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**IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY**

No. A16 of 2012

**BETWEEN: ATTORNEY GENERAL FOR THE STATE OF SOUTH AUSTRALIA**  
Appellant

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**AND: THE CORPORATION OF THE CITY OF ADELAIDE**  
First Respondent

**CALEB CORNELOUP**  
Second Respondent

**SAMUEL CORNELOUP**  
Third Respondent

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**THIRD RESPONDENT'S SUPPLEMENTARY SUBMISSION**

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Filed on behalf of the Third Respondent by  
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Dated: 27 September 2012

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10 1. This submission is in support of the third respondent's draft amendment to his notice of contention. SA does not oppose the amendment.

2. In short, the third respondent ("Samuel") submits that the two clauses of the by-law ("the by-law") are invalid because they contravene the provisions of s.248(1)(a) of the *Local Government Act 1999* (SA) ("the 1999 Act"). It is convenient to consider this issue by reference to the text of ss.246-248 of the 1999 Act.

3. Section 248 provides as follows:

"(1) *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; or*

20 (b) *be inconsistent with this or another Act, or with the general law of the State; or*

(c) *without clear and express authority in this or another Act –*

(i) *have retrospective effect; or*

(ii) *impose a tax; or*

(iii) *purport to shift the onus of proof to a person accused of an offence; or*

(iv) *provide for the further delegation of powers delegated under an Act; or*

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

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

30 (2) *If a by-law is inconsistent with a trust that applies to real or personal property held by the council, the by-law does not, to the extent of the inconsistency, apply in relation to that property.*

(3) *This section does not affect the validity of a by-law made before the commencement of this section."*

*(emphasis added)*

4. (Sections 246-247 are annexed to these submissions.)

5. It is clear that the intention of s.248 is "that an act done in breach of the provision should be invalid": *Project Blue Sky v ABA* (1998) 194 CLR 355, at [93]; see also SAFC at [138] (citing *Gedeon v NSWCC* (2008) 236 CLR 120, at 139). The language of s.248(3) shows that the validity of by-laws made after the commencement of the section (including the by-law the subject of this appeal) is affected by s.248. And the

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10 section (which creates “rules”) works by way of contrast to the “principles” established by s.247 (which do not provide grounds for challenging the validity of by-laws).<sup>1</sup>

6. It is submitted that the two clauses of the by-law are invalid for the following reasons:

- (i) the by-law purports to be made under the 1999 Act: AB 98.38, 47.5, 91.5;
- (ii) the only by-law making powers “conferred” by the 1999 Act are those found in ss.238-240;
- (iii) SA does not assert that the by-law is within the powers to make by-laws “conferred” by ss.238-240;
- (iv) therefore, the by-law is invalid.

20 7. SA’s only response to this argument is to assert that the by-law does not “exceed the power conferred by the [1999] Act” because s.246(1)(a) of the 1999 Act “confers” on the Council power to make by-laws “that are within the contemplation of this or another Act” and the by-law is validly made under a by-law making power in “another” Act (*viz* s.667(1)9(XVI) of the 1934 Act).

8. There are substantial difficulties with this argument.

9. First, s.246(1)(a) does not “confer” any power to make by-laws under the 1934 Act. That power is (relevantly) “conferred” by s.667 of the 1934 Act. Indeed the Attorney-General for SA makes this very point several times in his own written submissions. Thus, SA has submitted that the by-law is within “the scope of the by-law making power *conferred* by s.667(1)9(XVI) of the 1934 Act”: [10.1] of SA’s reply submissions. See also SA’s reply at [14] (“the power *conferred* by s.667(1)9(XVI) of the 1934 Act”), [19] (“the power *conferred* by s.667(1)9(XVI) of the 1934 Act”) and [10] of SA’s initial submissions (“s.667(1)9(XVI) of the 1934 Act, which *confers* a broad power... to make by-laws”) (all emphases added).

