IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A16 of 2012

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Appellant

and

THE CORPORATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. The Attorney-General for the State of Victoria certifies that these submissions are suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Attorney-General for the State of South Australia (**South Australia**) and the first respondent (**the Council**).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. In addition to the constitutional and statutory provisions listed in Pt VII and set out in the annexure to South Australia's submissions, reference may be required to By-law No 1 – Permits and Penalties (passed on 10 May 2004), cll 1 and 2.1: see the Appendix to these submissions.[1]

PART V: ARGUMENT

By-law No 4 – Roads, cll 2.3 and 2.8

5. The Full Court held[2] that, subject to the implied constitutional freedom in relation to political communication, By-law No 4 – Roads (**the By-law**) was supported by the power conferred by s 667(1)9(XVI) of the *Local Government Act 1934* (SA) (**the 1934 Act**) to make by-laws for the "good rule and government of the area, and for the convenience, comfort and safety of its inhabitants" (**the convenience power**). The following submissions assume that the Full Court's conclusion in that respect was correct. As explained further below, the question then becomes whether the constitutional limitation circumscribed the convenience power so as to render the making of the By-law by the Council beyond the scope of that power.

6. Clause 2 of the By-law prohibited a person from engaging in certain activities on any road[3] without permission. The relevant activities prohibited were to "preach, canvass [or] harangue", except in any area designated by the Council as a "Speakers Corner" (cl 2.3) or to "give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter" except by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum: cl 2.8.

7. The necessary permission was required to be granted by the Council in writing.[4] The Council could attach such conditions to a grant of permission as it thought fit, and could vary or revoke such conditions or impose new conditions by notice in writing to the permit holder.[5] A permit holder was required to comply with the

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1 South Australia, *Government Gazette*, No 44, 27 May 2004 at 1380 (replaced after the decision of the District Court in this matter by a by-law of the same name but in different terms made on 31 May 2011: South Australia, *Government Gazette*, No 36, 9 June 2011 at 2028).

2 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 (***Corneloup***) at 340 [22].

3 The word "road" was defined by cl 1.6 of the By-Law to have the same meaning as in the *Local Government Act 1999* (SA), where it is defined, in s 4(1), to mean "a public or private street, road or thoroughfare to which public access is available on a continuous or substantially continuous basis to vehicles or pedestrians or both and includes – (a) a bridge, viaduct or subway; or (b) an alley, laneway or walkway".

4 See By-law No 1 – Permits and Penalties, cl 1.1.

5 See By-law No 1 – Permits and Penalties, cl 1.2.

conditions.[6] A person who breached the By-law committed an offence and was liable to a maximum penalty of $750.[7]

Approach to the determination of the validity of cll 2.3 and 2.8 of the By-law

8. South Australia appeals against the declaratory relief ordered by the Full Court in respect of the validity of the By-law. The question in this appeal is whether the Council, as repository of the power to make by-laws for the convenience, comfort and safety of its inhabitants, complied with the statutory limits upon the exercise of that power when it made the By-law.[8] Those statutory limits are themselves established, in part, by constitutional limits on the exercise of legislative power.

10 9. As described by a Full Court of the Federal Court in *Evans v New South Wales* (***Evans***),[9] it is necessary, first, to consider the proper construction of the relevant by-law making power in the 1934 Act in light of the scope and objects of that Act, and then to construe cll 2.3 and 2.8 of the By-law to determine whether they fall within the statutory authority. These processes are interdependent, as the Full Court recognised in *Evans*,[10] in that the construction of the By-law will be informed by the proper scope of the empowering provision.[11]

10. The convenience power in s 667(1)9(XVI) of the 1934 Act is expressed in broad terms. It is, however, confined by the principle that statutory provisions should be construed, where constructional choices are open, so as not to encroach upon
20 common law rights and freedoms, including freedom of speech,[12] and, as the Full Court recognised,[13] by the implied constitutional freedom of communication of political and governmental matters.[14]

11. No question of the validity of the convenience power arises: it is susceptible of exercise in accordance with the constitutional restriction upon legislative power that is imposed by the implied freedom of communication and so is effective in its terms.[15] The question is whether the relevant provisions of the By-law exceed the convenience power by operating in a manner that would infringe the constitutional

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6 See By-law No 1 – Permits and Penalties, cl 1.3.

