

**2009 REFERENCE TO THE APPELLATE TRIBUNAL CONCERNING THE
ADMINISTRATION OF HOLY COMMUNION AND THE LORD'S SUPPER
BY PERSONS OTHER THAN A PRIEST OR PRESBYTER**

SUBMISSION OF BISHOP GLENN N DAVIES

Introduction

1. In accordance with Section 63(1) of the Constitution of the Anglican Church of Australia ("the Constitution"), 28 members of the General Synod ("the Applicants") referred certain questions to the Appellate Tribunal as to whether any canons of General Synod authorise the administration of the Holy Communion or Lord's Supper by a layperson or deacon and whether Resolution 27/08 of the Synod of the Diocese of Sydney, affirming that persons other than a presbyter may administer the Lord's Supper, is consistent with the Constitution and the canons made thereunder.
2. On 20 August 2009 a Preliminary Conference and Directions Hearing was held in the General Synod office, where I was given leave to appear and make a submission supporting an affirmative answer to the central question in the Reference. I indicated at that Conference that I would limit my submission to supporting the proposition that there exists a General Synod Canon which authorises deacons to administer the Lord's Supper.
3. The President directed that the Applicants were to lodge written submissions by 20 November 2009. Mr Robertson Wright, the Revs Keith Dalby, Steven Salmon and Adrian Stephens ("the First Supporting Party") were also given leave to make submissions, and subsequently the Diocese of Newcastle (although representatives of the Diocese of Newcastle were not present at the Preliminary Conference) was also given similar leave. As a contradictor I was directed to make my submission by 20 January 2010.

The Central Issue

4. All parties present at the Preliminary Conference agreed that the Reference before the Appellate Tribunal is a question of law and not a question of doctrine. There is therefore no need to invoke section 58(1) of the Constitution. The Applicants' Reference recognises that the administration of the Lord's Supper by persons other than a presbyter is consistent with the Constitution (citing the Opinion of the Appellate Tribunal, 24 December 1997). While that opinion is clear and not in dispute, the Appellate Tribunal also expressed the opinion that any authorisation of the administration of the Lord's Supper by a deacon or layperson would require a General Synod Canon before a diocese could make provision for this practice. This is the central issue: does such a canon exist?
5. The Applicants raise questions of the existence of any canons which authorise either laypersons or deacons to administer the Lord's Supper, and in their submission answer the questions in the negative. However, as indicated above, I shall confine myself to the question of diaconal administration only, that is, to Question 3 of the Reference.

Does the *Ordination Service for Deacons Canon 1985* of General Synod 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?

6. The reason for restricting my comments to Question 3 is that while Resolution 27/08 of the Synod of the Diocese of Sydney expressed the opinion of the majority of members at the time of voting, the resolution has no legal force, but merely expressed a view as to what persons other than presbyters may do. While the synod accepted the view that there were no legal impediments to the administration of the Lord's Supper by persons other than presbyters, the resolution in and of itself made no change to law or custom in the diocese.¹ The report before the synod² submitted the view that deacons, if ordained in accordance with the schedule to the General Synod Ordination Service for Deacons Canon 1985 ("the 1985 Canon"), could administer the Lord's Supper and that laypersons could, if authorised by the Archbishop under the Lay Assistants at Holy Communion Canon 1973, administer the Lord's Supper.³ However, it was also made clear in the speeches in the synod debate that the Archbishop of Sydney had no intention of authorising any layperson to administer the Lord's Supper.
7. My submission to the Appellate Tribunal is that it is legal for deacons to administer⁴ the Holy Communion within the Anglican Church of Australia where they have been made deacon under the 1985 Canon, which authorises deacons to assist the priest in administering both sacraments, namely, Holy Baptism and Holy Communion. The argument may be summarised as follows.
 - (1) The Appellate Tribunal has ruled that diaconal administration of Holy Communion is consistent with the Constitution.
 - (2) The Appellate Tribunal has ruled that a General Synod Canon authorising such practice would be required before any diocese could make provision for diaconal administration of Holy Communion.

¹ "While reaffirming in principle the commitment of the diocese to authorised lay administration of the sacraments, *this implements no change in practice*, and the matter remains a legal impasse which reflects the deep theological divisions within the Anglican Church of Australia." N H Taylor, *Lay Presidency at the Eucharist*, Mowbray, London, 2009, at 189 [emphasis added]. This concurs with the final conclusion of the First Supporting Parties' Submission, at §10, viz., that the resolution was of no effect.

² The report is helpfully printed in the Applicants' Documents Book, at 2-38. The argument with special reference to deacons is found in Appendix B of that report, at 21-7.

³ The Canon Concerning Services 1992 was also advanced as another means whereby lay and diaconal administration of the Lord's Supper might be authorised.

⁴ My explanation for understanding the term "administer/administration of the Lord's Supper" to refer to the conduct of the service in its entirety may be found in Appendix B of the 2007 Report to the Synod of the Diocese of Sydney, reprinted in the Applicants' Documents Book at §§23-4.

- (3) The 1985 Canon contained a new service for the Ordination of Deacons, which was a radical revision of the Ordinal of the *Book of Common Prayer (BCP)*, an alternative to the conservative revision that was published in *An Australian Prayer Book (AAPB)* in 1978.
- (4) The 1985 service departed from the text of both *AAPB* and *BCP* with expanded functions for the deacon, notably with respect to preaching and the administration of baptism and Holy Communion.
- (5) Unlike the Ordinal of *BCP*, the deacon's responsibilities were not delineated separately with respect to each sacrament (baptise infants in the absence of the priest; help the priest in the distribution of the Holy Communion), but were coupled together in the expression "to assist in the administration of his holy sacraments", without any further qualification concerning the presence or absence of the priest.
- (6) The function of the deacon was thereby expanded to allow the deacon to baptise not only infants, but candidates of any age (regardless of the absence of the priest), although such baptisms would only be conducted under the aegis of the priest, whom the deacon was to assist.
- (7) The function of the deacon was also expanded to allow the deacon to administer Holy Communion with the same authority the deacon had to administer baptism, likewise in an assisting capacity under delegation from the priest.
- (8) There are occasions when canons have valid legal effects which are not recognised until some time later, as was the case with the change in definition of canonical fitness for bishops in the Constitution. The fact that the 1985 Canon was not previously recognised as authorising deacons to assist the priest in administering Holy Communion does not override the plain reading of the text of the service, in accordance with the principles of statutory interpretation.
- (9) The 1985 Canon satisfies the conditions of the Appellate Tribunal to permit diaconal administration in any diocese which ordains deacons in accordance with the service in the 1985 Canon.
- (10) Therefore the *Ordination Service for Deacons Canon 1985* of General Synod constitutes 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 1985 Canon

8. In 1985 a new Ordination Service for Deacons became an authorised liturgy under a canon of General Synod and has since been adopted by every diocese in

Australia.⁵ The new service was introduced on the basis of the changing shape of the diaconate and the perception that the 1978 service in *AAPB* was inadequate for setting out the responsibilities of a deacon at the end of the twentieth century.⁶ The 1985 Canon, introduced into General Synod by the chair of the Liturgical Commission, was deemed an important step in the revision of the Ordinal, which came to full expression in the 1995 canon authorising *A Prayer Book for Australia (APBA)*.⁷ In the Report of the Liturgical Commission, which accompanied the introduction of the bill it was 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. 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.⁸

9. The above report is consistent with the remarks of Bishop John Grindrod, chairman of the Liturgical Commission in 1978, when he explained the reason why only one form of the Ordinal was published in *AAPB*.

The Ordinal was prepared in both radical and conservative revisions, but canonical and legal requirements showed that it was not possible to include the radical version in this Book.⁹

It needs to be recognised at the outset that the 1985 Ordination for Deacons Service was self-consciously a “radical revision” of the Ordinal of the *BCP*.

