Preface

Our Church, ACSA, has grown to be an ecclesiastical organisation with parishioners numbered in the millions, property worth possibly between R10 billion and R15 billion and an aggregate gross income over all 28 dioceses and the Province of an estimated R550 million a year. It is in every way a very public organisation. A review of our governance processes, in this time of the Millenial Generation and acute awareness of these responsibilities, is timely and necessary. William Lane's 1987 monograph set out the legal requirements; this review restates their principles in relation to the special structure of the Church and the impact of the King Codes. In relation to juristic structures, there are, generally speaking, five ways in which undertakings and their related assets can be owned, operated and governed:

(a) by an individual, as his or her own venture;

(b) by a partnership of two or more individuals or organisations, sharing the risks and benefits and responsibilities as may be agreed between them;

(c) by a registered company, with the benefits after all expenses flowing ultimately through to its shareholders in accordance with their shareholdings, and with the shareholders voting on to the board the directors, but limiting their risk to the value of their investment in their individual shareholdings – such companies are either for profit or not for profit, and it is only not for profit companies that are included in our consideration in this monograph;

(d) by a trust, which is a legal entity registered with the Master of the High Court and established in terms of a trust deed, in accordance with which a donor or founder establishes the trust and transfers to the trustees assets, which are to be held by the trustees for the benefit of a third party, e.g. a trust in terms of a last will and testament for an heir or heiress, or a deed of trust to establish a school, hospital, home and the like; and finally

(e) by a voluntary association, which is a body established by individuals or entities in terms of a constitution, with the power to sue and be sued, own assets and function independently of its members, which entity is included in our consideration as it is the legal structure upon and around which ACSA built, as set out in our Constitution and Canons.

1. The Structuring of the Anglican Church of Southern Africa (ACSA)

For our purpose a useful beginning is 1870. By then, the Cape had in 1814 become a British colony in the division of the "spoils" by the victors of the Napoleonic war. The Boers had moved to and settled in the Free State and Transvaal (using pre-1994 terms) and the British had in 1842 annexed Natal. Diamonds had been discovered near Hopetown and by 1870 there were already some 10 000 diggers of all nations and colours in the area.

At that stage there were five dioceses in this part of the world. These were Cape Town, Grahamstown, Maritzburg (embracing the Diocese of Natal – taking into account the dispute there had been at that time with Bishop Colenso), the Orange Free State and St. Helena. The Bishop of Cape Town was even then acknowledged to be the Metropolitan, meaning in effect the first amongst equals, rather like the chairman of a board. In 1870 these Bishops come together as a Province, each with clerical and lay representatives (save for St Helena for reasons of distance, which was condoned), so as to create the first session of Provincial Synod, out of which a Constitution and the first set of Canons could and did emerge. The Constitution was confirmed and amended by the second session of Provincial Synod in 1876 (and has been amended many times since then). The Canons were amended and adopted by that same Synod and have been amended by almost every Synod since then.

It should be noted that ACSA is a unitary body or organisation (i.e. the Province), comprising within itself its various dioceses. Provincial Synod is its supreme legislative body (i.e. the canon law making institution); all Church property and revenues are vested in the Provincial Trustees. Subject to that, each diocese regulates its own affairs in accordance with the canon law under its diocesan bishop (or "diocesan", as distinct from a suffragan bishop). This applies also to the Diocese of Cape Town under its diocesan bishop, styled the Archbishop or Metropolitan, as the first amongst equals with special canonical authority in relation to them and the affairs of the Province. To cope with this expanded role, the administration of the Cape Town Diocese is placed in the hands of the Bishop of Table Bay, who is in canonical fact a Suffragan to the Archbishop.

The Constitution starts by setting out our Standards of Faith and Doctrine in the following terms:

> "The Anglican Church of Southern Africa, otherwise known as the Church of England in these parts: First, receives and maintains the Faith of our Lord Jesus Christ as taught in the Holy Scriptures, held by the Primitive Church, summed up in the Creeds, and affirmed by the undisputed General Councils: Secondly, receives the Doctrine, Sacraments, and Discipline of Christ as the same are contained and commanded in Holy Scripture according as the Church of England has set forth the same in its standards of Faith and Doctrine, and it receives the Book of Common Prayer, and of Ordering of Bishops, Priests, and Deacons, to be used, according to the form therein prescribed, in the Public Prayer and Administration of the Sacraments and other Holy Offices; and it accepts the English version of the Holy Scriptures as appointed to be read in Churches; and, further, it disclaims for itself the right of altering any of the aforesaid Standards of Faith and Doctrine."

There are provisos regarding alterations, additions and interpretation, but these are not of concern to us in this monograph.

