

Congregational Religious Trusts in Victoria's Churches of Christ

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The leaders of 21st Century church organisations face the challenge of how to revitalise and rationalise their property holdings for contemporary usage while simultaneously respecting the history and sensibilities of congregations. In an increasingly secular society, many congregations have dwindling memberships and are no longer financially viable. The real estate portfolios amassed by Christian church movements and denominations, scattered around the metropolitan areas and country towns of Australia at prominent locations on main streets, are massively valuable. But who 'owns' the properties of churches in a religious denomination? Do the organising bodies of movements have the power to divest particular congregations of their church properties in service of the broader movement? These are questions that arouse passions and that have real contemporary significance for the 'business' of church. Answers differ depending on the characterisation of a church movement as hierarchical, presbyterian, or congregational. This article examines these questions by focusing on the case of the Churches of Christ in Victoria, a congregational movement whose properties are generally held under a variety of forms of trust. Relevant case law is reviewed. The implications of the history of the movement and its foundational principle of congregational autonomy are explained.

I. INTRODUCTION

In the early days of the congregational religious movements that flourished in the State of Victoria from the late nineteenth century onward, trusts were established to hold church properties. Nowadays the properties of these movements, dotted around the metropolitan areas and country towns of the State on main streets and prominent corner allotments, have a combined value of many hundreds of millions of dollars.¹ At the same time, in an increasingly secular society, many congregations have dwindling memberships and are no longer financially viable. This has led to the central organising bodies of these movements or denominations seeking to take hold of the properties of these dwindling congregations and to apply them to the purposes of the broader church.

But whether they can do so is another question. Unlike hierarchical churches such as the Roman Catholic Church, authority in congregational movements was structured to reside with the disparate Elderships of the various congregations, not in one central organisation. The autonomy of congregational movements is sometimes reflected in the trusts established to hold their property, which in many cases remain in effect.

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¹ For example, the land and buildings of the Brighton Church of Christ were estimated by the Board of that church in early 2021 to have a commercial value of \$10 million. As of November 2021, the Churches of Christ movement in Victoria comprised 122 affiliated churches and agencies (excluding interstate affiliates).

Disputes can arise when the legal owner of church property seeks to seize control of a congregation's land and buildings against the wishes of a congregation. Who 'owns' the properties of churches in a congregational church movement? Do the central organising bodies of congregational movements have the power to divest particular congregations of their church properties in service of the broader movement? These are questions that arouse passions and that have real contemporary significance for the 'business' of church.²

Over the decade from 1930 to 1941, the Victorian parliament established bodies corporate to hold the real property of the four main congregational religious movements active in the State at that time. It enacted the *Baptist Union Incorporation Act 1930* (Vic), the *Congregational Building Association Incorporation Act 1930* (Vic), the *The Salvation Army (Victoria) Property Trust Act 1930* (Vic), and the *Churches of Christ Property Act 1941* (Vic) ('1941 Property Act').³ This article focuses on the arrangements of the Churches of Christ in Victoria as a case study. It examines the *1941 Property Act*, which established the statutory body corporate known as the Properties Corporation of the Churches of Christ in Victoria ('Properties Corporation') to hold church property.

It will be argued that, where the Properties Corporation holds church property on the trusts established by the First Schedule of the *1941 Property Act*, it holds it for the purposes of the particular congregation of the Churches of Christ in question, not for the purposes of the Churches of Christ conceived as a whole. It will be noted that there are at least seven distinct pathways by which properties could fall under the First Schedule trusts of the *1941 Property Act*. Although this article examines a particular congregational movement, the same essential questions can arise in the context of denominations such as the Presbyterian and Baptist churches.

Interpreting the trusts applicable to the Churches of Christ in Victoria requires an understanding of four things: the history of the Churches of Christ movement, including the adherence of its members to the principle of congregational autonomy; the implications of a congregational — rather than presbyterian or hierarchical — polity; familiarity with the legislative scheme of the *1941 Property Act*; and the nature of the terms of relevant trust instruments. These topics are examined in Parts II, III, and IV below. In Part V, the interpretation of the First Schedule trusts of the *1941 Property Act* is addressed.

The research that underpins the article has been conducted in liaison with five congregations of the Churches of Christ located in Victoria, each of which has granted access to their archives, historical trust deeds registered with Victoria's Register of Successory Trusts, and detailed files of recent correspondence.

Where there is a trust instrument, the purposes of the trust depend on the intention of the settlor or settlors as manifested by the trust instrument at the time of the creation of the trust. But if there is no trust instrument, a Court can 'act on evidence of long practice in the relevant

² The Executive Officer of the Churches of Christ in Victoria & Tasmania Inc ('CCVT Inc') [the movement's coordinating religious body in Victoria] called for 'prayerful discernment to release the resources God has given us where they are most needed' and noted that 'we have all the resources needed to be obedient to God's call to be a 21st Century movement of the people of God': Churches of Christ in Victoria and Tasmania Inc, *Annual Report 2017: Stories and Statistics from 2016* (Report, 2017) 4. This message foreshadowed that 'the season CCVT [Inc] is now entering will at times call us to make difficult choices and decisions': at 4.

³ These four statutes were described in summary in Victoria Legislative Assembly, *Parliamentary Debates*, 2 July 1941, 95 (Henry Bailey, Attorney-General) ('Bailey').

religious body'.⁴ In the case of a congregational church, as Chief Justice Young of the New South Wales Supreme Court said in *Radmanovich v Nedeljkovic*, 'it is usually necessary to resort to what has been the custom in the church over a period of years in order to see what the original consensual compact must have been'.⁵ Accordingly, this article begins with an outline of some history.

