,\textsuperscript{1238} and extends to ‘any

\textsuperscript{1234} Code of Canon Law1983 canon 803 §3.
\textsuperscript{1235} Ibid canon 1256.
\textsuperscript{1236} Ibid canon 1257.
\textsuperscript{1237} Ibid canon 1254.
\textsuperscript{1238} Ibid canons 1291 – 1294.
transaction whereby the patrimonial condition of the juridical person could be adversely affected.¹²³⁹ The canonical administrator should seek advice from the competent ecclesiastical authority¹²⁴⁰ as to whether or not a transaction falls within the ambit of Book V. It follows, therefore, that a congregation cannot transfer the ownership of their school properties to a new common law structure without receiving the prior approval of the competent authority.

8.3.4 The Role of the Laity in Catholic School Governance

Since Vatican II, the Church has discussed the role of the laity in canonical governance. Although recognising that the laity have a fundamental and central role in canonical governance, the actual extent and practicality of that role remains unresolved, particularly in light of unsettled interpretations of canon 129. However, the decreasing number of religious actively participating in their school’s governance creates the reality that the laity must have a more active role in canonical governance of Catholic schools, in line with their involvement in common law governance. The formation of the laity participating in canonical and common law governance of Catholic schools is essential to the effective governance of those schools and is made possible through the provision, and participation in, formation programs specifically directed to a school. The common law structures are only as effective as the people who constitute them.

8.3.5 Appropriate Structures for Common Law Governance of Catholic Schools

Unlike the Church bodies, there are several appropriate alternative legal entities that congregations may adopt for the common law governance of their schools in the future.

¹²³⁹ Ibid canon 1295.
¹²⁴⁰ Ibid canon 1292 §1-2.
that will allow for the protection of the congregation’s charism and its continued existence in the school. These include the incorporated association, the company limited by guarantee and the statutory corporation. Which corporate structure a congregation adopts will depend on the complexity of their school’s governance, the size and annual turnover of the school, and the availability of legislation in their state. Each allows for either no continued involvement in governance on the part of the congregation, or varying degrees of participation determined by reserve powers in the constitution or rules of the body. It follows, therefore, that a congregation that needs to transfer the common law governance of its schools should do so to one of these corporate bodies.

8.4 RECOMMENDATIONS

There are legal options available to congregational schools that will protect the charism of the congregation and most effectively continue the delivery of education in that charism, when the congregations play no, or no significant, role in the governance of their schools. Those options are the incorporated association, the company limited by guarantee and the statutory corporation. It is the governance document of these legal entities that provides the protection for the charism and the drafting of the document is essential in capturing not only how the charism is protected, but to what degree it is protected. Some congregations have already adopted such structures, and their constitutions, to varying degrees, address these issues.

However, in transferring the current governance and ownership of congregational schools to any one of these common law entities for the future, a congregation must also comply with the canonical requirements for the governance and alienation of
ecclesiastical property. The common law options are pointless without the canonical compliances.

Based on this answer to the thesis question, the thesis makes the following recommendations:

1. That congregations seeking new governance and ownership of their schools when they are no longer willing or able to actively participate in that ownership and governance, choose a corporate structure that has a separate legal identity, referred to above, based on the needs of their school.

2. That congregations seeking new governance and ownership of their schools, but wish to continue some active involvement in that governance in the foreseeable future, choose a corporate structure, referred to above, based on the needs of their school with reserve powers articulated in the constitution or rules of the chosen corporate structure.

3. That congregations seeking new governance and ownership of their schools when they are no longer willing or able to actively participate in that ownership and governance, seek a new public juridical person to continue the canonical governance of the school.

4. That the laity be given an active role in the new canonical governance of the schools.

5. That all canonical governors be required to undergo annual formation programs to ensure they have a proper and continuing understanding of their role to further ensure the continuation and maintenance of the charism.

6. That unless and until the Catholic Church acquires a recognised legal status, congregations seeking new governance and ownership of their schools when
they are no longer willing or able to actively participate in that ownership and governance, do not transfer governance or ownership of their schools to the diocesan school system.

