

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 Synod of the Diocese of Sydney concerning the **Special Tribunal Canon 2007** 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 Synod of the Diocese of Sydney concerning the **Offences Canon Amendment Canon 2007** of General Synod.

DETERMINATION OF THE APPELLATE TRIBUNAL

To the Most Reverend Dr Phillip Aspinall, President of the General Synod of the Anglican Church of Australia

Greeting:

1. Your Grace referred to the Appellate Tribunal pursuant to s 30(c)(iii) of the Constitution questions raised by the opinion of the Synod of the Diocese of Sydney that the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney.
2. A copy of the reference appears as Schedule 1 to this determination.
3. All members of the Tribunal considered the reference. For the purposes of record, the members are The Hon Mr Justice Peter W Young AO, President, Mr Max Horton OAM, Deputy President, The Hon Justice David J Bleby, The Hon Keith Mason AC, QC, the Most Reverend Dr Phillip Aspinall, Archbishop of Brisbane, The Most Reverend Roger Herft, Archbishop of Perth and the Right Reverend Peter Bain, Bishop of Armidale.
4. Upon receipt of the reference, on behalf of the Tribunal I directed that, in view of the Tribunal's determination dated 8 March 2010 in respect of identical references arising out of the opinion of the Standing Committee of the Synod of the Diocese of Sydney in respect of the two Canons the subject of the present reference and the National Register Canon 2007:

- (a) The matter not be advertised for the purpose of inviting submissions;
 - (b) The Synod of the Diocese of Sydney be invited to deliver submissions within 21 days;
 - (c) The Standing Committee of the General Synod (SCGS) be directed to deliver any submissions within 21 days thereafter.
5. The Diocesan Secretary of the Diocese of Sydney was notified of that direction by letter dated 20 May 2010. The last day for delivering any submissions in support of the opinion of the Synod of the Diocese of Sydney was 10 June 2010. The Diocesan Secretary of the Diocese of Sydney informed the Registrar by email dated 3 June 2010 that no submission would be made by the Synod to the Tribunal. No submission was received.
6. The SCGS was also informed of the direction and that any submission by the SCGS should be lodged by 1 July 2010. A submission on behalf of the SCGS was received on 21 June 2010 alleging that the declaration of opinion by the Synod of the Diocese of Sydney was ineffective and the reference was accordingly invalid, and that if valid, neither Canon affects the order in good government of the Church in the Diocese of Sydney.
7. The Tribunal considered that on this reference no oral hearing was necessary, and it did not convene one.
8. The Tribunal considered that the reference did not involve doctrine and that it was not necessary to obtain the opinion of the House of Bishops or of a Board of Assessors under s 58 of the Constitution.
9. I have the honour to report that:
 - (a) In the circumstances the Tribunal does not consider it necessary or appropriate to rule on the validity of the reference; and
 - (b) Assuming the validity of the reference, the Tribunal's unanimous determination of the questions that arise on the reference are as follows:
 - (i) In respect of the reference of the Primate dated 18 May 2010 concerning the *Special Tribunal Canon 2007*, 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 or the church trust property of the Diocese of Sydney.
 - (ii) In respect of the reference of the Primate dated 18 May 2010 concerning the *Offences Canon Amendment Canon*

2007, 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 or the church trust property of the Diocese of Sydney.

10. The unanimous reasons of the Tribunal are contained in Schedule 2 of this determination.

Dated this 8th day of September 2010

**The Honourable Mr Justice Peter W Young AO
President of the Appellate Tribunal**

SCHEDULE 1

PRIMATE
OF AUSTRALIA

18 May 2010

The Hon Mr Justice Peter Young AO
President, Appellate Tribunal 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.

By a letter dated 4 November 2009 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 21 October 2009 the Synod of the Diocese of Sydney declared its opinion that the provisions of the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church within the Diocese of Sydney.

In accordance with s30(c)(ii) of the Constitution I sought the opinion of the Standing Committee in relation to the declarations. The Standing Committee of General Synod at its meeting on 16-18 April 2010 resolved as follows:

Without acknowledging that the Synod of the Diocese of Sydney has made a valid declaration within Section 30(c)(ii) of the Constitution, the Standing Committee resolves not to advise the President it agrees with

the opinion of the Synod of the Diocese of Sydney that the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney.

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

SCHEDULE 2

REASONS OF THE APPELLATE TRIBUNAL

Introduction

1. Although there are references concerning two Canons of the General Synod of the Anglican Church of Australia, the question of their operation and effect is the subject of one reference by the President of the General Synod to this Tribunal for determination pursuant to s 30(c)(iii) of the Constitution. It is convenient that they be dealt with together.
2. The Offences Canon Amendment Canon 2007 was passed by the General Synod of 23 October 2007.
3. The Special Tribunal Canon 2007 was passed by the General Synod on 25 October 2007.
4. On 29 June 2009 the Standing Committee of the Diocese of Sydney declared its opinion that the provisions of these two Canons and of another Canon passed at the same session of the General Synod, namely the National Register Canon 2007, affect the order and good government of the Church in the Diocese of Sydney.
5. In accordance with s 30(c)(i) of the Constitution the President of the General Synod sought the opinion of the SCGS in relation to the declarations. The SCGS resolved not to advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney.
6. The consequence of that resolution was that the President was required to and, on 3 November 2009, did refer the questions raised by

the opinion of the Standing Committee of the Diocese of Sydney to the Appellate Tribunal for its determination.

