

SUPREME COURT OF QUEENSLAND

CITATION: *Sellars v Coleman* [2000] QCA 465

PARTIES: **COLEMAN, Patrick John**
(appellant/appellant)
v
SELLARS, Nicholas Andrew
(respondent/respondent)

FILE NOS: CA No 50 of 2000
DC No 93 of 1999

DIVISION: Court of Appeal

PROCEEDING: Appeal against conviction

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 21 November 2000

DELIVERED AT: Brisbane

HEARING DATE: 12 September 2000

JUDGES: Pincus JA, Muir and Jones JJ
Separate reasons for judgment of each member of the Court;
Pincus JA and Jones J concurring as to the orders made, Muir J dissenting

ORDER: **Appeal against conviction dismissed**

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – OPERATION OF THE COMMONWEALTH AND THE LAWS OF THE COMMONWEALTH – GENERAL PRINCIPLES – implied constitutional rights – freedom of communication about matters relating to government and politics – appellant convicted of taking part in public address contrary to Council By-laws – whether By-law invalid as contravening freedom of communication implicit in Constitution – characterization of By-law – whether By-law is reasonably and appropriately adapted to the fulfilment of a legitimate end, ie what is necessary for effective operation of system of representative and responsible government – whether restriction on freedom proportionate to legitimate aim of By-law.

The Commonwealth of Australia Constitution Act 1900 (Imp)

The Parliamentary Privileges Act 1987 (Cth), s 16(3)
Townsville City Council By-laws, 2, 8, 11, 12, Chapter 39

Ackroyd v McKechnie (1986) 161 CLR 60, referred to
Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106, referred to
Boyd v Carah Coaches Pty Ltd (1979) 145 CLR 78, referred to
Cunliffe v The Commonwealth (1994) 182 CLR 272, referred to
Frisby v Schulz & Braun 487 US 474 (1988), referred to
Hughes & Vale Pty Ltd v New South Wales (1954) 93 CLR 1, referred to
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, applied
Levy v The State of Victoria (1997) 189 CLR 579, applied
Nationwide News Pty Ltd v Wills (1992) 177 CLR 1, referred to
Perry Education Association v Perry Local Educator's Association 460 US 37 (1983), referred to
Rann v Olsen [2000] SASC 83, 172 ALR 395, referred to
Schad v Borough of Mount Ephraim 452 US 61 (1981), referred to
Stephens v West Australian Newspapers Ltd (1993-4) 182 CLR 211, referred to
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, referred to

COUNSEL:	J A Griffin QC with N H Ferrett for the appellant W A Clark for the respondent N M Cooke QC with D Williams for the Townsville City Council, intervening in support of the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent King & Company for the Townsville City Council, intervening in support of the respondent

- [1] **PINCUS JA:** The circumstances giving rise to this appeal are set out in the reasons of Muir J. The appellant was convicted of breaching a Townsville City Council by-law which provided that "[n]o person shall ... take part in any public demonstration or any public address ... in or upon a pedestrian mall without a permit in writing from the Council". The only question is whether the by-law under which the appellant was prosecuted is constitutionally valid, insofar as it purports to prohibit conduct such as that of the appellant. Witnesses said that the appellant's speech referred to various political matters – to quote the magistrate's reasons – "bills of right, freedom of speech and other subjects including mining, land rights and the Wik decision amongst others".