8.5 CONCLUDING REMARKS

The thesis question is a critical one to many congregations. The thesis provides an opportunity to address the issues and, as importantly, to consider the contribution of congregational schools to Catholic education in WA. That contribution is worth continuing and the thesis sought ways to ensure that it could do so through legal structures. As discussed in the thesis, the congregational schools, and through them the charisms of the congregation’s founders, are an ongoing tradition in Catholic education. The diversity offered by them enriches the delivery of Catholic education in WA.

In order to maintain that diversity, the congregations and bishops (as the competent ecclesiastical authority) must engage in honest and open dialogue, and be amenable to new forms of common law and canonical governance when considering the future governance of congregational schools:

The signs of the times are the significant features which characterise our era, the world of human experience and the life of the Church. As their ultimate origin is to be found in God’s providence, a refusal to read and scrutinise the signs or to resist or not to respond to them is in the ultimate analysis a refusal to respond to the Spirit.¹²⁴¹

In implementing any new common law or canonical structures, it is essential that both common law and canon law professionals work together to ensure that the common law structures are effective, but that they also ‘will safeguard the proper ecclesial role of those who have canonical oversight of Catholic schools’.  

The formation of canonical administrators is integral to the success of maintaining the charism of a school; the structure is only as good as the people who serve it. ‘Catholic identity is essentially linked to the quality of the … workers and to the respect for the mission, philosophy and code of ethics of the facility.’

Pope John Paul II identified four issues arising from Vatican II that assist Catholic identity, which is a central part of Catholic education. These are:

1. ecclesiology;
2. Vatican Council II’s focus on all Christ’s faithful sharing the ‘prophetic, priestly and kingly role of Christ’;
3. the rights and duties of the laity; and
4. the ‘assiduity with which the Church must devote to ecumenism’.

These Vatican II foci support the recommendations of this thesis and guide the Church to allow an increased role for the laity in Catholic school governance.

This thesis grew out of the need arising from the challenges faced by many congregations. For some, decisions regarding the future of their own survival and that of their schools take on an immediate urgency as the diminishing numbers of those joining the congregations and the ageing population of current members creates a need

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1244 Ibid 166.
for change. This thesis serves as a resource for those congregations informing them and empowering them to make informed decisions for the future governance and ownership of their schools that involve complex legal matters. It contributes to the congregations, and to Catholic education in this state, to enable them to move forward despite the current challenges facing them. The thesis provides a contribution to Catholic education by bringing together the relevant educational, legal and canonical issues facing future Catholic education.

‘It would be a tragedy if we did not have the courage to move beyond the past and have the creativity to address the future’.1245

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## APPENDICES

### APPENDIX A

**PRESENTATION SCHOOLS IN WESTERN AUSTRALIA**

<table>
<thead>
<tr>
<th>School</th>
<th>Address</th>
<th>Property title holder</th>
<th>Legal governance</th>
<th>Governance on a daily level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iona Presentation Primary</td>
<td>Buckland Avenue, Mosman Park</td>
<td>The Congregation of the Presentation Sisters (WA) Inc</td>
<td>The Congregation of the Presentation Sisters (WA) Inc</td>
<td>Principal and (Advisory) Primary School Board</td>
</tr>
<tr>
<td>Iona Presentation College</td>
<td>Palmerston Street, Mosman Park</td>
<td>The Congregation of the Presentation Sisters (WA) Inc</td>
<td>The Congregation of the Presentation Sisters (WA) Inc</td>
<td>Principal and (Advisory) College School Board</td>
</tr>
</tbody>
</table>
## APPENDIX B

**CHRISTIAN BROTHERS SCHOOLS IN WESTERN AUSTRALIA**

<table>
<thead>
<tr>
<th>School</th>
<th>Address</th>
<th>Property title holder</th>
<th>Legal governance pre October 2007</th>
<th>Legal governance October 2007 to April 2013</th>
<th>Legal governance post October 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aquinas</td>
<td>Mount Henry Road, Manning</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>EREA Trustees</td>
</tr>
<tr>
<td>Trinity</td>
<td>Trinity Avenue, East Perth</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>EREA Trustees</td>
</tr>
<tr>
<td>Christian Brothers College</td>
<td>51 Ellen Street, Fremantle</td>
<td>Trustees of the Christian Brothers of Strathfield, NSW</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>EREA Trustees</td>
</tr>
<tr>
<td>Catholic Agricultural College</td>
<td>Great Northern Highway, Bindoon</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>EREA Trustees</td>
</tr>
<tr>
<td>Christian Brothers School</td>
<td>Kelly Road, Tardun</td>
<td>Trustees of the Christian Brothers of Strathfield, NSW</td>
<td>Trustees of the Christian Brothers in Western Australia Inc</td>
<td>Closed 2009</td>
<td>Closed 2009</td>
</tr>
</tbody>
</table>

