

A consideration of the benefits of appointing The Presbyterian Church of Victoria Trusts Corporation as trustee of congregational property.

The Presbyterian Church of Victoria Trusts Corporation is a corporate trustee. That is, the Trusts Corporation is a company. It has an unique legal identity which is distinct from the members who make up the Trusts Corporation. Individuals who act as trustees cannot separate their identity into parts. Their identify as a trustee is the same as their personal identity in which they hold their private assets.

Once church property is held by the Trusts Corporation, there is no need to make any further appointments. The corporate trustee is recorded as proprietor with the Land Titles Office and in our Register of Titles referred to in the S21 of the Presbyterian Trusts Act 1890. Members of the Trusts Corporation may change from time to time in accordance with the regulations of the Church, but there is no need to update the title or register. By contrast, when local trustees are appointed, the names of the individual trustees are recorded with the proprietors with the Land Titles Office and in our Register of Titles. Each time any of the trustees resigns, dies or is otherwise unable to continue to act as trustee, new appointments must be made and the registers must be updated.

One benefit of appointing the Trusts Corporation to hold the congregational property is procedural simplicity. Once the Trusts Corporation is appointed, the congregation and Presbytery can be confident that the matter is resolved, without having to revisit the matter at some future time. There is no further need to address the issue of trustees. In many cases, the matter of who the local trustees are is forgotten about until such time as the congregation needs to transact on the title. Possibly the current trustees are no longer alive or have moved away and are untraceable. The process of appointing new trustees can be time consuming as it involves calling a congregational meeting and Presbytery approval once suitable trustees have been identified. This can be inconvenient and time consuming, especially if there is a need to act quickly on the property.

In the normal course of events, the question of who is the legal owner of a property can be resolved by doing a search at the Land Titles Offices. However this is not the case with the property of the Presbyterian Church of Victoria which can sometimes lead to confusion and unnecessary expense. The Presbyterian Trusts Act 1890 has special provisions concerning the way property is held on behalf of the church which are not generally known. The provisions of the 1890 Act in Section 21 have the effect that the Register of Trustees maintained by the Moderator (and held in the PCV office), overrides the records held by the Land Titles Office. A solicitor who is unaware of the provisions of The Presbyterian Trusts Act 1890 may proceed to do a title search and then embark on a process of seeking to transfer the title from the deceased or no longer available former trustees to new ones. This has happened on several occasions leading to undue expense which ultimately did not achieve the desired outcome. By appointing the Trusts Corporation, this possibility is eliminated.

The responsibilities of a trustee and the way they intersect with church polity is often misunderstood. Indeed the regulations of the church regarding property transactions can be complicated. In addition to the general law of the land including but not limited to the Trustee Act 1958, they are governed by the Code, The Presbyterian Trusts Act 1890 and the Model Trust Deeds referred to in the 1890 Act. The Trusts Corporation is an experienced body with the necessary skills and knowledge to

competently deal with the relevant transactions in accordance with all these legislative and legal requirements. While local trustees may be equally competent and qualified, this is not often the case, particularly over a long period of time as people come and go as trustees. The Trusts Corporation is dealing with these matters on a regular basis and can apply that experience for the benefit of the congregation. Local trustees will not have the same experience in relation to church property transactions, although they may have considerable experience in commercial property transactions.

The role of trustee is a responsible one with potential liability attaching to the actions of the trustee. An individual acting in this capacity, is to a degree, putting their own reputation and personal assets at risk in the performance of their duties as trustee, since there is no legal separation to prevent a claim being made against the personal assets of a trustee for their actions as trustee. The Trusts Corporation as a corporate trustee is distinct from the individuals who serve as members which provides protection of their personal assets in the event of legal proceedings or claim being made.

