

BETWEEN

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA  
Appellant

and

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THE CORPORATION OF THE CITY OF ADELAIDE  
First Respondent

CALEB CORNELOUP  
Second Respondent

SAMUEL CORNELOUP  
Third Respondent

APPELLANT'S SUBMISSIONS

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Part I – Internet Publication

1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II – Concise Statement of Issues

2. This appeal raises the following questions:

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2.1. Is a permit system that enables a local council to balance the competing interests of various road users within a municipality, including those who seek to use roads for the purposes of political communication, reasonably appropriate and adapted to promoting the convenience of road users, such that it does not offend the implied freedom of political communication?

2.2. Is a by-law that is properly adjudged to be a reasonable and proportionate exercise of the relevant by-law making power necessarily reasonably appropriate and adapted for the purposes of considering whether the by-law offends the implied freedom of political communication?

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2.3. To what extent, if any, should the validity of a by-law be judged by reference to the possibility that it may be erroneously administered?

**Part III – Section 78B of the *Judiciary Act 1903* (Cth)**

3. The Appellant filed and served notices in compliance with s78B of the *Judiciary Act 1903* (Cth) on 24 May 2012.

**Part IV – Citations**

4. The judgment of the District Court of South Australia ([2010] SADC 144) is reported at (2010) 179 LGERA 1.
5. The judgment of the Full Court of the Supreme Court of South Australia ([2011] SASFC 84) is reported at (2011) 110 SASR 334.

**Part V – Facts**

6. The Second and Third Respondents (**the Respondents**) are members of a religious organisation called “Street Church”. They seek to preach on the streets of Adelaide. They say that their preaching is also political in nature.

*District Court judgment*

7. The Respondents commenced proceedings in the District Court of South Australia seeking a declaration pursuant to s276 of the *Local Government Act 1999* (SA) (**the 1999 Act**) that cl 2.3 and 2.8 of *By-Law No 4 - Roads* (**the By-law**), made by the First Respondent, the Corporation of the City of Adelaide (**the Council**), was invalid. The relevant clauses of the By-law provided as follows:

**Activities requiring permission**

No person shall without permission on any road:

...

**2.3 Preaching and canvassing**

preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to a designated area as resolved by the Council known as a ‘Speakers Corner’ and 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 Distribute**

give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, 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 to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum;

8. The District Court held that the By-law exceeded the by-law making power conferred by the *Local Government Act 1934* (SA) (**the 1934 Act**) and the 1999 Act, but that the By-law could be saved by severing the first three words of cl2.3 and cl2.8.<sup>1</sup> Consequently no need arose to consider the alternate argument that the impugned clauses infringed the freedom of political communication implicit in the *Commonwealth Constitution*.

<sup>1</sup> *Corneloup v Adelaide City Council* [2010] SADC 144, [168]; (2010) 179 LGERA 1, 44.

Full Court judgment - Did the By-law exceed the limits of the by-law making power?

9. On appeal the Full Court held that the By-law was within the broad by-law making power of the Council conferred by s667(1)(9)XVI of the 1934 Act. However, cll 2.3 and 2.8 were held to be inconsistent with the implied constitutional freedom of political communication.

10. The Full Court accepted that the By-law was supported by s667(1)(9)XVI of the 1934 Act, which confers a broad power on local government councils to make by-laws “generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants” (the convenience power). Kourakis J (with whom Doyle CJ and White J agreed) expressed his conclusions in relation to the breadth of the convenience power in the following terms:

The convenience powers extends to regulating conduct which, having regard to the [...the nature of contemporary urban communities, the legislative responsibilities of other levels of government and the nature of the specific powers expressly conferred on the organs of local government...], is properly a matter of municipal concern and which, if left uncontrolled, will materially interfere with the comfort, convenience and safety of the city’s inhabitants.<sup>2</sup>

11. Justice Kourakis then proceeded to consider whether the By-law was a reasonable and proportionate exercise of the by-law making power.<sup>3</sup> His Honour concluded that it was. He said:

It is next necessary to consider the reasonableness and proportionality of the by-law.

Little more needs to be said about the regulation of those who wish to harangue the public. The inconvenience and discomfort caused by that activity is substantial. It is well illustrated by some of the alleged activities of the respondents. If there is a common law liberty to harangue it is open to the City of Adelaide to subjugate it in the interest of the convenience of its inhabitants.

Preaching and soliciting, if they are to achieve their purpose, must, in some way, attract the attention of passers by. Requiring persons who propose to engage in the regulated conduct to obtain permission will directly advance the convenience, comfort and safety of the inhabitants of the City. I accept that the way in which some, perhaps many, persons engage in those activities, would have, individually, little impact on the comfort, convenience and safety of the City’s inhabitants. However, that is not the question. Plainly enough the convenience, comfort and safety of the inhabitants would be adversely affected if there were no limit on the number of persons who could engage in the regulated conduct on any given day. The by-law, therefore, advances the statutory purpose of the convenience power. The requirement to obtain permission is not a disproportionate response to the problem. Rather, it is a measure calculated not only to ensure that road users are not faced with a barrage of spruikers but also to afford those who wish to disseminate their opinions on the roads an orderly system and opportunity to do so.

I accept that handing out printed material by a single person, stationary on a street corner, is unlikely to cause any serious inconvenience. However, persons anxious to distribute written material will often be motivated to position themselves in a way which leaves a passer-by little choice but to take written material even if he or she does not want it. The inconvenience to road users, the consequential litter problems and the orderly allocation of space and time to those who wish to disseminate the material, are reasons which sufficiently justify the regulation of this conduct. I am not persuaded that it is unreasonable to protect the convenience of road users in this way.

<sup>2</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASFC 84, [98]; (2011) 110 SASR 334, 361.

<sup>3</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASFC 84, [99]-[129]; (2011) 110 SASR 334, 361-367.

Alternative measures are not immediately obvious. Limitation by reference to distance from other similar activities, or the number of persons involved, requires a large measure of self regulation and is difficult to police. Importantly, it does not address the other purpose of the by-law which is to allocate space and time equitably between those who wish to engage in the regulated conduct. A permit system avoids what might be described as the 'Olympic system' where the fastest, loudest, or most numerous prevail. Limitation by reference to the degree of obstruction, volume or offensiveness is also difficult to enforce after the event and would not address all of the mischief caused by such activities. Enforcement by prosecution of breach of a by-law which prohibited only that conduct which was offensive, or otherwise breached the peace, would depend on the cooperation of members of the public or extensive supervision by police or local government officers. Prosecution of a breach of a by-law limited to conduct which in fact interfered with the convenience, comfort and safety of the City's inhabitants would necessitate a more expensive and protracted prosecution than one for engaging in the regulated conduct without permission. On the other hand, refusing permission to engage in the regulated conduct to individuals who are in the habit of preaching or haranguing in a way which offends or materially interferes with the public's use of the City's roads would appear to be a more effective way of advancing the convenience, comfort and safety of the City of Adelaide's inhabitants. The collateral effect on those persons who wish to engage in the regulated conduct without interfering with anyone else's convenience has not been shown to be substantial.<sup>4</sup>

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20 12. The Appellant accepts and adopts the reasoning of the Full Court on this issue.

Full Court judgment - Did the By-law infringe the implied freedom of political communication?

13. The Full Court held that the By-law infringed the implied freedom of political communication in that it was not reasonably appropriate and adapted to the purpose of promoting the convenience, comfort and safety of the users of city streets. It was not the object of cll 2.3 and 2.8 that was offensive, but the method chosen to achieve it. The method, Kourakis J considered, was not compatible with the constitutionally mandated system of responsible government.

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14. As to the regulation of preaching, Kourakis J considered that "[t]he 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 responsible and democratic government".<sup>5</sup>

15. In particular, Kourakis J was troubled by the delay inherent in the requirement to obtain permission and the possibility that Council officers who administer the permit system may not have sufficient regard to the implied freedom in exercising their discretion.<sup>6</sup> Kourakis J commented that "[m]embers of a democratic society do not need advance permission to speak on political matters".<sup>7</sup>

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16. Justice Kourakis reached the same conclusion regarding the regulation of haranguing.<sup>8</sup>

17. Turning to the concept of proportionality, Kourakis J accepted that the By-law sought to avoid inconvenience to road users by restricting both political and non-political forms of speech.<sup>9</sup> The avoidance of inconvenience caused by non-political speech was a legitimate end. However, because the By-law sought to avoid inconvenience by regulating both political and non-political speech, it sought to regulate communication in a disproportionate way.<sup>10</sup>

<sup>4</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [124]-[128]; (2011) 110 SASR 334, 366-367.

<sup>5</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [157]; (2011) 110 SASR 334, 373.

<sup>6</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [158]; (2011) 110 SASR 334, 373-374.

<sup>7</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [159]; (2011) 110 SASR 334, 374.

<sup>8</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [160]; (2011) 110 SASR 334, 374.

<sup>9</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [161]; (2011) 110 SASR 334, 374.

<sup>10</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [161]; (2011) 110 SASR 334, 374.

18. Having concluded that the By-law did infringe the implied freedom, Kourakis J considered whether certain portions of the By-law could be severed in order to preserve the remainder of the By-law. His Honour concluded that the first three words of cl2.3 and the whole of cl2.8 could be severed.<sup>11</sup>

## Part VI – Appellant’s Argument

### The Lange test

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19. In *Wotton v Queensland* the two step approach to determining whether a law infringes the implied freedom of political communication was confirmed in the following terms:

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 legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.<sup>12</sup>

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The test articulated in *Wotton* is not materially different to that accepted in *Lange v Australian Broadcasting Corporation*,<sup>13</sup> as modified in *Coleman v Power*<sup>14</sup> (the *Lange test*).

20. The first step of the *Lange* test focuses attention on the nature of the communications that may be burdened by the impugned law. The implied freedom does not protect all forms of speech. It only protects those communications that are necessary to preserve the system of government prescribed by the *Commonwealth Constitution*.

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21. The second step of the *Lange* test arises from the Court’s unanimous holding that the implied freedom is not absolute.<sup>15</sup> This conclusion recognised that there will be circumstances in which political speech must be limited in order to give effect to other societal interests. As the freedom is not absolute, it was necessary for the Court to enunciate a test to determine when a law that burdens political communication will nonetheless be valid. The following principles apply to the second step:

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21.1. The *Lange* test draws a distinction between laws that serve a legitimate end, on the one hand, and laws that serve the purpose of targeting and restricting free political communication, on the other hand. Where a law sets out to impede the implied freedom it will ordinarily be invalid. Such a law will not serve a legitimate end. For example, a law that was designed to prevent criticism of government policies during an election campaign would fail this limb of the second step of the *Lange test*.

