

just redemptive outcomes.



CORNEY & LIND
LAWYERS

Asset protection

Structuring to protect leaders from personal liability and possibly moving away from property trusts

Andrew Lind, Director & Callum Gibson, Lawyer

just redemptive outcomes.[®]



CORNEY & LIND
LAWYERS

About your speakers



Andrew Lind
Director



Callum Gibson
Lawyer



Overview

- How ACC Local Churches Are Usually Structured
- Previous Rationale of this Approach
- Developments in the Law
- Options Going Forward



How ACC Churches are usually structured

Many local ACC churches are 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.



How ACC Churches are usually structured

Property is generally held:

1. By the movement entity on trust for the purposes of the local church; or
2. By a Local Trustee Company Ltd by Guarantee on trust for the purposes of the local church.

Trustee is the registered owner on the title of the property, and will be described as trustee “under instrument no. # “ That is, where you find the Trust Deed.



Rationale

Separate Liabilities/Asset Protection.

Succession of leaders (local church) without having to change the title.

As real properties are in a separate trust, there was some protection from the broader liability of the movement and potentially the local church (depending upon the terms of the trust) (more soon).



Developments in the Law:

Bathurst Case - Bathurst v Palmer [2015] NSWSC 1856

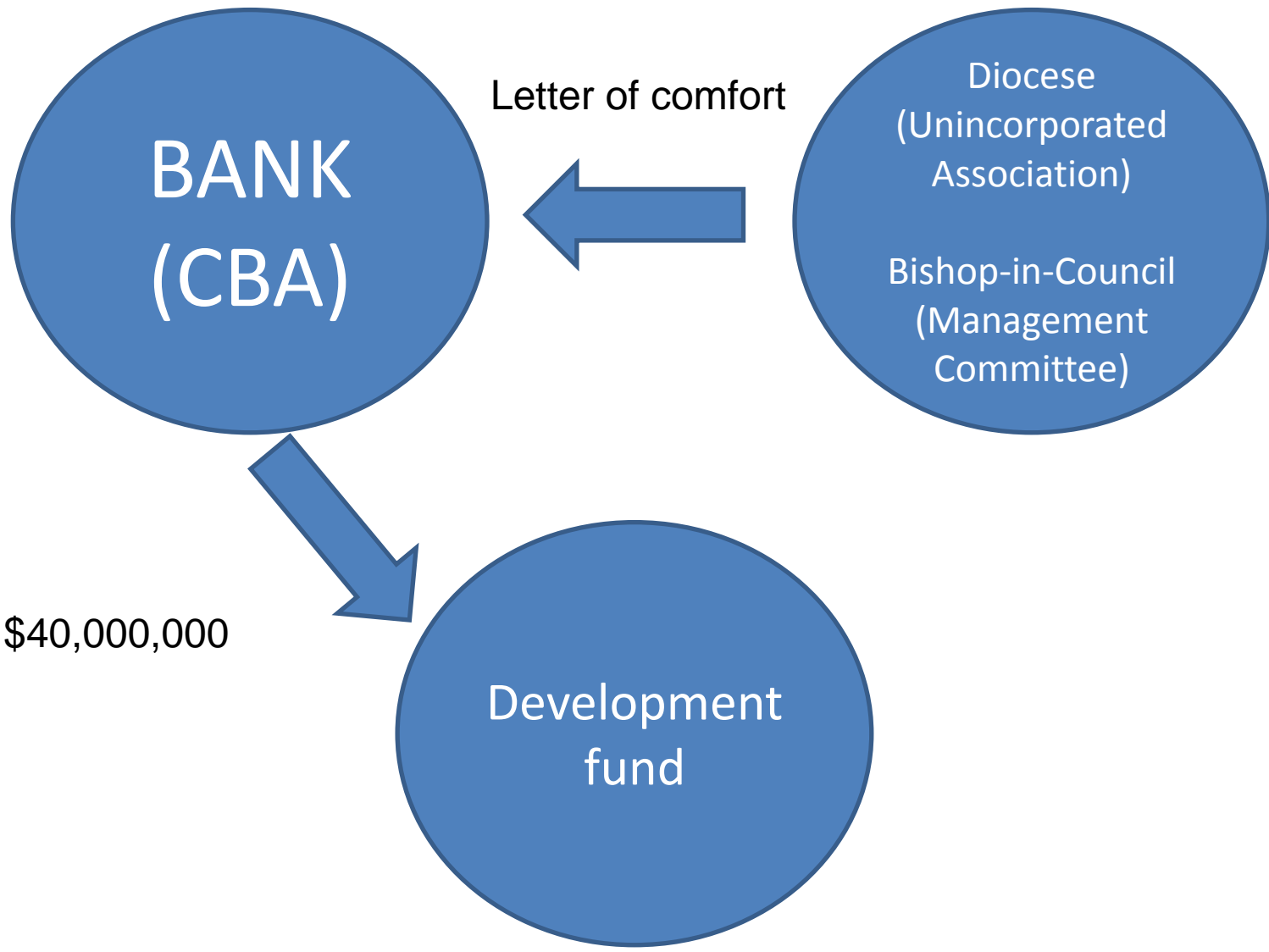
Facts:

- **\$40,000,000 facility** by the Anglican Development Fund Diocese of Bathurst (the “Development Fund”) from the Commonwealth Bank of Australia.
- Backed by a letter of comfort from Bishop Hurford addressed to CBA confirmed that the Diocese (an unincorporated association) *“undertakes to use its best endeavours and powers conferred by legislative or other means to resolve issues that may arise with the loan facilities”*.
- Money loaned from Development Fund of the Diocese (a separate legal entity) for the management of church schools, which proved to not be sustainable and the **money was lost**.



Developments in the Law: Bathurst Case (cont'd)

- In turn, the Development Fund defaulted on its obligations under the loan and Receivers were appointed.
- Supreme Court entered judgment in favour of the CBA against the Development Fund for just over \$36,000,000.
- Even after assets of the fund were liquidated, there was a deficiency owing to CBA of over \$25,000,000.
- The bank sought to recover the deficiency from the members of the Bishop-in-Council (the members of the “committee of management” of the unincorporated association) to repay the debt, as well as claiming damages.





Developments in the Law: Bathurst Case (cont'd)

Some issues:

- The bank had relied on the letter of comfort from the Bishop Hurford
- No specific charge over identifiable assets
- Who had the bank contracted with?



Developments in the Law: Bathurst Case (cont'd)

Judgment:

- intention for the Bishop's Letter to the Commonwealth Bank to **create binding legal relations.**
- the **members of the Bishop-in-Council became bound** by the obligations under the Bishop's Letter.
- the **only realistic source of money to meet the debt was church trust property.**
- Where trust property is held for the use and benefit of church members, it is for their benefit **that the trust property be used to discharge an obligation undertaken on behalf of the Diocese.**
- the Bishop-in-Council **by ordinance may direct that it be sold or otherwise dealt with to honour the Bishop's Letters or make up the Development Fund's deficiency without breaching any trust, or any ordinance or law.**



Developments in the Law: Bathurst Case Implications

- Asset protection?
 - Where a management committee of an unincorporated association controls trust assets – they can direct the trustee to sell and use trust assets to meet a liability of the local church.
 - However, only trust assets for general purposes of the local church may be looked to.
- In ACC property trusts, it is usually the members of the Assembly and not the “committee of management” who need to direct the sale of real property.
- This provides no real protection for liability in “committee of management” member hands as they would generally have a right of indemnity from local church assets (including we expect assets in controlled trusts).



Going forward

Options A – Do nothing

- Church assets held in general purpose trusts remain vulnerable.
- However, if there is a legitimate liability, would meet it, so not trying to avoid that.
- Personal assets of current management committee of an unincorporated association may also be vulnerable to meet liabilities of church (subject to volunteer protections for civil liability under the Civil Liability Act (Qld) and equivalent in other States).



Going forward

Options B – Limited Recourse Letters of Comfort

Letters of comfort drafted so that the church limits what assets back finance – limited to assets of the church.

Needs to be very carefully drafted.



Going forward

Options C – Incorporate Local Churches

- Company Limited by Guarantee
- Can move trust assets into local church structure.
- Liability of church contained in entity.
- Less administrative burden as dealing with one entity conducting both activities and holding assets. One ABN, one GST reporting entity, on set of accounts.
- Loss of basic religious status with the ACNC.



Going forward

Options D – Amend Trust Terms to be for more specific purposes:

- ❑ This option seeks to take advantage of the ‘general purpose’ potential “safe harbour” as to what assets can be looked to when meeting liability of local church.
- ❑ The argument is that if assets are for specific purposes, then only related specific purpose liabilities should be met from that trust fund.
- ❑ However, if there are powers of amendment, court may look to compel amendment by the “controllers”.



Going forward

Options E – Blended larger trust

BIG STRUCTURAL CHANGE

By diluting control of real property by local church, the asset protection afforded by trust structure is increased.

The argument is that the property is for the benefit of more than just the local church and not “controlled” by the local church, and therefore is not, essentially, the local church’s asset and cannot be used to meet liability of the local church.

Not consistent with current ACC polity.

just redemptive outcomes®



CORNEY & LIND
LAWYERS

Contact



Name: Andrew Lind

Position: Director

Email: andrew.lind@corneyandlind.com.au



Name: Callum Gibson

Position: Lawyer

Email: callum.gibson@corneyandlind.com.au

07 32520011

www.corneyandlind.com.au

Next Webinar

TUESDAY

6th Mar 2018 @ 1:00pm

Asset Protection –

Structuring your church arms – maintaining sufficient diversity, accountability and control between entities under the church

corneyandlind.com.au/webinar/acc-asset-protection-structuring-church-arms-maintaining-sufficient-diversity-accountability-control-entities-church-part-2/