II. THE HISTORICAL CONTEXT

A. A Brief Early History of the Churches of Christ

The Churches of Christ in Australia are a product of the British Churches of Christ and the American Disciples. Both movements owe a common indebtedness to the visionary Thomas Campbell (1763–1854) and his son Alexander Campbell (1788–1866), whose theology was dominated by a vision of a reunited Church and the cause of Christian unity. Thomas Campbell's *Declaration and Address* became the charter of a new movement of non-denominational Christian churches that stressed reliance on scripture and few essentials.⁶ Their approach was based on the entire abandonment of everything in religion for which there could not be produced a divine warrant. Encapsulating this approach, Thomas Campbell said: 'Where the Scriptures speak, we speak; and where the Scriptures are silent, we are silent.'⁷

Churches of Christ in Britain came into being in 1842 at a meeting of over fifty separate congregations.⁸ The enduring governance of these congregations sat with their own self-taught, unpaid Elderships.

The Churches of Christ movement was established in Victoria in 1854, with ten members.⁹ It gained a toehold in the midst of the population boom and social foment of gold rush Melbourne, driven by a staunch commitment to turn people from wayward lives bent on earthly riches.¹⁰ Members aimed to live moral lives in accordance with the Scriptures, offering an example to those around them and doing good works in local communities. They disdained central authority, just as they objected to the consumption of alcohol or organ music in church.¹¹ Churches jealously guarded their local autonomy, disallowing any control beyond the local congregation.¹²

⁴ *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 667 (Young CJ in Eq). See also *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Dobrijevic* (2017) 94 NSWLR 340, 387 (Payne JA).

⁵ *Radmanovich v Nedeljkovic* (n 4) 670 (Young CJ in Eq).

⁶ Lester McAllister and William E Tucker, *Journey in Faith* (Bethany Press, 1975).

⁷ Graeme Chapman, *One Lord, One Faith, One Baptism: A History of Churches of Christ in Australia* (Vital Publications, 1979) 22.

⁸ David M Thompson, *Let Sects and Parties Fail: A Short History of the Association of Churches of Christ in Great Britain and Ireland* (Berean Press, 1980) 17–20. See also Chapman (n 7) ch 3; Gordon Stirling, *Churches of Christ: Reinterpreting Ourselves for the New Century* (Vital Publications, 1999) 9. Some of the congregations that came into association had previously existed, for decades, as Scotch Baptist or independent churches.

⁹ Bailey (n 3) 93–5.

¹⁰ Chapman (n 7) chs 4, 6.

¹¹ The Surrey Hills Church of Christ congregation finally relented to pressure from some members to purchase its first organ in about 1920. The purchased item was sardonically described in a Jubilee Souvenir Programme published in 1940 as 'the accursed thing' — although seen as 'a mark of fidelity with some for many years'. The social issues that disturbed Churches of Christ at the start of the twentieth century included 'smoking, prize fighting, the football mania, card playing, gambling, the theatre, dancing, sexual impurity and divorce': Chapman (n 7) 103.

¹² Chapman (n 7) 16.

The initial incarnation of Victoria's Churches of Christ movement in the mid-nineteenth century was as a 'lay religious organisation without centralised authority' having 'deep roots in Nonconformist anti-clericalism' as practised in Great Britain at that time. Members of the British Churches of Christ who came to Victoria in the 1850s as individuals seeking business and personal opportunities brought with them 'the primitivist lay practice and congregational polity of their home churches.'¹³

The movement experienced strong growth in its early decades. Although Australian Churches of Christ were set up by migrants from British Churches of Christ, they were nurtured by evangelists from the United States.¹⁴ Membership grew nearly twentyfold in the forty years to Federation to the point that, in the 1901 Australian census, Churches of Christ had more adherents than the Salvation Army, Brethren, and Seventh-day Adventists.¹⁵ Between 1907 and 1930 the number of members in Victoria jumped from 7,441 to 13,122.¹⁶ The movement was severely challenged by the Depression of the 1930s, but by 1941 the membership had stabilised at more than 12,000 dispersed across 115 congregations, with property holdings to match.¹⁷

Early fundraising for the acquisition of land and construction of church buildings occurred via the exertions and generosity of individual congregation members. There was no central resource upon which to draw. When new congregations were 'seeded' in (then) outer suburbs of Melbourne such as Surrey Hills in 1889 and Hartwell around 1920, this occurred via the patronage of older, already-established congregations.¹⁸

B. 'Unity in Diversity' and the Principle of Congregational Autonomy

While not always being of the same mind in matters of theology and practice, the network of congregations that comprised the early Churches of Christ movement in Victoria believed that unity based on some 'simple' foundational principles was more important than homogeneity of thought and practice. Affirmation of these foundational principles enabled congregations to hang together as a movement despite their awareness they would not always hold the same opinions on matters of scripture or theology, and not always follow the same practices in matters of church life, worship, and governance. Churches of Christ championed the principle of 'unity in diversity' and came to regard their differences as enriching and their ability to hang together as a strength.

In practice, this unity in diversity was manifested on the basis of another foundational value, the autonomy of the local congregation. Echoing the cry 'in essentials, unity; in non-essentials, liberty; in all things charity (grace)', the founding leaders forged a movement anchored in values of personal faith (status of faith is between the individual and God and not subject to determination by or judgement of other individuals or church councils), individual interpretation of scripture (each person, with due regard to the traditions of the Church and the wisdom of fellow believers, has the right to discern their own understanding of scripture in its

¹³ Kerrie Handasyde, 'Pioneering Leadership: Historical Myth-Making, Absence, and Identity in the Churches of Christ in Victoria' [2017] (June) 41(2) *Journal of Religious History* 235, 236.

¹⁴ Stirling (n 8) 4.

¹⁵ Handasyde (n 13) 237.

¹⁶ Chapman (n 7) 111,141.

¹⁷ Bailey (n 3) 93.

¹⁸ Patronage for the formation of the Surrey Hills church came from the Carlton and Hawthorn congregations.

application to their life), communal discernment of the mind of God (the mind or will of God is best discerned in a community of the faithful where diverse opinions and understandings are welcomed, respected, and heard in seeking a common mind), and congregational autonomy (communities of faith have the right to order their own life and determine their own local practices).¹⁹

Thus, congregational autonomy is a long-held and deeply anchored tenet of the Churches of Christ. This was not ‘independence’ of the local congregation in a literal sense — it was recognised that the autonomous congregations were, in fact, interdependent. They may not have thought alike or acted or looked alike — diversity was championed — but they held together on the basis of the aforementioned ‘essentials’. The principle of unity in diversity was asserted as a core value of the movement.