There is a commonly held view that in appointing the Trusts Corporation, a congregation may lose a measure of control over its affairs. This is a misconception. The former Law Agent, Brian Bayston, has written on this subject in the attached article entitled the “The Historical and Legal Matrix of the Presbyterian Trusts Act 1890” which is instructive in these matters. The obligations and responsibilities of the trustee remain the same whether the Trusts Corporation is appointed as trustee or local individuals are appointed. Under the polity of the Presbyterian Church of Victoria, the trustees do not have managerial oversight of the properties. This lies with the Congregation through its Board of Management. The decisions to transact on property are made by the Congregation, Presbytery and Assembly. The trustees have no managerial authority to make such decisions or to disregard the decisions which have been properly made by the congregation, Presbytery and Assembly.

The powers of the trustees, whether they be locally appointed trustees, or the Trusts Corporation are defined by the Model Trust Deeds referred to in the 1890 Act. The Model Trust Deeds proscribe the extent of the powers of the trustees and place them in the context of taking direction from the congregation – specifically a 2/3 majority of those present at a congregational meeting called to consider the proposal at hand. (There are other general powers granted by the Trustee Act 1958 and other civil legislation but the Model Trust Deed is most relevant in the context of this discussion.) At the same time the trustees have a duty to see that the property is properly insured and maintained and in certain situations is able and required to act to protect the interest of the church in these respects. Usually they would do so in conjunction with the Board of Management, although there are some rare situations in which the trustees may have to act on their own.

The responsibility of the trustees is significant and one which is becoming increasingly regulated. The intersection of the role of the trustee with the polity of the church is complex. The Trusts Corporation is generally better equipped to carry this responsibility than local individuals.

THE HISTORICAL AND LEGAL MATRIX OF THE PRESBYTERIAN TRUSTS ACT 1890

As Sydney-siders forcibly reminded Melburnians in 1988, the year 1788 marked the commencement of British settlement in Australia on the shores of Port Jackson. The Reverend Richard Johnson was Chaplain to the first Fleet and to the settlement. My great-great-uncle James Bonwick wrote twice¹ about Australia's first preacher, but Johnson was an Anglican, certainly of the evangelical party, but not a Presbyterian. Thirty years were to pass before there was a Presbyterian minister in Australia: Archibald McArthur arrived in Hobart in 1822, and John Dunmore Lang arrived in Sydney in 1823². Lang conducted his first service on 8 June 1823. Next Sunday he declared that though holding out the right hand of friendship to others, Scotsmen were not obliged to surrender their attachment to the Church to which they traditionally belonged³. Immigration to Australia after the Second World War added in substantial numbers Presbyterians from other Reformed Churches of the Continent of Europe, but the Scots were dominant until then. The Scots in Australia⁴ constituted a vigorous and influential group in both Church and State. Prentis says that the Presbyterian Church was "the most important Scottish institution brought to Australia" and "it was Scottish (and Scotch-Irish) with very little remainder"⁵. It is not surprising therefore that the polity of the Presbyterian Church is substantially derived from the polity of the Church in Scotland.

British settlement in Victoria had two false starts, at Sorrento in 1803 and at Corinella in 1826, before the settlement at Portland commenced on 19 November 1834⁶. The first Presbyterian service was conducted by the Reverend James Clow on the Barwon River in October 1837⁷. This was still in the Port Phillip district of New South Wales. The separation from New South Wales of the Colony of Victoria was championed by John Dunmore Lang in a speech as a member of the Legislative Council sitting in Sydney on 20 Aug 1844⁸ but the Australian Colonies Act, which effected separation,

¹ James Bonwick, *Australia's First Preacher; The Rev. Richard Johnson, First Chaplain of New South Wales* (London: Sampson Low, Marston & Company: 1898) and *Curious Facts of Old Colonial Days* pp 1-7 (London: Sampson Low, Son & Marston: 1870). But see now Neil K. Macintosh, *Richard Johnson: Chaplain to the Colony of New South Wales: His Life and Times 1755-1827* (Sydney: Library of Australian History: 1978) and K. J. Cable, article in *Australian Dictionary of Biography* Volume 2 pp 17-19 (Melbourne University Press: 1967)

² Frederick Maxwell Bradshaw, article *Presbyterian Church* in *The Australian Encyclopaedia* Volume VII, pp 262-272 (Sydney: The Grolier Society of Australia: 1963)

³ D. W. A. Baker, *Days of Wrath: A life of John Dunmore Lang* (Melbourne University Press, 1985)