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<sup>11</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASFC 84, [173]; (2011) 110 SASR 334, 376-377.  
<sup>12</sup> (2012) 86 ALJR 246, 253 [25] (French CJ, Gummow, Hayne, Crennan & Bell JJ), 255 [40] (Heydon J), 262 [77] (Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).  
<sup>13</sup> (1997) 189 CLR 520, 567-568 (the Court).  
<sup>14</sup> (2004) 220 CLR 1, 50-51 [94]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J): the words “the fulfilment of” were replaced by “in a manner”.  
<sup>15</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561, and the references cited in fn 251; *Levy v Victoria* (1997) 189 CLR 579, 617 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 51-52 [97] (McHugh J).

21.2. A law that serves a legitimate end, conversely, is a law that serves any purpose other than one that is aimed at the destruction, subversion or frustration of the constitutionally prescribed system of government. Where a law serves a legitimate end, and therefore only incidentally burdens the freedom of political communication, it will only be held to be invalid where it is not reasonably appropriate and adapted to that legitimate end.

21.3. The Court should not accept at face value an assertion made by a party before it, usually a representative of the executive branch, that the impugned law serves a legitimate end. As Mason CJ said:

Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.<sup>16</sup>

21.4. The purpose of asking whether the law is reasonably appropriate and adapted is to provide an objective measure by which to test an assertion that a law serves a legitimate end. It is a test of characterisation. Does the impugned law *really* serve the stated end, or alternatively is it so inappropriate and ill-adapted to meet its stated purpose, that it cannot be considered to serve that end. This prevents legislatures from passing laws with stated purposes that are legitimate, but which by reference to their operation can be demonstrated as having the objective purpose of thwarting the implied freedom. The use of the reasonably appropriate and adapted test in this way is consistent with its application in other constitutional contexts, for example, in characterising a law to test whether it is a law with respect to a purposive power.<sup>17</sup>

21.5. When understood in this way, it becomes clear that determining whether a law is reasonably appropriate and adapted to a legitimate end does not involve a weighing of the legitimate object of the impugned law against the importance of free political communication.<sup>18</sup> In assessing validity, the relevant relationship of proportion is between the legislative purpose of the impugned law and the means adopted to achieve it. The significance of the freedom of political communication to the system of government mandated by the *Commonwealth Constitution* gives rise to the need to test the validity of laws that burden that freedom, but it is not weighed in determining the validity of the impugned law.

<sup>16</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145.

<sup>17</sup> *Williams v Melbourne Corporation* (1933) 49 CLR 142, 155-156 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161, 164-165 (Wilson, Dawson, Toohey & Gaudron JJ), 175-179 (Brennan J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 323-324 (Brennan J) and 355-356 (Dawson J); *Leask v Commonwealth* (1996) 187 CLR 579, 591 (Brennan J), 605-606 (Dawson J), 616-617 (McHugh J), 624 (Gummow J). In the context of s 92 see *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 484 [134] (Heydon J) ("So wide is the technique adopted - so ill-suited is it to achieve the end supposedly advanced - that it must be inferred that the only purpose is protectionist.")

<sup>18</sup> *Coleman v Power* (2004) 220 CLR 1, 46-50 [83]-[91] (McHugh J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 197 [32]-[33] (Gleeson CJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178-179 [17] (Gleeson CJ).

- 21.6. An impugned law is not invalid simply because it can be shown that it was not the least restrictive measure available to achieve the legitimate end served by the law.<sup>19</sup> The measure need not be “essential” or “unavoidable”.<sup>20</sup> Nonetheless, in determining whether an impugned law is reasonably appropriate and adapted, it is permissible to inquire whether other means exist which are more likely to impair the freedom of political communication to a lesser extent. This is not so because the legislative power of the States and the Commonwealth is confined to pursuing legitimate ends in a manner that only minimally impairs the freedom. Rather, it is because if an obvious alternative exists, which is less likely to impair rights and freedoms and which promotes the legitimate end equally effectively,<sup>21</sup> then this may demonstrate that the purpose of the impugned law is not in fact the stated purpose.<sup>22</sup> It is in this context that the concept of strict scrutiny may be utilised.<sup>23</sup> The more likely it is that a law will burden the freedom of political communication the less likely it is that the legislature sought to pursue a legitimate end, where a less intrusive alternative existed. Conversely, the less inherently likely it is that the impugned law will burden free political communication the more likely it is that the law serves a legitimate end, even where less intrusive alternatives exist.<sup>24</sup>
- 21.7. There is a difference between weighing the value of a legitimate end against the importance of free political communication and considering whether the impugned law is reasonably appropriate and adapted by reference to how likely it is that the law will interfere with the implied freedom or, for that matter, any other freedoms. The former process entails weighing of incommensurable policy objectives. The latter remains one of characterisation. The notion of deference can play no role in the process of characterisation, because it is for the Courts to determine the limits of legislative power. Further, there is nothing deferential about this Court refusing to weigh an asserted legitimate end against the value of free political communication. That is merely to acknowledge that it is not for the courts to second guess the means adopted by the legislature, so long as the means adopted are in pursuit of a legitimate end.<sup>25</sup> This approach recognises the proper role of the judiciary operating within the context of the

<sup>19</sup> *Coleman v Power* (2004) 220 CLR 1, 31 [31] (Gleeson CJ), 53 [100] (McHugh J) (“The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another.”), 123-124 [328] (Heydon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 305 [360] (Callinan J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 22 [29] (French CJ); *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ); *Rann v Olsen* (2000) 76 SASR 450, 483 [185] (Doyle CJ).

<sup>20</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby & Crennan JJ), referring to *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199-200 [39]-[40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506, 549 [72] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

<sup>21</sup> This was recently recognised in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134 [438] (Kiefel J), citing *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 306 (Stephen & Mason JJ).

<sup>22</sup> *Coleman v Power* (2004) 220 CLR 1, 52-53 [100] (McHugh J).

<sup>23</sup> *Levy v Victoria* (1997) 189 CLR 579, 619 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 31 [30]-[31] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506, 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ); *Wotton v Queensland* (2012) 86 ALJR 246, 254 [30] (French CJ, Gummow, Hayne, Crennan & Bell JJ).

<sup>24</sup> *Coleman v Power* (2004) 220 CLR 1, 120 [319] (Heydon J).

<sup>25</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 22 [29] (French CJ) (“It is not for this Court to hold such a law beyond the power of the Parliament simply because the Court thinks there might be a better way of achieving the same beneficial purpose.”); *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ); *Rann v Olsen* (2000) 76 SASR 450, 483 [184] (Doyle CJ) (“[I]t is not for the Court to substitute its judgment for that of Parliament as to the best or most appropriate means of achieving the legitimate end.”)

separation of powers.<sup>26</sup> To the extent that a different test may emerge in other constitutional contexts, that difference is attributable to either the imposition of an express constitutional limitation on legislative power, such as the express guarantee of free trade in s 92,<sup>27</sup> or the express conferral of a constitutional right. However, it has been repeatedly confirmed that the implied freedom does not confer a personal right.<sup>28</sup>

21.8. The freedom of political communication arises as an implication necessary to facilitate the operation of the system of representative and responsible government provided for by the *Commonwealth Constitution*. An important aspect of this constitutionally mandated system of government is the accountability of the Government to the Parliament and of the Parliament to the people for political choices that are taken. It would be ironic if the *Lange* test, implied so as to protect the institutions of representative and responsible government, was to develop in such a manner as to deny to the legislative branch the responsibility of identifying legitimate ends and the means by which those ends, in good faith, are pursued. Such an implication would become self-defeating.

#### Construction of the By-law

22. Before turning to apply the *Lange* test to the facts of this case, the antecedent step in determining whether or not an impugned law is invalid is to construe its terms.<sup>29</sup>

23. The By-law does not define the terms “preach”, “canvass” or “harangue”. The term “preach” means “to advocate or inculcate (religious or moral truth, right conduct, etc) in speech or in writing.”<sup>30</sup> The term “canvass” means “to solicit votes, subscriptions, opinions, etc, from (a district, group of people, etc).”<sup>31</sup> The term “harangue” is ambiguous. There are two possible meanings:

23.1. “a passionate, vehement speech; noisy and intemperate address”.<sup>32</sup> Similar definitions include, “to lecture (someone) at length in an aggressive and critical manner”,<sup>33</sup> or,

<sup>26</sup> *Coleman v Power* (2004) 220 CLR 1, 31 [31] (Gleeson CJ); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 178-179 [17] (Gleeson CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 134 [438] (Kiefel J) (referring to the need to “maintain legislative choice” and to “avoid ... unwarranted substitution”); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 550-551 [2]-[5] (Gleeson CJ), 597 [168] (Crennan & Kiefel JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 399-400 (Windeyer J); *R v Spicer; Ex parte Australian Builders Labourers’ Federation* (1957) 100 CLR 277, 305 (Kitto J); M Gleeson, *Courts and the Rule of Law* (unpublished paper delivered at Melbourne University, 7 November 2001); *Australian Gas Light Company v Australian Competition & Consumer Commission (No 3)* (2003) 137 FCR 317, 492-493 [607]. In a related context, see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J) and B Selway, “The principle behind the common law judicial review of administrative action - the search continues” (2002) 30 *Federal Law Review* 217, 231, 233-234.

<sup>27</sup> *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 475-478 [98]-[105] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ).

<sup>28</sup> *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 560 (the Court); *Wotton v Queensland* (2012) 86 ALJR 246, 258-259 [54] (Heydon J).

<sup>29</sup> *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon & Kiefel JJ), 569 [72] (Kirby J, in dissent).

<sup>30</sup> *Macquarie Dictionary* (3rd ed, 1997), 1683.

<sup>31</sup> *Macquarie Dictionary* (3rd ed, 1997), 326.

<sup>32</sup> *Macquarie Dictionary* (3rd ed, 1997), 972.

<sup>33</sup> *Oxford Dictionaries Online*, cited in *Corneloup v Adelaide City Council* [2010] SADC 144, [119]; (2010) 179 LGERA 1, 29. See also *Leslie v City of Essendon* [1952] VLR 222, 239 (Sholl J).

- 23.2. “any long, declamatory or pompous speech”.<sup>34</sup> Similar definitions include, “a speech to a mob or gathering or a concourse of people, and therefore a speech which must be delivered in a loud voice in order to be heard.”<sup>35</sup>

The important difference between these meanings is that the former is narrower in the sense that it contemplates that the speech in question will be objectionable to its audience in some respect (whether by virtue of its critical content, excessive volume or the demeanour of the speaker).