Congregations were resourced to shape their own lives and practices by an interplay of rigorous scholarship, attention to tradition, dialogue within the community of churches, and individual discernment. This rarely resulted in homogeneity of thought and practice, but it set foundations for diversity, as congregations were afforded the right to order their own lives.

The founders of the Churches of Christ believed a congregational polity to be consistent with New Testament practice and viewed denominational bodies as an ungodly innovation. In lingering accord with this sentiment, a majority of congregations of the Churches of Christ in Victoria in the first half of the twentieth century were fiercely opposed to ‘denominationalism’.²⁰

Over the years, the autonomous congregations came to recognise that there were some functions and responsibilities that could best be exercised in cooperation with others, so ‘conferences’ were formed to undertake, on behalf of and with accountability to the congregations, joint ventures such as ministry education, local and overseas mission, group insurance, and regulatory compliance. The conferences so formed were always appointed by and accountable to the congregations, and their *raison d’être* was understood as being to resource the mission of the local church. These were not easy steps for the movement to take — the 1842 meeting which created the Churches of Christ in Britain had debated whether cooperation between congregations was ever justified, but decided that solely for the purposes of evangelism, it was justifiable for a committee to be formed. The conferences were required to report to the congregations at least annually.

Churches of Christ have never had a written ‘creed’. However, ‘those things most surely believed among us’ included: ‘biblical baptism’ via the immersion in water of penitent believers; the observance of the Lord’s Supper weekly; and ‘the church’s ministry as a mutual ministry of all believers’.²¹ Throughout their history, Churches of Christ have pleaded for the unity of all Christians by restoring ‘New Testament Christianity’. Their ‘threefold reason for existence’ was the belief that world evangelism was being seriously hindered by the divided state of the church, the belief that this division was contrary to the will of God so that

¹⁹ The description of the ‘Unity in Diversity’ principles outlined in this section has drawn upon (with permission) an unpublished essay, written in 2020 by David Brooker, a former State Minister of Churches of Christ in South Australia and the Northern Territory and current Senior Minister of The Avenue Church of Christ, Surrey Hills.

²⁰ Chapman (n 7) ch 9.

²¹ Stirling (n 8) 8.

denominationalism must be ended, and belief in the need to set aside traditions and divisive creeds and get back to ‘primitive Christianity’ as found in the New Testament.²²

One of the clearest expositions of the central principles underpinning mid twentieth-century Churches of Christ thought was an interpretation stated in 1980 by E Lyall Williams, an eminent former Principal of The College of the Bible and State President of Churches of Christ in Victoria and Tasmania:

Churches of Christ hold regular conferences and appoint conference committees to care for co-operative enterprises. In keeping with the congregational principles these committees may act in an advisory capacity only, and make recommendations to a local congregation without exercising any legislative power. ... The great principle of congregationalism appears to be self-determination in local enterprise. However, congregationalism should not be confused with absolute independency, much less with irresponsible individualism. ... The whole community never overrides the local community and the latter never ignores the former, the congregation being conditioned by the consideration of the good of the whole community and the latter being conditioned by the rights of the congregation.²³

The Australian Churches of Christ movement has maintained overt adherence to the principle of congregational autonomy throughout the majority of its history. Debates within Churches of Christ about whether it is a ‘movement’ or a ‘denomination’ have waxed and waned but the available evidence suggests that at the key points of significance to this article, such as around 1917 and 1941, the anti-denomination view was strong in Victoria.

The sentiment gained expression in the trust deeds of particular congregations, such as that of the Surrey Hills church, which provides in its cl 15:

In all matters relating to the internal government of the said church the same shall be conducted on congregational principles namely the members for the time being shall have full and uncontrolled power to manage and arrange all their internal or church affairs whether regarding the suspension or exclusion of members, the election suspension or dismissal of Elders Deacons, or otherwise howsoever (except only in cases by these presents otherwise specially provided after) according to their own interpretation of the Holy Scriptures.²⁴

III. *RADMANOVICH V NEDELJKOVIC* AND THE SPECTRUM OF CHRISTIAN CHURCHES: HIERARCHICAL, PRESBYTERIAN, CONGREGATIONAL

In the 1871 United States Supreme Court case *Watson v Jones*,²⁵ Miller J saw that church trusts might be of three types: (1) where the founder expressly laid down the rules of a new church; (2) where the donor gave funds to an existing independent congregation owing fealty to no higher authority; or (3) where the gift was to an ecclesiastical body which was sub-ordinate to some general church organisation.

²² Stirling (n 8) 3.

²³ E L Williams, *Churches of Christ: An Interpretation* (Vital Publications, 1980) 47.

²⁴ Surrey Hills Trust Deed (1917). This deed, which remains on foot, was declared over the properties of the Surrey Hills church on 17 June 1917 and registered on Victoria’s Register of Successory Trusts on 25 April 1918.

²⁵ *Watson v Jones* 80 US 679 (1871).

The Supreme Court of New South Wales case *Radmanovich v Nedeljkovic* concerned a dispute between two factions of members of the Serbian Orthodox Church over control of property for church and school buildings at Elanora Heights in Sydney. One faction (the defendants) was aligned to the church hierarchy and sought declarations the property was held on trust ‘for the religious and charitable purposes of the Serbian Orthodox Diocese of Australia and New Zealand being part of the Serbian Orthodox Church having its See in Belgrade, Yugoslavia.’ The other faction (the plaintiffs) sought declarations they were entitled to hold that property on trust for the First Serbian Orthodox Church School Community St Sava Warriewood-Mona Vale ‘without being bound by directions made under the power and authority of the Bishop of the Diocese of Australia and New Zealand of the Serbian Orthodox Church’.²⁶ Chief Justice Young observed that the judgment of Miller J in *Watson v Jones* led to a classification of churches into three broad categories: hierarchical, presbyterian, and congregational, with the classification representing a sliding scale of autonomy.²⁷

The basic question for determination in *Radmanovich v Nedeljkovic* was whether the trusts affecting the relevant land were for the purposes of the Serbian Orthodox Church as a whole, or solely for the purposes of the local Church community, or otherwise. His Honour held that the trust was for the purposes of the Serbian Orthodox Church, rather than the Church community of Warriewood-Mona Vale, based on his interpretation of the particular Church constitution and trust arrangements that applied.

