

**In the Appellate Tribunal
of the Anglican Church of Australia:**

Reference in the matter of lay and diaconal presidency

Submissions of the 28 Signatories

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The Signatories

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Submissions of the 28 Signatories (the Signatories)

1. The Signatories whose names appear in the schedule make the following submissions on the questions the subject of the Reference in accordance with the directions of the Tribunal given on 20 August 2009. These submissions address the legal issues raised by the questions. They do not address doctrinal matters, there having been provisional agreement at the directions hearing that no issue of doctrine arises.
2. At the directions hearing, the President directed inter alia that after submissions in reply, the Tribunal would determine whether or not there is a need for an oral hearing. The President noted the provisional view of the Tribunal and the parties that no oral hearing was necessary. The Signatories reserve their position on this question at this stage.

Background

3. The Appellate Tribunal (**the Tribunal**) in an Opinion given on 24 December 1997, held that the synod of a diocese could not permit, authorise or make provision for deacons to preside at, administer or celebrate the Holy Communion or for lay persons to preside at, administer or celebrate the Holy Communion otherwise than under or in accordance with a canon of General Synod. The Tribunal's Opinion assumed that no canon of General Synod had then authorised lay or diaconal presidency.
4. Neither since that Opinion was given nor prior to that time, has any Bill for a Canon to provide for deacons to preside at, administer or celebrate the Holy Communion (**diaconal presidency**) or for lay persons to preside at, administer or celebrate the Holy Communion (**lay presidency**) been considered at a General Synod meeting.¹
5. At the 13th meeting of the General Synod, held in 2004, resolution 74.04 declared in part (referring to this Tribunal's Opinion referred to above):

That this General Synod...

... notes the opinion of the Appellate Tribunal of this Church "that although Lay Presidency is consistent with the Constitution it requires a Canon of the General Synod to implement it", and urges any Diocesan Synod considering legislation on this matter to consider this opinion, the theological and legal issues and the implication for the unity of this Church, the Anglican Communion and our ecumenical partners...

¹ Since 1997 General Synod has met in ordinary session in 1998, 2001, 2004 and 2007.

... does not condone the practice of lay and diaconal administration/presidency at the eucharist in this Church.

6. Notwithstanding this declaration, the Synod of the Diocese of Sydney in 2008 by resolution No 27.08 passed on 20 October 2008 (**the Sydney 2008 resolution**) -
 - (a) accepted the report of Standing Committee of the Synod of the Diocese of Sydney concerning legal barriers to lay and diaconal administration of the Lord's Supper which was submitted to the 3rd session of the 47th Synod; and
 - (b) affirmed again its conviction that lay and diaconal administration of the Lord's Supper is consistent with the teaching of Scripture; and
 - (c) affirmed that the Lord's Supper in this diocese may be administered by persons other than presbyters
 and requested the Diocesan Secretary to send a copy of *The Lord's Supper in Human Hands*² to all bishops who attended the GAFCON.
7. The report referred to in part (a) of the Sydney 2008 resolution, entitled 'Lay and Diaconal Administration of Holy Communion: Legal Impediments', revised edition, (**the Sydney 2008 report**) identified three canons of General Synod which it submitted might provide the necessary authority for lay and diaconal presidency:

*... if we were to assume that the Appellate Tribunal opinion is correct, and that General Synod legislation is required to achieve the desired outcome, it is the view of the committee that several General Synod canons **may** already exist which authorise or provide for the authorisation of lay persons or deacons to administer the Lord's Supper, namely the Ordination Service for Deacons Canon 1985, the Canon Concerning Services 1992, and the Lay Assistants at Holy Communion Canon 1973.³ [emphasis added]*

8. In March 2009, Sydney Barrister Dr John Bishop, writing in the Sydney Diocesan newspaper *Southern Cross*, claimed that:

some or all of the regional Bishops have written to the churches in their regions to advise the senior ministers of the resolution of Sydney and authorizing them, on certain conditions, to introduce diaconal presidency to their churches if they see fit.⁴

² Peter Bolt, Mark Thompson, & Robert Tong, eds, *The Lord's Supper in Human Hands: Who Should Administer?*, Australian Church Record, Sydney, 2008

³ 'Lay and Diaconal Administration of Holy Communion: Legal Impediments', revised edition, presented to Sydney Synod 2008 (The Sydney Report 2008), p.164, paragraph 61.

⁴ *Southern Cross* March 2009 p. 13.

This claim was not disputed when both Bishop Davies and the Revd Canon Dr John Woodhouse responded to Dr Bishop's article in the following issue of *Southern Cross*.⁵

9. The Documents Book which accompanies these submissions contains a copy of a letter dated 21 October 2008 which the Bishop of South Sydney, Bishop Robert Forsyth, wrote to the rectors in his region, in response to the Sydney 2008 resolution and specifically section (c) stating:

However, it seems to me that there is a reasonable case that deacons presiding at the Lord's Supper is lawful. The case for unordained people presiding at the Lord's Supper is far more difficult to sustain. In the rest of my remarks. I will only deal with the question of deacons.

Although we are moving into uncharted waters, I am prepared to give my personal approval to deacons presiding at the Lord's Supper where appropriate. I do this because although it is difficult to be completely certain as to the legal right of the action, I find that the higher need for regular provision of the Lord's Supper in a proper, authorised form compels me to suggest a way forward...

10. He further described the resolution as representing "an important statement of moral force".

The Questions

11. By letter to the Primate of the Church dated 17 June, 2009, in accordance with section 63(1) of the Constitution of the Anglican Church of Australia (**the National Constitution**), the Signatories made written request of the Primate that six questions be referred to this Tribunal (**the Questions**). The Primate made that reference. The first four of the Questions relate to specific General Synod canons –

Lay Assistants at Holy Communion Canon 1973

Authorized Lay Ministry Canon 1992

Ordination Service for Deacons Canon 1985

Canon Concerning Services 1992

12. Each question asks - Does [the Canon] constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person or deacon (as the case may be) to preside at, administer or celebrate the Holy Communion? The Signatories submit that each of these questions should be answered No.

⁵ *Southern Cross*, April 2009, pp.16, 23.

13. The fifth question asks whether there is any other canon of General Synod that constitutes such an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the National Constitution. The Signatories submit that this question should be answered No.
14. The sixth question asks whether resolution No 27.08 of 2008 of the synod of the Diocese of Sydney in affirming that the Lord's Supper in the diocese may be administered by persons other than presbyters is consistent and in accordance with the Constitution of the Anglican Church of Australia and the canons made thereunder? The Signatories submit that this question should be answered No.
15. Further, the Signatories adopt and support the submissions of the Rector of the Parish of Christ Church St Laurence, Sydney, the Rector of the Parish of St John the Evangelist, Gordon, the Rector of the Parish of St John the Evangelist, Dee Why, and a Parishioner of the Parish of St John the Evangelist, Gordon (**the First Supporting Parties**).

The National Constitution

16. We set out below the provisions in the National Constitution relevant to the determination of the Questions and the proper construction of the various General Synod canons under consideration. Emphasis has been added.
17. Section 3 of the National Constitution provides:

This Church will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons in the sacred ministry.

Section 3, along with sections 1 and 2, comprise chapter 1, 'the Fundamental Declarations'.

18. Section 4 of the National Constitution relevantly provides:

This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles but has plenary authority at its own discretion to make statements as the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements forms and rules, provided all such statements, forms rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution Provided...