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24. The first meaning of “harangue” should be accepted for the following reasons:

24.1. It is consistent with the genus that is apparent from the various kinds of conduct referred to in cl2.3 of the By-law, namely uses identified by the Council that have the potential to interfere with the enjoyment of roads by other users. If the broader interpretation of harangue were adopted then it would fall outside this genus because it would include perfectly inoffensive forms of communication, such as a temperate speech delivered at a volume sufficient to be heard.

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24.2. The adoption of the narrower definition is consistent with various objects of the 1999 Act, including:

24.2.1. “to encourage the participation of local communities in the affairs of local government and to provide local communities, through their councils, with sufficient autonomy to manage the local affairs of their area”;<sup>36</sup> and,

24.2.2. “to ensure the accountability of councils to the community”;<sup>37</sup> and,

24.2.3. “to enhance the capacity of councils to act within their local areas as participants in the Australian system of representative government”.<sup>38</sup>

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24.3. Where there are two interpretations available, one of which would render the law in question invalid, the other interpretation should be preferred.<sup>39</sup> To adopt the broader of the meanings identified above would unduly impair the implied freedom of political communication, and would thereby imperil the validity of the By-law.

25. The terms of cl2.8 of the By-law are relatively free of ambiguity.

<sup>34</sup> *Macquarie Dictionary* (3rd ed, 1997), 972.

<sup>35</sup> This was the meaning attributed to this term by Gavan Duffy J in *Proud v City of Box Hill* [1949] VLR 208, 210, cited in *Corneloup v Adelaide City Council* [2010] SADC 144, [119]; (2010) 179 LGERA 1, 29.

<sup>36</sup> Section 3(b) of the 1999 Act.

<sup>37</sup> Section 3(d) of the 1999 Act.

<sup>38</sup> Section 3(e) of the 1999 Act.

<sup>39</sup> *Attorney-General (Vic) v Commonwealth; Ex rel Dale (‘the Pharmaceutical Benefits Case’)* (1945) 71 CLR 237, 267 (Dixon J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Momcilovic v The Queen* (2011) 85 ALJR 957, 1052 [390] (Heydon J); s 22A of the *Acts Interpretation Act 1915 (SA)*. See other references collected in D Pearce & R Geddes, *Statutory Interpretation in Australia* (7th ed, 2011), 174 [5.8].

Does the By-law burden political communication?

26. It may be accepted that cll 2.3 and 2.8 of the By-law are capable of effectively burdening communication about political matters in certain circumstances. By imposing a requirement to obtain a permit before allowing people to engage in the activities set out in cll 2.3 and 2.8, the By-law may impose a burden upon those who seek to engage in an activity of that kind where it bears a political aspect.

10 27. Indeed, it may be that the instant case presents an example whereby the By-law does restrict the Respondents' unfettered freedom to engage in political communication. It is accepted that some 'religious' speech may also be characterised as 'political' for the purposes of the implied freedom.<sup>40</sup> The Respondents depose to preaching on topics including pornography, abortion, same sex marriage and teenage binge drinking.<sup>41</sup> Further, the Respondents deposed to have actively supported a candidate for the Christian Democratic Party in the course of the federal election conducted in 2010.<sup>42</sup>

20 28. Whether the Respondents are engaged in political speech for the purpose of the implied freedom may turn on whether they seek to engage in genuine political discussion, or whether the content of their preaching is so peripherally political that it cannot be said that it is necessary to protect it in order to preserve the system of representative and responsible government provided for by the *Commonwealth Constitution*.<sup>43</sup> However, as the jurisdiction of the District Court, conferred pursuant to s276 of the Act, grants a wide jurisdiction to inquire into the validity of by-laws it is unnecessary to make any conclusive findings about whether the Respondents engage in speech that attracts the protection of the implied freedom.<sup>44</sup>

29. For these reasons, the first question posed by the *Lange* test should be answered 'yes'.

Is the By-law reasonably appropriate and adapted? The legitimate end

30 30. The primary end that cll 2.3 and 2.8 of the By-law serve is to balance the many and varied competing interests of road users within the Council area.<sup>45</sup> Such users include, amongst others, pedestrians, retailers, drivers of vehicles, service providers, spruikers, buskers and those who want to speak politically. These users may come into conflict. The purpose of restricting preaching, canvassing, haranguing and the distribution of materials without a permit is to enable all road users, including those who want to speak politically, to use roads without being subjected to an unacceptable level of disruption in their enjoyment thereof.

40 31. The By-law serves the additional subsidiary ends of promoting safety on roads and keeping the peace. Safety is promoted by enabling the Council to grant permits so as to ensure that activity that may be likely to cause members of the public to divert their course does not occur in close proximity to busy streets. By way of example, it may be desirable to refuse a permit to preach on the platform of a tram stop during peak hour, or to refuse a permit to distribute handbills to traffic that is stationary at a busy intersection. Keeping the peace may be enhanced in circumstances where the views of one person or group who wish to engage in the regulated

<sup>40</sup> *Evans v New South Wales* (2008) 168 FCR 576, 578 [2] (French, Branson & Stone JJ).

<sup>41</sup> *Corneloup v Adelaide City Council* [2010] SADC 144, [8]; (2010) 179 LGERA 1, 7.

<sup>42</sup> *Corneloup v Adelaide City Council* [2010] SADC 144, [3], [8], [9], [11]; (2010) 179 LGERA 1, 6-8.

<sup>43</sup> *Wotton v Queensland* (2012) 86 ALJR 246, 258-259 [54] (Heydon J).

<sup>44</sup> It is accepted that the Respondents had a "material interest in the matter" for the purposes of s276(2)(d) of the 1999 Act so as to give them standing to bring the proceedings in the District Court.

<sup>45</sup> *Coleman v Sellars* (2000) 181 ALR 120, 127 [31] (Muir J), 132 [59]-[60] (Jones J).

activity clash with those held by another person or group. By way of example, the permit system enables the Council to grant permission to a group that wishes to preach against same-sex marriage to do so in a different location to a group that wishes to canvass for membership of a organisation committed to furthering gay rights.

32. At a higher level of abstraction the By-law may be considered to serve the end of promoting the convenience, comfort and safety of the municipality.<sup>46</sup>

10 33. The By-law plainly does not target or single out political speech for regulation. Rather, the requirement for permission to preach, canvass, harangue or distribute printed matter applies regardless of whether the activity is motivated by a desire to engage in political communication or otherwise. In this sense, the *ends* are consistent with the maintenance of the system of government prescribed by the *Commonwealth Constitution*. Clauses 2.3 and 2.8 do not have “the direct purpose of ... restrict[ing] political communication”, but rather they have “some other purpose ... and only incidentally restrict... political communication”.<sup>47</sup> As such, the By-law serves a legitimate end for the purposes of the *Lange* test. Therefore, it is necessary to ask whether the By-law is reasonably appropriate and adapted to its legitimate purpose.

20 *Is the By-law reasonably appropriate and adapted? The permit system*

34. The By-law does not operate by prohibiting conduct on roads outright. Rather, it establishes a permission system which provides a mechanism for the Council effectively to manage and co-ordinate the use of roads, for a variety of different purposes, without road users being subjected to an unacceptable level of disruption in their enjoyment thereof. By virtue of its familiarity with the locality, the Council is peculiarly well placed to balance the competing interests and needs of the many users of roads within the Council area.<sup>48</sup> It is the inherent flexibility of the permit system that makes it capable of remaining responsive to the various needs of road users.

30 35. For these reasons, the impugned clauses may be regarded as facilitative of the implied freedom of political communication because they may enhance the opportunity for meaningful participation in a manner that allows diverse voices to be heard. The By-law provides a mechanism by which all may be heard and not just those who may succeed in, to use an expression coined by Kourakis J, an ‘Olympic system’, namely, the fastest, loudest, or most numerous.<sup>49</sup> The implied freedom is not necessarily best served by an absence of all regulation. The remarks of Dawson J in relation to the regulation of elections are pertinent:

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<sup>46</sup> This end reflects the terms of the by-law making power found in s667(1)9(XVI) of the 1934 Act. Kourakis J accepted not only that the By-law sought to pursue this end, but also that the By-law was reasonably appropriate and adapted to that purpose: *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [124]-[129]; (2011) 110 SASR 334, 366-367.

<sup>47</sup> *Levy v Victoria* (1997) 189 CLR 579, 619 (Gaudron J). See also, *Cunliffe v Commonwealth* (1994) 182 CLR 272, 396 (McHugh J): “a law that incidentally restricts or burdens [a constitutional right or freedom] as the consequence of regulating another subject matter will be easier to justify as being consistent with the freedom ... than a law that directly restricts or burdens a characteristic of [the right or freedom].” *Hogan v Hinch* (2011) 243 CLR 506, 555-556 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ). A law that has only an incidental effect on protected communications will more readily satisfy the second limb of the test set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; see also *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (Gleeson CJ).

<sup>48</sup> *Padley v Foley* (1983) 32 SASR 122, 130-132 (Matheson J, Bollen J agreeing, 132). The result in this case was upheld on appeal in *Foley v Padley* (1984) 154 CLR 349.

<sup>49</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [128]; (2011) 110 SASR 334, 367.

Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society.<sup>50</sup> (footnote omitted)

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36. Further, the discretion conferred by the By-law on the Council to grant permission, although expressed in broad terms, is not unfettered.<sup>51</sup> Rather, it must be exercised in accordance with any applicable law, including the *Commonwealth Constitution*. By parity of reasoning adopted in *Wotton*, this result comes about by the following steps: (i) s22A of the *Acts Interpretation Act 1915* (SA) requires that the By-law be interpreted to the full extent of, but not to exceed, the legislative power of the South Australian Parliament;<sup>52</sup> (ii) the By-law confers an apparently broad discretion on the Council to grant or withhold permission to engage in the regulated conduct; (iii) however, the scope of the discretion is constrained by constitutional restrictions on the legislative power of the State, including, relevantly for present purposes, the restriction imposed by virtue of the implied freedom of political communication; (iv) therefore, the discretion conferred on the Council by the By-law to grant or withhold permission to undertake the regulated activity must be exercised in a manner that does not abridge the implied freedom.<sup>53</sup>

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37. The practical consequence of this analysis is that any decision to grant or withhold permission to “preach, canvass, harangue” or “distribute ... printed matter” would need to pay due regard to the intention of an applicant to undertake that activity for the purpose of engaging in political communication. Where an applicant sought permission to speak on political matters at short notice such a request should, where practicable, be accommodated if necessary to enable the applicant to communicate on a political matter of topical concern.