Earlier, in 1989, in *Attorney-General (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association*, referring to *Watson v Jones*, Young J (as he then was) said:

By hierarchical, Miller J meant a church which has superior clergy and in which the government of the church is committed to those superior clergy. Ordinarily a church which has bishops will fall into this class and this will be so notwithstanding that some governmental powers are given to clergy of inferior rank or to laity. ... With a congregational model, the local congregation is the body which makes or unmakes the rules. ... With [a hierarchical] church American courts would apply their ‘neutral principles’ one of which is that a strong presumption operates in favour of the property being the property of the national church not of a local parish. The fact that the physical property of the local church was purchased by the local congregation without any financial assistance from the parent body has no effect on this rule.²⁸

Thus, Young CJ observed, there is a very large difference between a trust for a congregational church and a trust for an hierarchical church.²⁹ Within congregational movements, local congregations have the power to govern themselves; by contrast, in a hierarchical church the government of the church is vested in superior clergy and ‘a court may presume a local church has relinquished all power to a hierarchical body which may, in some instances, frustrate the

²⁶ *Radmanovich v Nedeljkovic* (n 4) 646.

²⁷ *Radmanovich v Nedeljkovic* (n 4) 669–70 (Young CJ in Eq). See also *A-G (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 37 NSWLR 293, 314–15 (Young J); *His Grace Metropolitan Petar v Kostovski* (Supreme Court of Victoria, Byrne J, 27 October 1997) 20.

²⁸ (1989) 37 NSWLR 293, 315. His Honour noted that the principles expounded in *Watson* had been reinforced in 1923 by *Hanna v Malick* 193 NW 798, 803 (Steere J) (Mich Sup Ct, 1923).

²⁹ *Radmanovich v Nedeljkovic* (n 4) 670.

actual intent or goals of the local church and deprive the local church of legal remedies that otherwise would or should be available to it.’³⁰

Presbyterian churches are some way in between: local congregations enjoy some autonomy, but are subject to some level of control by the presbytery. The decision by members of the Congregational Church to integrate with Methodists and Presbyterians to form the Uniting Church of Australia in 1977 required the embrace of a more collective or Presbyterian polity. In *Wylde v Attorney-General (NSW) ex rel Ashford*, Dixon J (as he then was) said:

Ultimately of course the question whether strict adherence to the formularies and ceremonies of the Church is involved in the performance of the trusts of property must depend upon the trusts themselves. These are to be ascertained from the trust instruments and from an examination of the history, doctrines and organization of the community or body whose religious purposes they serve.³¹

It can be difficult to ascertain the purposes of a trust for a congregational church, as they often commenced informally. In cases where it is problematic to ascertain the purposes it is usually necessary to resort to what has been the custom of the church over a period of years in order to see what the original consensual compact must have been.³² Young CJ saw that it was necessary to ‘determine the fundamental principles of the trust’: ‘What must be discovered is the intention of the founders ... If there is evidence as to the founder’s intention, that prevails. If there is insufficient evidence, then the court can act on evidence of long practice in the relevant religious body and from that deduce what the founders’ intention was.’³³ An example was given of this principle in operation:

[I]f one finds that the founders’ intention was to have a church which was completely free from any control by the Pope, yet otherwise accepted the doctrine and tenets of the Church of Rome, there might well be a valid charitable trust to that end but even if there had been evidence of 30 to 50 years recent practice whereby the hierarchy in Rome in fact appointed priests and otherwise controlled the Church that would not be enough to displace the original trust.³⁴

Thus, whilst recent practice and usage in a church movement may have some relevance in determining disputes, as Romilly MR said in *Attorney-General v Gould*, ‘usage is only important [in a legal point of view] where there is an absence of any instrument of endowment, or where the words of the instrument produced are ambiguous[;] in such cases[,] usage constitutes presumptive evidence of the trusts on which the charity was established; but when the deed of foundation is produced, and is precise, that presumption is excluded.’³⁵

The typology of churches outlined by Young CJ in *Radmanovich v Nedeljkovic* has important implications for the ownership and control of church properties. In a hierarchical church there is a strong presumption that property is held on trust for the purposes of the broader church and

³⁰ *Aglikin v Kovacheff* 516 NE (2d) 704, 708 (McMorrow J) (Ill Ct App, 1987).

³¹ (1948) 78 CLR 224, 289–90.

³² *Radmanovich v Nedeljkovic* (n 4) 670 [171] citing *A-G v Pearson* (1817) 3 Mer 353; 36 ER 135 and *A-G v Murdoch* (1852) 1 De G M & G 86; 42 ER 484.

³³ *Ibid* 642, 667.

³⁴ *Ibid* 667 [152]. These principles were said to be deduced from cases such as *Craigdallie v Aikman* (1813) 1 Dow 1; 3 ER 601 and *Foley v Wontner* (1820) 2 Jac & W 245; 37 ER 621.

³⁵ *Attorney-General v Gould* (1860) 28 Beav 248; 54 ER 452 [485].

not for those of a local ‘parish’ or congregational unit. Implicitly, the opposite presumption obtains for a congregational church.³⁶

IV. THE LEGISLATIVE SCHEME OF THE *1941 PROPERTY ACT*

A. The Rationale for Legislation Establishing a Churches of Christ Properties Corporation

Over the first ninety years of their existence in Victoria the Churches of Christ came to hold properties on a variety of trusts. In the Second Reading speech for The Churches of Christ in Victoria Property Bill in 1941, Attorney-General Bailey said that the Churches of Christ at that time consisted of ‘54 church properties in the metropolitan area, and 61 church properties in country districts, valued in the aggregate at more than £200,000’ and that ‘some of these properties are held by the committee which is proposed to be incorporated, and others by various other trusts’.³⁷

By 1941 the properties of a sizeable bloc of 53 congregations were vested in the trusteeship of a Church Extension Properties Trusts and Bequests Committee, which had been formed to act as the trustee for ‘Church property on behalf of such of the Churches of Christ in Victoria as might desire such Committee to act in such capacity’. The Committee oversaw a ‘Churches of Christ in Victoria Church Properties’ trust deed put in place in 1914 and registered as a Successory Trust in 1915.³⁸ Essentially, this provided a mechanism for new churches to be seeded from donations and bequests of the faithful.