The Standards of Faith and Doctrine are, of course, what we are all about in the Anglican Church. However, being the sort of people we are, we exercise our ministry in community. This entails, for us, the ministry to congregations under episcopal leadership and the stewardship of Church properties under responsible governors. To make it manageable and locally relevant to us, we need to have parishes where we can worship and be ministered to by clerics licensed to that task by the bishop. To help fulfil this task the members of the parishes over the years provide funds and assistance of various kinds to build churches, rectories and so on, to provide (a) clerics with the wherewithal to live, meet, operate and travel; (b) the church with furniture, communion vessels and the like; and (c) the diocese with a contribution towards its diocesan expenses. Multiply all this by the number of parishes in a Diocese, and then by the number of Dioceses in the Province (we have 28 in 2019), and add to this Provincial facilities (such as Bishopscourt,

Braehead House and the College of the Transfiguration), and you find that amongst us as ACSA we are responsible for the pastoral care of and ministry to several million Anglicans and for billions of rand worth of movable and immovable property and hundreds of millions of rand annually of directly or indirectly donated income (by this is meant parish and individual giving as direct donations, and interest and rental from investments originally emanating from donations as indirect donations). This is the extent of our responsibility as ministers and stewards of the resources coming from our members, but given for the benefit of the Church.

As stewards of the resources, the law recognises us as trustees of all these assets in our capacity as fiduciaries for the benefit of the Church. That is where the King Code and its guidelines are helpful for us to understand and live out these fiduciary obligations in practice. In our Church these fiduciaries have various titles, depending on the parts of the Church's organisation they govern. So we have Provincial and Diocesan trustees, Parish councillors, board members and governors of Anglican institutions (whatever title they may be known by in particular instances).

2. Governance in General

Whenever a person assumes or is placed (however it is done) in a position where he/she controls an organisation or property for the benefit of another, he/she is in a position of trust. The concept of trusteeship, therefore, goes far further than that of a trustee under a trust deed, although such a trustee is in the same position and, in that case, also subject to the terms of the trust deed. The trust relationship involves three parties.

2.1 First, there is the person or body of people in whom the trust has been placed. There are many such fiduciary situations. In this paper he/she is referred to generically as the guardian to include our trustees, councilors, governors and board members. The responsibilities and duties of the guardian are governed by common law and any applicable instrument, being a deed or constitution or agreement under which the guardian receives

authority: in the case of ACSA, this would be any one or more of its Constitution, the Canons, Diocesan Rules, or a Church institution's own founding document. Company directors in South Africa have additional duties in terms of the Companies Act, and presumably this is also the case in the other countries in the Province which have their own company law and structures.

2.2 Second, there is the organisation and its property (the "assets") whose care is placed in the hands of the guardian.

2.3 Third, there is the person or body of people or stakeholders (the "beneficiaries"), which include the organisation, for whose benefit the assets or organisation has been placed in the care of the guardian.

All this, namely the guardian's duties and responsibilities in terms of any applicable instrument and common law, is in turn in South Africa subject to the requirements of South Africa's Constitution. In sections 39(2) and (3) it states:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights [i.e. sections 7 to 38 of the Constitution].
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

The "foundational values of the Constitution are openness, accountability and responsiveness". (per Adv. P. Hoffman). These "foundational values" may also (to a greater or lesser extent) apply in the other countries within ACSA's compass, but there may be specific inroads in some cases.

3. Governance in the Anglican Church of Southern Africa ("ACSA")

Following on from the aforegoing, the most frequently encountered fiduciary situations in ACSA are as set out below (the references to an Article being that in the ACSA Constitution):

Guardians	Assets	Beneficiaries
3.1 Provincial Synod and Bishops (Acts 1, Timothy 3; Articles II-IX; Bishop's Ordination, APB para's 64-66);	The organisation and mission of the Church at Provincial and Diocesan level	The people of God in these parts and in particular its members
3.2 Provincial Trustees (Article XVIII, Canon 42)	All property, including income and rights, of the Church	ACSA
3.3 Diocescan Trustees under delegation from the Provincial Trustees. (Canon 42) assisted by Archdeacons (Canon 15.4 to 15.7)	All ACSA property, including income and rights, within a Diocese	Provincial Trustees
3.4 Priests and Deacons 16(2), 23 and 24; APB Cleric's Ordination para's 28-43)	The people and management of the parish or station to which he/she is appointed	The people of the (Canons parish or station
3.5 Churchwardens, Parish Councillors and Incumbent (Canons 28 and 29)	The financial integrity of a Parish and its property vested in the Parish by the Diocesan Trustees	The Diocesan Trustees

3.6 Church Institutions e.g. ABESA, COTT, Hope Africa, etc.

3.7 Special, Church supported endeavours e.g. Anglican Ablaze

3.8 Independent Anglican Institutions e.g. Anglican Schools

4. The King Codes

The King Codes on Corporate Governance for South Africa, now in its fourth iteration as King IV (2016), although initially aimed at company directors, have been developed and updated to form a comprehensive code in relation to the responsibilities of any person in a governance relationship with an organisation. Its requirements provide, in an accessible form, all the obligations that governors have, which up to now have been scattered in case law, legal publications and statutes (in the case of companies). The Code applies to all entities, including non-profit organisations, like the Church with its dioceses, parishes and church organisations. It constitutes the measure by which the general public and the courts will measure the performance – or under-performance – of Provincial and Diocesan Trustees, Parish Councillors, including Church Wardens and Incumbents, and Governors and Board Members (howsoever designated) of church organisations. Quotations from the King Codes in this paper are taken from King III and King IV.