19. Section 5 of the National Constitution relevantly provides:

Subject to the Fundamental Declarations and the provisions of this Chapter this Church has plenary authority and power to make canons, ordinances and rules for the order and good government of the Church, and to administer the affairs thereof...

20. Section 26 of the National Constitution relevantly provides:

Subject to the terms of this Constitution Synod may make canons rules and resolutions relating to the order and good government of this Church including canons in respect of ritual, ceremonial and discipline and may make statements as to the faith of this Church...

21. Section 71 of the National Constitution relevantly provides:

- (1) *Every consensual compact and every enactment in force in the Church of England in the dioceses of Australia and Tasmania, or in any province or diocese which has become or becomes a province or diocese to which this Constitution applies shall insofar as they are not inconsistent with this Constitution, continue in force in this Church or in the province or diocese, until altered under the Constitution or under the constitution of the province or diocese.*

...

Nothing in this Constitution shall authorise the synod of a diocese or of a province to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod.

- (2) *The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution.*

22. The introduction of lay or diaconal presidency would constitute an alteration in the ritual or ceremonial of the Church. In expressing his Opinion in December 1997 on the then Reference on lay and diaconal presidency, Handley JA concluded that it was not competent for a diocesan synod to act unilaterally in such a matter. The other members of the Tribunal, except for the Bishop of Armidale, were of the same view. Handley JA observed:

The principle of priestly presidency embodied in the Book of Common Prayer and the Ordinal is a ruling principle of the Church pursuant to s 4 of the Constitution. It is also incorporated by s 71(2) as part of the law of this Church relating to faith, ritual

and ceremonial. The conduct of services of Holy Communion, and the status of the person presiding, is clearly a matter of ritual and ceremonial and hence within the third paragraph of s 71(1) which provides:

Nothing in this Constitution shall authorise the synod of a diocese or of a province to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod.

23. Each of the above provisions which confer power on General Synod to make canons imposes limitations – section 5 *Subject to the Fundamental Declarations and the provisions of this Chapter*, and section 26 *Subject to the terms of this Constitution*. Under the latter provision the National Constitution confers on the General Synod power to make canons for the order and good government of the Church, that is to say, the Church as a whole. A matter of ritual or ceremonial, of which lay or diaconal presidency is a ‘prime example’⁶ affects the Church as a whole and section 71(1) makes it clear that a diocesan synod may not make an alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod.
24. The relevant enquiry must focus on whether General Synod has made such an alteration. A construction of any General Synod canon must not do violence to the overriding requirement for consistency with the Fundamental Declarations, relevantly here, the preservation of the three orders of bishops, priests and deacons in the sacred ministry.

We now turn to each of the Questions:

The Lay Assistants at Holy Communion Canon 1973

25. The *Lay Assistants at Holy Communion Canon 1973* of General Synod (**the 1973 Canon**) was adopted by the Synod of the Diocese of Sydney through the *General Synod – Lay Assistants at Holy Communion Canon 1973 Adopting Ordinance 1973*. The Canon remains in force in the Diocese of Sydney; the Synod of the Diocese of Sydney has not adopted the *Authorized Lay Ministry Canon 1992* of General Synod, which adoption would have had the effect of repealing the *Lay Assistants at Holy Communion Canon 1973*.
26. The *Lay Assistants at Holy Communion Canon 1973*, section 1, provides–

Lay persons being communicants may be authorised by the bishop to assist the priest in the ministering and distribution of the Holy Communion.
27. The Signatories adopt and support the contentions of the First Supporting Parties in paragraphs 30 to 39 of their submissions. We reiterate the following points:

⁶ Opinion of Peter Young J in the Appellate Tribunal on 28 November 1997

- (a) The context in which the 1973 Canon was intended to operate was one where the prayer of consecration at Holy Communion was required to be offered by the priest, in accordance with the relevant form of service set out in the 1662 Book of Common Prayer or any other form of service subsequently authorized by General Synod.
 - (b) The ordinary and natural meaning of the words of section 1 of the 1973 Canon permits lay persons to help the priest with those aspects of the Holy Communion not required to be performed by the priest. The very title to the 1973 Canon, with its reference to 'lay assistants' bears this out. An assistant is an auxiliary or ancillary (who helps), not a deputy who may act in place of the principal person.
 - (c) The reference in section 1 of the 1973 Canon to authorising lay persons "to assist the priest in the ministering ... of the Holy Communion" does not on the proper construction of the section encompass authorising them to conduct the service of Holy Communion, including the consecration of the elements, in its entirety. The *Oxford English Dictionary* defines the verb 'minister' in one sense to mean 'dispense, administer (the sacrament, the elements or the like)'.⁷
28. In support of the above, we also refer to the section below in relation to diaconal presidency. Many of the arguments against diaconal presidency apply with even greater force to the arguments against lay presidency. We also make the following further observations and contentions.
29. The 1973 Canon was passed by General Synod and adopted by Sydney Synod at a time when there was no material discussion of lay presidency in the Anglican Church of Australia⁸; on the contrary, the concept of any lay ministry within the context of services of worship was in its infancy at that time. The 1662 *Book of Common Prayer*, with its assumptions of ordained ministry only, was the only authorised prayer book for the Church of England in Australia (as the Anglican Church of Australia was known until 1981) until General Synod prescribed the *Australian Prayer Book Canon* 1977 and the Church adopted *An Australian Prayer Book* in 1978.

The 1662 form of service of Holy Communion

30. "The Order of the Administration of The Lord's Supper or Holy Communion" in the 1662 *Book of Common Prayer* specifies that a priest is to undertake all roles in that service, and not just the Prayer of Consecration. The priest's role includes reading the Epistle and Gospel, as well as pronouncing the Absolution and the Blessing if the Bishop is not present. The only exceptions

⁷ 2nd ed. sense I 3 where the 1549 Book of Common Prayer is quoted: "If there be a Deacon or other priest, then shal he follow with the Chalice: and as the Priest ministereth the Sacramet of the body, so shal he ...minister the Sacramet of the bloud..."

⁸ *The Lord's Supper in Human Hands* provides a timeline of the debate in Australia from 1969 that focusses on the actions by Sydney Synod in this matter since the late 1970s.

(apart from the Bishop's role identified here) are occasional references to "ministers" which, in the context, are a clear reference to the priest. For example, the rubric before the rehearsal of the Ten Commandments identifies the priest as the officiant:

Then shall the Priest, turning to the people, rehearse distinctly all the ten commandments...

31. The heading for that rehearsal is "Minister" and the reader of each of the commandments is identified in turn as "Minister". "The Minister" is also identified as the officiant for the declaration of the Exhortation; in the context, it is clear this term refers likewise to the priest. Similarly, the term "Minister" is used in the rubric directing the order of the distribution of the consecrated bread and wine, where it clearly refers to the presiding priest:

Then shall the Minister first receive the Communion in both kinds himself and then proceed to deliver the same to the Bishops, Priests, and Deacons, in like manner...

32. The only role assigned to someone not identified as priest, bishop or minister (meaning priest) is the "Curate", who gives the notices of Holy days and the like. "Curate" in the 16th and 17th centuries referred to the priest who had the care ("cure") of the parish⁹; in modern parlance, the Incumbent or Priest-in-Charge. This terminology specifies this role for the priest in charge of the parish, as distinct from another priest or bishop who might be presiding at the service.