Additionally, as of 1941, there were 62 churches (30 in metropolitan locations and 32 in country towns) whose properties were held under a range of trust deeds which tended to install esteemed Elders from within their own congregations to act as trustees.³⁹

With so many disparate trusts in existence, problems with succession of title began to arise. The Elderships of most congregations were ageing and many early Elders had passed away. In addition, it was difficult to borrow money on church securities unless the trustees personally became liable for loans, and many church members were unwilling to expose their personal assets to liability for mortgage debt. The administration of trusts required sophisticated skill sets on the part of trustees. The principal purpose of the *1941 Property Act* was to avoid inconveniences arising from the succession of trustees and to facilitate dealings with church properties (especially given the need for trustees to become personally liable for loans secured against church properties).⁴⁰

The experience of the Baptists and Salvation Army had shown that an Act of Parliament could overcome the ongoing need to register the deaths and resignations of trustees and appointments of new trustees in the office of the Registrar-General. It was observed in Attorney-General Bailey’s Second Reading speech that there were well-established precedents for seeking

³⁶ *A-G (NSW) ex rel Elisha v Holy Apostolic and Catholic Church of the East (Assyrian) Australia NSW Parish Association* (1989) 37 NSWLR 293, 315 (Young J).

³⁷ Bailey (n 3) 93–4.

³⁸ See *Churches of Christ Property Act 1941* (Vic) Preamble (‘*1941 Property Act*’).

³⁹ These calculations were arrived at by comparing the overall number of churches referenced in the Second Reading speech of Attorney-General Henry Bailey (n 3) with the listing of congregations and properties set out in the Second Schedule of the *1941 Property Act*.

⁴⁰ Bailey (n 3) 94.

parliamentary action to procure the establishment of a corporation to deal with the properties of a religious movement.⁴¹

B. The *Baptist Union Incorporation Act 1930* and *1941 Property Act* Compared

There are similarities, but also two notable differences, between the structure and wording of the *1941 Properties Act*, as eventually enacted, and the *Baptist Union Incorporation Act 1930* (Vic).

The first difference is that, unlike the Churches of Christ, the Baptists moved early to prescribe doctrines and tenets and to depict themselves as a denomination. The Preamble to the 1930 Act commenced with the characterisation of the Baptist Union constituents as:

[C]ertain persons being members of the religious denomination called Baptists in the State of Victoria and holding as their general tenets the doctrines set forth in the declaration of Baptist Union Trusts 1892 which is deposited with the Registrar-General of Victoria at Melbourne and ... [who] have formed an Association called 'The Baptist Union of Victoria'.

By contrast, the distinctive contributions of the Churches of Christ movement were seen (from a 1938 example) to be 'their stress on the sinfulness of division, their opposition to creedal inflexibility, the priority they give to personal loyalty to Jesus Christ over assent to doctrine, and their belief in the need for an historical study of the Bible.'⁴² The Churches of Christ were known in their early years for speaking out against Pentecostal revivalism, 'being unhappy with the Calvinistic doctrine of the spirit's irresistible influence' believing instead, 'that a resurgence of religion would result from the faithful propagation of the original gospel, rather than through the intense prayer of men who were unwilling to publish the whole evangel.'⁴³

A second difference is that the entity which was incorporated by the *Baptist Union Incorporation 1930 Act* in order to deliver succession of titles for the Baptists was their umbrella Association itself, the Baptist Union of Victoria ('BUV'). This entity performs a myriad of other functions beside property management, including administration of religious matters; unlike the Churches of Christ Properties Corporation, which is charged with specific responsibilities for property protection and property dealings.

The BUV, which has been assiduous in its efforts to centralise control of the properties of its movement, has highlighted its success in transitioning virtually all its properties to what it terms 'Schedule B' trusts. According to the BUV website in 2021: 'Currently only three of the BUV churches own property directly or have it held by trustees other than the BUV.'⁴⁴

⁴¹ Bailey (n 3) 95.

⁴² C Irving Benson, Minister of the Wesley Church, writing of the Churches of Christ movement in the *Melbourne Herald* in September 1938, quoted by Chapman (n 7) 153.

⁴³ Chapman (n 7) 152.

⁴⁴ The modern-day expression of the approach of the Baptist Union on their website has reflected concerns about the kinds of decisions that may be made by individual congregations: 'Schedule B restrictions on property are designed to ensure that the fruit of the labours of past generations is protected from misuse by the current generation in order to ensure provision of property for future generations.' Baptist Union Victoria, 'Incorporation and Property Ownership' (Web Page, June 2021) See <www.buv.com.au/resources/incorporation-properties/>.

C. The Mechanisms of the *1941 Property Act*

The *1941 Property Act* came into effect on 30 September 1941. The preamble recited some of the relevant history of property holding in the Victorian Churches of Christ, including that an umbrella association named ‘The Churches of Christ in Victoria’ was formed in 1913, and that a pre-existing committee named the ‘Church Extension Committee’ (subsequently re-named in 1925 the ‘Church Extension Properties Trusts and Bequests Committee’) was the holder of real and other properties for some churches.⁴⁵

The immediate effect of the *1941 Property Act* was to convert the Church Extension Properties Trusts and Bequests Committee to a corporate body with perpetual succession, re-named as the Properties Corporation of the Churches of Christ. This was distinct from the Association of the Churches of Christ in Victoria. Section 3(1) of the Act, under the heading ‘Incorporation’, provided:

There shall be a body corporate by the name of ‘The Properties Corporation of the Churches of Christ’ consisting of the Trustees appointed by or under this act; and the body corporate shall have perpetual succession and a common seal and under that name may sue and be sued, prosecute and defend, and take and suffer all other proceedings in all courts civil or criminal and it shall be lawful for the body corporate to take, purchase, receive, hold, and enjoy real and personal property of any description whatsoever and also to sell, grant, exchange, convey, demise, reserve, or grant easements over or otherwise dispose of or deal with either absolutely or by way of mortgage, charge, lien or other encumbrance any of the property real or personal which may at any time belong to the body corporate and generally to exercise subject to the provisions of this Act all powers incidental to a body corporate.