10. Two notable changes occur in the service. First, whereas deacons could only baptise infants in the absence of the priest,¹⁰ the deacon may now baptise a candidate of any age and may do so, if appropriate, in the presence of the priest. Second, the authority to preach, which was previously dependent upon the bishop's explicit licence, is replaced by the bishop's instruction: “to preach the

⁵ A copy of the 1985 Canon is printed in the Appendix below.

⁶ In the words of Chares Sherlock: “Growth in a renewed diaconate, and the prospect of women being made deacons, led to the approval of a new service for the ordination of deacons in 1985... [which] sought to include a wider understanding of what the ministry of a deacon entails.” “The Ordinal”, *A Prayer Book for Australia: A Practical Commentary*, ed. G Varcoe, E J Dwyer, Alexandria, NSW, at 150.

⁷ Significantly, when the 1995 Prayer Book was authorised by canon, the previous 1985 Ordination of Deacons Canon was not repealed but remained in force as church law.

⁸ “Liturgical Commission Report”, *Reports to 1985 General Synod*, at 1.111.

⁹ Preface to *An Australian Prayer Book*, at 12.

¹⁰ “It appertaineth to the office of a Deacon...in the absence of the priest to baptize infants.” *BCP Ordinal*.

word of God in the place to which you are licensed.”¹¹ In other words, the authority to preach, which was not inherent in a deacon's functions in the *BCP* service,¹² is now by definition one of the functions of a deacon.¹³

11. Under the 1985 Canon, both of these changes are highlighted in the words of the bishop when he gives the deacon a copy of the New Testament: “Receive this sign of your authority to proclaim God's word and to assist in the administration of the sacraments.” These changes seem to have been widely recognised as an authorisation of the deacon to preach God's word and to administer baptism to candidates of any age, whether or not the priest is present. This represented a liturgical catch-up as many deacons had been baptising candidates other than infants, and the general recognition that there are occasions when it is appropriate for a deacon to baptise, notwithstanding the presence of the priest. However, what is novel about the wording of the 1985 service is the explicit inclusion of assisting in the administration of Holy Communion in the deacon's responsibilities.
12. On three occasions the service makes reference to the responsibilities of the deacon with respect to the administration of the Lord's Supper.

From the bishop's instruction:

You are to be faithful in prayer, and take your place with bishop, priest and people in public worship and at the administration of the sacraments.

In the bishop's questions:

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

In the bishop's authorisation:

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

13. The service refers to the administering/administration of the sacraments, whereas the individual names of each sacrament, namely “Baptism” and “Holy Communion” do not occur at all. The text of the service does not differentiate between the sacraments: what applies to one sacrament applies to the other.¹⁴ There is likewise no differentiation in the deacon's authority to assist the priest

¹¹ These words are virtually identical to those used in the Ordinal of *APBA*.

¹² The bishop's charge to the newly ordained deacon in *BCP* is: “Take authority to read the Gospel in the Church of God, and to preach the same, if thou be thereto licensed by the Bishop himself.” It is also worthy of note that the content of the preaching is the “Gospel” in *BCP*, but expanded to embrace the “word of God” in the 1985 Canon as well as in the Ordinal of *APBA*.

¹³ The form of words describing the functions of a deacon in both the 1985 Canon and *APBA* Ordinal are virtually identical, neither requiring a separate or specific licence from the bishop, whereas the words of *AAPB* resemble those of *BCP*, highlighting the nature of the conservative revision of *AAPB* and the radical revision of 1985.

¹⁴ The Constitution, while recognising that the two sacraments are not identical, readily couples them in the Fundamental Declarations. It is a strained interpretation that would seek to unravel and differentiate their administration, where the text of the 1985 Canon has placed both baptism and the Lord's Supper under the one phrase, “his holy sacraments”, when authorising the deacon to assist in their administration.

in the administration of either sacrament. Therefore no distinction ought to be made. *In neither case does the deacon act unilaterally; the deacon, who is traditionally licensed to the incumbent priest, always assists the priest and acts at the priest's direction and under delegation,*¹⁵ whether it is in administering Holy Baptism or in administering Holy Communion in accordance with the 1985 Canon.

Principles of Statutory Interpretation with respect to the 1985 Canon

14. *Butterworth's Australian Legal Dictionary* has the following entry under "Statutory interpretation".

The interpretation of the meaning, effect, and scope of statutes by the courts. The courts have developed a number of approaches and assumptions to aid in the discovery of the meaning of legislation, such as the literal approach, the golden rule, the mischief rule or the purposive approach. The purposive approach has been given pre-eminence by statute: for example (CTH) Acts Interpretation Act 1901 s 15AA; (NSW) Interpretation Act 1987 s 33. More specific common law principles of interpretation include that general words are to be given their plain and ordinary meaning unless their context necessarily implies some limitation (*Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647); where words have an accepted legal meaning, they are to be interpreted in accordance with that meaning (*Sterling Nicholas Duty Free Pty Ltd v Commonwealth* [1971] 1 NSWLR 353); words in legislation are not to be regarded as superfluous or insignificant (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97 at 102); an interpretation of an Act that will permit a person to take advantage of his or her own wrong will be resisted (*Holden v Nuttall* [1945] VLR 171); and where more than one interpretation is possible, that which will ensure validity of the Act will be preferred (*Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* at 103). Extrinsic aids to interpretation may also be used, such as parliamentary and executive materials: for example (CTH) Acts Interpretation Act 1901 s 15AB; (NSW) Interpretation Act 1987 s 34. Also known as 'statutory construction'.¹⁶

15. Section 15AA of the Acts Interpretation Act 1901 (CTH) provides

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not provide that purpose or object.¹⁷

¹⁵ It is for this reason that the expression "diaconal presidency" is an inappropriate description of what is being advanced. It is the priest who as pastor of a congregation is the president (should we wish to use such a term, despite its absence from our Anglican formularies) of the Lord's table. The deacon when administering the sacrament only does so under the aegis and delegated authority of the priest. The same is true when the deacon administers baptism.

¹⁶ *Butterworth's Australian Legal Dictionary*, PE Nygh & P Butt (eds), Butterworths, Sydney, 1997, at 1115.

¹⁷ Cited in DC Pearce & RS Geddes, *Statutory Interpretation in Australia*, 6th ed, Butterworths, Sydney, 2006, at § 2.7.

However, as Pearce & Geddes astutely observe, citing Dawson J in *Mills v Meeking* (1990) 169 CLR 214 at 235; 91 ALR 16 at 30-1: "Section 15AA and equivalent provisions do not permit the courts to ignore the actual words of a statute."¹⁸ This comment is also supported by the Full Federal Court decision in *R v L* (1994) 49 FCR 524 at 538; 122 ALR 464 at 468.

The requirement of s 15AA(1) that one construction be preferred to another can only have meaning where two constructions are otherwise open, and s 15AA(1) is not a warrant for redrafting legislation nearer to an assumed desire of the legislature: *Trevison v FCT* (1991) 101 ALR 26 at 31 per Burchett J.¹⁹

16. The Applicants contend "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."²⁰ The difficulty with this view is twofold. First, as the Applicants affirm,²¹ all parts of the *BCP* service of Holy Communion were conducted by the priest. Yet the *BCP* Ordinal specifically authorises the deacon to "read the Gospel in the Church of God" and to read the Scriptures "in the Church". It would appear, and is endorsed by universal custom, that the deacon is thus authorised to read the Gospel in the Holy Communion, *notwithstanding the rubrical direction of BCP that the priest should read it.*²² In this case, it is the ordinal that overrides the rubrics of the service of Holy Communion, not the reverse, and is consistent with my argument above.
17. Second, it assumes that diaconal administration is inconsistent with priestly presidency. This underlying assumption in the submissions of the Applicants and other supporting parties appears to affect their ability to consider the meaning of the words of the 1985 Canon and to recognise the clear development of function in diaconal ministry, which does not affect the nature of the sacred office, in accordance with the Fundamental Declarations. We have already noted the chairman of the Liturgical Commission's description of the two forms of ordination service which while planned for publication in *AAPB* in 1978 did not eventuate: the first order being a conservative revision and the second a radical revision.²³ The 1985 Canon is the fruit of the Liturgical Commission's labours to provide "the radical version"²⁴ of the Ordinal with respect to deacons. Furthermore, the view is contrary to the opinion of the Appellate Tribunal that indicated a canon of General Synod could make provision for diaconal administration.

