

High Court 'Win' for Local Government: There'll be dancing in the streets (unless prohibited by a by-law!)

Yesterday the highly anticipated judgment in *Attorney-General (SA) v Corporation of the City of Adelaide* (otherwise known as the 'Preachers' case') was handed down by the High Court. The message from the High Court is that whilst the by-law weighs upon the implied freedom of speech it does not infringe it. The preachers are allowed to preach but the Council has the right to control where and when they do so.

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These proceedings arose following a history of Court action, in south Australia. Firstly, in the District Court to try the validity of provisions of the City of Adelaide's Roads By-law which sought to regulate preaching and similar activities, including distributing handbills, on roads within the Council's area.

The District Court first ruled the by-law provisions to be invalid on the basis the Council did not have power to regulate such activities on roads. The Council appealed this decision to the Full Court of the Supreme Court, which found the by-law provisions invalid for a different reason – because of inconsistency with the implied freedom of political communication embedded in the Australian Constitution.

The Attorney-General appealed the matter to the High Court. The High Court examined the 'convenience' power contained in section 667(1)(9)(XVI) of the *Local Government Act 1934*, which confers power on councils to make by-laws "generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants". The appeal stemmed from the contentions raised by the Corneloup brothers that the by-law provisions are invalid due to procedural error, because they are outside the scope of the Council's by-law making powers and, they are not a reasonable and proportionate exercise of the convenience power, not least because they infringe the implied constitutional freedom of political communication.

The High Court rejected each of these arguments and found:

- the convenience power must not be narrowly construed. Rather, the power is to be broadly interpreted within its statutory context;
- the convenience power can be relied upon to make by-laws about matters relevant to Local Government. The determination as to what these matters include is to be made having regard to the

Local Government Act and the other legislation that confers power on councils;

- the management of roads falls within the realm of Local Government responsibilities (i.e. it is a matter of municipal concern). The convenience power, therefore, supports a by-law governing whether and when there may be activities on a road which may diminish the convenience of others in using the road;
- the by-law provisions restrict forms of political communication. However, the question is whether the by-law is proportionate to its purposes. In this regard, the by-law provisions prevent obstructions to roads, they are not directed to restrict political communication. Any burden on communication, is indirect and only when it is necessary to achieve the safe and convenient use of roads. In this regard the High Court reinforced and accepted Kourakis' CJ view that "it could not be seen as equally practicable to allow persons to conduct political speech and distribute political material without restriction and yet secure the safe and convenient use of roads";
- the High Court confirmed Kourakis' CJ view that the requirement to obtain a permit for certain activities regulated under a by-law is within the scope of the by-law making powers conferred upon councils.

Councils that have similar provisions in their by-law prohibiting preaching and/or the distribution of handbills subject to a grant of permission (i.e. a permit) can now feel safe in lawfully enforcing these provisions. Importantly, where a permit is sought to conduct such activities, whether on a road or on Local Government land, permission must only be refused where the activities in question cannot be accommodated having regard to the safety and convenience of users of the relevant land. Of course, it is necessary for councils to record reasons to justify any refusals on these grounds to ensure their position is defensible and withstands scrutiny if challenged.

Finally, whilst the High Court has confirmed the broad power to regulate activities on Local Government land and roads under a by-law, our view is that the power to make by-laws in relation to private land in reliance upon the convenience (or nuisance) power is exceptionally limited. This is necessary to ensure Local Government does not improperly burden the rights and responsibilities of individuals in the use of their own land.

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