HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA — APPELLANT

AND

THE CORPORATION OF THE CITY OF ADELAIDE & ORS — RESPONDENTS

Attorney-General (SA) v Corporation of the City of Adelaide
[2013] HCA 3
27 February 2013
A16/2012

ORDER

1. *Appeal allowed.*

2. *Set aside paragraph 1 of the orders of the Full Court of the Supreme Court of South Australia made on 10 August 2011 and, in its place, order that:*

   (a) the appeal to that Court be allowed; and

   (b) the orders of the District Court of South Australia made on 25 November 2010 be set aside and, in their place, order that:

      (i) the application of Samuel Corneloup dated 2 November 2009 be dismissed; and

      (ii) so much of the appeal of Caleb Corneloup by notice dated 28 July 2010 as sought to challenge the validity of By-law No 4 – Roads made by the Corporation of the City of Adelaide on 10 May 2004 be dismissed.

On appeal from the Supreme Court of South Australia

Representation

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers for the appellant (instructed by Crown Solicitor (SA))

M J Roder SC with R F Gray for the first respondent (instructed by Norman Waterhouse Lawyers)

The second respondent, C Corneloup, appeared in person

G O'L Reynolds SC with J C Hewitt and G R Rubagotti for the third respondent (instructed by Banki Haddock Fiora)

Interveners

T M Howe QC with C D Bleby SC for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with A M Mitchelmore for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

S G E McLeish SC, Solicitor-General for the State of Victoria with A D Pound for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with R B Phillips for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

R Merkel QC with E M Nekvapil and N M Wood for the Human Rights Law Centre, as amicus curiae (instructed by DLA Piper Australia)

CATCHWORDS

Attorney-General (SA) v Corporation of the City of Adelaide

Constitutional law – Implied freedom of communication on government and political matters – Where by-law prohibited preaching and distributing printed matter on any road without permission – Whether by-law effectively burdened freedom of political communication – Whether by-law reasonably appropriate and adapted to achieving legitimate end in manner compatible with system of representative and responsible government.

Local government – Where power to make by-laws "for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants" – Whether generally expressed by-law making power must be narrowly or restrictively construed – Whether by-law exceeded limitations on power delegated to local government under *Local Government Act* 1934 (SA) – Whether by-law complied with limitations and procedures prescribed by *Local Government Act* 1999 (SA) – Whether by-law was reasonable and proportionate exercise of by-law making power.

Words and phrases – "could not reasonably have been adopted", "legitimate end", "licence", "political communication", "principle of legality", "proportionality".

Constitution, ss 7, 24, 128.
Electronic Transactions Act 2000 (SA), ss 9(1), 10(3).
Local Government Act 1934 (SA), ss 667(1) 4 I, 667(1) 9 XVI.
Local Government Act 1999 (SA), ss 4(1), 246(1)(a), 246(2), 248(1)(a), 249(4).
By-law No 4 – Roads, pars 2.3, 2.8.

FRENCH CJ.

Introduction

1 Caleb Corneloup, the second respondent, is the President of an incorporated association known as "Street Church". Samuel Corneloup, the third respondent, describes himself as an "expositor of the Gospel". Each has preached his religious beliefs and associated political beliefs in the City of Adelaide ("the City"). Each has done so without permission from the Corporation of the City of Adelaide ("the Council"), which was required by By-law No 4, entitled "Roads". The third respondent was convicted in the Magistrates Court of South Australia on 27 July 2010[1] and fined $250. His appeal against that conviction is pending in the Supreme Court of South Australia. The second and third respondents, Street Church and a number of other persons are the defendants to an injunction proceeding commenced by the Council in the Supreme Court. The Council sought to restrain those defendants from preaching, canvassing, haranguing or distributing printed material within the area of the City, unless they held a permit to do so as required by pars 2.3 and 2.8 of By-law No 4. The injunction proceeding has also been adjourned, pending the outcome of the proceeding before this Court.

2 On 2 November 2009 and 28 July 2010 respectively, the third respondent and the second respondent filed applications in the Administrative and Disciplinary Division of the District Court of South Australia seeking declaratory relief[2]. In the District Court they argued that pars 2.3 and 2.8 of By-law No 4 were invalid as they were outside the by-law making power conferred by the *Local Government Act* 1999 (SA) ("the 1999 Act"). They further argued that the paragraphs were invalid because they infringed the freedom of political communication implied from the Constitution of the Commonwealth of Australia.

3 His Honour Judge Stretton found that those parts of par 2.3 of By-law No 4 which prohibited haranguing, canvassing and preaching on a road without a permit, and the whole of par 2.8, which prohibited distribution of literature, were beyond the by-law making power conferred by s 239 of the 1999 Act and s 667 of the *Local Government Act* 1934 (SA) ("the 1934 Act")[3]. His Honour found it

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1 *Adelaide City Council v Farnden, Bickle, Corneloup & Morrison* unreported, Magistrates Court of South Australia, 27 July 2010.

2 The third respondent applied in relation to a differently numbered by-law but, in the event, the applications proceeded in the District Court on the basis that they involved a challenge to the validity of pars 2.3 and 2.8 of By-law No 4.

3 *Corneloup v Adelaide City Council* (2010) 179 LGERA 1 at 43 [162]–[163].

unnecessary to determine whether, if they were otherwise within power, the provisions of By-law No 4 infringed the implied freedom of political communication[4]. He made declarations of invalidity.

4 The Council appealed to the Full Court of the Supreme Court. The appeal was dismissed[5]. Kourakis J, who wrote the judgment of the Court, with which Doyle CJ and White J agreed, held that the impugned provisions were a valid exercise of the power conferred by s 667(1)(9)(XVI) of the 1934 Act to make laws "for the convenience, comfort and safety" of the inhabitants of the City[6]. However, his Honour went on to hold that par 2.3, by prohibiting preaching, canvassing and haranguing on a road without a permit, infringed the implied freedom of political communication, as did the whole of par 2.8[7], and that the appeal should be dismissed.

5 On 11 May 2012, this Court granted the Attorney-General for the State of South Australia, who had been a respondent to the proceedings in the Full Court, special leave to appeal against the judgment of the Full Court[8]. For the reasons that follow the appeal should be allowed.

The proceedings in the District Court

6 The jurisdiction of the District Court to hear the applications brought by the second and third respondents derived from s 276 of the 1999 Act[9]. That section creates a "Special jurisdiction" defined by reference to classes of proceedings which "may be taken before, and determined by, the District Court"[10]. They include "proceedings to try the validity of a by-law"[11]. The District Court has power in such proceedings to make an order "declaring a

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4 (2010) 179 LGERA 1 at 45–46 [175]–[176].

5 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334.

6 (2011) 110 SASR 334 at 340–341 [22], 365–367 [118]–[129].

7 (2011) 110 SASR 334 at 373–375 [157]–[164].

8 [2012] HCATrans 107.

9 *District Court Act* 1991 (SA), s 8(3) provides that the Court, in its Administrative and Disciplinary Division, has the jurisdiction conferred by statute.

10 1999 Act, s 276(1).

11 1999 Act, s 276(1)(f).

by-law to be invalid"[12]. Such proceedings may be brought by any person "with a material interest in the matter."[13] The second and third respondents commenced their proceedings on the basis that each of them had "a material interest in the matter"[14]. Their standing was not in issue in this appeal.

7 The challenge to the validity of pars 2.3 and 2.8 of By-law No 4 was based in part upon their alleged infringement of the freedom of political communication implied in the Constitution. The District Court was therefore exercising federal jurisdiction in a matter arising under the Constitution or involving its interpretation. That federal jurisdiction is conferred by s 39(2) of the *Judiciary Act* 1903 (Cth) as jurisdiction in a matter in which the High Court has jurisdiction, or can have jurisdiction conferred upon it pursuant to s 76 of the Constitution.

8 The declaration made by the District Court was in the following terms:

> "1. The words 'preaching', 'canvassing' and 'haranguing' in paragraph 2.3 of 'By-law No 4 – Roads' of the Corporation of the City of Adelaide are declared to be invalid and are severed from the By-law.
>
> 2. Paragraph 2.8 of 'By-law No 4 – Roads' of the Corporation of the City of Adelaide is declared to be invalid and is severed from the By-law."

The form of the declaration, which was left in place by the order of the Full Court dismissing the appeal from the District Court, leaves something to be desired. Individual words of a by-law have no legal operation and are not amenable to declarations of invalidity. Severance is not an act of remedial amputation carried out by the court. It is the application of a constructional rule[15]. The rule derived originally from the common law[16]. It is now reflected in

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12 1999 Act, s 276(5)(e).

13 1999 Act, s 276(2)(d). Such proceedings may also be brought by a council, an elector or the Minister: 1999 Act, s 276(2)(a)–(c).

14 (2010) 179 LGERA 1 at 8 [12]–[14] per Stretton DCJ.

15 *Pidoto v Victoria* (1943) 68 CLR 87 at 110 per Latham CJ, Rich J agreeing at 115, 118 per Starke J, 125–126 per McTiernan J, 130–131 per Williams J; [1943] HCA 37. See generally Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012), ch 29; cf Gans, "Severability as Judicial Lawmaking", (2008) 76 *The George Washington Law Review* 639.

statutory provisions such as s 13 of the *Acts Interpretation Act* 1915 (SA)[17], which applies to delegated legislation in South Australia. The effect of the declaration made by the District Court was clear enough and no point was taken about its form. It is necessary now to refer to the provisions of the 1934 and 1999 Acts relevant to the by-law making powers of the Council.

The statutory framework—the 1934 and 1999 Acts

9 This appeal is concerned with the validity of a by-law made by the Council. The term "by-law" is not defined in either the 1934 Act or the 1999 Act. Lord Russell of Killowen CJ in *Kruse v Johnson* described a by-law as[18]:

> "an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance."

Today the term is used to describe delegated legislation by bodies having limited geographical jurisdiction and is "the expression most commonly used for the primary legislative instruments made by local government authorities."[19]

10 The 1999 Act operates concurrently with provisions of its predecessor, the 1934 Act, which continue in force. When the 1999 Act was enacted, significant portions of the 1934 Act were repealed by the *Local Government (Implementation) Act* 1999 (SA) ("the Implementation Act")[20]. Some elements of s 667 of the 1934 Act survived. Today, the section confers by-law making

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16 *Harrington v Lowe* (1996) 190 CLR 311 at 328 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 8.

17 Section 13 provides that:

> "A statutory or other instrument made pursuant to a power conferred by or under an Act will be read and construed so as not to exceed that power, so that, where a provision of the instrument, or the application of a provision of the instrument to any person or circumstances, is in excess of that power, the remainder of the instrument, or the application of the provision to other persons and circumstances, is not affected."

18 [1898] 2 QB 91 at 96.

19 Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 4 [1.7].

20 Implementation Act, s 6.

powers on councils for a number of specific purposes. Relevantly to the present appeal, sub-s (1) provided:

> "Subject to this Act, a council may make by-laws for all or any of the following purposes:
>
> ...
>
> 4 **Nuisances and health**
>
> I for the prevention and suppression of nuisances;
>
> ...
>
> 9 **Miscellaneous**
>
> XVI generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants."

That is a combination of powers which has a mixed ancestry in the United Kingdom and colonial Australia, stretching back to the first half of the 19th century.

11 The Implementation Act also inserted a new section 668 into the 1934 Act[21]. Section 668 provides that:

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

12 The Governor was empowered by the Implementation Act to repeal additional provisions of the 1934 Act, and that Act in its entirety, by proclamation[22] and to confer new by-law making powers on local governments[23]. There has been no exercise of these powers relevant to this appeal.

13 As enacted, the 1934 Act contained extensive provisions in relation to "Streets, Roads, and Public Places"[24]. They have mostly been repealed save for

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21 Implementation Act, s 6(zk).

22 Implementation Act, s 46.

23 Implementation Act, s 35(1)(b)(ii) read with s 45.

24 1934 Act, Pt XVII.

s 359 which authorises the council, by resolution, to exclude vehicles generally or vehicles of a particular class from a particular street, road or public place.

14 Part 2 of Ch 11 of the 1999 Act is entitled "Roads". The term "road" is defined as[25]:

> "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".

All public roads in the area of a council are vested in the council in fee simple under the *Real Property Act* 1886 (SA)[26]. The 1999 Act prohibits the use of public roads for business purposes unless authorised by a permit[27]. There is provision for the regulation of moveable signs on roads[28], the planting of vegetation[29] and the depositing of rubbish or goods or any other substance on roads or in public places[30]. The provisions of both the 1934 Act and the 1999 Act support the proposition that the regulation of activities on and adjacent to roads and public places within a council area falls within the accepted responsibilities of local government in South Australia.

15 Express power to make by-laws about the use of roads is found in s 239(1) of the 1999 Act. The by-laws made under that sub-section may be about the use of roads for a number of specific purposes including:

> "(d) soliciting for religious or charitable purposes; or

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25 1999 Act, s 4(1).

26 1999 Act, s 208(1).

27 1999 Act, s 222(1). Examples of business purposes given in the Act include business activities carried on from kiosks or pie carts on the side of a road or the extension of a restaurant or cafe business to outside tables on a footpath or roadside.

28 1999 Act, ss 226 and 227.

29 1999 Act, s 232.

30 1999 Act, s 235.

...

(g) any other use in relation to which the making of by-laws is authorised by regulation."

Section 239(2) of the 1999 Act provides that:

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

16 Section 246(1)(a) of the 1999 Act provides that subject to that "or another Act" the council may make by-laws that "are within the contemplation of this or another Act". Section 246(2) provides that the council cannot make a by-law that a person "obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act." However, s 246(3) provides that subject to the 1999 Act, or another Act, a by-law made by the council may:

"(a) operate subject to specified conditions; and

...

(c) be of general or limited application, and provide for exemptions".

The second respondent, by a notice of contention, asserted that By-law No 4 infringed s 246(2) because the requirement for a "permission" constituted a requirement for a "licence" within the meaning of s 246(2). Absent any express power to license the activities otherwise prohibited by By-law No 4, By-law No 4 was beyond power. That submission should not be accepted.

17 As Kourakis J observed, s 246(2) has to be read with s 246(3) so that the latter provision has work to do[31]. The ordinary English meaning of the word "licence" extends to a "formal permission" and "exemption"[32]. However, if extended to permissions and exemptions in this statutory context it would be inconsistent with s 246(3). As Kourakis J said, s 246(2) in its legislative and historical context is directed to controlling the powers of local governments to license business or like activities in particular places[33]. Provision for that kind of licensing was made in the 1934 Act. As enacted, that Act conferred power on local governments to license a variety of activities, including "noisy trades" (such

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31 (2011) 110 SASR 334 at 368 [134]–[135].

32 *The Oxford English Dictionary*, 2nd ed (1989), vol 8 at 890, "licence", senses 1a and 2a.

33 (2011) 110 SASR 334 at 368 [133].

as wood-cutting and boiler-making)[34], horse bazaars and cattle markets[35], chimney-sweeps[36], ice cream carts[37] and newsvendors[38]. The second respondent's contention that By-law No 4 infringed the limitation on the by-law making power imposed by s 246(2) should be rejected.

18 The third respondent invoked in his amended notice of contention s 248(1) of the 1999 Act which provides:

> "A by-law made by a council must not—
>
> (a) exceed the power conferred by the Act under which the by-law purports to be made".

That aspect of his notice of contention can also be dealt with immediately.

19 The third respondent argued that compliance with s 248(1)(a) conditions the validity of any by-law. He pointed out, as is the fact, that By-law No 4, as gazetted, purported to be made under the 1999 Act. He submitted that the only by-law making powers conferred by that Act are those in ss 238-240. The appellant did not contend that they were capable of supporting By-law No 4. He relied upon s 667(1)(9)(XVI) of the 1934 Act. The third respondent submitted that as By-law No 4 was not authorised by ss 238-240 it was not supported by any source of power within the 1999 Act. The answer to that submission is found in s 246(1)(a) of the 1999 Act which confers on the Council power to make by-laws that are "within the contemplation of this *or another Act*" (emphasis added). Assuming that By-law No 4 was able to be authorised by s 667(1)(9)(XVI) of the 1934 Act, the power conferred by that provision was, within the meaning of s 246(1)(a), a power to make by-laws "that are within the contemplation of ... another Act". The third respondent's contention in reliance upon s 248(1) should be rejected.

20 A further provision of the 1999 Act which was relied upon by the second respondent in his notice of contention was s 249(4), which requires certification of a proposed by-law by a legal practitioner before it is made by a council. The

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34 1934 Act, ss 569 and 571.

35 1934 Act, s 669(2)(II).

36 1934 Act, s 669(6).

37 1934 Act, s 669(14).

38 1934 Act, s 669(16).

second respondent contended that the Full Court erred in holding that the certification requirement had been met. Section 249(4) provides:

> "A council must not make a by-law unless or until the council has obtained a certificate, in the prescribed form, signed by a legal practitioner certifying that, in the opinion of the legal practitioner—
>
> (a) the council has power to make the by-law by virtue of a statutory power specified in the certificate; and
>
> (b) the by-law is not in conflict with this Act."

Regulation 19 of the *Local Government (General) Regulations* 1999 (SA) ("the Regulations") prescribes a form which requires the identification of the certifying practitioner by name and business address and that the practitioner sign the certificate. The by-law to be certified must be described in the body of the certificate.

21 As set out in the judgment of Kourakis J, a legal practitioner engaged by the Council reviewed the proposed By-law No 4 in late April and early May 2004, and formed the opinion that the Council had the statutory power to make it and that it was not in conflict with the 1999 Act. A certificate of validity, which accorded with the prescribed form under the Regulations, was prepared and incorporated in an electronic document which set out the proposed by-law. The document was sent by the legal practitioner to an officer of the Council on 3 May 2004[39]. The prescribed form made provision for the legal practitioner's signature, followed by the words "legal practitioner". The practitioner's signature did not appear in the electronic document, but his name did[40].

22 Section 9 of the *Electronic Transactions Act* 2000 (SA) ("the Electronic Transactions Act") provides that:

> "(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—
>
> (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
>
> (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was

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39 (2011) 110 SASR 334 at 370 [146].

40 (2011) 110 SASR 334 at 370 [146].

appropriate for the purposes for which the information was communicated; and

(c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a)."

23 Kourakis J held that the provision of the electronic certificate by the legal practitioner to the Council, together with the statement of his name and accompanying email, sufficiently identified him and made it clear that he expected that the certificate of validity of By-law No 4 could be printed and put before the Council for the purpose of making By-law No 4[41]. His Honour held that the provision of the certificate, albeit unsigned, unequivocally signified that the named legal practitioner held the view that By-law No 4 was valid and subscribed to the opinion required by the certificate although he had not signed it[42].

24 In my respectful opinion, his Honour was correct in his application of s 9(1) of the Electronic Transactions Act and his conclusion that the requirements of s 249(4) and the Regulations, read with the Electronic Transactions Act, were met. The second respondent's contention to the contrary fails.