¹⁸ Ibid at §2.9.

¹⁹ Ibid.

²⁰ Applicants' Submission, at §50.

²¹ Ibid, at §30.

²² It is interesting to note that the First English Prayer Book of 1549 allowed the deacon to read the Gospel and presumably allowed persons other than the priest ("or he that is appointed") to read the Epistle.

²³ See above, at §9.

²⁴ Bishop Grindrod's description of the revised ordination service for deacons in the Preface to *AAPB*, at 12. Compare the Liturgical Commission's Report in 1981 "Consideration has been given to the provision of a second order of a more radical nature than that at present provided in 'An Australian Prayer Book'." *Reports to 1981 General Synod*, at 1.112.

18. The submission of the Diocese of Newcastle rightly quotes the words of the Chief Justice of New South Wales who advocates an approach to statutory interpretation which is “literal in context”.

Whatever words are used it is always to be remembered that a statute has a context, it has a background and it reflects assumptions as to the circumstances in which it will operate.²⁵

However it is my contention that both the context and the text of the 1985 Canon bear the weight of the interpretation that I propose. Furthermore, the confident, yet unfounded, assertion from the Diocese of Newcastle, that the “context of the Ordination Service for Deacons Ordinance [sic] 1985 is clear beyond argument”²⁶ appears to lack any knowledge of the process of diaconal reform of which the 1985 Canon was a part.

19. Consideration of diaconal administration of the Lord's Supper was part of the conversation at General Synod in 1985. In that year the General Synod received a Report of the Lay Reader's Commission, in which one of the members of the Commission, Mr Gerald Christmas, contributed the following observations.

4. The Order of deacon is much neglected. It is currently only a temporary or transitory office and I believe that it should be developed and extended to be a permanent office to cater for those who wish to be ordained permanently as deacons within the Church to exercise a ministry [of] reading and preaching and pastoral work.

5. To extend the present order of diaconate as in 4. would avoid proliferation of offices within the church. It would utilise offices already created. I do not see the need for a lay office of Reader. It is a perpetuation of an outmoded emphasis on status which is not in keeping with modern patterns of ministry. I would favour widening ordination to include an extended diaconate. Such deacons should be enabled to preside at the Holy Communion. If a man or woman may preach I see no reason why he or she should not also preside at Communion. A deacon would, therefore, be entitled to fulfil all functions exercised by a Priest except that he could not be licensed to a separate cure of souls and will always be working under the authority of a priest in a parish situation.²⁷

While it is doubtful that all members of the Liturgical Commission were committed to promoting diaconal administration of the Lord's Supper, they were aware of the debates surrounding the expansion of the role of deacon and their carefully crafted service deliberately sought a “radical revision” of the *BCP* service, which would meet the needs of a changing diaconate.

²⁵ Cabell v Markham (1945) 148 F2d 737 at 739 cited by the Diocese of Newcastle Submission at §2 on p3.

²⁶ Diocese of Newcastle Submission, *ibid*.

²⁷ *Reports to 1985 General Synod*, at 1.337.

20. It is worthy of note that even in *AAPB* a number of changes were made to the services of *BCP*, where previously no part of the services were led by laypersons. In the First Form of Morning and Evening Prayer, the requirement for an Absolution said by the priest may be replaced by a prayer or word of assurance by a “minister” (one who is not a priest²⁸). In the second order of Holy Communion the manual acts of laying hands on the bread and the cup in the prayer of consecration are no longer required, and the fraction of the bread falls outside the prayer of consecration proper. Even in the first order Holy Communion of *AAPB* there is a modification of the *BCP* requirement that all parts of the service were to be read by the priest.²⁹ Thus the Epistle and the Gospel readings may be read by persons other than a priest, and the sermon may be preached by an authorised layperson.
21. In the second order the change is more radical with the option for the prayers for all people and for the Church throughout the world, together with the Comfortable Words, to be said by laypersons. Specific provision is also made in the second order for the deacon to introduce the Confession. The widening of non-priestly participation clearly continues to be a feature of *APBA*³⁰ as well.
22. Under *BCP* only priests could act as marriage celebrants. Yet in 1981 the General Synod expanded the role of the deacon to allow for diaconal solemnization of matrimony.³¹ While *contrary to the explicit rubrics* of *BCP*, the General Synod modified the precepts of *BCP*, without modifying any principle of doctrine and worship in allowing deacons to act as celebrants at marriage services. It is consistent with this revision of liturgical practice in

²⁸ While recognising that *BCP* uses the term “minister” as a synonym for “priest” in the service for Holy Communion, as identified by the Applicants, at §§30-31, the term also encompasses deacons in other services, for example, Morning and Evening Prayer. Compare the observation of Bishop Robinson: “All ministrations in the congregation referred to in the Prayer Book are performed by either bishops, priests or deacons, and there appears to be no concept of any ministry by individual lay persons within the congregation.” D W B Robinson, “What Theology of Order and Ministry do the Anglican Formularies Teach?”, *Lay Presidency at the Eucharist. A Theological Consultation*, published by the Standing Committee of General Synod, 1995, at 18-9. However, this is not the case in modern English liturgies, such as *AAPB*. Similarly *APBA* uses the nomenclature of “minister” to denote ordained or non-ordained persons. Compare the comments of Charles Sherlock: “‘Minister’, following the usage of *BCP* and *AAPB*, means any person (ordained or not) authorised to take a role in public worship.” “Services of the Word”, *A Prayer Book for Australia: A Practical Commentary*, ed. G Varcoe, E J Dwyer, Alexandria, NSW, at 47. However, it is doubtful that Dr Sherlock is correct in suggesting that *BCP* allowed for non-ordained persons to take any part ascribed to ministers.

²⁹ The only exception to this priestly monopoly was the declaration by the Curate (either a priest or deacon) of Holy-days and Fasting days in the coming week. As observed above, the Ordinal also allowed for the deacon to take part in the service by reading the Gospel, preaching the sermon (if licensed by the bishop) and distributing the bread and the cup, if so directed by the priest.

³⁰ For example, the introduction of the Confession in the Second Order Holy Communion includes laypersons as well as deacons.

³¹ “Matrimony shall not be solemnized according to the rites and ceremonies of this Church –
(a) unless the celebrant is a minister registered on the nomination of this Church as an authorised celebrant according to the law of the Commonwealth of Australia; ...” Solemnization of Matrimony Canon 1981, clause 3.

