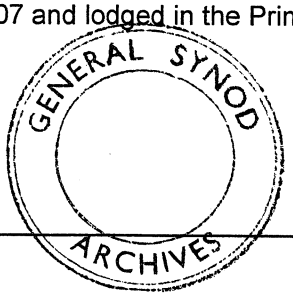
Certificate under Rule XVIII of the Constitution
I certify that the this and the following 72 pages comprise a true copy of the Certificate of Determination and Report of the President of the Appellate Tribunal to the Primate of the Anglican Church of Australia dated 4 April 2007 and lodged in the Primate's Registry at the General Synod Office on Level 9 of 51 Druitt Street, Sydney.



The Reverend Canon Bruce James McAteer
Registrar to the Primate
Dated: 12 April 2007

ANGLICAN CHURCH OF AUSTRALIA

IN THE APPELLATE TRIBUNAL)
)

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the said Church of the question raised by the opinion of the Council of the Diocese of Wangaratta concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** under section 63(1) of the said Constitution by the Primate at the request of the Synod of the Diocese of Wangaratta of a question arising under the Constitution concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** under section 63(1) of the said Constitution by the Primate at the request of the Provincial Council of the Province of Victoria of a question arising under the Constitution concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **National Register Canon 2004** of General Synod.

DETERMINATION OF THE APPELLATE TRIBUNAL

4 April, 2007

To the Most Reverend Dr Phillip Aspinall, Primate of Australia

Greetings,

Your Grace referred to the Appellate Tribunal a series of matters concerning the operation of s 30 of the Constitution of the Anglican Church of Australia with respect to the Special Tribunal Canon 2004 and the National Register Canon.

For convenience, a copy of each of the References appear as Schedule 3 to the attached report.

I have the honour to report that the Tribunal's unanimous determination of the questions that arise on the References are in accordance with the attached Report which I have duly identified.

The essential answers to the questions raised are as follows:-

1. In respect of the reference of the Primate dated 14 December 2005 concerning the Special Tribunal Canon 2004 the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon affects the order and good government of the Church within the Diocese of Sydney.

2. In respect of the reference of the Primate dated 21 March, 2006 concerning the Special Tribunal Canon 2004 the Tribunal determines pursuant to s 30(c)(iii) that the Canon affects the order and good government of the Church within the Diocese of Wangaratta.

3. In respect of the reference of the Primate dated 8 February 2006 and the following question referred at the request of the Provincial Council of the Province of Victoria concerning the Special Tribunal Canon 2004:

   "Does proviso (a) to s 30 of the Constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General

Synod coming into force in a diocese unless and until the diocese by ordinance adopts it?"

The Tribunal determines that the answer is "Yes".

4. In respect of the reference of the Primate dated 11 May 2006 and the following question referred at the request of the Synod of the Diocese of Wangaratta concerning the Special Tribunal Canon 2004:

"Does proviso (a) to s 30 of the Constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General Synod coming into force in a diocese unless and until the Diocese by Ordinance adopts it?"

The Tribunal determines that the answer is "Yes".

The formal answer of the Tribunal to the reference made concerning the National Register Canon 2004 is as follows:

In respect of the reference of the Primate dated 14 December 2005 concerning the National Register Canon 2004, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.

DATED 4 APRIL, 2007

.....
Hon Justice Peter W Young AO
President of the Appellate Tribunal

This and the following 70 pages constitute the Report referred to in my certificate to the Primate of Australia dated 4 April, 2007.

.....
Hon Justice Peter W Young AO
President of the Appellate Tribunal

ANGLICAN CHURCH OF AUSTRALIA

IN THE APPELLATE TRIBUNAL)
)

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the said Church of the question raised by the opinion of the Council of the Diocese of Wangaratta concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** under section 63(1) of the said Constitution by the Primate at the request of the Synod of the Diocese of Wangaratta of a question arising under the Constitution concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** under section 63(1) of the said Constitution by the Primate at the request of the Provincial Council of the Province of Victoria of a question arising under the Constitution concerning the **Special Tribunal Canon 2004** of General Synod.

- and –

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **National Register Canon 2004** of General Synod.

REASONS FOR DETERMINATION

Introduction

There are four matters before the Appellate Tribunal concerning the effect under the Constitution of the Special Tribunal Canon 2004 of the General Synod. There is one matter concerning the effect under the Constitution of the National Register Canon 2004 of the General Synod.

It is convenient that all matters be dealt with together. The five matters are as follows:

1. A question arising at the instance of the Standing Committee of the Diocese of Sydney under s 30(c)(iii) of the Constitution as to whether the provisions of the Special Tribunal Canon 2004 affect the order and good government of the Church within the Diocese of Sydney.

2. A question arising at the instance of the Council of the Diocese of Wangaratta under s 30(c)(iii) of the Constitution as to whether the provisions of the Special Tribunal Canon 2004 affect the order and good government of the Church within the Diocese of Wangaratta.

3. A question referred by the Primate pursuant to s 63(1) of the Constitution at the request of the Provincial Council of the Province of Victoria :

> Does proviso (a) to section 30 of the Constitution ... preclude the Special Tribunal Canon 2004 of General Synod coming into force in a diocese unless and until the diocese by ordinance adopts it?

4. An identical question referred by the Primate pursuant to s 63(1) of the Constitution at the request of the Synod of the Diocese of Wangaratta.

5. A question arising at the instance of the Standing Committee of the Diocese of Sydney made under s 30(c)(iii) of the Constitution as to whether the provisions of the National Register Cannon 2004 affect the order and good government of the Church within the Diocese of Sydney.

Copies of the formal references by the Primate are attached to these reasons.

Procedure of the Tribunal

The questions raised as a result of the actions of the Standing Committee of the Diocese of Sydney and the Synod of the Diocese of Wangaratta were advertised and submissions from interested parties were invited for lodgement with the Tribunal by 31 May 2006, with any submissions in reply to be lodged by 31 July 2006.

Submissions were received from the Synod and Council of the Diocese of Wangaratta and the Provincial Council of the Province of Victoria suggesting that the President and the Honourable Justice Bleby were disqualified from sitting on the references. They have been dealt with by the members concerned. Each has declined to disqualify himself for reasons which are appended to this

report as Schedule I in the case of Bleby, J and Schedule 2 in the case of the President.

Submissions supporting the opinions of the Standing Committee of the Diocese of Sydney and the Council of the Diocese of Wangaratta under s 30(c) of the Constitution in respect of the Special Tribunal Canon were received from those bodies.

Submissions supporting the view that the Special Tribunal Canon did not apply in a diocese unless the diocese by ordinance adopted the Canon under s 30(a) of the Constitution were received from the Synod of the Diocese of Wangaratta, the Provincial Council of the Province of Victoria and from the Standing Committee of the Synod of the Diocese of Sydney.

A further submission supporting the opinion of the Standing Committee of the Diocese of Sydney in respect of the National Register Canon was received from that body.

A submission was received from Mr P J Relton, a resident of the Diocese of Sydney, raising the purported illegality of certain proceedings of the Synod of the Diocese of Sydney. However, the Tribunal is of the view that that has no bearing on the issues before the Tribunal.

No submissions were received in opposition to the position taken by those who made submissions. This is a little disappointing on a point that is of obvious significance to the ordering of the affairs of the Church. Moreover, none of the

submissions contained detailed reasoned argument, and the Tribunal was required to undertake its own research. The Synod and Council of the Diocese of Wangaratta did put some legal argument on the meaning of "affecting" in s 30(a) of the Constitution, dealing only with those cases which supported its position. Without a contradictor, the Tribunal has had to examine very carefully and critically the submissions put to it. Merely because there is no contradictor does not mean that the submissions lodged must be accepted. The Tribunal must form its own view on the questions referred to it.

The Tribunal considered that on these references no oral hearing was necessary, and it did not convene one.

The Tribunal considered that none of the references involved doctrine and that it was not necessary to obtain the opinion of the House of Bishops or a Board of Assessors under s 58 of the Constitution.

Legislative Powers and the Constitution

The Constitution makes it clear that the Diocese is the unit of organisation of this Church (s 7). Section 5 confers almost plenary powers to legislate for the order and good government of the Church. The power is, by that section, conferred on "the several synods and tribunals in accordance with the provisions of this Constitution".

Section 26 empowers the General Synod to "make canons, rules and resolutions relating to the order and good government of this Church including Canons in respect of ritual, ceremonial and discipline ...". Section 51 either

confers or confirms the power of a diocesan synod, "subject to this Constitution" to "make ordinances for the order and good government of this Church within the diocese in accordance with the powers in that behalf conferred upon it by the Constitution of such diocese. These powers may vary from diocese to diocese, and there will be some matters on which some diocesan synods cannot legislate.[1] There is obviously an overlap in legislative power between the General Synod and diocesan synods.

These powers are affected by express and implied restrictions. First, no synod may legislate against the Fundamental Declarations (Chapter I) or the Ruling Principles (Chapter II).

Secondly, the power of diocesan synods may be limited by their own constitutions and by implications drawn from the national Church Constitution.[2]

Thirdly, s 32 imposes restrictions on the General Synod from imposing financial liabilities on dioceses except within a certain range.

Fourthly, s 52 prohibits the General Synod from altering the powers rights or duties of the diocesan synod and certain other diocesan matters without consent.

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[1] E.g. authorising the ordination of women to the priesthood by a Victorian Synod : Appellate Tribunal Opinion, 2 November 1989, re *The Ordination to the Office of Priest Act 1988* of the Synod of the Diocese of Melbourne. The Tribunal was unable to achieve a concurrence of opinions in respect of similar questions concerning other diocesan ordinances in the Opinion of 28 November 1991, re Eleven questions appertaining to the Ordination of Women.

[2] See above and the opinions referred to in footnote 1.

Section 30 of the Constitution

It is against this background that s 30 of the Constitution must be considered. Section 30, so far as is relevant, provides as follows:-

> 30. Subject to the preceding section and unless the canon itself otherwise provides, a canon duly passed by General Synod shall come into force on and from a date appointed by the President, being not later than one calendar month from the date upon which the canon was passed. The canon as on and from the appointed date shall apply to every diocese of this Church and any ordinance of any diocesan synod inconsistent with the canon shall to the extent of the inconsistency have no effect.
>
> Provided that:-
>
> (a) Any canon affecting the ritual, ceremonial or discipline of this Church shall be deemed to affect the order and good government of the Church within a diocese, and shall not come into force in any diocese unless and until the diocese by ordinance adopts the said canon.
>
> (b) If General Synod declares that the provisions of any other canon affect the order and good government of the Church, within, or the church trust property of a diocese, such canon shall not come into force in any diocese unless and until the diocese by ordinance adopts the said canon.
>
> (c) If General Synod should not so declare the synod of a diocese or the diocesan council may declare its opinion that the provisions of the said canon affect the order and good government of the Church within or the church trust property of such diocese and notify the President within one month thereafter and then the following provisions shall apply.

It is not necessary to set out the remainder of the section. It suffices that, in the present case, the relevant diocesan councils declared their opinion that the canons under consideration affected the order and good government of their diocese, the Standing Committee of General Synod did not advise the President that it agreed with that opinion and the Primate duly referred the matter to this Tribunal.

Section 30 addresses the situation where there is an overlap of legislative power between that of the General Synod and that of diocesan synods. It provides for valid canons to prevail over inconsistent diocesan legislation, while providing various blocking mechanisms in the provisos.