The new Corporation was empowered to perform the trusts previously performed by the Church Extension Property Trusts and Bequests Committee. It was provided that all real property formerly held upon the 1914 Church Extension Committee trusts would in the future be ‘held by the body corporate upon the trusts set forth in the First Schedule’.⁴⁶

There were three Schedules to the Act. In addition to the First Schedule, which detailed the terms of trust, there was a Second Schedule which contained ‘a list of all the real property now held by the present trustees of the said Successory Trust upon the trusts set forth in the said Deed of Trust’.⁴⁷ The 53 congregations whose properties were held under the Church Extension Deed of Trust were listed (24 in metropolitan and 29 in country areas), with 67 individual property deeds itemised.⁴⁸

Section 4 of the *1941 Property Act* headed ‘Vesting of Property’ provided that:

Immediately after the passing of this Act all real property set forth in the Second Schedule to this Act shall vest in the body corporate for an estate in fee simple without the necessity for any conveyance transfer or other assurance of such property and all such real property shall subject to the provisions of this Act be

⁴⁵ *1941 Property Act* (n 38) Preamble.

⁴⁶ See *ibid.*

⁴⁷ See *ibid.*

⁴⁸ Bailey (n 3) 93–4.

held upon the trusts set out in the First Schedule to this Act and the Register of Successory Trusts shall thereupon as to such real property be closed and the Registrar of Titles shall upon production to him of any documents of title indorsed under section sixteen of the *Religious Successory and Charitable Trusts Act 1928* [(Vic)] cancel such indorsement.

The actual wording of the First Schedule trusts, for the most part, closely mirrored the provisions of the predecessor 1914 Church Extension Trust Deed.⁴⁹ However there were two significant deletions. These are discussed in Part V below.

Section 8 of the First Schedule trusts was headed ‘Churches Enabled to Appoint Corporation Despite Terms of Trust Deed’. This addressed the possibility of additional existing congregations deciding at a later date to bring their properties under the trusteeship of the Properties Corporation on the terms of the newly established First Schedule trusts, rather than their own pre-existing terms of trust. For this significant step to occur explicit actions needed to be taken by the congregations requesting such a trusteeship. A resolution was required to be passed at a Special Meeting by a two-thirds majority of the members of the congregation after following prescribed notice procedures and utilising a particular form of words detailed in the Third Schedule to the Act. The resolution needed to specify the details of any real property being brought under new trusteeship and state that the body corporate incorporated by the 1941 Act should be the trustee and that ‘such real [*or personal or real and personal (as the case may be)*] property should forthwith be vested in such body corporate to be held by it upon the trusts set forth in the First Schedule to the said Act.’⁵⁰

Section 7 of the *1941 Property Act*, headed ‘Churches enabled to appoint corporation to act as trustee under existing trusts’, offered a more straightforward procedure if a congregation decided to appoint the Properties Corporation as trustee under the congregation’s pre-existing trust terms. It provided that:

It shall be lawful for the trustee (if only one) or the trustees (if more than one) of any Church of Christ in Victoria or the members of any such Church in all cases with the consent of the body corporate to appoint the body corporate to act as trustee of any real or personal property held by such trustee or trustees or held on behalf of such members and upon acceptance by the body corporate of any such appointment the real or personal property shall be transferred, conveyed, assigned or otherwise assured to the body corporate and such real or personal property shall thenceforth be held upon the same trusts as those upon which such property was previously held but so far as such trusts *do not extend to or are not inconsistent with* the trusts set forth in the First Schedule to this Act such property shall be held by the body corporate upon such last-mentioned trusts.⁵¹

The italicised words ‘do not extend to or are not inconsistent with’ indicate that, to the extent that the terms of a pre-existing trust deed that remains on foot are inconsistent with the First Schedule trusts, the terms of the trust deed prevail over the First Schedule.

⁴⁹ Clauses 1 to 10 of the 1914 Trust Deed and the First Schedule of the *1941 Property Act* broadly map to one another. Clauses 12, 13, 14, 15, 16, 18, 19, and 20 of the 1914 Deed were largely functional and were therefore not repeated in the *1941 Property Act*. Clause 8 of the 1914 Trust Deed became s 10 of the *1941 Property Act*.

⁵⁰ See *1941 Property Act* (n 38) ss 8 (1)–(6), Third Schedule.

⁵¹ *Ibid* s 7 (emphasis added).

Section 9 allowed the Properties Corporation to act as trustee for the property of ‘any committee, organization or department of Churches of Christ in Victoria or ... the Federal Conference of Churches of Christ in Australia’.

Other provisions of the *1941 Property Act* were more mechanical. For example, s 3(2) provided that the maximum number of individual trustees comprising the Properties Corporation should be seven, and s 3(9) specified that the power of appointment of trustees of Properties Corporation should reside with the annual general meeting of the ‘Conference’ (i.e., the Association). Sections 18 and 19 conferred powers to borrow, mortgage, charge, sell, and convey trust properties. Section 10 provided a mechanism for the Properties Corporation, with the consent of the Conference, to transfer, convey, or assign property to defined persons, subject to relevant trusts.

D. Ascertaining the Applicable Trusts for a Given Property: Seven Pathways

The regime of the *1941 Property Act* established, or permitted, at least seven distinct ways in which properties could be subject to trusts of various forms. Under four of these pathways, properties could fall under the First Schedule trusts of the Act.

