IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY NO A16 OF 2012

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Appellant

THE CORPORATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

SUBMISSIONS OF THE HUMAN RIGHTS LAW CENTRE

SEEKING LEAVE TO INTERVENE AS AN AMICUS CURIAE

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PART I CERTIFICATION

1. The Human Rights Law Centre (**the Centre**) certifies that these submissions are in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Centre seeks leave to intervene as an *amicus curiae* to make submissions on the second limb of the *Lange* test, there being no significant dispute about the first limb. The Centre contends that the Court should reject the submissions in relation to the second limb of the appellant (**South Australia**), the interveners and the first respondent (**the Council**), which are based on their erroneous application of the decision in *Wotton*.[1] Those submissions are to the effect that, although the impugned by-laws[2] may be accepted as effectively burdening the freedom of communication of members of the public on Adelaide roads and walkways (**public places**) about government or political matters (**political communications**) the decision in *Wotton* requires that the second *Lange* question receive an affirmative answer because:

   (a) the burden is no more than an obligation to apply to the Council for a permit to engage in the political communications regulated by the impugned by-laws;

   (b) in determining that application, the Council must have regard to the constitutional restraint on legislative power in respect of political communications; and

   (c) any decision of the Council to refuse to grant the permit is subject to judicial review.

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1 *Wotton v Queensland* (2012) 285 ALR 1.
2 Clauses 2.3 and 2.8 of By-Law No 4 – Roads.

Put simply, the substantive contention appears to be that the system of requiring a permit to engage in political protest in public places will satisfy the *Lange* test.

3. The resolution of the issues in the present matter in relation to the second limb of the *Lange* test may require clarification in respect of the two matters identified by Kiefel J at [83] in *Wotton*. The Centre will contend that an affirmative answer to the second *Lange* question in this case requires that: (1) both the ends and the means of the impugned by-laws be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (**the mandated system of representative government**); and (2) although the ends of the impugned by-laws are legitimate, the by-laws will satisfy the test only if the means imposing the burden on political communications be proportionate to their ends, taking into account the mandated system of representative government. The by-laws fail that test in the present matter because they unreasonably burden political communications given the availability of alternative and significantly less burdensome means by which the objectives of the law could be achieved in a manner compatible with the mandated system of representative government. Accordingly, the second *Lange* question should be answered in the negative.

4. The Centre will also contend that the reliance placed upon *Wotton* by the appellant, the interveners and the Council is misconceived. The different legitimate statutory ends served, and the different statutory contexts, in each case require different proportionality and compatibility analyses for the purpose of the second *Lange* question. Yet, those supporting the impugned by-laws either ignore those differences or treat them as irrelevant, substantially on the basis that *Wotton* decided that the existence of a permit system with the features set out in [2] above ensures validity.

5. The issues in this matter are of general application: the prohibition in this case subject to a permit system is similar to laws that operate in public places throughout Australia.[3] In substance, those laws commonly require council permission for the public to lawfully engage in spontaneous or organised political communications or political protests (and associated activities) in public places, being the places where members of the public will usually gather to engage in such communications or protests.[4] By way of example, cl 33 of the *Alice Springs Management of Public Places By-laws* 2009 makes it an offence for a person to organise or lead a demonstration or protest in a public place without a permit; cl 41 of the *Hobart City Council Highways By-Law* (2008) makes it an offence to conduct, take part in or attend a meeting to discuss, protest or speak on any political matters or issues in a mall, but cl 42 allows a person to apply for a permit to do so.