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## APPENDIX C

### COMPARATIVE TABLE OF THE INCORPORATED ASSOCIATION AND COMPANY LIMITED BY GUARANTEE

<table>
<thead>
<tr>
<th></th>
<th><strong>Incorporated Associations under the AI Act</strong></th>
<th><strong>Incorporated Associations under the AI Bill</strong></th>
<th><strong>Companies Limited Guarantee</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Definition</strong></td>
<td>Not-for-profit, has five members and is incorporated for a reason listed in s 4(a); is a separate legal entity and can own property; a body corporate with perpetual succession and a common seal</td>
<td>Not-for-profit, has six members and is incorporated for a reason listed in s 4(a) (expanded the reasons in the <em>AI Act</em>); is a separate legal entity and can own property; a body corporate with perpetual succession and a common seal</td>
<td>Not-for-profit, has three directors, at least one of whom resides in Australia, and a member; is a separate legal entity and can own property; a body corporate with perpetual succession and a common seal</td>
</tr>
<tr>
<td><strong>Legislation and Jurisdiction</strong></td>
<td><em>Associations Incorporation Act 1987</em> (WA); applies only in Western Australia</td>
<td><em>Associations Incorporation Bill 2014</em> (WA); applies only in Western Australia</td>
<td><em>Corporations Act 2001</em> (Cth) and <em>Corporations Regulations 2001</em> (Cth); applies in all states and territories of Australia</td>
</tr>
<tr>
<td><strong>Regulatory body</strong></td>
<td>Consumer Protection Division of the WA Department of Commerce</td>
<td>Consumer Protection Division of the WA Department of Commerce</td>
<td>ASIC</td>
</tr>
<tr>
<td><strong>Liability</strong></td>
<td>Liability of members limited to outstanding membership or subscription fees, if any</td>
<td>Liability of members limited to outstanding membership or subscription fees, if any</td>
<td>Liability of members limited to the amount of guarantee originally pledged, if there are outstanding debts; the guarantee is normally a nominal amount between $10–$100</td>
</tr>
<tr>
<td><strong>Application requirements</strong></td>
<td>Notice of intention to apply to the Commissioner; application in prescribed form; draft rules; and an advertisement in the local newspaper</td>
<td>Notice of intention to apply to the Commissioner; draft rules that must comply with aspects of the model rules</td>
<td>Application must be lodged with ASIC and include the proposed constitution</td>
</tr>
<tr>
<td>Membership</td>
<td>There must be a minimum of five members; qualification for membership is determined by the rules.</td>
<td>There must be a minimum of six members; qualification for membership is determined by the rules.</td>
<td>Qualification for membership is determined by the constitution</td>
</tr>
<tr>
<td>Rules/constitution</td>
<td>Must adopt its own rules; include provision in respect of each of the matters that are specified in sch 1 to the AI Act</td>
<td>May adopt its own rules or the model rules; must include details of: purpose/objects; name; powers; dispute resolution processes; membership qualifications; calling and procedures in meetings</td>
<td>May adopt its own constitution or the replaceable rules and a copy must be lodged by ASIC</td>
</tr>
<tr>
<td>Officers</td>
<td>Members of a committee who have the power to manage the affairs of the association; no secretary is required</td>
<td>Members of the management committee; no secretary is required</td>
<td>Must have at least three directors, one at least one of whom is ordinarily resident in Australia, and at least one member; at least one secretary is required</td>
</tr>
<tr>
<td>Duties and obligations</td>
<td>No statutory duties, but the common law duties of directors likely to apply to the committee members</td>
<td>Members of the management committee must: act in good faith; act with due care and diligence; not make improper use of information or position; disclose any material interest; and not allow the company to trade insolvent</td>
<td>Directors owe the following duties: act in good faith; act with due care and diligence; not make improper use of information or position; disclose any material interest; and not allow the company to trade insolvent</td>
</tr>
<tr>
<td>Meetings</td>
<td>Generally determined by the rules; must hold an AGM within four months of the end of the association’s financial year</td>
<td>Generally determined by the rules but members may call meetings into addition to any in the rules and an AGM must be held within 6 months of the end of the association’s financial year</td>
<td>Members may call meetings; an AGM must be held each year within five months of the end of the company’s financial year</td>
</tr>
<tr>
<td>Resolution of internal disputes (eg concerning the charism)</td>
<td>Only provision is that made in the rules, but the provision is not compulsory</td>
<td>A dispute resolution process is required in the rules and matters are appealable to SAT</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Record keeping</th>
<th>Must ‘keep accounting records’</th>
<th>A record must be kept of all members, directors, and financial records</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reporting requirements</td>
<td>Must ‘keep accounting records’ and submit at the AGM</td>
<td>Three tier reporting requirements — association with revenue less than $250 000, no reporting requirements unless members request it but must prepare financial statements; association with revenue between $250 000 and $1 000 000 must prepare and lodge financial report and a review or audit with the commissioner; and association with revenue in excess of $1 000 000 must prepare and lodge reports in compliance with Accounting Standards, have the report/s audited, send the reports and auditor’s report to members and present at the AGM, and lodge the reports with Commissioner</td>
</tr>
<tr>
<td>Amalgamation</td>
<td>Amalgamation is not possible</td>
<td>Amalgamation is possible</td>
</tr>
<tr>
<td>Winding up</td>
<td>Can be wound up voluntarily or by the court and surplus distributed according to the constitution</td>
<td>Can be wound up voluntarily or by the court and surplus distributed according to the constitution, but adds new provisions for winding up of associations with more complicated affairs</td>
</tr>
</tbody>
</table>
The hierarchical structure of the Church consists of:

1. **The Pontiff.**

2. **The College of Bishops** — all consecrated bishops, with the Pope at their head. It has ‘supreme and full power over the universal church’ and infallible teaching authority ‘both when gathered in an ecumenical council and when dispersed throughout the world, as long as its members agree on what is to be definitively held as true church doctrine’.

3. **The Synod of Bishops** — a representative gathering of worldwide bishops. Its main function is as an advisory group to the Pope. Canon 342 describes the Synod’s purpose as threefold:

   1) to foster closer ties between the bishops and the Pope;
   2) to advise the Pope on matters of faith, morals, and church discipline, and

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1246 *Code of Canon Law* canon 333.
3) to answer questions arising from ‘changing situations of the church in the world’.

4. *The College of Cardinals* — the group of bishops whose purpose is solely to:
   
   a. elect the Pope;
   
   b. head offices in the Roman Curia and be engaged in special assignments for the church; and
   
   c. serve as an advisory body to the Pope.\textsuperscript{1248}

5. *The Roman Curia* — ‘the collective name for the complex of secretariats, congregations, tribunals, councils, and offices that assist the Pope in the exercise of his pastoral office’.\textsuperscript{1249} It ‘carries on the ordinary business of the church’s central office.’\textsuperscript{1250} The Apostolic See or Holy See is the Pope with the Roman Curia.\textsuperscript{1251}

6. *Legates of the Pope* — the Pope’s permanent representatives to churches, states and public authorities in various parts of the world.\textsuperscript{1252}

7. *Dioceses* — define a geographical area established by the Pope, but constituted by the people within it. It refers to the people rather than the geographical area, the latter being a convenient way to define the boundaries.\textsuperscript{1253}

8. *Bishops* — are the representative head of a diocese, which is a public juridical person by law. ‘[T]hey are teachers of doctrine, priests of sacred worship, and

\textsuperscript{1248} *Code of Canon Law* canons 349, 356 and 358.
\textsuperscript{1249} *Coriden*, above n 786, 77; *Code of Canon Law* canon 360.
\textsuperscript{1250} Ibid 78.
\textsuperscript{1251} *Code of Canon Law* canon 361.
\textsuperscript{1252} Ibid canons 362 - 3. They are usually bishops.
\textsuperscript{1253} Ibid canon 372 §1.
ministers of governance. A bishop has four responsibilities: pastor, teacher, sanctifier, and ruler.

