IN THE HIGH COURT OF AUSTRALIA
ADELAIDE 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

THIRD RESPONDENT'S WRITTEN SUBMISSIONS

Filed on behalf of the Third Respondent by
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Part I: Publication on the internet

1. These submissions are suitable for publication on the internet.

Part II: Issues arising on the appeal and notice of contention

2. This case concerns two clauses of a by-law. The relevant clauses of the by-law are as follows:

> 2. 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 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.

3. The following issues arise on the appeal proper:

   (i) the construction of the two clauses;

   (ii) the operation and effect of the two clauses;

   (iii) whether the two clauses are invalid by reason of the operation of the second limb of the implied freedom of political communication.

4. The following issues arise on the notice of contention:

   (i) whether the two clauses are a valid exercise of the power conferred by s.667(1)9(XVI) of the *Local Government Act 1934* (SA) ("the 1934 Act");

(ii) that issue involves the question of whether the two clauses are a reasonably proportional exercise of the power conferred by s.667(1)9(XVI) of the 1934 Act;

(iii) whether the two clauses infringe s. 248(1)(d) of the *Local Government Act* 1999 (SA) ("the 1999 Act");

(iv) whether the two clauses infringe s. 248(1)(e) of the 1999 Act.

Part III: Section 78B notice

5. The s.78B notice of the appellant ("SA") adequately specifies the constitutional issues, except in relation to the matters specified in [47] below.

Part IV: Material facts

6. The third respondent ("Samuel") agrees with SA's statement of material facts, subject to the inclusion of the following matters (which are relevant to standing).

7. First, the SAFC case book discloses (at p.164f) that on 27 July 2010 Magistrate Tracey convicted Samuel of preaching or canvassing on a road without the permission of the council contrary to clause 2.3. This judgment is currently the subject of an appeal in the Supreme Court of South Australia which has not yet been heard and determined: see [40] on p.21 of the annexure to SA's submissions ("SAS").

8. Secondly, the SAFC case book also discloses (p.106) that Samuel is a defendant in proceedings brought in the Supreme Court of South Australia by the Corporation of the City of Adelaide ("the Council") in which the following orders were made on 31 August 2010:

> "The Defendants, their servants or agents are restrained from engaging in any of the following activities:
>
> 1.2.1 preaching;
>
> 1.2.2 canvassing;
>
> 1.2.3 haranguing or harassing any person;
>
> 1.2.4 giving out or distributing any handbill, book, notice, or other printed matter; or
>
> 1.2.5 using any amplifier or other device whether mechanical or electrical for the purpose of amplifying sound for the broadcasting of announcements of any kind;
>
> on the road known as Rundle Mall, Adelaide."

9. On 8 October 2010 Anderson J made a slight variation of these orders. That variation was not before the SAFC and is immaterial for the purposes of this appeal.

Part V: Applicable constitutional and statutory provisions

10. Samuel accepts SA's statement of relevant provisions in SAS with the addition of the following: s. 248(1)(d) and s. 248(1)(e) of the 1999 Act.

Part VI: Third respondent's argument

11. Samuel's arguments on the appeal proper are conveniently dealt with under three headings.

(i) Construction of the two clauses

12. The text of the two clauses of the by-law is set out at [2] above.

13. Both clauses apply to activity "on any road". The word "road" in the by-law has the same meaning as in the 1999 Act where it is defined in s 4(1) to mean:

> "a public or private street, road or thoroughfare to which public access is available on a continuous or substantially continuous basis to vehicles or pedestrians or both and includes –
>
> (a) a bridge, viaduct or subway; or
>
> (b) an alley, laneway or walkway".

14. The word "preach" is not defined in the by-law but its dictionary meanings include: to advocate or inculcate right conduct in speech or in writing; to give earnest advice (especially in a tedious way); to proclaim or make known by sermon; to advocate or teach with earnest exhortation.

15. The term "canvass" is also undefined but its dictionary meanings include: to discuss; to debate; to engage in discussion, debate; to investigate by inquiry; to examine fully; to seek to ascertain; to solicit support; to solicit votes, subscriptions, opinions.