The 1978 forms of service of Holy Communion

33. The services of Holy Communion (First and Second Order) in *An Australian Prayer Book 1978*¹⁰ (authorised by *Australian Prayer Book Canon 1977*) clearly specify that the priest is the officiant in almost every section of the service, not just the Prayer of Consecration. In the First Order, the priest is identified as the officiant in all but three sections: section 8 ("If there is no communion, the service concludes here with the Lord's Prayer, other authorized prayers at the discretion of the minister..."), section 29 (supplying the words for "the minister" when he distributes the bread and the wine which have been consecrated) and section 31 ("When all have communicated the minister reverently places on the table what remains of the consecrated elements. If he does not then consume them... he covers them with a clean white cloth.")
34. The introduction to the Second Order service of Holy Communion says:

The parts of the service are set out for three different ministers: the presiding priest or bishop; the deacon or assisting priest;

⁹ F.L.Cross & E.A.Livingstone, *The Oxford Dictionary of the Christian Church*, third edition, Oxford University Press, Oxford, 1997, p.439.

¹⁰ *An Australian Prayer Book for use together with The Book of Common Prayer 1662, 1978*, AIO Press for the Standing Committee of the General Synod of the Church of England in Australia, Sydney, 1978.

*and other ministers or authorized assistants. The parts assigned to the deacon or assisting priest may be read by the priest, or all three parts may be read by the priest. When there is no communion, all three parts may be read by a deacon or authorized layman; save that a deacon or authorized layman says 1 John 2. 1,2 in place of the Absolution...*¹¹

35. In this order of service, the priest is again specifically identified as the officiant in almost all the sections of the service, including the Absolution and the Blessing if the Bishop is not present, and the Prayer of Thanksgiving and Consecration. The deacon is specifically identified as the officiant in inviting the congregation to confess their sins and leading them in the prayer of confession, and in pronouncing the dismissal. Ministers (which, according to the introduction, could include "authorized assistants", presumably lay people authorized by the *Lay Assistants at Holy Communion Canon 1973*) are identified as officiants in introducing and leading the prayers of the people and in distributing the consecrated elements. In contrast with the *Book of Common Prayer*, neither the First nor Second Order specifies who must read from the Holy Scriptures.
36. The 1662 service of Holy Communion, authorised under the National Constitution, was the context in which the *Lay Assistants at Holy Communion Canon 1973* came into force and was adopted by ordinance in the Diocese of Sydney. The First and Second Order services of Holy Communion in *An Australian Prayer Book 1978* were authorised by the *Australian Prayer Book Canon 1977* of General Synod and adopted by ordinance by the Diocese of Sydney, following the adoption of the *Lay Assistants at Holy Communion Canon 1973*. The Signatories submit that the specific requirement that a priest officiate in these services almost entirely, with only limited, specific provision for ministers who might be lay, negates any claim that the *Lay Assistants at Holy Communion Canon 1973* authorises lay presidency.

The 1995 forms of service of Holy Communion

37. Further, the three orders of Holy Communion in *A Prayer Book for Australia 1995*¹² provide similar specific authorization for a priest only to preside in almost all sections of the service, including the Absolution and Blessing where the Bishop is not present, and the Prayer of Thanksgiving and Consecration. Those sections where someone other than a priest is specified are, as in the 1978 services, confined to leading the prayers of the people, the introduction of the Confession, the distribution of the consecrated elements, and the dismissal.
38. None of the above forms of service, nor any canon authorising them, allow for a lay person to preside at Holy Communion. The opinion provided in the 1994 Sydney report entitled 'Lay and Diaconal Administration of The Lord's

¹¹ From *An Australian Prayer Book* (1978), p. 134.

¹² *A Prayer Book for Australia for use together with The Book of Common Prayer (1662) and An Australian Prayer Book (1978): Liturgical Resources authorised by General Synod*, Broughton Books, Sydney, 1995.

Supper', a report from a committee appointed by the Sydney Synod Standing Committee in response to Sydney Synod Resolution 16.94, recognised as much. It observed:

*...it seems clear that neither the General Synod nor the Sydney Synod intended to allow for lay people to be authorised to offer unlimited assistance to the priest in the administration of the Lord's Supper. To our knowledge it has never before been suggested that the Lay Assistants at Holy Communion Canon 1973 enables so much. It therefore seems advisable to proceed by way of making explicit and deliberate allowance for lay persons and deacons to be authorised to administer the Lord's Supper...*¹³

39. A 1976 report of Sydney Synod Standing Committee observed:

*there does not appear to be any legislation allowing or regulating a ministry of laymen in church except the 'Lay Assistants Canon 1973', which includes both men and women in its scope but does not extend beyond certain assistance in the service of Holy Communion.*¹⁴

40. The 1973 Canon, section 2, authorises "The Synod of any diocese" to set by ordinance "further limitations to the doing of any act referred to in this Canon by any lay person." The use of the word "further" confirms that the authority given to lay persons in the canon is already of a limited nature and lends support to the construction of section 1 that the Canon does not empower the bishop to authorise lay persons to preside at Holy Communion.
41. The Signatories therefore submit that the Standing Committee of the Synod of the Diocese of Sydney, in its Sydney 2008 report, is wrong to suggest that the 1973 Canon may allow for the authorization of lay persons to preside at Holy Communion. Consequently, paragraph (c) of the Sydney 2008 resolution is wrong to affirm that, as regards lay persons, the "Lord's Supper in this diocese may be administered by persons other than presbyters".
42. The Signatories submit that the 1973 Canon does not constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion.

¹³ Section 4.8 of 'Lay and Diaconal Administration of The Lord's Supper' (a report from a committee appointed by the Standing Committee) 1994. Section 6.3 of the report states: "The *Lay Assistants at Holy Communion Canon 1973* may allow for all that is envisaged in Synod resolution 16/94 with respect to lay persons and no further legislation may be required. It may be advisable for the Regulations re Lay Assistants at Holy Communion to recognise this situation."

¹⁴ 'Lay Ministry and Licensing', [Sydney] Standing Committee Report, *Year Book 1977*, p.289, quoted in *The Lord's Supper in Human Hands*, p.39

The Authorized Lay Ministry Canon 1992

43. The *Authorized Lay Ministry Canon 1992* of General Synod provides-

(a) in section 3(1)(c) that -

A lay person who is a communicant member of this Church may be authorised by the bishop of a diocese to exercise within and for this Church in that diocese one or more of the following ministries:

...
(c) *assistance to the priest in the ministration and distribution of the Holy Communion; and*

(b) in section 6 that -

The Lay Assistants at Holy Communion Canon 1973 ceases to have effect in a diocese that adopts this canon by ordinance of the synod of the diocese.

44. The *Authorized Lay Ministry Canon 1992* of General Synod (the **1992 Lay Ministry Canon**) was designed to replace the 1973 Canon; where it is adopted, by force of section 6, the 1973 Canon ceases to have effect. The Synod of the Diocese of Sydney has not adopted the 1992 Lay Ministry Canon,¹⁵ though other dioceses have.

45. The Signatories adopt and support the propositions of the First Supporting Parties in paragraphs 36 to 39 of their submission. We reiterate that, even if the Synod of the Diocese of Sydney were to adopt the 1992 Lay Ministry Canon, the Canon would not support the Sydney 2008 resolution, given that "the wording of this Canon is relevantly indistinguishable from the wording of the 1973 Canon and the same arguments apply".

46. Further, the Signatories submit that the definition of 'lay ministry' in the Lay Ministry Canon 1992 and absent from the 1973 Canon, is relevant. The definition in section 2 states:

In this Canon, 'lay ministry' means a lay ministry referred to in section 3 but does not include any function required by the discipline or doctrine of this Church to be exercised or performed only by a deacon, priest or bishop.

