

Incorporation for Victorian Baptist Churches?

There are thought to be three perceived benefits derived from a Victorian Baptist Church incorporating under the *Associations Incorporation Act 1981*:

1. Unincorporated bodies are unable to be registered as the Proprietor of land. The Baptist Union of Victoria's Incorporation Act of 1930 overcomes this problem by enabling the Union to hold property on trust for unincorporated local churches. The local church is the beneficial owner and, as trustee, the Union is obliged to comply with the wishes of a properly constituted Special Church Members meeting called to decide issues related to the property.
2. Baptist Churches who operate substantial businesses such as Schools, Nursing Homes, Retirement Villages, Child Care Centres and the like find it beneficial to be incorporated because many people they deal with (especially in Government) are unfamiliar and uncomfortable when dealing with unincorporated bodies. The advice in this paper is confined to Baptist Church property that is not owned by such enterprises.
3. Some people believe that churches should incorporate to minimize their indebtedness to others. I believe that this view is misguided, unethical and, arguably un-Christian.

The position of The Baptist Union of Victoria in response to these issues has been considered by the Union's Executive Council after consultation with the Honorary Legal Advisor.

Those advocating the incorporation of Baptist Churches appear to rely on the following reasons.

- if a Baptist Church is unincorporated then all church members become personally liable and their private assets are placed in jeopardy.
- if a Baptist Church is incorporated then they can avoid all liability over and above the value of the assets of the incorporated body.
- the extra responsibilities of an incorporated Church are minimal

The assertion that "If a Baptist Church is unincorporated, then all church members become personally liable and their private assets are placed in jeopardy" is wrong. The law relating to unincorporated churches is the same as that relating to unincorporated associations generally. The Privy Council in *Wise v Perpetual Trustees Co* (1903) A.C. at p.149 stated the law in relation to unincorporated associations such as clubs as follows:-

"Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships, they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions regarded by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed."

Cases such as *Wise; Peckham and Bradley Egg Farm Limited v Clifford* (1943) 2 All E.R. 378 make it clear that only the general committee of the unincorporated association, as distinct from the members as a whole, can be liable for breach in contract or an act of negligence by an unincorporated Baptist Church. The relevant committee for the purposes of an unincorporated Baptist Church is most likely the Diaconate or Leadership Team.

The general committee of the unincorporated association is entitled to be indemnified out of the assets of the unincorporated association.

It would appear that there are two situations in which the Diaconate or Leadership Team of an unincorporated Baptist Church could theoretically find itself exposed financially. First, contractual obligations may have been entered into which exceed the assets of the Church.

Where the liability is contractual, it is totally unethical for a Baptist Church to hide behind a corporate veil to minimize liability. Those responsible for such contractual liability should accept (as the law requires them to accept) personal liability insofar as the contractual liability exceeds the assets of the Church.

Where the liability is based on negligence it is arguably still unethical for a Baptist Church to hide behind a corporate veil to minimize liability. The Diaconate of a Baptist Church should ensure that proper insurance coverage exists to ensure that no liability for negligence will embarrass their church or individuals associated with their Church who might be liable for negligence in the course of some activity under the control of Church. It is very important for a Diaconate or Leadership Team to ensure that there is proper insurance because besides exposing the Church's assets if there is inadequate insurance, individuals associated with the Church who commit negligent acts in the course of an activity under the control of the Church will be personally liable. If insurance coverage is inadequate, then such individuals will be financially exposed regardless of whether the Church is incorporated or unincorporated. The insurance cover offered by the Australian Baptist Insurance Scheme is in excess of any likely claim against church diaconates and in excess of cover likely to be affordable for a separately incorporated Baptist Church.

Those who advocate incorporation tend to rely heavily on the possibility that insurance coverage will be inadequate even where proper insurance advice has been taken. They tend to ignore:

- the ethical issue of whether Churches should hide behind a corporate veil to minimize the liability of their Diaconates or Leadership Teams
- the personal liability of individuals who are negligent regardless of whether the Baptist Church with which they are involved is incorporated or unincorporated
- the cost of incorporation
- the annual fees required to be paid to comply with the annual obligations of incorporation
- the possibility of a corporation becoming liable for land tax and rates (unless the incorporation is structured very carefully for charitable purposes)
- the inability of a corporation to borrow from Baptists Trust Funds with our proper security and the difficulty of borrowing from a Bank without offering personal guarantees

- the onerous obligations on director of corporations (including their potential personal liability for the debts of the corporation under fee Corporations Law) and the higher standard of care expected of directors of corporations in negligence cases.

There is much greater likelihood of a Court finding directors of an incorporated Baptist Church or the incorporated Church itself being liable for negligence when compared with the position of deacons of an unincorporated church. Unincorporated Baptist Churches and their leaders are more likely to escape liability for negligence on the grounds that the standard of care owed is a much lesser standard. There has not been a single instance where the general committee of an unincorporated Baptist Church has been liable for an amount in excess of their insurance coverage.

In conclusion, while a Baptist Church which operates a School or Nursing Home or a Retirement Village or a Child Care Centre or some other substantial commercial enterprise, might wish to incorporate that particular enterprise, it is both unnecessary and arguably inappropriate for any Baptist Church in Victoria to be incorporated.

Much of the information in this paper is drawn from "Advice regarding the merits of Incorporating Baptist Churches in New South Wales", Geoffrey Moore, Honorary Legal Advisor, Baptist Union of New South Wales, 25 November 1998