



# Office of Hon Simon Bridges

## MP for Tauranga

Minister of Energy and Resources

Minister of Transport

Deputy Leader of the House

Associate Minister for Climate Change  
Issues

Associate Minister of Justice

25 AUG 2016

Todd Niall  
Auckland Correspondent  
Radio New Zealand  
[Todd.Niall@radionz.co.nz](mailto:Todd.Niall@radionz.co.nz)

Dear Mr Niall

### OFFICIAL INFORMATION ACT REQUEST

I refer to your requests dated 9 August and 10 August 2016, pursuant to the Official Information Act 1982, seeking:

- *the advice, legal or other, provided to the Minister on the issue of Auckland Transport's election signage by-law, and especially on the question on whether any part of it potentially conflicts with any part of the Bill of Rights*
- *copies of correspondence or communication between the Minister's office and Auckland Transport on the question of the election signage bylaw and its compliance with the Bill of Rights Act.*

The following documents fall within the scope of your request and are enclosed:

Date	Document	Parties
29 April 2016	Letter	Minister of Transport to Auckland Transport
13 May 2016	Letter	Auckland Transport to Minister of Transport
20 May 2016	Letter and attachment	Auckland Transport to Minister of Transport
24 June 2016	Letter	Minister of Transport to Auckland Transport

15 July 2016	Letter	Auckland Transport to Minister of Transport
10 August 2016	Letter	Minister of Transport to Auckland Transport

Also within the scope of your request are communications between the Minister of Transport, the Minister's Office, the Ministry of Transport's legal team and Crown Law, for obtaining legal advice. These documents are being withheld under section 9(2)(h) of the Official Information Act 1982, which relates to the maintenance of legal professional privilege.

With respect to the information being withheld, I do not consider that there are any considerations making it desirable, in the public interest to make the information available.

You have the right under section 28(3) of the Official Information Act to make a complaint about the withholding of information to the Ombudsman.

Yours sincerely



Hon Simon Bridges  
**Minister of Transport**



## Office of Hon Simon Bridges

MP for Tauranga  
Minister of Energy and Resources  
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Associate Minister for Climate Change  
Issues  
Associate Minister of Justice

29 APR 2016

Dr David Warburton  
Chief Executive Officer  
Auckland Transport  
Private Bag 92250  
**AUCKLAND 1142**

Dear Dr Warburton

### **AUCKLAND TRANSPORT ELECTION SIGNS BYLAW 2013**

I am writing to you because I have been asked to exercise my power under section 22AC of the Land Transport Act 1998 (the Act) to disallow the Auckland Transport Election Signs Bylaw 2013 (the Bylaw) on the grounds that it is inconsistent with both the Act and the New Zealand Bill of Rights Act 1990.

I note that:

1. Auckland Transport made the Bylaw on 30 May 2013, citing section 22AB of the Act as authority.
2. Section 22AB(1)(y) of the Act empowers road controlling authorities to make bylaws regulating, controlling, or prohibiting the display or continuance of the display of posters, placards, handbills, writings, pictures, or devices for advertising or other purposes on or over public buildings or bridges, or on or over buildings, walls, fences, posts, trees, pavements, or hoardings, that are situated—
  - (i) in or on or adjoining any land or road that is the property of, or under the control of, the relevant road controlling authority; or
  - (ii) where that display is visible from a road or public place.
3. It appears that the Bylaw was then amended on two occasions. Firstly, with effect from 12 August 2013, by the Auckland Transport Election Signs Amendment Bylaw No 1 of 2013 and secondly, with effect from 18 July 2014 by the Auckland Transport Election Signs Amendment Bylaw No 2 2014. These amendments included the insertion of clause 7(1)(aa), which imposes a temporal restriction of the display of election signs, to the period commencing on the Saturday that is nine weeks before election day and ending at midnight on the day before the election day.

Although, in accordance with section 22AB(4) of the Act, my predecessor was provided with a copy of the original Bylaw in June 2013, my office has no record of having been provided with copies of the two amendment bylaws.

Under section 22AC of the Act, as Minister of Transport, I may amend, replace, or disallow, either wholly or in part, any bylaw made by a road controlling authority under section 22AB or any other enactment (whether before or after the commencement of this section) if the bylaw—

- (a) is inconsistent with any enactment; or
- (b) is unreasonable or undesirable in so far as it relates to or may affect traffic.

Before considering this request further, I invite Auckland Transport's response to the following points, which are potential triggers for the exercise of my section 22AC powers.