6. There are four reasons why the Centre's application to intervene as an *amicus* should be granted.

7. First, the issues raised as to the meaning and application of the second limb of the *Lange* test are of general importance throughout Australia. The respective interests of the second and third respondents in relation to those issues are primarily related to their dispute with the Council and the various proceedings between them and the Council in relation to the respondents' communications in public places in Adelaide.[5] The Centre's interest is in the broader freedom of the public to engage in political communications or

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3 Alice Springs: *Alice Springs Management of Public Places By-laws* 2009, cll 23, 26, 33; Brisbane: *Chapter 9 – Parks*, cll 24, 36 and 37, *Chapter 19 – Queen Street Mall*, cl 11(1) and *Chapter 21 – Chinatown and Brunswick Street Malls*, cl 8(1); Adelaide: *By-law No 4 – Roads*, cll 2.6 and 2.7; *By-law No 3 – Local Government Land*, cll 2.10, 2.14, 2.26, 2.29, 2.30 and 2.31; Perth: *Local Government Property Local Law 2005*, cl 29(1)(b), (c), (h) and (m), *Signs Local Law 2005*, cl 4.5; Darwin: *Darwin City By-Laws*, cll 97, 103(1)(c); Hobart: *Hobart City Council Highways By-law*, cll 40 and 41, *Hobart City Council Salamanca Market By-law*, cl 21; Melbourne: *Melbourne City Council Activities Local Law 2009*, cll 2.11, 4.6 and 5.4.Sydney: *Local Government Act 1993*, ss 68, 626.

4 Cf *Shuttlesworth v City of Birmingham* 394 US 147 (1969) at 152

5 See *Corneloup v Adelaide City Council* [2010] SADC 144 at [3]-[11] at AB 409-411

spontaneous or organised political protests in public places throughout Australia, being the places where political communications between electors themselves and between them and legislators and the executive are most likely to occur.[6] Given the extensive submissions in support of the impugned laws in reliance on *Wotton* on behalf of the Commonwealth, South Australia, New South Wales, Queensland, Victoria, Western Australia and the Council, the Centre contends that it is appropriate for the Court to have its assistance as a contradictor in respect of the submissions of those parties substantially for the reasons stated by French CJ in *Wurridjal* v *Commonwealth* for permitting an *amicus* to intervene.[7]

8. Secondly, as the Centre's submissions raise matters and put arguments that were not raised, put or fully articulated in the submissions of the second and third respondents, those submissions can assist the Court in reaching a correct determination[8] in a way in which it would not otherwise be assisted.[9]

9. Thirdly, the Centre's submissions relate only to the second *Lange* question, with the consequence that any additional costs or delay consequent on granting leave will not be disproportionate to the assistance the Centre can provide.[10]

10. Fourthly, the Centre has, on a pro bono basis, assisted applicants in a number of cases in this Court involving the implied freedom of political communication.[11] It has also assisted the applicants in the 'Occupy Melbourne' trial in the Federal Court at Melbourne, in which North J has reserved his decision. In that case, which involved, *inter alia*, a constitutional

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6 In *Aid/Watch Inc* v *Federal Commissioner of Taxation* (2010) 241 CLR 539 at [44] such communications were accepted as 'an indispensable incident' of the constitutional mandate of representative and responsible government.
7 *Wurridjal* v *Commonwealth* (2009) 237 CLR 309 at 312.
8 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 284 ALR 222 at [6].
9 *Levy v Victoria* (1997) 189 CLR 579, 604-605, 650-652.
10 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 284 ALR 222 at [4].
11 *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; and *Wotton*.

challenge to the validity of the City of Melbourne Local Law permit provisions that were applied to hinder or impede a continuing political protest on public parklands, the Attorney-General for Victoria put submissions against the applicants' case in reliance on *Wotton* which were similar to those now being put by him in the present case. In particular, the Attorney-General submitted that the applicants' reliance on the decision of the South Australian Full Court in this case was misplaced because it was inconsistent with *Wotton*. In the circumstances, it is appropriate that these submissions in response to the Attorney's submissions (and to the submissions of the other parties seeking to uphold the impugned by-laws) be before the Court, particularly as the decision in this case is likely to be determinative of the significant constitutional and political communication issues that arose in the 'Occupy Melbourne' case.

11. The presentation of the intervener's submissions should take no more than 30-45 minutes.

PART III LEGISLATIVE PROVISIONS

12. The Centre does not take issue with the statements of applicable legislation set out in submissions of South Australia and the Council.