- [2] The case is about an implication in the Constitution. There is room for argument about the extent to which the effect given to the Constitution should extend beyond the strict meaning of its language. But where, first, there is no such strict meaning or, secondly, the Constitution does not deal with a topic which is basic to its framework, the courts have not merely a right but a duty to make implications, and if necessary large ones. An example of the first category I have mentioned is s 92, which is little more than a political slogan ("... absolutely free" – from what?) and an example of the second is the problem of the extent to which Commonwealth power may be used to expunge, for practical purposes, powers the Constitution intended the States to have. The right to freedom of speech is in the second category; to preserve the system of government embodied in the Constitution there is a need to protect freedom of discussion. For example, no-one could seriously defend a law purporting to prohibit electronic (more accurately, photonic) communication of criticism of the Federal Government. Our system of government could hardly survive such a prohibition. But it can survive restrictions on public addresses in the Flinders Mall; more generally, the relevant implication does not extend, in my respectful opinion, to restriction on communication which is not directed against political discussion and leaves available ample means of engaging in such discussion.
- [3] By making a public address, as he did, the appellant took part in a public address and so was, subject to the constitutional objection, properly convicted under a by-law saying that "no person shall ... take part in any public address". What is not quite so clear is whether members of a speaker's audience are, by passively listening to the address, taking part in it. But it is my respectful opinion that the by-law should not be so construed as to catch such an activity. It seems unlikely that there was intended to be a distinction made between persons within earshot of the speaker who could be proved to be attending to the speech and those in the same vicinity who had their attention elsewhere.
- [4] Other questions of construction of the by-law might arise, in particular whether a person holding a placard attacking or defending the speaker, or a heckler, would be guilty of taking part in the address; but it is not necessary precisely to delimit the scope of the criminal liability intended to be created by the by-law, in order to solve the problem of its validity.
- [5] In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court reviewed its previous decisions on the subject and said that provisions of the Constitution "necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors" (560). The freedom protects "political discussion in relation to all levels of government including State government": *Levy v Victoria* (1997) 189 CLR 579 at 596.
- [6] In *Lange* it was also held that the law burdening freedom of communication about government or political matters would be valid if "reasonably appropriate and adapted to serve a legitimate end" (567). It appears to me that at least some of the judges in *Levy's* case enunciated tests of validity different from that laid down in *Lange*; however, I have been unable to derive a ratio from *Levy*, on this point, supported by a majority of the *Levy* judges. I propose to apply the *Lange* test, as being binding on this Court.

- [7] We rejected an application made by Mr Cooke QC, who, leading Mr D Williams, was allowed to intervene on behalf of the Council, to adduce further evidence. The purpose of such evidence was to support the conviction, by showing that in various respects the Council had acted reasonably in controlling public addresses under its by-laws. In my view, if the by-law was unlawful when it was made and, subsequently, Council acted impeccably in relation to it, that would not validate the by-law. For example, if the Council freely and promptly granted written permits to take part in public addresses in the malls, that would not matter if the by-law was invalid at its inception. I note that in s 92 cases it has been consistently held that "[i]f I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition": *Hughes & Vale Pty Ltd v New South Wales* (1954) 93 CLR 1 at 26; *Boyd v Carah Coaches Pty Ltd* (1979) 145 CLR 78 at 84, *Ackroyd v McKechnie* (1986) 161 CLR 60 at 68.
- [8] The by-law, if it is to be upheld, must therefore be regarded as if it were an absolute prohibition. It is my opinion that, so regarded, the by-law is constitutionally valid. The *Lange* test – that the law must be "reasonably appropriate and adapted to serve a legitimate end" – requires one to deduce the "end" or purpose of the law. If the purpose is not "legitimate", an example of illegitimacy being a purpose of suppressing political discussion, then the law is invalid. If the purpose is legitimate, then the law may still be bad, as going further in the direction of suppression of communication than could be thought to be appropriate or adapted to the law's purpose.
- [9] In the present case there is no reason to think that the purpose of the by-law was other than legitimate; it was not made for the purpose of burdening "freedom of communication about government or political matters". To reach such a conclusion, one does not take evidence from those who made the law, but simply considers the likely purpose of the law, on its face. The mall in question is a minute part of the area governed by the Council and was established to provide comfortable access on foot to the premises which line it. The purpose of a prohibition of public addresses in the malls is likely to have been to preserve those wishing to use them from being harangued about any matters – political or otherwise – by public addresses. I refer to and agree with the remarks made by Muir J (par [15]) which are relevant to this point.
- [10] The real question in the case, then, is whether the law is "reasonably appropriate and adapted to serve" the legitimate end. Does it, trying to achieve that end, too greatly burden freedom of communication about government or political matters? *Lange* does not define the degree of suspicion or harshness which must be adopted, in scrutinizing such a law; but the High Court could hardly have intended that Australian courts should readily conclude that laws passing the "legitimate end" test are invalid because, to put it shortly, they are unreasonable.
- [11] An example – some might think an extreme one – of the hesitancy which should, in my view, be the proper approach to invitations to strike out laws not having the purpose of interfering with political discussion is the decision in *Rann v Olsen*, [2000] SASC 83, 172 ALR 395. There a five-judge Court, presided over by (with respect) a Chief Justice with considerable experience in constitutional matters, substantially upheld the validity of s 16(3) of the *Parliamentary Privileges Act* 1987 (Cth), which reads in part as follows:

"In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

...

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament".