7 See By-law No 1 – Permits and Penalties, cl 2.1, *Local Government Act 1999* (SA), s 246(3)(g).

8 *Wotton v Queensland* (2012) 86 ALJR 246 (***Wotton***); see at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

9 (2008) 168 FCR 576 at 591 [60].

10 *Evans* at 592-595 [68]-[73].

11 To similar effect, s 13 of the *Acts Interpretation Act 1915* (SA) provides that a "statutory or other instrument made pursuant to a power conferred by or under an Act will be read and construed so as not to exceed that power"; see also cl 8 of the By-law.

12 See *Evans* at 592 [60].

13 *Corneloup* at 373 [156].

14 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 (***Miller***) at 613-614 (Brennan J); *Wotton* at [10], [21]-[22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

15 *Wotton* at [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

restriction to which the convenience power is subject.[16] The first of the two alternative approaches identified by the Full Court[17] should therefore be adopted.

The implied freedom of communication

12. The terms of the two questions that arise when determining whether a law infringes the implied freedom of political communication (the *Lange*[18] questions) are settled.[19]

13. The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If so, the second question asks whether the law is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[20]

The first *Lange* question

14. In order to determine the nature of the burden, if any, imposed upon the implied freedom by cll 2.3 and 2.8 of the By-law, it is necessary to consider the relevant provisions as a whole.[21] That exercise reveals that the relevant burden imposed by cll 2.3 and 2.8, as in *Wotton*,[22] is the obligation (other than in circumstances where one of the exceptions to each clause applies) to seek and obtain the written permission of the Council to engage in the regulated conduct.

15. Whether that constitutes an effective burden on the freedom of communication about government or political matters depends upon how the provisions in question affect the freedom generally, not upon how a particular person wishes to communicate.[23] As Hayne J said in *APLA v Legal Services Commissioner (NSW)*, "the central question is what the impugned law does, not how an individual might want to construct a particular communication".[24] Nevertheless, as Kiefel J observed in *Wotton*:[25]

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16 *Wotton* at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 373 [103]-[104] (Gummow J).

17 *Corneloup* at 373 [156].

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567-568 (the Court).

19 *Wotton* at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [75], [77] (Kiefel J).

20 The "constitutionally prescribed system of representative and responsible government" has the features identified in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [44]: see *Wotton* at [20], [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

21 *Wotton* at [19], [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

22 *Wotton* at [28] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

23 *Wotton* at [80] (Kiefel J).

24 (2005) 224 CLR 322 at 451 [381], endorsed by French CJ in *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50].

25 *Wotton* at [80].

> The issues which the plaintiff identifies as those which he wishes to discuss may nevertheless assist in the identification of the area of communication which may be affected by the statutory provisions and they are relevant to his standing.

16. The starting point in identifying the relevant burden is to construe the By-law.[26] Each of the terms "preach", "canvass" or "harangue" in clause 2.3 should, again, be construed having regard to the principle of legality, whereby legislation is to be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms, and in particular in this context the freedom of expression.[27] Both cl 2.3 and cl 2.8 are capable of effectively burdening the freedom of communication of government or political matters in the manner set out in paragraph 14 above, whether they are construed in the manner adopted by the Full Court[28] or in the manner suggested by South Australia in its submissions.[29] However, the principle of legality suggests that "preach" describes speech that is concerned with religious or moral truth and that, as South Australia submits, "harangue" describes speech that is intemperate or offensive to its audience.

