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Church Structuring and Property Holding Options for Local ACC Churches

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Introduction

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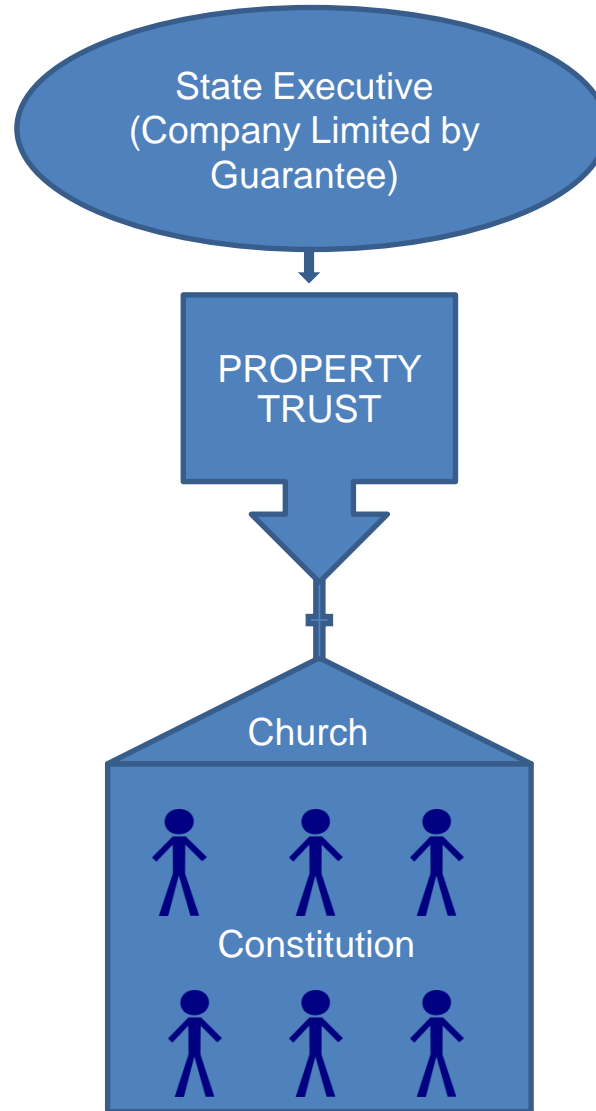
What is your current Church structure?

- Historically most local ACC churches were **unincorporated**
- An unincorporated church is **not** a “legal person” / “legal entity”
- This means it cannot hold property in its own name
- The State Executive Australian Christian Churches Queensland Ltd (formerly Assemblies of God in Australia (Queensland Conference)) has historically acted as trustee for local unincorporated churches, providing a legal person to own a church’s property on its behalf.
- Tighter regulation and stricter financial reporting requirements have increased the financial and administrative burden of the State Executive performing this role. Consequently, the State Executive is working to facilitate a transition property holding from the State Executive to local churches within their own local church structure.
- This is an ideal time for churches to review their structure and governance, ensure their ongoing compliance with legislation, while establishing a property holding structure that:
 - is local church controlled;
 - provides some asset protection;
 - is generally well accepted by lending institutions



What is your current Church structure?

- Unincorporated local church with the State Executive acting as trustee for property holding:
 - Most churches
 - Historically was a simple and affordable way for local churches to buy property
 - Increasingly problematic from a governance and regulatory perspective



Trustee (legal person) holds property on trust of the religious purposes of the Church as set out in its Constitution

An unincorporated church is a group of people who agree to join together for the religious purposes set out in its Constitution



Other Structures

- Unincorporated local church with a locally controlled company limited by guarantee acting as trustee for property holding:
 - Historically recommended for churches desiring local control of their church assets
 - Recommended in the past for asset protection reasons and governance reasons
 - Structure more complicated
 - As assets are held separately from the church income, can be problematic when dealing with financiers. Some financiers will only lend to incorporated churches.
- Local church historically Incorporated by Letters Patent:
 - Churches incorporated under the now repealed Religious Educational and Charitable Institutions Act of 1861
 - No longer an option for incorporation
 - Existing letters patent bodies preserved under the Associations Incorporation Act 1981
 - Possible to transition incorporation type to company limited by guarantee
 - Can be prudent to maintain the “status quo” with these unique structures
- **Local Church incorporated as a Company Limited by Guarantee – increasingly the preferred model:**
 - Church operations and property holding conducted directly from one church company entity;
 - Comprised of members and directors
 - Recommended → Company Limited by Guarantee not Incorporated Association.



