IN THE HIGH COURT OF AUSTRALIA
Adelaide REGISTRY

No. A16 of 2012

BETWEEN: *ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA*
Appellant

and

THE CORPERATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

RESPONDENT'S SUBMISSIONS

Part I:
I certify that this submission is in a form suitable for publication on the internet.

Part II:
Is The City of Adelaide by-law 4 2.3 and 2.8 valid? Can the Government require citizens to first obtain permission before making a public address.

Part III:
Notice has been given

HIGH COURT OF AUSTRALIA
FILED
29 JUN 2012
THE REGISTRY ADELAIDE

Part IV:

Part V:

Part VI:
The Law

1. In Wotton [2012] HCA 2 the court articulated the test in paragraphs 25 & 20 in the following manner,

> 25 Two questions ("the *Lange*[20] questions") arise with respect to each statutory provision which the plaintiff puts in contention. The terms of the questions are settled. They were recently stated, and applied, by the whole Court in *Hogan v Hinch*[21] as follows. The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a

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> legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government described in the passage from *Aid/Watch* set out above.
>
> 20 "The provisions of the Constitution mandate a system of representative and responsible government[14] with a universal adult franchise[15], and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system[16]." (emphasis omitted)

Thus the test expressed in Wotton reads"When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7,24, 64 or 128 of the *Constitution*, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, is the law 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 with a universal adult franchise, a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors, and an indispensable incident' of communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics.

1. As the first limb of the test will be dealt with during the construction of the by-law I will first deal with the second limb of the test namely, is the law 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 with a universal adult franchise, a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors, and an indispensable incident' of communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics. In addition Kiefel J. brought up the need for clarification concerning the meaning of the second limb of the test.

> 83. The second *Lange* question, as restated by McHugh J in *Coleman v Power*, may be thought to require even further clarification in respect of two matters: (1) as to the relationship, if any, between the means chosen by the statute to achieve its objective and the constitutional imperative of the maintenance of the system of representative government; and (2) as to whether that imperative is intended to be part of the test of proportionality which inheres in the second question in *Lange*, or whether it serves only to underline the importance and purpose of the freedom. These matters were not addressed in argument and may be put to one side.

In In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court first formulated the test to determine whether laws impermissibly burden the implied freedom of political communication. In the same paragraph the court commented on the development of the common law rules in light of the freedom and said,

> "If it is necessary, they (the common law rules) must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires.

In other words the development of the common law rules, in pursuit of the protection of personal reputation, must not unnecessarily or unreasonable impair the freedom of communication about government or political matters. This principle best describes the term "*in a manner compatible with the maintenance of the constitutionally prescribed system*". So the second limb of the test ought to be expressed in the following manner;

"Is the law nevertheless reasonably appropriate and adapted to serve a legitimate in a manner which does not unnecessarily or unreasonably impairing the indispensable incident' of communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics".

Thus if less drastic means can be used to achieve the end sought by the legislation then the law would be invalid. Similarly if the law poses an unreasonable restraint on the freedom the law would be invalid. Also if the law was not reasonably appropriate and adapted to a legitimate end it would be invalid. To hold otherwise could and would eventually have the effect of dissolving the implied freedom by a wave of good intention. As Mc Hugh said in Coleman v Power (2004) 220 CLR 1

> [93] No doubt the Court would have made the meaning of the second limb in Lange clearer if it had used the phrase "in a manner" instead of the phrase "the fulfilment of" in that limb. The second limb would then have read "is the law reasonably appropriate and adapted to serve a legitimate end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?" However, it is clear that the Court did intend the second limb to be read in a way that requires that both the end and the manner of its achievement be compatible with the system of representative and responsible government.

Also Gaudron J expressed in Nationwide News Pty Ltd v Wills (1992) 177 CLR 1,

> freedom to discuss matters pertaining to government institutions and agencies may be curtailed by a law under s.51, but only if its purpose is not to impair freedom, but to secure some end within power in a manner which, having regard to the

> general law as it has developed in relation to the written and spoken word, is reasonably and appropriately adapted to that end.

So if the by-law has as its purpose the infringement of the freedom it will be invalid (it seeks an illegitimate end)

The By-law

Breadth of the by-law

2. Road is defined in section 4 of the Act as 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. It includes a bridge, viaduct, subway, alley, causeway or walkway. In other words it would include the footpaths outside every building in the city, and Rundle Mall.

3. The prohibition sits in tandem with a similar prohibition relating to all Local Government Land, created at the same time as this by-law by By-law No. 3 – Local Government Land. Together, the prohibitions would cover virtually all public space in the city of Adelaide.