The impugned by-law

25 By-law No 4 – Roads was published in the South Australian Government Gazette on 27 May 2004[43]. By-law No 4 was entitled:

"CITY OF ADELAIDE

BY-LAW MADE UNDER THE LOCAL GOVERNMENT ACT 1999

By-law No 4 – Roads

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

26 Paragraph 2 of By-law No 4, under the heading "*Activities Requiring Permission*", provided, inter alia:

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41 (2011) 110 SASR 334 at 371 [150].

42 (2011) 110 SASR 334 at 371 [150].

43 *South Australian Government Gazette*, No 44, 27 May 2004 at 1384–1385.

"No person shall without permission on any road:

...

2.3 *Preaching and Canvassing*

preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to [a] designated area as resolved by the Council known as a 'Speakers Corner' and any survey or opinion poll conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum;

...

2.8 *Distribute*

give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, provided that this restriction shall not apply to any handbill or leaflet given out or distributed by or with the authority of a candidate during the course of a Federal, State or Local Government Election or to a handbill or leaflet given out or distributed during the course and for the purpose of a Referendum".

27 The term "road" has the same meaning as in the 1999 Act[44].

28 The reference to "permission" in par 2 of By-law No 4 must be read in the light of By-law No 1, entitled "Permits and Penalties". That by-law was made under the 1999 Act and provided, inter alia:

"1. *Permits*

1.1 In any by-law of the Council, unless the contrary intention is clearly indicated, the word 'permission' means the permission of the Council given in writing.

1.2 The Council may attach such conditions to a grant of permission as it thinks fit, and may vary or revoke such conditions or impose new conditions by notice in writing to the permit holder.

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44 By-law No 4, par 1.6.

1.3 Any permit holder shall comply with every such condition.

1.4 The Council may revoke such grant of permission at any time by notice in writing to the permit holder."

Revocation of By-law No 4

29 By-law No 4 was revoked in 2011[45] and replaced by a by-law in similar terms in relation to preaching, canvassing and haranguing on roads[46]. It did not contain any provision equivalent to par 2.8 of By-law No 4 relating to the distribution of written materials. Despite the revocation, the appeal is not moot. There are two reasons for that. The first is that there are proceedings in the Supreme Court of South Australia, the outcome of which may be related to the outcome of this appeal. The third respondent has appealed to the Supreme Court against his conviction in the Magistrates Court of South Australia for breaching By-law No 4. There are also unresolved proceedings for an injunction in the Supreme Court brought by the Council against the second and third respondents and others. Both proceedings have been adjourned pending the outcome of this appeal. Further, a decision of this Court as to whether par 2.3 of By-law No 4 infringes the implied freedom of political communication is likely to be significant, if not determinative, of the question whether the like provision in the 2011 by-law is valid.

The by-law making power

30 Paragraphs 2.3 and 2.8 of By-law No 4 were found by the Full Court to be supported by s 667(1)(9)(XVI) of the 1934 Act. In his Honour's reasons for judgment, which included a review of the history of similar by-law making powers, Kourakis J favoured a broad view of s 667(1)(9)(XVI)[47]. His Honour further held that pars 2.3 and 2.8 were, subject to the implied freedom of political communication, a reasonable and proportional exercise of the by-law making power[48].

31 By their notices of contention, the second and third respondents submitted that pars 2.3 and 2.8 of By-law No 4 were not authorised by s 667(1)(9)(XVI). They argued that the specific and limited heads of power in other paragraphs of s 667(1) of the 1934 Act and s 239 of the 1999 Act were inconsistent with the

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45 *South Australian Government Gazette*, No 36, 9 June 2011 at 2028.

46 *South Australian Government Gazette*, No 36, 9 June 2011 at 2034–2035.

47 (2011) 110 SASR 334 at 361 [98].

48 (2011) 110 SASR 334 at 340–341 [22].

broad construction of s 667(1)(9)(XVI) found by the Full Court. Those contentions should be rejected.

32 There is nothing novel about the language of s 667(1)(9)(XVI). The terms "good rule and government of the area" and "convenience, comfort and safety of its inhabitants" have a venerable ancestry. In the first *Municipal Corporations Act* (5 & 6 Wm IV, c 76), enacted in the United Kingdom in 1835, s 90 provided that:

> "it shall be lawful for the Council of any Borough to make such Bye Laws as to them shall seem meet for the good Rule and Government of the Borough, and for Prevention and Suppression of all such Nuisances as are not already punishable".

A similar successor provision, s 23 of the *Municipal Corporations Act* 1882 (45 & 46 Vict, c 50), was judicially construed in 1896 as disclosing two purposes: that of good government and the suppression of nuisances[49]. The English courts took a "benevolent" approach to its construction[50]. It supported by-laws relating to conduct in public places including the use of indecent language or gestures[51], singing or playing music[52] and gambling[53].

33 The terms "good rule and government" and "suppression of nuisances", describing heads of by-law making power, found their way into local government statutes in the Australian colonies in the 19th century and in State statutes after federation. Griffith CJ in *President &c of the Shire of Tungamah v Merrett*[54] said, of "good rule and government"[55]:

> "whatever interpretation is put upon it, [it] certainly includes any matter which the legislature have plainly said they think to be for the good rule and government of the municipality."

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49 *Mantle v Jordan* [1897] 1 QB 248.

50 *Kruse v Johnson* [1898] 2 QB 91 at 99 per Lord Russell CJ; *Thomas v Sutters* [1900] 1 Ch 10 at 13 per Lindley MR, 16–17 per Sir FH Jeune, 18 per Romer LJ.

51 *Mantle v Jordan* [1897] 1 QB 248.

52 *Kruse v Johnson* [1898] 2 QB 91.

53 *Thomas v Sutters* [1900] 1 Ch 10.

54 (1912) 15 CLR 407 at 415; [1912] HCA 63.

55 As was then provided in s 197(34) of the *Local Government Act* 1903 (Vic).

Speaking of the same head of power[56] in *Melbourne Corporation v Barry*[57], Isaacs J said[58]:

> "It confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *ejusdem generis* with the specific powers of the Act". (footnote omitted)

That dictum was approved by Starke J in *Williams v Melbourne Corporation*[59] but was not considered in the judgments of the other members of the Court. It was, in effect, applied by the Full Court of the Supreme Court of Victoria in *Seeligson v City of Melbourne*[60]. But, as noted in that case, there was no common characteristic to be found in the specific powers which defined the boundaries of the general power[61]. That is to say, there was no single genus of power. It was, however, legitimate to refer to any of the specific powers for guidance in a like case arising under the general power[62]. So in *Leslie v City of Essendon*[63], relied upon here by the second and third respondents, a by-law prohibiting any person from singing or haranguing on a street or footway after being required to desist by a police or council officer, was held invalid. O'Bryan J thought that the "good rule and government" power in the *Local Government Act* 1928 (Vic) could be given no wider scope than indicated by Isaacs J in *Barry*[64]. Sholl J took the view that the power authorised by-laws which were machinery provisions for the better implementing of by-laws made under the specific powers and by-laws made on any subject of a character similar and related to that dealt with by a specific power and not by implication excluded

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56 *Local Government Act* 1915 (Vic), s 197(37).

57 (1922) 31 CLR 174; [1922] HCA 56.

58 (1922) 31 CLR 174 at 194.

59 (1933) 49 CLR 142 at 147; [1933] HCA 56.

60 [1935] VLR 365.

61 [1935] VLR 365 at 368.

62 [1935] VLR 365 at 368.

63 [1952] VLR 222.

64 [1952] VLR 222 at 227–228.

by its terms or that of other specific powers[65]. As appears below, that construction does not fit the language of s 667(1)(9)(XVI) of the 1934 Act.

34 The earliest relevant South Australian statute was the *Municipal Corporations Act* 1861 (SA). It conferred a general power on councils to make "such by-laws as to them shall seem meet for the good rule and government of the city, and for the prevention and suppression of nuisances therein"[66]. Its successor, the *Municipal Corporations Act* 1880 (SA), created a power to make by-laws on 146 specific topics[67], concluding with:

> "AND GENERALLY for more effectually regulating, observing, and carrying out all and every the powers and authorities by this Act given to Corporations, and for the good rule and government of the municipality—for the convenience, comfort, and safety of the inhabitants thereof—and for the prevention and suppression of nuisances therein."

This appears to have been the first use of the term "convenience, comfort, and safety of the inhabitants" as a head of by-law making power in South Australia. The expressions "good rule and government" and "convenience, comfort, and safety" have continued in South Australian local government legislation as heads of by-law making power since then[68].

35 Early judicial consideration in South Australia of the "convenience, comfort, and safety" by-law making power in the *Municipal Corporations Act* 1890 (SA) gave it a broad construction. It was not to be limited to the prevention of common or public nuisances, but might support by-laws with respect to a wider range of conduct in a particular district according to its locality and character, and the occupations of its population[69].

36 The concepts at common law of common and public nuisances suffer from difficulties of coherence[70]. The difficulties are a product of their history.

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65 [1952] VLR 222 at 235 and 238, see also at 247 per Coppel AJ.

66 *Municipal Corporations Act* 1861 (SA), s 146, incorporating by reference Sched K which set out specific matters on which by-laws could be made.

67 *Municipal Corporations Act* 1880 (SA), s 242.

68 *Municipal Corporations Act* 1890 (SA), s 314; *Municipal Corporations Act* 1923 (SA), s 504(1).

69 *Bremer v District Council of Echunga* [1919] SALR 288.

70 Spencer, "Public Nuisance—A Critical Examination", (1989) 48 *Cambridge Law Journal* 55.

Nevertheless, they incorporate elements of annoyance, inconvenience, or hurt to the public[71]. By-laws may be made for the "convenience, comfort and safety" of the inhabitants of the City which prohibit or regulate conduct which would or could constitute a public nuisance. Such a by-law would, in any event, fall within the specific head of power to make by-laws for the prevention and suppression of nuisances in s 667(1)(4)(I). On its face the scope of the "good rule and government" power would also authorise by-laws which prohibit or regulate analogous conduct. By-laws to regulate the places, times and manner of conduct which, while not constituting a nuisance, may affect the use and enjoyment of roads and public places by members of the public, would fall within the scope of the subject matter of the power.

37 In *Lynch v Brisbane City Council*[72], Dixon CJ considered the terms "the peace, comfort, … welfare, … convenience … of the City and its inhabitants" and "the general good government of … its inhabitants", which appeared in the *City of Brisbane Acts* 1924-1958 (Q). He characterised them as "wide and indefinite"[73]. Referring to a number of decisions of State Supreme Courts, his Honour said[74]:

> "they serve to show that a power to make by-laws for the good rule and government of a municipality is capable of a diversity of applications and is an effective power of control by ordinance."

He referred with approval to *Leslie v City of Essendon* as a case in which a general power was preceded by enumerated specific heads of power. In the *City of Brisbane Acts*, the general good government provision began with the words "Without limiting the generality of its powers". Dixon CJ said of the words of that provision[75]:

> "They give a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the

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71 *R v Rimmington* [2006] 1 AC 459 at 467–471 [5]–[12] per Lord Bingham of Cornhill.

72 (1961) 104 CLR 353; [1961] HCA 19.

73 (1961) 104 CLR 353 at 362, McTiernan and Fullagar JJ agreeing at 365.

74 (1961) 104 CLR 353 at 363.

75 (1961) 104 CLR 353 at 364.

> city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government."

38 What was said in *Lynch* by Dixon CJ may have been little more than a particular application of the general proposition that a statutory power must be exercised having regard to the scope, object and subject matter of the Act by which the power is conferred[76]. The Supreme Court of South Australia in subsequent cases treated *Lynch* as supporting a more liberal view of the "good rule and government" head of power than had been envisaged by Isaacs J[77]. In the Full Court in the present proceedings, Kourakis J adopted that wide view. His Honour held that the specific powers conferred by the 1934 Act elucidate and inform the denotation of "the convenience power". His Honour did not think it necessary for the subject matter of a by-law made pursuant to the convenience power to be strictly analogous to the subject matter of one or more of the specific powers. He said[78]:

> "The question is whether the by-law made pursuant to the convenience power addresses a municipal purpose having regard to the subject matters of the specific powers."

In the event, he held that[79]:

> "The convenience power 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."

In so holding, his Honour was, with respect, correct.

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76 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504–505 per Dixon J; [1947] HCA 21; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21]–[22] per Gaudron and Gummow JJ; [1998] HCA 11; *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198 at 211 [31]; [2008] HCA 33.

77 *Samuels v Hall* [1969] SASR 296 at 313–314 per Chamberlain J; *Rice v Daire* (1982) 30 SASR 560 at 573–574 per Bollen J.

78 (2011) 110 SASR 334 at 360 [96].

79 (2011) 110 SASR 334 at 361 [98].

39 The powers conferred upon the Council by s 667(1)(9)(XVI) open with the word "generally" and are not expressed to be incidental or ancillary to specific heads of power. There is no textual warrant for so reading them. Like any wide statutory discretion, however, they must be exercised consistently with the subject matter, scope and purpose of the 1934 and 1999 Acts[80].

40 Local government is a creature of statute. The 1934 and 1999 Acts may be consulted to determine what are, in the words of Dixon CJ, "matters of municipal concern"[81]. There may also be matters which are not expressly mentioned in those Acts but which are within what Dixon CJ called "the accepted notions of local government."[82] By-laws made under the general power may of course be ancillary to by-laws made under specific heads of power. They may also deal with related or analogous topics which, because of the relationship or analogy, can be characterised as matters of "municipal concern". Those examples are not intended to describe exhaustively the scope of the general power. They are, however, sufficient for the disposition of this appeal.

41 The conclusion to be drawn from the preceding construction of s 667(1)(9)(XVI) is not difficult. Having regard to the extensive provisions relating to roads previously found in the 1934 Act and their successors in the 1999 Act, a by-law which regulates the conduct, on roads, of public advocacy of commercial or religious or political messages, is a by-law which deals with a matter of municipal concern. It is well within the subject matter covered by the rubrics "good rule and government of the area" and "the convenience, comfort and safety of its inhabitants." However, to say that pars 2.3 and 2.8 of By-law No 4 were within the subject matter of the by-law making power is not to answer the question whether they were a valid exercise of that power. The power and by-laws made under it must be construed by reference to the common law principle of legality, and the requirements of reasonableness and proportionality discussed below. Ultimately, the implied constitutional freedom of political communication imposes limits which affect construction. It is necessary first to consider the application of the principle of legality so far as it concerns the common law freedom of expression.

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80 In relation to broad administrative discretions see *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504–505 per Dixon J; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 [21]–[22] per Gaudron and Gummow JJ; *WR Carpenter Holdings Pty Ltd v Federal Commissioner of Taxation* (2008) 237 CLR 198 at 211 [31].

81 *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 364.

82 (1961) 104 CLR 353 at 364.

The principle of legality

42 Statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law[83]. The common law presumption against the parliamentary intention to infringe upon such rights and freedoms has been described as an aspect of a "principle of legality" which governs the relationship between parliament, the executive and the courts[84]. The presumption is of long standing and has been restated over many years. It can be taken to be a presumption of which those who draft legislation, regulations and by-laws are aware. To apply it is to act conformably with legislative intention as explained by this Court in *Lacey v Attorney-General (Qld)*[85].

43 Relevantly, the construction of s 667(1)(9)(XVI) is informed by the principle of legality in its application to freedom of speech. Freedom of speech is a long-established common law freedom[86]. It has been linked to the proper functioning of representative democracies and on that basis has informed the application of public interest considerations to claimed restraints upon publication of information[87]. It is never more powerful than when it involves the

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83 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 per Higgins J; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J; [1987] HCA 12; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43 per Brennan J; [1992] HCA 46; *Coco v The Queen* (1994) 179 CLR 427 at 436–437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15.

84 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40, citing *R v Home Secretary; Ex parte Pierson* [1998] AC 539 at 587, 589 per Lord Steyn.

85 (2011) 242 CLR 573; [2011] HCA 10.

86 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 151–152; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ; *R v Council of Metropolitan Police; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155 per Lord Denning MR; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203 per Dillon LJ.

87 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J; [1980] HCA 44; *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 315 per Lord Simon of Glaisdale; *Hector v Attorney-General of Antigua* [1990] 2 AC 312 at 318.

discussion and criticism of public authorities and institutions, be they legislative, executive or judicial[88]. An example of its strength in that context is the common law impediment to local authorities and public authorities suing for defamation[89]. The "paramount importance" accorded to freedom of expression and of criticism of public institutions has also played a part in the development of the principles of the law of contempt[90]. It played a part in the reasoning of this Court in *Davis v The Commonwealth*[91] in the characterisation, for constitutional purposes, of legislation said to be incidental to a substantive head of power. It was also identified as a material consideration in similar reasoning adopted by Mason CJ in *Nationwide News Pty Ltd v Wills*[92]. On the question whether a law could be said to be reasonably proportional and therefore incidental to a head of power, Mason CJ said[93]:

> "in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law, such as freedom of expression." (footnote omitted)

As discussed below, analogous reasoning applies to the determination whether a by-law is, or is capable of being, a reasonable and proportionate, and therefore valid, exercise of the by-law making power. Its effect upon the exercise of freedom of expression will be a material consideration.

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88 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 79 per Deane and Toohey JJ, 101 per McHugh J.

89 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

90 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34 per Mason CJ.

91 (1988) 166 CLR 79; [1988] HCA 63.

92 (1992) 177 CLR 1.

93 (1992) 177 CLR 1 at 30–31.

44 The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories[94]. However, through the principle of legality, and criteria of reasonable proportionality, applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of statutes generally and the construction of delegated legislation made in the purported exercise of statutory powers. As a consequence of its effect upon statutory construction, it may affect the scope of discretionary powers which involve the imposition of restrictions upon freedom of speech and expression.

45 The terms "preach", "canvass" and "harangue" used in par 2.3 of By-law No 4 were not defined. There was, however, little controversy about their ordinary meaning. The term "preach" means to advocate or inculcate asserted religious or moral truth and right conduct in speech or in writing[95]. The term "canvass" refers to the soliciting of votes, subscriptions and opinions from a district or a group of people[96]. The term "harangue" may refer to "passionate, vehement speech; noisy and intemperate address". It can also refer to "any long, declamatory or pompous speech"[97]. The appellant contended for the first meaning. That contention should be accepted as it fits more readily with the text and context of By-law No 4. The communications which are covered by By-law No 4 are not private discussions with willing listeners. There is little point in preaching only to the converted. Consistently with the principle of legality, pars 2.3 and 2.8 should be construed as concerned only with communications which are directed, without discrimination, to willing and unwilling recipients. That construction accords with their text.

46 Each category of conduct covered by pars 2.3 and 2.8 of By-law No 4 is a mode of unsolicited public communication in a class of locations vested in the Council and for which the Council has statutory responsibilities. By-law No 4 did not purport to proscribe or regulate the content of any communication. That is not to say that the content of a proposed communication will always be irrelevant to the grant or withholding of permission under By-law No 4. It could,

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94 Although as Brennan J observed in *Nationwide News*, "constitutional questions should be considered and resolved in the context of the whole law, of which the common law ... forms not the least essential part": (1992) 177 CLR 1 at 45, quoting Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240 at 245.