Unincorporated vs Incorporated Church

Unincorporated local church –

PROS

- Freedom constitutionally
- Less Regulation
- “Basic Religious Charity Exemption”
 - no financial reporting to the ACNC
 - not subject to the Governance Standards under the ACNC Act

CONS

- Leaders (and possibly members):
 - jointly and severally liable for the liabilities of the church
 - at risk of personal suit for any claims against the church
 - leaders jointly and severally liable under the ACNC Act (s 180.5)
- No ability to hold property or enter into contracts
- As churches become larger with more staff and bigger budgets, these risks increase accordingly



Unincorporated vs Incorporated Church

Incorporated local church (as a Company limited by guarantee) –

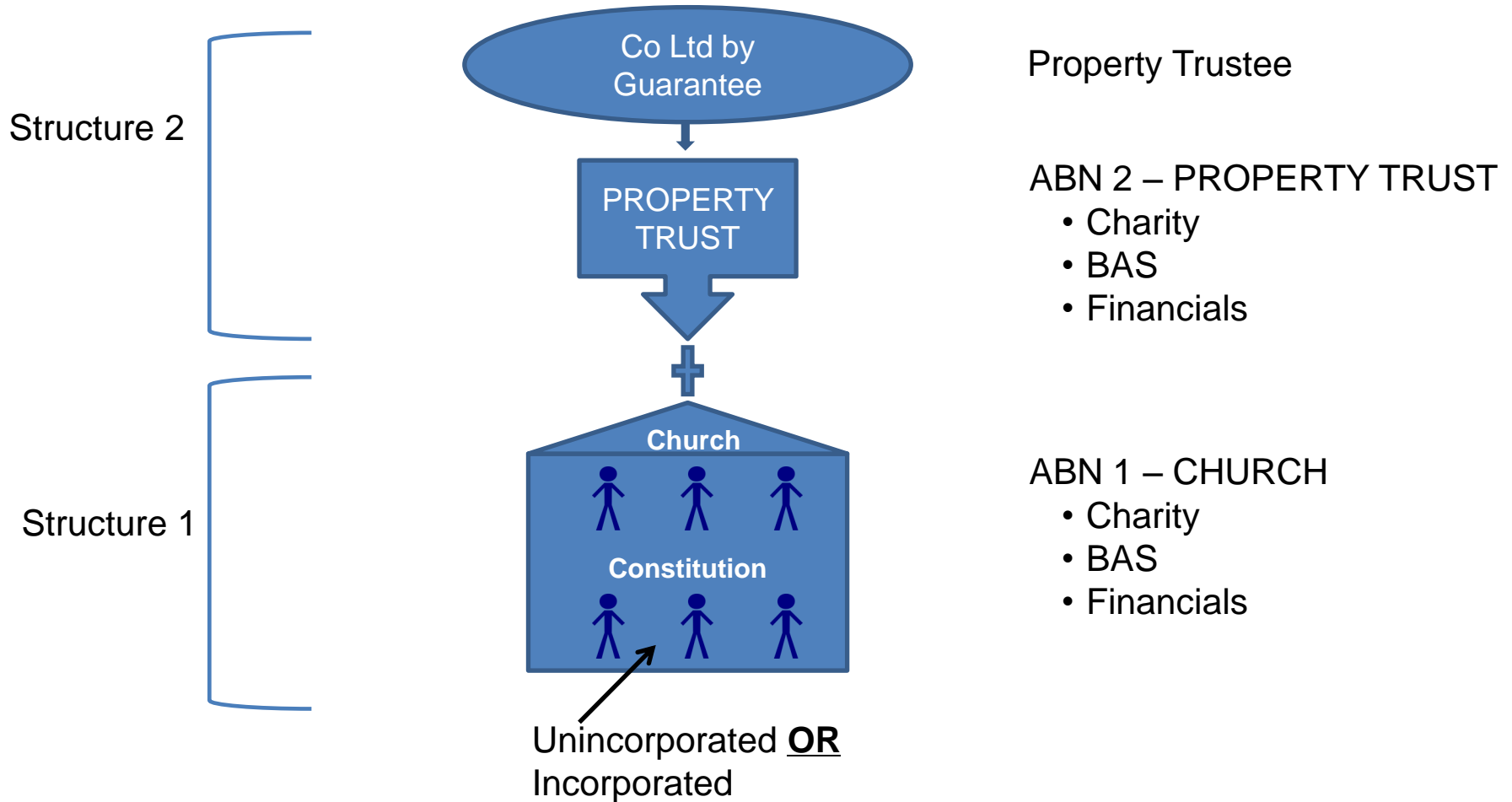
PROS

- Protection of the corporate veil
 - members liability for the debts of the church limited
 - Directors protected against personal liability except in certain instances.
- Ease of corporate structuring and control
- Can hold property in its own right (property holding trust not necessary for property holding)
- Can enter contracts
- Well understood by lenders and leaders in the Church
- Learning in this “for profit” world can be more readily applied.

CONS

- Financial reporting to the ACNC (not a Basic Religious Charity)
- Subject to the Governance Standards & ACNC Act generally (not a Basic Religious Charity)
- Subject to the Corporations Act. In our experience, this is very manageable for churches without the church feeling that they need to compromise their Biblical convictions.

Structures with a Property Holding Trust





Structures with a Property Holding Trust

- Necessary for *unincorporated* churches
- Are there any benefits for incorporated churches?
 - Asset protection?
 - However, recent decisions have eroded *Richstar & Spry*
 - Asset holding structure able to access basic religious charity exemption
 - Sometimes appropriate property holding structure where the church entity wishes to have many members (that is, church membership open to most congregational members). The property holding trustee can be controlled by a smaller group of leaders, allowing for efficient dealing with property.
- Be wary of trend with financiers to lend only to the income receiving entity (that is, the church entity) regardless of capital held in a trust. This can be overcome by the borrower being the church entity and the property holding trust providing third party security.
- State Trustee or Local Trustee
 - State Trustee historically provided accessible property holding option, especially for smaller churches
 - Local ability to deal with property without needing to liaise with State trustee



Where is my “Trust Deed”?

- Historical property trusts often established via a “Schedule of Trusts”
 - Short form document annexed to the Transfer lodged at the Titles Office, usually when the property is first purchased.