PART IV STATEMENT OF ARGUMENT

A. DISTINGUISHING *WOTTON*

13. The Centre accepts that the relevant legal framework in the present matter is as set out in [5]-[7] of the Commonwealth's submissions. Accordingly, the question is whether the impugned by-laws would be valid if Parliament had enacted them.

14. In accordance with the analysis in *Wotton* at [28], it can be accepted that the relevant burden imposed by the impugned by-laws is the obligation to seek

and obtain a permit from the Council to engage in the modes of political communication regulated by those laws.

15. There are, however, a number of features of the impugned by-laws, which are relevant to their legal and practical operation,[12] that differ from the laws in issue in *Wotton*. First, the procedural and other benefits of the 'ADJR Act' form of judicial review are not available. In particular, there is no right to reasons[13] in relation to a refusal to grant a permit under the by-laws. The absence of reasons means that the decision presents an 'inscrutable face'.[14] An applicant for judicial review would be left with the task of establishing that the refusal was not bona fide or was actuated by motives or reasons which fall outside the scope and purpose of the by-laws. As was explained by Dixon J in *Swan Hill Corporation v Bradbury*[15] in an analogous context, apart from the difficulty of establishing what in fact was the reason for a decision, it 'would be no easy thing' to establish that the decision was outside of the discretion conferred under the relevant Council by-laws.[16]

16. Secondly, the relevant by-laws[17] contain no decision-making procedures or criteria in relation to the exercise of the power to grant a permit, which power is not expressly conditioned or guided in any way. Although the law in *Wotton* had that same characteristic, the ends in that case of 'community safety and crime prevention through humane containment, supervision and rehabilitation

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12 See, for example, *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 12 [2] and 21 [25] (French CJ) and 56-57 [151] (Gummow and Bell JJ) and 75 [218] (Hayne J); *New South Wales v The Commonwealth* (the *Work Choices Case*) (2006) 229 CR 1 at 121 [197].

13 The absence of reasons undermines the power of the Courts to scrutinize the exercise of power by the decision maker: see generally *Minster for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 622 [32] -624 [36] per Gummow ACJ and Kiefel J.

14 Cf. *Minister for Immigration and Ethnic Affairs v SZMDS* (2010) 240 CLR 611 at 623 [34] (Gummow A-CJ and Kiefel J).

15 (1937) 56 CLR 746 at 758-9.

16 See also *Denver Chemical Manufacturing Co v Commissioner of Taxation* (1949) 79 CLR 296 at 313, where Dixon J observed that without the reasons for a decision the Court will need to be able to say that the decision could not be explained on any ground which would be consistent with the valid exercise of the functions committed to the decision maker.

17 Construed by reference to cl 1 of *By-law No. 1 – Permits and Penalties*; extracted in the Appendix to the submissions of the Attorney-General of Victoria.

of offenders' affords a clearer and more confined statutory framework within which interview permit decisions are to be made. Also, any permit that might be granted, or conditions that might be imposed, under the impugned by-laws may, without any reason being given, be revoked by notice at any time.[18]

17. Thirdly, as stated in *Wotton* at [21], it is incumbent on the decision-maker 'to have regard to' the restraint on legislative power in relation to political communications. If the constraint is no more than the existence of a mandatory consideration, then it does not protect the freedom of political communication because the weight to be accorded to a consideration is a matter for the decision maker.[19] The consequence would be that a decision-maker could decide to act inconsistently with the implied freedom, provided he or she considered it. If the constraint is such that the power to grant a permit must be exercised in a manner that conforms with the constitutional restraint then judicial review proceedings, which may include review on the merits, could be fact intensive, complex, time-consuming and costly. Thus, any legal challenge to a failure to exercise the power or a refusal to grant a permit by a putative protester who, in the normal course, will have no financial interest at stake will not only be fraught with great difficulty and speculative[20] but would be most unlikely to occur. These circumstances may be contrasted with *Wotton* where it was recognised at, for example, [88], that the relevant provision was directed to the method by which the media (and others) obtain information or opinions from a prisoner. Usually the media will have a greater capacity and incentive to undertake court proceedings than members of the public. Also, the specific factual matrix in

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18 See cl 1.4 of *By-law No. 1 – Permits and Penalties*, attached as the Appendix to the submissions of the Attorney-General of Victoria.