⁴ See Article in *The Australian Encyclopaedia*, Volume VIII, pp 32-37 and Malcolm D. Prentis, *The Scots in Australia: A Study of New South Wales, Victoria and Queensland, 1788-1900* (Sydney University Press: 1983)

⁵ Prentis, pp 219, 240

⁶ Geoffrey Blainey, *Our side of the Country: the Story of Victoria* (North Ryde: Methuen Haynes: 1984)

⁷ This date explains the title of Robert Hamilton, *A Jubilee History of the Presbyterian Church in Victoria* (1888)

⁸ Alexander Sutherland, *Victoria and its Metropolis*, Vol 1, p 284 (Melbourne: McCarron, Bird &

was not passed by the Imperial Parliament until 5 August 1850, and news of it did not reach Victoria until 11 November 1850⁹. A Presbytery had been formed in New South Wales on 14 December 1832, and from it the Presbyterian structure in the four eastern states is derived. Lang separated from this Presbytery on 11 December 1837 to form the Synod of New South Wales, but reunion was effected on 5 October 1840 when the Synod of Australia in connection with the Established Church of Scotland was formed. The commission of the Synod in April 1842 authorised the ministers of the Church of Scotland in Port Phillip and an elder from each congregation there to constitute themselves a presbytery, the Presbytery of Melbourne, which in 1854 became the Synod of Victoria. That Presbytery first met on 7 June 1842. But the situation became complicated because of the disruption¹⁰ of the Scottish Church in 1843. There were in consequence a number of differing Presbyterian Churches in the Colony of Victoria.

On 7 April 1859 "the Synod of the Presbyterian Church of Victoria was formed by the union of the Synod of Victoria, the larger of the two bodies calling themselves the Free Presbyterian Church of Victoria (except one congregation), the United Presbyterian Church of Victoria (except three congregations), and the United Presbyterian Church of Australia, and on the following day the synod assumed the designation of General Assembly"¹¹. Fifty five ministers entered the union, with about 55 pastoral charges, which grew to 145 by 1880. The minority Free Presbyterian Church (except for two ministers) entered the Presbyterian Church of Victoria in 1867. The Presbyterian Church of Victoria in 1879 initiated proposals for some sort of federal structure of corresponding churches in the Australian Colonies, which resulted in the formation of the Presbyterian Church of Australia on 24 July 1901, the year in which the Colonies were federated to form the Commonwealth of Australia.

The Presbyterian Trusts Act 1890¹² is thus an Act of the Colony of Victoria; and the Church to which it refers is the Presbyterian Church of Victoria. One of the main purposes of that Act was to enable a body corporate to come into existence, as it subsequently did, having the name of The Presbyterian Church of Victoria Trusts Corporation. The Presbyterian Church of Australia Act 1971¹³ of the State of Victoria, together with similar legislation in other States, made it possible for the Presbyterian Church to enter into union with other churches without all its property remaining with a dissenting minority¹⁴. Votes were taken in congregations, on the basis that if one third¹⁵ of the communicants desired to continue upon the basis adopted on the formation of the Presbyterian Church of Australia in 1901, it would be a continuing congregation which did not enter into union. In 1974 a decision was taken to enter into

⁹ Sutherland, p 291

¹⁰ On it see article *Disruption* in Nigel m. de S. Cameron and ors, *Dictionary of Scottish Church History & Theology*, p 246 (Edinburgh: T & T Clark: 1993)

¹¹ Bradshaw, p 267

¹² Act No 1175, 6 October 1890, reprinted by the Presbyterian Church of Victoria in *Handbook relating to the Presbyterian Trusts Act 1890*

¹³ Act No 8102, 27 April 1971

¹⁴ A consequence of the application of the principle of the Free Church Case, on which see Kenneth R. Ross *Church and Creed in Scotland: The Free Church Case 1900-1904 and its origins*

union with the Methodist Church and the Congregational Church. That union was not accomplished until 1977, because on the one hand the parties entering into union had to arrange for government to enact The Uniting Church in Australia Act 1977¹⁶, and the property commission set up¹⁷ under the provisions of the 1971 Act was delayed in starting its deliberations by litigation to determine whether Frederick Maxwell Bradshaw was entitled to sit as a member of the property commission. Even after the union, because the majority considered that it was the Presbyterian Church of Victoria that had entered into union, and that the minority who continued, though entitled to the name, were not the same church, there was doubt whether the Presbyterian Church of Victoria Trusts Corporation could pass to the control of those continuing. The Presbyterian Trusts Act 1979 established that it did.