95 *Macquarie Dictionary*, 3rd ed (1997) at 1683.

96 *Macquarie Dictionary*, 3rd ed (1997) at 326.

97 *Macquarie Dictionary*, 3rd ed (1997) at 972.

however, never be a relevant consideration that the Council or its officers disagreed with, or disapproved of, that content. As previously observed, the subject matter of By-law No 4 and the discretion which it created to grant permissions to engage in the conduct which it otherwise proscribed, had to fall within the scope of matters of municipal concern or "accepted notions of local government". Control of the expression of religious or political opinions per se is not within that subject matter. According to the circumstances, control *sub modo* may be within it. By-law No 4, so understood, involved the least interference with freedom of expression that its language could bear. By parity of reasoning, the power conferred by s 667(1)(9)(XVI), construed in accordance with the principle of legality in its application to the common law freedom of expression, was sufficient to support the impugned by-law. That leaves for consideration the question whether pars 2.3 and 2.8 were unreasonable or not reasonably proportional exercises of that power. Those questions were raised by the third respondent's amended notice of contention. It is only after those questions are answered that it is necessary to have regard to whether, as the Full Court found, pars 2.3 and 2.8 infringed the implied freedom of political communication.

Reasonableness and reasonable proportionality

47 The third respondent by his amended notice of contention asserted that the impugned provisions of By-law No 4 were "an unreasonable exercise" of the by-law making power and "not a reasonably proportionate or proportionate exercise of the power". Those grounds invoke criteria of invalidity which have overlapping histories and applications. They define limits on the by-law making power.

48 A high threshold test for unreasonableness invalidating delegated legislation was set by the Privy Council in *Slattery v Naylor*[98]. Their Lordships spoke of a "merely fantastic and capricious bye-law, such as reasonable men could not make in good faith"[99]. That criterion did not invite judicial merits review of delegated legislation. Nor has unreasonableness ever been so regarded in this Court. As their Lordships said, a by-law would not be treated as unreasonable "merely because it does not contain qualifications which commend themselves to the minds of judges."[100] In *Kruse v Johnson*[101], Lord Russell CJ accorded a particular respect to the authority conferred on public representative

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98 (1888) 13 App Cas 446.

99 (1888) 13 App Cas 446 at 452.

100 (1888) 13 App Cas 446 at 453.

101 [1898] 2 QB 91.

bodies in making delegated legislation which would not necessarily inform consideration of validity today. However, he did not exclude from review by-laws "partial and unequal in their operation" or "manifestly unjust" or involving "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men"[102].

49 The high threshold approach to invalidating unreasonableness was reflected early in the life of this Court in *Widgee Shire Council v Bonney*[103], where Griffith CJ, after referring to *Slattery v Naylor* and *Kruse v Johnson*, said[104]:

> "The existence of a power and the expediency of its exercise are quite different matters. The question of the existence of the power can always be determined by a Court of law. But, in my opinion, the expediency of the exercise of a power is not a matter for determination by a Court."

The reasoning of Isaacs J was to similar effect, although he specifically referred to the limiting case formulated in *Slattery v Naylor*[105]. All the Justices treated unreasonableness, so understood, as going to power. The point was made plainly by Higgins J[106]:

> "Questions as to the validity of by-laws really come under the ordinary principles applicable to powers; and when it is said that a by-law is unreasonable, and therefore invalid, what is really meant is that the provisions in the by-law cannot reasonably be regarded as being within the scope or ambit or purpose of the power. The language used in Courts of equity with regard to powers seems to me to be more appropriate, and to conduce to greater clearness of thought."

50 This Court continued to treat invalidating unreasonableness, in relation to delegated legislation, in a limiting high threshold sense concerned with "the

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102 [1898] 2 QB 91 at 99–100, see also at 104 per Sir FH Jeune.

103 (1907) 4 CLR 977; [1907] HCA 11.

104 (1907) 4 CLR 977 at 982–983.

105 (1907) 4 CLR 977 at 986.

106 (1907) 4 CLR 977 at 989.

contemplated ambit of power."[107] In *Williams v Melbourne Corporation*, Dixon J said[108]:

> "Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a separate ground of invalidity, in this Court it is not so treated." (footnotes omitted)

51 In *Brunswick Corporation v Stewart*[109] Starke J adopted the language of the Privy Council in *Slattery* in distinguishing between a "drastic" provision and one which was "so capricious and oppressive that no reasonable mind can justify it."[110] Williams J in the same case adopted the language of Lord Russell CJ in *Kruse v Johnson*, equating unreasonableness in a by-law with "such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men"[111].

52 It is logically possible that the limits defined by the content of a general power may intersect with the limits imposed upon it by the requirement that its exercise not be unreasonable. Such an intersection was apparent in *Clements v Bull*[112]. A majority of the Court held invalid a regulation purportedly made with respect to "[t]he improvement and management of the port" under s 138(i) of the *Melbourne Harbor Trust Act* 1928 (Vic)[113]. The regulation made it an offence to "[h]old any meeting or address any assemblage within the Port without the consent of the Commissioners in writing"[114]. Fullagar J, with whom Webb J generally agreed[115], held the regulation invalid as enacting a prohibition extending to acts or things "which cannot reasonably be regarded as the concern

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107 *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 189 per Isaacs J.

108 (1933) 49 CLR 142 at 154, referring to *McCarthy v Madden* (1914) 33 NZLR 1251.

109 (1941) 65 CLR 88; [1941] HCA 7.

110 (1941) 65 CLR 88 at 98.

111 (1941) 65 CLR 88 at 99.

112 (1953) 88 CLR 572; [1953] HCA 61.

113 (1953) 88 CLR 572 at 576 per Williams ACJ and Kitto J.

114 (1953) 88 CLR 572 at 583 per Taylor J.

115 (1953) 88 CLR 572 at 579.

of a corporation charged with the management of a port or harbour."[116] His Honour said that "[t]he case, indeed, well illustrates ... the relevance, and the only relevance, of 'unreasonableness' in relation to the validity of a by-law."[117] The regulation in that case, because it covered the area of the port, would have extended to meetings and assemblages for any purpose in private homes or buildings or otherwise on private lands within the port[118]. Williams ACJ and Kitto J, in dissent, found a connection between the regulation and the efficient performance of the functions of the port[119]. They observed, referring to *Brunswick Corporation*, that a regulation might be held invalid on the ground that no reasonable mind could justify it by reference to the purposes of the power, but characterised that criterion as "only a way of stating the conclusion that no real connection with the purposes of the power can be seen."[120]

53 In *Shanahan v Scott*[121], the Court considered limitations on a very general power to make regulations "providing for all or any purposes ... necessary or expedient for the administration of the Act or for carrying out the objects of the Act."[122] Such a power, it was said, would not support "attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."[123] In *Minister for Resources v Dover Fisheries Pty Ltd*[124], Gummow J, considering a similarly worded regulation-making power, said of the indicia of invalidity identified in *Shanahan v Scott* that[125]:

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116 (1953) 88 CLR 572 at 581.

117 (1953) 88 CLR 572 at 582. The reference to a "by-law" should in that case have been a reference to a regulation.

118 (1953) 88 CLR 572 at 580 per Webb J.

119 (1953) 88 CLR 572 at 578–579.

120 (1953) 88 CLR 572 at 577.

121 (1957) 96 CLR 245; [1957] HCA 4.

122 (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ.

123 (1957) 96 CLR 245 at 250 per Dixon CJ, Williams, Webb and Fullagar JJ.

124 (1993) 43 FCR 565.

125 (1993) 43 FCR 565 at 578.

> "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."

The text of the regulation-making powers considered in *Shanahan v Scott* and in *Dover Fisheries* expressly raised the requirement that regulations made under them have a rational connection to the statutory purpose. Nevertheless, as the approach adopted by Gummow J suggested, the analysis in those cases is applicable to the general question whether a regulation is invalid for unreasonableness.

54 Applying the general approach to "unreasonableness" set out in the preceding cases, and accepting its subsistence as a limit on delegated legislative power, the impugned provisions of By-law No 4 could not be said to have been invalid on that ground. Paragraphs 2.3 and 2.8 provided a rational mechanism for the regulation by proscription, absent permission, of conduct on roads which involves unsolicited communication to members of the public. They were not, on their face, capricious or oppressive. Nor did they represent a gratuitous interference with the rights of those affected by them. They provided a mechanism for protecting members of the public from gratuitous interference with their freedom to choose whether and, if so, when and where they would be the subject of proselytising communications. They were directed to modes and places of communication, rather than content. It was not necessary to the application of the high threshold test of unreasonableness to consider possible alternative modes of regulation. The criterion is not confined to purposive powers. Paragraphs 2.3 and 2.8 were not invalid on account of unreasonableness.

55 The difficulties of making out a challenge to validity on the basis of unreasonableness no doubt explain the focus in the third respondent's written submissions on the ground of contention asserting lack of reasonable proportionality. Proportionality is not a legal doctrine. In Australia it designates a class of criteria used to determine the validity or lawfulness of legislative and administrative action by reference to rational relationships between purpose and means, and the interaction of competing legal rules and principles, including qualifications of constitutional guarantees, immunities or freedoms. Proportionality criteria have been applied to purposive and incidental law-making powers derived from the Constitution and from statutes. They have also been applied in determining the validity of laws affecting constitutional guarantees, immunities and freedoms, including the implied freedom of political communication which is considered later in these reasons.

56 A high threshold test, which falls into the class of proportionality criteria, was applied to determine the validity of delegated legislation by Dixon J in *Williams v Melbourne Corporation*. His Honour, speaking of unreasonableness in the context of a purposive by-law making power, pointed out that although

there might, on the face of it, be a sufficient connection between the subject of the power and that of the by-law[126]:

> "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." (emphasis added) (footnote omitted)

Although a high threshold test, that formulation permitted greater judicial scrutiny than the test, approaching a criterion of irrationality, derived from *Slattery v Naylor* and *Kruse v Johnson*. It has been suggested that the difference in the result between the majority and the minority in *Clements* might be attributable to the majority's application of the test adopted by Dixon J in *Williams*, and the minority's preference for that of Starke J in *Brunswick Corporation v Stewart*[127]. In *Coulter v The Queen*[128], which concerned the validity of procedural rules of the Supreme Court of South Australia, Mason CJ, Wilson and Brennan JJ, citing *Williams*, said[129]:

> "The relevant criterion of validity is not the fairness of the rules but whether they are a reasonable means of attaining the ends of the rule-making power".

The formulation adopted by their Honours, however, suggests a lower threshold test than that adopted by Dixon J. In the event, as appears below, it is the high threshold test which prevails in the field of purposive delegated legislation.

57 In the *Tasmanian Dam Case*[130], Deane J adopted a high threshold proportionality test, similar to that stated by Dixon J, for a law purportedly made in the exercise of a purposive power under the Constitution. Such a law, he said, "must be capable of being reasonably considered to be appropriate and adapted to

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126 (1933) 49 CLR 142 at 155, see also at 150 per Starke J, 158 per Evatt J, 159 per McTiernan J.

127 Bayne, "Reasonableness, proportionality and delegated legislation", (1993) 67 *Australian Law Journal* 448 at 449.

128 (1988) 164 CLR 350; [1988] HCA 3.

129 (1988) 164 CLR 350 at 357.

130 *The Commonwealth v Tasmania* (1983) 158 CLR 1; [1983] HCA 21.

achieving" its constitutional purpose[131]. His Honour characterised the test as one of "reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it."[132] Applying the test so framed, the Court was not simply to substitute its view of what was appropriate and adapted to the objects of the law-making power for that of the legislative body. Similar formulations appeared in the judgments of Murphy and Brennan JJ[133]. Although it is not clear from the text of Mason J's judgment in that case, his Honour later regarded himself as having joined in that formulation[134]. Deane J explained the significance of the high threshold test in *Richardson v Forestry Commission*[135]. His Honour observed that it was not necessary for the Court to be persuaded that the particular provisions were in fact appropriate and adapted to the designated purpose or object. That was a matter for the Parliament. He said[136]:

> "it will, in my view, suffice if it appears to the Court that the relevant provisions are capable of being reasonably considered to be so appropriate and adapted".

Almost identical formulations were adopted by four other Justices[137].

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131 (1983) 158 CLR 1 at 259. This imposed a higher threshold test than that expressed by Starke J in *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 647; [1939] HCA 19. In relation to a regulation purporting to give effect to an international convention, Starke J said:

> "that all means which are appropriate and are adapted for the enforcement of the Convention and are not prohibited or are not repugnant to or inconsistent with it are within the power."

See also *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 86 per Barwick CJ; [1965] HCA 3.

132 (1983) 158 CLR 1 at 260.

133 (1983) 158 CLR 1 at 172 and 232.

134 *Richardson v Forestry Commission* (1988) 164 CLR 261 at 289 per Mason CJ and Brennan J; [1988] HCA 10.

135 (1988) 164 CLR 261.

136 (1988) 164 CLR 261 at 312.

137 (1988) 164 CLR 261 at 289 per Mason CJ and Brennan J, 303 per Wilson J, 345 per Gaudron J.

58 In *South Australia v Tanner*[138], which concerned the validity of delegated legislation, the majority noted, without demur, that the parties had accepted "the reasonable proportionality test of validity ... namely, whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose."[139] Their Honours equated that test with the test enunciated by Dixon J in *Williams* and added that it was[140]:

> "in substance, whether the regulation goes beyond any restraint which could be reasonably adopted for the prescribed purpose."

The test sets an appropriate limit on the exercise of purposive powers entrusted to a public authority to make delegated legislation. It gives due respect to the authority entrusted by the parliament in the law-making body. Historically, it can be regarded as a development of the high threshold "unreasonableness" test derived from the 19th century English authorities. It requires a rational relationship between the purpose for which the power is conferred and the laws made in furtherance of that purpose, whether it be widely or narrowly defined.

59 The high threshold test for reasonable proportionality should be accepted as that applicable to delegated legislation made in furtherance of a purposive power.

60 The proportionality test formulated by Dixon J in *Williams*, adopted by Deane J in the *Tasmanian Dam Case*, and accepted in *Tanner*, makes it clear that a reviewing court is not entitled to substitute its own view of what would be a reasonable law for that of the legislature or a body exercising delegated legislative power. So formulated, the criterion of reasonable proportionality can be regarded as an application of the unreasonableness criterion, adapted to a purposive law-making power. Indeed, in *Tanner* the majority echoed some of the language of Griffith CJ in *Widgee Shire Council*, when their Honours observed[141]:

> "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 power."

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138 (1989) 166 CLR 161; [1989] HCA 3.

139 (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ (footnote omitted).

140 (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

141 (1989) 166 CLR 161 at 168 per Wilson, Dawson, Toohey and Gaudron JJ.

61 The use of the term "proportionality" in *Tanner* did not draw upon any novel or distinct theory of judicial review of delegated legislation. It was used to designate an evolved criterion defining the limits of a particular class of statutory power[142]. As discussed earlier in these reasons, "proportionality" is a term used to designate criteria, going to validity, of rational law-making and decision-making in the exercise of public power. Kiefel J, writing extra-curially, has referred to its application in such disparate fields as criminal responsibility, sentencing, the permissible scope of qualifications upon human rights and freedoms under constitutional and statutory charters, intrusions upon constitutional guarantees, immunities and freedoms, express and implied, as well as purposive law-making power[143]. Other fields in which it has been said proportionality operates include apportionment of liability in negligence cases[144] and in the application of equitable estoppel against the "disproportionate making good of the relevant assumption"[145]. Each of its applications has its own history.

62 The focus of these reasons so far has been on reasonable proportionality in its application to the validity of delegated legislation made in the exercise of a purposive power. A separate but related question arises about the proportionality criterion to be applied where, as in this case, it is contended that a law, which may be delegated legislation, impinges upon a constitutional guarantee,

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142 In *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 577, Gummow J suggested there was a different focus in the approach taken by the Court to proportionality according to whether it was applied to delegated legislation or to a law said to be invalid for constitutional reasons.

143 Kiefel, "Proportionality: A rule of reason", (2012) 23 *Public Law Review* 85. For an earlier summary of the Australian position see Selway, "The Rise and Rise of the Reasonable Proportionality Test in Public Law", (1996) 7 *Public Law Review* 212.

144 Burmester and Bezzi, "Proportionality: a fashionable and dangerous doctrine, or an essential safeguard against abuse of power?", in Pearson (ed), *Administrative Law: Setting the Pace or being left behind?*, (1997) 145 at 156, citing *Maranboy Pty Ltd v General Plastics Pty Ltd* (1993) 6 BPR 13,253 and *Carter Corporation Pty Ltd v Medway* (1995) 11 NSWCCR 558.

145 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 413 per Mason CJ; [1990] HCA 39, cited in Burmester and Bezzi, "Proportionality: a fashionable and dangerous doctrine, or an essential safeguard against abuse of power?", in Pearson (ed), *Administrative Law: Setting the Pace or being left behind?*, (1997) 145 at 157. See also Kneebone, "A commentary on proportionality: protection of common law rights or 'chipping away at the Diceyan edifice'", in Pearson (ed), *Administrative Law: Setting the Pace or being left behind?*, (1997) 168.

immunity or freedom. In *Cunliffe v The Commonwealth*[146], Mason CJ distinguished the approach to be taken to the question whether a law falls within a head of constitutional legislative power on the one hand, and the validity of a law affecting the guarantee of a fundamental right or the implied freedom of communication on the other. His Honour said[147]:

> "In the case of the implication, as with a constitutional guarantee, this question is simply whether the burden or restriction is reasonably appropriate and adapted, in the court's judgment, to the legitimate end in view. In the context of whether a law is within power, the question is whether the law is capable of being reasonably considered to be appropriate and adapted to the end sought to be achieved."

That distinction appears to have been applied, albeit not explicitly, by three Justices of this Court in *Coleman v Power*[148] when they rejected a high threshold proportionality test in relation to laws affecting the implied freedom of political communication. McHugh J observed of the high threshold test[149]:

> "Although Justices of this Court have used that formulation on previous occasions, a majority of the Court has not accepted it in any case concerned with the constitutional protection of political communication."

The distinction so made does not exclude the practical convergence of the tests in particular cases. A law which fails the high threshold test will necessarily fail the lower threshold test. The application of the proportionality test applicable to the implied freedom of political communication is considered later in these reasons.

63 The third respondent contended that pars 2.3 and 2.8 of By-law No 4 were not a reasonably proportional exercise of the power conferred by s 667(1)(9)(XVI) of the 1934 Act because they:

- departed from or varied the plan of the enabling Acts;
- were gravely oppressive in their effect on the distribution of written matter and a large part of "normal speech" and the "ordinary incidents of human intercourse";

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146 (1994) 182 CLR 272; [1994] HCA 44.

147 (1994) 182 CLR 272 at 300, see also at 297.

148 (2004) 220 CLR 1 at 48 [87] per McHugh J, 78 [196] per Gummow and Hayne JJ; [2004] HCA 39.