- [12] Since any evidence, question, submission or comment in a court or tribunal would ordinarily have the purpose of leading to **some** conclusion – otherwise it would presumably be irrelevant – s 16(3) goes, as a practical matter, close to saying that Parliamentary proceedings may not be discussed in any court or tribunal. The qualification one must make to this is that, if it can be shown that the question, statement, submission or comment about Parliamentary proceedings is not intended to lead (either by itself or with other matters) to any conclusion whatever, then it is lawful. Mr Olsen publicly accused Mr Rann of having lied in a Parliamentary proceeding and Mr Rann sued for defamation. It was held that Mr Olsen was validly prevented by s 16(3) from trying to prove that his accusation was true – a judicial conclusion which would tend to inhibit free discussion of Parliamentary matters.
- [13] I have found assistance in United States authority concerning laws alleged to breach the First Amendment's guarantee of freedom of speech. The Supreme Court applies an elaborate set of rules by which to judge validity of laws of this kind. These rules distinguish between "content-based" and "content-neutral" prohibitions, the latter being more leniently judged. Here the Council's by-law is content-neutral. With respect to content-neutral prohibition, it is relevant to consider whether there are left "open ample alternative channels of communication": *Perry Education Association v Perry Local Educator's Association* 460 US 37 (1983) at 45. That doctrine has been applied to laws of the present sort – i.e. local authority by-laws. In *Schad v Borough of Mount Ephraim* 452 US 61 (1981), a by-law had the effect of prohibiting a wide variety of activities; what was in issue was a certain sort of vulgar entertainment. Apparently because of the breadth of the prohibition, it was held invalid, the court noting that adequate alternative channels of communication had not been left open: 76. Then in *Frisby v Schultz & Braun* 487 US 474 (1988), a by-law prohibiting picketing "before or about the residence or dwelling of any individual in the Town of Brookfield" was held valid. The court was of the view that other avenues of communication were sufficiently left open and took the view that the by-law could be interpreted as having the purpose of serving the interests of protecting the privacy of the home.
- [14] The fact that the by-law is limited in its operation to pedestrian malls greatly assists in meeting the *Lange* test. In my opinion this is the critical point; a by-law prohibiting public addresses within a very limited area, leaving plenty of opportunity for making such addresses in other suitable places, is not invalid under the *Lange* test, provided that it can be seen that the end in view is a legitimate one.
- [15] In reaching that conclusion I have been assisted by the United States authorities to which I have referred, but even in the absence of those cases it would seem to me to be going too far to hold that local authorities are powerless to prevent by by-laws

public addresses in small but busy areas, being by-laws made, not to inhibit political discussion, but for other and legitimate purposes. Despite the able argument advanced by Messrs Griffin QC and Ferrett for the appellant, I prefer the conclusion contended for by Mr Clark for the respondent and by Messrs Cooke QC and Williams for the intervener.

- [16] I would dismiss the appeal but without costs.
- [17] **MUIR J:** The appellant was convicted in the Magistrates Court of the offence of taking part in a public address in the Flinders Pedestrian Mall, Townsville, without a permit in writing, contrary to the provisions of Chapter 39 of the Townsville City Council By-laws. He was fined \$300 and allowed three months within which to pay. After an unsuccessful appeal to the District Court, he was given leave to appeal to this Court, such leave being restricted to the issue of whether the Council By-law is invalid in light of the constitutionally guaranteed freedom of speech.
- [18] The Flinders Mall runs between and at right angles to Denham and Stanley Streets and cuts across Stokes Street. The conduct of the appellant, the subject of the charge, took place at mid-morning on a Sunday when, in accordance with established custom, market stalls were set up and in use in the mall. The appellant, whilst in the mall and brandishing a flag, stood on the concrete rim of a fountain and then on concrete tables in order to loudly address passers-by and a captive audience in nearby stalls for some 15 minutes.

The issue for determination

- [19] Mr Griffin QC who led Mr Ferrett for the appellant, submitted that the part of the by-law which the appellant was found to have contravened was invalid as infringing the freedom of communication held to be implicit in the Constitution by a number of decisions of the High Court.¹
- [20] The Crown, for whom Mr Clark appeared, and the Townsville City Council (which had been given leave to intervene) represented by Mr Cooke QC leading Mr D Williams, accepted the existence of an implied freedom of communication about government or political matters, that By-law 8(2) imposed an effective burden on freedom of communication about government or political matters and that the appellant's speech concerned such matters. However, both respondents contended, in reliance on a principle expressed in *Lange v Australian Broadcasting Corporation*,² that the By-law was saved from invalidity by being reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which was compatible with the maintenance of the constitutionally prescribed system of representative government.
- [21] The appellant sought to meet such arguments by submitting that –

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Levy v The State of Victoria* (1997) 189 CLR 579.