Australia to see a trend of changing diaconal functions and a continuation of the expansion of the role of deacon in the 1985 Canon.³²

23. Since the purpose of the 1985 Canon was a radical revision of the *BCP* Ordinal, it would be strange to find that there were no differences in the functions of the deacon, despite there being no change to the order and office of deacon. The reality is that the 1985 Canon did not transfer without amendment all the functions of the deacon from 1662. As stated by Mr Justice Handley, the preserved ministries of bishop, priest and deacon “are not defined by their functions accepted in the English reformation settlement in the 16th century.”³³
24. The Applicants maintain that the 1985 Canon does not authorise deacons to baptise candidates of any age, “other than the traditional authority to baptize infants in the absence of the priest.”³⁴ The ground for this assertion lies not in the text of the service, but in the assumption that the service could not make any substantial changes to the Ordinal. Yet as Lord Mersey, in an oft-cited passage from *Thompson v Gould & Co* [1910] AC 409 at 420, says:

It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.³⁵

Similarly Pearce & Geddes state:

Of course, courts can never literally ‘read words into legislation’, any more than they can ‘fill gaps disclosed in legislation’, as part of a process of interpretation.³⁶

³² Not only did the General Synod change the ritual and ceremonial of the Church, it authorised what was previously unauthorised by the *BCP*. Furthermore, it might well be argued that such a change was not entirely clear to all members of the Church, since the canon does not refer to deacons’ solemnizing matrimony, *per se*, but refers rather to “ministers” who are duly registered as authorised celebrants. However, it was certainly clear to the Liturgical Commission that deacons were included by the term “minister”. Their *A Prayer Book for Australia* contained two orders of the Marriage Service when it was adopted by the General Synod in 1995: the first order prescribes the celebrant as priest while the second order prescribes the celebrant as minister, that is, either a priest or deacon. It is not without interest that this expansion of the role of the deacon with respect to solemnizing matrimony was adopted by General Synod four years earlier than the expansion of the deacon’s role in the Ordination Service of 1985.

³³ Handley J, 1997 Appellate Tribunal Opinion Concerning Diaconal and Lay Presidency, at 22. Compare the Bishop of Bathurst’s comments at 87: “The submission of the House of Bishops fails to observe this [the consistency of delegated diaconal administration with the Fundamental Declarations] because of its focus on function rather than office or order.” See also the comments of Young J at 28: “Today we see a fledgling [sic] permanent diaconate, deacons in the workplace etc. No matter what the function for the time being, the office remains.”

³⁴ Applicants’ Submission, at §77. However, there seems an element of self doubt in this proposition, given their next sentence: “Even if this is wrong, one cannot infer from the conferral of any authority to baptize, an authority to preside at Holy Communion.”

³⁵ Cited in Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §2.28. “If a gap is disclosed, the remedy lies in an amending Act” and not in a “usurpation of the legislative function under the thin guise of interpretation.” Lord Simmons in *Magor and St Mellons RDC v Newport Corp* [1952] AC 189 at 191, also cited by Pearce & Geddes, *ibid*.

³⁶ *Ibid*, at §2.29. Pearce & Geddes also cite at §2.29 the opinion of Kirby J in *James Hardie & Coy Pty Ltd v Seltam Pty Ltd* (1998) 159 ALR 268 at 288: “Lord Diplock’s approach to statutory construction now prevails, not only in England, but also in Australia and throughout the common law world. Today, unless driven to the result by unyielding words, no judicial

25. The purpose of the 1985 Canon was not merely to restate the provisions of the Ordinal of *BCP* in modern English; the *AAPB* Ordinal (first order) had already done so—"a very modest translation of *BCP*."³⁷ The 1985 Canon, on the other hand, was written to address a changing diaconal ministry with changing functions, in particular an expansion of the role of the deacon in the administration of baptism, unencumbered by the constraints of *BCP*, yet consistent with the principles of doctrine and worship of *BCP*.
26. While the Applicants contend that the functions of the deacon in *BCP* *cannot* be changed by subsequent legislation,³⁸ such a claim is inconsistent with statutory interpretation. It is improper to impose upon amending legislation a judicial construction that is unchanged from that which belonged to the original legislation, ignoring the import of what has been deliberately added to or omitted from that legislation.

When we see in Acts *in pari materia* by the very same Legislature words added to those used in a prior enactment, it would be setting at nought the clear intention of the Legislature to give the latter enactment the construction judicially placed on the earlier enactment. To do so would be to read out of the statute expressions which must be held to have been deliberately inserted to make the new Act differ from the old.³⁹

27. Similarly, Viscount Simon explained the importance of particular phrases used in legislation.

When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that unless there is good reason to the contrary, the words add something which would not be there if the words were left out.⁴⁰

28. The authorising words of the bishop to the newly ordained deacon are accompanied with a copy of the New Testament.

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

satisfaction is to be derived from concluding that the manifest target of legislation has been missed."

³⁷ Gilbert Sinden's comment on the Making of Deacons Service in *AAPB, When We Meet for Worship. A Manual for using An Australian Prayer Book*, St Michael's House, Crafers, SA, 1978, at 294.

³⁸ Of course, it is understood that no change could be introduced which was inconsistent with the Constitution, but with respect to diaconal administration, the Appellate Tribunal has already ruled that such a change of practice would be consistent with the Constitution.

³⁹ *Craies on Statute Law*, 5th ed, 1952 at 133, cited approvingly by the New South Wales Arbitration Commission in *Bridge v Mattis* [1953] 52 AR (NSW) 49 at 56-7, cited by Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §3.33.

⁴⁰ *Hill v William Hill (Park Lane) Ltd* [1949] AC 530, at 546-7.

While the symbol of authority was the same as that in the *BCP Ordinal*, under the 1985 Canon the New Testament now symbolised a new authority: an authority to proclaim God's word and an authority to assist in the administration of both sacraments.

29. It is therefore unjustified and contrary to the evidence for the First Supporting Parties to claim that

from the title, preamble and contents of the Canon, it is clear that its purpose and intent was merely to authorise an additional form of service for the ordination of deacons. It would be straining the Canon as a whole to extract from it an alteration in the functions and duties of a deacon. Such a strained reading of the Canon is both inappropriate and unnecessary.⁴¹

Constitutional Objections to Authorising Deacons to Administer Holy Communion

30. The Applicants agreed at the Preliminary Conference and Directions Hearing that the issue is a legal issue and there was provisional agreement that "no issue of doctrine arises".⁴² This is consistent with the expressed view of all parties at the preliminary Conference that the Appellate Tribunal Opinion of 1997 is accepted and not being challenged; rather the existence of a General Synod Canon that would authorise diaconal administration is being tested. However, despite the reassurance at the Preliminary Conference, it is difficult to escape the inference that the Applicants' Submission considers that the 1997 Opinion, which stated that diaconal administration was consistent with the Constitution, was in error. Thus they uncritically "adopt and support the submissions"⁴³ of the First Supporting Parties, who unashamedly declare that the 1985 Canon *could not* authorise diaconal administration, because such authorisation would be contrary to the Fundamental Declarations of the Constitution.

It is clear beyond dispute in the light of section 3 of the Constitution that one of the Fundamental Declarations is that the Church will "*preserve the three orders of bishops, priests and deacons in the sacred ministry.*" The construction of the Canons apparently relied upon by the Sydney Synod undermines that Declaration as the distinctions between the order of priest and the order of deacon would effectively be abolished or reduced to the trivial if those constructions were correct. To construe those Canons as authorising diaconal celebration of the Holy Communion, let alone, lay celebration would be the antithesis of preserving the three orders of sacred ministry.⁴⁴

⁴¹ First Supporting Parties' Submission, at §12.

⁴² Applicants' Submission, at §1. "There was agreement between the parties that the questions for determination were legal questions and provisionally agreed that no issue of doctrine arises." "Report on Preliminary Conference and Directions Hearing", 20 August 2009, at 2.

⁴³ Applicants' Submission, at §15.

⁴⁴ First Supporting Parties' Submission, at §45. The argument refers to "Canons", since the argument also addresses purported canons authorising lay administration of the Lord's Supper.

31. The First Supporting Parties continue in the same vein to advance the view that any change that would authorise deacons to administer the Lord's Supper would contravene a principle of doctrine or worship laid down in the *BCP* and the 39 Articles. Their submission enumerates some of the functions of priests and deacons, in particular, ascribing the solemnization of matrimony to the priest alone, as specified by the *BCP*. However, as noted above, under the Solemnization of Matrimony Canon 1981 the General Synod expanded the role of deacon so that a deacon could solemnize matrimony.
32. Nonetheless, despite this example of the General Synod's change to the ritual and ceremonial of the *BCP*, the First Supporting Parties contend that "it may be that the Appellate Tribunal also erred in its 1997 Opinion that Lay and Diaconal celebration of the Holy Communion could be authorised by a canon of General Synod (if that were relevant)".⁴⁵ While this may be the First Supporting Parties' personal opinion, I concur that such opinion is not relevant to the current reference before the Appellate Tribunal.
33. The submission from the Diocese of Newcastle is less muted in dissenting from the 1997 Appellate Tribunal's Opinion with regard to the constitutionality of lay and diaconal administration of the Lord's Supper.