9. **Auxiliary bishops** — are required where a diocese is very large or there is too much work for one bishop. He has canonical authority and assists the bishop administering to the needs of the diocese. There are three types of auxiliary bishop:

   a. auxiliary
   b. auxiliary with special and/or limited faculties
   c. coadjutor with special faculties and the right to succession to the office of the current bishop

Auxiliary bishops with special faculties and coadjutors may also hold the position of vicars general and their role is to assist the bishop in all issues of governance.

10. **Provinces and Metropolitans** — ‘neighbouring dioceses’ are grouped together around a larger diocese. The archbishop is then the Metropolitan of the Province.

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1254 Ibid canon 375.
1256 Ibid canons 386, 756 §2, 763, 775 §1, 802 and 806.
1257 Ibid canons 387 - 9 and 835 §1.
1258 Ibid canon 391 §1. In relation to the administration of goods the relevant canons include 392, 1276 and 1287.
1259 Ibid canon 403.
1260 Ibid canon 479.
1261 Ibid canon 403 §1.
1262 Ibid canon 403 §2.
1263 Ibid canons 403 §3 and 409 §1.
1264 Ibid canon 479.
1265 Ibid canon 435; the existence of Provinces recognises two values – 1) they recognise that even bishops may need authority other than the Pope who is closer at hand when complaints are made about the bishop and 2) they recognise a co-operation between the bishops of the provinces which provides additional protection for the People of God.
‘The Metropolitan has no power of governance over the suffragan dioceses, other
than as specifically provided for in canon 436 §1 [canon 436 §3].’

11. The Conference of Bishops — canon 447 defines this as a congregation or
   grouping of all bishops of a country or defined territory. It is a ‘permanent
   institution’ with staff, annual meetings, executive/officers and records. It is a
   means whereby bishops can address issues which confront the whole nation … [it]
   has authority to make decisions which are binding but only in those matters
   prescribed in the universal law of the Church or by special mandate of the
   Apostolic See [canon 445 §1]. Such decisions are reviewed by the Apostolic See
   before promulgation. [canon 445 §2].

The Conference of Bishops’ purpose is twofold:

1) teaching; and

2) ‘planning, support, encouragement and co-ordination of the apostolate’.

12. The Internal Organisation of Dioceses —

Within each diocese, there are groups (councils or committees) that assist in the
management of the diocese. They include a:

a. diocesan synod;

b. presbyteral council;

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1266 Rodger Austin, ‘Report of Dr Rodger Joseph Austin JCD STL Canon Lawyer for the Attention of
   The Commissioner Ms Margaret Cuneen SC’ Special Commission of Enquiry Into Matters Relating to
   Police Investigation of Certain Child Sexual Abuse Allegations In the Catholic Diocese of Maitland-
   Newcastle, 16 January 2014, 3.
1268 Rodger Austin, ‘Report of Dr Rodger Joseph Austin JCD STL Canon Lawyer for the Attention of
   The Commissioner Ms Margaret Cuneen SC’, above n 804, 3.
1269 The Code of Canon Law canon 753.
1270 Coriden, above n 786, 89.
1271 Code of Canon Law canon 460.
1272 Ibid canon 495.
c. college of Consulters;\textsuperscript{1273}
d. pastoral council;\textsuperscript{1274} and
e. finance council.\textsuperscript{1275}

13. *Parishes and pastors (priests) —* parishes are established by diocesan bishops and are a juridical person capable of owning their own property.\textsuperscript{1276} Pastors are more commonly referred to in Australia as parish priests and conduct a ‘central ministerial role’.\textsuperscript{1277}

\hspace{1cm}\textsuperscript{1273} Ibid canon 502;
\textsuperscript{1274} Ibid canons 511 - 12.
\textsuperscript{1275} Ibid canon 492.
\textsuperscript{1276} Ibid canon 515.
\textsuperscript{1277} Coriden, above n 786, 95.
APPENDIX E

ADDITIONAL DRAFT CLAUSES FOR RULES OF INCORPORATED ASSOCIATIONS

RULES\textsuperscript{1278} OF [SCHOOL NAME]

Preamble\textsuperscript{1279}

A. [Insert name of School] (the Association) was incorporated under the provisions of the Incorporations Association Act 1987 on [insert date] following [insert reason for the incorporation which may simply include the decision of the relevant Congregation to alter the governance structure, or be more specific or include reasons for that decision].