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38. A purported decision to refuse a permit that failed to have adequate regard to the implied freedom would be *ultra vires* the discretionary power conferred by the By-law. It would be of no legal effect<sup>54</sup> and would be liable to be quashed by an order of *certiorari* in the exercise of the

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<sup>50</sup> *Levy v Victoria* (1997) 189 CLR 579, 608 (Dawson J).

<sup>51</sup> Although the By-law does not expressly confer this discretion on the Council, this power may be implied. See by parity of reasoning the implied conferral of a discretion on the Chief Executive of the Department of Correctional Services: *Wotton v Queensland* (2012) 86 ALJR 246, 252 [18] (French CJ, Gummow, Hayne, Crennan & Bell JJ).

<sup>52</sup> Section 22A applies to by-laws by virtue of s14A and the definition of “statutory instrument” in s4(1) of the *Acts Interpretation Act*.

<sup>53</sup> *Wotton v Queensland* (2012) 86 ALJR 246, 250 [9]-[10], 252-253 [21]-[22] (French CJ, Gummow, Hayne, Crennan & Bell JJ) referring to Brennan J in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 613-614. See also *Kruger v Commonwealth* (1997) 190 CLR 1, 157 (Gummow J); *AMS v AIF* (1999) 199 CLR 160, 176 [37] (Gleeson CJ, McHugh & Gummow JJ); *Wainohu v New South Wales* (2011) 243 CLR 181, 231 [113] (Heydon J). In the absence of s 22A of the *Acts Interpretation Act 1915* (SA) a similar conclusion would be reached by reference to the principle that the stream cannot rise above its source: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>54</sup> *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 604-605 [11]-[13] (Gleeson CJ), 613 [46] (Gummow & Gaudron), 630-634 [101]-[110] (Kirby J), 646-647 [151]-[152] (Hayne J).

supervisory jurisdiction of the Supreme Court.<sup>55</sup> A failure to grant permission promptly, where the circumstances warranted expedition, would be liable to an order of *mandamus*.<sup>56</sup> Other avenues of redress for a person aggrieved by a decision of the Council to withhold permission include internal review and mediation procedures provided for by ss270 and 271 of the 1999 Act. Furthermore, a person aggrieved by a decision of a Council may make a complaint to the Ombudsman at any time pursuant to s 15 of the *Ombudsman Act 1972*.

10 39. The combined operation of a legal obligation on the Council to administer the By-law in a manner that does not offend the implied freedom together with the availability of review mechanisms to enforce these obligations speaks strongly in favour of the validity of the By-law.<sup>57</sup>

40. In concluding that the permit system established under the By-law was not reasonably appropriate and adapted for the purposes of the implied freedom, Kourakis J took into account the following matters:

40.1. The possibility that the permit system would be improperly administered.<sup>58</sup>

40.2. The delay inherent in an applicant seeking permission to engage in the regulated conduct.<sup>59</sup>

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With respect, it is submitted, for the reasons below, that His Honour fell into error in taking account of the first matter and placing undue weight on the second.

*Is the By-law reasonably appropriate and adapted? Speculation about maladministration of the By-law*

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41. It was erroneous for Kourakis J to have regard to the possibility that the By-law might be administered in a manner that failed to have adequate regard to the requirements imposed by the implied freedom of political communication. For the reasons given above, there is a legal obligation that the By-law be administered in a manner that is consistent with the implied freedom of political communication. Consistent with the presumption of regularity, it should be assumed that in the absence of evidence to the contrary a power will be exercised in accordance with the law.<sup>60</sup> In *Proud v City of Box Hill* Gavan Duffy J said in relation to the administration of by-laws that:

It is ... possible that this law, like a great many other laws, might be abused in the way it is carried out; but Judges have been warned in former reported cases to treat by-law making authority as one that might be expected to act reasonably in the administration of the law.<sup>61</sup>

<sup>55</sup> *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 580-581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel, & Bell JJ). Section 17(2) of the *Supreme Court Act 1935* (SA) confers jurisdiction on that Court to grant prerogative relief. That jurisdiction is exercised in accordance with rr 200 and 201 of the *Supreme Court Civil Rules 2006* (SA).

<sup>56</sup> *Re Media, Entertainment and Arts Alliance: Ex parte Hoyts Corporation Pty Ltd* (1993) 178 CLR 379, 394 (Mason CJ, Brennan, Dawson, Toohey, Gaudron & McHugh JJ).

<sup>57</sup> *Cunliffe v Commonwealth* (1994) 182 CLR 272, 302-303 (Mason CJ), 330-332 (Brennan J), 342 (Deane J), 381 (Toohey J), 397 (McHugh J).

<sup>58</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASFC 84, [158]; (2011) 110 SASR 334, 373-374.

<sup>59</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASFC 84, [158]; (2011) 110 SASR 334, 373-374.

<sup>60</sup> *Watson v Lee* (1979) 144 CLR 374, 381-382 (Barwick CJ); *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1013 (Lord Diplock); *Ousley v The Queen* (1997) 192 CLR 69, 130-131 (Gummow J); *Gibbs v Rea* [1998] AC 786, 798 (Gault J); *Selby v Pennings* (1999) 19 WAR 520, 528-537 (Ipp J).

<sup>61</sup> *Proud v City of Box Hill* [1949] VLR 208, 211. See also *Kruse v Johnson* [1898] 2 QB 91, 99 (Lord Russell CJ).

Further, as noted above, where a by-law is incorrectly administered avenues exist to remedy such errors.

42. The approach adopted by Kourakis J is inconsistent with the reasoning of the joint judgment in *Wotton*. It was acknowledged in *Wotton* that it would have been possible for the Chief Executive of the Department to deny Mr Wotton the capacity to engage in political communication by impermissibly exercising the discretions conferred on him under the *Corrective Services Act 2006* (Qld). It was for this reason that the availability of avenues of redress assumed such significance in the Court's reasoning. The existence of these avenues was significant in determining that the impugned provisions were reasonably appropriate and adapted. However, the ability to review the exercise of the Chief Executive's discretion converted that which had been presented as a constitutional question into an administrative law question.<sup>62</sup>

43. In focussing on the effect that a potential misapplication of the By-law may have on a particular applicant, rather than on the general obligation on those who administer the By-law to do so lawfully and the constitutionally protected avenue available to remedy breaches, Kourakis J appears to have erroneously slipped into a rights-centred analysis of the implied freedom. The jurisprudence that has developed in relation to individual constitutional rights, rather than preserving a system of government, has given rise to consideration of maladministration of similar laws in different jurisdictions.<sup>63</sup>

*Is the By-law reasonably appropriate and adapted? The delay inherent in applying for permission*

44. It is submitted, with respect, that Kourakis J erred in placing undue weight on the delay inherent in applying for permission to engage in the regulated activity. It may be accepted that the implied freedom of political communication protects spontaneous forms of speech where such spontaneity is required to engage in political communication. However, there are three important points to be made concerning: (i) the necessity for spontaneity; (ii) the availability of other means of spontaneous forms of communication; and, (iii) the weight to be attributed to an impairment of spontaneous speech. These points are addressed in turn below.

44.1. Spontaneity is not normally required to engage in political communication. Rather, political communication, particularly of a kind that might be expected to be undertaken by one of the means of regulated conduct, will ordinarily be effectively undertaken despite a reasonable delay to enable the seeking and granting of permission. It is possible to hypothesise extreme examples where even a reasonable delay in granting a permit to preach, canvass, harangue or distribute printed matter, might diminish the pertinence of a particular political message. However, such instances are likely to be exceptions.

44.2. Where spontaneity is required to deliver effectively a political message, the By-law does not prevent it. The By-law only requires a permit to engage in the identified modes of communication. It does not, for example, prevent a person who wishes to engage in political communication, without delay, from delivering a political speech in a busy pedestrian mall or holding a sign or placard containing a political message on a street corner. It does not prohibit the Premier of South Australia giving an impromptu press

<sup>62</sup> *Wotton v Queensland* (2012) 86 ALJR 246, 253 [24], 254 [33] (French CJ, Gummow, Hayne, Crennan & Bell JJ), 262 [74] (Kiefel J).

<sup>63</sup> For example, in the US context see *Kunz v New York*, 340 US 290 (1951); *Lakewood v Plain Dealer Publishing Co*, 486 US 750 (1987); *Forsyth County, Georgia v Nationalist Movement*, 505 US 123 (1992).

conference in Rundle Mall.<sup>64</sup> In light of the availability of other kinds of political communication, the likely impairment of the system of representative and responsible government arising by virtue of the requirement to obtain a permit to engage in the regulated conduct is likely to be minimal.

- 10 44.3. Even if spontaneity to engage in the regulated conduct was considered to be *desirable* in certain circumstances, just like any other aspect of political speech, spontaneous speech does not enjoy any form of absolute protection. An absolute protection would presumably invalidate the electoral advertising blackout<sup>65</sup> and the requirement to have electoral material authorised.<sup>66</sup> It would also require a reworking of the extended defence of qualified privilege recognised in *Lange* because the usual requirement to verify the accuracy of a proposed publication would delay an absolute right to speak out with immediacy.<sup>67</sup> Examples may be multiplied of laws and regulations that require a permit or authorisation to engage in all manner of activity, such as busking and erecting tents and stalls on public land. The delay inherent in these processes is the price of living in an orderly community.
- 20 45. Justice Kourakis' statement that "[m]embers of a democratic society do not need advance permission to speak on political matters" has an immediate appeal.<sup>68</sup> However, when it is recognised that the By-law only requires permission in relation to a defined class of activities that are likely to frustrate other road users, and there are many other kinds of political communication that do legitimately require prior authorisation, the significance of this statement to the resolution of this case must be doubted.
- 30 46. Finally, it should also be noted that the weight attributed to delay by Kourakis J stands at odds with the reasoning of this Court in *Wotton*.<sup>69</sup> Just as there is a reasonable delay inherent in seeking permission pursuant to the By-law, there was a delay inherent in the process by which Mr Wotton would need to seek permission from the Chief Executive in that case. There is no reason to consider that the need for a parolee to communicate spontaneously is different to that of a person who wishes to communicate on roads.