First, by virtue of s 4, there were the properties of the cluster of churches named in the Second Schedule to the *1941 Property Act*, which had formerly been subject to the trust administered by the Church Extension Properties Trusts and Bequests Committee. The transition of their trusts to the terms set out in the First Schedule was immediate, although it was incumbent on the new trustee (under s 4 of the *1941 Property Act*) to liaise with the Registrar of Titles to attend to closure of indorsements on documents of title under s 16 of the *Religious Successory and Charitable Trusts Act 1928*. As noted earlier, out of the total of 115 congregations active in 1941, 53 congregations had properties itemised in the Second Schedule of the Act (24 metropolitan and 29 rural), representing a little less than half the Churches of Christ operating in Victoria at the time.

Second, a mechanism was created in s 8 of the Act to allow, by passing special resolutions adhering to the form of words prescribed by the Third Schedule, for congregations which had been in existence prior to 1941 to ‘opt in’ to making their properties subject to the First Schedule trusts. For the trust arrangements of these 62 congregations to alter, and for their properties to become subject to the First Schedule trusts, it was necessary for the steps delineated in s 8 of the Act, including adoption of the special resolution wording specified in Schedule Three to the Act, to be followed. Although numerous congregations elected to appoint the Properties Corporation to be their trustee in the years following 1941, it is unclear how many of them took the step of abandoning their pre-existing trust deeds. Congregations within the Churches of Christ had an historical predisposition towards maintaining control of their own affairs. A likely factor in the initially slow take-up of the opportunity to appoint Properties Corporation as trustee was that suspicion of central authority persisted within the movement.

Third, properties acquired for committees, organisations, or departments of the Churches of Christ were placed under the First Schedule trusts by means of s 9 of the Act.

Fourth, congregations becoming new Affiliates of the Churches of Christ have, since 1941, been able to elect to place their properties under the First Schedule trusts.

At least three additional pathways exist by which the properties of affiliated churches can be subject to trusts, or alternative ownership arrangements, other than the First Schedule trusts.

Category five consists of congregations which have become new affiliates of the Churches of Christ in recent decades but which have been permitted to participate in the Conference of Churches of Christ without being required to subject their properties to the First Schedule trusts. In recent times, CCVT Inc has articulated policies that ‘new Affiliates holding property under their own legal structure may continue to hold property titles and not transfer the titles to Prop Corp’ and that ‘new Affiliates that transfer property titles to Prop Corp can elect to take the property back should disaffiliation occur within five years’.⁵²

Sixth, there are congregations whose properties were subject to pre-1941 trust deeds that never moved to appoint Properties Corporation as their trustee and have continuously preferred to maintain other trustee arrangements.⁵³

A seventh category is the group of congregations that, in the decades after 1941, chose to appoint the Properties Corporation to be their trustee under the s 7 mechanism of the *1941 Property Act* which provides for properties thereafter to be held ‘upon the same trusts as those upon which such property was previously held’.⁵⁴

Although there is an absence of definitive information, it can be reasonably surmised that the majority of properties of Churches of Christ congregations in Victoria now fall into one of the first, second, or seventh categories above. The applicable terms of trust will be a matter for detailed analysis in each particular case.

V. FIRST SCHEDULE TRUSTS: FOR CONGREGATIONS OR THE MOVEMENT?

For those congregations whose properties have become subject to the First Schedule trusts of the *1941 Property Act* (via the first or second pathways referred to in Part IV(D) of this article), a question arises whether the First Schedule establishes a trust for the purposes of the congregation of the Churches of Christ only, or for the purposes of the Churches of Christ in Victoria.

CCVT Inc and the trustees of the Properties Corporation have asserted in recent years that properties held by Properties Corporation in trust are held for the purposes of ‘the movement’. A ‘Guide to Churches of Christ Trusteeship’ published on the CCVT website in early 2023 illustrated the differences of viewpoint that can arise between central organising bodies and congregations. This document contended that ‘historical issues’ such as ‘inherent difficulties of churches holding titles and raising finance to secure and develop property’ are ‘still inherent in the nature of church trusteeship today’. The Guide outlined a particular interpretation of the *1941 Property Act*. It stated ‘Prop Corp is the incorporated trustee under the Act on the basis that church titles are held for the Churches of Christ in Victoria under the terms of trust

⁵² CCVT Inc Circular to Affiliates dated 16 August 2021 communicating ‘an Affiliation policy which was recently approved by the CCVT board’, at p 8. See June 2021 CCVT Affiliation Policy. See <<https://churchesofchrist.org.au/wp-content/uploads/2022/11/CCVT-Affiliation-Policy-approved-June-2021.pdf>> (Accessed 4 August 2023).

⁵³ At least one of the Churches of Christ established in the Victorian goldfields region in the 1850s has taken this approach.

⁵⁴ Available evidence suggests there are strong arguments that three of the churches consulted in the development of this article, though they appointed Properties Corporation to be their trustees in 1944, 1947, and 1952 respectively, could be considered examples of the use of this mechanism.

contained in the Act, which is different to holding assets as a fixed beneficial trust directly for respective churches.⁵⁵

However, as noted earlier in Part III, in the absence of a trust instrument, a presumption arises in the case of a congregational church that property is to be held on trust for the purposes of a particular congregation, not the broader church but, where there is a trust instrument, the question must ultimately be resolved by reference to the terms of that instrument. Of course, construing the terms of the First Schedule involves the construction of a legislative instrument. The characterisation of the Churches of Christ as congregational is reflected in the remarks of Attorney-General Bailey in the Second Reading speech for the Bill that became the *1941 Property Act*. Consistently with the purposes of the *1941 Property Act*,⁵⁶ the Attorney-General said:

The Bill does not attempt to incorporate the religious body as has been done with other denominations All churches and all members of the churches are free to continue their mode of worship and to conduct their own church affairs in the same manner as previously; the Bill does not in any way interfere with or restrict the rights of any church or the members of any church.⁵⁷

