IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A16 of 2012

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

AND: **CORPORATION OF THE CITY OF ADELAIDE**
First Respondent

AND: **CALEB CORNELOUP**
Second Respondent

AND:

SAMUEL CORNELOUP
Third Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant.

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

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Filed on behalf of: Attorney-General for the State of Queensland

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IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the Appellant.

V. ARGUMENT

5. It is well established that in order to determine whether a law infringes the implied freedom of political communication, a court must ask two questions:[1]

   (a) Does the law under challenge effectively burden freedom of political communication about government or political matters either in its terms, operation or effect?

   (b) If it does, 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?

6. The Attorney-General for South Australia assumes that answer to (a) is 'yes'[2] and submits that answer to (b) is also 'yes'.

7. These submissions therefore focus on the second question from *Lange*.[3]

8. The conclusion of the Full Court that clauses 2.3 and 2.8 of By-law No 4-Roads ('the By-law') was invalid depended on the reasoning at paragraphs 158 to 159 of the judgment of Kourakis J.

9. That reasoning, however, should be rejected.

10. First, it is inconsistent with this Court's decision in *Wotton*. In that case, the plaintiff was a prisoner on parole who claimed that he wished to speak on matters relating to Aboriginal and Indigenous affairs. He argued that s 132(1) of the *Corrective Services Act 2006* (Qld) hindered him from doing so and therefore breached the implied freedom of political communication. Section 132(1) made it an offence (subject to certain exceptions) to interview a prisoner without the approval of the Chief Executive. French CJ and Gummow, Hayne, Crennan and Bell JJ treated the capacity of the plaintiff to

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 as refined in *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*').

2 See *Wotton v State of Queensland* (2012) 86 ALJR 246 ('*Wotton*') at [28] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

3 An inquiry into whether a law is reasonably appropriate and adapted requires a court to identify the ends of the law and to ascertain whether it is a reasonable means of achieving those ends. It is not necessary for those seeking to uphold the law to show that it is the best means of achieving the legitimate end: *Coleman v Power* (2004) 220 CLR 1 at 102-103 [328] (Heydon J). See also at [31] (Gleeson CJ). In deciding whether the law is a reasonable means of achieving legitimate ends, the extent of the burden on political communication is relevant: see, for example, *Coleman v Power* (2004) 220 CLR 1 at 99 [319] (Heydon J).

have the decision of the Chief Executive examined under the *Judicial Review Act 1991* (Qld) as an important factor pointing to the compatibility of s 132(1) with the implied freedom: (2012) 86 ALJR 246 at [10], [31]. Their Honours must have accepted that the Chief Executive might, from time to time, be found by a court to have acted beyond power in refusing approval; they must also have accepted that the judicial examination would involve some delay. These features, however, did not affect the validity of s 132(1). By contrast, Kourakis J regarded the delays inherent in invoking the Supreme Court's supervisory jurisdiction and the possibility that City officers might make errors as demonstrating incompatibility of the By-law with the maintenance of representative and responsible government.

11. Secondly, any impact that clauses 2.3 and 2.8 have on freedom of political communication is incidental. Those clauses apply only to certain activities on 'roads' (as defined in the *Local Government Act 1999* (SA), s 4). They apply without distinction to all manner of communications, whether they be political, commercial or otherwise. Their purpose is not to prevent political communications or to control the content of speech: see [2011] SASCFC 84 at [126]-[128] and compare *Coleman v Power* (2004) 220 CLR 1 at 123 [326] (Heydon J). The clauses therefore cannot be said to regulate or prohibit communications that are inherently political or a necessary ingredient of political communication. Accordingly, they more readily satisfy the second limb of *Lange*: *Coleman v Power* (2004) 220 CLR 1 at [31] (Gleeson CJ); *Hogan v Hinch* (2011) 85 ALJR 398 at [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v State of Queensland* (2012) 86 ALJR 246 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ). Justice Kourakis, however, saw no difference in the application of the second limb of *Lange* to the clauses of the By-law. That was a significant error.

12. Thirdly, the effect of the By-law on freedom of political communication is limited and clauses 2.3 and 2.8 apply only to certain activities on 'roads'. Neither clause imposes an absolute prohibition. Neither purports to affect the ability of persons to engage in political communication by, for example, posting messages on the internet, by sending letters to council members or newspapers, or even by printing leaflets and dropping them in letter boxes. Clause 2.3 does not apply to the Speaker's Corner or to surveys during election and referendum periods, and clause 2.8 does not apply to leaflets and handbills during those periods. The limited extent of the burden on the implied freedom suggests that clauses 2.3 and 2.8 are reasonably adapted and appropriate: compare *Sellars v Coleman* [2001] 2 Qd R 565 (rejecting a claim that a by-law that required a permit for taking part in public demonstrations or public addresses in malls in Townsville infringed the implied freedom; special leave to appeal was refused: [2002] HCATrans 322); *Meyerhoff v Darwin City Council* (2005) 190 FLR 344 (rejecting a challenge to a by-law that made it an offence to affix or cause to be affixed a handbill to a power pole, signpost or fixture in a street without permission).

13. Fourthly, legislation regulating communications in public spaces, including roads, has existed in several Australian jurisdictions for decades without any apparent impact on the maintenance of the constitutional system of responsible and democratic government provided for by the Constitution: see, for example, *Seeligson v City of Melbourne* [1935] VLR 365 (upholding a by-law providing that no person could give out or distribute to bystanders or passers-by handbills, placards, notices, advertisement, books, pamphlets or papers); *Proud v City of Box Hill* [1949] VLR 208 (upholding a by-law providing, among other things, that no person should in any public highway cause or suffer to be caused any noise by shouting, calling out, haranguing or singing); *Sellars v Coleman* [2001] 2 Qd R 565; *Meyerhoff v Darwin City Council* (2005) 190 FLR 344. This makes it difficult to accept the views of Kourakis J that the delay inherent in obtaining permission might affect the system of representative and responsible government and would 'strangle' political speech.

14. Even in the United States, the Supreme Court has made it clear that content-neutral legislation regulating the time, place and manner of communications in public places may be compatible with the First Amendment. In *Thomas v Chicago Park District*, for example, the Supreme Court held that a requirement to obtain permission before holding certain gatherings in a park did not infringe the First Amendment. That was so notwithstanding that a core concern of the First Amendment was with invalidating prior restraints and the City had up to 28 days in which to decide on a permit: 534 US 316 at 320-321, 323 (2002).

15. Finally, insofar as it is relevant, there is no obvious, less drastic alternative available to achieve the legitimate objects of the By-law. Justice Kourakis suggested that an alternative was to exclude political communications from the scope of the By-law. That, however, would undermine the object of allocating space and time equitably between those who wished to engage in the conduct: see [2011] SASCFC 84 at [126], [128]. Such an exclusion may also render the law largely ineffective, as his Honour admitted: at [2011] SASCFC 84 at [163]. Limiting the By-law to speech that might threaten public order would also make it difficult to achieve the object of an orderly allocation of time and space. Given the lack of obvious alternatives, clauses 2.3 and 2.8 are a reasonable means of implementing their objects. They therefore do not infringe the implied freedom.

16. Accordingly, the appeal should be allowed.

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