General Synod may itself act to prevent a canon from applying in a diocese without adoption by employing the mechanism provided in proviso (b). If it does not do so, and if the canon "affect(s) the ritual, ceremonial or discipline of this Church", it is deemed to affect the order and good government of the Church within a diocese and does and does not have force in any diocese unless and until the diocese by ordinance adopts the canon.

If neither of the foregoing mechanisms apply, the canon will have effect in every diocese, to the exclusion of inconsistent diocesan legislation, unless action is taken by a diocese under proviso (c), and then the canon will only not have effect without adoption in that diocese if the decision of the Standing Committee or of the Appellate Tribunal is that the canon "affects the order and good government of the Church within ..." that diocese. A decision under proviso (c) in relation to one diocese does not automatically have effect in any other diocese.

The expressions "affecting" and "affects"

For proviso (a) to apply, the Canon in question must be one "affecting" the ritual, ceremonial or discipline of the Church. For proviso (c) to apply, the Canon must "affect" the order and good government of the Church within or the church trust property of a diocese. If any part of the Canon attracts the operation of either proviso (a) or proviso (c) then the whole Canon is affected by the relevant proviso.

"Affect" is a word with a number of shades of meaning.

One can see that there have been occasions dealt with in the reported cases where the word "affects" has been given a very wide meaning and is said to mean "touching, relating to or concerning".[3] However, as the English Court of Appeal pointed out in *Re Bluston*[4], that is not its ordinary meaning which is more in the nature of "influenced, altered, shaped".

A good place to commence the discussion is with the authorities which consider how changes in the constitution of a corporation could be said to "affect" the class rights of the holders of particular classes of shares in the corporation.

Cases such as *White v Bristol Areoplane Co Ltd*[5] and *Re John Smith's Tadcaster Brewery Co Ltd*[6] indicate that such a broad word as "affect" has to be governed by what it is that is to be affected. If, as is the case in company law, it is the rights of shareholders, then the legal rights must be affected, not merely the enjoyment of those rights.

One gets the same flavour in leading cases seeking to define the word "affect" in other areas of law. Thus in *Ford v Ford*[7], when considering whether a decree of judicial separation affected a person's status so as to allow an appeal as of right to the High Court of Australia, Dixon J said that in that situation "the

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[3] See e.g. *Shanks v Shanks* (1942) 65 CLR 334 at 337, McTiernan J; *Reid v Hesselman* [1975] Tas SR 95 at 102.
[4] [1967] Ch 615 at 633.
[5] [1953] Ch 65 (CA).
[6] [1953] Ch 308 (CA).
[7] (1947) 73 CLR 524 at 539.

word 'affect' was not intended to cover consequential or incidental effects produced by orders based upon marriage."

There are, of course, cases going the other way. One such is the High Court's decision in *Tana v Baxter*[8] where the expression "affecting a contract" in a statute dealing with interstate service of process was given a wide meaning to embrace actions which had legal or even practical effects on the operation of a contract.

There is another line of cases concerning s 10 of the now repealed *Local Government Act*, 1991 (NSW) which provided that nothing in the first mentioned Act was to affect any of the provisions of the *Sydney Harbour Trust Act.* In *Woollahra MC v MacLennon*[9] the NSW Court of Appeal held that any provision in the Local Government Act requiring consent which could not be complied with if the applicant complied with the *Sydney Harbour Trust Act* was a provision which "affected" the latter Act.[10]

A narrow rather than wide interpretation of the word "affect" is warranted when one notes the provisions of ss 32 and 52 of the Constitution which might be considered otiose if a wide view of "affect" were taken.

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[8] (1986) 160 CLR 572 at 580.
[9] (1970) 19 LGRA 227.
[10] See also *Gierssch v Sydney City Council* (1982) 47 LGRA 143.

A consideration of the cases mentioned and the context in which the expression appears in s 30 tend to suggest that it should be given a narrow rather than an expansive meaning.

In the context in which it is used in s 30 we consider that the verb "affect" means to influence directly the effect of; to have or produce an effect on; or to make a difference to or produce a change in. The participle "affecting" should be given a corresponding meaning.

The Special Tribunal and the Constitution

Before turning to a consideration of the Special Tribunal Canon, it is necessary to note the provisions of the Constitution concerning the Special Tribunal. The Tribunal is created by s 53 of the Constitution. Section 56 specifies a number of matters concerning the jurisdiction and operation of the Tribunal. Subsections (1) and (2) specify how it is to be constituted. Subsection (3) provides that the members of the Tribunal shall be elected by or shall be appointed from a panel of persons elected by General Synod as prescribed by Canon. Subsection (4) provides that the period of office of members of the Tribunal should be as prescribed by Canon. Subsection (5) is an interim provision concerning membership of the Tribunal "until the Synod shall by canon otherwise prescribe". Subsection (6) specifies the jurisdiction of the Tribunal both as to persons and subject matter. As to subject matter the Tribunal has jurisdiction to hear and determine charges "of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified by Canon".

Subsection (7) provides for an appeal from the Tribunal to the Appellate Tribunal subject to any limitation as may be provided by Canon.

Section 60(1) specifies the recommendations that the Tribunal may make in respect of a person over whom it has jurisdiction. The recommendation is to be made to the Primate or, in certain circumstances, to a Metropolitan bishop in his stead. Section 60(2) confers power on the Primate or Metropolitan as the case may be to give effect to the recommendation and to mitigate, suspend or mitigate and suspend the sentence.

Section 61A provides for suspension of the bishop of a diocese where a charge has been promoted against him, and s 62 specifies certain machinery provisions relating to the summoning and attendance of witnesses and the production of documents in proceedings before the Tribunal. It also provides certain aids to proof of matters which may come before the Tribunal.

The Constitution does not specify how a matter is brought before the Tribunal, but by the clearest implication it requires whoever does so to specify the breach of faith, ritual, ceremonial or discipline or the offence with which the person before the Tribunal is charged.

The Special Tribunal Canon

Part II of the Canon provides for the creation and appointment of and the powers and procedures to be followed by the Episcopal Standards Commission (**"ESC"**). In particular, its powers are set out in s 13 of the Canon. In essence, they are to receive and investigate complaints made against persons who may be

the subject of proceedings before the Tribunal and, where appropriate, to promote a charge against a bishop before the Tribunal, together with certain incidental matters.

Part III provides for the appointment and functions of the Director of the ESC.

Part IV deals with the handling of complaints, their investigation by the ESC and the institution of proceedings by the ESC against a bishop.

Part V provides for the method of appointing members of the Special Tribunal and for procedures to be followed by the Tribunal. Part VI provides for how a charge is to be brought before the Tribunal. It can only be brought by the ESC.

Part VII provides for the suspension pending the hearing of charges of a bishop who is not the bishop of a diocese. That can only relate to a bishop who (A) is a bishop assistant to the Primate in his capacity as Primate (vide s 56(6)(b) of the Constitution) or (B) to a bishop who becomes a member of General Synod pursuant to the provisions of s 17(8)(a)(i) of the Constitution, namely an Aboriginal bishop and a Torres Strait Islander bishop appointed under that section, or to a bishop assistant to the Primate in his capacity as Primate.[11] The power to suspend a diocesan Bishop is conferred not by the Canon but by s 61A of the Constitution.

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[11] S 56(6), Constitution.

Part VIII of the Canon specifies certain procedures to be adopted by the Tribunal, and Part IX provides for the procedure to be followed on deposition from orders where such a recommendation is made by the Tribunal.

The Canon does not provide for the creation of the Special Tribunal; it does not specify the sentence that can be recommended by the Tribunal or specify any matters affecting the implementation of such a recommendation other than procedural matters relating to the deposition from holy orders.

The Special Tribunal Canon - proviso (a)

Against that background it is convenient first to consider whether the Special Tribunal Canon is a canon "affecting the ritual, ceremonial or discipline of this Church", being the question posed by the two references under s 63(1) of the Constitution.

Before doing so, it is necessary to observe that the expressions "ritual", "ceremonial" and "discipline" are all defined in s 74 of the Constitution.

"Ritual" is defined in s 74(1) of the Constitution as including "rites according to the use of this Church, and also the obligation to abide by such use". "Ceremonial" is defined in the same subsection as including "ceremonial according to the use of this Church, and also the obligation to abide by such use".

Section 74(9) of the Constitution provides that in the Constitution "discipline" relevantly means :

> ... the obligation to adhere to, to observe and to carry out (as appropriate) :

(i) the faith, ritual and ceremonial of this Church; and

(ii) the other rules of this Church which impose on the members of the clergy obligations regarding the religious and moral life of this Church.

Discipline does not include the obligation to observe other rules outside these categories, such as procedural rules, some of which appear in the Special Tribunal Canon.

From the discussion above as to the meaning of "affecting", in order to attract the operation of proviso (a), the Canon must either make new rules of ritual, ceremonial or discipline (as defined), or effect some changes to the existing rules on those matters, or influence the effect of or produce an effect on those rules. The Canon must affect, in that sense, the substantive rules on those matters.

Finally, if the Canon is to attract the operation of proviso (a) by affecting discipline, it must affect the discipline "of this Church". Discipline, as we have seen, is the obligation to adhere to, to observe or to carry out, among other things, certain rules of this Church. Section 5 and other sections of the Constitution to which reference has been made recognise that such rules may be made by the several synods and tribunals. They may not necessarily be rules which apply throughout the Church or to every member of it. If validly made, together they will constitute the rules of this Church. Such rules may or may not constitute rules of "discipline".

Submission of the Standing Committee of the Diocese of Sydney

It is submitted by the Standing Committee of the Synod of the Diocese of Sydney that the Canon affects the discipline of the Church in the following respects :

(a) It creates a new body for the investigation of complaints against bishops, namely the Episcopal Standards Commission (the ESC) and grants certain powers to and imposes certain limitations on the investigation of complaints by the ESC.

(b) It imposes an obligation on a respondent bishop to provide a detailed report to the ESC within a specified time on any matter of relevance to an investigation (clause 21) (Sic)[12].

(c) It imposes an obligation on a respondent bishop not to unreasonably delay or obstruct a member or delegate of the ESC in the exercise of its powers (clause 22(2)).

(d) It provides that a charge against a bishop may only be brought by the ESC (clause 44). In the absence of the Canon there is no restriction on who may bring a charge before the Special Tribunal.

(e) It provides for the suspension of a bishop from the duties of his office (Part VII).

(f) It provides for the deposition of a bishop from Holy Orders (Part 9).

[12] This is probably intended as a reference to clause 22(1).

(g) The Canon provides that any failure of a bishop to comply with a provision of the Canon may be relied upon by the Special Tribunal in making its determination and thereby expands the matters to which the Special Tribunal would ordinarily have regard in making a determination (clause 52(c)).

The submission does not advance any reasons why the Canon affects the discipline of this Church in any of these respects.

So far as paragraph (a) is concerned, the powers and duties of the ESC are set out in clause 13(1) of the Canon:

> (a) to receive complaints;
>
> (b) to investigate the subject matter of complaint in a timely and appropriate manner;
>
> (c) where appropriate to arrange for the conciliation and mediation of any complaint;
>
> (d) where the complaint relates to an alleged offence against the law of a State or Territory of the Commonwealth or against a law of the Commonwealth, to refer any information in its possession to a member of the appropriate law enforcement, prosecution or child protection authority and to co-operate as far as possible with any such authority;
>
> (e) to maintain proper records of all complaints received and of action taken in relation to such complaints;
>
> (f) subject to any limit imposed by the Standing Committee to authorise such expenditure on behalf of the General Synod as may be necessary to implement, in a particular case, the provisions of this Canon;
>
> (g) to promote a charge against a Bishop before the Tribunal.