16. The word "harangue" is also undefined. Its dictionary meanings include: to deliver a passionate, vehement speech; to deliver a long, declaratory or pompous speech; to deliver a long or impassioned address or monologue.

17. The prohibition in clause 2.8 on giving out or distribution applies to "any handbill, book, notice, or other printed matter".

18. The by-law also refers to "permission". This is not defined but is dealt with in by-law 1 which refers to such conditions "as it thinks fit". A copy of by-law 1 is appended to the written submissions of the Attorney General for the State of Victoria (intervening) dated 26 June 2012.

19. The effect of the two clauses is to prohibit all of the relevant conduct and to give to the Council a discretion to alleviate the ban. Both clauses create criminal offences: see by-law 1. The penalty for the offences is dealt with in s.791 of the 1934 Act and s.246(3)(g) of the 1999 Act.

(ii) Operation and effect of the two clauses

20. Both clauses consist of prior restraints on almost all forms of speech and physical distribution of printed matter to other persons. The clauses create criminal offences. The prohibitions are not confined to political material, but obviously include a vast swathe of political communication. The political matter covered would include core political material including electoral material, party political speeches and the like and material amounting to public discourse.

21. The clauses apply to any road (defined very broadly) which includes not only all roads, streets, laneways, but also any "thoroughfare to which public access is available on a continuous or a substantially continuous basis". This would include the squares which are a feature of the Adelaide landscape and also some park land and other public land.

22. It is important to note that the proscription applies to the whole of the Adelaide central business district. That is an area which includes not only the State Parliament and the Federal and State courts, but also Government House, the Adelaide Town Hall and various buildings housing officers of the State and Commonwealth executive.

23. The prohibitions are not directed to any particular level of noise, or to time or place. They apply uniformly in relation to all roads (as broadly defined). And they do not apply in terms to anything which is offensive *per se*: statements in writing or in speech which are mild-mannered and genteel are caught as well as more vociferous and aggressive speech and communication. No particular place is singled out (eg, an area near a school, library or particular institution). Nor has there been any "Speaker's Corner" created by council resolution. And the prohibitions do not contain any time restriction: they apply 24 hours a day, 7 days a week and 365 days a year.

24. As SA concedes (at SAS [23]), there is vagueness in the word "harangue". And there is also a wide degree of vagueness in the two other expressions which are used. When taken together the two clauses prohibit a very large portion of normal everyday written and oral communication. And there is also a "chilling effect" on communications which fall strictly outside the publications: citizens seeking to obey the law and to avoid prosecution will give the prohibitions ample clearance.

25. The clauses are not a regulation of activity but a complete ban with a discretion given to the Council to alleviate the ban and to impose such conditions as the Council thinks fit. The process for obtaining a permit is not delineated in the by-law. The citizen is not directed by the by-law to any particular mode of obtaining permission. Nor is there any time limit indicated for the provision or refusal of permission. Subject to the writ of mandamus the Council may take its time in dealing with a permission. Nor is there any limitation on the documents or information which can be sought by the Council in order to deal with an application for permission. And the conditions which may be placed upon the granting of permission are the subject of a very wide discretion. Importantly, the qualifications or exceptions in the two clauses are very limited.

(iii) Implied freedom: second limb of *Lange*

26. Before Stretton DCJ and the SAFC it was argued that both clauses contravened the implied freedom of political communication and infringed both the first and second limbs of the *Lange* test. Stretton DCJ discussed the issue at [169]-[176]. However, his Honour did not need to decide it for the reasons which he explains. The SAFC dealt with the second limb at [153]-[164] and held that the two clauses infringed both the first and the second limbs of the *Lange* test. In this Court, SA accepts that the first limb is infringed but submits that the second is not.

27. Since the SAFC's decision in this case, this Court has made some important comments on the second limb in *Wotton v Queensland* (2012) 86 ALJR 246. In *Wotton* at [25] French CJ, Gummow, Hayne, Crennan and Bell JJ articulated the second limb of the *Lange* test as follows: "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 described in the passage from *Aid/Watch* set out above".

