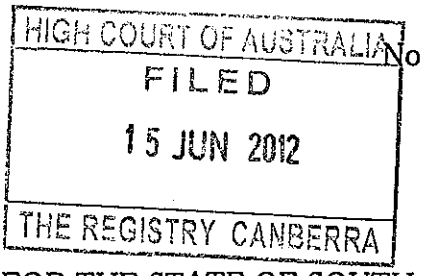
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY



No A16 of 2012

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Appellant

THE CORPORATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

SUBMISSIONS OF THE

ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General
of the Commonwealth (Intervening) by:

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I

INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

II

INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the appellant.

IV

LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the appellant's statement of legislative provisions.

V

ARGUMENT

4. The source and nature of the implied freedom of political communication is now well understood. The constitutionally mandated system of representative and responsible government and of amendment by referendum depends for its efficacy on communication amongst electors, and between electors and legislators and executive officers, about matters of government and politics. The freedom is implied no further than is reasonably necessary to protect that system. The

freedom does not confer rights on individuals and is not a freedom to communicate. The freedom is from burdens on communication about political and governmental matters that are not reasonably appropriate and adapted to the attainment of constitutionally permissible ends.

5. The implied freedom operates as a limitation on legislative power. It operates to invalidate legislation that burdens communication about political and governmental matters in a manner or to an extent that is not reasonably appropriate and adapted to the attainment of constitutionally permissible ends to which the legislation is directed. That is equally so for legislation conferring a power to enact delegated legislation or to make an administrative or judicial decision. The implied freedom operates to invalidate the legislative conferral of power if and to the extent the law conferring the power purports to authorise an exercise of power in a manner or to an extent that is not reasonably appropriate and adapted to the attainment of the constitutionally permissible ends. The purported exercise of power to enact delegated legislation or to make an administrative or judicial decision that imposes such a burden is then invalid not because it independently infringes the constitutional freedom but because it transgresses the limits of the legislatively conferred of power.

6. Where a putative burden on communication about a political or governmental matter is imposed by delegated legislation, the relevant operation of the implied freedom is therefore a limitation on the validity of the legislation purporting to confer the power to enact that delegated legislation. The constitutional question is whether that legislative conferral of power complies with the constitutional limitation. The statutory question is whether the delegated legislation lies within the scope of the power legislatively conferred.

7. Where a putative burden on communication about a political or governmental matter is imposed by delegated legislation, the analysis therefore necessarily starts

with the law conferring the power pursuant to which the delegated legislation is purportedly enacted. In some cases, the law on its proper construction will confer a power, the scope of which is sufficiently confined to comply with the constitutional limitation without need for reading down. In those cases, no further constitutional question arises.[1] In other cases, the law will need to be read down so as not to authorise the enactment of delegated legislation that would transgress the constitutional limitation. In some of those other cases, the reading down of the law to comply with the constitutional limitation may have the result that the statutory question of whether particular delegated legislation lies within the scope of the power will coincide with the constitutional question of whether the legislative conferral of that power complies with the constitutional limitation. In that class of case, "[t]he question ... resolves itself into whether the [delegated legislation is] within the constitutional power of the [State]. If Parliament had enacted [it] directly, would [it] be valid?"[2]

8. The analysis in the present case therefore necessarily starts with the by-law making power conferred by s 246(1) of the *Local Government Act 1999* (SA) (**the 1999 Act**) and s 667(1)9(XVI) of the *Local Government Act 1934* (SA) (**the 1934 Act**). Contrary to the approach of the Full Court of the Supreme Court of South Australia, it is impossible for the impugned by-law to be within the scope of the by-law making power yet constitutionally invalid. The impugned by-law could only be invalid if it exceeded the limits of the power legislatively conferred by the by-law making power.

9. The by-law making power, on its proper construction, is sufficiently confined to comply with the constitutional limitation without any need for reading down. That must be so if, as the Full Court appears to have held, the by-law making power is

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1 *Wotton v Queensland* (2012) 285 ALR 1 (***Wotton***) at [22] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

2 *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at [104] (Gummow J), quoting *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 594 (Fullagar J).

properly construed as extending only to authorise the making of a by-law that: (1) advances the purpose of regulating conduct, akin to a common law nuisance, amounting to a material interference with the comfort, convenience or safety of the inhabitants of a local government area[3]; and (2) does so by means of which the "collateral consequences" are not "disproportionate" having regard to the extent, if any, to which they infringe "fundamental values traditionally protected by the common law" including "freedom of expression".[4] The identified purpose required to be advanced by a by-law is a "legitimate end". The identified means to which a by-law is legislatively restricted in advancing that purpose are required to be reasonably appropriate and adapted to serve that purpose and to do so "in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". A by-law that complies with the statutory limitations identified by the Full Court is therefore necessarily reasonably appropriate and adapted to the attainment of constitutionally permissible ends. No further constitutional question arises: a by-law meeting the statutory criteria for validity will be within the constitutionally permissible scope of the by-law making power even where the by-law operates to impose a burden upon communication about political or governmental matters.