5. The Relevance of the Code's Strictures

Why should we bother about these issues?

First, there is the question of legal liability. A breach of any of these responsibilities can result in a disgraced removal from office and litigation from those, including the Church, who have suffered loss as a result. We are living in an increasingly litigious society, where court action of one kind or another by people who see themselves as having been aggrieved is increasingly likely. Obvious examples are the claims arising out of misuse of funds or property, as well as criminal proceedings against any clerics and laity involved. These are people who have abused their positions of power. Where dioceses or parishes fail to pay tax or pension contributions, not only can there be penalties and fines, but there may also be civil claims and criminal prosecutions. All this flows from a failure of governance oversight of the organisation, so that the governors themselves may also be joined as co-defendants in the claims.

Second, there is the question of public confidence. A well governed organisation will basically be seen as a well run organisation. A well run parish or Diocese or Province is attractive to parishioners and donors (and remember the Church relies almost entirely on donations for the necessary temporal support for its work). Such attractive organisations will become increasingly self-sustaining, and thus better able to fulfil their main role, which is spiritual. On the other hand, a poorly governed organisation is going to suffer from a lack of confidence in the people it is supposed to serve, resulting in them leaving to go elsewhere or withholding funds, until it becomes a failed organisation. One could sum it up by saying that good governance helps ensure a virtuous life cycle for the organisation, resulting in it being the best it can be, while poor governance leads to an unprincipled life cycle, ultimately resulting in its failure.

6. The ACSA's Constitution and Canons

6.1 The Operational Side of ACSA (Ministry)

Article I of the Constitution sets out our Standards of Faith and Doctrine, as we have seen. Article II establishes Synod as the supreme legislative body of the Church, with these words:

"The Provincial Synod of this Church, which shall be constituted as hereinafter declared, shall be the Legislative body of the Church of the Province: and every enactment of the said Provincial Synod shall be a Law and Rule of the Church of this Province in those matters to which it may pertain."

Having done this, Article XXII then gives Provincial Synod the power to make Church law, known as Canons, in the following terms:

"The Provincial Synod shall have full power and authority to make, from time to time, such Canons, Rules, Regulations, and Bye-Laws for giving effect to the provisions of this Constitution as to the said Provincial Synod shall seem fit, and further from time to time, to amend, alter, and add to such Canons, Rules, Regulations, and Bye-Laws."

Every diocese in the Province is represented at Provincial Synod by its Bishop, plus clerical and lay representatives, who accordingly share with other dioceses the Church law making processes. Church law is known as canon law, and is enforced by the courts unless unconstitutional (e.g. contrary to the Bill of Rights in the South African Constitution) or unlawful under secular law. The position in dioceses outside South Africa may be broadly similar in effect, but this will need to be ascertained in each country. A diocese will pass Rules or Acts affecting matters within its area of jurisdiction, but these may not conflict with any enactment of Provincial Synod (Article IX).

This gives us our "operating" structure in relation to pastoral matters, in terms of which each diocese, under the leadership of its Bishop, governs itself on the basis that its Rules will not conflict with anything passed by Provincial Synod. What Provincial Synod passes is done by the whole Church of the Province, sitting together as Bishops (including Suffragans) and representatives of the clergy and laity of each diocese. There is thus considerable regional autonomy in each diocese, under an overarching Constitution and Canons, which establish the "rules of the game". However, outside of this the Province cannot tell a Diocese or its Bishop what to do or what not to do, and it has limited powers in terms of the Canons as they stand at the moment to intervene in cases where a diocese is in trouble. For example: (a) Canon 21(3) makes provision for the Archbishop to appoint a task team to investigate matters in a diocese that is in distress, which team makes a report to the Metropolitan, who takes the matter to the next Synod of Bishops, which then decides what to do in terms of options set out in that Canon; (b) Canon 14(2) provides for a process in terms of which a Diocesan Bishop may be required to resign if two thirds of the Synod of Bishops are of the opinion that the diocesan is no longer able to discharge the duties of office adequately; and (c) Canon 38, of course, provides for disciplinary charges to be laid against a Bishop alleged to have been guilty of acts or omissions listed in Canon 37.

Having established the relationships between the dioceses in the Province, and between the Province and each of the dioceses, at the macro level, Canon 21 then deals with the establishment of dioceses and Canon 23 with the establishment of parishes within a diocese by Diocesan Synod. These

are also known as pastoral charges. Each pastoral charge is under the leadership of an Incumbent (i.e. the Rector), licensed to that office by the Bishop (Canon 23). The parish council, on which the incumbent and assistant clergy serve, is responsible for the governance of parish affairs, including the control and direction of its properties and finances (Canon 28). In this governance role and as the Canons stood up to 2018, the churchwardens with the incumbent constitute the executive of the parish and, with the parish councilors, the guardians (i.e. trustees) of its assets (i.e. income and property and the incurring and payment of necessary debt).