28. The relevant passage from *Aid/Watch v FCT* (2010) 241 CLR 539 (at [44]) is set out at *Wotton* [20]:

> "The provisions of the Constitution mandate a system of representative and responsible government with a universal adult franchise, and s.128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system." (footnotes omitted)

29. At [20] of *Wotton* the five justices made the following additional observations:

> "Their Honours [i.e. in *Aid/Watch*] added that the system of law which applies in Australia thus postulates, for its operation, communication in the nature of agitation for legislative and political changes. This freedom of communication operates both upon the formulation of common law principles and as a restriction on the legislative powers of the Commonwealth, the States and the Territories." (footnotes omitted)

30. Also relevant in *Wotton* is [30]:

> "In answering the second *Lange* question, there is a distinction, recently affirmed in *Hogan v Hinch*, between laws which, as they arise in the present case, incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political *or a necessary ingredient of political communication.* The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description." (emphasis added)

31. The two clauses clearly create a substantial burden on freedom of political communication. They create criminal offences. The scope of the prohibitions is very broad: the clauses cover a great swathe of oral and written communications and, in particular, cover forms of communication which are "a necessary ingredient of political communication" (*Wotton* at [30]). The clauses also constitute a substantial prior restraint on political communications capable of alleviation only by the granting of a permit. And they create a need for a permit in speech and written communication (areas where modern western liberal representative democracies have historically been hostile to licensing). The physical areas the subject of the prohibitions are vast and cover a great portion of the public areas of the Adelaide central business district (which includes the seat of government, the Parliament, the courts and other buildings associated with government). The prohibitions also cover many forms of communication which this Court has stated to be "indispensable incidents" of our constitutional system: *Wotton* at [20].

32. Although permission may be sought, the discretion to grant or refuse that permission is very broad. And the conditions which may be imposed are also the subject of a

wide discretionary power (see e.g. by-law 1, clause 1.2). The decision-maker is not obliged to give any reasons for decision. The clauses do not specify matters in relation to which the decision-maker must be satisfied nor criteria (or relevant factors) by reference to which the discretion must (or may) be exercised. Any judicial review would also confront the difficulty that relevant and irrelevant matters taken into account may not be manifest. And it cannot be said that matters of policy, opinion or taste are necessarily irrelevant which may make it difficult to demonstrate unreasonableness. Accordingly, although judicial review is possible, decisions will often be difficult to review and some decisions may be such that they cannot effectively be reviewed. In addition, these difficulties mean that anyone seeking a permit (intending later to seek judicial review) would be well advised to obtain the services not only of an experienced lawyer, but one *au fait* with the niceties of administrative law. Given the difficulties in any judicial review, appropriate steps would need to be taken to maximise the prospects of effective review from the outset (i.e. prior to seeking a permit). Moreover, there would necessarily be a delay (and perhaps a substantial delay) before a decision could be obtained (although mandamus would no doubt be available if there was sufficient delay and if the applicant had sufficient means to approach the courts). The prospect of such delay would doubtless deter many applicants from seeking review, particularly those wanting immediate and spontaneous discussion of current affairs. Others would no doubt be deterred by the difficulties (and the expense and cost risk) of seeking judicial review. And any permit would require the applicant's name (and other details) thus eliminating anonymity (a matter which many engaged in political debate would consider desirable). Thus the nature and extent of judicial review is markedly different from that in *Wotton*: see particularly [13] and [31]-[32] of that decision.

33. Bearing these matters in mind, it is necessary to consider the various integers of the second limb of the *Lange* test.

34. As interpreted in *Wotton*, the second limb requires that the law:

    (a) be reasonably appropriate and adapted to serve a legitimate end;

    (b) be compatible with the constitutionally prescribed system of government described in *Aid/Watch* at [44].

35. The "constitutionally prescribed system of government" referred to in *Aid/Watch* at [44] is described in *Wotton* at [20]. Thus the second portion of the second limb requires that the law be compatible:

(a) with the maintenance of the following matters as "indispensable incidents" of the constitutional system:

(i) communication between electors and legislators;

(ii) communication between electors and officers of the executive; and

(iii) communication between electors themselves;

(b) with the maintenance of communication in the nature of agitation for legislative and political changes as a fundamental principle of our system of government.