The ESC also has certain reporting obligations, and in certain circumstances it can refrain from further investigation. Clause 23 of the Canon provides:

At any time after the commencement of an investigation into a complaint against a Bishop under this Part the ESC may:

(a) if it considers on reasonable grounds that the Bishop may be incapable, report the matter in writing to the relevant Metropolitan, and such report shall be a report for the purposes of section 4 of the Bishops (Incapacity) Canon 1995 as if it were made by three members of the synod of a diocese pursuant to that section;

(b) institute, amend or withdraw proceedings by way of charge against a bishop before the Tribunal; or

(c) in the event that the bishop whose conduct is under investigation ceases to be a Bishop, refer the matter, together with such information as it shall have received, to the bishop of the diocese in which the former Bishop then resides.

None of the powers mentioned impose any coercion on a bishop or indeed any rule or rules which might be said to be rules of discipline at all. The exercise of any of those powers cannot affect, in the sense described above, any rules of discipline. The exercise of powers by the ESC may be preparatory to action of the Tribunal which in some way may affect the ability of the bishop to discharge his functions, and thereby affect the discipline of the Church. However, the exercise of investigatory, charging and other incidental powers in themselves can have no such effect. Even the power to arrange for conciliation and mediation of a complaint "where appropriate" involves no coercion on or against the bishop.[13]

Similar comments apply to paragraph (d) above. The bringing of a charge by the ESC cannot in itself affect a rule of discipline of this Church.

It is incorrect to say, as is asserted in paragraph (f), that Part IX of the Canon provides for the deposition of a Bishop from Holy Orders. That is provided for in s 60 of the Constitution. All Part IX of the Canon does is to

[13] This point is discussed further in considering proviso (c) below.

provide a form of Instrument of Deposition for use by the Primate and to place certain obligations on the Primate as to what the Primate is to do with the Instrument and as to forwarding certain details for entry in the National Register. These obligations on the Primate cannot be or affect rules of discipline as defined.

The Sydney submission must therefore fail in respect of all these paragraphs.

It is convenient to consider paragraphs (b), (c) and (g) together. By clause 22(1) of the Canon, the ESC may require a respondent to provide a detailed report. It does not merely give the respondent the opportunity to do so. Clause 22(2) places an obligation on the respondent not to mislead the ESC or its delegates and not unreasonably to delay or obstruct the ESC in the exercise of its powers. Clause 55(c) provides that the Tribunal, in making any determination, shall (not may) take into account, among other things, any failure of the bishop to comply with a provision of the Canon.

In general terms, it may be said that the Canon imposes an obligation on a bishop to cooperate with the ESC and not to mislead, delay or obstruct it, on pain of some harsher recommendation by the Tribunal than might otherwise be the case. Such obligations may well be applauded, but they constitute a rule of the Church imposing on a bishop an obligation regarding the moral life of the Church, namely the moral obligation of a bishop to cooperate with the ESC. As such, the Canon affects the discipline (as defined) of this Church.

Finally, as to paragraph (e), the suspension of a diocesan Bishop is provided for in s 61A of the Constitution. Part VII of the Canon says nothing about that. Part VII can only have application to those who are members of the House of Bishops by virtue of s 17(8)(a)(i) of the Constitution (the two indigenous Bishops) or to a bishop assistant to the Primate in his capacity as Primate, (see section 56(6), Constitution).

However, Part VII constitutes a rule of this Church. It empowers the President of the Tribunal in certain circumstances to suspend one of these bishops from the duties of office pending determination of a charge. It is a rule which provides that in certain circumstances a bishop may not perform the duties of the office. It is plainly a rule of the Church which affects the obligation that that bishop otherwise has to observe and carry out the rules of the Church which impose on him obligations in respect of the religious life of the Church, at least in the diocese and in respect of the community which he may serve.

Submission of the Diocese of Wangaratta

The submission on behalf of the Council of the Diocese of Wangaratta and the Synod of that Diocese in relation to this topic urges a broad interpretation of the word "affecting" in proviso (a) of s 30. For reasons already given we do not accept that submission. Upon that basis it is submitted that the provisions of the Canon "touch, concern, relate to, deal with and have an effect on, discipline, for they create new and stringent ways of dealing with breaches of it and punish or discipline bishops for such breaches. Whilst the provisions may not change the

content of the obligation referred to in s 74(9)(a) [of the Constitution], they bear most directly upon that obligation, that is, they touch, concern, relate to, deal with and have an effect upon it .... They have an undoubted practical effect on the discipline of this Church".

The submission fails to analyse just what the functions and powers of the ESC are, and fails to recognise that the essential disciplinary powers against bishops are contained in the Constitution, not in the Ordinance. The submission fails to identify any specific provisions of the Canon which are said to affect the discipline of the Church. Merely because the Canon prescribes some processes associated with the undoubted rules of discipline contained in Chapter IX of the Constitution does not mean that those provisions affect the discipline of the Church in the sense described in the Constitution. While the Canon may prescribe rules, with the exception of the rules identified above, they are not rules which affect the discipline of the Church.

Submission of the Provincial Council of the Province of Victoria

The Provincial Council of the Province of Victoria adopted the submission of the Council and Synod of the Diocese of Wangaratta. In addition it referred to the fact that many diocesan synods had adopted the predecessors of the Special Tribunal Canon and the Canon itself. It also noted that General Synod, in some cases treated certain bills as special bills under s 28 of the Constitution, and in other cases did not.

In answering questions posed by these references the Tribunal cannot be influenced by what steps various synods may have taken in the past in reference to this or any other legislation. It must apply the provisions of the Constitution to the circumstances before it. What the survey of synod practices reveals is either some differing views as to the need for adoption which these references may help to resolve or some precautionary action on the part of some dioceses in order to remove uncertainty. They cannot affect the proper interpretation and application in a given case of the provisions of the Constitution.

Conclusion – proviso (a)

It follows that the provisions of the Canon affect the discipline of this Church in two respects identified above. It must also follow that the Canon is deemed to affect the order and good government of the Church within a diocese, and does not come into force in any diocese unless and until the diocese by ordinance adopts the Canon.

Strictly speaking, this renders it unnecessary to answer the two references made under s 30(c) of the Constitution. However, proviso (c) requires that they be answered, and failure to do so may still cause uncertainty if the Canon is amended to avoid any operation of proviso (a). We therefore turn to consider those references.

The references under section 30(c) of the Constitution

Proviso (c) of s 30 of the Constitution is only engaged if the provisions of the Canon "affect the order and good government of the Church within or the

trust property of (a) diocese". We have already discussed the meaning of the word "affect" in this context. It is not suggested that the Canon affects the trust property of either of the two dioceses concerned.

The phrase "order and good government" is a very well known phrase though it usually occurs in constitutions as "peace, order and good government".[14] The words are usually construed as meaning that a government to whom is committed a power to make laws for the peace order and good government of its territory has a grant of plenary power to legislate, subject only to limitations within the constitution itself.[15] However, here the focus is not on the power to legislate but rather on the actual order and good government of the diocese, an expression which includes but which is not limited to the power to legislate.

Whether a Canon affects the order and good government of the Church within a diocese will depend on whether it can be said to affect how the Church in the diocese orders and governs itself and the conduct of its members.

As we have seen, certain provisions relating to the discipline of bishops are provided for in Chapter IX of the Constitution itself. Those provisions obviously affect the order and good government of the Church in a diocese. A canon will not do so if it merely provides for implementation of what the Constitution

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[14] See e.g. Australian Constitution s 51.
[15] See eg *Clayton v Heffron* (1960) 105 CLR 214 at 250; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10.

already provides by way of affecting the order and good government of the Church in a diocese.

Submission of the Standing Committee of the Diocese of Sydney

The Standing Committee of the Diocese of Sydney identifies the following provisions of the Canon which are said to engage the operation of proviso (c) of s 30:

(a) Cl. 13(1)(b) where the complaint relates to conduct within the diocese, as it authorises the Episcopal Standards Commission to investigate what is alleged to have happened within the diocese;

(b) Cl. 13(1)(c) as any conciliation or mediation will involve the bishop and thereby deprive the diocese of his ministry during the time involved in the preparation for and conduct of the conciliation or mediation;

(c) Cl. 13(1)(d) as the reference of information may (very properly) affect the order and good government of the diocese but nevertheless, has that effect and requires that the Canon, to be effective, needs the assent of the synod of the diocese;

(d) Cl. 13(1)(g) as the promotion of the charge may (very properly) affect the order and good government of the diocese but nevertheless, has that effect and requires that the Canon, to be effective, needs the assent of the synod of the diocese;

(e) Cl. 19 which purports to authorise the Episcopal Standards Commission to investigate a complaint which investigation, if the complaint relates to conduct within the diocese, may or is likely to affect the bishop of the diocese and affect the order and good government of the diocese;

(f) Cl. 21 which purports to authorise the Episcopal Standards Commission to collect information which collection, if the complaint relates to conduct within the diocese, may or is likely to affect the bishop of the diocese and other persons, members of this Church within the diocese and thereby affect the order and good government of the diocese;

(g) Cl. 22(1) which purports to authorise the Episcopal Standards Commission to require the bishop of a diocese, in respect of whom a complaint has been made to collect information which collection, if the complaint relates to conduct within the diocese, may or is likely to affect the bishop of the diocese and other persons, members of this Church within the diocese and thereby affect the order and good government of the diocese;

(h) Cl. 46(1) purports to confer power on the President of the Special Tribunal to suspend a bishop from the duties of his office and is a clear interference in the order and good government of the relevant diocese in that it deprives the diocesan council of its right to dissent

from and block such a proposal and deprives the diocese of its bishop during the period of suspension.

As with the submission relating to proviso (a) the Standing Committee does not elaborate on any reasons why these provisions or any of them affect the order and good government of the Church within the Diocese of Sydney.

Paragraphs (a) – (c) can be dealt with together. The relevant provisions of clause 13 of the Canon are set out above. The exercise of these powers by the ESC in respect of a complaint against a diocesan Bishop imposes no obligation on any person in the diocese, nor does it detract from the rights of any person exercisable as a member or resident of the diocese concerned. The investigation of a complaint by the ESC by gathering evidence and interviewing potential witnesses, none of whom are compellable, does not affect in any way the order and good government of the Church within the diocese.

If the power to arrange for conciliation and mediation of a complaint in clause 13(1)(c) were to include a compulsory power of mediation or conciliation, it could affect the order and good government of the Church within the diocese. However, it is not so expressed. It is a power to arrange for conciliation and mediation "where appropriate". There is no power to require the bishop to participate or, more importantly, to be bound by the result. That will only occur if the bishop agrees. If, as a result, the order and good government of the Church in the diocese is affected, that will not be by virtue of any coercive powers

contained in the Canon but by the voluntary submission by the bishop to a process which the Canon enables the ESC to facilitate.

The reference of information to law enforcement authorities referred to in clause 13(1)(d) of the Canon does not in itself affect the order and good government of the Church within the diocese. That may only be affected if others take action as a result of such information being referred.

Clause 13(1)(g), the subject of paragraph (d) of the Sydney submission, enables the ESC to promote a charge against a bishop before the Tribunal. It must be read in conjunction with clause 23(b), which further enables the ESC to institute, amend or withdraw proceedings by way of a charge against a bishop before the Tribunal, and clause 44 which provides that a charge against a bishop in the Tribunal may only be brought by the ESC.