19 See, e.g., *Abebe v Commonwealth* (1999) 197 CLR 510 at 580 [197] (Gummow and Hayne JJ).

20 Being inherently speculative the applicants might also have to contend with a 'fishing' objection on a discovery application in a judicial review proceeding: see *Jilani v Wilhelm* (2005) 148 FCR 255 at 273-274, [108]-[113]

cases such as *Wotton* and the special statutory ends in question in that case make a 'prisoner' case very different to, and more confined than that of, a political protester in a public place.

18. Fourthly, as the above matters demonstrate, the legal and practical operation of the by-laws is such that, although the exercise of a power whether to grant a permit does not involve an 'unbridled discretion' and is not unreviewable, there will in reality be a very substantial hurdle confronting persons who may wish to challenge council decisions (or failures to decide) refusing to grant a permit to engage in the otherwise proscribed political activities in public places. Tthe requirement imposed on a member of the public, who claims to have wrongly been denied permission to engage in the otherwise proscribed political activities, to take proceedings for judicial review has the tendency to 'strangle political speech almost as effectively as an absolute prohibition.'[21]

19. Fifthly, as was observed by Kiefel J in *Wotton* at [84], the statutory context in that case recognised that a prisoner's entitlements are necessarily diminished because of imprisonment or court sentence. No such observation can be made in relation to the right of access to, and use of, public places in Adelaide by members of the public.

20. Sixthly, in *Wotton*, a prisoner was not prevented from engaging in political communications without a permit as a permit was only required for a person to interview a prisoner or to obtain a written or recorded statement from a prisoner. That factor is significant to the proportionality and compatibility analyses in the present case as a permit is required for all political communications in public places that involve preaching, canvassing,

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[21] See: Kourakis J at [158]

haranguing or giving out or distribution of handbills, notices or other printed matter, which are the usual or common incidents of political protest.[22]

THE SECOND LANGE QUESTION

A direct and substantial burden

21. As was observed at [30] in *Wotton*, laws that incidentally restrict political communications, as opposed to laws that regulate communications that are inherently political or are a necessary ingredient of political communication, will more readily satisfy the second *Lange* question. The effect of the submissions of those supporting the validity of the impugned by-laws is to leave little scope for that distinction as a permit system, on their analysis, is an answer to both kinds of regulation.

22. The distinction between an incidental or indirect restriction and a direct or substantial restriction necessarily involves questions of fact and degree: the more directly or substantially the law restricts political communication, the more difficult it will be to satisfy the second limb of the *Lange* test. In the present case, the restriction is within the "direct" end of the spectrum, as the aspects of the freedom burdened are the common modes of political communication in public places regulated by the impugned by-laws. As explained at [5] and [21] above, the effect of the impugned by-laws is to directly and substantially burden those aspects of the freedom by requiring a permit to engage in political communications involving any of those modes of communication in public places in Adelaide. The effect, which is not incidental or indirect, is not any the less direct or substantial because the same burden is also imposed on non-political communications. Each of the by-laws could easily be divided into two provisions – one prohibiting only the

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22 See Kourakis J at [157]. Cf: *Boos v Barry* (1988) 485 US 312 at 318: *Shuttlesworth v City of Birmingham* 394 US 147 (1969) at 152.

particular modes of communication in relation to political matters; the other relating only to the modes of communication of non-political matters – without altering in any way the degree of the burden on political communication. Drawing a distinction between a law expressed to prohibit a class of activity that includes political activity and a law that prohibits that political activity, would be to allow drafting devices to defeat the constitutional constraint.