36. The first portion of the second limb (see [34(a)] above) requires that the law be reasonably appropriate and adapted to serve a legitimate end. This exercise involves (i) a delineation of the relevant end (or ends); (ii) a determination of whether that end is legitimate; (iii) a determination that in truth the law has that end (or ends); (iv) a determination of whether the law is reasonably appropriate and adapted to serve the stated end (or ends).

37. As to (i): SA states the ends of the clauses to be the following (SAS at [30]-[32]):

(a) to balance the many and varied competing interests of road users within the council area;

(b) to serve the ends of promoting safety on roads and keeping the peace;

(c) to serve the end of promoting the convenience, comfort and safety of the municipality.

38. As to (ii): Samuel accepts that these ends are legitimate.

39. As to (iii): Samuel submits that it cannot be said that these two clauses truly have these ends. There is nothing in the text of the two clauses which supports the view that they have these ends. The clauses contain no reference to any of these matters. In particular, none of these matters are stated to be relevant to the exercise of the discretion to alleviate the prohibitions. Nor are they stated to be relevant to the imposition or drafting of conditions in any permit. Nor do they relate to any matters of which the decision-maker must be satisfied before granting a permit. And the essential character of the clauses is a general prohibition on most oral and much written communication, matters which have little (if any) connexion with the use of

roads, road safety, keeping the peace etc. The most that could be said is that it is possible that the decision-maker with the discretion to alleviate the bans might have regard to these matters in exercising the discretion. But that does not mean that the two clauses have these ends.

40. As to (iv): Samuel submits that the clauses are not reasonably appropriate and adapted to serve the three stated ends for the following reasons:

(i) a ban on most forms of oral and written communication in public areas is not a reasonable mode of achieving ends related to road use, road safety, keeping the peace etc;

(ii) there are many ways of achieving these ends that are less draconian and extreme;

(iii) communication of the kinds proscribed has little to do with road use, road safety etc;

(iv) for reasons noted above, any judicial review of the prohibitions will be difficult;

(v) to criminalise many forms of everyday communication is not reasonable or proportionate;

(vi) the prohibitions are an unnecessarily severe restriction on the activities of everyday life;

(vii) the prohibitions are an unreasonable prior restraint not only on political speech but on freedom of speech generally, and freedom of religious expression and freedom of assembly;

(viii) the effect of the prohibition is grossly to curtail civil liberties and democratic rights in the seat of South Australian government;

(ix) in particular, the prohibitions gravely curtail freedom of expression on political and public affairs in the areas of Adelaide where this freedom is most important, being the areas in which many (perhaps most) forms of communication between electors and legislators, electors and officers of the executive and between electors would be expected to occur;

(x) the prohibitions also operate in areas where much communication in the nature of agitation for legislative and political changes would be expected to occur;

(xi) the prohibitions would deter many citizens from political discussion and debate and from participating in this aspect of public affairs;

(xii) the vagueness and uncertainty of the scope of the prohibitions has an inevitable chilling effect on most forms of communication in most public areas;

(xiii) the prohibitions gravely curtail political discussion (within the ambit of the implied freedom) and deal with many matters lying at the core of the freedom;

(xiv) other councils have been able effectively to regulate road safety etc without resorting to the creation of criminal offences of these kinds;

(xv) the prohibitions are capable of being used to bring about selective persecution (and prosecution) of particular individuals for conducting normal everyday activity, in the manner of a totalitarian regime;

(xvi) spontaneous and immediate debate and communication on matters of political and public concern in public areas is almost eliminated pending a time consuming application for a licence;

(xvii) no real attempt has been made to ensure that the prohibitions are limited to any particular time, manner or place;

41. SA asserts that the by-law is reasonably appropriate and adapted because the "broad discretion" to grant or withhold permission "must be exercised in a manner that does not abridge the implied freedom": SAS at [36]. *Wotton* is cited as authority for this argument. And it is further suggested (SAS [37]) that 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 matter of topical concern". On these arguments, the Council could presumably ban all communication (or all political discussion) provided a permit system was administered in accordance with the requirements of the implied freedom.