*Is the By-law reasonably appropriate and adapted? Alternative means*

- 40 47. For the reasons enunciated by Kourakis J in holding that the By-law was a reasonable and proportionate exercise of the by-law making power, there are no adequate alternatives available to meet the legitimate end pursued by the By-law.<sup>70</sup> A hard and fast rule that attempted to allocate time and space for various road users on a fixed basis would be less capable of meeting the various demands of road users, including the needs of those who seek to use roads for the purposes of political communication. A carve out that exempted the need to obtain a permit where the regulated conduct was to be undertaken for the purposes of engaging in political

<sup>64</sup> *Corneloup v Adelaide City Council* [2010] SADC 144, [31], [33]; (2010) 179 LGERA 1, 13.

<sup>65</sup> *Broadcasting Services Act 1992* (Cth), sch2, pt2, cl3A and the definition of "relevant period."

<sup>66</sup> *Commonwealth Electoral Act 1918* (Cth), ss328, 328A, 351, and the definition of "electoral matter" in ss4(1) and 4(9)); *Broadcasting Services Act 1992* (Cth), sch2, cl4(2).

<sup>67</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow & Kirby JJ).

<sup>68</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [159]; (2011) 110 SASR 334, 374.

<sup>69</sup> *Wotton v Queensland* (2012) 86 ALJR 246.

<sup>70</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [128]. His Honour's reasoning is set out in full in paragraph 11 above.

communication would fail to advance the legitimate end of the By-law, that is promoting the convenience, comfort and safety of the municipality, as effectively as the By-law itself.<sup>71</sup>

48. It is submitted, with respect, that having concluded that the By-law was a reasonable and proportionate exercise of the by-law making power, Kourakis J had foreclosed the inquiry that he embarked upon later in his reasons as to whether the By-law was proportionate to a legitimate end for the purpose of the constitutional freedom.<sup>72</sup> Although His Honour expressly disavowed a weighing process,<sup>73</sup> it is submitted that the different result arrived at in applying the reasonably appropriate and adapted test for the purpose of characterisation and then to test the compatibility of the By-law with the implied freedom, suggests otherwise.

Is the By-law reasonably appropriate and adapted? Conclusion

49. For these reasons, the second question posed by the *Lange* test should be answered 'yes'.

Is the By-law reasonably appropriate and adapted? Alternative submission

50. If the Court rejects the propositions set out in paragraph 21 above, then it is submitted in the alternative that the appeal must nonetheless succeed because the Respondents have failed to demonstrate that there were alternative measures that were equally effective in promoting the end identified. They have also failed to demonstrate that the ends pursued by the By-law are of minor significance to the body politic by comparison to the importance of free political communication, such that they should be afforded relatively little weight.

**Part VII – Legislation**

51. The applicable constitutional provisions, statutes and regulations as they existed at the relevant time are included in an Annexure to these Submissions (Part A). The provisions that are reproduced are as follows:

- *Commonwealth Constitution*, ss7, 24, 128
- *Acts Interpretation Act 1915 (SA)*, s22A
- *Electronic Transactions Act 2000 (SA)*, ss9, 10, 11
- *Local Government Act 1934 (SA)*, ss667, 668
- *Local Government Act 1999 (SA)*, ss6, 7, 238, 239, 246, 249, 270, 271
- *By-law No 4 – Roads* (published in South Australian Government Gazette on 27 May 2004)
- *By-law No 4 – Roads* (published in South Australian Government Gazette on 9 June 2011)

52. All of the provisions remain in force save for *By-law No 4 – Roads* (the by-law which is the subject of this litigation) which was revoked on 9 October 2011. A brief description of the circumstances surrounding this revocation, and the terms of the replacement by-law, is contained in Part B of the Annexure.

53. The Appellant submits that the replacement of *By-law No 4 – Roads* does not bear upon the propriety of the grant of special leave to appeal because the new by-law contains terms that are very similar to those that were held to be invalid by the Supreme Court. Further, the validity of *By-law No 4 – Roads* is a relevant issue in various legal proceedings in South Australian courts, also referred to in Part B of the Annexure, which have been adjourned pending the outcome of this appeal.

<sup>71</sup> Cf *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [163].

<sup>72</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [157]-[164].

<sup>73</sup> *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84, [154]-[155].

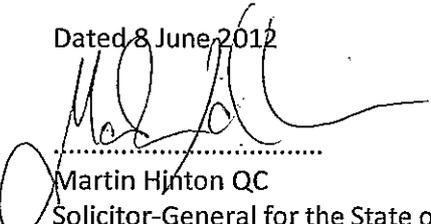
**Part VIII – Orders Sought**

54. The Appellant seeks the following orders:

- 54.1. The appeal be allowed and the orders of the Full Court, dated 10 August 2011, are set aside.
- 54.2. A declaration that the Corporation of the City of Adelaide *By-law No 4 – Roads* is valid.
- 54.3. Such other orders as the Court deems fit.

Dated 8 June 2012

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Martin Hjinton QC

Solicitor-General for the State of South Australia

  
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Michael Wait

Crown Solicitor's Office (SA)

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Telephone: (08) 8207 1703

Facsimile: (08) 8207 1724

Email: wait.michael@agd.sa.gov.au

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**ANNEXURE TO APPELLANT’S SUBMISSIONS**

**PART A – Applicable Provisions**

**Constitution, ss 7, 24, 128**

**7 The Senate [see Note 5]**

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

10 But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

20 The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

**24 Constitution of House of Representatives**

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

30 The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

- (i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;
- (ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

40 But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

**128 Mode of altering the Constitution [see Note 1]**

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

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But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

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When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

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No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, *Territory* means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

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***Acts Interpretation Act 1915 (SA), s 22A***

**22A—Construction of Act so as not to exceed power of State**

- (1) Every Act and every provision of an Act will be construed so as not to exceed the legislative power of the State.

- (2) Any Act or provision of an Act which, but for this section, would exceed the power of the State, is nevertheless a valid enactment to the extent to which it does not exceed that power.

*Electronic Transactions Act 2000 (SA), ss 9, 10, 11*

**9—Signatures**

- 10 (1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—
- (a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated; and
  - (b) the method used was either—
    - (i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
    - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
  - (c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).
- 20 (2) This section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring—
- (a) an electronic communication to contain an electronic signature (however described); or
  - (b) an electronic communication to contain a unique identification in an electronic form; or
  - (c) a particular method to be used in relation to an electronic communication to identify the originator of the communication and to indicate the
- 30 (3) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

**10—Production of document**

- 40 (1) If, under a law of this jurisdiction, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document, where—
- (a) having regard to all the relevant circumstances at the time the communication was sent, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and

- (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and
  - (c) the person to whom the document is required to be produced consents to the production, by means of an electronic communication, of an electronic form of the document.
- 10 (2) If, under a law of this jurisdiction, a person is permitted to produce a document that is in the form of paper, an article or other material, then, instead of producing the document in that form, the person may produce, by means of an electronic communication, an electronic form of the document, where—
  - (a) having regard to all the relevant circumstances at the time the communication was sent, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
  - (b) at the time the communication was sent, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and
  - 20 (c) the person to whom the document is permitted to be produced consents to the production, by means of an electronic communication, of an electronic form of the document.
- (3) For the purposes of this section, the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered, apart from—
  - (a) the addition of any endorsement; or
  - (b) any immaterial change,which arises in the normal course of communication, storage or display.
- 30 (4) This section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring or permitting electronic forms of documents to be produced, in accordance with particular information technology requirements—
  - (a) on a particular kind of data storage device; or
  - (b) by means of a particular kind of electronic communication.

#### **11—Retention of information and documents**

- 40 (1) If, under a law of this jurisdiction, a person is required to record information in writing, that requirement is taken to have been met if the person records the information in electronic form, where—
  - (a) at the time of the recording of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
  - (b) if the regulations require that the information be recorded on a particular kind of data storage device—that requirement has been met.

- (2) If, under a law of this jurisdiction, a person is required to retain, for a particular period, a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person retains, or causes another person to retain, an electronic form of the document throughout that period, where—
- 10 (a) having regard to all the relevant circumstances at the time of the generation of the electronic form of the document, the method of generating the electronic form of the document provided a reliable means of assuring the maintenance of the integrity of the information contained in the document; and
- (b) at the time of the generation of the electronic form of the document, it was reasonable to expect that the information contained in the electronic form of the document would be readily accessible so as to be useable for subsequent reference; and
- (c) if the regulations require that the electronic form of the document be retained on a particular kind of data storage device—that requirement has been met throughout that period.
- (3) For the purposes of subsection (2), the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered, apart from—
- 20 (a) the addition of any endorsement; or
- (b) any immaterial change,
- which arises in the normal course of communication, storage or display.
- (4) If, under a law of this jurisdiction, a person (the *first person*) is required to retain, for a particular period, information that was the subject of an electronic communication, that requirement is taken to have been met if the first person retains, or causes another person to retain, in electronic form, the information throughout that period, where—
- 30 (a) at the time of commencement of the retention of the information, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and
- (b) having regard to all the relevant circumstances at the time of commencement of the retention of the information, the method of retaining the information in electronic form provided a reliable means of assuring the maintenance of the integrity of the information contained in the electronic communication; and
- (c) throughout that period, the first person also retains, or causes the other person to retain, in electronic form, such additional information obtained by the first person as is sufficient to enable the identification of the
- 40 following:
- (i) the origin of the electronic communication;
- (ii) the destination of the electronic communication;
- (iii) the time when the electronic communication was sent;
- (iv) the time when the electronic communication was received; and

- (d) at the time of commencement of the retention of the additional information covered by paragraph (c), it was reasonable to expect that the additional information would be readily accessible so as to be useable for subsequent reference; and
  - (e) if the regulations require that the information be retained on a particular kind of data storage device—that requirement has been met throughout that period.
- (5) For the purposes of subsection (4), the integrity of information that was the subject of an electronic communication is maintained if, and only if, the information has remained complete and unaltered, apart from—
- (a) the addition of any endorsement; or
  - (b) any immaterial change,
- which arises in the normal course of communication, storage or display.