23. Further, the intention, *inter alia*, that political communications be targeted by, or are intended to fall within, the by-laws is clear from the carve-out from each of the by-laws of the specified political activities of a candidate during and for the purpose of a Federal, State or Local Government election. This conclusion is significant to the proportionality and compatibility analyses and will more readily result in a negative answer to the second *Lange* question. Insofar as reliance has been placed on the carve outs to uphold the validity of the by-laws, that reliance is misplaced. As is made clear in *Aid/Watch*[23] at [44], communications at any time between electors and by electors to legislators or the executive are 'indispensable incidents' of the constitutional mandate of representative and responsible government. The carve outs, which only relate to a small part of such communications, are supportive of the view that the legitimate ends served by the by-laws are not likely to be diminished in any significant respect by any of the carved out activities occurring during and for the purposes of an election. The proportionality and compatibility requirements inherent in the second *Lange* question should have resulted at the very least in similar carve outs, or some other form of facilitation, of the same activities by electors.

Proportionality and compatibility

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23 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539.

24. The *Lange* question focuses attention on the compatibility of a law that burdens political communication with the maintenance of the constitutionally prescribed system of representative and responsible government. The objectives of the law must be so compatible. However, as McHugh J clarified in *Coleman v Power*, not only the objectives but also "the manner of achieving" those objectives must be so compatible.[24] Accordingly, the compound question as re-stated by McHugh J in *Coleman v Power* and accepted by the Court is whether the law is "reasonably appropriate and adapted to serve a legitimate end in a manner which is [so] compatible".

10 25. In *Wotton*, Kiefel J observed that the re-stated question may be thought to require further clarification in two respects: (1) as to the relationship, if any, between the means chosen by the law to achieve its objectives and the constitutional imperative of the maintenance of the system of representative government; and (2) as to whether that imperative is intended to be part of the test of proportionality which inheres in the second *Lange* question.[25]

26. With respect to these matters, the Centre submits: (1) the relationship between the means chosen by a law to achieve its objectives and the constitutional imperative is that the law is not compatible with the constitutional imperative if the means chosen are not reasonably appropriate
20 and adapted to serve those objectives after taking into account that imperative, which is the context for that proportionality analysis. As McHugh J explained in *Coleman v Power*,[26] a law that unreasonably burdens political communication would have the result that political communication is no longer free, and the constitutional imperative is thereby undermined.

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24 (2004) 220 CLR 1 at 51 (McHugh J), with whom Gummow and Hayne JJ (at 78) and Kirby J (at 90-91) agreed.
25 *Wotton v Queensland* (2012) 285 ALR 1 at [83].
26 (2004) 220 CLR 1 at 51 [96]

27. Thus, the proportionality analysis which inheres in the second *Lange* question is directed to answering the question whether a law that burdens political communication is compatible with the constitutional imperative.[27] That must be so as a matter of principle: the implied freedom derives from the constitutional imperative, and limits legislative power to the extent that a law must not be incompatible with that imperative. It is also apparent from the terms of the test articulated by Kirby J in *Levy*,[28] and embraced by McHugh in *Coleman v Power* as the "true test".[29] That test asks simply whether a law burdens political communication "in a manner which is inconsistent" with the constitutional imperative.

28. As Crennan and Kiefel JJ J observed in *Momcilovic v The Queen*, one test of proportionality is that of "reasonable necessity"; it asks "whether there are less restrictive statutory measures available to achieve the purpose that is sought to be achieved".[30] Thus, in *Coleman v Power*, McHugh J observed that the means chosen to pursue a legitimate end will be incompatible with the constitutional imperative if they "unreasonably burden the communication given the availability of other alternatives" or (setting aside "nice judgments as to whether one course is slightly preferable to another") if there are "less drastic means by which the objectives of the law could be achieved".[31]

29. Contrary to the submissions of the appellant and others,[32] the proportionality analysis that inheres in the second *Lange* question differs substantially to that which may be required to ascertain whether delegated legislation is

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27 It has been said that there is little difference between the phrase "reasonably appropriate and adapted" and the notion of proportionality: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn 272; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85]; *Wotton v Queensland* (2012) 285 ALR 1 at [83].