149 (2004) 220 CLR 1 at 48 [87].

- were "fundamentally directed at banning most forms of communication in most public places";
- were so widely drawn as to extend to acts and things which could not reasonably be regarded as the concern of local government;
- had a substantial and unnecessary adverse effect on freedom of expression; and
- advanced the statutory purpose only marginally.

64 Applying the high threshold test for reasonable proportionality, none of these matters either singly or collectively support a finding that By-law No 4 was not a valid exercise of the by-law making power. Some of the points made by the third respondent have already been considered in determining whether By-law No 4 was invalid for unreasonableness. The roads under the control of the Council, as was said in the Full Court, are a shared public resource[150]. Regulation of their use is necessary to optimise their benefit. The conduct proscribed, subject to permissions, could, if unregulated, have potentially significant effects upon the ability of people using the roads and public places to go about their business unimpeded and undistracted by preaching, haranguing and canvassing, and the unsolicited tender of literature from strangers.

65 The availability of an alternative mode of regulation may be relevant in cases in which the question of want of reasonable proportionality is raised with respect to delegated legislation. In the constitutional context, the availability of alternative modes of regulation has been used to determine the existence of a prohibited purpose of discriminating against freedom of interstate trade and commerce, contrary to s 92 of the Constitution[151], and for the purpose of determining the validity of a legislative burden on the implied freedom of political communication[152]. It suffices to say that, having regard to the high threshold of reasonable proportionality going to the validity of delegated legislation, this approach requires caution. Counterfactual explorations run the risk of descending to a lower level test and second-guessing the merits of the

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150 (2011) 110 SASR 334 at 365 [118] per Kourakis J.

151 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471–472 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1. See also *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616 per Mason J; [1975] HCA 45; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 479 [110] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

152 *Coleman v Power* (2004) 220 CLR 1 at 53 [100] per McHugh J.

delegated legislation. In any event, the utility of the possible alternatives in this case is not obvious, and certainly not obvious enough to support an invalidating characterisation of By-law No 4 as lacking "reasonable proportionality". A hypothetical restriction on preaching, canvassing, haranguing or distributing literature imposed by reference to criteria such as time and place, and/or minimum distances between persons engaging in such activities, would raise questions of administration, enforcement and supervision. Courts are not in a position to make comparative judgments on such issues, particularly where they may involve costs and the allocation of resources upon which there may be competing claims.

66 Paragraphs 2.3 and 2.8 of By-law No 4, on the face of it, served legitimate ends in terms of the regulation of the public use of roads and public places. Having regard to the class of conduct and the class of locations in which they applied, they were capable of being considered reasonably appropriate and adapted to support that end. The contention that pars 2.3 and 2.8 were invalid as not reasonably proportionate exercises of the by-law making power fails.

The implied freedom of political communication

67 It is not necessary in order to dispose of this appeal to embark upon any extended exegesis of the implied freedom of political communication. The parties were on common ground as to the test to be applied in determining whether the freedom was infringed by By-law No 4. The test adopted by this Court in *Lange v Australian Broadcasting Corporation*[153], as modified in *Coleman v Power*[154], involves two questions, the terms of which are settled[155]:

1. Does the law, in its terms, operation or effect, effectively burden freedom of communication about government or political matters?

2. If the law effectively burdens that freedom, is the law nevertheless 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, and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?

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153 (1997) 189 CLR 520; [1997] HCA 25.

154 (2004) 220 CLR 1.

155 *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 2.

The answer to the first question in this case is yes. It was not in dispute. The appellant accepted in his written submissions that pars 2.3 and 2.8 of By-law No 4 are capable of effectively burdening communications about political matters in certain circumstances. He accepted that some "religious" speech may also be characterised as "political" communication for the purposes of the freedom. The concession was proper. Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide[156].

68 For reasons already expressed, however, the answer to the second question is yes. Paragraphs 2.3 and 2.8 of By-law No 4 are reasonably appropriate and adapted to serve the legitimate end of the by-law making power. They meet the high threshold proportionality test for reasons which also satisfy the proportionality test applicable to laws which burden the implied freedom of political communication. They are confined in their application to particular places. They are directed to unsolicited communications. The granting or withholding of permission to engage in such activities cannot validly be based upon approval or disapproval of their content. The restriction does not apply to a designated area known as "Speakers Corner". Nor does it apply to surveys or opinion polls conducted, or literature distributed, 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. In the circumstances, pars 2.3 and 2.8 of By-law No 4 are reasonably 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 and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people.

69 In finding to the contrary, the Full Court was in error and the appeal should be allowed. I agree with the orders proposed by Hayne J.

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156 *Hogan v Hinch* (2011) 243 CLR 506 at 543–544 [49] per French CJ; [2011] HCA 4; see also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 123–125 per Mason CJ, Toohey and Gaudron JJ; [1994] HCA 46; *Levy v Victoria* (1997) 189 CLR 579 at 594–595 per Brennan CJ, 613–614 per Toohey and Gummow JJ, 622–624 per McHugh J, 638–642 per Kirby J; [1997] HCA 31; cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28]–[29] per Gleeson CJ and Heydon J; [2005] HCA 44.

70 HAYNE J. Caleb and Samuel Corneloup (the second and third respondents) are members of "Street Church", an incorporated association the objects of which include preaching about the Christian religion in the streets of Adelaide. A by-law made by the Corporation of the City of Adelaide ("the Council") prohibited persons preaching on any road and distributing printed matter on any road to any bystander or passer-by without permission.

71 The Corneloups wish to preach and give out printed material in Rundle Mall, a road in the central retail area of Adelaide which, for the most part, is open only to pedestrians. They claim that the by-law which prevented them doing so in Rundle Mall or other roads without permission is invalid. For the reasons that follow, this claim should be rejected. The by-law is valid.

The impugned by-law

72 On 10 May 2004 the Council made a by-law which bore the headings:

"CITY OF ADELAIDE

BY-LAW MADE UNDER THE LOCAL GOVERNMENT ACT 1999

By-law No 4—Roads

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

73 Paragraph 1 of the by-law set out some definitions. The only one of present relevance is the definition of "road": "In this by-law ... 'road' has the same meaning as in the Local Government Act 1999". Section 4(1) of the *Local Government Act* 1999 (SA) ("the 1999 Act") defined "road" as:

> "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".

There was no dispute that Rundle Mall falls within this definition of a "road".

74 Paragraph 2 bore the heading "*Activities Requiring Permission*". So far as presently relevant, it provided that:

> "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".

75 It will be convenient to refer to these particular provisions of the by-law, which would have prevented the Corneloups preaching or distributing printed matter in Rundle Mall without permission at the times relevant to this appeal, as "the impugned provisions" and to the whole by-law as either "the impugned by-law" or simply "the by-law".

The course of proceedings

76 The Corneloups each brought separate proceedings in the District Court of South Australia, pursuant to s 276 of the 1999 Act, seeking in effect a declaration that the by-law is invalid. In the District Court, Judge Stretton held[157] that parts of the impugned provisions exceeded the by-law making powers conferred on the Council by the *Local Government Act* 1934 (SA) ("the 1934 Act") and the 1999 Act and that the words "preach, canvass, harangue" in par 2.3 and the whole of par 2.8 should be severed[158] from the by-law.

77 The Council appealed to the Full Court of the Supreme Court of South Australia. That Court (Doyle CJ, White and Kourakis JJ) dismissed[159] the

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157 *Corneloup v Adelaide City Council* (2010) 179 LGERA 1.

158 (2010) 179 LGERA 1 at 44 [168].

159 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334.

appeal. For the reasons given by Kourakis J, the Full Court concluded that the by-law was not invalid[160] as beyond the terms of the by-law making power given by s 667(1) 9 XVI of the 1934 Act and was not invalid[161] for want of compliance with limitations and by-law making procedures prescribed by the 1999 Act. But the Court held[162] that the impugned provisions were inconsistent with the implied constitutional freedom of political communication and struck out[163] "preach, canvass, harangue" from par 2.3 and the whole of par 2.8.

78 By special leave, the Attorney-General for South Australia, who had intervened in the proceedings in the District Court and was a party to the appeal to the Full Court, appealed to this Court.

79 In this Court, the Corneloups, between them, advanced three different bases for the invalidity of the impugned provisions. First, they submitted that neither the 1934 Act nor the 1999 Act empowered the Council to make the by-law. Second, Caleb Corneloup submitted that, if the Council had power to make the by-law, the procedural steps necessary to make it validly were not taken. Third, they submitted that, if the Council had power to make the by-law and if the Council took the necessary procedural steps to make it, the by-law infringes the implied constitutional freedom of political communication and for that reason is invalid. These reasons deal with the arguments in this order.

The arguments about by-law making power

80 The Corneloups contended that, contrary to the Full Court's decision, the impugned provisions were not a valid exercise of the power set out in s 667(1) 9 XVI of the 1934 Act or any other by-law making power. Four different arguments, advanced by one or both of the Corneloups, were said to lead to that conclusion. First, they submitted that, properly and narrowly construed, s 667(1) 9 XVI did not support the impugned by-law. Second, Samuel Corneloup submitted that the impugned provisions "are an unreasonable exercise of the power" set out in s 667(1) 9 XVI and "are not a reasonably proportionate or proportionate exercise" of that power. Third, the Corneloups submitted that the impugned by-law purported to be made under the 1999 Act and that, since ss 238-240 of the 1999 Act did not give power to make the impugned by-law, the by-law exceeded the power conferred by the Act under which it purported to be made. Fourth, Caleb Corneloup submitted that the

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160 (2011) 110 SASR 334 at 361 [98], 367 [129].

161 (2011) 110 SASR 334 at 368 [136], 371 [152].

162 (2011) 110 SASR 334 at 375 [164].

163 (2011) 110 SASR 334 at 376-377 [173].

impugned by-law required a person to obtain a licence to engage in the activities specified by the impugned provisions contrary to s 246(2) of the 1999 Act.

81 Before examining this group of submissions, it is necessary to identify the provisions of the 1934 Act and the 1999 Act which confer relevant by-law making powers.

The powers to make by-laws

82 At the times relevant to this appeal, the Council's powers to make by-laws were found in both the 1934 Act and the 1999 Act. Section 668 of the 1934 Act provided that the 1999 Act "applies to and in relation to by-laws made under this Act as if they were by-laws made under that Act".

The 1934 Act

83 Section 667(1) of the 1934 Act gave a council constituted under the 1999 Act power to "make by-laws for all or any" of a list of purposes. The list was set out under five numbered headings: "Uses and licences" (3), "Nuisances and health" (4), "Animals" (5), "Streets, roads and footways" (7) and "Miscellaneous" (9). Under each heading, one or more separate purposes was set out and designated by a roman numeral.

84 Argument in this appeal focused upon the power given by s 667(1) 9 XVI to make by-laws "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants". This power was referred to by the Full Court and in argument in this Court as "the convenience power" and these reasons adopt that expression.

85 It is also necessary to notice that s 667(1) 4 I gave power to make by-laws "for the prevention and suppression of nuisances". This power was referred to by the Full Court and in argument in this Court as "the nuisance power". The Attorney-General for South Australia submitted that the nuisance power, alone or together with the convenience power, supported the impugned by-law. Indeed, the Attorney-General submitted that, notwithstanding the Full Court's conclusion[164] that the impugned provisions were not supported by the nuisance power, the Full Court did conclude that the impugned provisions were supported by not only the convenience power but also the convenience power operating in aid of the nuisance power. Given the conclusions reached about the convenience power in these reasons, it is unnecessary to pursue further any questions about the nuisance power.

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164 (2011) 110 SASR 334 at 346 [44].

The 1999 Act

86 Part 4 of Ch 11 (ss 238-240) of the 1999 Act gave power to a council constituted under that Act to make by-laws on three subjects: the control of access to and use of local government land (s 238), the use of roads (s 239) and the posting of bills (s 240). No party submitted that any of these powers supported the impugned provisions.

87 Part 1 of Ch 12 (ss 246-253) of the 1999 Act provided more generally for the making of by-laws. Section 246 dealt with the power to make by-laws and provided, so far as presently relevant, that:

> "(1) Subject to this or another Act, a council may make by-laws—
>
> (a) that are within the contemplation of this or another Act; or
>
> (b) that relate to a matter in relation to which the making of by-laws is authorised by the regulations under this or another Act.
>
> (2) A council cannot make a by-law that requires that a person obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act."

Section 246(2) was the foundation for Caleb Corneloup's submission that the impugned by-law impermissibly requires a person to obtain a licence to engage in the activities specified by the impugned provisions.

88 Section 248 set out some rules relating to by-laws. Relevantly, s 248(1)(a) provided that a by-law made by a council must not exceed the power "conferred by the Act under which the by-law purports to be made". Section 248(1)(a) was the foundation for the Corneloups' submission that the impugned by-law is invalid because it purported to be made under an Act (the 1999 Act) which did not in fact support its making.

89 It is convenient to consider, and reject, those submissions that were based on s 246(2) and s 248(1)(a) before turning to the issues on which argument in this Court focused.

Challenge to validity based on s 246(2)

90 Caleb Corneloup pressed a submission also made in the Full Court that the by-law required a person to obtain a licence from the Council to carry out the activities regulated by the by-law contrary to s 246(2). As already noted, s 246(2) provided that a council cannot make a by-law that requires a person to "obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act". The Full Court

concluded[165] that the word "licence" in this provision "does not include the mere grant of permission to do an act or engage in certain conduct" but instead means a licence for a fee to engage in activity at a particular place. In this Court, Caleb Corneloup submitted that the ordinary meaning of "licence" includes the giving of "permission" and for that reason the by-law imposed a licensing requirement.

91 Caleb Corneloup's submission must be rejected. Although the ordinary meaning of "licence" may include the granting of a permission, the Full Court was right to hold[166] that the statutory context of s 246(2), and in particular the provisions of s 246(3), demonstrate that "licence" has a more confined meaning in s 246(2). The by-law did not require a person to obtain a "licence" to carry out the activity regulated by the by-law for the purposes of s 246(2) of the 1999 Act.

Challenge to validity based on s 248(1)(a)

92 Because s 248(1)(a) of the 1999 Act referred to "the Act under which the by-law purports to be made", some attention was given in argument to whether the impugned provisions were properly to be seen as made under the 1934 Act or the 1999 Act. Samuel Corneloup's submission proceeded in three steps. First, he submitted that the stated source of power in a by-law must support the making of that by-law. No party submitted (and it is not to be supposed) that s 248(1)(a) required enumeration of *every* power that was or could be relied on as enabling the making of a particular by-law. Second, he observed that the heading to the impugned by-law said it was "made under" the 1999 Act. And third, he submitted that the impugned by-law must be invalid because no party submitted that any of the by-law making powers given by ss 238-240 of the 1999 Act supported the impugned by-law.

93 It is not necessary to decide whether incorrectly identifying a source of power to make a particular by-law would invalidate it. It is not necessary to do so because the impugned by-law rightly recorded that it was made under the 1999 Act. Assuming that the by-law was supported by s 667(1) of the 1934 Act (a proposition which is considered below), the effect of s 246(1)(a) of the 1999 Act is that the by-law is also made under the 1999 Act.

94 Section 246(1)(a) of the 1999 Act gave councils power to make by-laws "within the contemplation of ... another Act". One kind of by-law which s 246(1)(a) thus empowered a council to make was a by-law "within the contemplation of" the 1934 Act (and, more particularly, s 667(1) of that Act).

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165 (2011) 110 SASR 334 at 368 [131]-[136].

166 (2011) 110 SASR 334 at 368 [134]-[135].

95 The submission of Samuel Corneloup, that s 246(1)(a) did not confer any by-law making power and should be treated as no more than a preamble or recital to the rules set out in the other sub-sections of s 246, should be rejected. Section 246(1) conferred by-law making power. It used the same language as those other provisions[167] of the 1999 Act which it was accepted did confer by-law making power: "a council may make by-laws" on the subjects identified in the provision. And contrary to the submission of Samuel Corneloup, reading s 246(1) as conferring by-law making power does not render s 248(1)(a) nugatory. That provision continues to operate according to its terms. A by-law made under s 246(1)(a) (because it is contemplated by another Act) must, in accordance with s 248(1)(a), not exceed the power conferred by s 246(1)(a) (and through it, the other Act).

96 The challenge to validity based on s 248(1)(a) fails. Assuming that the impugned by-law is supported by the 1934 Act (and in particular the convenience power), it is also a by-law made under the 1999 Act. It is to that question which these reasons now turn.

The convenience power

A narrow construction?

97 The convenience power is expressed in very wide terms. The thrust of the Corneloups' submissions was that it should be read down and not given effect according to its terms. But what narrower construction could or should be given to the convenience power was never articulated with any specificity. Instead, two arguments were advanced. The first took the form of a negative proposition: the convenience power, read properly, does not support the impugned provisions. The second was that the impugned provisions were either an "unreasonable" exercise of the power, or not a "reasonably proportionate" or "proportionate" exercise of the power. Because this second argument was advanced as a separate ground for invalidity it is better to give it separate consideration below. For the moment, attention will be given to the first of the arguments.

98 Much emphasis was given to two decisions of this Court[168] and one of the Supreme Court of Victoria[169], all of which considered the reach of generally expressed powers to make by-laws. The proposition that the convenience power should be read narrowly was said to be supported by the reasons of Isaacs J in

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167 ss 238-240.

168 *Melbourne Corporation v Barry* (1922) 31 CLR 174; [1922] HCA 56; *Lynch v Brisbane City Council* (1961) 104 CLR 353; [1961] HCA 19.

169 *Leslie v City of Essendon* [1952] VLR 222.

Melbourne Corporation v Barry[170] and the reasons of Dixon CJ in *Lynch v Brisbane City Council*[171]. It is necessary to say something about each.

99 In *Barry*, this Court considered the validity of a by-law made by the Council of Melbourne prohibiting any "processions of persons or of vehicles ... except for military or funeral purposes" parading or passing through any street unless with the consent of the Council and unless the recipient of the consent had given at least 24 hours' notice to the police. By majority (Isaacs and Higgins JJ, Knox CJ dissenting) the by-law was held not to be authorised by the *Local Government Act* 1915 (Vic) or by the *Police Offences Act* 1915 (Vic). The former of those Acts provided that "[s]ubject to the provisions hereinafter contained by-laws may be made for any municipality for the purposes mentioned in this Act and for the purposes following", after which there appeared 37 purposes for which by-laws might be made. One listed purpose was "[r]egulating traffic and processions" and the last listed purpose was "[g]enerally for maintaining the good rule and government of the municipality".