7. On 8 March 2010 the Tribunal determined, for reasons then published, that each of the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 do not affect the order and good government of the Church in the Diocese of Sydney (“the earlier determination”).
8. In the meantime, on 21 October 2009 the Synod of the Diocese of Sydney declared its opinion that the provisions of each of the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney.
9. At its meeting on 16 – 18 April 2010 the SCGS resolved that:

Without acknowledging that the Synod of the Diocese of Sydney has made a valid declaration within s 30(c)(ii) of the Constitution, the Standing Committee resolves not to advise the President that it agrees with the opinion of the Synod of the Diocese of Sydney that (the two Canons in question) affect the order and good government of the Church in the Diocese of Sydney.

The SCGS acknowledges that the reference to s 30(c)(ii) of the Constitution in the resolution is incorrect, as the declaration by the Synod of the Diocese of Sydney was made within two years of the passing of each of the two Canons in question.

10. On 18 May 2010 the Primate referred the questions raised by the opinion expressed by the Synod of the Diocese of Sydney to the Tribunal for its determination.

The Validity of the Reference

11. The SCGS submitted that where the Standing Committee of the Diocese of Sydney had declared its opinion in respect of the two Canons and the SCGS had resolved not to advise the President that it agrees with the opinion, the Tribunal should hold that a subsequent declaration of opinion to the same effect in respect of the same Canons by the Synod of the same Diocese is not effective for the purpose of s 30(c)(i) of the Constitution, and that accordingly the reference by the President of the questions raised by the opinion of the Synod of the Diocese of Sydney to this Tribunal was invalid.
12. No reasons for the declaration of its opinion were given by the Standing Committee of the Diocese of Sydney and no submissions in support of its opinion were made to this Tribunal upon the reference which followed. In the earlier determination the Tribunal nevertheless considered all relevant matters and determined that neither Canon

affected the order and good government of the Church within or the church trust property of the Diocese of Sydney.

13. No reasons for the declaration of its opinion were given by the Synod of the Diocese of Sydney in respect of either Canon, and no submissions were received from the Synod in support of its opinion upon this reference.¹ Put slightly differently, no submissions in support of the opinion differing from those on which the Tribunal acted in the previous determination have been made. As will be seen, the Tribunal has no reason to depart from its previous determination. Furthermore, the Tribunal has not had the benefit of any submissions in favour of the validity of the reference.
14. In these circumstances it would be undesirable and inappropriate to rule on the SCGS submission that the reference is invalid. The situation may arise where the Tribunal, having determined that a particular Canon does not affect the order and good government of the Church within or the church trust property of a Diocese for stated reasons, the same or some other Diocese declares its opinion that the Canon does affect such matters for quite different reasons which were not previously considered by the Tribunal. If and when that situation arises, and the question of the validity of a subsequent reference is fully argued, it may be necessary for the Tribunal to determine whether the subsequent reference is valid. However, that is not this case.

Whether either Canon affects the order and good government of the Church within or the Church Trust Property of the Diocese of Sydney

15. The Tribunal is not bound to follow its previous decisions. However, it should only depart from them in clear cases and with great caution. Decisions will have been made and actions taken at many levels throughout the Church in reliance on the Tribunal's determinations. There are therefore good policy and practical reasons why its previous decisions should be followed. In this regard the Tribunal respectfully adopts the reasons of Cox J expressed in the Reference concerned in the Ordination of Women to the Office of Deacon Canon 1985² and of Mason P expressed in the Reference concerning Women Bishops.³
16. The Tribunal has already given reasons why it considers that neither Canon the subject of these references affects the order and good government of the Church within or the church trust property of the

¹ The Tribunal has already expressed its concern at the failure of the instigator of the constitutional process provided by s 30(c) of the Constitution to make any submission in support of its opinion: see Reasons for Determination dated 8 March 2010, [9]. The Tribunal acknowledges, however, that at the time the Synod declared its opinion, this Tribunal's reasons of 8 March 2010 had not been published. As the Synod had expressed no reasons for its opinion, it is understandable that no reasons could be supplied on the hearing of this reference without another call of the Synod.

² Determination dated 28 February 1987, reasons of Cox J at 12-13.

³ Determination dated 26 September 2007, reasons of Mason P at [66]. See also Reasons for Determination under s 30(c) of the Constitution dated 8 March 2010 at [32].

Diocese of Sydney.⁴ No submission has been made that those reasons are inadequate or warrant reconsideration. No further reasons have been advanced which would qualify in any way the earlier determination of the Tribunal.

17. Accordingly, the Tribunal, to the extent that it may be necessary to do so, again determines that neither Canon the subject of these references affects the order and good government of the Church within or of the church trust property of the Diocese of Sydney.

⁴ Determination under s 30(c) of the Constitution dated 8 March 2010.