² (1995-1996) 186 CLR 302 at 561, 562.

- (a) the authorities establish that, prima facie, legislation which is inconsistent with the right of freedom of communication is invalid;
- (b) a person seeking to uphold the validity of such inconsistent legislation has the onus of establishing that it complies with the *Levy* test;
- (c) the onus of proof had not been discharged by the respondents.

[22] It was submitted, in particular, that the prosecuting authority failed to lead evidence at the trial to show that there were places in Townsville “more suitable for public expression of viewpoint on political matters than the Flinders Mall”. It was submitted also that the nature of pedestrian malls made them inherently useful as venues for the effective exercise of free speech.

By-law 8 of Chapter 39 of the By-laws of the Townsville City Council

[23] The appellant was found by the learned magistrate to have infringed By-law 8(2)(e) and submissions on appeal had that provision as their principal focus. The remainder of By-law 8, however, as the parties acknowledged in argument, has a direct bearing on the question for determination.

[24] The By-law provides –

- “(1) This By-law does not apply to the setting up and use of booth for religious, charitable, educational or political purposes or of a booth to be used at or near a polling booth, for, or for a meeting in connection with, an election in respect of either House of the Commonwealth Parliament, the Legislative Assembly or a Local Authority.
- (2) No person shall –
 - (a) sell or offer for sale any goods;
 - (b) display any goods for sale;
 - (c) carry on any business;
 - (d) perform any form of entertainment;
 - (e) take part in any public demonstration or any public address;
 - (f) use or permit or suffer to be used any megaphone, sound amplifier, radio, loud speaker, gramophone (sic) or the like or any other means of mechanically, electrically or artificially increasing or reproducing sound; or
 - (g) take or have or to be in control of anything whatsoever whether animate or inanimate used or which is apparently designed or capable of being used for or in connection with any of the purposes enumerated in paragraphs (a) to (f) (both inclusive) of this Clause of this By-law,
 in or upon a pedestrian mall without a permit in writing from the Council.
- (3) A person who desires to obtain a permit for the purposes of this By-law shall make application in writing therefor in the prescribed form.

The application shall be lodged with the Council and shall be accompanied by the prescribed fee and such other information as the Council may require.

- (4) Upon application made to it under this By-law the council may:-
 - (a) grant a permit; or
 - (b) refuse a permit; or
 - (c) grant a permit subject to such conditions as the Council shall think fit.
- (5) A permit issued under this By-law shall be in writing.
- (6) It shall be a condition of every permit issued under this By-law on breach whereof the permit may be revoked by the Council:-
 - (a) that the holder of the permit will at all times obey the provisions of this Chapter, the Order in Council and the conditions, if any, subject to which the permit was granted; and
 - (b) that the permit in writing shall be produce (sic) to an Authorised Person (Pedestrian Mall) forthwith upon request made by the Authorised Person (Pedestrian Mall) in that behalf.
- (7) Unless sooner revoked a permit issued under this By-law shall remain in force from the date of issue up to and including the expiry date written on the face of the permit or if no expiry date is so written up to and including the thirtieth day of June next following the date of the issuing of the permit.”

Relevant principles of law

- [25] There is a freedom of communication between persons concerning political or government matters to be implied in, or derived from, the Constitution.³ The freedom is not a personal right, but one which precludes the curtailment of the protected freedom by the exercise of legislative or executive power.⁴
- [26] The freedom of communication protected by the Constitution extends beyond matters which directly concern the Commonwealth Parliament and Government of the Commonwealth and includes “... discussion of Government or politics at State or Territory level and even at local government level ... whether or not it bears on matters at the federal level.”⁵
- [27] Such freedom of communication may not be curtailed by the exercise of legislative or executive power,⁶ but it is not absolute. It is limited “to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution”.⁷

³ *Lange* at 560.

⁴ *Lange* at 560 and see also *Levy* at 652 per McHugh J.

⁵ *Lange* at 571.

⁶ *Lange* at 560.

⁷ *Lange* at 561.