The diocese respectfully disagrees with this opinion. The diocese affirms the distinct function and nature of each office and takes the view that maintaining this distinction is one of the responsibilities conferred by the Fundamental Declarations.⁴⁶

34. The Applicants make a similar claim to the First Supporting Parties.

A construction of any General Synod canon must not do violence to the overriding requirement or consistency with the Fundamental Declarations, relevantly here, the preservation of the three orders of bishops, priests and deacons in the sacred ministry.⁴⁷

However, such a claim would on face value imply that no canon could authorise diaconal administration of the Lord's Supper, because of the alleged inconsistency of diaconal administration with the Fundamental Declarations. This point is made even more emphatically in the Applicants' consideration of the separate roles assigned to deacons and priests in the *BCP*.

A construction of the canons, the subject of the Questions, which is based on these concepts of separate roles [for priests and deacons] 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.⁴⁸

⁴⁵ First Supporting Parties' Submission, at §50.

⁴⁶ Diocese of Newcastle Submission, at §1, p2.

⁴⁷ Applicants' Submission, at §24.

⁴⁸ *Ibid*, at §74.

35. Yet these claims are entirely out of order and irrelevant to the Reference before the Tribunal.⁴⁹ For not only did the Tribunal express its opinion as to the consistency of diaconal administration with the Constitution, it even outlined the way in which diaconal administration could be seen as consistent with the office of a deacon in an assisting capacity to the incumbent priest. Mr Justice Handley states it clearly in the following words.

Section 3 preserves the threefold ministry which emerged in the Church in Apostolic times or shortly afterwards. The ministries so preserved are not defined by their functions accepted in the English reformation settlement in the 16th century. On this issue I agree generally with the opinions of Justice Young⁵⁰ and the Bishop of Bathurst.⁵¹

The role of the deacon, as defined by the Ordinal, is to assist the priest. If the priest was present at a communion service he (or she) would preside and the deacon would be relegated to the role of an assistant to the presiding priest. The situation would be otherwise if the priest was sick, on holidays, away from the parish on duty, or conducting services elsewhere. In such circumstances the deacon could “assist” the priest in fulfilling his/her ministry to the parish by conducting communion services that the priest could not conduct personally.

The duties of deacons referred to in the Ordinal include baptising infants “in the absence of the priest” so that the other sacrament of the Church can be celebrated by a delegate during the absence of the priest. However, the role of an assistant is not limited to situations in which the rector is absent. An assistant priest could assist the rector by conducting an entire communion service although the rector was present. In these circumstances I see no reason to construe s 3 as denying to the Church the power, if it saw fit, to expand the role of the deacon as an assistant to the priest in charge of the parish, to enable the deacon to preside at communion, certainly in the absence of the priest, but even if the priest is present.⁵²

36. Mr Justice Young, whom Handley J cites approvingly above, states it this way.

⁴⁹ Notwithstanding their dissent from the 1997 Appellate Tribunal Opinion, “reluctantly the Diocese [of Newcastle] recognizes that the force of the 1996 [sic] Appellate Tribunal Opinion is that this Church acting through General Synod could pass a Canon to allow Diaconal and Lay Presidency in a Diocese which adopted such Canon.” Diocese of Newcastle Submission, at §3, p4.

⁵⁰ “In my view it is impermissible to define the orders of bishops and priest and deacons in terms of function. Nor is it correct to interpret the section, as the assessors do, by forbidding this Church from altering the basic functions of bishops, priests or deacons.” Young J, 1997 Appellate Tribunal Opinion Concerning Diaconal and Lay Presidency, at 27.

⁵¹ “[I]t is a highly dubious matter to contend that the Fundamental Declarations demand the retention of any particular practice of the primitive church, including any primitive practice of who may be permitted to preside at the eucharist. Clearly the intention of the Fundamental Declarations here, as a knowledge of our contentious Constitutional history will bear out, is simply to preserve Apostolic Faith and Doctrine. Nothing is said about practice.” The Bishop of Bathurst, *ibid*, at 81.

⁵² Handley J, *ibid*, at 22.

It is said that no matter what the differing ideas of priesthood are in the Anglican church, there is a common acceptance that the role centres on the Eucharist. Not everyone would agree with this statement, because, as I note later, there is considerable support for the view that the principal role of the priest is to be the leader of Christian community in a particular place. However, even accepting its correctness, the statement does not take the argument anywhere. Any modification of the existing procedure that the General Synod may adopt in the future which removes the bishop and the priest from the primary role as president of the Eucharist may be questionable. A measure that recognized that primacy, but permitted delegation of certain eucharistic activities to lay people or deacons under the authority and aegis of the priest would be in a different category.⁵³

37. The current issue before the Appellate Tribunal, however, is merely one of law. Does the 1985 Canon permit deacons to administer the Lord's Supper? There is no place for an *a priori* argument that the Canon *cannot* legislate such permission. Having considered the language, meaning and purpose of the Canon, I now turn my attention to the specific, interpretative objections raised by the Applicants and other supporting parties, other than their *a priori* objections to the possibility of diaconal administration of Holy Communion.

Objections to Reading the 1985 Canon as Authorising Deacons to Administer Holy Communion

38. Three specific objections have been raised in the submissions.
- (1) The language of "assistance" implies that the deacon cannot administer the Holy Communion on his/her own.
 - (2) The language of "take your place" and "take your part" in the bishop's instruction and question to the deacon respectively excludes the deacon from administering Holy Communion in its entirety.
 - (3) It was not the intention of General Synod to authorise diaconal administration of Holy Communion.
39. The text of the *BCP* Ordinal states that the deacon is
- to assist the Priest in Divine Service, and specially when he ministereth the holy Communion, and to help him in the distribution thereof, and to read holy Scriptures and Homilies in the church; and to instruct the youth in the Catechism; in the absence of the priest to baptize infants; and to preach if he be admitted by the Bishop.

Clearly the deacon can only assist the priest at Holy Communion when the priest is present. However, the language of assistance also applies to the deacon's

⁵³ Young, J, *ibid*, at 28.

participation in Divine Service, to his reading of Holy Scripture or homilies in church. When the deacon reads Morning or Evening Prayer (assuming the absolution is not read), it is not necessary for the priest to be present, yet in so doing the deacon is still assisting the priest in Divine Service. When the deacon baptises an infant, he is likewise assisting the priest in Divine Service, which he can only do when the priest is absent.

40. However, there is a marked departure in the text of the 1985 Canon in the bishop's instruction to the deacon.

take your place with bishops, priests, and people in public worship and at the administration of the sacraments.

Similarly the question put by the bishop to the deacon reads:

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

There is clearly no requirement here that the bishop must be present before the deacon can take his part, and there is no express restriction on the role of the deacon in public worship or the administration of the sacraments, except the general rubric of being one who assists the priest in taking part. Hence the deacon, when reading Scripture or teaching the doctrine of Christ, does so on his/her own. The presence of the priest, like the presence of the bishop, is not necessary for the deacon's reading of Scripture or teaching of doctrine. Yet by the addition of the words "and in the administration of the sacraments" the text of the service makes no differentiation between these activities in which the deacon takes his or her part. While it is arguable that all these activities are delegated and by way of assistance to the priest, there is no justification for reading the presence of the priest into the text of the 1985 Canon. By way of contrast, the *BCP* Ordinal clearly intended the priest to be present in the service of Holy Communion, which is underlined by the exception allowed for the deacon to baptise infants only in the priest's absence.