4. It's clear that the by-law is expressly intended to target political communications from the terms of the by-law;

> *By-law 4*
> *2.3 "provided that this restriction shall not apply to… …any survey or opinion poll conducted 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"*
> *2.8 provided that this restriction shall not apply to… …any handbill or leaflet given out or distributed 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"*

From these exclusions it is abundantly clear that the Council directly, not indecently, intends that the by-law prohibit preaching, canvassing, haranguing, and literature distribution on political and governmental matters unless those communications fall within the exemptions mentioned above. Part of the purpose of the by-law is to restrict political communications.

The Oxford Dictionary at 640 defines harangue as: "lengthy and earnest speech", "lecture or make a harangue to", Macquarie dictionary at 863 defines harangue as: 1 "a passionate vehement speech; noisy and intemperate address" 2 "any long, declamatory or pompous speech"… however Gavan Duffy J in Proud v City of Box Hill [1949] VLR 208 at 210 held that the phrase in a similar by-law enacted by the city of Box Hill included merely "a speech to a mob or gathering or a concourse of people, and therefore speech which must be delivered in a loud voice to be

heard". In other words, according to Gavan Duffy J, it includes any speech to a gathering of people and if the judgment in Proud v City of Box Hill were followed an innocent person refusing to stop addressing a gathering of persons could be arrested and found guilty of breaching the by-law.

5. Preaching, according to Macquarie at 1496 means to 1 "to advocate or inculcate (religious or moral truth, right conduct, etc) in speech or writing"2 "to proclaim or make known by sermon (the gospel, good tidings, etc.)" 3 "to deliver (a sermon or the like)"... 4 "to deliver a sermon" 5 "to give earnest advice, as on religious subjects" 6 "to do this in an obtrusive or tedious way". It is not defined in the Act, the By-law or the Encyclopedic Australian Legal Dictionary,

6. Macquarie Dictionary (3rd edition, Macquarie University, 1997) at 289 defines canvass as: 1 "solicit votes, subscriptions, opinion, etc from (a district, group of people, etc.)" 2 "to engage in a political campaign" 3 "to examine carefully; investigate by inquiry; discuss; debate"... 7 "to engage in discussion or debate"...

7. The terms of the by-law prohibits any public address without prior permission and in regards to the prohibition of preaching, would impair persons from making a public address which either 1. Has a religious undertone or theme (impairing Christian lobbyists who want to preach in public which have influenced government policies and laws since the foundation of our society) 2. Calls for change in society or calls for society to change their opinions about a particular issue 3. Criticizes any immoral action taken by the government or its members (e.g. environment issues, animal cruelty, foreign policy, policing, criticism of big businesses and banking institution as campaigned by those involved in the occupy movement etc), the list is endless.

8. Of particular importance to myself is the prohibition of preaching on Christian beliefs unless permission is first obtained. Traditionally Christian beliefs have had substantial influence on politics and it was said by Sir Henry Parks in 1886 *"As we are a British people—pre-eminently a Christian people as our laws, our whole jurisprudence, our Constitution are based upon and interwoven with our Christian belief, and as we are immensely in the majority, we have a fair claim to be spoke of at all times with respect and deference"*..The pre-amble to the Australian Constitution gives credence the Christian God expressing the Commonwealth's reliance upon the blessings of Almighty God, "*WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania,* ***humbly relying on the blessing of Almighty God****, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established".* Furthermore the Christian politicians, Christian political parties and Christian lobby groups around Australia, their policies and the

various political issues they campaign reveal that the Christian faith directly affects the Australian Government's laws and policies. As the Federal Court held in Evans v NSW [2008] FCAFC 130

> 2 Religious beliefs and doctrines frequently attract public debate and sometimes have political consequences reflected in government laws and policies.

Also Kirby J in Levy v Victoria (1997) 189 CLR 579 **said,**

> A rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written. Lifting a flag in battle, raising a hand against advancing tanks, wearing symbols of dissent, participating in a silent vigil, **public prayer and meditation**, turning away from a speaker, or even boycotting a big public event clearly constitutes political communication although not a single word is uttered.

9. So the by-law properly constructed substantially and vastly burdens the implied freedom of political communication. if the Court accepts a narrower definition of harrague the argument remains that if the Council can make a by-law prohibiting preaching, canvassing, and haranguing and literature distribution then it can also make a by-law prohibiting all forms of pubic address. The same arguments advanced by the applicant for the validity of the by-law can be argued to support a by-law which requires persons obtain permission before making any public address. Consequently the question this court must answer is; can the government require that every citizen must first obtain permission from the government before making a public address? Such a prohibition would bring us back to the Soviet and communist era, yet if the Council can make a by-law requiring permission to be obtained to preach, canvass and harangue and distribute literature then it follows that it can make a by-law in the same terms for persons wanting to make a general public address.