Looking back at what we have covered, it is clear that we have in this regard created in our Constitution and Canons in this Province what in law is described as a voluntary association. A voluntary association is recognized as a juristic entity (like a trust or a company which are other forms of juristic entities) legally separate from its members, able to conduct its own affairs, to own and dispose of its property and to sue and be sued in its own name. A voluntary association is established by agreement i.e. in our case the Synods of 1870 and 1876, reflected in a founding agreement or constitution of some kind. In the case of the Anglican Church, this founding agreement is set out in its Constitution read with the Canons, with provision for subsidiary local Rules and Acts of Diocesan Synods relating to matters within a Diocese. This voluntary association is regulated at an overarching level by Provincial Synod and, between sessions of Synod, by the Provincial Standing Committee (a smaller representative provincial body comprising bishops and a limited number of diocesan clerical and lay representatives, but without canon law making powers). The operational executive of the Province for the mission and pastoral work of the Church resides in the Synod of Bishops, under the chairmanship of the Metropolitan, with day to day functions of the Province being carried out by employed Provincial executives based mainly in Cape Town and Provincial clergy under the direction of the Metropolitan, and those functions of each Diocese by employed Diocesan executives and Diocesan clergy under the direction of its Bishop.

6.2 The Financial and Property Side of ACSA (Governance)

It is further arguable that our Constitution and Canons have in fact created two juristic entities in a single set of documentation. The first being the voluntary association just mentioned and the second being an asset holding trust.

We have seen in para 6.1 how the operational (i.e. mission and pastoral) structure of the Church has been put together. We turn now to the issue of assets – the property and funds that come in, their use and investment until needed by the Church in various ways. The gross aggregate income of all the Dioceses and the Province at the moment is estimated at some R550 million and the total value of all buildings and land is (less accurately) estimated at between R10 to R15 billion. These are significant responsibilities. Remember that, broadly speaking, everything that is given to the Church by its members, or earned by the Church on its investments (whether buildings, shares or deposits), through the hundreds of parishes in 28 dioceses throughout the Province, in fact belongs to the Anglican Church of Southern Africa as a whole, although administered and cared for at different levels, i.e. Provincial, Diocesan or Parish level. So we have a whole cascade of boards and councils with fiduciary responsibilities for the administration of Church assets, which have been given to the Church for its work in this part of the world. This is trustee responsibility *par excellence.* Millions of individual Anglicans have given money and property to the Church over the years in the assurance that these will be stewarded and used, properly and responsibly, in the work of the Church, and that the Church's trustees, parish councilors and board members will see to it that this happens.

Where are these trustees, councilors and board members situated within the Church? Here we look at the second structure, i.e. the Trust that sits alongside and functions in tandem with the operating structure of the Province (i.e. the voluntary association of Metropolitan and all the twenty eight Diocesan Bishops, and each Diocese with its parishes and their individual councils). This second structure is that of the Provincial Trustees and their associated Diocesan Trustees (who have delegated powers from them), as well as parish councils and the board members of Anglican institutions. Again, we start with the Constitution and then move on to the Canons.

The Provincial Trustees are established in terms of three Articles in the Constitution.

Article XVIII provides:

"All property, of what nature or kind so ever, whether movable or immovable, real or personal, which is or may be given, obtained, or held for the benefit of the Church of this Province, shall, whenever it be practicable, be transferred to a Trustee or Trustees acting on behalf of the Provincial Synod."

There follow a number of provisions and qualifications, which are not necessary for our purpose now. Having declared there to be Provincial Trustees for this purpose, Article XIX goes on to provide:

"Every Trustee in whom any property, whether movable or immovable, real or personal, shall be vested, either solely or jointly with any other person or persons, for and on behalf of the Provincial Synod, shall hold the same with the powers and subject to the limitations, restrictions, declarations, and provisos contained in the several Clauses of the Schedule A hereunto annexed, so far as the same may be consistent with any special Trusts affecting such property."

We will get back to Schedule A in a moment, but before we do so we must pick up the Canon law making powers given to Provincial Synod in relation to the functions of the Provincial Trustees, which are set out in Article XVI, namely:

"The Provincial Synod shall frame such regulations as may be necessary from time to time for the management of property held in Trust for the Church of this Province …… and shall have full power and authority, except so far as the same shall be ordered by law, or prescribed by the terms of any special Trust, to determine in what manner, and upon what conditions, such property shall be used or occupied."

Article XVII finally authorizes delegation in the following terms:

"The Provincial Synod may delegate to any Synod, Board, Committee, or other Body, either specifically, as the case may require, or under such general regulations as may from time to time be laid down by the Provincial Synod, and powers which may be required for the management of property."