Against that background, cl 2 of the First Schedule of the *1941 Property Act* provides that the Properties Corporation holds property on trusts:

To permit and suffer any such church, chapel, or place of religious worship or religious teaching or other buildings erections and improvements with the appurtenances to be used, occupied, and enjoyed as and for a place of religious worship or religious teaching *by a congregation* of the religious body known as the Churches of Christ in Victoria and for public meetings and services held according to the general rules and usages for the time being of the Churches of Christ in Victoria and for Sunday or other school purposes and for such other purposes as may from time to time be determined by the body corporate. *The congregation of any church may be allowed to manage its own internal affairs.*⁵⁸

The italicised parts of cl 2 suggest that each congregation is intended to enjoy a significant degree of autonomy in the management of its own affairs, consistent with a trust for the objects of a specific congregation. However, cl 5 of the First Schedule empowers the Properties Corporation to deal with land ‘in such manner as the body corporate shall think fit’. Clause 5 also provides that ‘[t]he body corporate shall apply the money to arise from any such sale, disposition, or exchange as aforesaid ... for such purposes of the Churches of Christ in Victoria as the body corporate may decide’. The power does not appear to be limited, in terms, to the purposes of the congregation in question.

The wide powers for the disposition of property conferred by the First Schedule, and cl 5, should be construed in the light of the purposes of the Act as disclosed in the Second Reading Speech.⁵⁹ So construed, cl 5 gives wide powers to the Properties Corporation as legal owner

⁵⁵ See CCVT Inc, ‘Trusteeship’ <<https://churchesofchrist.org.au/for-churches/property-and-finances/property-management/trusteeship/>> (Accessed 4 August 2023).

⁵⁶ See Part IV(A) of this article.

⁵⁷ Bailey (n 3) 94.

⁵⁸ Emphasis added.

⁵⁹ *Interpretation of Legislation Act 1984* (Vic) s 35(a). See Part IV(A) of this article.

of the properties to deal with them. That is consistent with the Act's purpose of facilitating the management of property. However, those powers should not be construed as enlarging the charitable and religious purposes of the trust on which the properties are held, consistently with the Act's purposes of allowing each congregation to conduct its own affairs in the same manner as previously, and not to interfere with the existing rights of any congregation or its members. This interpretation is consistent with the principle of legality: that the legislature is not to be taken to infringe rights without clear words.

As foreshadowed earlier, when in 1941 the Churches of Christ's 1914 Church Extension Trust Deed was replaced by the First Schedule trusts,⁶⁰ there were two significant clause deletions. The first of these was cl 17 of the 1914 Trust Deed, which had said:

Any conference of the Churches of Christ in Victoria shall with respect to any properties for the time being subject to the trusts hereof have power by special resolution to make, alter, add to, or rescind and vary all or any resolutions or regulations as to:-

- a. The doctrine to be taught in the said chapels or places or public ... [words lost].
- b. ... [words lost].
- c. All matters appertaining to the selection, remuneration and removal of Evangelists, preachers or ministers.
- d. Meetings of congregations and proceedings and powers thereof and the management of the internal affairs of churches.

The omitted cl 21 of the 1914 Trust Deed had said:

The trustees may with respect to any church properties for the time being subject to this trust (but without obligation so to do) take cognisance of any breach or non-observance of the doctrines or regulations or resolutions of a conference of the Churches of Christ in Victoria and the said Conference may remove from any office in connection with the said religious body any person or persons responsible for or participating in or conniving at any such breach or non-observance.

The non-inclusion of these former trust terms, cls 17 and 21, would have reflected dialogue as to key principles amongst church leaders during 1941. Their absence from the First Schedule (likely a conscious decision of the leaders at the time to not have these terms incorporated in the new First Schedule trusts) suggests that, in 1941, it was considered inappropriate by the majority of the movement for doctrinal and related conditions to be placed around properties the Bequests Committee was making available for congregational use. These clause deletions, which reflect the principle of congregational autonomy, are relevant in construing the First Schedule trusts.⁶¹

For the reasons set out above, the better view is that the First Schedule establishes a trust for the purposes of the local congregation in question, not the Churches of Christ broadly speaking (if it can be said that the Churches of Christ *have* a set of consistent purposes).

⁶⁰ See above (n 38) and accompanying text; above (n 46) and accompanying text. The scanned copy of the 1914 Trust Deed accessed from Victoria's Register of Successory Trusts has not preserved the words noted below as '[words lost]'.

⁶¹ As to the significance of the original consensual compact, see the passage from *Radmanovich v Nedeljkovic* (n 4) 670. See above (n 5) and accompanying text.

VI. CONCLUSION

The real estate portfolios amassed by Christian church movements are massive. An understanding of how such properties are held, and in particular of the scope of the religious and charitable purposes on which they are held, is therefore of the utmost importance. Ignorance of the charitable trusts on which church properties are held is a potential source of significant legal risk: both for the trustees of those properties and for the congregations themselves.⁶² Depending on the trust in question, a local church might unlawfully refuse to hand over church property to a central church body, or a central church body might unlawfully seize property that belongs to a local congregation.

It has been observed that the scope of charitable purposes will be informed by whether the church denomination or movement in question is hierarchical, presbyterian, or congregational. In the case of hierarchical churches, it is presumed that church property is held for the purposes of the wider church. The reverse presumption obtains in the case of congregational churches. Against that background and the history of the Churches of Christ movement, it has been argued that the church properties held on the trusts established by the First Schedule to the *1941 Property Act* in Victoria are held for the purposes of the particular congregation, and not those of the broader Churches of Christ.

⁶² For the implications of trustees of church property misapplying trust assets in breach of trust, see *The Presbyterian Church of Victoria Trusts Corporation v Anstee, Nuske, Evans, Holman, Kerss & Ors (No. 1)* [2016] VSC 297 (7 June 2016). The Supreme Court of Victoria found that beneficiaries had been ‘impoverished’ through various breaches of trust by the trustees in relation to unauthorised expenditure of over \$11 million. They were entitled to bring a personal claim against the trustees and to assert beneficial ownership in the assets acquired in breach of trust.