28 *Levy v Victoria* (1997) 189 CLR 579 at 646.

29 *Coleman v Power* (2004) 220 CLR 1 at 51 [95].

30 (2011) 85 ALJR 957 at 1088 [556].

31 (2004) 220 CLR 1 at 50 [93] (McHugh J), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568. See also *Wotton v Queensland* (2012) 86 ALJR 246 at 264-265 [89] (Kiefel J).

32 Appellant's submissions at [47]-[48]; Appellant's reply at [22]; Western Australia at [18]-[21]; New South Wales at [34]; Commonwealth at [9].

authorised by an Act.[33] As Gummow J observed in *Minister for Resources v Dover Fisheries Pty Ltd*, the questions are "differently focused".[34] In relation to delegated legislation, "[t]he fundamental question is whether the delegated legislation is within the scope of what the parliament intended when enacting the statute which empowers the subordinate authority to make certain laws".[35] It is therefore, essentially, a question of the proper interpretation of the provision empowering the making of delegated legislation and the proper characterisation of the delegated legislation purportedly made under it. By contrast, the proportionality analysis that inheres in the second *Lange* question asks not whether a subordinate law is supported by an empowering provision, but rather whether the subordinate law transgresses a constitutional *limit* on the legislative power to make the empowering provision. Delegated legislation may, as a matter of characterisation, fall within the scope of a power purportedly conferred by an Act, and yet the Act may be incompatible with the constitutional imperative insofar as it purports to authorise the making of the delegated legislation.

Less drastic means are available

30. The proposition that the impugned by-laws go further than is reasonably necessary in seeking to achieve the relevant objectives may be illustrated by reference to examples of other laws from both Australian and comparable foreign jurisdictions[36] that pursue the same or substantially similar objectives, while imposing a lighter burden on freedom of political communication.

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33 Cf. *South Australia v Tanner* (1989) 166 CLR 161 at 167-168.
34 (1993) 43 FCR 565 at 577. See also Cooper J at 584-585.
35 Ibid.
36 See, for example, the *Municipal Code of Chicago*, chapters 4-244-141 (peddlers), 10-8-330 (parades) and 10-8-334 (public assemblies); *Chicago Park District Code*, Chapter 7 (use of parks); *Code of Federal Regulations* (US), Title 26 (Parks, Forests and Public Property) § 2.51 and Title 41 (public contracts and property management) § 102-74 esp. 10-74.500; *Public Order Act 1986* (UK), s 14; *Wanganui Act* (NZ), s 5(6).

31. Those laws protect freedom of political communication in a number of different ways, including, for instance: by "carving out" political communication from the scope of the relevant prohibition; by imposing a requirement for a permit only when a protest is of a certain size or has a certain impact on public amenity; by providing that assemblies etc are permissible unless certain circumstances apply (e.g., an official gives notice that the assembly would cause some particular interference); by creating a presumption that a permit ought to be given unless certain circumstances apply; by providing clear criteria against which applications for permits may be assessed;[37] by providing that reasons must be given for a refusal to give a permit; by providing that, where feasible, a refusal decision must be accompanied by proposed measures to cure defects in the application for a permit; by providing for a timely administrative process of review and/or appeal. including by way of rehearing.

32. Some of the Australian examples are as follows. The *Peaceful Assembly Act 1992* (Qld) creates a statutory right to assemble peacefully with others in a public place, subject only to restrictions necessary in a democratic society in the interests of public safety, public order and the protection of rights and freedoms of others. If a notice of intention to hold a public assembly (that meets the specified requirements) is given to the relevant authorities not less than 5 business days before the assembly is held, then the assembly is approved unless an authority applies to the Magistrates Court for a contrary order. Such an order can only be sought on grounds of safety, serious public disorder or excessive interference with rights and freedoms of others, and only after consultation and an unsuccessful mediation process. This scheme contains a presumption that the permission will be granted, which can only be

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37 Cf: the US cases that require a law subjecting First Amendment Freedoms to the prior restraint on freedom of expression of a license to provide 'narrow, objective and definite standards to guide the licensing authority': see *Shuttlesworth* at 150-151.

displaced by application on appropriate and adapted grounds, and only following review by an independent court.