B. The Congregation (or Religious Institute) expresses the charism of [founder’s name], reflected in the [School’s name] since [date of establishment of School].

C. [Any further details of the history of the Congregation or School may be included here].

D. [For a School whose members are also the committee of the Association the following clause may be added] The members of the Association shall be limited to those referred to in clause XX herein, and the power to manage the affairs of the Association shall vest in those members as the management committee known as [insert name of the Committee, or ‘Council’ or ‘Board’].

E. All real estate owned by the School is registered in the name of the Association and is ecclesiastical property for the purposes of Canon Law.

Definitions

act of administration, act of ordinary administration and act of extraordinary administration – adopt the meaning given to them in Canon Law.

archbishop or bishop – means the representative of the relevant diocese in which the School /s are situated.

\textsuperscript{1278} These draft clauses are based primarily on the existing clauses in the constitutions of Edmund Rice Education Australia, John Twenty Third College, St Rita’s College Ltd and Mercy Partners. They are not intended to be adopted in full by any School but serve as a basis for a School to complete their own constitution based on the model rules with clauses relevant to the mode of governance and management chosen by them and by the Congregation and reflecting the desired amount of participation in governance by the Congregation.

\textsuperscript{1279} These draft clauses are intended to be used in addition to those included in the model rules. The model rules for the Associations Incorporation Act 2014 will be prescribed by regulations that will come into operation after the commencement of the Associations Incorporation Act 2014 (currently still the Associations Incorporation Bill 2014 (WA)).
canon law – means the law of the Roman Catholic Church including the *Code of Canon Law 1983*.

CECWA – means the Catholic Education Commission of Western Australia as constituted from time to time.

CEOWA – means the Catholic Education Office of Western Australia, the executive arm of the Catholic Education Commission of Western Australia.

Church – means the Roman Catholic Church.

charism – means the charism of [name of founder/s] and adopted by the [name of congregation/s]; a charism is ‘a specific gift or grace of the Holy Spirit which directly or indirectly benefits the Church, given in order to help a person live out the Christian life, or to serve the common good in building up the Church’, *Catechism of the Catholic Church* (St Paul’s Publications, 2nd ed, 2000) 870.

**Congregation** [the term ‘Religious Institute’ is the preferred canonical term and may be used in place of congregation] –

**Congregational Leader** – means the person appointed from time to lead the [name of congregation or religious institute] in accordance with the rules or constitution of that congregation or religious institute;

**Congregational Leadership Team** [or similar title given to the governing body of the congregation] – means those members of the congregation appointed in accordance with the constitutions of [full title of Congregation’s common law and/or canonical constitution/statutes].

**Council** means the incorporated Association (where for example the members of the management committee are the incorporated Association as is the case with JTC).

**formation** – means ‘a process of preparation and ongoing reflection and development for the purpose of ensuring that individuals are appropriately self-aware and understand the meaning of their ministry at a depth beyond that of ‘a worker doing a job’’. John Henry Thornber and Michael Gaffney, *Governing in Faith* (Connor Court Publishing, 2014) 69; [if there is a Formation Policy, refer to it here and annex it noting its current date].

**management committee** – means the management committee of the incorporated Association and comprises [list those members that form the management committee, eg the Chair, Deputy Chair, Congregational Leader etc].

**nomination committee** – means the committee referred to in rule XX constituted for the purpose of appointing new members and office holders to the association.
Principal – means the Principal of [name of School] appointed from time to time.

public juridical person – means [name public juridical person relevant to the School ]; a public juridical person is a body ‘constituted either by the prescript of law or by special grant of competent authority given through a decree. They are aggregates of persons (universitates personarum) or of things (universitates rerum) ordered for a purpose which is in keeping with the mission of the Church and which transcends the purpose of the individuals’, canon 114 §1.

School – means [name of School].

school community – means current and past students, current and past parents and benefactors of the School.

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

Statutes – mean the canonical constitution of the Congregation [or Religious Institute].

temporal goods – means 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.