10. In the alternative, if reading down is necessary, the by-law making power can readily be read down so as only to authorise the making of by-laws that comply with the constitutional limitation.[5]

11. On either approach, the reasoning of the Full Court concerning the purpose of the by-law (at [120]) and its reasonableness and proportionality (at [124]-[129]) ought to have been sufficient to sustain its constitutional validity.

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3 (2011) 110 SASR 334 at [98], [109].

4 (2011) 110 SASR 334 at [109]-[110].

5 See eg *Wainohu v State of New South Wales* (2011) 243 CLR 181 (***Wainohu***) at [113] (Gummow, Hayne, Crennan and Bell JJ).

12. The separate reasoning of the Full Court leading to its conclusion that the by-law transgresses the constitutional limitation sets the constitutional bar too high. The implied freedom does not have the consequence recorded by the Full Court (at [159]) that "[t]he prohibition of disseminating a political message, unless permission of an arm of government is first obtained, is antithetic to the democratic principle". To address the constitutional question by adopting such an absolute proposition effectively fails to engage with the necessary question of whether it is reasonably appropriate and adapted to constitutionally permissible ends. It precludes the inquiry or, rather, assumes the answer.

10 13. In particular, the Full Court's absolute proposition fails to accommodate two critical considerations.

14. The first is that the question of whether a law is reasonably appropriate and adapted to constitutionally permissible ends will necessitate varying degrees of scrutiny depending on the nature of the burden that is placed on political communication. An effective burden on political communications may, by its operation or practical effect, restrict or limit the time, place, manner or conditions of their occurrence.[6] The necessary scrutiny may thus extend to the permitted manner of communication in exception to a prohibition;[7] as well as to restrictions upon the time and place of such communications.[8] However, even where the
20 nature of the burden calls for close scrutiny, the required demonstration that the law "is no more than is reasonably necessary"[9] to achieve a legitimate end should

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6 *Coleman v Power* (2004) 220 CLR 1 at [91] (McHugh J).

7 See eg *Hogan v Hinch* (2011) 243 CLR 506 at [66]-[84], [98] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

8 See eg *Levy v Victoria* (1997) 189 CLR 579 (*Levy*) at 617-620 (Gaudron J).

9 *Australia Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 (Mason CJ); *Levy* at 618 (Gaudron J).

not be understood to mean "unavoidable" or "essential". The question can never rise higher than asking whether there is a compelling justification.[10]

15. The second is that the granting or withholding of the permission required by the by-law as a precondition to an activity on a road that may involve disseminating a political message involves the exercise of a discretion conferred by the by-law itself on the Council or a person authorised by the Council.[11] The discretion so conferred is not unconfined. It must itself be read down so as not to exceed the by-law making power[12] and therefore so as not to be capable of valid exercise or non-exercise such as to transgress the constitutional limitation.[13] Moreover, it is a discretion to be exercised on application.[14] That means that it is a discretion that is subject to a duty to consider[15] and to do so within what, in all the circumstances of the individual case, is a reasonable time.[16]

16. The exercise or non-exercise of the discretion is then reviewable within the constitutionally entrenched jurisdiction of the Supreme Court of South Australia to grant certiorari or mandamus.[17] At common law there is no general obligation to give reasons for an administrative decision.[18] However, that is hardly determinative of whether a qualified prohibition is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government or, as is the question here, is reasonably

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10 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [40] (Gleeson CJ). See also *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [161]-[163] (Gummow and Bell JJ); [374] (Crennan J) (cf [436]-[444] (Kiefel J)).

11 The by-law's reference to "permission" is to be interpreted in accordance with cl 3 of *The Corporation of the City of Adelaide By-Law No. 1 - Permits and Penalties.*

12 *Acts Interpretation Act 1915* (SA), s 13.

13 *Wotton* at [23], [31]-[33] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

14 See *The Corporation of the City of Adelaide By-Law No. 1 - Permits and Penalties*, cl 3.

15 *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-8 (Dixon J).

16 For the general approach to assessing delay, see *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455 at 477 (Neaves J).

17 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

18 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 669-670 (Gibbs CJ; Wilson, Brennan and Dawson JJ agreeing); *Wainohu* at [155] (Heydon J).

proportionate to the grant of power. The Council's file on the application would be discoverable; subpoenas may compel the provision of information. It would be possible for the Supreme Court on judicial review to inquire into whether the accepted value of freedom of expression and what is constitutionally permissible[19] were taken into account on a given application.[20]

17. For these reasons, the Court should make the orders sought in para [54] of the appellant's submissions.

Dated: 15 June 2012

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19 *Wotton* at [32] (French CJ, Gummow, Hayne, Crennan, and Bell JJ).

20 Even if it were thought that there might be some practical difficulty in identifying whether the Council has taken into account the accepted value of freedom of expression and what is constitutionally permissible as relevant considerations (see eg *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J)), that would not of itself create a justification for importing an obligation to give reasons: *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [106] (Basten JA, McColl JA agreeing). A similar issue is raised by way of a notice of contention in Minister for Home Affairs of the Commonwealth v Zentai (High Court of Australia No P56/2011), in which judgment is reserved.