- [28] Constitutional freedom is not confined to verbal communication, and may extend to conduct where such conduct "... is a means of communicating a message within the scope of the freedom".⁸ Laws which prohibit or regulate communication by restricting freedom of movement or denying persons the opportunity to communicate may contravene the constitutional freedom.⁹
- [29] The purpose, as well as the operation and effect of a law, may be taken into account in assessing whether the law curtails freedom of political communication or discussion in a manner or to an extent inconsistent with the constitutional implication.¹⁰
- [30] In *Lange*, the following test for determining whether a law infringes the constitutional implication was propounded –¹¹
- “When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? (cf *Cunliffe* (1994) 182 CLR 272 at 337). Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (*Cunliffe* (1994) 182 CLR 272 at 300, 324, 339, 387-388. In this context, there is little difference between the test of ‘reasonably appropriate and adapted’ and the test of proportionality: see at 377, 396) (hereafter collectively ‘the system of government prescribed by the Constitution’). If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid. In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.”

⁸ *Levy* at 613 per Toohey and Gummow JJ.

⁹ *Levy* at 617-618 per Gaudron J and 622- 623 per McHugh J

¹⁰ *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337, *Levy* at 611 per Toohey and Gummow JJ.

¹¹ At 567-8.

The character of the By-law

- [31] With these principles in mind, I turn to a consideration of the By-law. It does not have the purpose of limiting freedom of communication in respect of political or government matters. Rather, it has the legitimate aim of advancing the public interest by regulating the use of heavily trafficked public areas with a view to the maintenance of public safety and the balancing of competing interests. In the absence of some form of regulation, members of the public using a pedestrian mall could be inconvenienced, caused annoyance or distress and even put at risk of injury. Access to and visibility of commercial premises could be impeded and traders disadvantaged in a variety of ways. For example, members of the public using the mall might wish to detour around or avoid a congregation of persons in the vicinity of a shop entry. In the absence of appropriate regulation, there is the possibility that a person making public addresses might impinge on the ability of others to use the mall for the same purpose. The use of loud speakers or even musical instruments in an uncontrolled way could detract from a mall's ambience to such a degree that persons might be discouraged from using it at all. Many other examples could be given, but enough has been said to illustrate the desirability of appropriate regulation of public spaces such as pedestrian malls.
- [32] Regulation is not necessarily inconsistent with freedom, as Dawson J pointed out in the following passage from *Levy* - ¹²
- “Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent but the free elections contemplated by the Constitution notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society.”
- [33] The prohibition in respect of public demonstrations and addresses in By-law 8(2) is not absolute. A person wishing to do a thing prohibited by the By-law may seek a permit to do it. However, any application must be in writing in a prescribed form. It must be lodged with the Council and accompanied by the prescribed fee and “such other information as the Council may require”. By-law 8(4) gives the Council an unqualified right to refuse the permit. The Council may impose “such conditions as the Council shall think fit” in respect of a granted permit. There are no restrictions on the length of time for determining any such application. Nor are there any prescribed limits on the conditions that the Council is able to impose.
- [34] The restrictions thus placed on a person's ability to take part in a public demonstration or public address are such as to make the relevant freedom of communication illusory or nearly so. The freedom exists only at the whim of the Council. Yet a “public demonstration” or “public address” in order to be effective, or even to have a point, may need to be held or given within days or even hours of a matter arising, or before an event takes place. To give some simple examples, there may be a question of whether certain persons should be deported or permitted to

¹²

At 608.

enter the country for a limited period, or concerning whether certain roads and offices should be temporarily closed to facilitate a visit by a Head of State.

- [35] A determination of the Council is challengeable by judicial review proceedings under the *Judicial Review Act 1991*, but for reasons just discussed, that procedure is unlikely to provide an effective remedy against arbitrary decision-making on the part of the Council. The absence of prescribed criteria to be applied in determining applications for permits also impedes effective judicial review.

The relevance of By-law 8(1)