#### *Consistency with the Land Transport Act*

The purpose of the Act is, among other things, to "promote safe road user behaviour and vehicle safety".

The bylaw controls signs "for a public referendum, election, or by-election, that encourages or persuades or appears to encourage or persuade voters to vote for a party or a person standing as a candidate, or to vote in a particular way on a referendum or election". It makes or requires no assessment of the impact of a particular sign on safety. A sign will be prohibited simply because it is an "election sign" while a similar sign, which may be equally distracting, or not, as the case may be, is not subject to control.

1. What problem or issue is the bylaw seeking to address?
2. How is the problem or issue being addressed a matter of transport safety?
3. How is the use of section 22AB(1)(y) of the Act to control signs erected for a particular purpose, without any obvious regard to the impact of a sign on traffic or safety, consistent with the purposes of the Act?
4. Why does signage need to be prohibited, from a transport safety perspective, at certain times, and not others?

#### *Consistency with the New Zealand Bill of Rights Act 1990*

Section 14 of the New Zealand Bill of Rights Act provides that "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." The Bill of Rights Act applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law, and thus applies to the making of the Bylaw by Auckland Transport under section 22AB of the Act. The relationship between the Bylaw's restrictions on advertising and the policy objectives behind the Bylaw will inform consideration of consistency of the Bylaw with the Bill of Rights Act.

5. What is the policy justification for the Bylaw and, in particular, the policy rationale behind clause 7 and sub-clause 7(1)(aa)?



6. With reference to section 5 of the New Zealand Bill of Rights Act, or otherwise, does Auckland Transport consider the bylaw consistent with that Act?

*Consistency with electoral legislation*

7. Why should transport legislation impose temporal restrictions on the display of election signs when this is not a feature of electoral legislation?

*Unreasonableness or undesirability in so far as the Bylaw relates to or may affect traffic*

According to the Auckland Transport website, the effect of the Bylaw is to limit the display of election signs, not only to particular periods of time, but also to particular locations. This appears to have the effect of concentrating election signage into particular sections of land alongside or visible from the road.

8. Has Auckland Transport assessed the implications for road safety of creating a regime that concentrates election signs in particular places, as opposed to signage being more widely dispersed, for example the effect on a driver trying to read a number of signs in quick succession?
9. If so what was the outcome?
10. In either case does Auckland Transport consider there is or is not potential for an unreasonable or undesirable effect on traffic? Why?
11. As noted above, an "election sign" will be prohibited outside the specified period, or allowed with the specified period, because of it being an election sign. However, there is no consideration of safety. A sign that is not an election sign, which may be equally distracting to traffic is not controlled. How is this reasonable or desirable from the perspective of effect on traffic?

I invite Auckland Transport's response to these questions, and any other information that you consider relevant to whether there is a case for me to exercise my section 22AC powers in relation to the Bylaw.

Please provide your response to me by 13 May 2016. If this is insufficient, please advise my office.

Yours sincerely



Hon Simon Bridges  
Minister of Transport

13 May 2016

Hon Simon Bridges  
Minister of Transport  
Parliament Buildings  
Private Bag 18041  
WELLINGTON 6160

Dear Minister

**Election Signage Bylaw**

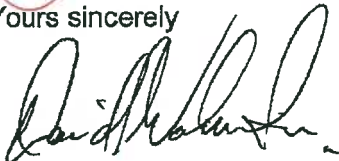
Further to your letter of 29 April and our brief discussion of the matter when we met at the Northern Region National Party Conference last Saturday.

Auckland Transport (AT), has continued to work with Auckland Council (AC), on this matter. In an effort to obtain the best balance between the need for some controls on signage around the road corridor and individual rights, we requested Russell McVeagh to review the existing bylaw and advise any improvements.

Similar to your comments re Crown Law's opinion, their view is that while the existing bylaw presents a defensible position, it could be improved. Consequently, we have requested that this work be done with the intent of forwarding to you an updated bylaw, drafted by Russell McVeagh and agreed by both AC and AT. If you were in agreement with this updated document we would be grateful if you exercised your authority under the Act so this updated bylaw could be used immediately.

Regrettably the redraft has not been completed by today, the date you requested a reply. However, we can confirm that the document will be completed and with your office before next Friday 20 May. My apologies for this delay and I trust this arrangement is acceptable for you.