10. Secondly, s.248(1)(a) is a provision which the legislature regards as so important that non-compliance results in invalidity. It is not meant to be taken lightly or rendered

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<sup>1</sup> It is noteworthy that in the Second Reading Speech (page 807 of the House of Assembly) the following appears: “The current principles for by-law making are divided into principles and rules. Inconsistency with a principle will not form the basis for challenging a by-law in the courts, whereas a breach of a rule will.”

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nugatory. If SA is correct, the strictures of s.248(1)(a) can be side-stepped for every by-law made by a Council by the simple expedient of saying “this by-law purports to be made under the 1999 Act”. On SA’s argument this will always amount to compliance with s.248(1)(a) because s.246(1) “confers” on the Council power to make by-laws which are contemplated by any Act or any regulation under any Act. With due respect, such a construction makes no sense and makes a mockery of this important provision. If SA is correct, no by-law will ever offend s.248(1)(a) provided that it includes the mantra that it is made under the 1999 Act (even where the relevant enabling Act – which “confers” the power to make the by-law – is an Act other than the 1999 Act). This cannot be the purpose of the provision: cf *Acts Interpretation Act* 1915 (SA) s.22.

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11. Thirdly, SA’s construction does not sit well with the legislature’s choice of words in s.248(1)(a). If the legislature had intended s.248(1)(a) to be read as SA asserts, it would have said “exceed the power conferred by *this* Act” (compare paragraphs (b) and (c)).

12. Fourthly, councils in SA have power to make by-laws under various powers specifically “conferred” by the following sections of the following Acts: *City of Adelaide Act 1998*, s.37A; *Dog and Cat Management Act 1995*, s.90; *General Tramways Act 1884*, s.38; *Harbours and Navigation Act 1993*, s.18A; *Local Government Act 1934*, s.667; *Local Government Act 1999*, ss.238, 239, 240; *National Soldiers Memorial Act 1949*, s.3. The 1999 Act requires that the Legislative Review Committee<sup>2</sup> review by-laws in order to determine whether they are validly and appropriately made and that they<sup>3</sup>:

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- (a) [are] consistent with the *objectives of the provision that authorises the by-law and accord with the provisions and general intent of the enabling Act*; and
- (b) adopt a means of achieving those objectives that [do] not:
  - (i) unreasonably burden the community; or

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<sup>2</sup> See s.10A *Subordinate Legislation Act 1978* (SA); s.12 *Parliamentary Committees Act 1991* (SA); Pearce and Argument, *Delegated Legislation in Australia*, [3.52]-[3.58].  
<sup>3</sup> See s.247(a) and (b).

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(ii) make unusual or unexpected use of the power *conferred by the enabling Act* (having regard to the general intent of the Act).  
(emphases added)

13. Similar reviews also need to be conducted by the solicitor who certifies that power to make the by-law exists under a specified enabling Act (s.249 of the 1999 Act), by the Council in determining whether to enact the by-law<sup>4</sup> and by the public as part of the by-law making process (s.249(1)(a) and (b) of the 1999 Act).

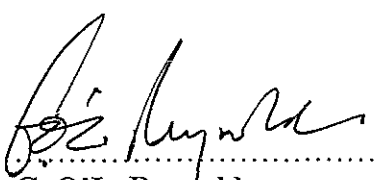
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14. Samuel's construction of s.246(1)(a) is conducive to the effectiveness of such reviews. On SA's construction of s.246(1)(a), s.248(1)(a) could be complied with by simply including in the by-law a statement that "this by-law is purportedly made under the 1999 Act". This is not conducive to effective reviews of whether a by-law is within the enabling Act and accords with its objectives and intent.

15. Fifthly, the clear purpose of s.248(1)(a) is to oblige Councils to enact by-laws that are within the powers of the relevant enabling Act. SA's argument does not sit comfortably with the achievement of this purpose.

16. Sixthly, the purpose of s.246(1) is to act as a form of recital by way of preamble to the regime which follows in s.246(2)-(7) (a regime which applies to all by-laws regardless of the source of the enabling power). Its purpose is not to "confer" on Councils by-law making powers which have already been conferred on them by other Acts (or by ss. 238-240 of the 1999 Act).