100 Isaacs J and Higgins J each held[172] that the express power to make a by-law "regulating" processions did not authorise making a by-law that *prohibited* processions unless consent was given. Each observed[173] that the statute in question distinguished between purposes of "regulating" certain subjects, "regulating or prohibiting" others, and "prohibiting" still other subjects. That being so, it is unsurprising that each concluded that the power to make by-laws "[g]enerally for maintaining the good rule and government of the municipality" could not support the by-law in question. That purpose was properly seen in the context of the whole of the relevant section as a category the content of which was necessarily limited or diminished by the preceding statements of purpose. The statement of Isaacs J so much relied on in the course of argument in this Court – that the good rule and government power "confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *ejusdem generis* with the specific powers of the Act"[174] – must be understood accordingly. It provides no support for a general proposition that a general conferral of by-law making power *must* be construed narrowly when the Act specifically lists other purposes for which by-laws may be made.

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170 (1922) 31 CLR 174.

171 (1961) 104 CLR 353.

172 (1922) 31 CLR 174 at 198-200 per Isaacs J, 209 per Higgins J.

173 (1922) 31 CLR 174 at 193 per Isaacs J, 205-206 per Higgins J.

174 (1922) 31 CLR 174 at 194 (footnote omitted).

101 In *Lynch*, this Court again considered the extent of a by-law making power given by what Dixon CJ called[175] "the extensive if traditional words 'generally in maintaining the good rule and government of the municipality'". Three points must be made about the decision in *Lynch*.

102 First, the expression considered in *Lynch*, like the words of the convenience power in issue in this appeal, was, as Dixon CJ said[176], "wide and indefinite". But, as Dixon CJ also said[177], the words used "cannot be dismissed for that reason as if they were meaningless or ineffective".

103 Second, how words of generality are to be construed depends upon their statutory context. Hence, in *Lynch* it was important to observe[178] about the statute in question that the listed powers were conferred "[w]ithout limiting the generality" of the relevant council's power to make ordinances for, among other purposes, the convenience of the inhabitants. And, most importantly, the general words conferring the power were "not to be applied without caution nor read as if they were designed to confide to the [relevant council] more than matters of local government" and hence were "not to be read as going beyond the accepted notions of local government"[179].

104 The third point to make concerns the references made by Dixon CJ to the decision of the Full Court of the Supreme Court of Victoria in *Leslie v City of Essendon*[180]. Although Dixon CJ referred[181] with approval to the historical examination undertaken in *Leslie*, it is evident that Dixon CJ saw the actual decision in *Leslie* as turning on the statutory context in which the particular "good rule and government" by-law making power sat. Hence, the proposition that *Leslie* decided that "in *that* context the power must be construed restrictively"[182] cannot be understood as propounding any generally applicable

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175 (1961) 104 CLR 353 at 363.

176 (1961) 104 CLR 353 at 362.

177 (1961) 104 CLR 353 at 362.

178 (1961) 104 CLR 353 at 364.

179 (1961) 104 CLR 353 at 364.

180 [1952] VLR 222.

181 (1961) 104 CLR 353 at 363-364.

182 (1961) 104 CLR 353 at 364 (emphasis added).

principle governing the construction of either a "good rule and government" power or the convenience power which is now under consideration.

105 The decisions in *Barry*, *Lynch* and *Leslie* do not require the conclusion that the convenience power *must* be construed narrowly, let alone that it should be construed so as not to support the making of the impugned by-law. Each case can be seen as adopting a narrower construction of the provision in issue than the words of the provision might possibly have been understood to bear, but in each this construction was required by consideration of the statutory context of the provision. These cases thus demonstrate the need to read a general provision like the convenience power in its statutory context. They demonstrate that particular aspects of statutory context may show that some applications of the provision otherwise available must yield to competing contextual indications (as was the case in *Barry*). It is not right to say that, together or separately, these cases establish any special rule of construction – whether applicable generally to by-law making powers or only to "good rule and government" or like powers – that a general provision like the convenience power must be read "narrowly" or "restrictively".

106 A rule expressed in those terms would be uninformative. It may divert attention (and did divert attention in this appeal) from the requirement to identify the meaning to be given to the provision which is being construed. Not only that, a rule so expressed may be understood to suggest, wrongly, that a generally expressed by-law making power appearing at the end of a list of more particularly expressed powers can and should be deprived, by being read "narrowly" or "restrictively", of any effective operation. That is not what was established by *Barry*, *Lynch* or *Leslie*. To the extent to which the Corneloups' arguments depended upon such an understanding of those cases, the arguments are ill-founded. The relevant question is not whether s 667(1) 9 XVI should be read "narrowly" or "restrictively". The question is what meaning should be given to its terms.

Construction of s 667(1) 9 XVI

107 It is not to be doubted that the meaning given to s 667(1) 9 XVI may be affected by consideration of other provisions of the 1934 Act. The Act must be read as a whole[183]. And it may readily be accepted that the subject-matter, scope and purpose of the 1934 Act reveal that the words of the convenience power are "not to be applied without caution nor read as if they were designed to confide to the [Council] more than matters of local government" and hence "are not to be

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183 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

read as going beyond the accepted notions of local government"[184]. But that is to say no more than that the words of the power are to be construed in their statutory context with proper regard to the purposes of the Act.

108 Unless it is shown that the words of s 667(1) 9 XVI are to be limited, whether by reference to the subject-matter or the manner of expression of other by-law making powers or otherwise, the words of the convenience power are well able to support a by-law governing whether and when there may be activities on a road which may diminish the convenience of using the road. Roads are public thoroughfares along which persons may pass and repass, with or without loads, and (according to the type of road in question) with or without the use of some or all kinds of vehicle. The definition of "road" in the 1999 Act is consistent with this general understanding of roads and their purposes. By their very nature, the uses which the impugned provisions prohibit without permission obstruct others who use the road from passing or repassing along it whether on foot or by vehicle.

109 The preacher and the canvasser hope and intend to attract a crowd of people who will stay long enough to listen to a message. And if the message is controversial, the preacher and the canvasser will likely attract others who come to contest the view that is offered. Any crowd of people obstructs the road and obstructs others who would use the road for its intended purpose as a thoroughfare.

110 Likewise, the person who distributes "any handbill, book, notice, or other printed matter" to any bystander or passer-by can do that to those who pass by in vehicles only when the vehicles are stopped. And with the pedestrian bystander or passer-by, the distributor will almost always either stand facing the on-coming pedestrians or move against the flow of that traffic. In any of those cases, the act of distribution will very likely impede the free flow of those who would pass and repass along the thoroughfare. A by-law made to regulate these sorts of activities would readily appear to be "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants".

111 Is the meaning of those terms to be limited by reference to either the subject-matter or the manner of expression of other by-law making powers or otherwise?

112 It is right to observe, as Samuel Corneloup did, that s 667(1) gave councils a number of by-law making powers for the regulation and licensing of various uses of vehicles on roads[185] and the regulation of "the standing of horses and

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184 *Lynch* (1961) 104 CLR 353 at 364 per Dixon CJ.

185 s 667(1) 3 XX-XLI.

other animals in streets, roads and public places"[186]. It is also right to observe, as again Samuel Corneloup did, that s 239(1) of the 1999 Act gave power to make by-laws about the use of roads for various purposes including "the broadcasting of announcements or advertisements"[187] and "soliciting for religious or charitable purposes"[188]. But neither of these observations supports the conclusion that the convenience power did not authorise the making of the impugned provisions.

113 The subject-matter of the impugned provisions differs markedly from the subject-matters of those other provisions of the 1934 Act mentioned in argument. The first group of provisions of the 1934 Act which were mentioned permitted the making of by-laws regulating how and when vehicles may be used on roads and the second group dealt with the standing of horses and other animals in streets. The impugned provisions were directed to a different form of use of roads. Neither the text of those other provisions of the 1934 Act, nor the context of the 1934 Act more generally, supports the conclusion that the only aspects of road usage which might be regulated by by-laws made under that Act were to be those that were dealt with in the express provisions mentioned in argument. Rather, the convenience power permitted the making of by-laws dealing with the subject-matters with which the impugned provisions dealt.

114 The later enactment of the 1999 Act, with its specific provisions for by-laws about the use of roads, did not confine the ambit of the convenience power by excluding from its operation the power to make the impugned provisions. Section 239(1) authorised the making of by-laws about the use of roads for certain purposes and expressly contemplated[189] that the making of by-laws about other uses of roads might be authorised by regulation. Yet it was made plain, by the retention in the 1934 Act of by-law making powers about certain other uses of roads, that s 239(1) was not to be read as an exhaustive statement of by-law making powers about the use of roads. And when it is recalled that s 246(1)(a) of the 1999 Act provided for the making of by-laws "within the contemplation of this or another Act", it is evident that the subsequent enactment of s 239(1) of the 1999 Act did not confine the operation of the convenience power by excluding from it any power to make by-laws relating to the use of roads.

115 It was not shown that the words of s 667(1) 9 XVI were to be limited by reference to the subject-matter or the manner of expression of other by-law

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186 s 667(1) 7 II.

187 s 239(1)(b).

188 s 239(1)(d).

189 s 239(1)(g).

making powers or otherwise. Prohibition of the activities described in the impugned provisions without permission is "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants". Section 667(1) 9 XVI of the 1934 Act, and so s 246(1)(a) of the 1999 Act, supported the impugned provisions.

An "unreasonable" exercise of power?

116 It will be recalled that the Corneloups contended that the impugned provisions were not a valid exercise of the Council's by-law making power for any one or more of four reasons. Three of those reasons, based on the construction of the convenience power, s 246(2) and s 248(1)(a) respectively, have already been considered and rejected. The fourth submission about the Council's by-law making powers was that the impugned provisions were not a reasonable and proportionate exercise of the convenience power. They were said not to be reasonable and proportionate having regard to several factors, which included the impugned by-law's restrictive effect on political communication, the availability of less restrictive means to achieve the same objects and the width of the discretion in granting permits and imposing conditions on those permits. These factors were said to demonstrate that the means chosen by the Council to prevent obstruction of roads went beyond what was a reasonable and proportionate means of achieving the by-law's goals and for that reason the impugned provisions are invalid.

117 Consideration of this challenge to the by-law must begin with what was said by Dixon J in *Williams v Melbourne Corporation*[190]. Dixon J said[191] that "[t]o 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". Examination of the legal and practical operation of the by-law may reveal that "it *could not reasonably* have been adopted as a means of attaining the ends of the power"[192] (emphasis added). He continued by observing[193] that "[i]n 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". Two fundamental points follow and must not be obscured. The first is that the relevant question is the character of the relevant provisions and the sufficiency of their connection with the relevant by-law making power. And the

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190 (1933) 49 CLR 142; [1933] HCA 56.

191 (1933) 49 CLR 142 at 155.

192 (1933) 49 CLR 142 at 155.

193 (1933) 49 CLR 142 at 155, referring to *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 982, 986; [1907] HCA 11.

second is related to the first: the court is concerned not with the expediency of the by-law but with the power to make it. As Fullagar J later pointed out in *Clements v Bull*[194], this Court's decision in *Williams* discredited the "idea that a by-law could be held invalid because it appeared to a court to be an 'unreasonable' provision".

118 Because the Court is here concerned with the power to make by-laws, attention must be given in the first instance to the terms of the by-law making power conferred by the statute. As Gummow J said in *Minister for Resources v Dover Fisheries Pty Ltd*[195], "[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". Attention can then turn to the legal and the practical effect of the by-law to determine whether it has a sufficient connection to the by-law making power[196]. No doubt that involves a question of degree and judgment. But a conclusion is to be reached paying due regard to "accepted notions of local government"[197] and the fact that "[m]unicipalities and other representative bodies which are entrusted with power to make by-laws are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality"[198]. It is not to be assumed (and no reason was given to the contrary in this appeal) that any more confined understanding of a by-law making power should be preferred. It is against this background that this challenge to validity must be assessed.

119 The legal and practical operation of the impugned provisions, in the circumstances to which they apply, prevents obstruction of roads. Contrary to the submissions of Samuel Corneloup, the impugned provisions are not "fundamentally directed at banning most forms of communication in most public places". Nor are they properly characterised as embracing "a large portion of everyday oral and written communication and much ordinary intercourse". They are directed, and *only* directed, to the prevention of obstruction in the use of

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194 (1953) 88 CLR 572 at 581; [1953] HCA 61 (footnote omitted).

195 (1993) 43 FCR 565 at 577 (footnote omitted). See also *Barry* (1922) 31 CLR 174 at 209 per Higgins J; *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 per Rich J; [1943] HCA 15.

196 See *South Australia v Tanner* (1989) 166 CLR 161 at 178 per Brennan J; [1989] HCA 3.

197 *Lynch* (1961) 104 CLR 353 at 364 per Dixon CJ.

198 *Footscray Corporation v Maize Products Pty Ltd* (1943) 67 CLR 301 at 308 per Rich J.

roads. And because that is so, the legal and practical effect of the impugned provisions is directly and substantially directed to the object of the relevant statutory head of by-law making power, namely, the convenience power. This challenge to the validity of the impugned provisions fails.

120 Before turning to the other submissions made by the Corneloups, something more needs to be said about the submission that less restrictive means of achieving the same object could have been devised and that, consequently, the by-law was not a reasonable and proportionate exercise of the convenience power. The correctness of the assertion that less restrictive means of achieving the same object could have been devised depends upon what is meant by "less restrictive means". In particular, the assertion provokes two further questions: "less restrictive of what?" and "less than what?" Assuming both of those further questions could be answered satisfactorily (and no answer was proffered in argument), that less restrictive means could be designed to achieve the same object raises the question why that proposition is relevant to the validity of the by-law. It could be relevant to validity only if at least one of the following assumptions is made good. Either the by-law making power is to be construed as conferring only a power to make by-laws which have the least restrictive effect possible on some specific interest while still achieving the same object, or the possibility of less restrictive means suggests that the by-law has an insufficient connection to the by-law making power.

121 The former assumption is not lightly to be made and was not shown to apply to the convenience power in this appeal. The assumption seeks, in another guise, to impose a narrow construction upon the convenience power when, as has already been explained, its terms do not warrant such narrowing. And if selection of less restrictive means is not a condition upon the convenience power, the alleged existence of less restrictive means can only be peripheral at best to determining whether a sufficient connection exists between the by-law and the convenience power.

122 This last point is critically important and is usefully understood by reference to the reasons of Brennan J in *South Australia v Tanner*[199]. Brennan J dissented from the orders made in that case but his Honour's statement of applicable principles does not differ in any material respect from those applied by the majority. Brennan J emphasised[200] that, where the validity of regulations (or in this appeal a by-law) is concerned, the problem is one of characterisation, which requires ascertainment of the character of the impugned regulation by reference to its operation and legal effect in the circumstances to which it applies.

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199 (1989) 166 CLR 161.

200 (1989) 166 CLR 161 at 178.

The court must[201] make its "own assessment of the directness and substantiality of the connexion between the likely operation of the regulation and the statutory object to be served". The regulation is invalid if the directness and substantiality of that connection "is *so exiguous* that the regulation *could not reasonably* have been adopted as a means of fulfilling the statutory object"[202] (emphasis added).

123 The references to "so exiguous" and "could not reasonably have been adopted" demonstrate that the question to be asked and answered is not whether the by-law is a reasonable or a proportionate response to the mischief to which it is directed but whether, in its legal and practical operation, the by-law is authorised by the relevant by-law making power. The question of validity is to be decided by characterising the impugned provisions and assessing the directness and substantiality of the connection between the likely operation of the by-law and the statutory object to be served. *Could* the by-law, so characterised and assessed, reasonably be adopted as a means of fulfilling that object? No further inquiry into the proportionality of the by-law is permitted or required.

The procedural challenge to the by-law

124 The second basis for the invalidity of the by-law was said to be that the Council had failed to take the procedural steps necessary to make the by-law validly. In particular, Caleb Corneloup contended that the Council did not obtain a certificate "*signed* by a legal practitioner" (emphasis added) as required by s 249(4) of the 1999 Act. That sub-section provided:

> "A council must not make a by-law unless or until the council has obtained a certificate, in the prescribed form, signed by a legal practitioner certifying that, in the opinion of the legal practitioner—
>
> (a) the council has power to make the by-law by virtue of a statutory power specified in the certificate; and
>
> (b) the by-law is not in conflict with this Act."

125 The solicitors retained by the Council sent it a number of by-laws (including the impugned by-law) that the solicitors had drafted together with certificates of the kind required by s 249(4). The solicitors sent these documents to the Council by attaching them to an email sent by the legal practitioner having the immediate carriage of the matter to an employee of the Council. The email asked the recipient to print the documents "and deal with them accordingly". It invited the recipient to call the legal practitioner who had sent the email if the

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201 (1989) 166 CLR 161 at 179.

202 (1989) 166 CLR 161 at 179.

recipient had "any queries concerning the process and procedure to make these by-laws". The certificate in respect of the impugned by-law which was attached to the email stated the name and business address of the legal practitioner who sent the email and provided a space in which the practitioner could have subscribed his signature over his printed name and designation as a legal practitioner. The practitioner did not write his signature on the document.

126 Did the Council obtain a certificate "signed by a legal practitioner" in these circumstances, as required by s 249(4) of the 1999 Act? To answer that question, it is necessary to consider s 9(1) of the *Electronic Transactions Act* 2000 (SA), which provided:

> "If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—
>
> (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
>
> (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
>
> (c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a)."

127 When the certificate attached to the email is read with the email, it is evident that the legal practitioner was identified and that he approved of the information communicated in the certificate. The method used to identify the legal practitioner and indicate his approval of the certificate and other documents sent to the Council was, in all the circumstances, as reliable as was appropriate for the purposes for which the information was being communicated to the Council. And it is evident that the Council consented to this method of communication of the relevant material. Section 9(1) of the *Electronic Transactions Act* was thus engaged. The requirement of s 249(4) of the 1999 Act for a certificate *signed* by a legal practitioner is to be taken as met.

128 This ground of contention fails.

129 There remains for consideration the constitutional challenge to the validity of the impugned provisions. That challenge also fails.

The constitutional challenge to the by-law

130 The Corneloups submitted that the by-law is invalid because it infringes the implied constitutional freedom of communication on matters of government

and politics which is "an indispensable incident of that system of representative government which the Constitution creates"[203]. It was on this basis that the Full Court held that parts of the impugned provisions are invalid and should be severed.

131 The accepted doctrine of the Court is to be found in the unanimous joint judgment in *Lange v Australian Broadcasting Corporation* as modified by a majority of the Court in *Coleman v Power*[204]. As the plurality in *Wotton v Queensland* recently observed[205], the terms of the questions identified in *Lange* are settled. The first question is whether the impugned law "effectively burden[s] freedom of communication about government or political matters either in its terms, operation or effect"[206]. If the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications, then the boundaries of the freedom are marked by two conditions, which together make up the second question identified in *Lange*. First, is the object or end of the impugned law "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government"[207] and second, is the impugned law "reasonably appropriate and adapted to achieving that legitimate object or end" *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government[208]?

132 Those are the established principles which must be applied, and it is to their application to the impugned provisions which these reasons now turn.

133 It will be recalled that the impugned provisions prohibited certain conduct on a road without permission. It may be assumed for the purposes of the present appeal that, because the impugned provisions put this limitation on the making of political (and other) communications, the impugned provisions "effectively burden" freedom of communication about government or political matters.

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203 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559; [1997] HCA 25.