The fact that the Presbyterian Trusts Act 1890 was passed bears testimony to the power and influence of Presbyterian magnates in the Colony of Victoria. Paul de Serville's *Pounds and pedigrees: The Upper Class in Victoria 1850-80* is worth a look to see how many Presbyterians there are among them particularly from the Western District. It is interesting to go through the names of the first trustees and see who they were¹⁸. The Act enabled the General Assembly to pass a resolution that a corporate body of trustees be constituted to hold property in trust for the church. That resolution was passed and advertised in the Government Gazette on 28 November 1890. That brought the Corporation into existence. It is not a corporation under the Corporations Law¹⁹, or under the Associations Incorporation Act 1981²⁰, by which Acts so many religious and charitable bodies are nowadays incorporated. It is interesting to observe that the Uniting Church in Australia is a creature of Statute, but the Trusts Corporation is created by the Church pursuant to enabling law. While it is the corporate body which is trustee, the members of that corporate body are in the Act called a corporate body of trustees. Thus the members of the Trusts Corporation are not incorrectly called trustees. The legal matrix within which the Trusts Corporation functions includes not only our own ecclesiastical law but also the law which governs trustees and the law which governs charities.

Prior to the Presbyterian Trusts Act 1890, the General Assembly adopted Model Trust Deeds which declare the trusts upon which a Church site and a Manse site are held. These trust deeds are printed in the Yellow Pages of the Code Book. The originals have been deposited with the Registrar-General. The Presbyterian Trusts Act enables the trusts previously declared in respect of those sites, for churches and manses, adopted by differing congregations and differing denominations to be assimilated to the standard or norm of the Model Deeds. The policy behind the Act was to enable

¹⁶ Act No 9021, 17 May 1977: it came into effect at a later date on proclamation

¹⁷ See Clause 18 (a) OF Part III of the Schedule to Act 8102

¹⁸ Sir James MacBain (A. D. B. 5. 127), Hon William Anderson (A. D. B. 3. 31), Hon James Balfour (A. D. B. 3. 80), Mr John Lang Currie (A. D. B. 3. 510), Hon. [later Sir] John Mark Davies (A. D. B. 4. 29), Messrs Thomas James Finlay, Andrew Harper, B.D. (A. D. B. 9. 200), Robert Harper (A. D. B. 9. 206), James Kirpfinmonth, William Lewis, Duncan Love, Alexander Morrison LL.D. (A. D. B. 5. 295), James Richmond (A. D. B. 6. 27), Robert Simson (A. D. B. 6. 127) and William Taylor (A. D. B. 6. 249) Note the Scottish origin of many of these worthies.

¹⁹ The Corporations Law (Victoria) is the result of the Corporations (Victoria) Act 1990, but I refer to its direct predecessors. Acts by which companies limited by guarantee were capable of incorporation.

existing settled congregations to retain their own Congregational Trustees, but progressively to vest all congregational property in the Trusts Corporation. Where a congregation is authorised to borrow against the security of its property on mortgage the Trusts Corporation may transfer the congregational property to Congregational trustees for the purpose of mortgaging it, but upon discharge of the mortgage the property reverts in the Trusts Corporation.