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<sup>4</sup> The Courts are also assisted in determining *ultra vires* issues (particularly reasonableness and proportionality) by a clear specification of the enabling Act.

**ANNEXURE**  
**(provisions in force as at 10 May 2004)**

**246—Power to make by-laws**

- (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.
- (3) Subject to this or another Act, a by-law made by a council may—
- (a) operate subject to specified conditions; and
  - (b) refer to or incorporate, wholly or partially and with or without modification, a code, standard or other document prepared or published by an authority or body, either as in force at the time the by-law is made or as in force from time to time; and
  - (c) be of general or limited application, and provide for exemptions; and
  - (d) make different provision according to the persons, things or circumstances to which it is expressed to apply; and
  - (e) provide that the by-law, or a provision of a by-law, applies only within a part or parts of the area as the council may determine from time to time; and
  - (f) provide that a matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the council, a specified person, authority or body, or a person holding a specified office; and
  - (g) fix a minimum as well as a maximum penalty for any breach of a by-law, or a maximum penalty only, or a general maximum penalty applicable to several by-laws, provided that the maximum penalty so fixed does not exceed \$750, and in the case of a continuing offence fix a further penalty not exceeding \$50 for every day on which the offence or breach of the by-law continues; and
  - (h) in a case of a by-law relating to the driving, parking or standing of vehicles—
    - (i) impose, modify or restrict any evidentiary burden on a party to proceedings for an offence against the by-law, or provide for other matters in respect of evidence or the proof of any matter; and
    - (ii) fix entrance fees or parking fees; and
    - (iii) provide that the owner and the driver of a vehicle driven, parked or standing in contravention of the by-law are each guilty of an offence and liable to the relevant penalty.
- (4) If a code, standard or other document is adopted under subsection (3)(b) as it is in force from time to time, an alteration to the code, standard or other document will

not take effect for the purposes of the by-law before a day on which notice of that alteration is published by the council in the *Gazette* and in a newspaper circulating in the area of the council.

(5) Expiation fees may be fixed for alleged offences against by-laws by—

- (a) by-laws; or
- (b) the council,

but an expiation fee fixed by the council cannot exceed 25 per cent of the maximum fine for the offence to which it relates.

(6) In any proceedings for an offence against a by-law under subsection (3)(h)—

- (a) an allegation in a complaint that a person named in the complaint was the owner of a specified vehicle on a specified day will be taken to be proved in the absence of proof to the contrary; and
- (b) if it is proved that a vehicle was driven, parked or left standing in contravention of the by-law it will be presumed, in the absence of evidence to the contrary, that the vehicle was so driven, parked or left standing by the owner of the vehicle.

(7) Despite a preceding subsection, the owner and driver of a vehicle cannot both be convicted of an offence arising out of the same circumstances and so conviction of the owner exonerates the driver and conversely conviction of the driver exonerates the owner.

#### 247—Principles applying to by-laws

A by-law made by a council must—

- (a) be consistent with the objectives of the provision that authorises the by-law and accord with the provisions and general intent of the enabling Act; and
- (b) adopt a means of achieving those objectives that does not—
  - (i) unreasonably burden the community; or
  - (ii) make unusual or unexpected use of the power conferred by the enabling Act (having regard to the general intent of the Act); and
- (c) avoid restricting competition to any significant degree unless the council is satisfied that there is evidence that the benefits of the restriction to the community outweigh the costs of the restriction, and that the objectives of the by-law can only be reasonably achieved by the restriction; and
- (d) avoid unreasonable duplication or overlap with other statutory rules or legislation; and
- (e) avoid regulating a matter so as to contradict an express policy of the State that provides for the deregulation of the matter; and
- (f) avoid breaching principles of justice and fairness; and
- (g) be expressed plainly and in gender neutral language,

but a by-law cannot be challenged on the ground that it is inconsistent with one or more of these principles.