204 (2004) 220 CLR 1 at 50-51 [92]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J; [2004] HCA 39.

205 (2012) 246 CLR 1 at 15 [25]; [2012] HCA 2.

206 *Lange* (1997) 189 CLR 520 at 567.

207 *Lange* (1997) 189 CLR 520 at 561-562.

208 *Lange* (1997) 189 CLR 520 at 562; *Coleman v Power* (2004) 220 CLR 1 at 51 [96].

Attention must therefore turn to the second question identified in *Lange*, which contains the conditions marking out the boundaries of the freedom.

134 What was the object or end of the impugned provisions? The object or end can best be described as the prevention of obstruction of roads. It is the pursuit of that object or end which brought the impugned provisions within the ambit of the convenience power, and the text, subject-matter and context of the impugned provisions point unequivocally to identifying their object or end in this way. The collocation of "preach, canvass, harangue, tout for business or conduct any survey or opinion poll" used in par 2.3 of the impugned by-law demonstrates its concern with a variety of different activities. The thread which is common to those activities is that each is an occasion for obstruction of the use of the road. The same thread can readily be seen as running through most of the other sub-paragraphs of par 2 of the impugned by-law: notably par 2.1 dealing with repairs to or other work on a vehicle, par 2.2 dealing with collections of money or other things, par 2.5 dealing with livestock on the road, pars 2.6 and 2.7 dealing with camping and tents, par 2.8 dealing with the distribution of printed matter and par 2.10 dealing with the erection of structures on a road. The remaining sub-paragraphs of par 2 (par 2.4 dealing with the use of amplifiers for broadcasting announcements or advertisements and par 2.9 dealing with the placing on vehicles of any handbill dealing with religious or charitable purposes or advertising) may have other and wider objects or ends.

135 It may be that the prevention of obstruction of roads will be conducive to the safe use of those roads and even the keeping of the peace. It might further be said that the prevention of obstruction of roads will balance the competing interests of those who seek to use them. But these descriptions advanced by the Attorney-General for South Australia of the object or end of the impugned provisions are better seen as *consequences* that may follow from preventing the obstruction of roads rather than as separate or additional objects or ends. And those consequences may then be relevant to whether the object or end of preventing obstruction of roads is legitimate.

136 No party or intervener submitted that the impugned provisions pursued an object or end which is incompatible with the constitutionally prescribed system of representative and responsible government and with the freedom of political communication that is its indispensable incident. It is not to be supposed that preventing the obstruction of roads is incompatible in the relevant sense. Preventing the obstruction of roads is conducive to the maintenance of roads as a means of travel, interaction and association (including political interaction and association) among the people. It ensures that travel can continue along the relevant road unimpeded.

137 In this Court, debate centred upon whether the impugned provisions were reasonably appropriate and adapted to achieving the legitimate object or end of preventing obstruction of roads in a manner which is compatible with the

maintenance of the constitutionally prescribed system of representative and responsible government. Contrary to the Attorney-General of the Commonwealth's submissions, the question is not concluded by determining that the by-law is not so unreasonable as to fall outside the by-law making power. The question which arises in considering whether the by-law made was supported by statutory power is not the same as the question which must be answered in considering its constitutional validity. The former is whether the by-law is so unreasonable that it could not fall within the by-law making power. The latter is whether the by-law is reasonably appropriate and adapted to serve a legitimate object or end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident.

138 Those supporting and those challenging validity emphasised, albeit for different purposes, that the impugned provisions took the form of a general prohibition of specified conduct coupled with a power to grant a consent to engage in that conduct. Those who challenged validity asserted that the general prohibition was a large intrusion upon freedom of political communication which was not ameliorated by the possibility of obtaining consent. Indeed, the power to grant or withhold consent was said to make the intrusion worse by permitting choice (either practically or legally) between the views that might be expressed by preaching or distributing printed material on a road. By contrast, those who sought to uphold validity submitted that the power to grant consent could not lawfully be exercised in a manner antithetical to the implied freedom of political communication and served no more complex purpose than avoiding what Kourakis J referred[209] to in the Full Court as "the 'Olympic system' where the fastest, loudest or most numerous prevail".

139 Both sides of the debate proceeded from explicit or implicit assertions about the proper construction of the impugned provisions and, in particular, the power to grant consent for the prohibited activities. The proper construction of the impugned provisions is the point at which consideration of the arguments must begin because it is the legal and practical operation of the impugned by-law which is central.

140 It is necessary to construe the power to give consent in a manner that gives due weight to the text, subject-matter and context of the whole of the provision in which it is found. As has already been explained, those matters show unequivocally that the *only* purpose of the impugned provisions is to prevent obstruction of roads. It follows that the power to grant or withhold consent to engage in the prohibited activities must be administered by reference to that consideration and none other. On the proper construction of the impugned

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209 (2011) 110 SASR 334 at 367 [128].

by-law, the concern of those who must decide whether to grant or withhold consent is confined to the practical question of whether the grant of permission will likely create an unacceptable obstruction of the road in question.

141 Once that is understood, it is readily evident that the impugned provisions are reasonably appropriate and adapted to prevent obstruction of roads in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. No consent of the Council to engage in the activities regulated by the impugned provisions is needed when the specific exclusions in the impugned provisions about elections and referendums are engaged. And when those exclusions are not engaged, the only burden which the impugned provisions place on the freedom of political communication is to prohibit the use of roads for the purposes of preaching, canvassing or haranguing persons or giving out or distributing printed matter in circumstances where it is judged that to do so would likely create an unacceptable obstruction of a road. Any restriction on political communication is confined to where the communication can be made and is a necessary incident of maintaining unimpeded use of roads. The prohibition without permission which the impugned provisions effect adequately balances the competing interests in political communication and the reasonable use by others of a road.

Conclusion and orders

142 For these reasons the challenges which the Corneloups made to the validity of the by-law all fail. The appeal to this Court should be allowed and par 1 of the orders of the Full Court of the Supreme Court of South Australia made on 10 August 2011 should be set aside. In its place there should be an order that the appeal to that Court is allowed, the orders of the District Court of South Australia made on 25 November 2010 are set aside and in their place there should be orders that (a) the application of Samuel Corneloup dated 2 November 2009 is dismissed; and (b) so much of the appeal of Caleb Corneloup by notice dated 28 July 2010 as sought to challenge the validity of By-law No 4 – Roads made by the Corporation of the City of Adelaide on 10 May 2004 is dismissed. Consistent with the terms on which special leave to appeal to this Court was granted, the orders for costs made by the Full Court should not be disturbed and there should be no order for the costs of the proceedings in this Court.

143 HEYDON J. The circumstances of the appeal are fully set out in other judgments. These reasons deal with only two points.

144 By notice of contention, the second and third respondents challenged the validity of pars 2.3 and 2.8 of By-law No 4 – Roads[210] ("the challenged clauses"). One question in the appeal is whether their making was a valid exercise of the power conferred by s 667(1) 9 XVI or s 667(1) 4 I of the *Local Government Act* 1934 (SA) ("the Act"). Section 667(1) 9 XVI gives power to councils to make by-laws "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants." Section 667(1) 4 I gives power to make by-laws "for the prevention and suppression of nuisances".

The principle of legality

145 At common law, citizens are free to behave as they like unless there is a prohibition created by common law rules or by legislation. That freedom need not depend on any express rule. Putting aside the positive grant of rights by the law, the common law recognises a "negative theory of rights". In the words of Glanville Williams, under that theory, rights are marked out by "gaps in the criminal law"[211]. Similarly, Lord Goff of Chieveley said that under the English common law "everybody is free to do anything, subject only to the provisions of the law"[212]. In this sense, there are many common law rights of free speech.

146 The third respondent correctly submitted that the challenged clauses created an impact on many common law rights of free speech apart from the common law right to make political communications. He correctly submitted that the rights on which this impact took place were rights to engage in "a very large portion of normal everyday written and oral communication." And he correctly submitted that the proscriptions in the challenged clauses were applicable to the whole of the Adelaide central business district; were not directed to any particular level of noise, time or place; and were not limited to offensive communications.

147 The appellant identified various classes of speech to which the challenged clauses allegedly did not apply – roadside interviews, impromptu press conferences, and communication through the internet, newspapers and signs. But even if that is correct, the third respondent's points remain sound. And they

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210 Set out at [26], [74] and [164].

211 Quoted in Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (2001) at 35 n 132.

212 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283.

totally contradict a Commonwealth submission that the challenged clauses apply only to "very, very precise and limited forms of communication".

148 The "principle of legality" holds that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. For that principle there are many authorities, ancient and modern, Australian and non-Australian. The principle exists for good reason. As Lord Hoffmann said[213]:

> "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process."

149 It may be prudent for a litigant relying on the principle of legality to select a meaning of legislation sufficiently narrow to suit that litigant's interests and defend it. But it is not necessary for that litigant to do so. Rather, it is for the party contending that the legislative language has curtailed fundamental rights or freedoms to show that the language is clear enough to achieve that effect.

150 The principle of legality can apply both to parliamentary legislation creating a power to make delegated legislation, and to the delegated legislation itself. The consequence of applying the principle of legality to a power in parliamentary legislation to make delegated legislation will tend to be a relatively narrow construction of that power. And the consequence of applying the principle of legality to delegated legislation made under that power will tend to be a relatively narrow construction of that delegated legislation. Here, the crucial issue is the impact of the principle of legality on the width of the s 667(1) 9 XVI and s 667(1) 4 I powers to make delegated legislation. That is because though the words of the challenged clauses are wide, and though they create criminal offences, they are on the whole clear enough, at least in their application to the second and third respondents, to prevent the principle of legality from causing difficulty in relation to them.

151 The common law right of free speech is a fundamental right or freedom falling within the principle of legality[214]. That must be so if there is any shadow of truth in Cardozo J's claim that freedom of speech is "the matrix, the

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213 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.

214 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 551; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 125-127; *Momcilovic v The Queen* (2011) 245 CLR 1 at 178 [444]; [2011] HCA 34.

indispensable condition, of nearly every other form of freedom."[215] It must be so if Lord Steyn's account of the importance of freedom of expression is convincing. He said[216]:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'[217]. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country".

And it must also be so if Kommers was correct to say[218]:

> "The basic right to freedom of opinion is the most immediate expression of the human personality … in society and, as such, one of the noblest of human rights … It is absolutely basic to a liberal-democratic constitutional order because it alone makes possible the constant intellectual exchange and the contest among opinions that form the lifeblood of such an order".

152 Of course, Cardozo J was dealing with the First and Fourteenth Amendments to the United States Constitution. And Kommers was dealing with Art 5, Section 1, in the German Constitution[219]:

> "Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and

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215 *Palko v Connecticut* 302 US 319 at 327 (1937).

216 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 126.

217 *Abrams v United States* 250 US 616 at 630 (1919) per Holmes J (dissenting).

218 *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed (1997) at 364-365.

219 Quoted in Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, (2010) at 49.

> freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

Constitutional rights of those kinds are different from a common law right capable of modification by statute. But the considerations underlying a constitutional right of free speech, where it exists, are equally strong indications that the right of free speech at common law is sufficiently important to attract the principle of legality. The common law right of free speech which the principle of legality protects is significantly wider, incidentally, than the constitutional limitation on the power to enact laws burdening communications on government and political matters.

The powers alleged to support the challenged clauses

153 *Section 667(1) 9 XVI.* The third respondent drew attention to what O'Bryan J said in *Leslie v City of Essendon*[220]:

> "a power to make by-laws for one purpose only, *viz*, for the good rule and government of the municipality or practically for that purpose alone will be interpreted in a very different way from a power expressed in like language but which is preceded by a power to make by-laws for thirty-two separate and distinct purposes, all or most of which are concerned with the good rule and government of the municipality. Apart from any authority, I would think that it is impossible as a matter of ordinary interpretation to give to clause (xxxiii) its full and natural meaning as though it appeared in a statute without any specific powers preceding it."

O'Bryan J held that the relevant by-law could not be upheld on the basis that the general power corresponding to s 667(1) 9 XVI was an independent power[221]. The third respondent contended that O'Bryan J's statement was approved by Dixon CJ in *Lynch v Brisbane City Council*[222]. Opinions can as readily differ on questions of construing what a judgment means as they can on any question of construction. It is clear, however, with respect, that the third respondent's contention is correct. Dixon CJ did approve what O'Bryan J said in *Leslie v City of Essendon*, though his Honour saw the different context of the case before him as making it distinguishable. Dixon CJ agreed that the structure of the legislation O'Bryan J considered established a context which suggested that a general power be construed "restrictively". But he saw the context of the legislation before him as not restrictive. He saw the words "without limiting the generality of [the

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220 [1952] VLR 222 at 226.

221 *Leslie v City of Essendon* [1952] VLR 222 at 228.

222 (1961) 104 CLR 353 at 364; [1961] HCA 19.

relevant council's] powers" before "a long and jumbled enumeration of subjects"[223] as giving power to "lay down rules in respect of matters of municipal concern", but not "as going beyond the accepted notions of local government."[224]

154 The challenged clauses are not within the powers conferred by s 667(1) 9 XVI for the following reasons.

155 First, while the outcome in each case must turn on the proper construction of the relevant provision considered in its statutory context, a similar conclusion was reached in *Leslie v City of Essendon*. There the power was preceded by a power to make by-laws for 32 separate and distinct purposes. Here the specified powers preceding s 667(1) 9 XVI are not few in number. There are 27 of them. And they are not narrow in scope. The specified powers relate to lodging houses; innumerable aspects of vehicles; licences and permits; nuisances; unattended or insecurely fastened animals; and the standing in streets, roads and public places of horses and other animals. Most of them, probably all of them, are concerned with the "good rule and government of the municipality", like the powers in *Leslie v City of Essendon*. Many of the powers relate to regulation of the use of roads. They have specific requirements and limitations which would be nugatory if s 667(1) 9 XVI were read sufficiently broadly to empower the challenged clauses. Thus s 667(1) 9 XVI does not create an independent power. It cannot be used to extend other powers.

156 Secondly, in contrast to the legislation considered in *Lynch v Brisbane City Council*[225], there is no provision in the legislation stating that the specific powers are to be construed without limiting the generality of the council's powers. The appellant submitted that the following words preceding s 667(1) 9 XVI, "a council may make by-laws for all or any of the following purposes", were "equally broad". But the appellant did not explain how those words could have the same effect as those which were decisive in *Lynch v Brisbane City Council*.

157 Thirdly, Brennan J held in *Foley v Padley*[226] that in the light of *Lynch v Brisbane City Council*[227] s 667(1) 9 XVI could not by itself authorise a by-law in terms overlapping with but narrower than par 2.8, namely:

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223 *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 361.

224 (1961) 104 CLR 353 at 364.

225 (1961) 104 CLR 353 at 364.

226 (1984) 154 CLR 349 at 373; [1984] HCA 50.

227 (1961) 104 CLR 353.

> "No person shall give out or distribute anything in the Mall or in any public place adjacent to the Mall to any bystander or passer-by without the permission of the council."

The appellant did not seek to demonstrate that Brennan J's conclusion was wrong.

158 Fourthly, even if it is correct to analyse legislation in terms of the mental states of the legislature or its members, it cannot be inferred from the form of s 667(1) 9 XVI that the legislature appreciated the question of free speech, or that the legislature intended s 667(1) 9 XVI to permit by-laws of the kind challenged in this appeal, or that, in Lord Hoffmann's words, the legislature "squarely confront[ed] what it [was] doing and accept[ed] the political cost."[228] If it is correct, which it is, to concentrate on the words of s 667(1) 9 XVI, it is clear that they are too general, ambiguous and uncertain to grant a power to make by-laws having the adverse effect on free speech of the challenged clauses.

159 The Full Court of the Supreme Court of South Australia held that s 667(1) 9 XVI gave the first respondent power to regulate conduct which was properly a matter of municipal concern and which, if left uncontrolled, would materially interfere with the comfort, convenience and safety of the city's inhabitants[229]. On the Full Court's construction, the impact of the challenged clauses on common law rights of free speech is radical. Even assuming that the Full Court's construction is available apart from the principle of legality, the language is insufficiently clear to permit that construction to be adopted in view of its impact on free speech.

160 The first respondent contended that in various cases powers identical or similar to that conferred by s 667(1) 9 XVI had been construed broadly[230]. This contention was allied with a submission that it was appropriate to give s 667(1) 9 XVI a wide construction because it was an element in a plenary power to regulate the competing interests of urban residents who had to live and work at close quarters in response to changing conditions and circumstances not foreseeable at earlier times. The courts which decided the cases relied on do not appear to have been invited to attach any significance to the principle of legality. And an appeal to the desirability of there being a statutory power to make delegated legislation so wide as to permit the criminalisation of conduct in

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228 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.

229 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 361 [98].

230 *Bremer v District Council of Echunga* [1919] SALR 288 at 295; *Seeligson v City of Melbourne* [1935] VLR 365; *Rice v Daire* (1982) 30 SASR 560.

circumstances which were unforeseeable when the statutory power was enacted does not sit well with the principle of legality.

161 *Section 667(1) 4 I.* The appellant also relied on the s 667(1) 4 I power to make by-laws "for the prevention and suppression of nuisances". The appellant submitted in writing that the challenged clauses "may be supported by the nuisance power, either standing alone or together with the convenience power." The appellant submitted orally that the challenged clauses "are … not directly supported by the nuisance power but they aid the nuisance power in a matter ejusdem generis." This language alluded to what Isaacs J said in *Melbourne Corporation v Barry*[231]. These somewhat inconsistent submissions must fail. In *Samuels v Hall*[232], Zelling AJ held that handing out leaflets in urban streets was not a common law nuisance. On appeal in that case, Mitchell J concurred with Zelling AJ[233]. Chamberlain J[234], with whom Walters J agreed[235], left that question open. So did the Full Court of the Supreme Court of South Australia in this case[236]. Zelling AJ's answer to the question, however, was completely correct[237]. Merely to preach, canvass or harangue on a road is not to commit a public nuisance. Nor is merely distributing printed material to bystanders or passers-by on a road.

Conclusion

162 The challenged clauses are invalid. The appeal should be allowed to the extent of making a declaration to that effect. The first respondent contended that the points raised by the second and third respondents in this respect were not capable of being raised by way of notice of contention, or were in the nature of a

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231 (1922) 31 CLR 174 at 194; [1922] HCA 56. Counsel for the third respondent repeatedly stated, without contradiction by the appellant, that the appellant was not relying on any ejusdem generis argument. However, the quoted words appear to involve a version of it.

232 [1969] SASR 296 at 304.

233 [1969] SASR 296 at 322.

234 [1969] SASR 296 at 314.

235 [1969] SASR 296 at 329.

236 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 345-346 [42].

237 See also *Cooper v Bormann* (1979) 22 SASR 589 at 591-592; *Rice v Daire* (1982) 30 SASR 560 at 568.

cross-appeal for which special leave was required. It is true that the submissions of the second and third respondents which have been accepted may call for an order which is in form different from the order made by the Full Court. But in substance that order has the same effect in its application to the circumstances of the second and third respondents as the Full Court's order. Even if special leave to cross-appeal be necessary, it should be granted. It is not necessary to consider the other issues raised by the parties. The appellant should be ordered to pay the costs, if any, of the third respondent and the costs, if any, of the second respondent.