The second *Lange* question

17. The Full Court identified the ends to which cll 2.3 and 2.8 of the By-law are directed as being the regulation of behaviour which "involves, or is at least likely to involve ... accosting persons using the City's roads for their commercial, working or recreational activities"[30] and which, "if left uncontrolled, would interfere with commercial activity and detract from the public's use of and enjoyment of Adelaide's streets".[31] These are legitimate objects for a local authority responsible for the good governance of a municipal area to pursue. As the Full Court acknowledged, "[t]he regulation of behaviour which detracts from the common enjoyment of city streets has long been, and continues to be, regarded as a matter of municipal concern".[32]

18. The Full Court further identified the purpose of the By-law as being "to allocate space and time equitably between those who wish to engage in the regulated conduct", noting that a "permit system avoids what might be described as the 'Olympic system' where the fastest, loudest or most numerous prevail".[33]

19. The Full Court held that "the *liberty to preach* to fellow citizens in public places on political matters, as and when they arise, without seeking permission from an arm of government is fundamental to the maintenance of the constitutional system of

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26 *Coleman v Power* (2004) 220 CLR 1 at 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ), 84 [219] (Kirby J), 115 [306] (Heydon J).

27 See *Evans* at 592-596 [68]-[78].

28 *Corneloup* at 338 [9]-[11].

29 South Australia's Submissions at pars 23-24.

30 *Corneloup* at 365 [120].

31 *Corneloup* at 341 [22].

32 *Corneloup* at 365 [119]. See also the passages at 366-367 [124]-[128], reproduced in South Australia's Submissions at par 11.

33 *Corneloup* at 367 [128].

responsible and democratic government" and that the "prohibition of disseminating a political message, unless permission of an arm of government is first obtained, is antithetical to the democratic principle".[34] In so holding, their Honours fell into error by failing to account for the obligation of the Council, in enforcing the By-law, to act conformably with the implied constitutional freedom. More fundamentally, the Full Court either incorrectly treated the purposes of the By-law as not legitimate under the Constitution or failed to pursue the proper inquiry whether the limits of the Council's power had been exceeded by making a by-law not reasonably appropriate and adapted to achieve a legitimate purpose. In doing so, their Honours appear to have treated the implied freedom as a personal right, rather than a restraint on legislative power.

20. The imposition of an obligation to seek permission before engaging in the regulated activities is reasonably appropriate and adapted to serve the relevant ends in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative government, for the following reasons. First, as was affirmed in *Hogan v Hinch*[35] and in *Wotton*:[36]

> In answering the second *Lange* question, there is a distinction ... between laws which, as they arise in the present case, incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication. The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description.

21. Clauses 2.3 and 2.8 of the By-law are laws of the former description. They are not directed to the regulation of communications which are inherently political in nature.[37] The restriction upon political communication imposed by those clauses is incidental to the achievement of the legitimate ends to which they are directed.

22. Secondly, the Council's power to grant or withhold permission is circumscribed by the obligation to exercise the power conformably with the subject matter, scope and purpose of the By-law and with any other applicable law, including the implied freedom of political communication, and compliance with these limitations can be enforced by way of judicial review.[38]

23. The significance of the fact that the Council's exercise of the power to grant permission is judicially examinable raises the question whether it is relevant to the validity of cll 2.3 and 2.8 that permission may be erroneously refused and that the need to seek review of an erroneous refusal of permission will result in some

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34 *Corneloup* at 373 [157] (emphasis added), 374 [159].

35 (2011) 243 CLR 506 at 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

36 *Wotton* at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); see also *Coleman v Power* (2004) 220 CLR 1 at 30 [27], 31 [31] (Gleeson CJ).

37 In the case of cl 2.8, so much is clear from the exemptions provided for candidates for election.

38 *Miller* at 613-614 (Brennan J); *Wotton* at [10], [21], [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

delay.[39] In so far as the *Lange* test concerns the operation and effect of a law, it is concerned with the operation or effect that the law has when properly construed and applied. Were it otherwise, the constitutional restriction on legislative power would extend not only to laws which in their terms and *lawful* operation and effect infringed the implied freedom, but also to laws susceptible of misconstruction and misapplication in a way that would (or might) infringe the implied freedom. Such an approach would be uncertain and unworkable.