- [36] It is argued on behalf of the Local Authority that By-law 8(1) operates to prevent By-law 8(2) providing any significant curtailment of the constitutional freedom as a person seeking to communicate on a political subject may do so by means of displaying and/or distributing printed material from a booth. The requirement that a booth be used, it was submitted, has a minimal impact on a person's ability to exercise the constitutional freedom as the term "booth" is capable of extending to "a set up that might include little more than a table and possibly a chair".
- [37] Two other By-laws bear on the right to set up and use a booth. By-law 11 empowers the Council to place signs in or near a pedestrian mall "for the purpose of regulating, prohibiting, warning, or guiding persons using a pedestrian mall ...". By-law 11(4) prohibits persons from acting in a manner "contrary to the direction or indication given by an official sign in the pedestrian mall ...". By-law 12 provides –
- "A person when in or upon a pedestrian mall shall obey every direction or instruction given to him by an Authorised Person (Pedestrian Mall) or by a member of the Police Force."
- [38] By-law 2 empowers the Council to appoint any permanent officer of the Council an authorised person for the purposes of Chapter 39 of the By-laws. An official sign could stipulate the hours during which booths could be used, govern the location of booths, and limit the activity which could be conducted in or from booths.
- [39] The *Shorter Oxford English Dictionary* definition of "booth" includes –
- "2. ... a covered stall at a market, fair, etc. ... polling-b., a temporary structure for voting purposes at an election."
- The *Macquarie Dictionary* defines "booth" as –
- "1. A temporary structure of boughs, canvass, boards, etc, as for shelter. 2. A stall or light structure for the sale of goods or for display purposes, as at a market for fair."
- [40] The role of a booth authorised by By-law 8(1) is to mark out an area within or at which the activity for which the booth is brought into existence may be conducted, and to provide a suitable structure for the conduct of that activity. The structure need not have a roof and may be flimsy and rudimentary in its construction. I accept that setting up a booth may necessitate little expenditure of time, energy or money, and may not be beyond the means and capabilities of most citizens. There is thus some substance in the contention that By-law 8(2) does not substantially burden a person's ability to make a public address on a political matter.

- [41] The Council contended that By-law 8(1) did not authorise the making of a public address from a booth, or the use at the booth of a megaphone or sound amplifier. The reasons for this view were not explained but I take it to be based on a perception that By-law 8(1) does not authorise acts or conduct expressly prohibited by By-law 8(2). By-law 8(1), however, expressly provides that By-law 8 does not apply to “the setting up and use of booth(s) of the prescribed type”. Consequently, I can see no reason why a person could not make a public address from a booth, with or without the benefit of some device to magnify sound, without infringing By-law 8(2).
- [42] The By-law though is not confined to the *making or giving* of a public address. It restricts a person’s ability to “take part in” public demonstrations and addresses. Persons may take part in a public address in a variety of ways. They may do so by holding up placards in aid of the speaker’s presentation, or by forming part of an audience through the exercise of free choice. In such cases, the protection afforded by By-law 8(1) may well extend only to the speaker and those who could be said to be actually using the booth. By-law 8(1), generally, would not be capable of protecting those wishing to exercise the constitutional right by means of a “demonstration” consisting of the display of placards by a group of persons. Nor could it protect from the operation of By-law 8(2) a person wishing to communicate by means of carrying a sandwich board through the mall.
- [43] There are further difficulties in the way of regarding the right to set up and use a booth as producing the result that By-law 8(2) meets the *Lange* test. It is not easy to understand how the right to set up booths for various prescribed purposes will prevent the difficulties By-law 8(2) is intended to overcome. One would think that persons in a booth armed with a loudspeaker would be capable of creating more of a nuisance than a person or persons standing in the mall speaking without such assistance, and that the booth itself would be capable of impeding traffic flow and restricting desirable visibility. The Council could exercise control over booth placement, composition and use by means of By-law 2 and/or 12, but the combined operation of those provisions could result in a severe curtailment of the freedom which would otherwise exist. More importantly though, By-law 8(1) sanctions the use of booths for “political” but not for “government” purposes. By-law 8(1) therefore cannot, by its operation alone, save By-law 8(2) from invalidity if it infringes the constitutional freedom.

The relevance of the limited geographical area to which By-law 8 is applicable

- [44] The respondents argue that the By-law is greatly assisted in meeting the *Lange* test by the fact that it is limited in its operation to pedestrian malls. I accept that restricting a person’s ability to communicate only within a limited area necessarily provides its own limitation on the extent to which there is a detraction from the benefits to be enjoyed by the exercise of the constitutional freedom. The respondent’s contentions also derive support from the nature of By-law 8. It is recognised that-
- “... a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on

such communications is unrelated to their nature as political communications.”¹³

- [45] As McHugh J expressed it in *Cunliffe v The Commonwealth*¹⁴ -
 “a law which incidentally restricts or burdens [a constitutional right or freedom] as the consequence of regulating another subject matter will be easier to justify as being consistent with the freedom ...than a law that directly restricts or burdens a characteristic of [the right or freedom].”