 - Relates only to real properties specifically purchased in that trust;
 - Often not registered as a charity or endorsed to receive charitable tax concessions – best practice is that the trusts are registered as charities prior to dealing with property to avoid capital gains tax liability
 - Due to their unusual nature, often not understood by banks financial institutions
 - There is no “trust deed”
 - Still require an incorporated trustee entity – historically the State Trustee
- Recommend moving to a Deed of Trust instead of a Schedule of Trusts
 - Banks understand them – avoid the question – “where is the Trust Deed?”
 - Versatile - can be used for other property holding – vehicles, personal property



Steps – Incorporated Church

First - have a meeting or teleconference with us to discuss your current structure and which structuring option is best for your church going forward.

Incorporated Church (no separate property trust)

- Is your current property trust endorsed as a tax concession charity – talk with us about the risks
- Hold a meeting of your church membership to pass a resolution to incorporate the unincorporated church
- Members and Directors need to consent
- New constitution – Template approved by the State Executive. Amended to suit your church's structuring and governance needs.
- Company incorporated with ASIC
- Company applies for new ABN, registration as a charity with the ACNC and tax concession charity endorsement with the ATO
- Existing property to be transferred from existing property trust to new church company. A transfer duty exemption application to OSR will be required to avoid transfer duty becoming payable on the transfer
- New church property assumes conduct of church activities
- Old ABN for unincorporated church cancelled



Steps – Local Property Trustee Company

- Is your current property trust endorsed as a tax concession charity – talk with us about the risks
- Hold a meeting of your church membership to pass a resolution to incorporate a local church trustee, establish a new property holding trust and transfer church property to the new structure once established and appropriately endorsed.
- Members and Directors of new trustee company need to consent
- New constitution for trustee company. Amended to suit your church's structuring and governance needs.
- Trustee company incorporated with ASIC
- Deed of trust settled – charitable trust existing to hold property on trust for the religious purposes of the church (established)
- Trust applies for new ABN, registration as a charity with the ACNC and tax concession charity endorsement with the ATO
- All existing property to be transferred from existing property trust to new trust. A transfer duty exemption application to OSR will be required to avoid transfer duty becoming payable on the transfer.
- Previous ABN and Charity endorsements of old property trust (if any) – cancelled

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