***Local Government Act 1934 (SA), ss 667, 668***

**667—By-laws**

- (1) Subject to this Act, a council may make by-laws for all or any of the following purposes:

20                   **3   Uses and licences**

- XVI for controlling, licensing, inspecting and regulating common lodging houses and other lodging houses;
- XX for the licensing for use of any vehicles (including motor and all other vehicles) plying for hire, or kept or let for hire, either for the conveyance of passengers or goods of any kind, and for prohibiting the use of such vehicles unless so licensed; and for licensing the drivers and conductors of such vehicles, and for prohibiting the driving of such vehicles, except by a person so licensed;
- 30                   XXI for appointing the stands for vehicles plying for hire, and the regulations to be observed thereat;
- XXII for regulating the conduct of the drivers, conductors and other persons attendant on or in charge of licensed vehicles;
- XXIII for regulating and licensing any such vehicles used in hawking firewood or water;
- XXIV for fixing the rates and fares to be taken, and the manner of computing distances, with power to distinguish between different types of vehicles;
- 40                   XXV for enforcing the obligation of owners and drivers to convey passengers and goods on demand;
- XXVI for limiting the number of such passengers (inside and outside), their baggage and goods, and regulating the taking up and setting down of passengers and fares for children;

- 10 XXXVII for the maintenance of vehicles in proper condition and order, and regulating how they are to be furnished, provided and kept;
- XXXVIII for enforcing the painting of the names of the owners and the numbers on the vehicles, and keeping affixed within the vehicles authorised tables of fares and distances;
- XXIX for providing for the delivery over and disposal of articles left in licensed vehicles;
- XXX for compelling the approved owner or driver to be in charge of such vehicles, and preventing it from being driven by others, and for preventing persons not hiring it from riding with the owner or driver;
- XXXI for preventing smoking in any such vehicle, or by its driver;
- XXXII for prohibiting coffins, containing the corpses of deceased persons above the age of two years, from being conveyed in any vehicle licensed for the conveyance of passengers;
- 20 XXXIII for punishing the misconduct of the drivers and conductors of, and persons attending any such passenger or other vehicles, in carelessly or furiously driving or racing, or in demanding or receiving more than the legal fare, or in using any threatening, abusive, indecent or insulting language; and also for punishing persons hiring such vehicles and evading or attempting to evade the payment of fares;
- XXXIV for regulating the routes to be observed by licensed buses or passenger vehicles plying as buses;
- XXXV for requiring all licensed vehicles, of whatever sort, to have the number of their licence conspicuously painted on and in the vehicle;
- 30 XXXVI for requiring and regulating the carrying of a lighted lamp inside licensed passenger vehicles whilst plying for hire after sunset;
- XXXVII for preventing licensed drivers or others loitering with licensed vehicles in streets, or plying for hire in streets except on a stand;
- XXXVIII for preventing any person, not being of the full age of 17 years, acting as driver;
- XXXIX for preventing licensed drivers from being or standing away from the vehicle in their charge whilst on the stand, or for regulating the distance at and the time during which such drivers may be allowed to be away from their vehicles whilst on the stand;
- XL for limiting the number of vehicles to be licensed by the council;
- 40 XLI for enforcing the painting, inside and outside, of all licensed passenger vehicles, the number of passengers the vehicle is licensed to carry outside and inside, also the rate of fares for time or distance;

- LIV for regulating the form and conditions of any licence or permit granted by the council, the form of application for it, and its transfer, renewal, suspension or revocation, the fees to be paid on any licence or permit, or its transfer or renewal, and how any such fees may be recovered;
  - 4 **Nuisances and health**
    - I for the prevention and suppression of nuisances;
  - 5 **Animals**
    - VII for the punishment of any driver or rider of horses or other animals who, in any street, road or public place within the municipality or any township within the district, leaves them unattended, or insecurely fastened to bridle-posts, so that the horses or animals may break away and bolt, to the danger or injury of any person;
  - 7 **Streets, roads and footways**
    - II for regulating the standing of horses and other animals in streets, roads and public places; and for prescribing where and under what conditions horses and other animals may be allowed to stand in streets, roads and public places;
  - 9 **Miscellaneous**
    - XVI generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants.
- (2) A by-law made under subsection (1) 3 XX to XLI applies only to the extent that it makes provision for matters—
- (a) that are not dealt with by or under the *Passenger Transport Act 1994* or an instrument under that Act; or
  - (b) that are the subject of an exemption under that Act.

**668—Local Government Act 1999 applies**

30 The *Local Government Act 1999* applies to and in relation to by-laws made under this Act as if they were by-laws made under that Act.

*Local Government Act 1999 (SA), ss 6, 7, 238, 239, 246, 249, 270, 271*

**6—Principal role of a council**

A council is, under the system of local government established by this Act, established to provide for the government and management of its area at the local level and, in particular—

- 40 (a) to act as a representative, informed and responsible decision-maker in the interests of its community; and
- (b) to provide and co-ordinate various public services and facilities and to develop its community and resources in a socially just and ecologically sustainable manner; and

- (c) to encourage and develop initiatives within its community for improving the quality of life of the community; and
- (d) to represent the interests of its community to the wider community; and
- (e) to exercise, perform and discharge the powers, functions and duties of local government under this and other Acts in relation to the area for which it is constituted.

## **7—Functions of a council**

The functions of a council include—

- 10 (a) to plan at the local and regional level for the development and future requirements of its area;
- (b) to provide services and facilities that benefit its area, its ratepayers and residents, and visitors to its area (including general public services or facilities (including electricity, gas and water services, and waste collection, control or disposal services or facilities), health, welfare or community services or facilities, and cultural or recreational services or facilities);
- (c) to provide for the welfare, well-being and interests of individuals and groups within its community;
- 20 (d) to take measures to protect its area from natural and other hazards and to mitigate the effects of such hazards;
- (e) to manage, develop, protect, restore, enhance and conserve the environment in an ecologically sustainable manner, and to improve amenity;
- (f) to provide infrastructure for its community and for development within its area (including infrastructure that helps to protect any part of the local or broader community from any hazard or other event, or that assists in the management of any area);
- (g) to promote its area and to provide an attractive climate and locations for the development of business, commerce, industry and tourism;
- 30 (h) to establish or support organisations or programs that benefit people in its area or local government generally;
- (i) to manage and, if appropriate, develop, public areas vested in, or occupied by, the council;
- (j) to manage, improve and develop resources available to the council;
- (k) to undertake other functions and activities conferred by or under an Act.

## **238—Power to control access and use of land**

- (1) A council may make by-laws controlling access to and use of local government land.

### **Examples—**

40 The by-laws may for example—

- fix opening hours for specified land and prohibit or restrict access at other times;

- regulate, restrict or prohibit public access to specified land;
- regulate, restrict or prohibit the bringing of animals or a specified class of animals onto specified land or the movement of animals or a specified class of animals on specified land;
- close specified land, or part of the land, to public access;
- regulate, restrict or prohibit the lighting of fires;
- regulate, restrict or prohibit sporting or other activities on specified land;
- regulate the use of facilities provided on specified land;
- regulate the speed or route of vehicles driving on the land;
- regulate, restrict or prohibit the parking or standing of vehicles.

10

(2) However—

- (a) a by-law cannot be made under subsection (1) about access to or use of a road; and
- (b) a by-law prohibiting a person from bringing alcoholic liquor onto local government land, or consuming alcoholic liquor on local government land, may only be made if the land constitutes a park or a reserve.

20

(3) If a council makes a by-law about access to or use of a particular piece of local government land under this section, a notice setting out the effect of the by-law should be erected in a prominent position on, or in the immediate vicinity of, the land to which the by-law applies.

### **239—By-laws about use of roads**

(1) A council may make by-laws about the use of roads for—

- (a) moveable signs; or
- (b) the broadcasting of announcements or advertisements; or
- (c) public exhibitions or displays; or
- (d) soliciting for religious or charitable purposes; or
- (e) motor vehicle maintenance or repair; or
- (f) the movement of animals; or
- (g) any other use in relation to which the making of by-laws is authorised by regulation.

30

(2) Subject to this Act, a by-law made under subsection (1) can regulate, restrict or prohibit the use of which it relates.

### **246—Power to make by-laws**

(1) Subject to this or another Act, a council may make by-laws—

- (a) that are within the contemplation of this or another Act; or
- (b) that relate to a matter in relation to which the making of by-laws is authorised by the regulations under this or another Act.

40

- (2) A council cannot make a by-law that requires that a person obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act.
- (3) Subject to this or another Act, a by-law made by a council may—
- (a) operate subject to specified conditions; and
  - (b) refer to or incorporate, wholly or partially and with or without modification, a code, standard or other document prepared or published by an authority or body, either as in force at the time the by-law is made or as in force from time to time; and
  - 10 (c) be of general or limited application, and provide for exemptions; and
  - (d) make different provision according to the persons, things or circumstances to which it is expressed to apply; and
  - (e) provide that the by-law, or a provision of a by-law, applies only within a part or parts of the area as the council may determine from time to time; and
  - (f) provide that a matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the council, a specified person, authority or body, or a person holding a specified office; and
  - 20 (g) fix a minimum as well as a maximum penalty for any breach of a by-law, or a maximum penalty only, or a general maximum penalty applicable to several by-laws, provided that the maximum penalty so fixed does not exceed \$750, and in the case of a continuing offence fix a further penalty not exceeding \$50 for every day on which the offence or breach of the by-law continues; and
  - (h) in a case of a by-law relating to the driving, parking or standing of vehicles—
    - (i) impose, modify or restrict any evidentiary burden on a party to proceedings for an offence against the by-law, or provide for other matters in respect of evidence or the proof of any matter; and
    - 30 (ii) fix entrance fees or parking fees; and
    - (iii) provide that the owner and the driver of a vehicle driven, parked or standing in contravention of the by-law are each guilty of an offence and liable to the relevant penalty.
- (4) If a code, standard or other document is adopted under subsection (3)(b) as it is in force from time to time, an alteration to the code, standard or other document will not take effect for the purposes of the by-law before a day on which notice of that alteration is published by the council in the Gazette and in a newspaper circulating in the area of the council.
- 40 (4a) If a council makes a determination under subsection (3)(e), the council must ensure that notice of the determination is published in the Gazette and in a newspaper circulating in the area of the council.

- (5) Expiation fees may be fixed for alleged offences against by-laws by—
- (a) by-laws; or
  - (b) the council,
- but an expiation fee fixed by the council cannot exceed 25 per cent of the maximum fine for the offence to which it relates.
- (6) In any proceedings for an offence against a by-law under subsection (3)(h)—
- (a) an allegation in a complaint that a person named in the complaint was the owner of a specified vehicle on a specified day will be taken to be proved in the absence of proof to the contrary; and
  - 10 (b) if it is proved that a vehicle was driven, parked or left standing in contravention of the by-law it will be presumed, in the absence of evidence to the contrary, that the vehicle was so driven, parked or left standing by the owner of the vehicle.
- (7) Despite a preceding subsection, the owner and driver of a vehicle cannot both be convicted of an offence arising out of the same circumstances and so conviction of the owner exonerates the driver and conversely conviction of the driver exonerates the owner.