47. By this definition General Synod recognized the existence of functions required by the discipline or doctrine of this Church to be exercised or performed only by a deacon, priest or bishop; it excised those from the definition of lay ministry and section 3(1)(c) of the Lay Ministry Canon 1992

¹⁵ The Sydney Synod Standing Committee recommended to the 1993 Sydney Synod that consideration of "the Authorised Lay Ministry Canon 1992 (No. 17 of 1992) be deferred until after the first session of the 43rd Synod and be reconsidered in light of any decisions taken at that session in relation to the Deaconesses, Readers and Other Lay Persons Ordinance 1981. The diocese already has laws for lay ministry which may be preferable to those in this canon."

gave the lay minister the limited function of "assistance to the priest in the ministration and distribution of the Holy Communion". This context weighs against an expansive construction of that expression in the Lay Ministry Canon 1992 that those advocating lay presidency may seek to rely on.

48. The Signatories therefore submit that the 1992 Lay Ministry Canon does not constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion.

The Ordination Service for Deacons Canon 1985

49. The Signatories adopt and support the key contentions of the First Supporting Parties in sections 12 to 29 of their submissions. We reiterate the following:
 - (a) The intent of the *Ordination Service for Deacons Canon 1985* (**the Deacons Ordination Service Canon 1985**) is merely to authorise an additional form of service for the ordination of deacons, not to alter the existing functions and duties of a deacon (paragraph 23 of the submission of the First Supporting Parties);
 - (b) The ordination service in the schedule to the canon does not contain any words expressly or impliedly authorising the deacon to preside at, administer or celebrate the Holy Communion;
 - (c) The natural meaning of the words used in the Bishop's question to the deacon – "will you take your part ... in administering the sacraments" – refers, in relation to the Holy Communion, to the accepted role of the deacon as an assistant, but never the president, in the administration of that sacrament. The use of the word, 'in', rather than 'by' tells against an expansive interpretation. Similarly, the Bishop, in giving the deacon a copy of the New Testament as a sign of authority to "proclaim God's word and to *assist* (emphasis added) in the administration of the holy sacraments", authorises assistance only.
50. The Signatories submit that the specific requirements of priestly presidency in the 1662 and 1978 services of Holy Communion negate any claim that deacons may preside at these services. We refer to the discussion above in paragraphs 30 to 38.
51. Further, the Signatories submit that the scope of any authority in favour of deacons recognised in the form of ordination service prescribed by the Deacons Ordination Service Canon 1985 must be construed in the context of that form of service being one of four forms of ordination service for deacons currently authorised by the General Synod of the Church, either by the National Constitution or by specific canons. The construction must be consistent with the other canons, unless the contrary intention is clearly expressed. The other three forms of ordination service are found respectively

in the 1662 *Book of Common Prayer*, *An Australian Prayer Book* (1978) and *A Prayer Book for Australia* (1995).

52. It is proper for the Tribunal to have regard to this context and to the relevant provisions of s4 of the National Constitution, the *Australian Prayer Book Canon* 1977 and the *Prayer Book for Australia Canon* 1995¹⁶ for the purpose of construing the provisions in the Deacons Ordination Service Canon 1985 against granting any new authority in favour of deacons¹⁷. The Tribunal should be all the more cautious in finding any conferral of that authority by General Synod in a canon that merely prescribes one particular form of ordination service rather than itself purporting in clear terms to confer authority on a deacon.

The 1662 form of service of ordination of deacons

53. In "The Form and Manner of Making of Deacons" in *The Book of Common Prayer* (1662), the Bishop says:

It appertaineth to the Office of a Deacon, in the Church where he shall be appointed to serve, to assist the Priest in Divine Service, and specially when he ministereth the holy Communion, and to help him in the distribution thereof [emphasis added]...

54. The Bishop, laying hands on the candidates, gives two separate forms of authority:

Take thou Authority to execute the Office of a Deacon in the Church of God committed unto thee...

and

Take thou Authority to read the Gospel in the Church of God, and to preach the same, if thou be thereto licensed by the Bishop himself.

55. There is no reference in these authorizations to administering the sacrament, unlike in the service for priestly ordination, 'The Ordering of Priests', in the *Book of Common Prayer*, where the Bishop says:

Take thou Authority to preach the Word of God, and to minister the holy Sacraments in the Congregation, where thou shalt be lawfully appointed thereunto.

The 1978 form of service of ordination of deacons

¹⁶ The *Prayer Book for Australia Canon* 1995 has not been adopted by ordinance by the Synod of the Diocese of Sydney; therefore the ordination services in that book are not in use in that diocese.

¹⁷ For cases where the Courts have for the purposes of interpretation, looked at a number of Acts forming a scheme of legislation, see *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 726 per Griffith CJ; *Commr of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 723-4; Pearce & Geddes, *Statutory Interpretation in Australia* (6th ed 2006) [3.39]. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1977) 187 CLR 384 at 408.

56. In "The Making of Deacons" in *An Australian Prayer Book 1978*, the Bishop, in the examination of the candidates, says that

it pertains to the office of a deacon, in the church where he is appointed to serve, to assist the priest in divine service, and help him in the administration of the holy communion...
[emphasis added]

57. The Bishop again gives two forms of authority:

Take authority to execute the office of a Deacon in the church of God, now committed to you...

and

Take authority to read the Gospel in the Church of God, and to preach the same if you are so licensed by the Bishop.

58. In contrast, the authority given to priests in the Ordering of Priests in *An Australian Prayer Book* is, as with the 1662 priests' ordination service, a specific authority to administer the sacraments:

Take authority to preach the word of God, and to administer the holy sacraments in the congregation in which you shall be lawfully appointed to do so [emphasis added]

and, in laying hands on the priest, the Bishop says:

Receive the Holy Spirit for the office and work of a priest in the church of God... and be a faithful dispenser of the word of God and of his holy sacraments... [emphasis added]

The 1985 form of service of ordination of deacons

59. In the form of service in the schedule to the Deacons Ordination Service Canon 1985, the Bishop, instructing the candidates says, in part:

As deacons, you are to model your life according to the word of God. You are to be faithful in prayer, and to take your place with bishop, priest and people in public worship and at the administration of the sacraments. [emphasis added]

and in interrogating the candidates, the Bishop asks:

Will you take your part in reading the holy scriptures in the church, in teaching the doctrine of Christ, and in administering the sacraments? [emphasis added]

60. Laying hands on the candidates, the Bishop, giving a copy of the New Testament, gives the following authority:

Receive this sign of your authority to proclaim God's word and to assist in the administration of his holy sacraments. [emphasis added]

61. The service contains a rubric which the Signatories submit reinforces their contention as to the limited authority given to deacons in relation to communion:

NOTE: The newly-ordained deacons may be invited by the bishop to assist in the administration of the communion. [emphasis added]

62. The Canon providing for this service was promoted by the General Synod Liturgical Commission. In its report to the 1985 General Synod,¹⁸ the Commission stated:

The Commission believes that many desire to have a form of service for ordination which reflects a more contemporary attitude to ministry whilst at the same time being loyal to our fundamental declarations and principles of worship. The Commission had done a great deal of work on a "second form" of service for ordination prior to the publication of An Australian Prayer Book. However, because this project was not ready for publication at that time it was withheld and only a "first form" was included. This proposed Ordination Service for Deacons is therefore the first instalment in a "second form" series of services for ordination.¹⁹ The Liturgical Commission is well aware that the Diaconate is under careful consideration and that it is possible that women will be ordained to it and that some men or women may remain in a permanent Diaconate. There would be no need for any adjustment to be made to this service to cover these cases.