What we have is a cascading set of fiduciary responsibilities – Provincial Trustees with financial responsibility for the whole Church; Diocesan Trustees with delegated financial responsibility for the Diocese; parish councilors with financial responsibility for their parish; and finally board members of Provincial and Diocesan institutions, with financial responsibility for those institutions.

The powers of Provincial and Diocesan Trustees are set out in Schedule A to the Constitution and further amplified in Canon 42.

Schedule A to the Constitution confers circumscribed but otherwise reasonably broad powers on the Trustees to do as they think best, provided they act in good faith. The general intention in relation to immovable property (i.e. land and improvements, if any) is that the proceeds of any sale shall be utilized in the acquisition of other immovable property, unless the Trustees, acting in the best interests of the Church and after due and proper consideration, consider that an alternative usage is of better advantage to the Church.

Canon 42, being a law passed by Provincial Synod in terms of Article XVI of the Constitution, establishes the Provincial Trusts' Board (PTB) for the management, control and disposal of property. In terms of Canon 42(2) the members of the PTB are:

- The Metropolitan
- All Diocesan Bishops (but not Suffragans)
- The Provincial Registrar
- One clerical and two lay members elected by their Houses in Provincial Synod, and
- One lay member nominated by the Provincial Pensions Board.

The PTB's composition is presently (2018/2019) under review by the PTB Management Committee and the Anglican Canon Law Council. Those

familiar with the prescripts of the King Codes, with its emphasis on the importance of independent non-executive directors for companies, will note that ACSA's PTB has 29 stipendiary clerics and 4 lay members (who are usually non-executive), a poor governance model (see also para 7.9 below).

The PTB appoints the Provincial Treasurer. The Canon establishes the quorum for PTB meetings, provides for vacancies and confers particular powers of investment and of loan making and finally deals with reporting requirements.

Canon 42(12) then goes on to deal with the delegation of the trustee powers of the PTB and its responsibilities to Diocesan Synods (where Dioceses have no Diocesan Trusts' Boards) or to Diocesan Trusts' Boards (where Dioceses do have them).

Finally, Canons 42(14) to (17) set out a number of general provisions applicable to both Provincial and Diocesan Trusts' Boards.

A Provincial or Diocesan Trusts' Board may be thought to be a separate body from a Diocesan Finance Board (however designated), but in fact a finance board should in terms of the ACSA Constitution be a standing sub-committee of the relevant Trust Board. The chairperson at least of the Finance Board should be a trustee, and trustees should all be entitled (but not obliged) to attend Finance Board meetings, unless they are appointed to the Finance Board when attendance is obligatory. All trustees should receive Finance Board minutes, and the report of the Finance Board should be a standing item on each meeting of trustees. The wisdom and practicality of this arrangement is questioned and discussed in section 6.3.4 below.

Now that we know that we have a cascading set of boards and councils with the fiduciary responsibilities of trustees (i.e. Provincial and Diocesan Trustees, parish councilors, and directors and governors of church institutions), what are their responsibilities? Much is sometimes made of how extensive these responsibilities are, but the King Code has done much to simplify what looks threatening and fearful, by its codification, and the way in which it has explained the rationale behind these responsibilities.

In fact you will find that the golden thread running through all these is much like the "second great commandment" set out in section 10 of the Service of the Holy Eucharist in the APB: "You shall love your neighbour as yourself" and in the dictum: "Do unto others what you would have them do unto you". Those who act in accordance with those commandments should have no difficulty. Ask yourselves: if you gave all your assets and all your income to someone else, to look after and use for you and your familys' benefit, what would you expect of that person? You would want him or her (a) to take care in, and pay attention to, what they were doing; (b) to be scrupulously honest and not take any of it or any related advantage for themselves without your express and informed consent; (c) to take good advice so as to invest wisely on good and sufficient security; (d) to keep good records and to account fully for their stewardship; and (e) at all times to act in <u>your</u> best interest, not theirs or anyone else's.

6.3 Tax and Other Implications of the ACSA Structure

If it is correct, as the Anglican Canon Law Council maintains, that ACSA comprises a "two-in-one" structure, then there are certain consequences. We touch on these below.

6.3.1 ACSA was finally established, in its present form, in 1876. A trust in South Africa, Namibia, Lesotho and Swaziland existed up to 1934 as a creature of common law. The first South African statute regulating trusts was Act 34 of 1934, known as the Trust Moneys Protection Act. That Act dealt specifically with trustees appointed by a written instrument "executed after the commencement of this Act" and their obligation to file that instrument with the Master and to provide security. The definition of "Trustee" was not time specific in this way, and so included the then (i.e. 1934) existing trustees of pre-established trusts, thus obliging them as well to keep records and file accounts.

6.3.2 There is no statute regulating voluntary associations. Those are governed by common law and statutes regarding specific elements of functioning (e.g. tax, labour relations where there is employment, public health, town planning, etc.).