The Constitution is silent as to who may promote a charge against a bishop in the Tribunal. The effect of the Canon is that a charge may only be promoted by the ESC and by no-one else. This means that if, for example, a group of residents of a diocese have a complaint against their bishop, they are required to process their complaint through the ESC. If the ESC refuses to act, whether there is justification for that refusal or not, the residents have no redress. The ability or inability of persons within a diocese to promote a charge in the Tribunal against their diocesan bishop is a matter which affects how the diocese is ordered and governed. In that respect the Canon affects the order and good government of the Church within the diocese.

That is not to say that the ability of the ESC to promote a charge affects the order and good government of the Church within a diocese. The promotion of a charge in itself cannot affect the order and good government of the Church in the diocese of the bishop or in any other diocese. The Constitution necessarily implies that where there is a serious allegation that a bishop has committed a breach of faith, ritual, ceremonial or discipline or an offence specified by Canon, a charge will be brought, whether that be by a person or persons within the diocese or elsewhere, as the breach of such provisions by a diocesan bishop may well affect the whole Church. The relevant effect of the Canon on the order and good government of the Church within a diocese is that it prevents such a charge being brought by persons within the diocese.

Clauses 19 and 21 of the Canon, merely because they authorise and require the ESC to investigate the allegations contained in a complaint, do not affect the order and government of the Church within the diocese of the bishop complained against. Paragraphs (e) and (f) of the submission must fail for similar reasons to those discussed in relation to paragraphs (a) – (c).

In relation to paragraph (g) of the submission, we have already held that clause 22(1) of the Canon, along with others, affects the discipline of the Church and is therefore deemed by proviso (a) to affect the order and good government of the Church within a diocese. However, it is not the collection of information from the bishop which affects the order and good government of the Church in the diocese. As the Sydney submission points out, such collection may affect the

bishop and others in the diocese, but that depends on what the Tribunal ultimately does with it. The collection itself does not affect the status, standing or powers of the bishop. Proviso (c) does not operate if the provisions of the Canon "may" or "are likely to", along with certain other activity, affect the order and good government of the Church within a diocese. It will only operate if such provisions in themselves do so when invoked.

Paragraph (h) of the Sydney submission misconceives the effect of clause 46 and the extent of its operation, described above. There is no suggestion that the two indigenous bishops or the bishop assistant to the Primate who could be affected by clause 46(1) of the Canon are licensed or hold any office in either of the two dioceses which have caused these references. The situation might be different in respect of the diocese in which such bishops are assistant bishops, but that diocese has taken no action under proviso (c).

Submission of the Diocese of Wangaratta

The submission on behalf of the Council of the Diocese of Wangaratta and the Synod of that diocese in respect of this topic also relies on the extremely wide definition of "affects" which we do not accept. It points in particular to the following provisions of the Canon which are said to affect the order and good government of the Church in that diocese. It is submitted that the Canon -

(a) makes provision for the composition and procedure of the Special Tribunal (Part 5);

(b) provides that a charge against a bishop in the Special Tribunal may be brought only by the Episcopal Standards Commission (s.44), whose powers are set out in Part 2 and which by s.22 can in addition require a respondent bishop to provide a detailed report to it;

(c) makes provision as to proceedings before the Special Tribunal (Part 8);

(d) provides for the manner in which the deposition of a bishop from Holy Orders pursuant to a recommendation of the Special Tribunal is to be effected (Part 9).

In relation to paragraph (a), the composition of the Tribunal is provided for in the Constitution. The Canon merely provides the means of selecting the required members. That process cannot affect the order and good government of the Church in the Diocese of Wangaratta. Nothing has been said which suggests that the procedure of the Special Tribunal affects the substantive or any other law of the Church in the Diocese of Wangaratta or that it interferes with or affects, in the relevant sense, how the Diocese of Wangaratta is ordered and governed. Most of the procedural rules contained in the Canon could be made by the Tribunal in any event.

Paragraph (b) of the submission has already been dealt with above. The Tribunal agrees that clause 44 does affect the order and good government of the Church in the Diocese of Wangaratta for reasons already stated. It is not necessary to add any further to what has been said about clause 22.

Paragraph (c) of the submission is sufficiently answered by what has been said in respect of paragraph (a).

The response to paragraph (d) is that it is the deposition from orders itself which is provided for in the Constitution which affects the order and good government of the Church in the Diocese of Wangaratta if the subject of deposition is its bishop. The form by which that may be effected cannot be said to affect the order and good government of the Church within the diocese.

The submission of the Diocese of Wangaratta suggests that merely because the procedures provided for in the Canon involve or affect the bishop of the diocese, they necessarily affect the order and good government of the Church within the diocese. For reasons already given, that gives an impermissibly wide operation to the word "affect" in proviso (c) and ignores what it is that must be affected. The Constitution provides for the making of the determination by the Tribunal which may well affect the order and good government of the Church within the diocese by removing or otherwise qualifying the authority of its bishop. Save to the extent already identified, the Canon affects the operation of the Tribunal and its procedures, but does not, in any material sense, affect the order and good government of the Church within the diocese.

Conclusion – Proviso (c)

It follows that the provisions of the Canon affect the order and good government of the Church within the Dioceses of Sydney and Wangaratta in one respect identified above. It also follows that the Canon does not come into force

in the Dioceses of Sydney or Wangaratta unless and until it is adopted by Ordinance of the diocesan synod of those respective dioceses. For reasons already given, this decision does not affect the operation of the Canon in dioceses where no action has been taken under proviso (c) of s 30 of the Constitution.

The National Register Canon 2004

Under the Canon there is to be created a national register of clergy and laypersons. In respect of clergy it is to be a register of all clergy ordained or licensed in the Church and is to contain the material set out in the First Schedule. It is not necessary to go into further detail of what that Schedule requires.

In relation to lay persons it is to be a register of all lay persons who have been the subject of investigation by a Professional Standards Committee where the allegations the subject of the investigation were not summarily dismissed, and of lay persons who have been declined ordination or employment or appointment in the Church because of an adverse risk assessment. The register is to contain the matters referred to in the Second Schedule.

The national register is to be maintained by the General Secretary in such form as the Standing Committee approves.

Section 8 of the Canon provides :

> It is the duty of each diocesan Register and each Director of Professional Standards to notify the General Secretary as soon as practicable after the first day of January, April, July and October in each year of all fresh matters and changes in details known to him or her within his or her area of responsibility which are required to be inserted in the National Register.

Other provisions of the Canon relate to access to the national register and correction of allegedly false information contained in it.

The only question on this reference is whether the provisions of the Canon "affect the order and good government of the Church within" the Diocese of Sydney.

The Sydney Standing Committee has submitted that clause 8 clearly affects the discipline of this Church. Their reasoning is that the persons who are to supply the information are likely to be employees of a diocese and that the administration of the diocese is being affected by altering the duties of a diocesan officer to add extra duties for which the diocese may well be liable to remunerate the officer.

As mentioned earlier, there were no submissions urging a contrary view.

One answer to this submission is that the Canon focuses on personae designatae, that is the individuals who are in the position of diocesan Registrar or Director of Professional Standards and not those persons as diocesan officers. It is doubtful whether that is a correct interpretation of the Canon, but there are other reasons why the Sydney submission fails.

Although there is no comparable provision in the Australian Constitution, s 106 preserves the State Constitutions until altered in accordance with the State's Constitution. There does not appear to be any problem with a Federal industrial award binding a State instrumentality even if the Federal award

imposes obligations on officers of the State to expend monies on keeping records at least up to the point where there is an appropriation of funds to discharge those costs.[16] The cost of complying with valid Federal laws lies where it falls whether the person affected be an individual or a State. The impost does not offend s 106.

Again, there is clearly no objection to a Federal tax being validly imposed on a State official.

Returning to church matters, a canon which, as clause 8 does, requires an employee of a diocese to perform a rather mechanical task of reporting to the General Secretary four times a year what he or she knows (note not what he or she has to research and ascertain) does not "affect" the order and good government of the Church within a diocese. It does not in any direct way influence, alter or shape how the diocese is ordered or governed.

One could contemplate a General Synod canon which would impose a duty on a diocesan officer and cast a significant financial burden on a diocese. However, the Constitution expressly deals with this situation in s 32. This fact reinforces the view that the mere fact that a canon of General Synod will require a diocese to incur some additional expense has no effect on the order and good government of the Church within a diocese.

The diocese of Sydney has not submitted that there is any matter of the discipline of this Church which would attract the operation of proviso (a) of s 30.

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[16] See e.g. The Professional Engineers Case (1959) 107 CLR 208.

Thus, in our view, the National Register Canon does not affect the order and good government of the Church within the Diocese of Sydney.

Answers to the References

The formal answers of the Tribunal to the references made concerning the Special Tribunal Canon 2004 are as follows:

1. In respect of the reference of the Primate dated 14 December 2005 concerning the Special Tribunal Canon 2004 the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon affects the order and good government of the Church within the Diocese of Sydney.

2. In respect of the reference of the Primate dated 21 March, 2006 concerning the Special Tribunal Canon 2004 the Tribunal determines pursuant to s 30(c)(iii) that the Canon affects the order and good government of the Church within the Diocese of Wangaratta.

3. In respect of the reference of the Primate dated 8 February 2006 and the following question referred at the request of the Provincial Council of the Province of Victoria concerning the Special Tribunal Canon 2004:

   "Does proviso (a) to s 30 of the Constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General

Synod coming into force in a diocese unless and until the diocese by ordinance adopts it?"

The Tribunal determines that the answer is "Yes".

4. In respect of the reference of the Primate dated 11 May 2006 and the following question referred at the request of the Synod of the Diocese of Wangaratta concerning the Special Tribunal Canon 2004:

"Does proviso (a) to s 30 of the Constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General Synod coming into force in a diocese unless and until the Diocese by Ordinance adopts it?"

The Tribunal determines that the answer is "Yes".

The formal answer of the Tribunal to the reference made concerning the National Register Canon 2004 is as follows:

In respect of the reference of the Primate dated 14 December 2005 concerning the National Register Canon 2004, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.

SCHEDULE 1

ANGLICAN CHURCH OF AUSTRALIA

IN THE APPELLATE TRIBUNAL)
)

IN THE MATTER of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Council of the Diocese of Wangaratta concerning the Special Tribunal Canon 2004 of General Synod.

- and –

IN THE MATTER of a **REFERENCE** under section 63(1) of the said Constitution by the Primate at the request of the Synod of the Diocese of Wangaratta of a question arising under the Constitution concerning the said Canon.

- and –

IN THE MATTER of Associated **REFERENCES** concerning the said Canon at the instance of the Diocese of Sydney and of the Provincial Council of Victoria.

REASONS FOR DECISION OF THE HONOURABLE JUSTICE BLEBY CONCERNING THE COMPOSITION OF THE APPELLATE TRIBUNAL

Introduction

Pursuant to section 30(c)(iii) of the Constitution, a question has been raised at the instance of the Standing Committee of the Diocese of Sydney as to whether the Special Tribunal Canon 2004 (No. 7 of 2004) ("the Canon") affects the order and good government of the Church within the Diocese of Sydney.

A similar question is raised by the Council of the Diocese of Wangaratta in respect of the Church within that Diocese.

Pursuant to section 63(1) of the Constitution a question has also been referred to the Appellate Tribunal at the instance of the Synod of the Diocese of Wangaratta and separately at the instance of the Provincial Council of the Province of Victoria, as to whether proviso (a) to section 30 of the Constitution precludes the Canon from coming into force in a diocese unless and until the diocese by ordinance adopts it.