63. It is clear that the General Synod Liturgical Commission did not envisage that the deacon would, through this new order of service, be authorised to take on the priestly role of presiding at the Holy Communion, or any other extension of the traditional liturgical role of the deacon.

64. The Deacons Ordination Service Canon 1985, section 4 states:

Nothing in section 2 or 3 affects

- (a) the use of the Book of Common Prayer in accordance with the provisions of the Constitution; or*
- (b) the use of An Australian Prayer Book 1978 in accordance with the appropriate canon of 1977; or*
- (c) the admission of a person to an office of bishop, priest or deacon in this Church as if this canon had not been made.²⁰*

¹⁸ 'Liturgical Commission Report: Report to General Synod', *Reports to General Synod*, vol. 1 Session 1985, The Anglican Church of Australia Trust Corporation, Sydney, 1985, pp.111-112.

¹⁹ Both *An Australian Prayer Book* and *A Prayer Book for Australia* provide more than one form of service for Holy Communion and Holy Matrimony. However, neither of them provides second forms for any of the ordination services.

²⁰ Sections 2 and 3 authorise the use of the service in the schedule to the Canon.

The 1995 form of service of ordination of deacons

65. In "The Ordination of Deacons" service in *A Prayer Book for Australia* 1995, the Bishop charges the candidates:

Together with your bishop, priest and people, you are to take your place in public worship, assist in the administration of the sacraments, and play your part in the life and councils of the church... [emphasis added]

66. Examining the candidates, the Bishop asks:

Will you take your part in reading the holy Scriptures in the church and in assisting the priest to teach the doctrine of Christ and administer the sacraments? [emphasis added]

"Assisting the priest" relates both to the administration of the sacraments and to teaching the doctrine of Christ.

67. Giving authority to the newly-ordained deacon, the Bishop says:
Take authority to exercise the office and ministry of a deacon in the Church of God...

in contrast with the authority given to a newly-ordained priest:

Take authority to preach the word of God, and to minister the holy sacraments in the congregation where you are appointed [emphasis added]

68. *A Prayer Book for Australia* 1995 has an introduction to the three ordination services it provides - for deacons, priests and bishop. The first part, entitled "Concerning the Ordinal", speaks, in part, of the contemporary sharing of responsibility for ministry within the life of the parish:

The special responsibility of the priest remains, but room is made for others to exercise their gifts of ministry as all. So the phrase 'take their part' is used to describe the minister's role in a partnership with other clergy and the congregation.

69. The introduction speaks of the order of the deacon principally in terms of the contemporary revival of the diaconate as a distinctive role, that is, not solely as the forerunner to priestly ordination. In this context, it states:

The limitations on the scope of the diaconate are maintained in accordance with the Ordinal in The Book of Common Prayer...The deacon's office... involves assisting others in ministry...

70. In the second part of the introduction, headed "Liturgical principles underlying the services", point 2, states:

The language used has sought to move away from the conservative style of the Ordinal included in An Australian Prayer Book. The content has been carefully considered so as to reflect the principles which guided the Ordinal of The Book of Common Prayer...

Conclusion

71. Although the wording concerning the liturgical role of the deacon differs slightly between the four services for the ordination of deacons currently authorised for use by the General Synod of the Anglican Church of Australia, it is submitted that the meaning is essentially the same. The liturgical role of the deacon is a limited role, assisting the priest in worship services, particularly when the priest is "ministering the Holy Communion", and helping the priest to distribute the Holy Communion. This aspect is common to each of the four services, as can be seen above.
72. The authority given by the Bishop to the newly-ordained deacon does not, in any of these four services, extend to "minister[ing] the Holy Sacraments in the Congregation" as the priest is specifically authorised to do in each of the ordination of priests services currently authorised by the General Synod of the Church.
73. In the form of service in the schedule to Deacons Ordination Service Canon 1985, the deacons are instructed to take their "place" with bishop, priest and people in worship and the administration of the sacraments. In the examination, they are asked if they will take their "part" in reading the holy scriptures in the church [in worship services], teaching the doctrine of Christ, and in administering the sacraments. It is submitted that the key concept here is that the deacon will take their "part", their "place", which is the part or place of the deacon, **not** the part of the bishop, priest or people in these areas, including in the administration of the sacraments. The specific authority given to the newly-ordained deacon is to **assist in** the administration of the sacraments, the key words here being "assist in".
74. These same concepts - of the deacon taking the deacon's part in worship services and in the administration of the sacraments, and of assisting in that administration - are repeated in the 1995 form of service. A construction of the canons, the subject of the Questions, which is based on these concepts of separate roles is consistent with the Fundamental Declaration in section 3 of the National Constitution for the Church to preserve the three orders of bishops, priests and deacons in the sacred ministry. A construction in favour of diaconal or, *a fortiori*, lay presidency does violence to that declaration and is repugnant to the National Constitution.
75. The Signatories submit that this comparison of all four services for the ordination of deacons currently authorised by the General Synod demonstrates that the Deacons Ordination Service Canon 1985 and its form of service are based on the same principles of diaconal duty and functions as the other three, and uses terminology that is relevantly of similar meaning. None of the other three services, it is submitted, purports to authorise the deacon to preside at the

service of Holy Communion. Nor does the Deacons Ordination Service Canon 1985 on its proper construction do so.

Baptism

76. The Sydney 2008 report, in Appendix B, offers several grounds for its claim that the Deacons Ordination Service Canon 1985 allows a deacon to preside at the Holy Communion. The principal ground seems to be the claim that the Deacons Ordination Service 1985 allows a deacon to baptise a candidate of any age, including in the presence of the priest, as distinct from the previous permission to baptise infants only, and then only in the absence of the priest (section 4),²¹ from which it is claimed that the service must also therefore permit a deacon to preside at the Holy Communion (paragraph 20).
77. The Signatories submit that, to the contrary, deacons ordained under this particular service do not have any authority to baptize, other than the traditional authority to baptize infants in the absence of the priest. Even if this is wrong, one cannot infer from the conferral of any additional authority to baptize, an authority to preside at Holy Communion. It is a complete *non sequitur*.

The meaning of 'administration'

78. Paragraphs 9, 10 and 11 of Appendix B of the Sydney Report 2008 seem to claim that deacons ordained under the Deacons Ordination Service Canon 1985 are authorised to preside at Holy Communion by the use of the word "administer" in that service where the Bishop gives the deacon authority "to assist in the administration of [God's] holy sacraments". The argument is here made that "administration" implies the entire service of Holy Communion, including the central prayer of consecration. This argument, however, overlooks the fact that the authority given to deacons in the Deacons Ordination Service Canon 1985 is an authority to "assist in" the administration, and to take their "part" in the administration of the sacraments, not to administer.
79. The Signatories therefore submit that the Deacons Ordination Service Canon 1985 does not constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon to preside at, administer or celebrate the Holy Communion.

The Canon Concerning Services 1992

80. The Signatories adopt the key proposition of the First Supporting Parties in paragraph 42 of their submission, namely that the Sydney 2008 report is

²¹ In the 1662 service, the Bishop says: "It appertaineth to the office of a Deacon... in the absence of the priest to baptize infants...". Likewise, in the 1978 Service, the Bishop says: "... it pertains to the office of a deacon ...to baptize infants when the priest is absent..."

misguided in its reliance on section 5(2) of the Canon to authorise persons other than presbyters to preside at Holy Communion, because that section only applies where there is "an occasion for which no provision is made". The canon does make provision; section 4 provides for the forms of service for the Holy Communion. Likewise, section 5(1) is concerned with forms, not functions of persons.