24. To deny validity on this basis is also inconsistent with the treatment in *Miller*[40] and in *Wotton*[41] of the validity of a discretionary statutory power as depending, at least in part, upon whether its exercise is judicially examinable. As South Australia's submissions observe,[42] the chief executive in *Wotton* may have wrongly refused to grant approval to a person to interview a prisoner under s 132(2)(d) of the *Corrective Services Act 2006* (Qld) even in circumstances where, for example, the person sought to conduct an impromptu interview with the plaintiff (who was in the community on parole) at a political rally. However, nothing in *Wotton* turned on the Court's assessment of the practicality or timeliness of seeking judicial review, despite the practical difficulties that may in fact have arisen. Moreover, modern court processes are well equipped to deal with matters quickly, on an interlocutory basis if need be.[43]

25. Thirdly, this is not to say that legislative restraints on political communication in the form of a permission system amenable to judicial review will always comply with the constitutional limitation. Whether or not such a regime infringes the implied freedom will depend upon the context, including any particular features of the permission system, the type of conduct that is regulated and, in some cases, whether "there were other, less drastic, means available by which the legislative objective could be achieved".[44]

26. In this case, the requirement to obtain permission before engaging in the regulated conduct was subject to certain exceptions, which are relevant to the operation and effect of the By-law generally. The exceptions to cl 2.3 permitted a person to engage in the regulated conduct in designated areas known as Speakers Corners. The exceptions to cl 2.8 permitted a person to distribute handbills or leaflets by or with the authority of a candidate for a federal, State or local government election or during the course and for the purpose of a referendum.

27. The freedom of political communication is not limited to election periods or the period leading up to a referendum,[45] nor is it limited to election candidates. That does not mean, however, that the Constitution requires that people be left free at all

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39 Notice of Appeal, ground of appeal numbered 4; South Australia's Submissions at par 2.3.

40 *Miller* at 613-614 (Brennan J).

41 *Wotton* at [10], [21], [31]-[32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

42 South Australia's Submissions at pars 42 and 46.

43 *Evans* provides an example in a somewhat analogous context.

44 *Wotton* at [89] (Kiefel J).

45 *Lange* at 561.

times, and from all regulation, to engage in conduct which, as the Full Court recognised, "involves, or is at least likely to involve ... accosting persons using the City's roads for their commercial, working or recreational activities"[46] and which, "if left uncontrolled, would interfere with commercial activity and detract from the public's use of and enjoyment of Adelaide's streets".[47]

28. The relaxation of the permit requirement during election and referendum periods reflects the fact that the purpose of the freedom is to protect communications concerning matters necessary to enable the people to exercise a free and informed choice as electors at the elections and referendums provided for by ss 7, 24 and 128 of the Constitution. Clauses 2.3 and 2.8 of the By-law, considered as a whole, may be seen as a means of regulating the relevant conduct in a manner that the Council reasonably considered consistent with the right of the City's inhabitants to the use and enjoyment of its roads and footpaths, subject to the relaxation of that regulation at these important times in the political cycle.[48]

29. Moreover, even if spontaneous or impromptu contributions to political debate were properly described as preaching, canvassing or haranguing,[49] or the distribution of handbills and other printed materials was sought to be done before permission could be obtained, there are other avenues whereby such contributions to political debate can be made. The By-law affects only certain kinds of conduct and must be assessed in that light, rather than by reference to an *a priori* approach which forbids the imposition of any requirement for permission. It applies to "preaching, canvassing and haranguing" rather than, for example, conducting a media interview, holding a demonstration or addressing members of the public in ways falling short of preaching, canvassing or haranguing.

30. Fourthly, in relation to the availability of alternative means of achieving the legislative objective, it is not the case that the existence of *any* less drastic means will spell invalidity. The question is whether the means chosen are *reasonably* appropriate and adapted to the legitimate end being pursued. As McHugh J said in *Coleman v Power*:[50]

> As the reasoning in *Lange* shows, the reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such

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46 *Corneloup* at 365 [120].

47 *Corneloup* at 341 [22].

48 Indeed, in so far as the exceptions apply to State and local government elections and may therefore enable persons, without the need for a permit, to engage in the regulated conduct in relation to matters of purely State or local concern, they may go further than the constitutional limitation would require.