The Synod of the Diocese of Wangaratta has submitted that I should disqualify myself from hearing or determining or taking any further part in these references on the ground of reasonable apprehension of bias by reason of pre-judgment. The submission is supported by the Provincial Council of the Province of Victoria. The Standing Committee of the Diocese of Sydney has made no submission as to whether I should disqualify myself.

The decision on my disqualification is mine to make and not that of the Appellate Tribunal as a whole.[17]

Basis of the Submission

The submission of the Synod of the Diocese of Wangaratta is based on the following facts which I acknowledge to be correct :

1. I am and have at all material times been the Chairman of the Church Law Commission, a body constituted under the Strategic Issues,

[17] *Ebner v Official Trustee in Bankruptcy*; *Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 205 CLR 337.

Commissions, Task Forces and Networks Canon 1998 of the General Synod.

2. The Canon was prepared by the Church Law Commission. I was involved in the drafting of the Canon;

3. The Church Law Commission promoted the Bill for the Canon at the 13th General Synod in October 2004.

4. I was a member of and Chairman of Committees of the General Synod and moved that the Bill for the Canon be approved in principle. I had the carriage of the Bill on behalf of the Church Law Commission at General Synod.

5. The Canon as drafted and passed contained no provision to the effect that its provisions affect the order and good government of the Church within a diocese or that its provisions would not come into force in a diocese unless and until the diocese by ordinance adopted the Canon.[18]

6. I neither moved the Bill for the Canon as a Special Bill nor moved that the Bill need not proceed as a Special Bill, but moved that it do pass, and it was passed as an ordinary Bill of the Synod.[19]

7. In November 2005 the Church Law Commission published a paper entitled "A Response to the Release of the Report of the Victorian

[18] See s 30(b), Constitution.
[19] See s 28(i), Constitution.

Provincial Legal Committee on the Provisional Episcopal Standards Canon 2004 (Canon P4, 2004)". I was not the dissentient referred to in that paper. I was party to the paper and assisted in the preparation of it. In part, the paper responded to an assertion by the Victorian Provincial Legal Committee that the Special Tribunal Canon 2004 has no effect in a diocese which does not adopt it. That response included the following:

> The Report adopts an uncompromising view that this is the position. This is on the basis that the Canon affects "the ritual ceremonial or discipline" of the Church: section 30(a), Constitution. The Report fails to acknowledge that there is an alternative view that it does not affect those concepts as defined in section 74 of the Constitution, and that this Canon merely gives effect to what is required by sections 53, 56, 60 and 61A of the Constitution.
>
> The Church Law Commission, which promoted the Bill for this Canon in General Synod, acknowledged in the explanatory memorandum (Book No.2, Bills 2004, page 54) that it was possible that the Bill should be treated as a Special Bill under section 28 of the Constitution for the same reason. It did not acknowledge the validity of that view. It urged the General Synod to enable it to be treated as an ordinary Bill in order to avoid that possibility, and "so that it can take effect as soon as possible, as it is necessary to give effect to an important Chapter of the Constitution". Without having to decide the validity of that possibility, General Synod seemed to take a pragmatic course, and the Bill proceeded as an ordinary Bill.
>
> .....
>
> What the authors of the Report may have overlooked (and what the Diocese of Sydney seems to have acknowledged by the action it has since taken) is that the Canon has taken effect subject only to the operation of section 30(c) of the Constitution whereby a diocesan synod or diocesan council may declare its opinion that the provisions of the Canon affect the order and good government of the Church within the diocese. That sets in train a process whereby, if that opinion is disputed, the effectiveness of the Canon in a diocese can be resolved authoritatively by the Appellate Tribunal: section 30(c)(iii), Constitution. In the meantime the Canon does not have effect in the diocese concerned. If a Victorian (or any other) diocese takes the view that the Canon affects the order and good government of the Church in its diocese, it is suggested that that is the course which should be followed.

The following additional facts not referred to in the submission of the Diocese of Wangaratta are also relevant:

1. As Chairman of Committees of the General Synod I am also a member of the Standing Committee of General Synod.[20] I was present at the meeting of the Standing Committee held on 10 and 11 July 2005 when there was tabled the letter dated 9 June 2005 from the Diocesan Secretary of the Diocese of Sydney giving rise to one of the references under section 30(c) of the Constitution concerning the Special Tribunal now before the Appellate Tribunal. The matter the subject of the letter was referred to the Church Law Commission by the Standing Committee.

2. Following its meeting held on 20-21 August 2005 the Church Law Commission submitted a report to the Standing Committee of General Synod. Annexed hereto is a copy of the report in question. That report accurately represents what occurred at the meeting of the Church Law Commission. No-one, other than the minority referred to in the report, expressed a view as to the effect of section 30(c) of the Constitution on the Special Tribunal Canon.

3. I was present at the meeting of the Standing Committee of General Synod on 18–19 November 2005 at which the report of the Church Law Commission was received. Minute 12.04 of the

[20] Rule II – Standing Committee, Clause 2.

Standing Committee of 18-19 November 2005 is an accurate record of what occurred in relation to the report of the Church Law Commission:

> 12.04 **Special Tribunal Canon 7/2004 & National Register Canon 12/2004**
> (Ref: July SC Mins # 11C on p 8) Doc # 2005-156
>
> David Bleby moved, Peter Young seconding and **RESOLVED**
> *That the report be received*
>
> **SC2005/3/045**
>
> Moved Ian Walker, Audrey Mills seconding, and after noting that all members of the Appellate Tribunal present abstained from voting, it was **RESOLVED**
> *That the Standing Committee*
> a. *not advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney concerning the Special Tribunal Canon 2004.*
> b. *not advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney concerning the National Register Canon 2004.*
>
> **SC2005/3/046**

4. I was also present at the meeting of the Standing Committee of General Synod on 4 and 5 March 2006 when there was tabled at the meeting the letter from the Diocese of Wangaratta giving rise to the other reference under section 30(c) of the Constitution concerning the Special Tribunal now before the Appellate Tribunal. Minute 9.12 of the Minutes of the Standing Committee held on 4-5 March 2006 is as follows:

> 9.12 **NOTED** that a letter from the Diocese of Wangaratta dated 15 December 2005 concerning the Special Tribunal Canon had been inadvertently omitted from the correspondence to be tabled. The letter advised that *"pursuant to Section 30(c) of the Constitution of the Anglican Church of Australia, Bishop in Council of the Diocese of Wangaratta resolved on 6th December 2005 that the Special Tribunal Canon of General Synod affects the order and good governance (sic) of the Church."*

Peter Young advised that this letter covers the same ground as other references to the Appellate Tribunal.

Moved Peter Young, seconded Ian Walker and **RESOLVED**

That the Standing Committee not advise the President that it agrees with the opinion of the Bishop in Council of the Diocese of Wangaratta concerning the Special Tribunal Canon 2004.

SC2006/1/02a

Moved Audrey Mills, seconded Graeme Lawrence and **RESOVED**

That those members of the Legal Committee of Standing Committee who are NOT members of the Appellate Tribunal be authorised to provide to the Appellate Tribunal submissions supporting this Standing Committee's position on the references dealing with the Special Tribunal Canon and/or the National Register Canon.

SC2006/1/002b

5. In relation to resolution SC2006/1/002a there was no discussion as to whether the Standing Committee agreed with the opinion of the Bishop in Council of the Diocese of Wangaratta. The resolution was passed without debate because of the action previously taken by the Standing Committee at its meeting on 18-19 November 2005 concerning the letter from the Diocesan Secretary of the Diocese of Sydney.

6. At no time did the Standing Committee determine a position on the relevant references to the Appellate Tribunal. I believe that resolution SC2006/1/002b does not correctly represent what the Standing Committee decided. The Standing Committee has never expressed a "position" on the references. To my recollection the Standing Committee decided that the relevant members of the Legal Committee of the Standing Committee

were authorised to provide whatever submissions they thought appropriate to the Tribunal, there being no known contradictor to the submissions of the Standing Committee of the Diocese of Sydney and the Council of the Diocese of Wangaratta. In the event, no such submissions have been made.

It is submitted that I should disqualify myself from hearing or determining or taking any further part in the references concerning the Special Tribunal Canon on the ground that those facts meet the test that, as a member of the Appellate Tribunal, "a fair minded lay observer might reasonably apprehend that [I] might not bring an impartial mind to the resolution of the question [I am] required to decide".[21]

As Gleeson CJ, McHugh, Gummow and Hayne JJ said, in their joint judgment in *Ebner v Official Trustee in Bankruptcy*:[22]

> That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. (Footnote omitted)

Whether I have expressed a view on a question the subject of the reference

It is necessary first to identify the nature of the question the subject of the reference. The Canon has been passed by General Synod. Its validity as a Canon of General Synod is not in question. The only questions before the tribunal are :

(a) Whether the Canon is a canon affecting the ritual, ceremonial or discipline of the Church[23], and

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[21] *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group Ltd* (2000) 205 CLR 337 at 344, [6].
[22] Ibid.

(b) Whether the provisions of the Canon affect the order and good government of the Church within the Diocese of Wangaratta and the Diocese of Sydney.[24]

It is not necessary to construe the Canon otherwise than for the purpose of answering those questions. The questions themselves arise under the Constitution and not under the Canon.

With those preliminary comments in mind I proceed to consider whether and in what circumstances I have expressed an opinion or have been party to the expression of an opinion concerning either or both of those questions.

As I have acknowledged, the Canon was prepared and promoted by the Church Law Commission of which I am the Chairman. I participated in the drafting of the Canon. That in itself says nothing about whether the Bill should have been treated as a special Bill pursuant to section 28(1) of the Constitution or as to the effect of the Bill when passed as a Canon.

It is true that, on behalf of the Church Law Commission, I promoted the Bill at the 13th General Synod and was responsible for its carriage before General Synod. The Church Law Commission had been asked to do that by the Standing Committee of General Synod following identification of many defects in the operation of the previous Special Tribunal Canon when the Special Tribunal sat in 1999. The fact that I was Chairman of Committees of General Synod and moved that the Bill be approved in principle and had the carriage of it in General Synod says nothing about my view of the effect of the Bill, if passed, or my view

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[23] Section 30(a), Constitution.
[24] Section 30(c), Constitution.

of the operation on the Canon of section 30(a) of the Constitution or the effect of a diocesan synod or a diocesan council taking action under section 30(c) of the Constitution.

The fact that the Canon as drafted and passed contained no provision to the effect that its provisions affect the order and good government of the Church within a diocese and shall not come into force in a diocese unless and until the diocese by ordinance adopts the Canon merely means that its promoters chose not to invoke the provisions of section 30(b) of the Constitution. That says nothing about the effect of section 30(a) of the Constitution or of any action taken by a diocesan synod or diocesan council under section 30(c) of the Constitution. It does not follow that I have decided the question of the "status or nature of the Canon that is raised for the decision of the Appellate Tribunal".[25] It does not follow from the foregoing that I have expressed any view as to the operation of section 30(c) of the Constitution on the Canon.

The fact that the procedure of section 28 of the Constitution was not followed says nothing about my view as to the operation of section 30 of the Constitution on the Canon. The President of General Synod did not see fit to rule that the procedure of section 28 should be followed in the passing of the Canon. No member of the General Synod raised a point of order as to the procedure that was in fact followed. My inaction in that regard does not constitute the expression of an opinion as to the effect on the Canon of section 30 of the

[25] Preliminary submission of the Synod of the Diocese for Wangaratta, paragraph 6.

Constitution. If it does, then that opinion seems to have been shared by every member of the General Synod.