81. The Signatories therefore submit that the *Canon Concerning Services* 1992 of General Synod does not constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon to preside at, administer or celebrate the Holy Communion.

Other Canons of General Synod

82. The Signatories submit that there is no other Canon of General Synod that could be construed as constituting an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon or a lay person to preside at, administer or celebrate the Holy Communion. To their knowledge, no-one has thus far contended otherwise.

Resolution No 27.08 of 2008 of the Synod of the Diocese of Sydney

83. The sixth question is whether the Sydney 2008 resolution in affirming that the Lord's Supper in the diocese may be administered by persons other than presbyters is consistent and in accordance with the Constitution of the Anglican Church of Australia and the canons made thereunder? The Signatories submit the answer must be No.
84. First, they refer to the Tribunal Opinion of 24 December 1997, that the synod of a diocese cannot permit, authorise or make provision for deacons to preside at, administer or celebrate the Holy Communion or for lay persons to preside at, administer or celebrate the Holy Communion otherwise than under or in accordance with a canon of General Synod.
85. Second, they refer to the analysis above in relation to each of the General Synod canons discussed relevant to the questions, none of which on their proper construction constitute the required alteration in the ritual or ceremonial of the Church for the purposes of section 71 of the National Constitution.
86. Third, as contended above, there is absent an alteration in the ritual or ceremonial of the Church made by General Synod which would permit, authorise or make provision for a deacon or lay person to preside at, administer or celebrate the Holy Communion. Sydney Synod has no authority under the National Constitution to make any such alteration, given the absence

of an alteration made by General Synod with which it might conform. Section 71 of the National Constitution so provides.

87. The provisions of section 71 promote a national uniform approach. The Sydney resolution seeks to work in the opposite direction and misrepresents the true position. It does not conform with either the National Constitution or any General Synod canon. Contrary to the affirmation in the resolution, under the National Constitution and the Canons of General Synod, the Lord's Supper in any Australian diocese, including Sydney, may **not** be administered by persons other than presbyters.

Defending Lay Presidency: The question of a contradictor

88. Sydney Synod Standing Committee has by letter dated 17 August 2009 to the Registrar of the Tribunal declined to participate in the reference to the Tribunal concerning the Sydney 2008 resolution.
89. Bishop Glenn Davies is participating by supporting diaconal presidency but not lay presidency. Bishop Davies informed the Tribunal at its preliminary hearing and directions conference that the Archbishop of Sydney has stated that he has no intention of authorising lay persons to administer Holy Communion.
90. Bishop Davies argued at the directions hearing held on 20 August 2009, that without any authorization by the Archbishop of Sydney, the Sydney 2008 resolution was no more than the majority opinion of the Synod at the time the resolution was passed.²²
91. At the directions hearing, the President of the Tribunal, Mr Justice Peter Young, raised the issue of whether the matter of lay presidency would be able to be addressed in the absence of a contradictor. He suggested the Signatories find a contradictor. He ruled that he would "allow a contradictor to lodge written submissions at the same time as Bishop Davies' submissions are due", that is, 20 January 2010.

The issues

92. The foregoing raises the following issues-
 - (a) Is the present reference in truth a case where there is no contradictor?
 - (b) Has the Tribunal jurisdiction to deal with the issue of lay presidency in the absence of a contradictor?
 - (c) If the Tribunal has jurisdiction, has it the discretion to decline to deal with the issue in the absence of a contradictor?

²² The Primate of the Anglican Church of Australia informed the Standing Committee of General Synod at its meeting on 13 February 2009 that he had asked the Archbishop of Sydney in writing to "do what he could to postpone any action on the resolution, and use his office to ensure as far as possible that others within the diocese also refrain from acting, until the bishops have an opportunity to discuss the matter at their 2009 meeting on 20-24 March". At that time no such undertaking had been given by Archbishop Jensen to the Primate. Subsequently, the bishops at their meeting urged a reference to the Appellate Tribunal.

(d) If so, what principles are relevant to the exercise of that discretion?

Is there no contradictor?

93. The present case is not a clear case where there is no contradictor. The Diocese of Sydney and its Archbishop clearly have notice of the Reference and its impingement on them. Although no party has to date given notice of intention to file submissions in support of lay presidency, elsewhere (as mentioned above) the Sydney Synod has taken a position on the matter, which contradicts that of the Signatories.
94. The Sydney Diocesan committees and individual leaders have presented substantial defences of lay presidency from biblical and doctrinal perspectives over the course of the past 30 years.²³ The recorded defences of its legality under existing General Synod canons are in the Sydney 2008 Report, in a 1994 report to Sydney Standing Committee and to a lesser degree, in an article written by the Principal of Moore Theological College, the Revd Canon Dr John Woodhouse, a member of the committee which prepared the Sydney 2008 report. The relevant extract from the reports, and the transcript of the Woodhouse article, are provided to the Tribunal in the schedule to assist the Tribunal in this regard. This material exposes clearly the position of those who have advocated lay presidency.
95. The Signatories submit that, in substance, the position of the Diocese of Sydney is similar to that of a defendant in an action for a declaration who has not entered an appearance but whose position or interests are known to be at variance with those of the plaintiff.
96. The Sydney 2008 report is a document that bears the authority of the Sydney Synod Standing Committee and which it may be assumed represents the substance of the Sydney case for the legality of lay presidency. The 1994 report was prepared by a committee appointed by Sydney Standing Committee in response to a resolution of Sydney Synod (resolution 16.94). Dr Woodhouse's article was published in the April 2009 edition of the Sydney Diocesan newspaper, *Southern Cross*, in response to an article in the previous edition by a Sydney lawyer, Dr John Bishop, which had argued, inter alia, that lay presidency was not legal.
97. The Signatories provide this material at the suggestion of Bishop Glenn Davies in the interests of placing before the Tribunal relevant material putting the case for lay presidency.

Jurisdiction

98. Section 63(1) of the National Constitution relevantly provides-

Whenever a question arises under this Constitution and in the manner provided and subject to the conditions imposed by this Constitution the question is referred for determination or for

²³ *The Lord's Supper in Human Hands* provides a comprehensive outline of the documentation to date.

an opinion to the Appellate Tribunal the Tribunal shall have jurisdiction to hear and determine the same or to give its opinion as the case may require....

Section 63(2) empowers the Tribunal to-

... direct that any synod person or class of persons or association claiming to be interested in the question shall be notified of the hearing and be entitled to appear or to be represented thereat.

The questions the subject of the present reference are questions arising under the National Constitution.

99. In the common law of the civil courts, the absence of a contradictor in a matter where the court is asked to make a declaration more often goes to the discretion of the court to make the order sought rather than to the jurisdiction of the Court.²⁴ The context of the Tribunal acting under s63 of the National Constitution is quite different from that of litigation where the Court quells a controversy between parties and determines rights and liabilities. The relevant purpose of the process in s63 is for the Tribunal to hear and determine questions arising under the National Constitution or give its opinion on them²⁵.
100. There is no provision in the National Constitution or any principle of law which would preclude the Tribunal from hearing and determining the questions by reason only that no person has filed submissions contradicting a position being taken by another party or that no such person intends to appear to argue the matter. It cannot be the intention of the National Constitution that a person or body may frustrate the Tribunal process in s63 merely by refraining from participating in that process. As a general proposition, the mere absence of a person or body participating in the process cannot itself be determinative of the Tribunal's approach to addressing or not addressing a question. Otherwise wilful abstention from participation would work unfairly to deny the intended operation of s63 of the National Constitution.
101. The Signatories contend that the Tribunal has jurisdiction to deal with the issue of lay presidency even if there is no contradictor.