41. In ordinary usage one person may assist another without both being present. In those dioceses, which have Assistant Bishops, they assist the Diocesan Bishop by undertaking activities, conducting ordinations and confirmations under delegated authority of their Bishop, who need not be present at any of these occasions. Similarly, deacons are often designated Assistant Ministers, assisting the parish priest in the course of their duties and often in the absence of the priest.
42. Pearce & Geddes make the following observation with regard to words being given their primary and natural significance.

[W]ords take colour from their surroundings and, accordingly, words of wide signification may well be limited by their context. But at the same time, the courts have tended to require such a limitation to be demonstrated. If general words are used, they will be given their plain and ordinary meaning unless the contrary is shown: *Cody v JH Nelson Pty Ltd*

(1947) 74 CLR 629 per Dixon J at 647; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid. In *Herbert Adams Pty Ltd v FCT* (1932) 47 CLR 222 at 228-9 Dixon J said that it is always less difficult to show that a word has a wider meaning than it is to establish a specialised use: '[A]n extension of meaning involves no abandonment of the use in respect of things to which it would in any case apply'.⁵⁴

43. In *R v Shane John Johnson* (no 2) [2004] SASC 04 it was submitted that a Detective, who had asked a constable to assist him in conducting a search of premises, could not claim that the constable was assisting him because the Detective was not present at the time of the search. In his judgment, Sulan J determined as follows.

Mr Vadasz submitted that Constable Van Der Ploeg was not an assistant of Detective Rowney. He submitted that **an assistant is a person who** is subordinate to the principal who gives direction and supervises the work done by the assistant. Constable Van Der Ploeg is an expert in the collection of physical evidence. He decided in this investigation what might be relevant and he was responsible for the method of collection. He was an assistant of Detective Rowney for the purposes of conducting the search at 11 Warren St. Mr Vadasz submitted that Detective Rowney was absent for much of the time conducting other enquiries whilst constable Van Der Ploeg conducted the search...[the] view that an assistant must be an inferior to and aiding a superior engaged actively in the same task is too restrictive. Often an investigator will seek assistance of experts. That expert may attend the scene and collect exhibits. He is not under direction, yet he is assisting the investigating officer. To that extent he is to be regarded as an assistant.⁵⁵

44. Lord Greene's judgment is also pertinent in a case where the vendors of a quarry covenanted (inter alia) that they would not "assist" in carrying on a business of a quarry within a certain area.

The first phrase that requires attention is "assist in carrying on". I should have thought that those words were wide enough to cover a person who provides the necessary capital, to enable a business to be carried on...I can think of no more effective way of assisting a person in carrying on his

⁵⁴ Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §2.20. Pearce & Geddes go on to state that "As a general principle, the courts have pointed out that they are not at liberty to consider any word or sentence as superfluous or significant. All words must prima facie be given some meaning and effect...This principle is more compelling if the word in question has been added by amendment." Ibid, §2.22.

⁵⁵ *R v Shane John Johnson* (no 2) [2004] SASC 04 at §§67-70. Compare Anderson J: "The ordinary meaning of 'an assistant' is a person who provides help or aid. An Assistant Supervisor assists a Supervisor or put another way helps or aids a Supervisor carry out his or her duties." *Kellerberrin Care of the Aged Committee Inc trading as Dryandra Frail Aged Hostel v Australian Liquor Hospitality and ORS* (1998) BC9800622 at 7.

business than to provide for him free of charge the necessary equipment to enable him to begin business.⁵⁶

45. The claim of the Applicants that the key words in the clause “assist in the administration of the sacraments” are “assist in”⁵⁷ proves too much. For if the use of the word “in”, rather than “by”, tells against an expansive interpretation, then it also tells against deacons’ administering Baptism as much as it does against their administering Holy Communion. If the text were to read in the way that the Applicants wished it to be read, the words might have been: “assist the priest by administering Holy Baptism and in administering Holy Communion.” However, the text of the Canon is undifferentiated in its application to both Baptism and Holy Communion. What is true of one is true of the other in this new and radical form of ordination service, addressing the needs of a changing diaconate. As Lord Reid put it:

The general principle is well settled. It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result, that the words of the enactment must prevail.⁵⁸

46. For the Applicants and other Supporting Parties, the consideration that the 1985 Canon might authorise diaconal administration of the Lord’s Supper is “a wholly unreasonable result” and one that was clearly not intended. However, sometimes General Synod legislation produces unpalatable outcomes. Yet “the remedy lies in an amending Act.”⁵⁹
47. When it became known that the Use of the Surplice Canon 1977 could be interpreted as allowing total relief of the surplice at all services, moves were made to remedy this mischief (the unintended consequence), which resulted in the Canon Concerning Vesture of Ministers 1992. The latter canon repealed the former and inserted a clause which required ministers to wear any vesture prescribed by the synod or Bishop of the Diocese, with the only proviso being that the minister could choose to wear a surplice in lieu of any other vesture so prescribed. The legislative intent was recognised to be not what was in the mind of the members of General Synod but what was conveyed by the text of the legislation.
48. Similarly, when the Solemnization of Holy Matrimony Canon 1981 was passed, it was not immediately recognised by all that deacons could now be authorised celebrants at marriage services. Some bishops object to this innovation and consider it inappropriate that deacons solemnize matrimony, as is evidenced by the fact that in some dioceses the bishop declines to register deacons as

⁵⁶ *Batts Combe Quarry Ltd v Ford and Others* [1943] Ch 51 at 53, cited under “Assist” in *Words and Phrases legally defined*, ed J B Saunders, 3rd ed, Butterworths, London, at 1.127. Cf also *Main v Stark* (1890) 15 App Cas 384.

⁵⁷ Applicants’ Submission, at §§49 & 73.

⁵⁸ *Luke v Inland Revenue Commissioners* [1963] AC 557 at 577 at 2.12, cited by Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §2.12.

⁵⁹ Lord Simmons in *Magor and St Mellons RDC v Newport Corp* [1952] AC 189 at 191, cited by Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §2.28

authorised marriage celebrants under Commonwealth law. This proved to be another remedy to the perceived mischief, other than seeking to amend the Matrimony Canon, in order to avoid the unpalatable consequence of a piece of General Synod legislation.⁶⁰

49. The Submission from the Diocese of Newcastle takes exception to my argument that there is a parallel between the amendment of the Constitution regarding canonical fitness for appointment or election as a bishop and the 1985 Canon.⁶¹ Contrary to the assertion of the Diocese of Newcastle, it was the amendment to s 74 of the Constitution which enabled women to be consecrated bishops.⁶² The Law of the Church of England Clarification Canon 1992 was already in place at the time the amendment of s74 took effect.⁶³ Moreover, assurances were given from members of the then Canon Law Commission that the change contemplated in s74 would not permit women to be consecrated bishops. Notwithstanding the Diocese of Sydney's codification by ordinance that the s74 amendment did not intend to permit women to be consecrated bishop,⁶⁴ the Appellate Tribunal ruled otherwise in 2007. This is the background to the submissions received by the Appellate Tribunal to which Mason J referred when he wrote the following.

The primary source of the presumed "intention" of a legislative body is the language it uses. But to talk about a legislator's "will" is largely fictional. It is certainly incapable of proof by resort to such hypothetical arguments as have been conjured up here.⁶⁵

Those who prepare or promote legislation (or any other formal instrument) have the opportunity to frame it in their own terms, but they have no additional control over its interpretation. After all, they are not the lawmakers.⁶⁶

50. The parallels between these two canons are somewhat surprising. Clearly the fact that the amendment to s 74 had opened the way for women to be consecrated bishops escaped the attention of the General Synod for more than a decade, as General Synod members attempted on two occasions (1998 & 2001)

⁶⁰ Indeed the fear expressed by the First Supporting Parties' Submission, at §26, that "there would be two classes of deacons with different functions and authority" if deacons ordained under the 1985 Canon were allowed to administer Holy Communion is already the case across the Australian Church. Furthermore, following the Appellate Tribunal's 2007 Opinion regarding Women Bishops, it became obvious that two classes of Assistant Bishop were also in operation across Australia with respect to their canonical fitness: those who were appointed under the Assistant Bishops' Canon 1966 and those who were appointed in dioceses where the Assistant Bishops Canon had not been adopted.