163 CRENNAN AND KIEFEL JJ. The second and third respondents to this appeal are members of a religious organisation called "Street Church". They wish to preach on the streets of the City of Adelaide. They say that their preaching is political in nature. Under a by-law said to have been made under the *Local Government Act* 1999 (SA) ("the 1999 Act"), the permission of the Corporation of the City of Adelaide ("the Council") is required for that activity.

164 By-law No 4 – Roads, which was gazetted on 27 May 2004[238], was entitled "FOR the management of roads vested in or under the control of the Council" ("the By-law"). Paragraphs 2.3 and 2.8 of the By-law provided at the relevant time[239]:

> "*Activities Requiring Permission*
>
> No person shall without permission on any road:
>
> …
>
> 2.3 *Preaching and Canvassing*
>
> preach, canvass, harangue, tout for business or conduct any survey or opinion poll provided that this restriction shall not apply to [a] designated area as resolved by the Council known as a 'Speakers Corner' and any survey or opinion poll conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum;
>
> …
>
> 2.8 *Distribute*
>
> give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter, provided that this restriction shall not apply to any handbill or leaflet given out or distributed by or with the authority of a candidate during the course of a Federal, State or Local Government Election or to a handbill or leaflet given

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238 *South Australian Government Gazette*, No 44, 27 May 2004 at 1384-1385.

239 By-law No 4 – Roads which was gazetted on 9 June 2011 is in different terms; but it too requires permission to preach, canvass or harangue on a road, other than a road which the Council has excluded from the restriction: *South Australian Government Gazette*, No 36, 9 June 2011 at 2034-2035, par 2.7.

> out or distributed during the course and for the purpose of a Referendum".

It is an offence to breach a by-law[240]. The maximum penalty for such an offence is $750[241].

165 A road is defined in s 4(1) of the 1999 Act as "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". The definition is wide enough to include pedestrian malls. The second and third respondents have preached in Rundle Mall in the City of Adelaide, which is principally a pedestrian precinct surrounded by retail stores. The consideration given to the operation of the By-law on this appeal is not restricted to that locality. Section 208(1) of the 1999 Act vests all public roads in the area of a council in that council. "Area" is defined to mean the area for which a council is constituted[242].

166 The second and third respondents brought proceedings in the District Court of South Australia[243] for a declaration that the abovementioned paragraphs of the By-law are invalid. They argued that the paragraphs are invalid because they are ultra vires the power to make by-laws given by the 1999 Act and because they place an unnecessary burden on their freedom of political and religious communication. It may at once be observed that the implied constitutional freedom of communication on political or governmental matters (referred to as "political communication" in these reasons), which has been recognised by this Court[244], is not a personal right. It operates as a restriction on

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240 By-law No 1 – Permits and Penalties, notified in the *South Australian Government Gazette*, No 44, 27 May 2004 at 1380, par 2.1. See also its successor, By-law No 1 – Permits and Penalties, notified in the *South Australian Government Gazette*, No 36, 9 June 2011 at 2028, par 4.1.

241 *Local Government Act* 1999 (SA), s 246(3)(g).

242 *Local Government Act* 1999, s 4(1).

243 *Local Government Act* 1999, ss 276(1)(f), 276(2)(d).

244 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25.

legislative power[245] and does so to support the constitutional imperative of the maintenance of representative government.

167 His Honour Judge Stretton of the District Court of South Australia declared the words "preach", "canvass" and "harangue" in par 2.3 and the whole of par 2.8 to be invalid and ordered that they be severed from the By-law on the basis that they exceeded the by-law making power conferred by the *Local Government Act* 1934 (SA) ("the 1934 Act") and the 1999 Act[246]. His Honour did not consider questions concerning the implied freedom[247]. The Full Court of the Supreme Court of South Australia (Kourakis J, Doyle CJ and White J agreeing) held that the By-law was within the power conferred by the 1934 Act, but that pars 2.3 and 2.8 were incompatible with the implied freedom and dismissed the appeal brought by the Council[248]. In the view of Kourakis J, members of a democratic society do not need advance permission to speak on political matters. The prohibition on disseminating a political message without first obtaining permission is, in his Honour's view, antithetical to the democratic principle underlying the implied freedom[249].

168 By a grant of special leave, the Attorney-General for South Australia appeals to this Court. The Council has been joined as first respondent to the appeal.

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245 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150, 168; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125, 149, 162, 166; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326; [1994] HCA 44; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4. Similarly in relation to the s 92 freedom, see *James v The Commonwealth* (1939) 62 CLR 339 at 361-362; [1939] HCA 9; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56, 59, 76.

246 *Corneloup v Adelaide City Council* (2010) 179 LGERA 1 at 43 [162]-[163], 44 [168].

247 *Corneloup v Adelaide City Council* (2010) 179 LGERA 1 at 45-46 [173]-[176].

248 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 365-366 [120], 375 [164], 376-377 [173].

249 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 374 [159].

The 1934 Act and the 1999 Act

169 Both the 1934 Act and the 1999 Act deal with the subject of local government and include grants of powers with respect to the making of by-laws for purposes associated with local government. Before considering the nature and extent of those powers, it is necessary to say something about the two Acts and their relationship.

170 The 1934 Act was not completely repealed when the 1999 Act came into effect. The *Local Government (Implementation) Act* 1999 (SA) repealed many, but not all, of the by-law making powers of the 1934 Act. Section 46 of that Act permits the further repeal of the 1934 Act, and although this power has been exercised[250], some by-law making powers under the 1934 Act remain in force. Amongst them is s 667(1) of the 1934 Act, which confers power to make by-laws for the "prevention and suppression of nuisances" (par 4 I), and "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants" (par 9 XVI). Section 668 of that Act provides that the 1999 Act "applies to and in relation to by-laws made under this Act as if they were by-laws made under [the 1999 Act]."

171 The specific by-law making powers of the 1999 Act are contained in ss 238 to 240. The subjects with which they are concerned are not numerous. They include the power to make by-laws controlling access to and use of local government land (s 238) and by-laws about the use of roads (s 239). Section 246(1)(a) appears in Ch 12 of the 1999 Act, titled "Regulatory functions", and provides more generally that, "[s]ubject to this or another Act, a council may make by-laws … that are within the contemplation of this or another Act". Sub-section (2) provides that a council cannot make a by-law that requires a person to obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act. Section 248(1)(a) provides that a by-law made by a council must not exceed the power conferred by the Act "under which the by-law purports to be made".

172 It remains to mention s 249(4) of the 1999 Act, which also features in the second respondent's Notice of Contention. It provides that a council must not make a by-law unless or until it has obtained a certificate signed by a legal practitioner certifying that, in the opinion of the practitioner, the council has the

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250 Local Government (Implementation) (Repeal of Certain Provisions) Proclamation 2003, notified in the *South Australian Government Gazette*, No 94, 2 October 2003 at 3702; Local Government (Implementation) (Repeal of Certain Provisions) Proclamation 2007, notified in the *South Australian Government Gazette*, No 48, 26 July 2007 at 3207.

power to make the by-law by virtue of a statutory power specified in the certificate and that the by-law is not in conflict with the 1999 Act.

The Notices of Contention

173 The following issues are raised by the second respondent's Notice of Contention and the third respondent's Amended Notice of Contention concerning the validity of the By-law by reference to the provisions of the 1934 and 1999 Acts relating to by-laws:

(i) whether the By-law contravenes s 248(1)(a) of the 1999 Act;

(ii) whether the restriction imposed on the making of by-laws by s 246(2) of the 1999 Act applies;

(iii) whether s 667(1) 9 XVI of the 1934 Act supports the By-law and whether the power there given to make by-laws should be construed narrowly;

(iv) whether there is to be seen as extracted from the power given by s 667(1) 9 XVI, powers to control conduct on roads because of the powers provided by ss 238(2)(a) and 239(1)(g) of the 1999 Act;

(v) if s 667(1) 9 XVI supports the By-law, whether the By-law is a reasonable and proportionate exercise of that power;

(vi) whether the By-law is valid given that not all of the requirements of s 249(4) of the 1999 Act were met.

The second respondent did not pursue a contention concerning the constitutionality of the creation of local government in South Australia.

Section 248(1)

174 Section 248(1) of the 1999 Act provides that a by-law must not exceed the power "conferred by the Act under which the by-law purports to be made". The third respondent points to the statement made in the Government Gazette with respect to the By-law, that it is a "By-law Made Under the Local Government Act 1999". The third respondent also points out that the appellant does not rely upon the by-law making powers of ss 238-240 of the 1999 Act as supporting the By-law, but rather relies on s 667 of the 1934 Act. It follows, in his submission, that the By-law is not authorised by the Act under which it purports to be made, the 1999 Act, and is therefore invalid.

175 The issue of the effect, if any, of stated reliance upon a wrong source of power arises most frequently in the area of administrative decision making. There is no reason why the principle relevant to the determination of that issue

cannot be applied to the exercise of delegated legislative powers, subject to the terms of the authorising legislation. It is a settled principle that an act purporting to be done under one statutory power may be supported under another statutory power[251]. A mistake as to the source of power does not render an act or decision invalid[252].

176 The words "purports to be made" in s 248(1) should not be read as rendering a statement about the source of the power for a by-law conclusive for the purposes of the sub-section. The words assume that a by-law will identify its legislative source and that it will do so correctly. Neither assumption is necessary for the purposes of the sub-section. Section 248(1) is concerned with the relationship between a by-law and the source of its power. It requires that the by-law be authorised and that its subject matter, scope and operation not extend beyond the limits of that authority. It is, as the first respondent maintains, a statutory expression of the common law principle that a by-law must be within the scope of the legislation which authorises it. The validity of a by-law in this context is to be tested by reference to all the powers given to a council to make a by-law.

177 The third respondent's contention also ignores provisions of the two Acts that connect a by-law made by reference to the 1934 Act with the 1999 Act. Section 668 of the 1934 Act states that the 1999 Act applies to by-laws made under the 1934 Act. Section 246(1)(a) of the 1999 Act empowers a council to make by-laws "within the contemplation of this or another Act" and thereby picks up a by-law contemplated by the 1934 Act. Therefore a by-law made by reference to s 667 of the 1934 Act is also one made under s 246(1)(a) and is one to which the 1999 Act applies.

Section 246(2)

178 Section 246(2) of the 1999 Act prohibits the making of a by-law which requires a person to obtain a licence from the council "to carry out an activity at a particular place", unless the council has express power to do so under an Act.

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251 *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184 per Fullagar J; [1954] HCA 31.

252 *Brown v West* (1990) 169 CLR 195 at 203 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 7; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 618 per Gummow J; [1997] HCA 38; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 362 [124] per Heydon J; [2003] HCA 28; *Australian Education Union v Department of Education and Children's Services* (2012) 86 ALJR 217 at 225-226 [34] per French CJ, Hayne, Kiefel and Bell JJ; 285 ALR 27 at 37; [2012] HCA 3.

The second respondent's reliance upon this prohibition as relevant to the By-law is misplaced.

179 The Full Court considered that s 246(2) pertains to licences to occupy particular places for the purpose of commercial or other business-like activities which are conducted continuously, regularly or frequently from those places[253]. This suggests that the "activities" to which the sub-section refers are those which may require something in the nature of town planning permission. If that be so, there would be no reason to restrict the range of such activities to those of a business-like nature. Nevertheless, the distinction sought to be drawn between activities contemplated by the sub-section and those to which the By-law refers is well made.

180 The object of s 246(2) is not particularly clear from its terms. It requires that there be an express power if a by-law is to require a person to obtain a licence to carry out an activity at a particular place. "Place" is not defined and may therefore extend to land and premises. It may be said that the purpose of the sub-section is to prevent a general by-law making power from being used for the proscribed purpose. This suggests that some other source of power for licensing is considered to be more appropriate. A power to regulate uses on particular land and in particular premises is one possibility.

181 It is not necessary to identify that power or those powers with any greater precision. It is sufficient to observe from the terms of the sub-section that the connection between the activity and the particular place at which it is to be carried out must be such as to necessitate permission. The same cannot be said of the connection between a person speaking or distributing materials and that person's location on a road. Those activities require permission because they are to be conducted on a roadway, not because they are conducted at a particular location. Further, the activity contemplated by s 246(2) as connected with the land or premises must be something more than the action of a person standing on a street or thoroughfare preaching, canvassing or distributing materials.

Section 667(1) 9 XVI

182 One of the second respondent's contentions relating to the by-law making power given by s 667(1) 9 XVI of the 1934 Act relies upon ss 238(2)(a) and 239(1)(b) of the 1999 Act as being in the nature of special powers relating to roads.

183 Section 238(2)(a) is an exception to the power contained in s 238(1), under which a council may make by-laws controlling access to and the use of

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253 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 341 [26].

local government land. Section 238(2)(a) provides that a by-law cannot be made under that power concerning access to, or the use of, a road. The terms of the provision do not prevent other sources of power authorising by-laws relating to roads, as the second respondent's submissions imply; they merely prevent a power to make by-laws relating to the subject of council lands from being used for the making of a by-law in relation to roads.

184 Section 239(1) provides for the making of by-laws about the use of roads. Paragraph (b) permits the making of such by-laws respecting the broadcasting of announcements or advertisements. Other by-laws concerning roads which are permitted by s 239(1) include those relating to public exhibitions or displays (par (c)); soliciting for religious or charitable purposes (par (d)); the movement of animals (par (f)); and any other use in relation to which the making of by-laws is authorised by regulation (par (g)). The second respondent's point is that because s 239(1) is intended to deal with the subject of roads, s 667(1) 9 XVI of the 1934 Act should be read not to include that subject. However, this contention assumes that s 239 is intended to be the only source of power concerning activities on roads. Such an intention is not evident from the limited topics with which it deals respecting the use of roads.

185 The third respondent also contends for a narrow operation of the power given by s 667(1) 9 XVI, to make by-laws "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants." It was this provision which the Full Court concluded was the source of the power to make the By-law[254]. The Full Court rejected the contention that the power there referred to is limited to matters which may be regarded as analogous to the subject matter of the specific by-law making powers provided by the two Acts.

186 The third respondent relies upon what was said by the Full Court of the Supreme Court of Victoria in *Leslie v City of Essendon*[255] respecting a power to make by-laws for the "good rule and government of the municipality". It was said that such a provision could not be regarded as an independent power[256] and could not extend the scope of the specific by-law making powers beyond the limits laid down by the legislature[257]. The contention that the power might be

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254 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 361 [98], 365-366 [120].

255 [1952] VLR 222.

256 *Leslie v City of Essendon* [1952] VLR 222 at 228 per O'Bryan J.

257 *Leslie v City of Essendon* [1952] VLR 222 at 247 per Coppel AJ.

seen to supplement the preceding specific powers was rejected. It was said that, as a matter of ordinary construction, it would not be possible to give the broadly stated power the full and natural meaning that its words would attract if it appeared in a statute without any specific powers preceding it[258]. But, as the Full Court in this case pointed out[259], by the time of the enactment of the *Local Government Act* 1928 (Vic), in which the provision was contained, there had been extensive enumeration of specific purpose powers. It was for that reason that the Court in *Leslie v City of Essendon* considered[260] that it should apply the reasoning of Isaacs J in *Melbourne Corporation v Barry*[261] and give the broad provision a narrow construction.

187 In *Lynch v Brisbane City Council*[262], Dixon CJ[263] gave a wide construction to s 36(3) of the *City of Brisbane Act* 1924 (Q), which provided that "[w]ithout limiting the generality of its powers, the Council shall have and possess express powers" in relation to all but a few enumerated matters, and then went on to extend those powers to "generally all works, matters, and things in its opinion necessary or conducive to the good government of the City and the wellbeing of its inhabitants." His Honour noted that in *In re Municipal Council of Kyneton*[264], which was decided in 1861, it was said that such a provision should be restrictively construed by reference to the ejusdem generis principle. However, his Honour observed, in s 36 there was no genus beyond that which appeared to belong to local government. And his Honour observed that there were other cases where like words had received a very wide interpretation. The words of s 36 were words traditionally used to characterise the powers of local government[265].

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258 *Leslie v City of Essendon* [1952] VLR 222 at 226 per O'Bryan J.

259 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 359 [91].

260 *Leslie v City of Essendon* [1952] VLR 222 at 226-228 per O'Bryan J, 238 per Sholl J, 247 per Coppel AJ.

261 (1922) 31 CLR 174 at 194; [1922] HCA 56.

262 (1961) 104 CLR 353; [1961] HCA 19.

263 With whom McTiernan and Fullagar JJ agreed.

264 (1861) 1 W & W (L) 11.

265 *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 362-363, referring to *Williamson v City of Melbourne* [1932] VLR 444; *Ex parte Pritchard* (1876) 14 SCR (NSW) 226; *Ex parte O'Neill* (1892) 13 LR (NSW) (L) 280; *Bremer v*

(Footnote continues on next page)

188 The third respondent submits that Dixon CJ nevertheless approved of the decision in *Leslie v City of Essendon*. It is not clear that this was the case. His Honour did say[266] that, insofar as the judgments provided the history of the use of the formulation, they "will repay study", but he then went on to distinguish the case. His Honour referred to the opening words of s 36(3), which were expressed not to limit the generality of the council's powers. His Honour said that the Court could not read down the words of the sub-section as if they were almost nugatory, and construed them as follows:

> "They give a power to lay down rules in respect of matters of municipal concern, matters that have been reasonably understood to be within the province of municipal government because they affect the welfare and good government of the city and its inhabitants. The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government."

189 In his reasons in the Full Court, Kourakis J surveyed the history of legislation in South Australia dealing with powers to be delegated to local government. His Honour observed that the 1934 Act, like the *Municipal Corporations Act* 1923 (SA) before it, conferred over 200 specific purpose powers to make by-laws on municipal corporations[267]. However, the 1999 Act and the *Local Government (Implementation) Act* contained very few specific powers relating to by-laws[268]. Those remaining in s 667 of the 1934 Act relate to: the licensing and regulation of hire vehicles and lodging houses; the prevention and suppression of nuisances; the regulation of the standing of horses and other animals in roads and public places and the control of such of them as might endanger persons by bolting; and the aforesaid general power of good rule and government. Those powers conferred by ss 238 to 240 of the 1999 Act concern access to and use of roads and other local government land for announcements, displays, soliciting, vehicle repairs, the movement of animals or the posting of bills or other papers.

District Council of Echunga [1919] SALR 288; *President &c of the Shire of Tungamah v Merrett* (1912) 15 CLR 407; [1912] HCA 63.

266 *Lynch v Brisbane City Council* (1961) 104 CLR 353 at 364.

267 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 353 [71].

268 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 353-354 [76].

