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4 February, 2000



### **Private & Confidential**

The Most Reverend Michael Malone  
 Bishop of Maitland-Newcastle  
 Chancery Office  
 PO Box 780  
 NEWCASTLE NSW 2300

**Facsimile: 0249 791119**

Dear Bishop

**RE: INDEMNITY CLAIM – CCI**

We refer to previous correspondence herein and now enclose herewith copy of a letter received by us from Messrs Dunhill Madden Butler Solicitors dated 31 January, 2000.

This letter confirms the previous informal indication given to your Mr Feenan from CCI to the effect that CCI Management is of the view that the indemnity claim ought be denied in this matters. Interestingly, it seems that the Board is yet to finalise or sign off on the decision.

The letter indicates that the Board is next scheduled to meet on 14 February, 2000 and it is implicit from the solicitor's letter that this matter will be discussed at that meeting. We are of the view that it is important that a position be put to the solicitors prior to the Board meeting so that the response of the Diocese can form a part of the Board's deliberations on 14 February next. In real terms, we want to put a position to CCI at an early time so that the process of pursuing the claim for indemnity can be commenced as soon as possible.



Certification from  
 27 July 1999 to 27 July 2002

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### ***Indemnity Claim***

In broad terms, the only issue so far as we can see is the question of Monsignor Cotter's conduct. It has been our experience with CCI that they will usually attempt to raise a number of impediments to indemnity but at the moment, non-disclosure is the issue.

We have been through this issue on a number of occasions.

CCI have had the benefit of personally conferring with the Monsignor.

With the benefit of hindsight clearly the ball was fumbled by the Monsignor.

However, at the human level, based on what the Monsignor knew and on prevailing conditions and understandings we do not believe that his conduct would be found by a Court to be so reprehensible or reckless so as to deprive the Diocese of an entitlement to indemnity.

This is particularly in circumstances where the major claim, that of <sup>CNF</sup> , did not arise until 1989, some fourteen (14) years after the initial report was made to Monsignor Cotter. It is to be noted that in the meantime between 1975 and 1989 no report of any descript was received by anybody in the Diocese regarding any problem with Father Ryan's conduct. Bishop Clarke did receive an anonymous complaint which was not specific in a telephone call in 1990-91.

We just cannot see that error on the part of the Monsignor some twenty (20) years previously and well prior to the establishment of Towards Healing or the introduction of mandatory reporting legislation (1997) would deprive the Diocese of insurance protection in relation to a claim made in the 1990s in respect of abuse that took place between 1989 and 1994. It is to be noted that in 1975 when these matters came to light, CCI was not the insurer of the Diocese. It was not until May 1981 that CCI came on risk.

We advise that the claim for indemnity is not without some issues and complexities and clearly any Church authority would be concerned not to have issues of this type the subject of formal litigation procedures.

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Clearly litigation would be adverse to the interests of CCI and all Church authorities who have had difficulties in this area. Such litigation may actually provoke further claims. Clearly many of the benefits of the confidential settlement could be lost.

The claim, however, is a reasonable claim and the position that CCI takes at least at first instance is in our view unreasonable and we would certainly strongly recommend that instructions be secured to pursue the matter vigorously to an informal mediation and that at this time the Diocese should keep its thinking open on the question of how far it would go legally if CCI does not alter its position.

We suspect that it may be that CCI would not be prepared to make reasonable allowance for the Diocese's claim for indemnity unless it develops a belief that the Diocese would be prepared to take formal legal action, on advice, if that was necessary.

### ***Options***

Obviously, it would be open to the Diocese to immediately commence proceedings in the Commercial Division of the Supreme Court for a declaration in respect of indemnity.

Alternatively, the Diocese could adopt a political approach now in terms of lobbying individual Board members and seeking to bypass completely traditional legal mechanisms.

The fairly obvious option which CCI will expect the Diocese to pursue is the mediation option which would involve the participation of barristers with expertise in insurance law, a mediator from an insurance background perhaps recently retired Supreme Court Judge John Brownie or ex-Supreme Court Judge Andrew Rogers.

We would seek instructions from you to write to Paul Gamble this week indicating clearly that the Diocese does not accept the position taken at this time by CCI and proposing in concrete terms an agenda for mediation with a view to seeing that option adopted by the Board and implemented in the first part of this year.

It is obvious that the evidence of Monsignor Cotter, and to a lesser extent Monsignor Casey, will be crucial in the outcome of the claim for indemnity. Both men are of very

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advanced years. We are of the view that steps should be taken to secure their evidence for the purposes of any later commenced court proceedings. In this regard, we would recommend that we have evidence taken from both men in our offices and have that evidence recorded on video camera. CCI would be given the opportunity in that process to cross-examination both men for the record. In that way, neither party would be disadvantaged, it is a process that may in fact involve the mediator in terms of making rulings on evidentiary objections, but importantly it would have this benefit. It would show to CCI that the Diocese is serious about commencing proceedings in relation to their decision. It is obviously a prudent decision given the age of the two (2) witnesses, but would not constitute perhaps the inflammatory step at this stage of actually commencing proceedings in Court. We strongly recommend that this process be commenced as soon as possible.

Indeed, we would seek your instructions to raise this matter in the letter to be forwarded to Paul Gamble next week.

We will need instructions in due course as to which counsel we retain for a mediation but at this stage would probably be inclined to involve Mr Justin Gleeson a junior counsel who has given some advice previously on insurance considerations in relation to these matters. We should also retain the services of an insurance expert, such as Mr Frank Hoffman, to provide an expert opinion regarding whether or not in 1981, insurers generally would have sought disclosure of such matters.

We await your instructions in due course.

Yours faithfully

**Carroll & O'Dea**

Per: 

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