6.3.3 Although the PTB, as an asset holding trust, is – and has been for years – properly and lawfully established, it needs to regularize its reporting to the Master of the High Court in terms of statute, the current one (2018) being Act 57 of 1988, known as the Trust Property Control Act. From the outset the PTB has only seen itself as an immovable property holding trust for the Church, as the income and expenditure of the Church has been managed and controlled at Diocesan or Provincial levels, as appropriate to each activity. In terms of arrangements with the South African Revenue Service ("SARS"), the Province and each diocese in South Africa has (or should have) each registered individually with SARS as public benefit organisations ("PBOs") for tax exemption purposes, in terms of s.10(1)(cN) read with s.30 and item 5 of Part 1 of the Ninth Schedule of the Income Tax Act ("ITA"). This was to ensure that each entity controlling its income and expenditure reported directly to SARS. This monograph has not explored the position relating to possible tax exemption in other countries in the Province, and input from them is needed. If our submission about "two entities in one document" is correct (see para 6.2), then insofar as the PTB is concerned, this strictly speaking will need registration in South Africa as a property holding PBO trust in terms of item 10 of Part 1 of the Ninth Schedule of the ITA, if this has not been encompassed in the Province's registration as a PBO. The position of Diocesan Trusts Boards may be different in that they have delegated authority and power from the PTB and are not as such independent juristic entities.

6.3.4 Consideration needs to be given to an amendment to the Constitution and to the Canons, in terms of which the responsibility for "movables", which includes rights and cash, is moved from the PTB (i.e. the Provincial Trustees) to those responsible for the Church's operational, or mission and pastoral work, i.e. the Diocesan Bishops. Movables relate directly to such work. The Provincial Trustees, as a governing body, have no canonical way of knowing, let alone overseeing, what is happening in dioceses. They can call for financial statements, but experience shows that these come in only slowly, if at all. The reality is that each diocese controls income and expenditure, the production of financial statements and reporting to the State (and each diocese in

South Africa is, or should be, registered for tax exemption and returns as a separate PBO – see section 6.3.3 above). This operational method of functioning is appropriate and should be reflected in an oversight role of the Synod of Bishops ("SoB"). The SoB would be well advised in such cirumstances to co-opt appropriate financial assistance to co-ordinate and guide this oversight role, the manner and format of reporting, the furnishing of those reports, the adherence to both prudent and statutory requirements and the fulfilment of financial obligations (e.g. pension contributions, PAYE tax on stipends and salaries, maintenance of movable assets, etc.).Expertise available in any body of commissaries (see section 7.9 below) could possibly be tapped into for this purpose.

6.3.5 In summary and as an *aide memoire,* two matters need to be undertaken by the clerical and secular governors of our Church. First, the reporting obligations to the Master need to be regularized. In this regard, consideration is being given by the Canon Law Council to recommending changes to the composition of the PTB to (a) facilitate and improve governance and (b) ease reporting administration. Second, the retrospective registration, permitted in terms of s.30(3)(b) of the ITA, of the PTB as a property holding PBO for the Church needs to be obtained.

7. A Trustee's Fiduciary Responsibilities

7.1 We have referred to the fiduciary duties of those in a governance role. The Institute of Directors of Southern Africa commissioned the well known King Reports, which codified the responsibilities of all persons holding fiduciary office. Its initial focus was on the company director, as one form of fiduciary, but in King 111 and IV this was widened to include all forms of fiduciary responsibility, often referred to as trustee responsibility. We have called them "governors", because that is what such fiduciaries are, whether as trustees in terms of a trust deed, parish councillors in terms of our Canons or board members in terms of a founding document. The individual responsibilities were previously gleaned from common law and case judgments, but are now conveniently brought together in the King Code. Added to them are those responsibilities accruing to directors of companies in terms of the new Companies Act, 71 of 2008, which will not be dealt with

in this monograph, although some do affect directors of non-profit companies (the old section 21 companies), but are of relatively peripheral concern to us as a Church. Directors of non-profit companies (such as our College of the Transfiguration – COTT) will need to refer to their own advisors to identify these specific statutory provisions. The King IV Report now has a special Supplement for Non-Profit Organisations. The Department of Social Development also has a Code of Good Practice for Non-Profit Organisations and SANGOCO (i.e. the South African National NGO Coalition) has produced a Code of Ethics.

7.2 At the outset, the King Code makes clear the wide embrace of its tenets, and the fact that principles of good governance cover all organisations of all kinds, however structured, and in all fields. It states:

> "[The Code] applies to all entities regardless of the manner and form of incorporation or establishment. We have drafted the principles on the basis that, if they are adhered to, any entity would have practised good governance. For that reason, we have not focused on or discussed the implementation of the code and each entity should consider the approach that best suits its size and complexity."