190 In contrast to the legislation considered in *Leslie v City of Essendon*, such a regime, of limited specification of powers, suggests an intention to provide councils with a broad power to make by-laws for the good rule and government of a council's area and for the convenience, comfort and safety of its inhabitants, within the bounds referred to by Dixon CJ in *Lynch v Brisbane City Council*. Dixon CJ's judgment in that case highlights the importance of the statutory setting in construing a provision of this kind. Here, by comparison with *Leslie v City of Essendon*, it could hardly be said that the subjects of the by-law making powers could have been intended as a comprehensive list of the powers necessary for effective local government. The general words of s 667(1) 9 XVI could not be said to be restricted by those few which are specified. Section 667(1) commences with the words that a council may make by-laws "for all or any" of the purposes which follow and that stated in par 9 XVI is one such purpose. That purpose is expressed as a general purpose ("generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants") and should be understood to provide all of the powers necessary to local government to which Dixon CJ referred in *Lynch v Brisbane City Council*.

Non-compliance with s 249(4)

191 It is accepted by the appellant that the certificate obtained by the Council in respect of the By-law, as was required by s 249(4), was not signed by the legal practitioner who provided it. The certificate was provided electronically, in the prescribed form[269].

192 The Full Court held that the requirement for a certificate under s 249(4) was an essential condition of the validity of a by-law. However, it found that the requirement of the practitioner's signature was satisfied by reason of s 9 of the *Electronic Transactions Act* 2000 (SA)[270].

193 Whilst the practitioner's signature was not given on the electronic form of certificate, the practitioner's name appeared in bold type, accompanied by the words "legal practitioner". Underneath the text comprising the certificate, the text of the By-law was reproduced. On 3 May 2004, before the By-law was gazetted, the practitioner sent the certificate by email transmission to an officer of the Council who was authorised to receive it.

194 Section 9(1) of the *Electronic Transactions Act* provided, at the relevant time:

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269 See Local Government (General) Regulations 1999 (SA), reg 19.

270 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 342 [29].

> "If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if –
>
> (a) a method is used to identify the person and to indicate the person's approval of the information communicated; and
>
> (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and
>
> (c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a)."

As the Full Court held[271], correctly, the requirements of those provisions were met in this case. The provision of the certificate signified that the named legal practitioner held the view that the By-law was valid and subscribed to the opinion required by the certificate albeit that he had not signed it.

195 The second respondent, however, points to the fact, recorded by his Honour Judge Stretton, that what appeared to be only an unsigned and undated draft of the certificate was provided to the Council amongst the papers relevant to the approval of the By-law. This enabled only a moderate inference that it was a certificate signed by the solicitor, his Honour found[272]. Section 10(3) of the *Electronic Transactions Act* provides that the integrity of information contained in a document is maintained if, and only if, the information has remained complete and unaltered.

196 However, s 10(3) is expressed to be for the purposes of s 10. That section is concerned with the situation where a law permits a person to produce a document in electronic form. Sub-section (3) is directed to maintaining the integrity of the information conveyed by the original document. It is not concerned with the conveyance of a signature and does not operate as a qualification of what appears in s 9. The requirements of s 9 were met when the electronic communication of the certificate was made to the authorised person. It matters not, for these purposes, that the Council was later provided with an abridged version of that document.

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271 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 342 [29], 371 [150].

272 *Corneloup v Adelaide City Council* (2010) 179 LGERA 1 at 26 [99].

197 This point of contention fails.

The By-law as an exercise of power

198 A test of reasonableness has been applied to the making of by-laws by local authorities under statutory power for a long time. In earlier decisions the test was severely constrained. It was thought that an attack on a by-law on the ground that it was unreasonable was not likely to succeed, because it was assumed that the local authority was to be the sole judge of what was necessary, subject only to the qualification that a by-law might be held invalid if it were such that no reasonable person could pass it[273].

199 The approach which is now adopted is that of Dixon J in *Williams v Melbourne Corporation*[274]. There, his Honour pointed out that it may not be enough to consider whether, on its face, a by-law appears to be sufficiently connected to the subject matter of the power to make it. The true character of the by-law, its nature and purpose, must be considered in order to determine whether it could not reasonably have been adopted as a means of attaining the purposes of the power. It will often be necessary to examine the operation of the by-law in the area in which it is intended to apply.

200 The by-law there in question regulated the driving of cattle through the streets of the City of Melbourne. The power said to support it was a power for the regulation of traffic. Dixon J said that the ultimate question was whether, when applied to conditions in the city, the by-law involved such an actual suppression of the use of the streets as to go beyond any restraint which could reasonably be adopted for the purpose of preserving the safety and convenience of traffic in general[275].

201 Dixon J's statement of a test of reasonableness bears an obvious affinity with a test of proportionality. So much has been recognised in later cases. In *South Australia v Tanner*[276], Wilson, Dawson, Toohey and Gaudron JJ equated the test with that of reasonable proportionality applied by Deane J in *The*

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273 *Kruse v Johnson* [1898] 2 QB 91 at 99-100; *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 982-983 per Griffith CJ; [1907] HCA 11.

274 (1933) 49 CLR 142 at 155; [1933] HCA 56; *South Australia v Tanner* (1989) 166 CLR 161 at 175 per Brennan J; [1989] HCA 3.

275 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 156.

276 (1989) 166 CLR 161 at 165.

Tasmanian Dam Case[277]. In *Coulter v The Queen*[278] the relevant criterion of validity was said to be whether the impugned rules "are a reasonable means of attaining the ends of the rule-making power", by reference to *Williams v Melbourne Corporation*. An analysis of the relationship between means and ends necessarily raises questions similar to those considered in the context of the implied freedom of political communication.

Proportionality in the *Lange* test

202 These reasons should be read in conjunction with the reasons of Crennan, Kiefel and Bell JJ in *Monis v The Queen*[279] so far as they concern the *Lange*[280] test. As is there explained[281], the first enquiry of the second limb of the *Lange* test concerns the relationship between a valid legislative object and the means provided for its attainment. The means must be proportionate to that object. If the means employed go further than is reasonably necessary to achieve the legislative object, they will be disproportionate and invalid for that reason. A test of reasonable necessity has been adopted by the Court in relation to the freedoms spoken of in s 92, in *Betfair Pty Ltd v Western Australia*[282]. It may consistently be applied with respect to the implied freedom of political communication.

203 The third respondent accepts that the By-law had a legitimate purpose. That purpose is evident. It concerns the safety and convenience of users of roads. As has been pointed out earlier in these reasons, "road" has a wide meaning and extends to any vehicular or pedestrian thoroughfare. The use of a road may involve the passage of vehicles of various kinds and also the passage of pedestrians. The number of activities listed in the By-law as requiring permission is indicative of potential problems which might be created for road users. In addition to preaching and canvassing, such activities include: repairing vehicles; collecting donations; amplifying sound for broadcasting announcements or advertisements; riding, leading or driving livestock; distributing printed matter; and erecting structures such as fences, hoardings, ladders and trestles.

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277 *The Commonwealth v Tasmania* (1983) 158 CLR 1 at 260; [1983] HCA 21.

278 (1988) 164 CLR 350 at 357; [1988] HCA 3; see also *Ousley v The Queen* (1997) 192 CLR 69 at 114 per McHugh J; [1997] HCA 49.

279 [2013] HCA 4.

280 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

281 *Monis v The Queen* [2013] HCA 4 at [280].

282 (2008) 234 CLR 418 at 477 [102]-[103], 479 [110]; [2008] HCA 11.

The By-law and its requirement of permission recognised a need to regulate these activities in order to accommodate interests which may conflict with the safety, convenience and comfort of road users.

204 The Full Court did not consider the requirement to obtain permission for preaching, canvassing or distributing matter to be a disproportionate response to the issues presented by the activities in question. It was a measure which afforded an orderly system by which the claims of those wishing to disseminate their opinions could be balanced against the impacts upon the comfort, convenience and safety of other road users. It permitted what may be a necessary allocation of time and space between those wishing to express their opinions[283].

205 The third respondent points out that the By-law was not couched in terms of regulation but was a prohibition coupled with a discretion to lift the ban, possibly upon conditions. The third respondent is strictly correct, in that the By-law effected a prohibition, relevantly, upon preaching, canvassing and distributing matter absent permission. A distinction is sometimes drawn between prohibition and regulation in the context of limits upon powers to make by-laws[284], but here there is no suggestion that the power is limited to regulation. More to the point is whether something less than a prohibition, coupled with a discretion to grant permission, would have been sufficient to achieve the objects of the By-law.

206 In *Lange v Australian Broadcasting Corporation*[285], reference was made to *Australian Capital Television Pty Ltd v The Commonwealth*[286] ("*ACTV*"), where a law was held to be invalid because there were other, less drastic, means by which the objectives of the law could be achieved[287]. This accords with the test of reasonable necessity adopted in *Betfair Pty Ltd v Western Australia*[288], by

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283 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 366-367 [126]-[127].

284 See, for example, *Country Roads Board v Neale Ads Pty Ltd* (1930) 43 CLR 126 at 133; [1930] HCA 5; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 752, 754-755; [1937] HCA 15; *Yanner v Eaton* (1999) 201 CLR 351 at 372 [37]; [1999] HCA 53.

285 (1997) 189 CLR 520 at 568.

286 (1992) 177 CLR 106.

287 See also *Coleman v Power* (2004) 220 CLR 1 at 50 [93] per McHugh J; [2004] HCA 39.

288 (2008) 234 CLR 418 at 477 [102].

reference to *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[289]. A necessary qualification to such a test is that the alternative means are equally practicable[290].

207 The Full Court in this case was unable to identify any alternative measures which would be equally practicable[291]. Neither was the third respondent able to do so. The second respondent attempted to draft a suggested by-law by which preaching could otherwise be regulated, but that attempt served only to highlight the general nature of the objectives of the By-law and the difficulty of prescribing, in advance, whether, when and upon what conditions an activity might be conducted. Clearly, so much will depend upon the location of the activity and those who might be affected by it.

208 It is difficult to conceive how the use of roads could be regulated, so as to meet the legitimate objectives of the By-law, other than by a system which requires permission for the activity in question. The third respondent points out that the discretion to grant or refuse permission is very broad and is not limited to specified criteria. The discretion, however, is not at large. It is necessarily limited to the purposes for which the discretion is conferred[292]. In any event the question of the width of the discretion is more relevant to the question of the extent to which the implied freedom of political communication is likely to be burdened by the operation of the By-law.

The By-law and the burden on the implied freedom – the *Lange* test

209 The real question in this case is as to the extent to which the By-law, in its terms or operation, effects a restriction or burden on the implied freedom. The first limb of the *Lange* test enquires whether the impugned law or regulation effectively burdens freedom of political communication[293]. It is not disputed

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289 (1975) 134 CLR 559 at 608; [1975] HCA 45.

290 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; [1980] HCA 40; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438]; [2010] HCA 46.

291 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 367 [128].

292 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758; *Wotton v Queensland* (2012) 246 CLR 1 at 9-10 [9]-[10]; [2012] HCA 2.

293 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Monis v The Queen* [2013] HCA 4 at [276].

here that the requirement of permission effects a burden on some communications of a political kind sought to be made in the process of preaching or canvassing. It is therefore necessary to apply the tests in the second limb.

210 The second limb of the *Lange* test requires that the By-law be proportionate to its purposes. That question has been dealt with. The second limb of the *Lange* test also requires that the By-law be proportionate in its effects upon the system of representative government which is the object of the implied freedom. As is explained in *Monis v The Queen*[294], this involves an assessment of the extent to which the law is likely to restrict political communication. This enquiry is evident in the conclusion stated in *Lange*, that the law there in question did not impose an "undue burden" on the freedom[295]. The terms of that conclusion recognise that some burden may be lawful[296]. This follows from an acceptance that the implied freedom is not absolute[297].

211 It is necessary to consider a number of matters in connection with this enquiry.

212 The third respondent points to the potential for the By-law to have a wide effect on political communication, by reference to the areas in respect of which permission to preach, canvass or distribute materials is required. Because "road" is defined widely, it includes many places which the public may access, including areas at or near many public buildings where political demonstrations might be expected to be made. This may be accepted. It may also be observed, in this regard, that at the relevant time the area referred to in the By-law as a "Speakers Corner" had not been designated. On the other hand, the By-law is limited to roads and cannot effect any restriction upon political communications in other public places.

213 The discretion on the part of the Council to refuse permission, or to subject a grant to conditions, is wide, as the third respondent points out. It is not, however, at large and is circumscribed by the purposes of the By-law. In

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294 [2013] HCA 4 at [281] per Crennan, Kiefel and Bell JJ.

295 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575.

296 *Monis v The Queen* [2013] HCA 4 at [350].

297 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77, 94-95; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142-144, 159, 169, 217-218; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299, 336-337, 363, 387; *Monis v The Queen* [2013] HCA 4 at [267].

addition to any internal review by the Council itself[298], the Council's decision is subject to judicial review by the Supreme Court of South Australia, although the costs of and potential delay in such procedures may act as a deterrent for some.

214 In argument, reliance was placed upon the statement in *Wotton v Queensland*[299] that a discretionary power must be exercised in accordance with any applicable law, including the Constitution. In *Wotton v Queensland*[300], reference was made to the judgment of Brennan J in *Miller v TCN Channel Nine Pty Ltd*[301], where his Honour said that a general discretion was not to be exercised in a manner foreign to its purposes or so as to discriminate against interstate trade, contrary to s 92 of the Constitution.

215 It was not suggested by his Honour, nor in *Wotton v Queensland*, that the existence of the obligation to act in accordance with constitutional requirements created an assumption that a discretionary power will be valid because the obligation would be fulfilled. In the judgment of Brennan J, and in the joint reasons in *Wotton v Queensland*[302], it was recognised that a discretion must be exercised in accordance with the purposes of the power. It follows from *Lange* that where a purpose of a discretionary power requires some restriction to be placed upon a freedom which the Constitution recognises, the question of its validity falls to be determined by the tests in *Lange*, and they involve proportionality analysis.

216 More relevant to the legislation in *Wotton v Queensland* was what Brennan J had to say in *Miller v TCN Channel Nine Pty Ltd*[303] respecting a discretionary power which, in its own terms, is so qualified as to confine the area for its exercise to constitutional requirements. In such a case, his Honour said, the power will be valid. In *Wotton v Queensland*, one of the statutory provisions conditioned the exercise of the discretion to what was reasonably necessary,

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298 *Local Government Act* 1999, s 270(1) requires councils to establish procedures for the review of council decisions.

299 (2012) 246 CLR 1 at 9 [9], 13-14 [21]-[24].

300 (2012) 246 CLR 1 at 9-10 [10].

301 (1986) 161 CLR 556 at 613-614; [1986] HCA 60.

302 (2012) 246 CLR 1 at 9 [9].

303 (1986) 161 CLR 556 at 613-614, quoting *Inglis v Moore (No 2)* (1979) 25 ALR 453 at 459.

thereby importing a requirement of proportionality into the exercise[304]. This was considered to be an important factor in favour of validity[305]. There is no similar condition expressed with respect to the discretion conferred by the By-law. It was not suggested in argument that such a condition could be implied from what was said about the limits to the by-law making powers in *Williams v Melbourne Corporation*[306].

217 Paragraphs 2.3 and 2.8 of the By-law are not directed to any restriction upon political communication. To the contrary, they except from its operation any survey or opinion poll conducted by or with the authority of a candidate, and the distribution of any handbill or leaflet by or with the authority of a candidate, during the course of a federal, State or local government election or referendum. And, to the extent that they will burden political communication, they will do so only indirectly[307]. This is a matter of no small importance, for a law which only incidentally restricts the freedom is more likely to satisfy the *Lange* test[308].

218 The Full Court considered that the By-law could have excluded political communication from its scope, when concluding that the By-law was incompatible with the implied freedom[309]. This underestimates the difficulty inherent in defining what will qualify as a political communication[310]. Further, the Full Court did not suggest that the By-law could do so and yet achieve its objects. It could not be seen as equally practicable to allow persons to conduct political speeches and distribute political material without restriction and yet secure the safe and convenient use of roads.

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304 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [32], 34 [91].

305 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [33], 34 [92].

306 (1933) 49 CLR 142.

307 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30], 30 [78]; *Monis v The Queen* [2013] HCA 4 at [342] per Crennan, Kiefel and Bell JJ.

308 *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30].

309 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 374-375 [163].

310 *Monis v The Queen* [2013] HCA 4 at [335].

219 It must be accepted that there will be occasions when the denial of permission to preach, canvass or distribute materials may prevent a political communication. However, the By-law is not directed to such a communication and has this effect only incidentally and only when it is necessary to achieve the object of securing the safe and convenient use of roads. It does not prevent a person speaking at every place to which the public may resort, but rather only those areas which come within the definition of a road. Given that the discretion must be exercised conformably with the purposes of the By-law, it may be assumed that permission will be denied only where the activities in question cannot be accommodated having regard to the safety and convenience of road users.

220 It must be recalled that the extent of the burden imposed by the By-law is not assessed by reference to its effects on the second and third respondents. There is no personal right of political communication. The extent of the burden is assessed by reference to the need to maintain the system of representative government which the Constitution mandates. The freedom requires that political communication not be restricted to such an extent that it is compromised as being free. Some degree of burden is permitted unless it is, as was said in *Lange*, "undue"[311]. It cannot be concluded that the operation of the By-law will have such an effect.

Incompatibility?

221 The *Lange* test requires that the object of the By-law and the means that it employs be tested for compatibility with the constitutional imperative of the maintenance of the system of representative government and the freedom which supports it[312]. The By-law is not directed to communications which the freedom seeks to protect. It concerns a different subject. Its object is to ensure the safety and convenience of road users. Such an object is not incompatible with the freedom; neither are the means by which that object is achieved.

222 The Full Court held that the requirement of permission is incompatible with the freedom[313]. It is evident from the statement that "[m]embers of a democratic society do not need advance permission to speak on political matters"

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311 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575; *Monis v The Queen* [2013] HCA 4 at [282].

312 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Monis v The Queen* [2013] HCA 4 at [277], [281].

313 *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 374 [159].

that the Full Court considered that the freedom is in the nature of a personal right and one which is absolute. With respect, this involves a misunderstanding of the freedom. It operates as a restriction upon legislative power, not as a right, and is not absolute. Some restriction upon the freedom may be permissible. Whether legislation exceeds the limits of that constraint, and is therefore invalid, falls to be determined by reference to the test in *Lange*, as explained in *Monis v The Queen*.

Conclusion and orders

223 The appeal should be allowed and the orders of the Full Court of the Supreme Court and the District Court of South Australia set aside. In lieu thereof there should be orders in the terms proposed by Hayne J. No orders for costs are sought.

224 BELL J. I agree with the orders proposed by Hayne J. I am in substantial agreement with the reasons of Crennan and Kiefel JJ for the making of those orders save with respect to the rejection of the second and third grounds of the third respondent's Amended Notice of Contention. These grounds contended that the impugned provisions are invalid because they are not a reasonable or proportionate exercise of the power under the *Local Government Act* 1934 (SA). I agree with Hayne J's reasons for rejecting each of these contentions.