42. Samuel respectfully submits that this argument is unpersuasive and is not supported by *Wotton*. The primary difficulty is that the reasoning in *Wotton* (see [31]-[33]) is predicated upon a "reasoned decision" which is fully "judicially examinable under the

Judicial Review Act" 1991 (Qld). And in *Wotton* the relevant statutory provision used the words "reasonably considers necessary" which is "akin to the phrase 'reasonably appropriate and adapted' for the second *Lange* question": *Wotton* at [32]. However, under these two clauses no reasons would be given for a refusal of a licence or imposition of conditions. And, for reasons set out at [32] above, there are grave difficulties in obtaining effective judicial review of the refusal of a permit or the imposition of unsatisfactory conditions. Moreover, the statements of principle in *Wotton* must be understood in the context of the particular circumstances of that case. And those principles include both portions of the second limb of the *Lange* test.

43. There are substantial differences between *Wotton* and the present case. *Wotton* concerned a parole condition imposed on one parolee, who had been convicted of rioting on Palm Island in the company of 300 persons, and who was subject to a condition that he "not attend public meetings on Palm Island without the prior approval of the corrective services officer". The by-law in the present case prevents *all* persons in most public areas of Adelaide from engaging in most forms of oral communication and much written communication. And there are major differences between *Wotton* and the present case in relation to the nature and extent of the judicial review available.

44. So far as the second portion of the second limb is concerned (see [34]-[35] above), this reformulation (or clarification of the *Lange* formulation) in *Wotton* breaks a little new ground. It focuses on (a) "compatibility" between the law and the indispensable nature of three specified forms of political communication, and (b) the compatibility of the law with a "postulate", namely, agitation for legislative and political changes.

45. This reformulation focuses particularly on core components of the implied freedom, the impact which the impugned law has on those components and the extent to which those components are affected by that law. The greater the impact on these key components, the more likely it is that the law will be adjudged "incompatible".

46. The impact of the two clauses on some core components of the implied freedom has been discussed in general above. More particularly, the two clauses have an obvious and substantial impact on public communication between electors and legislators, electors and officers of the executive, between electors and on agitation for legislative and political change. Unless a permit is granted to a person, that person is at risk of a criminal conviction if he or she engages in such communications in a public area in central Adelaide. This strikes at the very heart of the implied freedom. And the only

way that these core components can be engaged in by any individual is if that person successfully navigates an administrative process based on wide discretions (and subject to such conditions as the Council deems fit). And (for reasons noted above) any judicial review of that process is fraught with difficulty, expense, delay, inconvenience, legal issues and uncertainty of outcome.

47. For these reasons, the two clauses are not "compatible" with the "indispensable incidents" of political communication and the axiomatic nature of communication by way of agitation for legislative and political change. If the two clauses were laws of the Parliament of S.A. they would be invalid. However, because they are delegated legislation, the consequence is that the enabling provision (i.e. para (XVI)) either (i) should be read down so as not to permit the enactment of the two clauses, or (ii) is invalid. Either way, the two clauses are invalid.

Part VII: Third respondent's argument on notice of contention

48. Samuel raises the following arguments by way of notice of contention.

(i) Good government and convenience power: s.667(1)9(XVI)

49. Section 667(1) of the 1934 Act is set out at pages 6-8 of the annexure to SAS. The subsection contains well over 20 specified powers for making by-laws which conclude with a heading "Miscellaneous" and a paragraph (XVI) as follows:

> "Generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants."

50. The SAFC held the two clauses *intra vires* only because they were within paragraph (XVI): see [22] and [48]-[98]. It is notable that this paragraph was not included in the list of powers under which the two clauses were purportedly made: SAFC case book at p.14.

51. The key portion in the reasoning of the SAFC seems to be the following passage at [98]:

> "The specific powers committed to local government by statute provide an important indication of the role and responsibilities of local government, but the convenience power is not limited to matters which are strictly analogous to the subject matters of the specific powers. The convenience powers [sic] extends to regulating conduct which, having regard to the considerations I have mentioned, 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."

Seeligson v City of Melbourne [1932] VLR 444 by saying that the convenience power before him "does not extend the scope of any of the specific powers beyond the limits laid down by the Legislature".