The Code is nuanced in its approach, recognising that "one size does not necessarily fit all", and calling for thought, judgment and explanation in cases where a particular principle cannot be applied, fully or partially, by an organisation. The key is that the issue in question has to be thought through, the decision needs to be rational and reasonable, and then communicated and explained to all parties concerned. The principles in the King Code are aspirational in the journey to good governance, and are stated at the level of leading practices which may not be wholly possible in each instance. Thus the King Code calls for the principles to be applied, but if this cannot be fully affected, then to explain why and to what extent there is a shortfall in the application, i.e. a "comply and explain" approach, as explained in King IV.

7.3 The King Code puts governance and law into perspective as follows:

(a) "There is always a link between good governance and law. Good governance is not something that exists separately from the law. It is entirely inappropriate to unhinge governance from the law. The starting point of any analysis on this topic is that [governors] must discharge their legal duties. ……."

(b) "The duty of care, skill and diligence, in terms of which [a governor] must manage the business of the [organisation] as a reasonably prudent person would manage his own affairs The standard of care is a mixed objective and subjective test, in the sense that the minimum standard is that of a reasonably prudent person but a [governor] who has greater skills, knowledge or experience than the reasonable person must give to the [organisation] the benefit of those greater skills, knowledge and experience; and

(c) fiduciary duties …[are]…. the duty to act in the best interest of the [organisation], to avoid conflicts, to not take the [organisation's] opportunities or secret profits, to not fetter their votes and to use their powers for the purpose conferred and not for a collateral purpose....."

7.4 Basically, a conflict of interest is where there are competing interests, personal or financial, between one's personal interests and the interests of the organisation. In this situation there is a "tangle of interests", as the Code puts it. For example, a builder may tender or offer to put up a structure for the Church, in a situation where the builder is also a trustee or councillor involved in making the decision for the Church, or even just a member of the parish. There is a conflict between the need for the Church to get the best deal and the personal financial gain of the builder. Obviously there must be full disclosure by the builder of this potential conflict, and preferably he or she should not take part in the decision making process and discussion. However, it is not only actual conflict of interest that needs to be avoided, but even the perception of such conflict, so great care needs to be taken to ensure that if it is decided to award that contract to the builder trustee/councillor/member, that it is fully and properly justifiable to the Church and its members, and that in the execution of that contract the work is independently evaluated. Another example, sadly, is the use of so called discretionary funds by some clergy for personal relief. There is often an unfortunate misunderstanding of language at best, although sometimes the

motivation may be opportunistic. A discretionary fund is intended to enable a cleric to utilise this trust asset to assist someone in need, confidentially and without the need to justify that decision. Sadly, some clerics seem to have thought to themselves: "I am a person in need, so I can use some of this money to pay my debt". At best, this is a clear case of a conflict of interest, but it is, of course, entirely wrong: the funds are there to help others, not the cleric who administers them. In the event of real need, such a decision needs to be taken objectively by the churchwardens, but preferably should be avoided altogether, however hard that may be.

7.5 On the issue of sustainability, King III has this to say:

> "The philosophy of the Report revolves around leadership, sustainability and corporate citizenship. To facilitate an understanding of the thought process, debate and changes in the Report, the following key principles should be highlighted:
>
> Good governance is essentially about effective **leadership.** Leaders need to rise to these challenges if there is to be any chance of effective responses. Leaders need to define strategy, provide direction and establish the ethics and values that will influence and guide practices and behaviour with regard to sustainability performance.
>
> Sustainability is the primary moral and economic imperative for the 21st Century, and it is one of the most important sources of both opportunities and risks for businesses. Nature, society, and business" (in this monograph substitute "Church" for "business")…" are interconnected in complex ways that need to be understood by decision makers....."

7.6 In real terms strategy, risk, performance and sustainability are inseparable, if the organisation is to operate in a sustainable manner, and does not wither away and die as a result of falling levels of support and losses from unforeseen risks. We have seen this happen in our own Church. Serious differences between a bishop and parishes, left unresolved through mediation or other processes, but in fact exacerbated by charges and counter-charges, tribunals and court actions have resulted in one case in parishes withholding diocesan assessments, and the diocese having to use money given for building or other purposes to fund running costs, leading to

further accusations and charges of misuse of funds. Ministry is prejudiced, and congregations wither away, with members going to other churches. If on top of this there has been a failure to pay PAYE or pension fund contributions properly, a whole range of civil actions and criminal sanctions rear up to further crush the Church's reputation and work in that place, over and above the hundreds of thousands – perhaps millions – of rand lost in the legal skirmishing.

7.7 As the Code points out, at Provincial, Diocesan and Parish level we must be constantly on the lookout for key risks that exist all the time – like the impact of technology (Twitter and Facebook can destroy reputations and spread enmity in nanoseconds), changes in the regulatory environment, tax compliance, donor confidence and reputational risks. There also needs to be in place a state of crisis readiness and a strategy for disaster recovery, if ever such an eventuality comes about. Remember, although the Code is seen to be talking to the secular world, the same principles apply to the stewardship of the operations and assets of a church: for "board" read whatever the controlling body is in your organisation – synod, chapter, senate, board, parish council, governing body, committee, chamber, etc.

