IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. A16 of 2012

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Appellant

and

THE CORPORATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR NEW SOUTH WALES (INTERVENING)

Part I

1. The Attorney-General for the State of New South Wales (the "NSW Attorney") certifies that these submissions are in a form suitable for publication on the Internet.

Part II

2. The NSW Attorney intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth).

Part III

3. The NSW Attorney accepts the appellant's statement of applicable constitutional provisions, statutes and regulations.

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Part IV

The first Lange question

4. The implied freedom of communication on government and political matters does not guarantee a personal right to freedom of communication: Cunliffe v The Commonwealth (1994) 182 CLR 272 at 327 per Brennan J. Rather, it is a limitation on legislative power, which arises by necessary implication from the system of responsible and representative government set up by the Constitution: Cunliffe at 327 per Brennan J; Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 ("Lange") at 560-561; APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 ("APLA") at 352 [27] per Gleeson CJ and Heydon J, 358 [56] per McHugh J, 451 [381] per Hayne J. Accordingly, in deciding whether the freedom has been infringed, "the central question is what the law does, not how an individual might want to construct a particular communication": APLA at 451 [381] per Hayne J; see also Hogan v Hinch (2011) 243 CLR 506 at 544 [50] per French CJ.

5. That is not to say, however, that consideration of the communications sought to be made, and on the basis of which a law is challenged, is irrelevant to the analysis. The first question that Lange established must be asked is whether the law effectively burdens the implied freedom either in its terms, operation or effect (at 567). If a communication is not one concerning a government or a political matter, that would resolve the constitutional challenge without needing to consider the second limb of the Lange inquiry: see APLA at 359 [59] per McHugh J. While the range of matters that may be characterised as "governmental and political matters" for the purpose of the constitutional freedom is broad (Hogan v Hinch at 544 [49] per French CJ), the freedom does not extend to discussions that cannot illuminate the choice for electors at federal elections or in amending the Constitution, or cannot throw light on the administration of federal government: Lange at 571.

6. Similarly, if the challenged law does not "effectively burden" the communications in question, the first of the Lange questions would also be answered in the negative. The incorporation of such a limitation in the first question is consistent with the ambit of the implied freedom extending only so far as is necessary to give effect to ss 7, 24, 64, 128 and related sections of the Constitution, being the provisions from which the

implication is drawn: Lange at 567. A burden which is not "meaningful", in the sense, inter alia, that it is "a real or actual burden upon relevant communications", would fall outside the scope of the implied freedom: Wotton v Queensland [2012] HCA 2 ("Wotton") at [54] per Heydon J; (2012) 86 ALJR 246 at 258-259.

7. In the proceedings in the District Court, both the parties and the present appellant, who intervened in those proceedings, agreed that the by-law in question effectively burdened the implied freedom of communication on a government or political matter: see Corneloup v Adelaide City Council [2010] SADC 144 at [173]; (2010) 179 LGERA 1 at 45. That concession appears to have been made, at least by the appellant, on the basis that the impugned by-laws are "capable of effectively burdening communication about political matters in certain circumstances" (see the appellant's submissions ("AWS") at [26]), although reference is also made to the topics about which the respondents deposed they wished to preach, and their support of a particular political party (AWS [27]; see the decision of Stretton J at [8], 179 LGERA 1 at 7).

8. Some of the topics referred to might include an element of political discussion but there appears to be no actual record of what was said on any particular occasion. Nor does there seem to be any real record of what the third respondent said to provide the basis for the charge on which he was convicted in the Magistrate's Court of South Australia on 27 July 2010.

9. The NSW Attorney contends that satisfaction of the first limb of the Lange test requires more than simply characterising the law as being capable of imposing an effective burden on the implied freedom of communication on government and political matters. The difficulty with this approach is that it gives the first limb of the Lange test very little work to do, with most legislation having an incidental effect on the content of communications being at least capable of imposing an effective burden on the implied freedom. As the appellant observes of the present case (AWS [28]), for example, the respondents may have sought to engage in genuine political discussion or their preaching may have been so peripherally political that it could not be said to be necessary to protect it. The question of whether they were engaged in political speech for the purpose of the implied freedom may not have had to be

determined for the purposes of standing (see AWS [28]), but it remained relevant for other purposes, including to identify the area of communication which may have been affected by the provisions in question: see Wotton at [80] per Kiefel J.

The second Lange question

10. On the assumption – which may not, as already noted, be apposite – that the first question is answered affirmatively, the second question is whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: Lange at 567-568, as modified by Coleman v Power (2004) 220 CLR 1 ("Coleman") at 51 [95]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J.

11. The impugned clauses of the by-laws impose a prohibition on the activities of preaching, canvassing or haranguing on any road (outside of a designated area and apart from particular surveys or polls conducted in the context of an election or referendum) (cl 2.3), and on the giving out or distribution of handbills and other materials on any road (again, outside of the election or referendum context) (cl 2.8). However, the Council may permit each of the otherwise prohibited activities to take place. The capacity to consider each case on its merits is to be distinguished from provisions which impose a general prohibition.

