



Our reference                      Michael Bradley 09300  
Phone                                +61 2 8216 3006  
Email                                michaelb@marquelawyers.com.au

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Louise Parzatka  
Supervisor Animal Management, Local Laws  
City of Boroondara  
8 Ingelsby Road  
Camberwell VIC 3124

Dear Ms Parzatka

**Oliver Yates**

We act for Mr Yates, who as you know is a candidate in the current federal election campaign for the electorate of Kooyong. Mr Yates is a high-profile independent candidate with a genuine prospect of being elected to the Commonwealth Parliament, a fact which has significant relevance to the subject matter of this letter.

We are writing to you in response to the Notice to Comply dated 26 April 2019, signed by you, which was served on Mr Yates on the evening of 26 April (**Notice**). We consider the Notice to be invalid and of no legal effect, for the reasons set out below.

**The Local Law does not apply to political advertising**

The Notice purports to declare that clause 28.1 of the Council's Amenity Local Law applies to a trailer containing political advertising material supporting Mr Yates' campaign, on the basis that the trailer is an 'advertising sign' for the purposes of clause 28.1.1.

The Local Law defines an 'advertising sign' as 'any portable sign, notice, structure, banner or other similar device used for the purpose of soliciting goods or services or displaying information'. Clause 28 is headed 'Trading Activities' and is clearly intended to govern activities in trade or commerce. Clause 28.1.1 must be interpreted within that context, from which it is obvious that it was not the legislative intention behind the clause that it would regulate non-commercial activities. Consequently, political advertising is not governed by clause 28.1 and the Council has no power to enforce clause 28.1 in respect of Mr Yates' political advertising.

## **The Local Law must be interpreted so as to comply with the Constitution and Charter of Human Rights**

The Local Law, like all laws, is subject to the Australian Constitution. If a law infringes the implied freedom of communication in relation to government and political matters, in a way which fails the test for validity established and repeatedly reaffirmed by the High Court, then that law is invalid.

The High Court has also established a principle of legislative construction in terms that: 'if the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open'; most recently approved in *Clubb v Edwards* [2019] HCA 11, 38 per Gageler J.

If clause 28.1 is interpreted so as to allow for the issue of the Notice, then it directly and impermissibly would infringe the implied freedom. The burden on freedom of communication is obvious; political advertising in the course of an election campaign is a direct and explicit form of communication which the implied freedom protects, and the Council's application of the Local Law in issuing the Notice places a clear burden on Mr Yates's ability to so communicate.

The question then is whether the law in question is reasonably appropriate and adapted to advance a legitimate object in a manner that is compatible with the constitutional system of government. If not, it is invalid.

This is always a complex question. In summary, the only legitimate object of clause 28.1 of the Local Law is to preserve public safety and public amenity. That object can be adequately achieved, in the context of political advertising activity during a declared election campaign period, by far less drastic means than the imposition of a permit system with the onerous conditions that the Council has sought to impose on Mr Yates. It cannot be said that that system, or its enforcement by way of the Notice, is reasonably appropriate and adapted in the sense that the case law requires.

However, if clause 28.1 is interpreted as we have suggested it should be, to exclude political advertising, then no question of infringement of the implied freedom and therefore constitutional invalidity arises.

The same proposition applies to interpreting clause 28.1 in light of the Victorian Charter of Human Rights, which gives legal effect to, among other rights, the right to freedom of expression and the right to take part in public life. These are rights possessed by Mr Yates and he is attempting to exercise them by his campaigning activities. The Council is obliged by law to act compatibly with Mr Yates' rights. Clause 28.1 should be interpreted so as to not place the Council in a position where it is necessarily infringing Mr Yates' Charter rights and therefore acting in a way which is invalid.

### **The Council is acting *ultra vires***

On whichever of the above bases it is accepted that clause 28.1 does not apply to political advertising during an election campaign, the effect is the same: the Notice is invalid. This is so because it has been issued in purported exercise of a legislative power which the Council does not possess. Consequently, the Council's action in issuing the Notice is *ultra vires*.

We invite the Council to acknowledge this and withdraw the Notice. If it does not do so, then we reserve Mr Yates' right to take legal action seeking appropriate relief to have the Notice declared

invalid and restraining the Council from persisting in its attempts to regulate activity which it has no power to regulate.

**Practical approach**

Notwithstanding the above matters, Mr Yates has no desire (and very limited capacity) to engage in legal battles with the Council. He also acknowledges and appreciates that the Council's intention is to carry out its regulatory functions appropriately and in the interests of the community.

In addition, there is the practical reality that the federal election campaign has only a little more than two weeks left to run, following which all of these questions will be academic.

Mr Yates is therefore keen to work with the Council to find a practical solution which will allow him to lawfully conduct his campaign without being unfairly constrained. He remains willing to negotiate directly with the Council to explore that possibility, so that no part of the remaining short period before election day will be wasted on legal disputes.

Yours sincerely

Michael Bradley  
Managing Partner