It is important, at this point, to make a distinction: it is the distinction between a managing trustee and a bare or custodian trustee²¹. The Model Trustee deeds make it clear that with respect to the church site and the manse site of a congregation in connexion with the Presbyterian Church of Victoria the trustee or trustees, whether the Trusts Corporation or Congregational Trustees are bare or custodian trustees only. The management of the trust property is vested elsewhere. This is often not understood. In consequence some congregations entertain suspicion that there will be some loss of control of their property if it is vested in the Trusts Corporation, and some Congregational Trustees falsely entertain the view that their position gives them some control. Under the code of the church, a prime source of its ecclesiastical law, there are powers of management of the trust property vested in the congregation, the presbytery, and the General Assembly. So, for example, if a trustee disobeys or neglects or refuses to carry out any order instruction or decision of the Assembly or Presbytery then it is both lawful and incumbent on the Presbytery by resolution reciting the facts to declare a vacancy in the trusteeship in respect of such trustee who shall thereupon *ipso facto* cease to be a trustee and shall be deprived of all powers and privileges vested in him²².

Where Congregational Trustees hold property, and there is a change in the trustees, by death, resignation or otherwise, it would, apart from the provisions of the Presbyterian Trusts Act, be necessary for documents to be prepared and registered with the Registrar of Titles to evidence removal of trustees and substitution of new trustees. The Act enables the Moderator to keep a Register of Trustees, so that an entry of change in that Register is equivalent to an endorsement on the title by the Registrar of Titles. This fulfils a purpose of the Act, mentioned in its recitals, to facilitate and render less expensive the conveyance and transfer of church property. Where there are no trustees, and where there is no one authorised to elect new trustees, or if the persons authorised do not elect within one month after being called on to do so by the Moderator, the property vests in the Trusts Corporation, and the certificate of the Moderator is sufficient evidence. Where a congregational property is vested, as is often²³ the case, according to the Register kept by the Registrar of Titles in trustees who are dead, and the property is sold, the transfer is executed by the trustees named in the Register of Trustees kept by the Moderator and the Moderator furnishes a certificate that they are the trustees, and the Registrar of Titles registers the transfer to the purchaser as if it had been executed by those dead persons entered on title. Sometimes congregations, anxious to be economical, use a local solicitor who is

²¹ Although a bare trustee holds property at the disposal of other persons, a bare trustee is not absolved from responsibility if that other person acts in breach of trust, so that a bare trustee may refuse to cooperate when a breach of trust is feared.

unaware of the Act, which is not reprinted in the consolidations of 1928 and 1958, and wrongly believes that he must prove the death of each trustee, ascertain the legal personal representative of the last surviving trustee, and lodge an application by that representative to be registered as legal proprietor before the property is transferred to the present trustees with a view to their making title to a purchaser. That could not happen in New South Wales²⁴ where all property transactions pass through the hands of the law agent from start to finish.

The law agent must be involved at some stage, although it has from time to time come to my notice that even here there has been a failure by congregations to observe the requirements of the Act. Where any sale mortgage exchange or lease of any church property (whether held upon the trusts of the Model trust deeds or either of them or otherwise) is made in conformity with such trusts the transfer conveyance mortgage exchange or lease must be made with the consent in writing of the Moderator and has no force or effect without such consent. Moreover, under a Rule made under the Act, the consent of the Moderator to any transfer conveyance mortgage exchange or lease must not be given unless a law agent of the Church first approves. It is the function of the Moderator to satisfy himself that the requirements of the Code have been observed, so that the dealing is in accordance with the trusts on which the property is held and that the dealing has the assent of the General Assembly. It is the function of the law agent to see that the instrument accords with the civil law.

The definition in the Act of "property" to which it applies is very wide extending far beyond real estate such as church and manse sites. It is wide enough to include "money or securities for money held by or vested or purporting to be vested in or claimable by any person or persons either in trust generally for the ...church or for any congregation thereof or for any special purpose in connexion therewith or for the benefit or use of the members thereof as such or of any person holding for the time being office therein". This gives the Trusts Corporation standing to sue and be sued in respect of that property. But the Trusts Corporation must observe any express trusts upon which that property is held, and where there are no express trusts must hold manage and deal with it in such manner as the General Assembly may from time to time direct, and such property is subject as to the management thereof to the rules or regulations of the General Assembly in force for the time being which are applicable thereto.