⁶¹ Diocese of Newcastle Submission, at §2 on p2.

⁶² Diocese of Newcastle Submission, at §2 on p3.

⁶³ 5 June 1995.

⁶⁴ "Nothing in this ordinance is to be interpreted as indicating an intention by the Synod to legislate on the issue of the ordination of women as priests or the consecration of women as bishops." General Synod – Constitution Alteration (Canonical Fitness) Canon and Bill 1989 Assenting Ordinance 1994, clause 3.

⁶⁵ Mason J, 2007 Appellate Tribunal Opinion Concerning Women Bishops, at §61.

⁶⁶ Mason J, *ibid*, at §64.

to pass canons authorising women to be admitted to the episcopate.⁶⁷ If the Applicants are correct in their assertion that the “Tribunal’s [1997] Opinion assumed that no canon of General Synod had then authorised lay or diaconal presidency”,⁶⁸ it may be because they were not searching for one. Yet as Mason J stated in his Opinion on Women Bishops, with reference to the passing of the s 74 amendment:

It is common ground that the measures excited no controversy in their adoption, but this entirely unexceptionable situation cannot be used to inform or control consideration of the meaning of the text.⁶⁹

The same could equally be said about the 1985 Canon.⁷⁰ However, now the opportunity has arrived for an evaluation of the argument presented above that the 1985 Canon does satisfy the conditions set forth by the Tribunal in 1997 which would authorise diaconal administration of the Lord’s Supper for those who have been ordained in accordance with the 1985 Canon.

51. While the argument proposed above has unsatisfactory consequences for those who continue to assert that diaconal administration is contrary to the Fundamental Declarations, as Pearce & Geddes indicate: “arguments by reference to unsatisfactory consequences are on shaky grounds unless a more attractive interpretation of the words used in the legislation is available.”⁷¹ They then cite the judgment of Black CJ and Sunberg J in *Esso Australia Resources Ltd v FCT* (1998) 159 ALR 664 at 670.

In our opinion the plain language of the sections is confirmed by the only directly relevant extrinsic material, which shows that parliament intended the consequence that is said by the appellant to be anomalous. Especially when different views can be held about whether the consequence is anomalous on the one hand or acceptable or understandable on the other, the court should be particularly careful that arguments based on anomaly or incongruity are not allowed to obscure the real intention, and choice, of the parliament...[W]e are unable to conclude that the operation of ss 118 and 119 on a literal reading does not confirm to the legislative purpose.⁷²

52. Geddes & Pearce continue to address this matter in the following manner.

In what circumstances should a court refuse to adopt an interpretation of a legislative provision that is otherwise acceptable on the basis that such an interpretation could also produce an anomalous result? In *Ganter v Whalland* [2001] NSWSC 1101 Campbell J supplied an answer to this

⁶⁷ “If, which I doubt, anyone at General Synod had turned their mind to it, he or she might possibly have reasoned that there would be no female bishops in the Church as long as there would be no female priests.” Mason J, *ibid*, at §56.

⁶⁸ Applicants’ Submission at §3.

⁶⁹ Mason J, 2007 Appellate Tribunal Opinion Concerning Women Bishops, at §60.

⁷⁰ Compare the subsequent statement of Mason J, *ibid*, at §63: “To delve into the subjective thoughts of the unidentified individuals who voted for the measures at General Synod in 1989 is both impossible and irrelevant.” The same could be said of the 1985 Canon.

⁷¹ Pearce & Geddes, *Statutory Interpretation in Australia*, 6th ed, at §2.36.

⁷² *Ibid*.

question. At [35] he referred to the language of Mason and Wilson JJ in the *Cooper Brookes* case...and the words of Jordan CJ in *Hall v Jones* ...and at [36] he suggested that:

From the strength of the language which these judges employed to describe the sort of consequences which will cause a possible construction to be rejected, it is apparent that an anomaly arising from what, on all tests of construction, is the correct construction of legislation, it must be a very serious one, before the court is justified in using that anomaly as a reason for rejecting what otherwise seems the correct construction. Were courts to act otherwise, they would risk taking over the function of making policy choices which properly belongs to the legislature.⁷³

Conclusion

53. The Reference before the Appellate Tribunal is a question of law. The central question in my view is whether the 1985 Canon authorises and permits the administration of the Lord's Supper by deacons, acting under the authority and delegation of the incumbent priest.
54. All parties present at the Preliminary Hearing agreed with the assessment that the question was a legal question and agreed that the issue was not the constitutionality of diaconal administration, but the validity of interpreting the 1985 Canon as making provision for diaconal administration. Nonetheless, despite their agreement that the 1997 Opinion of the Appellate Tribunal represented the law of the Church, their submission betrayed a reluctance to embrace the possibility that any canon of General Synod could authorise diaconal administration because of the perceived incongruity of this practice with the Fundamental Declarations of the Constitution.
55. Nonetheless, I have sought to demonstrate that the 1997 Appellate Tribunal Opinion has put to rest any question concerning the constitutionality of diaconal administration, and that the 1985 Canon does provide the required authorisation which would make diaconal administration lawful.
56. The 1985 Canon was the result of a radical liturgical revision of the functions of the deacon, which expanded their role in the ministry of word and sacrament, yet confirmed their office and order as one of assistance to the priest. The expansion was part of the trajectory of a changing diaconate, which was clearly expressed by the permission given in 1981 for deacons to solemnize matrimony. However, in 1985 this expanded role included an authority to preach the word of God and to assist in the administration of the sacraments.
57. The sacramental expansion of diaconal ministry was undifferentiated across both sacraments. Where the deacon was always able, in the absence of the priest, to conduct the ministrations of baptism to infants, permission was now widened to include candidates other than infants and to allow the deacon to baptise in the presence or absence of the priest.

⁷³

Ibid.

58. Yet what was stated in terms of the deacon's role in baptism was equally applicable to Holy Communion, as the 1985 Canon did not differentiate between the two sacraments in their administration. As the deacon took his part in assisting the priest in conducting baptism in its entirety, so he took his part in assisting the priest in administering Holy Communion in its entirety. The part that the deacon played was not defined by the role he had played under *BCP*, but by the role he played under the 1985 Canon.
59. Although it may not have been recognised for some years that the 1985 Canon had indeed authorised diaconal administration of the Lord's Supper, the text and context of the canon cannot be avoided. Other examples of late recognition of the implications of General Synod legislation include the Use of the Surplice Canon 1977 and the amendment to s 74 of the Constitution with respect to canonical fitness for bishops. In both of these examples, the intention of the legislation was derived principally by an examination of the text of the respective legislation, regardless of any perceived anomaly expressed by those who framed the legislation, and in both cases this took place some years after the passing of the original canons.
60. Therefore the answer to Question 3 of the Reference is Yes. The Ordination Service for Deacons Canon 1985 of General Synod *does 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.