The only opinion as to the operation of section 30 of the Constitution on the Canon to which I have been party is that expressed in the paper referred to and from which relevant extracts are quoted above.

The first paragraph quoted advocates no view at all but asserts that there are views other than that expressed by the Victorian Provincial Legal Committee. The second paragraph quoted contains an acknowledgment on the part of the Church Law Commission that it was possible that the Bill should be treated as a special Bill under section 28 of the Constitution. It expressed no view on the validity or otherwise of that question, the answer to which might also have a bearing on the operation of section 30(a) of the Constitution.

The paper does assert a view that the Canon presently has effect in a diocese which has not taken action under section 30(c) of the Constitution. I acknowledge that that impliedly expresses a view that section 30(a) of the Constitution does not apply to the Canon. I acknowledge that I was party to the view so expressed. As is apparent from the paper, it is not a reasoned view. There was one dissentient from the paper. If the dissent included dissent from that paragraph, the dissentient did not advance any argument in favour of the contrary view.

The expression of that view must also be understood in the context that I have also been party to acknowledging that there may be an alternative view as to the operation of section 28, and therefore section 30(a), on the Canon. The Bill for the Canon, when presented to General Synod in 2004, was accompanied by an explanatory memorandum, also prepared by the Church Law Commission, to which memorandum I was a party. As acknowledged by the submission of the Provincial Council of the Province of Victoria, that explanatory memorandum contained the following passage :

> It is possible that this Bill must be treated as a special bill pursuant to section 28(1) of the Constitution. However, it is essential that a Canon of this nature be enacted and be in force as soon as possible. Accordingly, the synod will be urged to give approval by three quarters of the members present in each house to this Bill proceeding as an ordinary Bill so that it can take effect as soon as possible, as it is necessary to give effect to an important chapter of the Constitution.

Section 28 of the Constitution provides that a bill which "deals with or concerns the ritual, ceremonial or discipline of this Church" is required to follow the procedure prescribed in that section as a special bill unless the synod determines otherwise by the special procedure referred to in that section. The preliminary submission of the Synod of the Diocese of Wangaratta asserts that, the expression "deals with or concerns" in section 28(1) of the Constitution is interchangeable with the expression "affecting" when those expressions have as their object "the ritual, ceremonial or discipline of this Church". I am not sure that that is necessarily so, but I am prepared to assume that it is for present purposes. If it is, it follows that I have also been party to acknowledging that there may be an alternative view to that expressed in the paper published by the Church Law Commission referred to above.

As to the events following the resolutions of the two Diocesan Councils giving rise to the references under section 30(c) of the Constitution, in my capacity as Chair of the Church Law Commission and as a member of the Standing Committee of General Synod I have been careful to avoid any discussion or participation in any decision which might be said to indicate a view on the matters the subject of the references or as to whether they should be referred to the Appellate Tribunal.

In summary, while I have been party to the expression of an opinion that the Canon operates in a diocese notwithstanding the provisions of section 30(a) of the Constitution, I have also been party to an acknowledgment of the force of an alternative view. It cannot be suggested that I come to this reference with a closed mind. When the full facts are known by the fair-minded lay observer, I doubt whether he or she would reasonably apprehend that I might not bring an impartial mind to the resolution of the questions before the Tribunal. However, that is not all that must be said in response to the submission of the Synod of the Diocese of Wangaratta.

Do the rules as to disqualification for bias apply at all?

The rules as to disqualification on the ground of apprehended bias are but part of a much wider requirement of the rules of natural justice to act fairly in the determination of questions affecting people's rights. In any given case the requirements of those rules will vary according to the nature of the tribunal, its constitution and the setting in which it is expected to operate.

The Anglican Church of Australia is a voluntary association. Its national Constitution is a consensual compact binding on the members of the Church *in foro conscientiae* without contractual force. Its provisions are not justiciable in a civil court except to the extent that they may be involved in a matter concerning church trust property.[26]

The Appellate Tribunal is the body set up under the Constitution as the ultimate arbiter of disputes on a number of issues which may arise under the Constitution. It consists of three diocesan bishops and four suitably qualified lay persons.[27] The members are nominated as to two members by the House of Bishops, as to two members by the House of Clergy and as to three members by the House of Laity.[28] The Constitution provides for the jurisdiction and powers of the Appellate Tribunal and for the resolution of disputes which may arise which are cognisable by the Appellate Tribunal.

Lay members of the Appellate Tribunal may or may not be members of General Synod. They are not disqualified from holding office on the Appellate Tribunal because they are members of the General Synod. They may therefore also be members of the Standing Committee of General Synod, whether elected or ex officio. The three episcopal members of the Appellate Tribunal, as diocesan bishops[29], must be members of General Synod. If an episcopal member of the Appellate Tribunal is also a metropolitan bishop, he will also be ex officio

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[26] *Scandrett v Dowling* (1992) 27 NSW LR 483.
[27] Constitution, section 57.
[28] Section 3, Appellate Tribunal Canon 1981.
[29] Constitution, section 57(1).

a member of the Standing Committee.[30] There is therefore no notion of separation of powers reflected in the Constitution, Canons or Rules of General Synod.

Many matters that come before the Appellate Tribunal concern the constitutional validity of canons or proposed canons of General Synod. In the past, they have often involved difficult questions of law and theology on which most members of General Synod will hold opinions, often strong and differing opinions, and opinions which, in many cases, will have been debated on the floor of General Synod.

The opinions of many on such issues are well known and have been revealed on the floor of Synod and elsewhere. Many of those opinions have been held and expressed by episcopal members of the Appellate Tribunal who have had to sit in judgment subsequently on those very issues. No-one has suggested that such members have been disqualified from sitting because they had expressed such views – often very strongly and uncompromisingly. That is not surprising, given the composition of the General Synod and the Appellate Tribunal. Indeed, many elections for membership of the Appellate Tribunal have been conducted, I venture to suggest, on the basis of the known and publicly expressed views of the candidate on matters likely to come before the Tribunal. Membership of the Appellate Tribunal cannot, therefore, be compared with membership of a civil court in a polity where the separation of powers is either

[30] Rule II.

constitutionally enshrined (in the case of the Commonwealth) or applied in practice (in the case of the Australian States) or with a tribunal whose judgments are enforceable in the same manner as those of a court of law. The Constitution of the national Church contemplates that members of the Appellate Tribunal, as members of the General Synod, will have exercised their rights as members of General Synod in respect of questions that may come before the Tribunal, and that in the course of doing so they may have expressed strong views in respect of questions that may come before the Tribunal.

The fact that some members of the Tribunal may in the past have abstained from voting in General Synod because it was apparent that a particular matter would come before the Tribunal does not affect their constitutional position. In many cases, opinions may have been expressed and votes cast on a matter which it was never contemplated would or might engage the Appellate Tribunal. Indeed, such might be said of the present references. There is nothing which requires a member of the Appellate Tribunal not to vote on a matter in General Synod in case the question the subject of debate may at some stage in the future come before the Appellate Tribunal.

Given that background, the Church is in no different position from that of any other voluntary association when it comes to ascertaining the extent to which the rules of natural justice will apply in the determination of important issues arising under the rules of the association. Whatever other rules of natural justice may apply in voluntary organisations, the rules relating to apprehended bias do

not to the same extent or in the same way as they do in a court of law, unless and to the extent that the rules of the organisation expressly or by necessary implication provide otherwise.

In *Australian Workers' Union v Bowen (No 2)*[31] there had been a bitter power struggle within the Australian Workers Union between the applicants, who had been expelled from the Union, on the one hand and the Executive of the Union, on the other hand. The High Court had occasion to consider the extent to which rules relating to disqualification for bias would apply in such an organisation.

Dixon J pointed out[32] that it was important to remember that the court was dealing with a "domestic forum acting under rules resting upon a consensual basis". He continued:[33]

> The last matter relied upon as invalidating the decisions is of a more serious kind. It is that the Executive and Dougherty were both prosecutors and judges and animated by such intensity of feeling that they were disqualified by bias. So far as this contention is based upon the fact that the Executive Council promoted the charges and that they were vitally concerned in the controversy not only as members of the union but as office-bearers whose authority had been resisted, there is in my opinion no substance in it. The reason lies in the constitution of the union. In choosing as a domestic forum a governing body and in authorizing it to make inquiries and investigations of such a kind the rules necessarily bring about, if they do not actually contemplate, such a situation. Domestic tribunals are often constituted of persons who may, or even must, have taken some part in the matters concerning which they are called upon to exercise their quasi-judicial function. Nor do I think that it has been shown that any particular member, putting aside the general secretary, was disqualified by any interest or specific ground of bias attaching to him or to them all. But Dougherty appears to me to have assumed altogether a different position. ...It is not in accordance with the principles of natural justice to have present as a member of the tribunal a person who has promoted the charge and supports it as the prosecutor or one who is invincibly biassed against the accused as a result of his participation in the controversy, and this was the case with Dougherty. If a person

[31] (1947) 77 CLR 201.
[32] Ibid at 628.
[33] Ibid at 630-631.

> disqualified by such considerations sits with the tribunal and takes part in the decision, that is enough to vitiate it: *Dickason v. Edwards* (1910) 10 CLR 243 at 630-631.

In the latter part of the quotation Dixon J was clearly speaking of a person who was actually biased.

Starke J concurred with Dixon J. Rich J said:[34]

> In considering the question whether the proceedings of the executive council of the union were carried out in accordance with the requirements of natural justice, the rule to be applied in this case is entirely different from that which is applied to judges, magistrates or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. But where the parties choose their own tribunal the case is very different (cf. *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 QB 667 at pp 672, 673). Nevertheless Mr. Dougherty's position was impossible. He had gone beyond the necessary functions of secretary to those of an informant and prosecutor.

In *Maloney v New South Wales National Coursing Association Ltd*[35] there had been a dispute between two members of a sporting association who sought appointment as the government nominee to the Greyhound Racing Control Board. The plaintiff was not appointed. He circulated a letter highly critical of the appointee, Mr Phillips. There were other complaints about the plaintiff's conduct. He was charged before the Committee of Management under Article 10 of the Association's Rules with conduct unbecoming of a member. The Committee found the charge proved and the plaintiff was expelled from the Association by the Committee. Phillips was a member of the Committee and took part in the decision. The validity of the decision was challenged. One of the grounds was apprehended bias on the part of Mr Phillips. The challenge was rejected.

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[34] Ibid at 618-619.
[35] [1978] 1 NSW LR 161.

Glass JA, with whom Hutley and Hope JJA agreed, cited the passages I have referred to in *Australian Workers Union v Bowen (No 2)* and referred to other cases. He said:[36]

> The passages I have quoted from these various decisions furnish, in my view, adequate support for the proposition that the requirements of natural justice are in some respects different where domestic tribunals are concerned. They also adumbrate the reasons why this is so. In the administration of justice by courts proper, and those acting in a similar capacity, public policy requires that there should be no doubt about the purity of that administration: *Allinson v General Council of Medical Education and Registration*, per Lord Esher M.R. The rules being enforced have no consensual basis. The parties have not chosen the tribunal. The judges and those being judged are drawn from two groups of people so numerous and so placed in relation to each other that it is not only desirable, but also eminently feasible, to insist that the former should be purged of all bias towards the latter, whether real or apprehended. Domestic tribunals are usually established in circumstances which are radically different. The members, generally speaking, have agreed to abide by a set of rules and the authority of a committee to enforce them, if necessary by expulsion. The committee members cannot, in the nature of things, divest themselves of the manifold predilections and prejudices resulting from past associations with members. Apprehension of bias could be generated in all kinds of ways. If it was a disqualifying consideration, the enforcement of the consensual rules would be largely unworkable. There may be some circumstances where a suspicion of bias would operate to disqualify a member of a domestic tribunal. But generally speaking it does not so operate and, in particular, it cannot operate with respect to tribunals such as the set up by Art. 10 in the articles of the defendant association: cf. SA de Smith, *Judicial Review of Administrative Action*, 3rd ed., p. 232. (Footnote omitted).