57. The reasoning of the SAFC, particularly at [98], sits uncomfortably with the reasoning in *Lynch* and *Leslie*. The statutory context in the present case involves a convenience power "preceded by a power to make by-laws for [over 20] separate and distinct purposes" (*Leslie* at p.226). Moreover, the limitations in the many specific powers dealing with the use of roads have been effectively overridden by the purported use of the convenience power.

58. For example, s.667(1)3(XX)-(XLI) of the 1934 Act (set out in SAS annexure at pp.6-8) contain a number of specific powers (each subject to limitations) for the regulation and licensing of various uses of vehicles on roads. And s.667(1)7(II) deals with animals on roads and in public places. Section 668 of the 1934 Act provides that "[t]he *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". And s.239 of the 1999 Act deals directly with by-laws that can be made "about use of roads" (heading to section). Section 239(1) provides as follows:

> (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.

59. It is submitted that in this statutory context para (XVI) cannot be read as a broad power of fulsome generality. In particular, it is submitted that:

(i) there is no statement in the relevant legislation that the specific powers are to be construed "without limiting the generality of its powers" (compare *Lynch* at p.364);

(ii) para (XVI) is not the only power to make by-laws;

(iii) para (XVI) is preceded by powers to make by-laws for over twenty other separate and distinct purposes;

(iv) all or most of those other purposes are concerned with the good rule and convenience of the municipality (cf *Lynch* at 364 quoting *Leslie* at 226);

(v) many of those other purposes relate to the regulation of the use of roads;

(vi) the powers to make by-laws in s.667 all have specific integers and limitations many of which would be rendered nugatory if para (XVI) was read as a very broad power in relation to road use;

(vii) s.239(1) of the 1999 Act is a recent animadversion by the legislature to the topic of "by-laws about use of roads" and it is highly specific in relation to the uses which may be regulated and includes specific powers in relation to the "broadcasting of announcements" and "soliciting for religious or charitable purposes";

(viii) the limitations in s.239(1) of the 1999 Act would be rendered otiose if para (XVI) was read as a very broad power in relation to road use.

60. It is notable that in *Foley v Padley* (1984) 154 CLR 349 (a case involving a similar by-law) Mr J.J. Doyle QC formally conceded that para (XVI) "could not by itself support" the by-law in that case given the reasoning of this Court in *Lynch*: see p.373 of the report.

61. Finally, at SAFC [98] the convenience power is said to permit "*regulating* conduct which ... is properly a matter of municipal concern". A power to "regulate" cannot be used to prohibit conduct absolutely subject to a discretionary power to create an exemption from the prohibition. Nor can the communications proscribed fairly be said to be "matters of municipal concern".

62. (See also the discussion of *Shanahan v Scott* (1957) 96 CLR 245, at 250 by Gummow J in *Dover Fisheries* (1993) 43 FCR 565 (at 577-578) at [66] below.)

(ii) Convenience power: proportionality and unreasonableness

63. The primary judge held that the convenience power would not permit the enactment of these two clauses and therefore did not need to consider the issue of proportionality

in relation to the convenience power. The Full Court held that the two clauses were a reasonable and proportionate exercise of the convenience power: see [22] and [108]-[129], especially [124]-[129]. Samuel respectfully submits that in so holding the SAFC erred.

64. A convenient (and pithy) summary of the relevant principles dealing with proportionality and unreasonableness in the context of delegated legislation is to be found in the judgment of Hely J in *One.Tel Ltd v Australian Communications Authority* (2000) 176 ALR 529 at [29]-[35] (which was embraced on the *One.Tel* appeal by Hill J (110 FCR 125 at [72]) and by Griffiths J in *Harbour Radio Pty Ltd v ACMA* [2012] FCA 614 at [116]):