#### 249—Passing by-laws

- 20 (1) If it is proposed that a council make a by-law, the council must, at least 21 days before resolving to make the by-law—
- (a) make copies of the proposed by-law (and any code, standard or other document proposed to be applied or incorporated by the by-law) available for public inspection, without charge and during ordinary office hours, at the principal office of the council, and so far as is reasonably practicable on the Internet; and
  - (b) by notice in a newspaper circulating in the area of the council—
    - (i) inform the public of the availability of the proposed by-law; and
    - 30 (ii) set out the terms of the by-law, or describe in general terms the by-law's nature and effect.
- (2) A council must give reasonable consideration to a written or other acceptable submission made to the council on a proposed by-law.
- (3) A by-law cannot be made unless—
- (a) the by-law is made at a meeting of the council where at least two-thirds of the members of the council are present; and
  - (b) the relevant resolution is supported by an absolute majority of members of the council.
- (4) A council must not make a by-law unless or until the council has obtained a certificate, in the prescribed form, signed by a legal practitioner certifying that, in
- 40 the opinion of the legal practitioner—
- (a) the council has power to make the by-law by virtue of a statutory power specified in the certificate; and
  - (b) the by-law is not in conflict with this Act.

- (5) Subject to subsection (6), a by-law comes into operation four months after the day on which it is published in the Gazette or from a later day or days fixed in the by-law.
- (6) A by-law may take effect from an earlier day specified in the by-law if—
- (a) it revokes a by-law without making provision in substitution for that by-law; or
  - (b) it corrects an error or inaccuracy in a by-law; or
  - (c) it is required for the purposes of an Act that will come into operation on assent or less than four months after assent; or
  - 10 (d) it confers a benefit on a person (other than the council or an authority of the council) and does not operate so as—
    - (i) to affect, in a manner prejudicial to a person (other than the council or an authority of the council), the rights of that person existing before the date of commencement of the by-law; or
    - (ii) to impose a liability on a person (other than the council or an authority of the council) in respect of anything done or omitted to be done before the date of commencement of the by-law; or
  - 20 (e) the council has been formed by the amalgamation of two or more councils and the by-law (or a by-law in substantially the same terms) was previously in force in the area of a council that has been amalgamated.
- (7) A council must publish a notice of the making of a by-law under this section in a newspaper circulating in the area of the council.
- (8) Section 10AA of the *Subordinate Legislation Act 1978* does not apply to a by-law of a council.

**270—Procedures for review of decisions and requests for services**

- (a1) A council must develop and maintain policies, practices and procedures for dealing with—
- 30 (a) any reasonable request for the provision of a service by the council or for the improvement of a service provided by the council; or
  - (b) complaints about the actions of the council, employees of the council, or other persons acting on behalf of the council.
- (a2) The policies, practices and procedures required under subsection (a1) must be directed towards—
- (a) dealing with the relevant requests or complaints in a timely, effective and fair way; and
  - (b) using information gained from the council's community to improve its services and operations.
- (1) Without limiting subsections (a1) and (a2), a council must establish procedures for the review of decisions of—
- 40 (a) the council;
  - (b) employees of the council;

- (c) other persons acting on behalf of the council.
- (2) The procedures must address the following matters (and may address other matters):
  - (a) the manner in which an application for review may be made;
  - (b) the assignment of a suitable person to reconsider a decision under review;
  - (c) the matters that must be referred to the council itself for consideration or further consideration;
  - 10 (ca) in the case of applications that relate to the impact that any declaration of rates or service charges may have had on ratepayers—the provision to be made to ensure that these applications can be dealt with promptly and, if appropriate, addressed through the provision of relief or concessions under this Act;
  - (d) the notification of the progress and outcome of an application for review;
  - (e) the time frames within which notifications will be made and procedures on a review will be completed.
- (3) A council is not entitled to charge a fee on an application for review.
- (4) A council, or a person assigned to consider the application, may refuse to consider an application for review if—
  - 20 (a) the application is made by an employee of the council and relates to an issue concerning his or her employment; or
  - (b) it appears that the application is frivolous or vexatious; or
  - (c) the applicant does not have a sufficient interest in the matter.
- (4a) The policies, practices and procedures established under this section must be consistent with any requirement prescribed by the regulations.
- (5) A council must ensure that copies of a document concerning the policies, practices and procedures that apply under this section are available for inspection (without charge) and purchase (on payment of a fee fixed by the council) by the public at the principal office of the council.
- 30 (6) A council may amend the policies, practices or procedures established by the council under this section from time to time.
- (7) Nothing in this section prevents a person from making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972*.
- (8) A council must, on an annual basis, initiate and consider a report that relates to—
  - (a) the number of applications for review made under this section; and
  - (b) the kinds of matters to which the applications relate; and
  - (c) the outcome of applications under this section; and
  - (d) such other matters as may be prescribed by the regulations.
- 40 (9) The right of a council to recover rates is not suspended by an application for the provision of some form of relief or concession with respect to the payment of those rates (but a council may then, if appropriate in view of the outcome of the application, refund the whole or a part of any amount that has been paid).

## 271—Mediation, conciliation and neutral evaluation

- (1) A council may, as part of, or in addition to, the procedures established under section 270, make provision for disputes between a person and the council to be dealt with under a scheme involving mediation, conciliation or neutral evaluation under this section.
- (2) A scheme made under this section must provide for the constitution of panels of persons who are available to act as mediators, conciliators and evaluators, and for the selection of an appropriate mediator, conciliator or evaluator if a dispute is to be dealt with under this section.
- 10 (3) For the purposes of mediation proceedings—
  - (a) the mediator may call a conference of the parties to the dispute and at that conference seek to identify the issues and the possibilities of resolving the matter by agreement; and
  - (b) a conference may be adjourned from time to time by the mediator; and
  - (c) the mediator may at any time interview the parties separately or together; and
  - (d) the mediator may at any time bring the proceedings to an end if the mediator considers that the proceedings will not result in an agreed settlement between the parties.
- 20 (3a) For the purposes of conciliation proceedings—
  - (a) the conciliator may call a conference of the parties to the dispute and at that conference seek to identify the issues and to provide advice as to how the matter might be settled through the conciliation proceedings; and
  - (b) the conciliator may make a recommendation for the resolution of the dispute; and
  - (c) a conference may be adjourned from time to time by the conciliator; and
  - (d) the conciliator may at any time bring the proceedings to an end if the conciliator considers that the proceedings will not result in a settlement of the matter.
- 30 (4) For the purposes of conducting neutral evaluation of a dispute—
  - (a) the parties must attend before the evaluator at a time and place determined by the evaluator; and
  - (b) the evaluator must hear the parties and seek to—
    - (i) identify and reduce the issues of fact and law that are in dispute; and
    - (ii) assess the relative strengths and weaknesses of each party's case; and
    - (iii) offer an opinion of the likely outcome of further proceedings; and
  - (c) the evaluator may at any time interview the parties separately or together.
- 40 (5) A mediator or evaluator may otherwise inform himself or herself on a matter as he or she thinks fit.

- (6) Evidence of anything said or done in an attempt to resolve a matter by mediation or neutral evaluation under this section must not be disclosed in subsequent proceedings.
- (7) Costs and expenses associated with the appointment and work of a mediator or evaluator under this section will be shared equally between the council and the other party.
- (8) No civil liability attaches to a mediator or evaluator acting in good faith under this section.
- 10 (9) Nothing in this section prevents a person from making a complaint to the Ombudsman at any time under the *Ombudsman Act 1972*.

**By-law No 4 – Roads (published in South Australian Government Gazette on 27 May 2004)**

CITY OF ADELAIDE  
By-law Made Under the Local Government Act 1999  
*By-law No. 4—Roads*

FOR the management of roads vested in or under the control of the Council.

1. *Definitions*

20 In this by-law:

- 1.1 'authorised person' means a person appointed as an authorised person pursuant to Section 260 of the Local Government Act 1999;
- 1.2 'Council' means the Corporation of the City of Adelaide;
- 1.3 'electoral matter' has the same meaning as in the Electoral Act 1995 provided that such electoral matter is not capable of causing physical damage or injury to any person within its immediate vicinity;
- 1.4 'Emergency Vehicle' has the same meaning as in the Australian Road Rules 1999 and the Road Traffic (Road Rules—Ancillary and Miscellaneous Provisions) Regulations 1999;
- 30 1.5 'livestock' has the same meaning as in the Livestock Act 1997;
- 1.6 'road' has the same meaning as in the Local Government Act 1999;
- 1.7 'vehicle' has the same meaning as in Section 5 of the Road Traffic Act 1961.

2. *Activities Requiring Permission*

No person shall without permission on any road:

2.1 *Repairs to Vehicles*

perform the work of repairing, washing, painting, panel-beating or other work of any nature on or to any vehicle, provided that this paragraph shall not extend to running repairs in the case of breakdown;

40 2.2 *Collections and Donations*

collect anything from any passer-by or ask for or receive or indicate that he or she desires a donation of money or any other thing;

2.3 *Preaching and Canvassing*

preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to designated area as resolved by the Council known as a 'Speakers Corner' and 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;

2.4 *Amplification*

use an amplifier or other device whether mechanical or electrical for the purpose of amplifying sound for broadcasting announcements or advertisements;

2.5 *Livestock*

ride, lead or drive any livestock on any street or road in those areas that the Council has designated by resolution;

2.6 *Camping*

camp or remain overnight either in the open, in a vehicle or otherwise;

2.7 *Tents*

erect any tents or other structure;

10 2.8 *Distribute*

give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, 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 to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum;

2.9 *Handbills on Cars*

10 place or put on any vehicle (or cause to be placed) any handbill, advertisement, notice or printed matter dealing with religious, charitable purposes or advertising except for any electoral matter posted on a vehicle with the authority of a candidate during the course of a Federal, State or Local Government election or Referendum;

2.10 *Erection of Structures*

2.10.1 erect a fence or hoarding, if:

2.10.1.1 the fence or hoarding is made of or contains barbed or razor wire; or

2.10.1.2 the fence is not easily visible at night and thereby creates a danger to users of the road;

2.10.2 erect, place, use or allow to remain:

2.10.2.1 a ladder or trestle;

2.10.2.2 any other equipment, appliance, object or material likely to cause an obstruction or danger to any person;

30 2.10.2.3 park, place, use or allow to remain a mobile crane, scissor lift, elevated platform vehicle or cherry picker;

3. *Public Exhibitions and Displays*

No person shall, without permission:

3.1 allow or cause any public exhibition or display to occur on a road;

3.2 allow or cause to be displayed any bills, advertisements or other papers or items or mark with any substance or apply any stickers or stencils to a building or structure on a road;

40 4. *Removal of Animals and Persons*

4.1 If any animal is found on part of a road in breach of a by-law any person in charge of the animal shall forthwith remove it from that part on the request of any authorised person; and

4.2 An authorised person may direct any person who is considered to be committing or has committed a breach of this by-law to leave that part of the road. Failure to comply with that direction forthwith is a breach of this by-law.