<u>The permit system</u>

10. Personal opinions may govern the grant or denial of permits, and persons of one particular persuasion or belief might get better locations and better time allotments then persons from another persuasion that might be prohibited completely or denied prominent locations or times. The opportunity for corruption, abuse and prohibition is high especially with the absence of a criterion for the grant or denial of a permit. No requirement for the Council to administer the by-law in a reasonable manner is stated or implied in the by-law. No statutory instrument for judicial review is available in South Australia, the ombudsman has no authority to overrule the decision and no other government entity has authority to overrule the decision of the Council. There is no effective form of review available, not to mention the ineffective and time consuming forms of review mentioned in the applicants application for special leave.

<u>Less drastic means available</u>

11. The end which is said to be sought by the by-law is to balance the many and varied competing interests of road users. The full also court gave numerous examples of behavior, covered by the by-law, which could interfere with the comfort, convenience and safety of the local inhabitance. In pursuit of that end the by-law has prohibited a series of activities which are a normal part of society and has substantially burdened the implied freedom of political communication. There is no by-law directed at assemblies on the footpath or in the mall, neither has there been prior to November 2010 directed at amplification or megaphones. The by-law is directed at persons seeking to preach, canvass and harangue and distribute literature. It can hardly be said that a single street corner preacher or a single person handing out literature will interfere with other road users. An immediate and obvious option to achieve the end sought to empower compliance officers to give directions to persons who are behaving in ways which unreasonable interfere with the rights of others. Such a law could have various guidelines of reasonableness for the officer to follow and would sufficiently meet the end sought by the impugned by-law.

The by-law unnecessarily or unreasonably impairs the freedom of communication about government and political matters

12. In this regard I accept and adopt the reasoning of Full Court in paragraphs 156-154 of the judgment.

The purpose of the by-law

13. In this regard I accept and adopt the reasoning of the Full court in paragraphs 161 judgment

Part VII:

1. The Full Court erred in finding that s667 XVI of the Local Government Act 1934 authorized the by-law subject only to the Constitutional requirement.

1.1. In this regard the Full Court fell into error by finding that s239 of the Local Government Act 1999 dealt with minor irritations which would not be covered by a broad interpretation of s667 XVI of the Local Government Act 1934, thus avoiding the limitation on the power to control conduct on roads implied by s 238(2) (a) and s239 (1) (g) of the 1999 Act and allowing for a broad interpretation of the convenience power. The Court ought to have found that because of s 239(1)(f) the movement of animals and (g) any other use in relation to which the making of by-laws is authorized by regulation (including obstructions), that s239 dealt with substantial matters of convenience, comfort and safety of the inhabitants municipal area, and combined with s238 (2)(a) and s239 (1)(g) of the 1999 Act restricted a broad interpretation of s667 XVI of the Local Government Act.

2. The Full Court erred in regards to s246 (2) of the Local Government Act 1999 by finding that the restriction on by-law making powers in regards to licenses did not apply to the by-law in question.

2.1. The Full Court fell into error in failing to recognize that "permission" as stated in by-law 4 is defined in by-law 1 as "permission from the Adelaide city Council in writing", which is the primary meaning of the word license in every dictionary. The Court ought to have followed the plain meaning of the text instead of reading into the text something that was not there.

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3. The Full Court erred in regards to the certificate of validity passing the requirements of the Electronic Transactions Act 2000.

3.1. The Full Court fell into error by finding on the one hand that s 249(4) of the 1999 Act required that the Council must obtain a certificate signed by a solicitor stating that the by-law is within the power of the Local Council, and on the other hand stating that this was provided via an email meeting the requirements of the Electronic Transactions Act 2000, when in fact no certificate was provided and what was provided did not meet the requirements set out in the Electronic
20 Transactions Act 2000 s9(1) (a), (b) & (c), s10(1)(a), (b) & (c), s10(2)(a), (b) & (c), s11(2)(a). The Court also ought to have taken into consideration the fact that not only was there no signature of the certificate, but there wasn't any date on the certificate either. The 3rd respondent also relies on his honor Judge Stretton's comments concerning the certificate of validity in Corneloup v Adelaide City Council [2010] SADC 144.

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Dated

.....(signed).....
[*Senior legal practitioner presenting the case in Court, or respondent if unrepresented*] Caleb Corneloup

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