> "It is common ground that the ambit of regulation-making power is subject to two limiting principles. The first is that the power must not be exercised in a manner which is arbitrary, capricious or unreasonable. The second is that the power must not be exercised in a manner which is disproportionate to the attainment of the objects for which it is conferred.
>
> "Unreasonableness" (and the concepts of arbitrariness or capriciousness which are included therein) in this context, means that "the regulation is so oppressive and capricious that no reasonable mind can justify it": *Qui v Minister for Immigration & Multicultural Affairs* (1994) 55 FCR 439 at 446. It needs to be borne in mind that the fundamental issue is one of power, not expediency: *Williams v Melbourne Corporation* (1993) 49 CLR 142 at 149-150. In *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381, Lockhart J emphasised at 384 that it is only in "an extreme case" that delegated legislation would be declared invalid on this ground.
>
> As to the second principle, if the regulation-making power is purposive, the substantive operation of delegated legislation must be capable of being reasonably considered to be appropriate and adapted to achieve the purpose prescribed by the legislation pursuant to which the regulation is made. This requires that there is a reasonable proportionality between the object or purpose and the means adopted to achieve or procure it: *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 584.
>
> If the subject matter of the statutory power cannot be described as purposive, then the question is whether there is a real and substantial connection between the delegated legislation and the subject matter of the grant of power. It is not sufficient that there be merely some connection between the delegated legislation and the subject matter of the regulation-making power. The connection must be so direct and substantive that the regulation is seen really to satisfy one of the descriptions by reference to which the regulation-making power is conferred: *Dover Fisheries* at 584-585.
>
> Where no reasonable mind could justify the delegated legislation by reference to the purposes of the power, or the subject matter of the power, the conclusion is that there is no real connection between the delegated legislation and the power: *Dover Fisheries* (supra) 584-585, in which case there is invalidity. In *Williams v Melbourne Corporation* (supra) at 155, Dixon J put the matter in this way:

> To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.

In *South Australia v Tanner* (1988-1989) 166 CLR 161 the majority said of the reasonable proportionality test of validity that: "it is not enough that the Court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power" (at 168). In *Tanner*'s case, Brennan J dissented in the result, but not in principle. At 179 his Honour said:

> Moreover, it must be steadily borne in mind that the fulfilling of the statutory object is a limitation on the power to make the regulation. A regulation which is so widely drawn as needlessly to embrace a field of operation which is quite unconnected with the statutory object cannot reasonably be adopted in exercise of a power so limited.

The 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: *Dover Fisheries* (supra) at 577."

65. In *South Australia v Tanner* (1989) 166 CLR 161 Wilson, Dawson, Toohey and Gaudron JJ referred to two tests (at page 165) which they held to be the same: first, "whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose"; secondly, "whether the regulation goes beyond any restraint which could be reasonably adopted for the prescribed purpose".

66. In *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 Gummow J referred to the joint judgment in *Shanahan v Scott* (1957) 96 CLR 245, at 250 and held (at 577-578) that *Shanahan* established the following:

> "A power [in an enabling] Act does not authorise the making of regulations which vary or depart from the positive provisions of the Act, or which go outside the field of operation which the Act marks out; such a power does not support attempts to widen the purposes of the Act, to add new and different means of carrying them into effect, or to depart from or vary the plan which the legislature has adopted to obtain its ends. These are indicia which assist in deciding the general question of whether the regulations in question are a reasonable means of attaining the ends of the legislative delegation of power."

67. In *Evans v NSW* (2008) 168 FCR 576 the Full Federal Court (French, Branson and Stone JJ), in the context of an assessment of the proportionality of delegated legislation, referred to *Davis v The Commonwealth* (1988) 166 CLR 79, at 100 and 116 and held (at [78]) that the judgments in *Davis* "support the general proposition that freedom of expression in Australia is a powerful consideration favouring restraint in the construction of broad statutory power when the terms in which that power is conferred so allow". Their Honours added at [79] that "another important freedom generally accepted in Australian society is freedom of religious belief and expression". Similarly, at [110] Kourakis J (in discussing proportionality) referred to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34 where Mason CJ stated (also in the context of "an issue of proportionality") that "the Court must take account of and scrutinise with great anxiety the adverse impact, if any, of the impugned law on such a fundamental freedom as freedom of expression, particularly when that impact impairs freedom of expression in relation to public affairs and freedom to criticise public institutions".

68. As noted at [51] above, the SAFC held at [98] that the convenience power not only covered "matters which are strictly analogous to the subject matters of ... the specific powers" but extended to "regulating conduct which ... 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".