Application of the test in *Lange v Australian Broadcasting Corporation*

- [46] The task of the Court in testing the validity of a law is to apply the test propounded in *Levy*.¹⁵ Despite the considerations I have just mentioned, I am unable to conclude that the By-law 8(2)(e) could be reasonably considered appropriate and adapted to the fulfilment of the Council’s purpose.
- [47] Pedestrian malls, as Mr Griffin QC submitted, are areas in which large numbers of people are likely to congregate. Their usefulness as venues for communicating information or messages on political or government matters is obvious. It may be that in particular circumstances the *Levy* test could be satisfied even if a local authority, for reasons of the public good, placed a complete ban on public addresses in a mall, or in part of a mall, or in a particular public space. But that is not the approach of the Council in relation to By-law 8 and there was no evidence before the learned magistrate suggesting that such a restriction was thought necessary in order to achieve the Council’s aims. The Council’s approach discernible from the By-law, supports the inference that the Council’s aim was to regulate rather than prohibit.
- [48] The By-law regulates activities in the mall in full measure. By-law 2(f) makes it unlawful for a person to walk through the mall wearing a hearing aid or listening to a radio with an ear plug attachment. The scope of By-law 2(g) is such that it would prevent a person from purchasing an amplifier, CD player, radio or television set from a retail outlet off the mall and carrying it through the mall in its original packaging.
- [49] Apart from such over-prescription, the device used by the By-law is to make the use of the mall for stipulated purposes subject to Council approval in the manner discussed earlier. In these circumstances, it seems to me that By-law 8(2)(e) is not “reasonably appropriate and adapted” to serve the Council’s legitimate aims. To borrow from the language in some of the cases, the restriction on the constitutional freedom is “more than is proportionate” to the legitimate aim of the By-Law.¹⁶ The By-law “unnecessarily or disproportionately regulates matters beyond power under the guise of protecting or enhancing the legitimate end in view.”¹⁷

¹³ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 109.

¹⁴ *Supra* at 396.

¹⁵ cf *Rann v Olsen* [2000] SASC 83, 172 ALR 395 at 428.

¹⁶ See eg, *Cunliffe* at 296-8, at 303 per Mason CJ and at 396 per McHugh J, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 116 at 157 per Brennan J and *Levy* at 645 per Kirby J.

¹⁷ *Cunliffe* at 297 per Mason CJ

- [50] For reasons already given, I am of the view that By-law 8(2)(e) is not saved from invalidity by the operation of By-law 8(1).
- [51] I would allow the appeal and order that the conviction be set aside.
- [52] **JONES J:** I have had the advantage of reading judgments prepared by Pincus JA and Muir J in which are detailed the circumstances giving rise to this appeal and the single ground upon which leave was granted. I do not propose to repeat those circumstances.
- [53] In 1982 the Townsville City Council (hereinafter “TCC”) prepared and had proclaimed an amendment to its by-laws by adding Chapter XXIX, the terms of which appear in the judgment of Muir J.
- [54] In 1992 the High Court of Australia in two cases¹⁸ identified a freedom of communication on governmental and political matters to be implied in the terms of the Constitution.
- [55] The scope of this freedom has been found to extend to the protection of all levels of government “consistent with the need to protect the system of representative government mandated by the Constitution”¹⁹
- [56] In 1997 in *Lange v Australian Broadcasting Corporation*²⁰, the High Court revisited the issue and proposed a two part test for determining whether a law infringed the requirement of freedom of communication on governmental and political matters. The test was stated in the following terms²¹:
- “When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people... If the first question is answered “yes” and the second is answered “no”, the law is invalid.”
- [57] The question to be determined in this appeal is whether the by-law which the appellant has been convicted of infringing was invalid by reason of its contravening that constitutionally implied freedom.

¹⁸ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. The communication is not limited to verbal utterance but may be by “signs, symbols, gestures” (*Levy v State of Victoria*) 189 CLR 579/622.

¹⁹ *Stephens v West Australian Newspapers Ltd* (1993-4) 182 CLR 211/232.
²⁰ (1997) 189 CLR 520.

²¹ *Ibid* p 567.