33. The *Public Order in Streets Act 1984(WA)* has analogous provisions but with no presumption in favour of a permit. Rather, it requires expedition, specifies limited grounds for a refusal and provides for appeal to the State Administrative Tribunal to review the refusal.[38]

34. Parts 4 and 5 of the City of Perth *Thoroughfares and Public Places Local Law* 2007 and Pt 3 and 8 of its *Local Government Property Local Law 2005* contain a detailed scheme which provides a permit must be approved or refused and, if refused, there is a right to reasons and right of merits review.[39]

35. Section 6(5) of the *Summary Offences Act 1966* (Vic)[40] is an example of a "carve-out" designed to protect the right to freedom of expression. Section 6(1) empowers a police officer or protective services officer to give a direction to a person to leave a public place, if he or she suspects on reasonable grounds that the person is, among other things, breaching or likely to breach the peace. But s 6(5) states that the section does not apply in relation to a person who "whether in the company of other persons or not" is picketing a place of employment, demonstrating or protesting about a particular issue, or behaving in a way that is apparently intended to publicise the person's view about a particular issue.

36. Clause 5.4 of the City of Melbourne's *Activities Local Law 2009* also contains a specific carve-out provision. Under the clause, a person must not, unless in accordance with a permit, display or distribute to any person any handbill in or

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38 Ss 5, 7 and 8.

39 Each Local Law adopts the scheme for review and appeals in ss 9.6 and 9.7 and Div 1, Pt 9 of the *Local Government Act* 1995 (WA).

40 Hansard, Legislative Assembly, Victoria, 12 November 2009 at 4018-9 (statement of compatibility under s 28 of the *Charter of Human Rights and Responsibilities Act 2006* for cl 3 of the *Summary Offences and Control of Weapons Acts Amendment Bill*, by which s 6 was inserted into the Summary Offences Act).

on a public place or allow that to occur. But "handbill" is defined so as to exclude documents "containing material of an exclusively political nature distributed by hand to any person".[41]

37. *The Local Government Act* 1993 (NSW) and the *Summary Offences Act* 1988 (NSW) provide for prior notification of public meetings in public places. If the notification is more than seven days prior to the meeting the Commissioner of Police must go to the Court seeking a prohibition order if the meeting is opposed. If the notification is less than seven days and the Commissioner has not authorised the meeting the organiser can seek court approval of the meeting.[42]

38. Most recently the *First Report on the Rights to Freedom of Peaceful Assembly and Association*, which was presented by the Special Rapporteur, Maina Kai, to the UN Human Rights Council on 20 June 2012, discusses "best practice" and states:[43]

> The Special Rapporteur believes that the exercise of fundamental freedoms should not be subject to previous authorization by the authorities ..., but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place ... Prior notification should ideally be required only for large meetings or meetings which may disrupt road traffic ...

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41 *Activities Local Law 2009*, cl 1.11

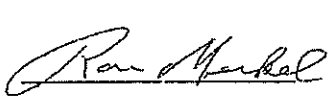
42 See generally ss 24, 25 and 26 of the Summary Offences Act 1988 (NSW)

43 A/HRC/20/27. See also General Comment 34 on Act 19 of the ICCPR (September 2011) by the Human Rights Committee of the United Nations.

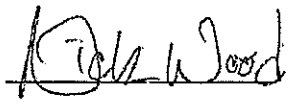
Conclusion

39. For the above reasons, alternative and significantly less drastic means were available with the consequence that the impugned by-laws unreasonably burden the freedom of political communication. Accordingly, the conclusions reached by the Full Court in relation to the second *Lange* question were correct.

Date of filing: 24 September 2012



RON MERKEL QC



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10 Counsel for the Centre