Discretion and relevant principles

102. If the question of lay presidency is properly one arising under the National Constitution, as the Signatories contend, the Tribunal is under a duty, it is submitted, to hear and determine the same or to give its opinion. The Tribunal

²⁴ See for example *CE Heath v Pyramid Building Society* [1997] 2 VR 256 per Phillips JA at 284; Zamir & Woolf, *The Declaratory Judgment* (2nd ed 1993) [4.033]

²⁵ In the references concerning the Special Tribunal Canon 2004, Bleby J and Young J declined the application on behalf of the Diocese of Wangaratta and the Province of Victoria, to recuse themselves for ostensible bias ruling inter alia that the principle of disqualification for ostensible bias, applicable to courts, was not applicable to the Tribunal.

is constituted by the National Constitution to discharge that function. It does not have a discretion to decline to deal with the matter.

103. If contrary to that contention, the Tribunal does have a discretion and the principles relevant to the exercise of a discretion of the Court to grant declaratory relief²⁶ offer guidance, those principles, broadly speaking, would hold that –
 - (a) the matter in which the declaration is sought must raise a real question, not a theoretical or abstract question; and
 - (b) the matter must be of real importance to the parties.
104. The Signatories make two broad contentions. First, the question of lay presidency is a real and not a theoretical or abstract question. The question has arisen out of specific events and concrete facts. The material referred to above in paragraphs 8 and 9 and in the following two paragraphs and the schedule bears this out. The Sydney 2008 resolution has a persuasive force within the Diocese of Sydney and perhaps beyond - an 'important statement of moral force' according to Bishop Robert Forsyth; it is no less significant because the resolution lacks the force of a binding Synod ordinance.
105. By way of example, we rely in support on the weekly newsletters of the Senior Minister at St Thomas' North Sydney, Simon Manchester, on 26 October –

"a decision was made at our Anglican Synod (Assembly) last week which could change our church gatherings considerably. It was agreed (by a large majority of the six or seven hundred members) to allow the administration of communion by lay or diaconal persons.."

and on 2 November 2008 –

"The Parish Council last Monday voted to allow clergy at St Thomas' who are deacons (and approved by the Rector of St Thomas') to administer Communion at St Thomas'. Since we allow them to handle the Word of God we should trust them to read/pray the set words for the Lord's Supper!"

A copy of the newsletters as posted on the Parish website appears in the Documents Book.

106. We also rely on the statutory declaration of the Revd John Reynolds Bunyan (included in the Documents Book) in substance to the effect that-
 - (a) Following the passing of the Sydney 2008 resolution, the then Rector of Campbelltown in the diocese of Sydney, Canon Peter Stavert, published a statement in the Sunday bulletin at a service at which Mr

²⁶ *Forster v Jododex Australia Pty Ltd & Anor* (1972) 127 CLR 421 at 437 per Gibbs J; *Ainsworth & Anor v Criminal Justice Commission* (1991) 175 CLR 564 at 581-2 per Mason CJ, Dawson, Toohey and Gaudron JJ. The relevant authorities are also canvassed in the judgment of Lasry J in *Hillman v Dissanayake* [2007] VSC 426.

Bunyan was present that lay and diaconal celebration of Holy Communion was now approved;

- (b) At a subsequent Women's Guild service of Holy Communion held in St Peter's Church Campbelltown, the service was celebrated by Mr James Carter-Locke, a layman holding the title of "Honorary Assistant Minister";
- (c) Members of the Guild expressed their surprise and concern to Mr Bunyan and to others;
- (d) Mr Bunyan and at least one other person wrote to the Parish Council to express concern;
- (e) The present Acting Rector, the Rev'd Philip Bassett, has recently stated in writing that this celebration by Mr Carter-Locke was authorised by Canon Stavert;
- (f) Mr Bunyan and at least one other and possibly two other priests, were available to celebrate on that day.

The statutory declaration puts beyond doubt that lay presidency has occurred in the Diocese of Sydney in response to the passing of the Sydney 2008 resolution.

- 107. The opinion of the Tribunal on the question of lay presidency will clearly produce consequences for all in the Church²⁷; it will definitively state the legal position on the issue and will have a direct effect on every bishop of the Church, having declared their assent to the National Constitution and the Canons of the Church. The issue is not theoretical but goes directly to the discharge of the Episcopal office.
- 108. Second, the question is a matter of real importance to the Church as a whole, whichever side of the debate one takes. The meeting of the Australian bishops in March 2009 regarded the issue of lay and diaconal presidency of such significance as to urge a reference of the issue to this Tribunal.
- 109. It is also of real importance to the wider Anglican Communion. We refer to the comments of the Archbishop of Canterbury to the Primate of the Anglican Church of Australia by letter dated 1 December 2008 describing the Sydney 2008 resolution as 'an unprecedented departure within the Anglican Communion'.²⁸
- 110. It is not to the point that the practice of lay presidency has not been formalised by the Archbishop of Sydney. In the context of civil law, the courts have recognised the general principle that where there are sensible and practical

²⁷ In *Oil Basins Ltd v Commonwealth of Australia & Ors* (1993) 178 CLR 643 at 649, Dawson J said: "The question raised by the plaintiff is neither abstract nor hypothetical and the answer to that question will clearly produce consequences for the parties."

²⁸ The letter from the Archbishop of Canterbury to the Primate of the Anglican Church of Australia, as reported by the Primate to the Standing Committee of General Synod on 13 February 2009, said in part in relation to the Sydney 2008 resolution: "While I grant there is a good deal of serious theological argumentation here, it remains the case that this decision represents an unprecedented departure within the Anglican Communion. Whatever anomalies have occasionally arisen or even been tolerated, this is the first time there has been an official and public licensing of a practice generally regarded as inadmissible".

reasons for granting a declaration, the court will do so even though the events with which the declaration deals have not yet happened and may not happen²⁹.

111. It would be undesirable if the Tribunal were not to offer an opinion on the matter of lay presidency, in response to the questions directed to it in this reference, for the following reasons:
- (a) It would leave unchallenged the legal status of the Sydney 2008 resolution as both a so called important statement of moral force and an encouragement to those who would move to adopt lay presidency without the necessary legislative authority.
 - (b) It would allow unchecked the celebration of Holy Communion by a lay person as president.
 - (c) Uncertainty on the question would be likely to adversely affect relationships between bishops and between dioceses within Australia and beyond.
 - (d) It is better to have the definitive opinion of the Tribunal on the issue now lest otherwise, if later, lay presidency is declared unlawful, initiatives within the Diocese of Sydney have to be reversed with all the dislocation to pastoral relationships which that would involve.
112. For the above reasons, there is no basis in the circumstances of the present reference, for the Tribunal to decline to hear and determine the questions relating to lay presidency.

M.W. SHAND

M.C. HINES

for the Signatories

18 November 2009

²⁹ Zamir & Woolf, *op. cit* [4.075, 4.087]

SCHEDULE

From the Sydney Report 2008:

Canon Concerning Services 1992

65. This canon provides, "Subject to any regulation made from time to time by the Synod of a diocese, a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions." The canon further states, "All variations in forms of service and all forms of service used must be reverent and edifying and must not be contrary to or a departure from the doctrine of this Church."