5. *Obstruction*

No person shall without permission on any road:

50 5.1 obstruct any road, path, footpath, track, gateway or other area;

5.2 erect, place, use or allow to remain over any path, footpath, track, gateway or other area any object including any planter box, hoarding, crane, cherry picker, elevated platform vehicle, scaffolding, stage, ladder, trestle, appliance, or other equipment;

#### 6. *Removal of Obstructions*

If an object is obstructing any part of local government land then the Council may remove the object provided that this clause shall not apply to any object that has been placed on local government land with the permission of the Council or the object has been placed on the local government land by some other lawful authority.

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#### 7. *Exemptions*

The restrictions in this by-law do not apply to any Police Officer, Council Officer or employee acting in the course and within the scope of that person's normal duties, or to a contractor while performing work for the Council and while acting under the supervision of a Council Officer, or an emergency worker when driving an Emergency Vehicle in an emergency situation.

#### 8. *Construction*

This by-law is subject to any Act of Parliament and Regulations made thereunder.

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#### 9. *Applications of Paragraphs*

Paragraph 2.5 of this by-law shall apply only in such portion or portions of the area as the Council may by resolution direct in accordance with Section 246 (3) (e) of the Local Government Act 1999.

The foregoing by-law was duly made and passed at a meeting of the Corporation of the City of Adelaide held on 10 May 2004 by an absolute majority of the members for the time being constituting the Council, there being at least two-thirds of the members present.

### 30 **By-law No. 4 – Roads (published in South Australian Government Gazette on 9 June 2011)**

THE CORPORATION OF THE CITY OF ADELAIDE  
By-law Made Under the Local Government Act 1999  
*By-law No. 4—Roads*

FOR the management of roads vested in or under the control of the Council.

#### 1. *Definitions*

In this by-law:

- 40
- 1.1 *Authorised Person* has the same meaning as in the Local Government Act 1999;
  - 1.2 *Electoral Matter* has the same meaning as in the Electoral Act 1985;
  - 1.3 *Emergency Vehicle* has the same meaning as in the Australian Road Rules 1999 and the Road Traffic (Road Rules—Ancillary and Miscellaneous Provisions) Regulations 1999;
  - 1.4 *Livestock* has the same meaning as in the Livestock Act 1997;
  - 1.5 *Road* has the same meaning as in the Local Government Act 1999;
  - 1.6 *Vehicle* has the same meaning as in the Road Traffic Act 1961 and the Australian Road Rules 1999.

#### 2. *Activities Requiring Permission*

50 No person shall without permission on any Road:

##### 2.1 *Advertising*

- display any sign other than a Moveable Sign which is displayed on a Road in accordance with the Council's Moveable Signs By-law;
- 2.2 *Amplification*  
use an amplifier or other device whether mechanical or electrical for the purpose of amplifying sound for broadcasting announcements or advertisements;
- 2.3 *Donations*  
ask for or receive or indicate that he or she desires a donation of money or any other thing, or otherwise solicit for religious or charitable purposes;
- 10 2.4 *Hatches*  
leave any hatch connected with adjacent premises unattended when open;
- 2.5 *Livestock*  
lead or drive any Livestock on any Road except in those areas that the Council has by resolution designated for that purpose;
- 2.6 *Posting of Bills*  
post or allow or cause to be posted any bills, advertisements or other papers or items on a building or structure on a Road except for:
- 20 2.6.1 any Electoral Matter posted on a building or structure by or with the authority of a candidate which is related to a Commonwealth or State election and is posted during the period commencing on the issue of the writ or writs for the election and ending at the close of polls on polling day; or
- 2.6.2 any Electoral Matter that is related to an election held under the Local Government Act 1999, or the Local Government (Elections) Act 1999 and is posted during the period commencing four weeks immediately before the date that has been set (either by or under either Act) for polling day and ending at the close of voting on polling day; or
- 2.6.3 any matter that is posted during the course of and for the purpose of a Referendum;
- 30 2.7 *Preaching and Canvassing*  
preach, canvass, harangue or otherwise solicit for religious purposes except on any Road or part thereof where the Council has, by resolution, determined this restriction shall not apply;
- 2.8 *Public Exhibitions and Displays*
- 2.8.1 sing, busk or play any recording or use any musical instrument;
- 2.8.2 conduct or hold any concert, festival, show, public gathering, circus, meeting, performance or any other similar activity;
- 2.8.3 cause any public exhibitions or displays, except on any Road or part thereof where the Council has, by resolution, determined this restriction shall not apply;
- 40 2.9 *Repairs to Vehicles*  
perform the work of repairing, washing, painting, panel-beating or other work of any nature on or to any Vehicle, provided that this paragraph shall not extend to running repairs in the case of breakdown;
- 2.10 *Tents and Camping*
- 2.10.1 erect any tent or other structure of calico, canvas, plastic or similar material as a place of habitation;
- 2.10.2 camp or remain overnight either in the open, in a Vehicle or otherwise;
- 2.11 *Use of Council Rubbish Bins*  
deposit any commercial waste or other rubbish emanating from commercial premises in any Council rubbish bin;
- 50 2.12 *Venue Management*

allow patrons or potential patrons of a venue under their management or control to queue outside the venue.

### 3. Directions

A person must comply with any reasonable direction or request from an Authorised Person relating to:

- 3.1 that person's use of the Road;
- 3.2 that person's conduct and behaviour on the Road;
- 3.3 that person's safety on the Road;
- 10 3.4 the safety and enjoyment of the Road by other persons.

### 4. Removal of Animals and Persons

4.1 If any animal is found on any part of a Road in breach of a by-law:

4.1.1 any person in charge of the animal must immediately remove it from that part of the Road on the request of an Authorised Person; and

4.1.2 an Authorised Person of the Council may remove the animal if a person fails to comply with the request, or if no person is in charge of the animal.

4.2 A person who is committing or has committed a breach of this by-law must immediately comply with a direction of an Authorised Person to leave that part of the Road.

4.3 Any Authorised Person may remove any person from a Road who is found committing a breach of a by-law, but must not use force in doing so.

### 5. Exemptions

The restrictions in this by-law do not apply to any Police Officer, Council Officer or employee acting in the course and within the scope of that person's normal duties, or to a Contractor while performing work for the Council and while acting under the supervision of a Council Officer, or an Emergency Worker when driving an Emergency Vehicle in an emergency situation.

The foregoing by-law was duly made and passed at a meeting of the Corporation of the City of Adelaide held on 31 May 2011, by an absolute majority of the members for the time being constituting the Council, there being at least two-thirds of the members present.

## **PART B – Changes to By-law No. 4 - Roads**

*By-law No. 4- Roads (the 2004 Roads By-law)*, as made by the City of Adelaide on 10 May 2004 and published in the Gazette on 27 May 2004 (the by-law the subject of this appeal), was revoked on 9 October 2011 by the commencement of cl1 of the Council's 2011 *By-law No. 1 - Permits and Penalties* which revoked all existing by-laws of the Council, except for *By-law No. 6 - Rundle Mall*. This revocation occurred as part of the Council's scheduled review of by-laws. All of the Council's 2004 by-laws, including *By-law No. 4 - Roads*, were scheduled to expire on 1 January 2012 by operation of s 251 of the *Local Government Act 1999* (SA).

The 2004 by-law has been replaced by another by-law dealing with broadly similar subject matter. Clause 2.7 of the Council's current *By-law No. 4 - Roads (the 2011 Roads By-law)*, which commenced on 9 October 2011, provides (in similar terms to cl2.3 of the earlier by-law) that:

*No person shall without permission on any Road:*

...  
*preach, canvass, harangue or otherwise solicit for religious purposes except on any Road or part thereof where the Council has, by resolution, determined this restriction shall not apply. (numbering removed)*

As such, preaching canvassing and haranguing continue to be regulated under the 2011 Roads By-law. Clause 2.7 requires permits to be obtained from the Council prior to engaging in preaching, canvassing and haranguing. The Council retains the capacity to establish speakers' corners on any road, or part-thereof.

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The 2011 Roads By-law does not include any clause dealing with the regulation of the distribution of handbills or other materials, however these matters are regulated in other areas by other by-laws of the Council (see for example cls 2.14 and 2.21 of the Council's *By-law No. 3 - Local Government Land*).

The Council has had no direct communications with the Second and Third Respondents regarding the 2011 Roads By-law and its enforcement.

On 29 November 2011 the Council passed a resolution in the following terms:

20

*That Council:*

- ...  
10. *Instructs the Chief Executive Officer to take no action to enforce the following clause of Council's By-law No. 4 - Roads until further resolution of Council, namely.*  
10.1 *Clause 2.7 – Preaching and Canvassing*

30

This decision followed concerns expressed by the Legislative Review Committee of the Parliament of South Australia that the 2011 Roads By-law was inconsistent with the decision of the Full Court of South Australia (the decision the subject of this High Court appeal). The Council also made a similar resolution with respect to certain clauses of *By-law No. 3 – Local Government Land*.

It is the Council's intention that no further resolution authorising the Chief Executive Officer to enforce cl2.7 of the 2011 Roads By-law will be made unless the High Court proceedings are resolved in the Attorney-General's favour.

#### Other Proceedings Raising the Validity of the 2004 Roads By-Law

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Two current Supreme Court of South Australia civil proceedings raise the issue of the validity of cls 2.3 and 2.7 of the 2004 Roads By-law. Supreme Court Action No. 92 of 2011 is an appeal by Samuel Corneloup (the Third Respondent in the High Court appeal) and others against 2010 Magistrates Court convictions for preaching or canvassing contrary to cl2.3 of the 2004 Roads By-law. Supreme Court Action No. 1106 of 2010 concerns injunction proceedings brought by the Council against Caleb and Samuel Corneloup (and a number of other persons) to restrain the defendants from preaching or distributing literature unless they hold a permit. Both of these Supreme Court matters have been adjourned pending the outcome of the High Court appeal.