49 It may be noted that the Full Court's remarks at 373 [158] in relation to the "urgency [of] political debate" related only to the prohibition on preaching and canvassing, not haranguing or distributing leaflets: see 373 [157], 374 [160].

50 (2004) 220 CLR 1 at 52-53 [100].

> communications.[51] The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another. But the Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means.

31. The postulated alternative means must also be as effective as the law in question to achieve the statutory purpose.[52] The Court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction could suffice to achieve a legitimate purpose.[53]

32. In the present case, the Full Court did not identify any less restrictive means of achieving the objectives sought to be achieved by cll 2.3 and 2.8 of the By-law. Kourakis J suggested that what his Honour had identified as the "collateral, impermissible and incompatible effects of the by-law could easily have been avoided by expressly excluding communications on 'government and political matters' from the scope of the by-law",[54] but in the same passage expressed the view that, if it were subject to such an exception, the By-law "may be largely ineffective".

33. Kourakis J also suggested that, "[a]lternatively, a by-law could apply to political and other communications which jeopardise public order because they are offensive, insulting or otherwise might encourage a breach of the peace",[55] referring to *Coleman v Power*.[56] But the legitimate purposes of the By-law are not so limited. It is not permissible for a court applying the *Lange* test to substitute its own view of the proper purposes to be achieved (within the range of constitutionally permitted alternatives) for those actually chosen by the law-making body to be pursued. A by-law in the form proposed would not be directed to achieving the objectives of the By-law.

34. Kourakis J observed earlier in his judgment:[57]

> It is not unreasonable to take the view that administrative regulation of the objectionable conduct generally will enhance the commercial, residential and recreational life of Adelaide's inhabitants more effectively than a prohibition of the

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51 *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ); *Rann v Olsen* (2000) 76 SASR 450 at 483.

52 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306 (Stephen and Mason JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438] (Kiefel J); and *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221; [2011] HCA 34 at [556] (Crennan and Kiefel JJ).

53 *Coleman v Power* (2004) 220 CLR 1 at 31 [29]-[31] (Gleeson CJ, citing *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ) and 619 (Gaudron J)).

54 *Corneloup* at 374 [163].

55 *Corneloup* at 375 [163].

56 (2004) 220 CLR 1.

57 *Corneloup* at 341 [22].

more egregious forms of that conduct which can only be enforced by a prosecution brought after the event.

That finding as to the reasonableness of a permission system ought to have sufficed to conclude that cll 2.3 and 2.8 of the By-law were reasonably and appropriately adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and accordingly were not ultra vires the regulation-making power in the 1934 Act.

Dated: 26 June 2012

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APPENDIX

CITY OF ADELAIDE

By-Law Made Under the Local Government Act 1999

(Made on 10 May 2004, gazetted 27 May 2004, repealed by By-law No.1 – Permits and Penalties, made on 31 May 2011 and gazetted 9 June 2011)

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1. *Permits*

1.1 In any by-law of the Council, unless the contrary intention is clearly indicated, the word 'permission' means the permission of the Council given in writing.

1.2 The Council may attach such conditions to a grant of permission as it thinks fit, and may vary or revoke such conditions or impose new conditions by notice in writing to the permit holder.

1.3 Any permit holder shall comply with every such condition.

1.4 The Council may revoke such grant of permission at any time by notice in writing to the permit holder.

2. *Offences and Penalties*

2.1 Any person who commits a breach of any by-law of the Council shall be guilty of an offence and shall be liable to a maximum penalty being the maximum penalty referred to in the Local Government Act 1999, that may be fixed by by-law for any breach of a by-law.

2.2 Any person who commits a breach of any by-law of the Council of a continuing nature shall be guilty of an offence and, in addition to any other penalty that may be imposed, shall be liable to a further penalty for every day on which the offence is continued, such penalty being the maximum amount referred to in the Local Government Act 1934 and/or Local Government Act 1999 which may be prescribed by by-law for offences of a continuing nature.