- [58] The by-law does burden that freedom in the sense that without a permit in writing from the TCC no person shall “take part in any public demonstration or any public address”. What is meant by the words “taking part in” a demonstration or address is not absolutely clear but it would not sensibly include simply being a spectator, listener or passer-by. The requirement to obtain a permit would be to authorise those persons who were actively promoting or actively participating in the demonstration or address. The precise scope of the by-law does not, however, need to be determined here.
- [59] The purpose which the by-law is designed to serve is to allow the orderly use of the two pedestrian malls to which it specifically relates. The by-law deals with such matters as the use of vehicles, prohibition as to dogs, damage to property, seizure and removal of property unlawfully present in the mall and controls on signage.
- [60] The evident objectives sought to be achieved by the terms of the by-law include such matters as the protection of the interests of the business owners and booth holders, the safety of the public, the enhancement of the users’ enjoyment by the provision of organised entertainment and the curtailment of annoying or unauthorised conduct.
- [61] In my view the by-laws are “reasonably appropriate and adapted” to the fulfilment of the purpose of the orderly use of the pedestrian malls. A minor criticism might be that in the absence of stated guidelines for the granting or withdrawing of permits, permits might be refused or withdrawn by local TCC officers on an arbitrary basis. However, such decisions would be subject to review which could be conducted in a timely way except perhaps for some extreme case.
- [62] The question then is whether there is compatibility between the fulfilment of the by-law’s purpose with the maintenance of a system of government prescribed by the Constitution. In *Levy v The State of Victoria & Ors*²² Brennan CJ said:-
 “A law which is appropriate and adapted to the fulfilment of that legitimate purpose is not invalidated by limitations of legislative power implied from the terms and structure of the Constitution merely because an opportunity to discuss matters of government or politics is thereby precluded.”

At p 608 Dawson J said:-

“Free elections do not require the absence of regulation. Indeed, regulation of the electoral process is necessary in order that it may operate effectively or at all. Not only that, but some limitations upon freedom of communication are necessary to ensure the proper working of any electoral system. Apart from regulation of the electoral process itself, elections must take place within the framework of an ordered society and regulation which is directed at producing and maintaining such a framework will not be inconsistent with the free elections contemplated by the Constitution notwithstanding that it may incidentally affect freedom of communication. In other words, the freedom of communication which the Constitution protects against laws which would inhibit it is

²²

(1997) 189 CLR 597 at p.597

a freedom which is commensurate with reasonable regulation in the interests of an ordered society.”

- [63] The by-law here is not of the same nature as the prohibition imposed on the broadcasting of electoral material in *Australian Capital Television* and the electoral laws in *Langer v Commonwealth of Australia*²³. In such cases the conflict between the implied freedom and the purpose of the legislative provision is starkly drawn. A different situation arises when the incompatibility with the maintenance of the system of government arises only incidentally to the thrust of the legislative provision. This requires a consideration of a number of factors and in the end a value judgment. In *Levy*, Kirby J, whilst acknowledging the authoritatively determined test from *Lange* set out above, also identified a number of other approaches. He said (at p 645-6):-

“Thus, it has been suggested that a law that is ‘appropriate and adapted’ to the fulfilment of a ‘legitimate purpose’ or ‘reasonably and appropriately adapted’ to ‘secure some end within power’ will survive a challenge although the freedom of communication on political and governmental matters is affected. Alternatively, the concept of proportionality has been invoked by the suggestion that the impugned law must not be ‘disproportionate’ to the attainment of the competing public interest or that there must be a ‘proportionality between the restriction which the law imposes on the freedom of communication and the legitimate interest which the law is intended to serve’. The concept of proportionality as a guide to the limits of powers not themselves expressed in purposive terms has been criticised. Nevertheless, in my view it is a useful concept, including in the context of burdens upon constitutional freedoms, so long as it is realised that it describes a process of reasoning and does not provide a sure answer to its outcome. It is a concept of growing influence upon our law. It is no more question-begging than the phrase ‘appropriate and adapted’. It springs from a richer jurisprudential source. It is certainly less ungainly.”

- [64] Whether one considers the effect of the subject by-law in terms of “compatibility with the maintenance of the constitutionally prescribed system of government” or “proportionality between the restriction ... and the freedom of communication”, the outcome is likely to be the same. The end result is a value judgment on which minds may differ.
- [65] Consistently with the reasons expressed by Pincus JA I take the view that the subject by-law does not infringe the implied constitutional freedom. The prohibition imposed by the relevant by-law is not absolute and moreover relates to a very small area of the City of Townsville. The opportunity within the TCC area for unregulated communication on political and governmental matters is quite vast. The opportunity to exercise the freedom within the confines of the pedestrian malls exists subject to restrictions which are appropriate and adapted to the legitimate purpose identified herein.

- [66] For these reasons I agree with Pincus JA that the appeal should be dismissed.

²³

(1995-6) 186 CLR 302

[67] I agree also that there should be no order for costs.