66. A form of the Lord's Supper which did not require any particular part to be said or conducted by a presbyter would seem to be allowed by this canon, since even the Appellate Tribunal opinion implies that lay and diaconal administration of the Lord's Supper would not be contrary to or a departure from the doctrine of this Church.

Lay Assistants at Holy Communion Canon 1973

67. This canon provides, "Lay persons being communicants may be authorised by the bishop to assist the priest in the ministering and distribution of the Holy Communion."

68. The canon does not define or limit the extent to which the lay person may "assist" the priest. Limitations beyond the fact that the lay person must "assist" the priest are left to diocesan synods. **This would seem to allow for the authorisation of lay persons to assist the presbyter by administering any part or all of the Lord's Supper.**

69. **It would appear, therefore, that the canon of General Synod, deemed by the Appellate Tribunal opinion to be required, may already exist.** Notably the 1985 Deacons Canon has been passed into legislation in all dioceses of the Anglican Church of Australia. Hence for diaconal administration of the Lord's Supper, at least, there is a way forward by simply licensing deacons to administer the sacraments in accordance with their ordination responsibilities. [emphasis added]

From the 1994 Report to Sydney Standing Committee:

Lay Assistants at Holy Communion Canon 1973

4.4 As far as the Anglican Church of Australia is concerned, lay involvement in the administration of the Lord's Supper began with the Lay Assistants at Holy Communion Canon 1973. This Canon, which was adopted by the Sydney Synod in the same year, allows for lay persons to be "authorised by the bishop to assist the priest in the ministration and distribution of the Holy Communion".

4.5 The really significant change to Anglican order in the Anglican Church of Australia, as far as lay involvement in the Lord's Supper is concerned, occurred with the 1973 Canon. There a shift took place. The ministration of the Lord's Supper is now no longer restricted to the clergy only. Few may have recognised that no principle was in place which would provide any limitation on what a lay person might now be authorised to do in his/her assistance to the priest. So significant was the change that it has been suggested that the Canon may be unconstitutional (D.W.B. Robinson in an unpublished paper). It has, however, never been challenged.

4.6 What does the term "ministration" mean in this Canon? From the context "ministration" means something additional to "distribution". BCP uses the word "ministration" in several contexts. In the table of Contents the Lord's Supper is called *The Order of the Ministration of the Holy Communion*, while the title given to the liturgy itself is *The Order for the Administration of the Lord's Supper or Holy Communion*. This suggests that "ministration" and "administration" are synonyms, and in these contexts refer to the whole activity. In the Ordinal the priest is given authority to "minister the holy Sacraments", while the deacon is "to assist the Priest when he ministereth the holy Communion". To "minister" the Sacrament seems to be a general term applying to the occasion as a whole.

4.7 The Lay Assistants at Holy Communion Canon 1973 does not specify limits to the assistance which a lay person may give. The Canon allows for "the synod of any diocese by ordinance [to] set further limitations". No such ordinance has been made in Sydney. **It seems therefore that there is no reason in law to prevent the assistance which can be authorised under this Canon extending to the Prayer of Consecration.** In other words if the Canon allows for some of the rubrics in BCP to be relaxed, it is arbitrary to say that it does not allow the same for the rubric to the Prayer of Consecration.

4.8 While this Committee believes that the above argument is sound, it seems clear that neither the General Synod nor the Sydney Synod *intended* to allow for lay people to be authorised to offer unlimited assistance to the priest in the administration of the Lord's Supper. To our knowledge it has never before been suggested that the Lay Assistants at Holy Communion Canon 1973 enables so much. It therefore seems advisable to proceed by way of making explicit and deliberate allowance for lay persons and deacons to be authorised to administer the Lord's Supper (however see item 6.3).

4.9 If there is no principle to prohibit a lay person authorised under the Lay Assistants at Holy Communion Canon 1973 from any particular part of the administration of the Lord's Supper, it would follow that there is likewise no principle limiting the scope of a deacon's assistance.

[The report suggested three possible options, one of which (Option 3) was based on *The Lay Assistants at Holy Communion Canon 1973*.]

Option 3

6.3 The *Lay Assistants at Holy Communion Canon 1973* may allow for all that is envisaged in Synod resolution 16/94 with respect to lay persons and no further legislation may be required. It may be advisable for the Regulations re Lay Assistants at Holy Communion to recognise this situation. In the light of item 4.9 no further legislation may be required for diaconal administration. The Standing Committee has asked its Legal Committee for an opinion on questions related to these possibilities.

[emphasis added]

‘Three Reasons Dr Bishop is Mistaken’, *Southern Cross*, April 2009, p.16:

John Bishop has provided a careful explanation of the difficulties he sees with the motion passed by the Sydney Synod last October regarding the administration of the Lord’s Supper by lay people and deacons. There are a few points to be made in response:

1. He does not identify any prohibition in Church Law that would make lay and diaconal administration of the Lord’s Supper illegal. Indeed he does not tell us why it would require an ordinance signed by the Archbishop to make such a practice legal. This to my mind is of fundamental importance. To simply declare that something is illegal, but not point us to the law that would be broken, is problematic.
2. Legal barriers are sometimes perceived by lawyers because of questionable theological assumptions. For example, if one assumes that the essence of a “priest’s” ministry is presiding at the Eucharist then allowing lay people to administer the Lord’s Supper may be seen as compromising this office. However both the Book of Common Prayer and the New Testament do not allow that assumption. Curiously, something like this appears in Dr Bishop’s arguments where he sees that “the celebration of the Lord’s Supper by lay persons and deacons is a *quintessential expression of the priesthood of all believers*”. It is certainly no such thing. Dr Bishop’s statement assumes that celebration of the Lord’s Supper is a *priestly* activity. My point is that in this matter some legal opinions are based on *theological* errors. [Original emphasis.]
3. It is at least interesting to note that Dr Bishop proposes that a Sydney Diocesan Ordinance signed by the Archbishop is what is needed. This is contrary to the 1997 opinion of the Appellate Tribunal that a canon of General Synod would be required. There is no difficulty with Dr Bishop differing from the Appellate Tribunal opinion. However, it is not clear that Dr Bishop is consistent here. Elsewhere in his argument he seems to give that opinion much more weight.

Reference on lay and diaconal presidency

The Signatories

The Revd John Baldock	(Melbourne)
Sally Burt	(Melbourne)
Helen Carrig	(Adelaide)
Canon Dr Ray Cleary	(Melbourne)
The Revd Sue Crothers-Robertson	(Brisbane)
Alan Dann	(Brisbane)
Phillip Davies	(Canberra & Goulburn)
The Revd Dr John Davis	(Melbourne)
Bishop Godfrey Fryar	(Rockhampton)
Leigh Haywood	(Bathurst)
Canon Theresa Harvey	(Perth)
The Revd Geoffrey Hoyte	(Brisbane)
Bishop Richard Hurford	(Bathurst)
Archdeacon Dr Sarah Macneil	(Canberra & Goulburn)
Bishop David McCall	(Bunbury)
Bishop John Parkes	(Wangaratta)
Dr Muriel Porter	(Melbourne)
The Revd Canon Dr Colleen O'Reilly	(Melbourne)
Bishop William Ray	(North Queensland)
The Revd Graham Reynolds	(Melbourne)
Dean John Shepherd	(Perth)
Bishop Keith Slater	(Grafton)
The Revd Gary Smith	(Brisbane)
Archdeacon John Stead	(Canberra & Goulburn)
Bishop Douglas Stevens	(Riverina)
Archdeacon David Thornton-Wakeford	(Adelaide)
Ian Walker	(Brisbane)
Bishop Garry Weatherill	(Willochra)