12. The legislative provision pursuant to which the by-laws were made confers a power to make by-laws for the purpose of "the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants": item 9(XVI) of s 667(1) of the Local Government Act 1934 (SA). In the Full Court, Kourakis J, with whom Doyle CJ and White J agreed, described the power as extending to regulating conduct which, having regard to such considerations as the nature of contemporary urban communities, the legislative responsibilities of other levels of government, and the nature of the specific powers expressly conferred on 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: Corporation of the City of Adelaide v Corneloup (2011) 110 SASR 334 at 361 [98].

13. As the appellant observes in his written submissions (AWS [30]-[32]), cll 2.3 and 2.8 of the by-laws serve legitimate ends, including to enable road users, a group that would include persons who wish to speak on political matters, to use the roads without being subjected to an unacceptable level of disruption or harassment. Justice Kourakis accepted that the impugned clauses of the by-laws constituted a reasonable and valid exercise of the legislative power: at 365-366 [120], 366-7 [125]-[128].

14. As to the question of whether the by-laws are reasonably appropriate and adapted to serve such legitimate ends in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, the relevant burden lies in the requirement to obtain permission: Wotton at [28]. If a person wishes to engage in discussion about government and political matters by, for example, preaching on any road, or handing out leaflets in relation to such matters on any road, they must first seek Council permission.

15. In so far as the cases have drawn a distinction between laws which have the purpose of restricting discussion of government or political matters and those that merely affect it incidentally (as to which see for example Nationwide News Pty Ltd v Wills (1992) 177 CLR at 76-7 per Deane and Toohey JJ; Levy v Victoria (1997) 189 CLR 579 at 611, 614 per Toohey and Gummow JJ, 618-619 per Gaudron J, 645 per Kirby J; Mulholland v Australian Electoral Commission (2004) 220 CLR 181 ("Mulholland") at 200 [40] per Gleeson CJ; APLA at 351 [28] per Gleeson CJ and Heydon J), the terms of cll 2.3 and 2.8 cannot properly be characterised as falling within the former category. If those clauses have a burdening effect on communications about a government or political matter, that effect is incidental, and unrelated, to their nature as political communications: see for example Hogan v Hinch at [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. Whilst it is not definitive, the incidental nature of the burden imposed by cll 2.3 and 2.8 is more readily seen to be reasonably appropriate and adapted to the end the clauses are to serve, in accordance with the second Lange criterion: Wotton at [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

16. Although Kourakis J accepted that the object of cll 2.3 and 2.8 was a purpose which was compatible with democratic and responsible government, his Honour took the view that a requirement to obtain advance permission to speak on political matters was "antithetical to the democratic principle" (at [159]). To the extent that his Honour was suggesting that a requirement to obtain permission was of itself incompatible with the implied freedom, his Honour's reasoning is inconsistent with the approach of the Court in Wotton. To the extent that his Honour's statement was premised only on the practical concerns of delay and the "substantial likelihood" that the freedom would be infringed (at [158]), his Honour was engaging in the doubtful practice of construing the constitutional validity of legislation by reference to extreme examples. The NSW Attorney adopts the appellant's submissions in response to his Honour's reasoning on these matters (AWS [44]-[46]).

17. The discretion conferred in the chapeau to the impugned by-laws, to grant or refuse permission to engage in otherwise proscribed conduct, is unconstrained in its terms, but its limits would be construed conformably with the constitutional limits imposed by the implied freedom: Wotton at [9]-[10] per French CJ, Gummow, Hayne, Crennan and Bell JJ, citing in particular Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 at 613-614 per Brennan J. If there was an undue delay in the Council granting permission, relief could be sought directing performance of the obligation to consider that issue; whilst a refusal to grant permission which exceeded the limit of the implied freedom would be amenable to judicial review on the basis that the exercise of the power was ultra vires. The NSW Attorney adopts the submissions of the appellant in this regard (AWS [38]).

18. The NSW Attorney contends that neither of the particular concerns raised by Kourakis J, nor his Honour's more general recourse to notions of democratic participation, requires a negative response to the second Lange question in relation to cll 2.3 and 2.8 of the by-laws. The choice made by the Council in respect of the formulation of the by-laws was a reasonable one in light of the burden which it places on the constitutional freedom of political communication: see for example Levy v Victoria at 598 per Brennan CJ, 608 per Dawson J, 614-615 per Toohey and Gummow JJ, 619-620 per Gaudron J, 627-628 per McHugh J, 647-648 per Kirby J;

Coleman at 31 [31] per Gleeson CJ, 52-53 [100] per McHugh J, 124 [328] per Heydon J; Mulholland at 197 [32]-[33] per Gleeson CJ, 305 [360] per Heydon J.

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