His Honour went on to observe that a domestic tribunal must generally observe the essential rules of natural justice, including those relating to disqualification for actual bias, unless the rules clearly dispense with such requirements. He concluded, however:[37]

> ... I am of opinion that suspected bias on the part of a member of a domestic tribunal such as the committee of the defendant association does not disqualify him, even if there be no rule which expressly, or by implication, so provides.

If he was speaking now, the Judge would refer, of course, to reasonable apprehension of bias rather than suspected bias.

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[36] Ibid at 170-171.
[37] Ibid at 171.

While there are obvious differences between a committee of management and the Appellate Tribunal, at least in respect of its role under sections 30(c) and 63(1) of the Constitution, the situation is analogous. It is elected under a consensual compact by members of General Synod to resolve questions affecting the Synod's powers and involving the interpretation of its Canons and of the Constitution. The Tribunal's members cannot be insulated from many of the controversies which the Tribunal may be called upon to resolve.

In the circumstances which I have described and subject to one qualification mentioned below, there is nothing in the Constitution to suggest that the principles applicable to disqualification on the ground of apprehended bias have any application to members of the Appellate Tribunal. The qualification is contained in section 57(2) of the Constitution[38] which has no application in these circumstances. I therefore conclude that the rules relating to disqualification on the ground of apprehended bias have no application in this case. That does not mean that other rules of natural justice, including disqualification for actual bias, do not apply to proceedings in the Tribunal.

Notwithstanding that conclusion, I am prepared to treat the submission of the Synod of the Diocese of Wangaratta and Province of Victoria on the basis that the rules do apply with their full force.

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[38] "No party to an appeal shall be a member of the tribunal for any purpose of the appeal and his place shall be filled for the purpose of the appeal by the other members co-opting a person qualified for the office."

Application of the Rules

If the conventional rules for disqualification on the ground of bias apply, the guiding principle is that already referred to and approved by the High Court in *Ebner v Official Trustee in Bankruptcy*; *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd.*[39]

In the application of that principle, it is equally clear, however, that an apprehension that a judge may decide the case adversely to a party does not require that the judge disqualify himself. In *Re JRL; Ex parte CJL.*[40] Mason J said:[41]

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as *Watson*[42] and *Livesey*[43] has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group*[44]; *Watson*[45]; *Re Lusink; Ex parte Shaw.*[46]

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[39] (2001) 205 CLR 337 at 344.
[40] (1986) 161 CLR 342.
[41] Ibid at 352.
[42] (1976) 136 CLR 248.
[43] (1983) 151 CLR 288.
[44] (1969) 122 CLR 546, at 553-554.
[45] (1976) 136 CLR at 262.
[46] (1980) 55 ALJR 12, at 14; 32 ALR 47 at 50-51.

That passage was quoted with approval in the joint judgment of the High Court in *Re Polites; Ex parte Hoyts Corporation Pty Ltd.*[47]

In *The Queen v The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited*[48] a question was raised as to the ability of a Commissioner of the Industrial Commission of South Australia to sit on an application for insertion in an industrial award of provisions consequent upon the redundancy of employees, the Commissioner having previously been party to the report of a political party as to the provision that should be made in such situations. He was held not to be disqualified from sitting on the application.

In the course of his judgment Bray CJ said:[49]

> [I]t is inevitable that many questions should come before a tribunal to which the person constituting the tribunal has given previous consideration and has, perhaps, come to some tentative view. Judges are often in this position with regard to controverted legal doctrine. This situation does not in itself necessarily disqualify. In *Reg v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty Ltd*[50] the High Court said,
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> > The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'preconceived opinions – though it is unfortunate that a judge should have any – do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded': per Charles J, *Reg v London County Council; Ex parte Empire Theatre.*[51]
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> Mr Perry suggested that this passage is unreliable because the learned Judges had in mind the reasonable likelihood of bias test rather than the reasonable suspicion of bias test. I am not sure that that is right, but, in any event, the inherent nature of bias is not

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[47] (1991) 173 CLR 78, at 88 Brennan, Gaudron and McHugh JJ.
[48] (1978) 18 SASR 65.
[49] Ibid at 70-71.
[50] (1953) 88 CLR 100 at 116.
[51] (1894) 71 LT 638 at 639.

involved in the choice between the two tests. And in the *Angliss Group* case[52], which undoubtedly applied the correct test, the learned Judge said at pp 553-554:

> Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it.

King J agreed with the Chief Justice. Zelling J said:[53]

> First, the mere possession of a tentative point of view is not enough to disqualify: see the *Angliss* case[54], and the judgment of Wilson J of the Supreme Court of Manitoba in *The Queen v Pickersgill and Another; Ex parte Smith*[55].
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> Secondly, the holding of preconceived opinions is not enough to disqualify provided that the opinion can be changed by the possession of an open mind and by the ability of the hearer to decide even against his preconceived opinion at the end of the day: see the judgment of the Court of Appeal of New Zealand in *Turner and Others v Allison and Others*[56]; the judgment of Hughes J of the Supreme Court of Saskatchewan in *Bateman v McKay and Others*[57], and the judgment of Moller J in *Whitford Residents and Ratepayers Association Inc v Manukau City Corporation.*[58]
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> Thirdly, the expression of very strong views on a subject, unfortunate as that is in the case of a judicial officer, will not necessarily disqualify, provided that the person holding judicial office has no closed mind on the subject. Some of the decisions go a very long way in this matter. For example the judgment of Donnelly J in chambers in the Supreme Court of Ontario in *The Queen v Menzies; Ex parte Skoff*[59], where a Magistrate had extremely strong views on the necessity for sending shoplifters to gaol, and *Ex parte Wilder*[60] where a Magistrate who had very severe views on motorists and motor cars generally was not disqualified from adjudicating in traffic cases. How these last-mentioned cases would stand with the development of the law in the recent past as to suspicion of bias I need not here decide. It is perhaps sufficient to say that they show the limits of disqualification rather than what is ideally desirable in a judicial officer.

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[52] (1969) 122 CLR 546.
[53] *The Queen v The Industrial Commission of South Australia*; Ex parte Adelaide Milk Supply Co-operative Limited (1978) 18 SASR 65 at 75.
[54] (1969) 122 CLR 546 at 553.
[55] (1970) 14 DLR (3d) 717 at 722.
[56] [1971] NZLR 833.
[57] [1976] 4 WWR 129.
[58] [1974] 2 NZLR 340 at 346.
[59] [1970] OR 120.
[60] (1902) 66 JP 761.

In *R v Masters*[61] the New South Wales Court of Criminal Appeal[62], having referred to the judgment of Mason J in *Re JRL*[63] and to other authorities said:[64]

> The effect of those unanimous pronouncements was clear. The fact that a judge has decided an issue in a particular way, and is likely to decide it in the same way when it arises again, does not amount to pre-judgment which may require him to disqualify himself in order to avoid an apprehension of bias. The reasonable apprehension which should lead to disqualification must be that the judge will not decide the case impartially or without prejudice, not simply that he or she will decide the case adversely to one party.

In *Kartinyeri v The Commonwealth (No. 2)*[65] the complaint was that Callinan J, when at the bar, had previously provided an opinion to the Senate Legal and Constitutional Affairs Committee on the very issues that were before the court in the litigation in question. He declined to disqualify himself. However, as appears from the report of the ultimate decision in the case[66], Callinan J heard full argument but did not deliver a judgment, presumably because of something which arose in the course of argument or on consideration of the judgment. However, the principles on which His Honour's earlier decision was made, remain valid and effective.

Having noted what Mason J said in *Re JRL* and having noted that other judges in the case with which he was dealing had publicly expressed views as to the application of section 51(xxvi) of the Constitution, being highly relevant to the issue to be decided, Callinan J said:[67]

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[61] (1992) 26 NSWLR 450.
[62] Hunt CJ at CL, Allen and Badgery-Parker JJ.
[63] *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.
[64] (1992) 26 NSWLR 450 at 471.
[65] (1998) 72 ALJR 1334.
[66] *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 347.
[67] *Kartinyeri v The Commonwealth* (No. 2) (1998) 72 ALJR 1334 at 1336, [23]-[24].

> Most judges on first appointment to the bench come from active practice as lawyers. In the course of a long career a lawyer is bound to have expressed opinions on the meaning and effect of statutes which will fall for consideration by a court to which such a lawyer is appointed.
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> I do not think that the expression of an opinion as to a legal matter, whether as a practising lawyer or as a judge on a prior occasion, will ordinarily of itself give rise to a reasonable apprehension of bias according to the relevant test. Mason J in the passage I have already quoted[68] points out that the making of a previous decision by a judge on issues of *fact* and law, although perhaps generating an expectation of a particular outcome, does not mean that the judge will not be impartial and unprejudiced in the relevant sense.

He went on to say, however:[69]

> My position is, I think, quite different from that of a person who, before coming to the bench, has been directly involved in the preparation of legislation that has to be construed by the Court, and who has taken active steps as principal law officer of the Commonwealth to seek to ensure the passage of a bill and to propound to the Governor-General the Senate's failure to pass it as a basis for a double dissolution. These were some of the circumstances that led Murphy J to stand aside in *Victoria v The Commonwealth and Connor.*[70] There were other closely related steps taken by his Honour there when he was the Attorney-General concerning that Act.[71]

However, the reference currently before the Appellate Tribunal does not require legislation in which I may have been involved to be construed by the Tribunal. Rather, it involves the construction of proviso (a) to section 30 of the Constitution. Callinan J went on to point out:[72]

> There is precedent for the participation by a judge in a case in which he has been directly involved when the issue is a constitutional one. In *The Commonwealth v Colonial Combing, Spinning Weaving Co Ltd,*[73] two members of the Court had, when at the bar, been counsel for opposing parties in the litigation. They sat on the case but confined the hearing in which they participated to the constitutional questions.
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> The special circumstance in that case was that unless those two judges did sit, there was a real doubt whether any effective decision could have been given.
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> Some members of this Court have come to it directly from a career in politics and in government. Inevitably, in Cabinet and in the Party Room, they must have had a very

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[68] *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352.
[69] Ibid at 1337, [29].
[70] (1975) 134 CLR 81.
[71] See "High Court Practice as to Eligibility of Judges to Sit in a Case" (1975) 49 *Australian Law Journal* 110.
[72] *Kartinyeri v The Commonwealth* (No. 2) (1998) 72 ALJR 1334 at 1337, [31]-[33].
[73] (1922) 31 CLR 421.

> close association with members of the Government whose legislation they have had from time to time to interpret. Sometimes the legislation may be in implementation of long-standing policy to which the former politician has subscribed and has perhaps even advocated. A particular association of itself, and even a current, proper one which observes the punctiliousness required in respect of a case and issues actually before, or which may be before the Court, should not ordinarily give rise to a reasonable apprehension of bias.