7.8 The Code sees the controlling body as providing effective leadership based on an ethical foundation and managing those ethics effectively. As the focal point and custodian of corporate governance, the controlling body must always act in the best interests of the organisation (i.e. Province, Diocese, Parish or institution, as the case may be). The Code also makes the point that the chairperson of the controlling body should ideally be an independent, non-executive member. For example, whilst it is common in terms of Diocesan Rules and Acts for the Bishop to chair the Diocesan Trustees, this is not necessarily a desirable practice. Remember, the bishop has an influential "operational" role and is the recipient of duly prescribed benefits from the Diocesan Trustees (of which the Finance Board should be a standing committee, as mentioned earlier). This places him or her potentially in a position of conflict when matters affecting such benefits or diocesan functioning are under discussion. In addition, as effectively the CEO (as it were) of the Diocese the bishop is not sufficiently independent to lead a body of trustees. Much better to have a lay person, not in receipt of benefits, to chair trustees, which leaves the bishop as an ordinary trustee better able to participate in the discussion. Such lay participation needs to

be grown, as it is the antithesis of good governance to have the bishop and the archdeacons composing the great majority of the trustees, as does happen in some dioceses. The same principles apply to parish councils.

7.9 The localised structure of our Church and the way it is funded (parishioners to parishes, parishes to dioceses and dioceses to Province) make absolute compliance with the King Code strictures difficult, but their principles need to be considered, implemented where possible (even if with difficulty) and rationally reasoned and explained where this is not possible in part or in whole (i.e. comply and explain). There should be a focus, when putting together a body of trustees and a parish council, on the mission and anticipated needs of the organisation, and then an attempt to find the necessary expertise and talents to have on the controlling body (e.g. building, financial, legal, mission, educational and the like). There needs to be a balance within the governing body, such that no individual or group controls decision making. The majority of the governing body should ideally be non-executive, and the majority of those (if possible) should be independent as well (i.e. in addition to the chancellor and registrar of the Province or Diocese and any professional advisor to the Diocese or Parish). As an aside and by way of example, at this time (i.e. 2018) Canon 42(2) is out of line with this prescript, in that the Provincial Trusts' Board is composed currently of 28 diocesan bishops, a cleric, the Provincial Registrar and three lay members – 29 "executives" and 4 non-executives (only three of whom might be independent). The Province is currently experimenting with a partial reversion to the engagement of commissaries with appropriate skills in terms of Canon 42(3), in line with the general use of commissaries before the mid-1990s.

7.10 As to the ethics of governance, the King Code points to a number of basic ethical and moral duties of a fiduciary that underpin good corporate governance, which can be paraphrased as:

- *Responsibility:* The board should assume responsibility for the assets and actions of the organisation and be willing to take corrective actions to keep it on its strategic path. It needs to have the courage to take difficult decisions that are in the organisation's best interests, and its members to take collective responsibility for these.

- *Accountability:* The board should be able to justify its decisions and actions, and to answer for these.

- *Fairness:* In its decisions and actions, the board should ensure it gives fair consideration to the interests of all stakeholders, the natural environment, society and future generations.

- *Transparency:* The board should disclose information in a manner that enables each stakeholder to make an informed analysis of the organisation's performance.

A governor is a steward of an organisation. The *ethics of governance* require that in this stewardship role, each governor be faithful to the four basic ethical values of good corporate governance (responsibility, accountability, fairness and transparency). In performing their stewardship role governors need to exercise the following five moral duties:

- *Integrity:* A governor should act with intellectual honesty in the best interest of the organisation ……. Conflicts of interest must be avoided, but if they cannot be, then they must be immediately disclosed and managed. Independence of mind and ethical conduct beyond mere legal compliance should prevail to ensure the best interest of the organisation is served.

- *Care:* A governor should devote serious time and attention to the affairs of the organisation. Relevant information required for exercising effective control and providing innovative direction to the organisation needs to be acquired.

- *Competence:* A governor should take steps to have the knowledge and skills required for governing the organisation effectively. This competence should be developed continuously, and exercised with care, skill and diligence.

- *Commitment:* A governor should be diligent in performing ……. duties. Sufficient time should be devoted to organisation affairs. Effort needs to be put into ensuring organisation performance and conformance.

- *Courage:* A governor should have the courage to …… act with integrity in all board decisions and activities.

8 Conclusion

The King Codes point to aspects that have made the world we live in so different from the one of a generation or two ago. Financial crises, extreme weather conditions, depletion of natural resources, technological advances and social media are part and parcel of today's society in which the Millennial Generation finds itself (and the rest of us too!). From a governance point of view, our Church's Constitution and Canons can be seen as dealing largely with the externals of administration, with many of the eternal ethical and moral tenets left as assumptions. The purpose of this monograph has been to facilitate the conscientious upholding of those tenets in relation to governance by those involved in our Church's ministry and administration.