Dr Glenn N Davies
Bishop of North Sydney
20 January 2010

Appendix 1

ORDINATION SERVICE FOR DEACONS CANON 1985

Canon 16, 1985

A canon to authorise the use of a form of service for the ordination of deacons

The General Synod prescribes as follows:

1. This canon may be cited as "Ordination Service for Deacons Canon 1985".
2. The use by this Church of the form of service set out in the schedule in accordance with the rubrics incorporated therein, for the ordination of deacons, is authorised.
3. The admission of persons to an office of deacon in this Church in accordance with the service set out in the schedule is authorised.
4. 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 Australian Prayer Book Canon 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.
5. The synod of a diocese may, by ordinance, regulate the use of the service set out in the schedule at services held in that diocese.
6. A person made deacon in this Church in accordance with the service in the schedule is for the purpose of the application of Article 36 of the Articles of Religion, sometimes call the Thirty-nine Articles, rightly, orderly and lawfully made and ordained.
7. This canon affects 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 canon.

SCHEDULE

The Ordination of Deacons

The ordination of deacons shall take place on a Sunday following one of the Ember weeks, or on another day appointed by the bishop, when a large number of people can be present.

1. The Holy Communion begins in the customary way. Where the rubrics in that service so allow, it is desirable that the confession and absolution be used after the reading of the commandments or one of the permitted alternatives.
2. The ordination collect

Almighty God, giver of all that is good, you have appointed various orders of ministry in your Church; bless these persons now called to the order of deacons. So fill them all with your truth and clothe them with holiness, that they may faithfully minister to the glory of your Name and the benefit of your Church. We ask this through Jesus Christ our Lord, who lives and reigns with you and the Holy Spirit, one God, now and for ever. **Amen.**

The collect of the day is added.

3. The readings are selected from those printed on pages 293-295 of AAPB or are those appointed for the day.
4. After the Gospel there is a sermon explaining the office and duty of a deacon.
5. All stand for the Nicene Creed which is said or sung.

The Presentation

6. The archdeacon, and/or other persons (who may be a priest and a lay person) appointed by the bishop, bring the candidates to stand before the bishop, and says

N, Bishop in the Church of God,

I/we present to you N/N to be admitted to the order of deacons.

The bishop says

Can you assure us that they are suited by training and godly living to minister to Christ's family?

The archdeacon

They have been examined. Enquiries have been made among the people of God, especially among those concerned with their training, and I believe that all these candidates are so suited.

The bishop says to the people

Dear friends in Christ, you know the importance of this ministry. We have been assured that these persons are suited to this calling. If anyone knows any adequate reason why we should not proceed, you should now come forward and make it known.

If any offence or obstacle is alleged against a candidate, the bishop shall postpone the candidate's ordination until the matter has been resolved.

If no objection is made, he continues

Are you ready to accept them as deacons in the Church of God?

The people reply

We accept them gladly!

The Examination

7. The people sit. The bishop instructs the candidates.

My brothers, every believer is called to follow Jesus Christ, serving God the Father in the world, through the power of the Holy Spirit. God now calls you to a special ministry of service under the care of your bishop.

You are to serve the church of God and to work with its members in caring for the sick, the needy, and all who are in trouble. By your teaching and your life you are to show Christ's people that in serving others we are serving Christ himself. You are to make his redemptive love known, by word and example, to those among whom you live, and work, and worship.

You are to share with the community the love of Christ and his gospel of reconciliation and hope. You are to pray and work for peace and justice in the world.

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

You are to strengthen the faithful, teach the young, search out the careless and the indifferent, and to preach the word of God in the place to which you are licensed.

In order that by your promises you may commit yourselves to your calling, and that this congregation may understand your intention, you must answer clearly to these questions which I now ask you in the name of God and his church:

Do you believe that you are truly called by God and inwardly moved by the Holy Spirit to this order and ministry of deacons, according to the will of our Lord Jesus Christ?

Answer

I do.

The bishop

Do you accept the holy scriptures as containing all doctrines necessary for eternal salvation through faith in Jesus Christ?

Answer

I do.

The bishop

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

Answer

I will.

The bishop

Will you be diligent in prayer, and in the study of the holy scriptures, and in such other studies as help in the performance of your office?

Answer

I will.

The bishop

Will you endeavour, with the help of God, to make your personal life *and that of your family* a wholesome example to Christ's people?

Answer

I will.

The bishop

Will you constantly seek the help of the Holy Spirit to use and develop God's gifts to you, and to proclaim the gospel of Christ?

Answer

I will.

The bishop

Will you promote unity, peace, and love among all Christian people, and especially among those whom you serve?

Answer

I will.

The bishop

Will you accept the order and the discipline of this Church, submitting yourselves to the lawful authority of your bishop and those appointed to have charge over you?

Answer

I will, with the help of God.

The bishop

Almighty God, who has given you the will to do all these things, grant you also strength and power to perform them.

The people

Amen. May God help us to support you in this work.

The Prayers

8. The bishop commends those who are to be ordained to the prayers of the people and silence is kept.

9. A minister begins this litany

God the Father,

Have mercy on us

God the Son,

Have mercy on us.

God the Holy Spirit,

Have mercy on us.

Holy, blessed and glorious Trinity, one God,

Have mercy on us.

We humbly pray that you will hear us, O Lord; send your peace to the whole world, which you have reconciled to yourself by the ministry of your Son, Jesus.

Lord, hear our prayer.

Heal the divisions of your church, that all may be one,

Lord, hear our prayer.

Grant to your people the forgiveness of sins, growth in grace, and the fruit of the Spirit,

Lord, hear our prayer.

Lead the members of your church in their particular vocation and ministry to serve you through a true and godly life,

Lord, hear our prayer.

Raise up faithful and able ministers in your church, that the Gospel may be made known to all people,

Lord, hear our prayer.

Inspire all bishops, priests, and deacons with your love, that they may hunger for truth, and thirst after righteousness,

Lord hear our prayer.

Fill them with compassion, and move them to care for all your people,

Lord hear our prayer.

Bless your *servants* (N.N...) now to be admitted to the order of deacons, and pour your grace upon *them*, that *they* may faithfully fulfil the duties of this ministry, build up your church, and glorify your Name,

Lord, hear our prayer.

Sustain by the indwelling of your Holy Spirit those who have been called to the ministry of your church, and encourage them to persevere to the end,

Lord, hear our prayer.

Gather us with all your saints into your eternal kingdom,

Lord, hear our prayer.

The Laying on of Hands

10. The candidates kneel before the bishop who says this prayer over them.

God and Father of all, we praise you for your infinite love in calling us to be a holy people in the kingdom of your son Jesus Christ our Lord, who took on himself the form of a servant, and humbled himself, becoming obedient even to death on a cross. We praise you that you have highly exalted him and made him Lord of all.

Through him, holy Father, we pray you to send down your Holy Spirit upon *these* your *servants*. Fill *them* with your strength and power for *their* work as *deacons* of your church, to the glory of your Name and the benefit of your people.

The bishop lays his hands on the head of each saying

N., receive authority for the office and work of a deacon in the church of God; in the name of the Father, and of the Son, and of the Holy Spirit.

And the people say

Amen.

(the deacon may be appropriately vested)

The bishop gives to *him* the New Testament, saying

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

11. The bishop

Lord, pour your grace continually on these your *servants* and stir up the spirit of holiness within *them*. May *they* be modest and humble, and strong and steadfast in observing the discipline of Christ. Let *their* lives and teaching so reflect your commandments, that through *them* many may come to know you and love you. As your Son came not to be served but to serve, may *these* deacons share in his service, and come to the unending glory of him who, with you and the Holy Spirit, lives and reigns, one God, for ever and ever. **Amen.**

12. All stand

The bishop may present the newly ordained deacons to the people and say

People of God, I present to you these deacons.

The congregation may welcome them with applause.

13. The greeting of peace is given by the bishop

We are the body of Christ.

His Spirit is with us.

The peace of the Lord be always with you.

And also with you.

A hymn may be sung.

The Holy Communion continues with the bringing of the gifts of the people to the Lord's Table (First Order #16, Second Order #19).

NOTE: The newly ordained deacons may be invited by the bishop to assist in the administration of the communion.

NOTE: In the form of service above all rubrics are printed in red.