Finally, in *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation*[74], Hayne J made the following pertinent observation:[75]

> The principles about apprehension of bias must be understood in the context of a judicial system founded in precedent and directed to establishing, and maintaining, consistency of judicial decision so that like cases are treated alike and principles of law are applied uniformly. The bare fact that a judicial officer has earlier expressed an opinion on questions of law will therefore seldom, if ever, warrant a conclusion of appearance of bias, no matter how important that opinion may have been to the disposition of the past case or how important it may be to the outcome of the instant case. Fidelity to precedent and consistency may make it very likely that the same opinion about a question of law will be expressed in both cases. But that stops well short of saying that the judicial officer will not listen to and properly consider arguments against the earlier holding. As Lush J said in *Ewert v Lonie* [1972] VR 308 at 311-12:
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> > "Every reasonable man knows that consistency in decision is one of the aims of judicial or quasi-judicial institutions, but if he is exercising his quality of reasonableness he does not suppose that a tribunal will refuse to entertain or will fail to give proper attention to a submission opposed to its former decision merely because it is so opposed. In this case, the reasonable onlooker might have thought that the appellants would not have much chance of succeeding, but this is not the same thing as feeling or believing that they would not get a proper hearing. It is not a characteristic of the law's reasonable man either to be irrationally suspicious of every institution or authority or to think that every cynical appraisal represents an absolute truth."
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> The "fair and unprejudiced mind" which must be brought to bear upon the determination of litigation is, as the Court said in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 554, "not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it".

On what is essentially a legal and not a theological question in this case, it is obviously desirable that the full complement of lay members of the Tribunal sit on a question involving the proper interpretation of the Constitution. Leaving that aside, however, even if the conventional rules as to disqualification on the

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[74] (1999) 166 ALR 302.
[75] Ibid at 307, [12].

ground of apprehended bias were to apply to a member of the Appellate Tribunal in a case much as the present, considering the relevant authorities as to what does constitute bias in such circumstances, I do not consider that any past activity on my part calls for my disqualification to participate in a decision on what is essentially a question of law relating to the interpretation of the Constitution. Whatever views I may have been party to concerning the Special Tribunal Canon will not prevent me from properly considering the arguments that are put on the hearing of these references or from deciding the references, as I must, according to law. There can be no reasonable apprehension that I will not do justice, to the best of my ability, in determining the questions before the Tribunal.

Accordingly, I do not propose to accede to the request to disqualify myself from hearing or determining the questions.

SCHEDULE 2

IN THE APPELLATE TRIBUNAL

REFERENCES UNDER S 30 OF THE CONSTITUTION

REASONS OF THE PRESIDENT ON APPLICATIONS THAT HE NOT PARTICIPATE IN THE REFERENCES

1. These reasons are given for my decision not to accede to the requests from Victoria that I not participate in the hearing of the references under s 30 of the Constitution into the Special Tribunal Canon 2004 and the National Register Canon.

2. I have read in draft the reasons of Justice David Bleby given in respect of a similar application made in respect of his participation.

3. I agree with everything that His Honour has said.

4. Normally, I am of the view that it serves the church best if only one set of reasons is given for a decision if that is at all possible. However, despite my agreement with His Honour, I consider I need to give some reasons of my own as, strictly speaking, there are two separate applications, one in respect of Bleby J and the other concerning myself.

5. First, I must make it clear that I am in entire agreement with the view, adopted by this Tribunal many years ago and expounded by Bleby J in his reasons that a decision on whether or not a member should recuse is for that member alone to decide, not the full Tribunal.

6. Secondly, many years ago, Bishop Alfred Holland pointed out when asked to recuse because of a statement he had made as a Bishop on an issue, that the church must have always have anticipated that an Episcopal member of the Tribunal would be expected to have been leading his people on all issues. Thus, the mere fact that he had made a statement

as a bishop would not in itself disqualify a bishop from sitting on the Tribunal.

7. Though for reasons I am about to give it is unnecessary to resolve this matter finally in the present reference, I consider that the same principles may well apply to the legal members of the Tribunal. The Church appoints lawyers to the Tribunal who are active members of the various Dioceses. It could hardly be expected that those lawyers should be muzzled from advising their bishops and diocesan councils on issues on the chance that the issue might one day come before the Tribunal.

8. Indeed this principle flows through trust law so that if a person appoints a trustee who is his business partner, he must expect that the partner will continue in his other role and the fiduciary obligation of the trustee is modified accordingly The Privy Council held this to be so in *Hordern v Hordern [1910] AC 465.*

9. I acknowledge that I was a member of the Church Law Commission which prepared the drafts of the canons under review. I was also a member of the Standing Committee of the Diocese of Sydney which proposed that the canon affected the welfare and good government of the diocese and am still a member of that committee. I was also a member of the Standing Committee of General Synod which declined to advise the Primate that he should accept the view of the Diocese of Sydney. Despite what I have said in paragraph 7 above, as far as I am aware, I did not participate or vote in either committee on the issue, though I may have moved or seconded formal resolutions.

10. My work in the Church Law Commission also did not involve consideration of the present point.

11. The point involved in the present reference is one of law and construction. Even had I been more involved in the bodies referred to in 9, I would still not have considered that I needed to recuse on this reference.

12. For the above reasons and those put forward by Bleby J, I decline to stand aside.

13. A Mr Relton also made application that I disqualify myself. He is not a person who has been given leave to be a party to the reference, further, he is not a person who has any official capacity in any dioceses of this church.

14. I do not consider that it is appropriate that the Tribunal consider such submissions, unless they raise matters which should be communicated to the parties for their reaction. Mr Relton's submissions are not in this category.

PW YOUNG

SCHEDULE 3

The following five pages consist of copies of the References.

PRIMATE OF AUSTRALIA

14 December 2005

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal
Anglican Church of Australia
Judges' Chambers
Supreme Court NSW
Queen's Square SYDNEY NSW 2000

Dear Justice Young

Reference to the Appellate Tribunal of the Anglican Church of Australia in relation to the Diocese of Sydney and the Special Tribunal Canon No. 7, 2004

By a letter dated 9 June 2005 addressed to the President of the General Synod, the Diocesan Secretary of the Diocese of Sydney gave notice under Section 30 (c) of the Constitution of the Anglican Church of Australia that on 30 May 2005 Standing Committee of the Diocese of Sydney declared its opinion that the provisions of the Special Tribunal Canon No. 7, 2004 affect the order and good government of the Church within the Diocese of Sydney.

The Standing Committee of General Synod at its meeting on 18 and 19 November 2005 resolved as follows [SC2005/3/046 relevantly] –

> That the Standing Committee not advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney concerning the Special Tribunal Canon 2004.

As President of the General Synod of the Anglican Church of Australia, I now refer the question raised by the said opinion to the Appellate Tribunal for its determination pursuant to Section 30 (c) (iii) of the Constitution.

Yours sincerely

+Phillip Brisbane

The Most Reverend Dr Phillip Aspinall
Primate of Australia

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PRIMATE
OF AUSTRALIA

21 March 2006

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal
Anglican Church of Australia
Judges' Chambers
Supreme Court NSW
Queen's Square SYDNEY NSW 2000

Dear Justice Young

Reference to the Appellate Tribunal of the Anglican Church of Australia in relation to the Diocese of Wangaratta and the Special Tribunal Canon No. 7, 2004

By a letter dated 15 December 2005 addressed to the President of the General Synod, the Registrar of the Diocese of Wangaratta gave notice under Section 30 (c) of the Constitution of the Anglican Church of Australia that on 6 December 2005 Bishop in Council of the Diocese of Wangaratta declared its opinion that the provisions of the Special Tribunal Canon No. 7, 2004 affect the order and good governance of the Church within the Diocese of Wangaratta.

The Standing Committee of General Synod at its meeting in March 2006 resolved as follows –

> That the Standing Committee not advise the President that it agrees with the opinion of the Bishop in Council of the Diocese of Wangaratta concerning the Special Tribunal Canon 2004.

As President of the General Synod of the Anglican Church of Australia, I now refer the question raised by the said opinion to the Appellate Tribunal for its determination pursuant to Section 30 (c) (iii) of the Constitution.

Yours sincerely

+ Phillip Brisbane

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PRIMATE OF AUSTRALIA

8 February 2006

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal
Anglican Church of Australia
Judges' Chambers, Supreme Court
GPO Box 3
SYDNEY NSW 2001

Dear Justice Young

Reference to the Appellate Tribunal of the Anglican Church of Australia in relation to the Victorian Provincial Council and the Special Tribunal Canon No. 07, 2004

The Right Reverend Andrew Curnow, acting Metropolitan of the Province of Victoria, wrote to me as Primate on 5 January 2006, conveying a resolution passed at a meeting of the Victorian Provincial Council. The resolution is as follows –

> *The Provincial Council of the Province of Victoria, pursuant to section 63 (1) of the Constitution of the Anglican Church of Australia, request that the Primate refer to the Appellate Tribunal the following question: "Does proviso (a) to section 30 of the constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General Synod coming into force in a diocese unless and until the diocese by ordinance adopts it?"*

Pursuant to section 63 (1) of the Constitution, I now refer the question set out in the above resolution to the Appellate Tribunal for determination or for an opinion as may be appropriate.

Bishop Curnow also advised that the Standing Committee of the Victorian Provincial Council meets on 26 April 2006, and wrote "(I)t would be helpful to have a response by that time."

Yours sincerely

+Phillip Brisbane

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PRIMATE OF AUSTRALIA

11 May 2006

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal
Anglican Church of Australia
Judges' Chambers, Supreme Court
GPO Box 3
SYDNEY NSW 2001

Dear Justice Young

Reference to the Appellate Tribunal of the Anglican Church of Australia in relation to the Synod of the Diocese of Wangaratta and the Special Tribunal Canon No. 07, 2004

Dr J W Pryor, Registrar of the Diocese of Wangaratta, wrote to me as Primate on 24 April 2006, conveying a resolution passed at a meeting of the Synod of the Diocese of Wangaratta. The resolution is as follows –

> The Synod of the Diocese of Wangaratta resolves, pursuant to section 63 (1) of the Constitution of the Anglican Church of Australia, to request the Primate to refer to the Appellate Tribunal the following question –
>
> *Does proviso (a) to section 30 of the Constitution of the Anglican Church of Australia preclude the Special Tribunal Canon 2004 of General Synod coming into force in a diocese unless and until the diocese by ordinance adopts it?*

Pursuant to section 63 (1) of the Constitution, I now refer the question set out in the above resolution to the Appellate Tribunal for determination or for an opinion as may be appropriate.

Yours sincerely

+Phillip Brisbane

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PRIMATE OF AUSTRALIA

14 December 2005

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal
Anglican Church of Australia
Judges' Chambers
Supreme Court NSW
Queen's Square SYDNEY NSW 2000

Dear Justice Young

Reference to the Appellate Tribunal of the Anglican Church of Australia in relation to the Diocese of Sydney and the National Register Canon No. 12, 2004

By a letter dated 9 June 2005 addressed to the President of the General Synod, the Diocesan Secretary of the Diocese of Sydney gave notice under Section 30 (c) of the Constitution of the Anglican Church of Australia that on 30 May 2005 Standing Committee of the Diocese of Sydney declared its opinion that the provisions of the National Register Canon No. 12, 2004 affect the order and good government of the Church within the Diocese of Sydney.

The Standing Committee of General Synod at its meeting on 18 and 19 November 2005 resolved as follows [SC2005/3/046 relevantly] –

> That the Standing Committee not advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney concerning the National Register Canon 2004.

As President of the General Synod of the Anglican Church of Australia, I now refer the question raised by the said opinion to the Appellate Tribunal for its determination pursuant to Section 30 (c) (iii) of the Constitution.

Yours sincerely

+Phillip Brisbane

The Most Reverend Dr Phillip Aspinall
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