Objects of Association

The objects of the Association are:1280

1. to carry on, subject to the authority of the relevant bishop, at [address of School] a [primary and/or secondary] Roman Catholic School for [boys and/or girls] in the tradition of [name of congregational founder];

2. to conduct the School in a manner which builds on the traditions of the Congregation of [name] and ensures the continuation of the charism of [name of congregational founder];

3. to conduct itself through governance and management in accordance with the teachings of the Church including the Code of Canon Law 1983;

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1280 Clause 1 based on the constitution on JTC; clauses 2 – 5 are based on the constitution of EREA Trustees; clause 6 is based on the constitution of St Rita’s College Ltd.
4. to acknowledge in conducting the school that it is subject to the authority of the [relevant eg Broome] diocesan bishop as defined by canon law (canons 394 and 806 §1);
5. to acknowledge the apostolate of Catholic education as an integral element of the mission of the Church;
6. to do all other things deemed related or beneficial to achieving the above named objects in accordance with:

(a) the Philosophy of the Congregation as it is interpreted and advised by the Congregation form time to time; and
(b) the [name of Congregation] Educational Vision/Mission/Design (by whatever name the Vision/Mission/Design may be known from time to time).

Powers of Association

Subject to the Act, the Association may do all things necessary or convenient for carrying out its objects in a lawful manner, and in particular may:1281

1. do all things necessary that are related or beneficial to achieving the objects of the Association and the exercise of the powers of the Association for these purposes;
2. found and maintain scholarships, exhibitions or bursaries to [name of School /s] as it may deem expedient from time to time, and to discontinue the same wholly or partly;
3. set up and maintain foundations for the receipt of monies from the public and School community for purposes beneficial to the School as determined by the Committee;
4. approve all financial dealings of temporal goods including acquisitions and sales in accordance with canon law, the Statute and these rules/constitution;
5. in each financial year, determine in accordance with canon law the acts of administration, if any, that exceed the limits of ordinary administration; and
6. [for associations where the public juridical person works closely with the association] prepare the annual report to the relevant diocesan bishop as required by canon law, for approval and submission by the [name the public juridical person] (canon 1287 §1).

1281 Power 1(a) is based on the constitution of St Rita’s College Ltd; powers 1(b) and (c) are based on the constitution of JTC; powers (d) – (f) are based on the constitution of Mercy Partners.
Reserve Powers

Notwithstanding anything in sub-clause [number of relevant clause re general powers of association], none of the following shall be done by the Association without the consent of the Congregational Leader [and/or representative of the public juridical person.] [Depending on the amount of participation in governance, the Congregation may prefer the consent of all members of the Congregation or of the Congregational Leadership Team]:^1282

1. the appointment of members to the Association in accordance with clause [refer to clause in which a representative of each of the Congregation and public juridical person are appointed as committee members];
2. any proposed changes may be made to the School ’s Mission Statement or Philosophy [or whatever term is used for the document/s containing these];
3. changes to the educational direction or operation of the School ;
4. financial expenditure, on capital works, over the amount of [insert sum proposed];
5. sale or acquisition of property that exceeds a sum set by the Congregation and/or public juridical person from time to time; or
6. any form of alienation of the stable patrimony of the association;

Membership\textsuperscript{1283}

1. the types of membership [for a congregation that wishes to retain active participation on the governance of the School]:
   \begin{itemize}
   \item[(a)] Class A membership — the Congregational Leader and the members of the Congregational Leadership Team, as it is constituted form time to time, shall be Class A members;
   \item[(b)] Class B membership — any other person, but not a body corporate, is eligible to be a Class B member;
   \end{itemize}

2. [for the congregation wishing to retain some participation in the governance of the School] Membership of the Association shall be limited to a number of members no less than 6 and no more than X [this number will depend on the desired size of the Association School ] and must include:
   \begin{itemize}
   \item[(a)] the Congregational Leader or their representative;
   \end{itemize}

\textsuperscript{1282} Clause 1(a) is based on the constitution of JTC College constitution; clauses 1(b) – (d) are based on the constitutions of St Rita’s College Ltd and EREA Trustees; clauses 1(e) and (f) are based on the constitution of St Rita’s College Ltd.