69. An initial difficulty with the two clauses is that they are a "new and different means of carrying ... into effect" the purposes of the enabling Act: *Dover Fisheries* at 577-578. The clauses also "depart from or vary the plan which the legislature has adopted to obtain its ends": *ibid.* See the discussion at [53] – [61] above.

70. Moreover, the clauses are gravely "oppressive" in barring in most public areas the distribution of virtually all written matter, a large portion of normal speech and many of the "ordinary incidents of human intercourse" (*Foley v Padley* at 372 per Brennan J).

71. In addition, the "true character" of the clauses (*Williams v Melbourne Corporation* at 155 per Dixon J) is that they are fundamentally directed at banning most forms of communication in most public places. They are not a real exercise of the enabling power at all and could not reasonably have been adopted as a means of attaining the ends of the power. That an exercise of the discretion to alleviate the ban *may* bring the ban into conformity with the purposes of the enabling Act is of little avail

particularly when the "reservation of a power to give permission for an activity that is prohibited by by-law does not validate the by-law if that activity is not amenable to prohibition": *Foley* at p.371.

72. Further, as Brennan J noted in *South Australia v Tanner* at 179, a by-law "which is so widely drawn as needlessly to embrace a field of operation which is quite unconnected with the statutory object cannot reasonably be adopted". Here the field of operation of the clauses embraces a large portion of everyday oral and written communication and much ordinary intercourse. This field lies well outside the objects of the enabling Act. In the words of Fullagar J, the "by-law enacts a prohibition which extends to acts and things which cannot reasonably be regarded as the concern of a corporation charged with the management of" the good rule and government of the area, and the convenience, comfort and safety of the local inhabitants: *Clements v Bull* (1953) 88 CLR 572, at 581.

73. Further still, the clauses have a substantial and unnecessarily adverse impact on freedom of expression (both generally and in relation to public and governmental affairs). They also impinge substantially on freedom of religious expression and freedom of public assembly. Unless (and until) a permit is sought and obtained, all of these freedoms are substantially compromised. This is a powerful reason why a proportional exercise of the power to enact the clauses would not extend to by-laws of the present kind: see the authorities discussed at [67] above.

74. Finally, to paraphrase Kourakis J (at [115] referring to various cases), if there is any advancement of the statutory purpose, it is a marginal advancement, and yet the clauses constitute a substantial burden on these various freedoms subject only to the large (and time consuming) practical burden of seeking a permit (and perhaps seeking judicial review of any refusal). And alternative clauses prohibiting particular forms of offensive, unsafe or undesirable conduct (with or without restrictions on time, manner and place) could easily be drafted. SA does not suggest that there is any precedent for by-laws of this kind or that councils throughout Australia have not been able to devise alternative (and more specific) means of regulation. Nor was there any material before the primary judge establishing that it is beyond the capacity of an able draftsman to devise such alternative by-laws.

75. In this context, Samuel also refers the Court to the matters discussed above in relation to the second limb of *Lange*.

76. It is therefore submitted that the SAFC erred in holding that the two clauses were a reasonable and proportional exercise of the power in para (XVI).

(iii) Section 248(1)(d) and (e) of the 1999 Act

77. For similar reasons, it is submitted[1] that the clauses are also contrary to s. 248(1)(d) and s. 248(1)(e) of the 1999 Act.

78. Section 248(1)(d) provides that "[a] by-law made by council must not... unreasonably interfere with rights established by law". And s. 248(1)(e) provides that "[a] by-law made by council must not... unreasonably make rights dependent upon administrative and not judicial decisions".

79. Stretton DCJ touches upon these provisions briefly at [39]-[40] but does not address the issue of whether the two clauses infringe either provision. The Full Court does not consider them.

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[1] Counsel for Samuel apologise for the abbreviated treatment of these two points which are not in the notice of contention and which were identified only just prior to the time for the filing of these submissions.

Annexure to the Third Respondent's Submissions

Local Government Act 1999 (SA), section 248 (1)(d) and (e)

248—Rules relating to by-laws

(1) A by-law made by a council must not—

...

(d) unreasonably interfere with rights established by law; or

(e) unreasonably make rights dependent on administrative and not judicial decisions.