It is part of the general law governing trustees that a trustee must not mix trust funds either with the trustee's own funds or with any other trust funds. This means that under the general law every separate trust must be separately invested. By an amendment to the Trusts Act²⁵, an important new series of sections (Sections 14A, 14B and 14C) set up a Common Fund for the investment, as one fund, of funds which otherwise would have been kept separate. This enables the much more efficient management of the funds, and enables the investment policies of the Trusts Corporation to be determined with respect to the sum or aggregation of many separate funds. These provisions were I believe procured from the government of the day because of the standing in the legal community of the Presbyterian promoters Sir Alastair Adam, a judge of the Supreme Court, and his brother Mr J. P. Adam, a prominent solicitor. These provisions became essential in an age of considerable

²⁴ As Mr Simon Fraser the present Law Agent tells me.

inflation. The Trusts Corporation has the sole responsibility for investing this Common Fund. This is not the place to go into the details of these sections.

It suffices to say that while each separate trust never increases in capital value, increases of capital accrue to a "Common Fund Reserve Account" (which also bears losses) and as the funds in the Reserve account earn income, that income together with the income earned by the funds of the separate trusts, is, after deduction of certain expenses, available for distribution by the trustee to the credit of the revenue of those separate trusts. It is in this way that an investment policy designed to procure capital growth works for the advantage of separate trusts. It is the practice of the Trusts Corporation to declare periodically the interest rate payable on the capital of the separate trusts. It may fix different rates of interest according to the source and nature of the different amounts invested, the periods for which they are so invested and such other factors as the Trusts Corporation considers relevant. The funds which are principally invested in the Common Fund are funds for the benefit of purposes of the several Committees of the General Assembly. All the trusts being charitable trusts are trusts for purposes, not persons.

Prior to the inauguration of the Uniting Church, a practice had grown up within the undivided Presbyterian Church, of having all decisions vested in the Trusts Corporation made by the Board of Investment and Finance of the General Assembly. The Trusts Corporation had become a rubber-stamp, membership of which was honorific, and which met infrequently to ratify the affixing of its seal to documents in the manner determined by the Board. The Church which continued on the basis of 1901, made new provisions. On 10 August 1977 there were advertised in the Government Gazette rules which from 15 July 1977 equated membership of the Board with membership of the Trusts Corporation, so that the Trusts Corporation now functions as the Board. It is the Board wearing another hat. These Rules have been amended once since then but not so as to alter that principle. As the Board, the members are a Committee of the General Assembly. As the Trusts Corporation, the members are independent of the Assembly and responsible as all charitable trustees to the Crown, being, for this purpose the Attorney-General, as the guardian of charity. It can sometimes be a difficult question whether the Trusts Corporation as such is bound by a decision of the General Assembly: it is certainly true to say that it is not always bound, and is often not bound.

In conclusion, it may be useful to others to know the sources which I use when called upon to advise the Trusts Corporation. I more often than not look to the Procurator for help. But when I have recourse to text-books, what are those I most frequently consult? First is the former Procurator's text: Mr F M Bradshaw's *The Law of Charitable Trusts in Australia*²⁶, particularly to help determine whether a particular trust is a charitable trust, how it should be construed, and when the cy-pres doctrine applies. The cy-pres doctrine enables a charitable purpose to be effected as near as may be to the intended purpose which is impossible or impracticable. He also has a valuable chapter on the administration of trust property especially with reference to the

exercise of a power of sale. Secondly, there is the Trustee Act 1958²⁷ of the State of Victoria, and texts and cases which enlighten its meaning. Thirdly there are the volumes of Halsbury's *Laws of England*, particularly the volumes on trusts and trustees, charities, and, although biased to the ecclesiastical law of the Church of England, ecclesiastical law. On Scottish ecclesiastical law, recourse is had to William Mair's *A Digest of Laws and Decisions Ecclesiastical and Civil relating to the Constitution, practice, and affairs of the Church of Scotland with explanatory notes and forms of procedure*²⁸ and to James T. Cox's *Practice and Procedure in the Church of Scotland*²⁹.

²⁷ Act No 6401 frequently amended and reprinted at 9 May 1996

²⁸ Edinburgh: William Blackwood and Sons: 1912

²⁹ —