\textsuperscript{1283} Clauses 1(a) and (b) are based on the constitution of St Rita’s College Ltd; clauses 2(a) – (f) are based on the constitution of JTC College.
(b) one nominee of the Congregational Leader;
(c) two nominees of the [name public juridical person];
(d) two people who, at the time of appointment, are current parents of a student at the School and appointed pursuant to [relevant clause specifying their appointment procedure];
(e) two people who, at the time of their appointment, are past students of the School and appointed relevant to [relevant clause specifying their appointment procedure]; and
(f) such other persons as are appointed pursuant to [relevant clause specifying their appointment procedure];

3. the nominee of the Congregational leader is appointed by written notice from the Congregational Leader to the committee. The term of office of the Congregational Leader’s nominee is determined by the Congregational Leader who may remove the nominee by written notice to the committee but must confer with the Chair before reappointing another nominee;

4. the nominees of the [name public juridical person] are appointed by written notice from the Chair of the [name public juridical person] to the committee. The term of office of the [name public juridical person] nominee is determined by the [name public juridical person] who may remove the nominee by written notice to the committee but must confer with the Chair of the Association before reappointing another nominee;

5. all other members will be appointed by the Nominations Committee in the following manner:

(a) the Chair, the nominees of the Congregational Leader and of the [name public juridical person] will constitute the Nominations Committee;
(b) only persons nominated by the Nominations Committee to the Management Committee are eligible for appointment to the association;
(c) candidates wishing to be nominated for membership must apply in writing to the Nominations Committee; and
(d) the Nomination Committee will assess any application on the basis of:
   (i) the need for special and relevant skills on the Management Committee;
   (ii) the experience, and expertise of applicants;
   (iii) their ability to commit the required time to the affairs of the association;
   (iv) their ability to commit to the charism and mission of the School; and
   (v) any other matter the Nominations Committee considers relevant; and
6. all appointments are conditional on the written acceptance by the applicant and on the approval of the Congregational Leader and the Chair of the [name public juridical person].

**Termination of Membership of the Association**

A member ceases to be a member upon any of the following occurring:

1. the member dies;
2. the member resigns, retires, becomes bankrupt or is of unsound mind;
3. the member is absent without cause from 3 consecutive meetings;
4. the member is removed pursuant to [refer to clause where Nominations Committee have power to remove a member]; or
5. the Congregational Leader and the Chair of the [name public juridical person] jointly determine the membership ceases due to the member’s conduct which renders them unsuitable for membership.

**Suspension or Expulsion of Members of the Association**

1. the members appointed to represent the Congregational Leader and the public juridical person may not be removed from their membership except by the Congregational Leader or relevant bishop;
2. the Management Committee may otherwise resolve to suspend or expel a member on the following grounds:
   (a) [set out grounds in separate sub clauses that determine the reasons a member may be suspended or expelled; they may relate to the charism of the school]; and
3. a resolution for expulsion or suspension is only valid if:
   (a) [insert any special requirements other than the usual ones provided by the Model Rules].

**Management Committee**

Subject to anything else in these rules, the Association will be managed exclusively by the Management Committee comprising:

1. a Chairperson;
2. a Deputy Chairperson;
3. a Secretary; and
4. all other members of the Association [for the association whose entire membership constitutes the Management Committee; if not, state the number or non-office holders required/desired on the Management Committee].
Office Holders’ Appointment
1. all office holders will be appointed by the Congregational Leader and the public juridical person’s representative; and
2. [where the congregation does not want to, or is unable to, participate in the appointment of the office holders, a school may wish to ensure the public juridical person’s representative is an active, or controlling, part of the process].

Sub-Committees
1. the Association will establish a Finance Committee, which must include the public juridical person’s representative;
2. the Association may establish other sub-committees as it requires consisting of members or co-opting persons with relevant expertise;
3. the Chairperson shall sit as an ex-officio member on all sub-committees; and
4. all sub-committees must be chaired by a member.

Casual Vacancies in Membership or Office Holders
1. where an office holder’s position becomes vacant before the end of their term, the process for appointing the office holder will be adopted for their replacement;
2. the person appointed to the casual vacancy will only hold that office holder’s position until the end of the term that applied to the office holder vacating the position;
3. where a member’s position becomes vacant before the end of their term, the process for appointing the member will be adopted for their replacement; and
4. the member appointed to the casual vacancy will only hold that position until the end of the term that applied to the person vacating the position.

Canonical Requirements
1. at the end of each financial year [or other time as determined relevant by the school and bishop] the Association will provide an itemised report on the stable patrimony held by it, including a list of all such property, its value and any authorised transactions relating to any stable patrimony in the past year; and
2. [any other specific requirements relating to ecclesiastical property].
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