Yours sincerely



David Warburton  
CHIEF EXECUTIVE

20 May 2016

Hon Simon Bridges  
Minister of Transport  
Private Bag 18041  
Parliament Buildings  
WELLINGTON 6160

Via email

Dear Minister

**AUCKLAND TRANSPORT ELECTION SIGNS BYLAW 2013**

Thank you for your letter dated 29 April 2016, in which you sought Auckland Transport's ("AT") response to a number of questions in relation to the Auckland Transport Election Signs Bylaw 2013 ("Bylaw"), as set out in your letter.

AT has had the Bylaw reviewed by external counsel (Dr Andrew Butler of Russell McVeagh), as indicated in my preliminary response dated 13 May 2016. Following that review, AT is of the view that the Bylaw is consistent with the Land Transport Act 1998 ("LTA"), and with the New Zealand Bill of Rights Act 1990 ("BORA"). That said, as a result of Dr Butler's review AT acknowledges that some aspects of the Bylaw impose limits on the right to freedom of expression that raise some concerns regarding BORA consistency. Although those limits can be considered justifiable, AT acknowledges that another person could take a different view.

1. As signaled in my 13 May letter, I set out below a number of improvements to the Bylaw, should you consider that amendments are necessary. In summary, those improvements are:
  - (a) an amendment to cl 7(1)(aa) that extends the time period during which election signs may be erected by three weeks, so that election signs may be erected for the 12 week period prior to midnight on polling day. This aligns with the date that nominations for council election officially open, on 15 July; and
  - (b) an amendment that provides exemptions for signs that have been granted resource consent, which may address some concerns relating to overregulation where traffic impacts and safety concerns are considered at the time that a resource consent application is granted.
2. I note that the purpose of the suggested amendments is to make small improvements to the Bylaw, which will be able to be implemented prior to the 2016 election.
3. I propose that members of your legal team contact the AT and Auckland Council legal teams to discuss next steps that are workable for the Ministry, AT and Auckland Council.
4. In answer to the questions that you posed in your letter dated 29 April 2016, I set out below:



- (a) the operation of the legacy bylaws and the legislative context to the Bylaw;
  - (b) the purpose of the Bylaw;
  - (c) consistency with the LTA;
  - (d) consistency with BORA;
  - (e) consistency with electoral legislation;
  - (f) lack of unreasonableness or undesirability in so far as the Bylaw relates to or may affect traffic; and
  - (g) a proposal to exercise the power to amend, replace or revoke the Bylaw, including a proposed amendment to the Bylaw, if you decide that amendments should be made.
5. I trust this will ease your concerns relating to the compliance with the LTA, BORA and electoral legislation, and the requirement that there be no unreasonableness or undesirability in so far as the Bylaw relates to or may affect traffic.

#### **Legacy bylaws and legislative context**

6. The context to the enactment of the Bylaw is important to understanding the role that the Bylaw plays in Auckland governance, and the reasons for its development.

#### *Authority to regulate election signage resides with AT*

7. Election signage is typically regulated nationally by promulgating either a bylaw or a planning rule. Regulation of election signage is different to the regulation of other election advertising, and does not affect other election advertising (such as flyers, radio and TV advertisements, and websites, which are not affected by the Bylaw). Unlike the regulation of other forms of political expression, regulation of election signage requires the striking of a balance between freedom of expression, which is particularly important in an electoral context, and the need to maximise traffic safety by preventing road hazards and excessive distraction.
8. For clarity, I note at the outset that AT, rather than an alternative Auckland Council entity, was required to enact the Bylaw because of the unique features of Auckland's governance framework following the amalgamation. The legacy council bylaws relating to signs, including election signs, were made by the legacy councils under s 684 of the Local Government Act 1974, and are now deemed to have been made by AT.<sup>1</sup>
9. In addition, AT is required, as a road controlling authority, to make and enforce bylaws in relation to the Auckland transport system,<sup>2</sup> including signs on or visible from roads, and Auckland Council is prohibited from making a bylaw where the legislative power has been conferred on AT.<sup>3</sup>
10. As the purpose of election signs is to draw attention to candidates or parties to generate more votes, election signs are generally displayed on locations visible from the Auckland transport system, and accordingly come within the authority of AT. Accordingly, although I accept that it may seem incongruous to some, AT is authorised, and indeed required, to regulate in this field. I consider that the Bylaw was the appropriate response to the context and issues facing AT.

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<sup>1</sup> Local Government (Auckland Transitional Provisions) Act 2010 s 61(2).

<sup>2</sup> Local Government (Auckland Council) Act 2009 s 46(1)(h).

<sup>3</sup> Local Government (Auckland Council) Act 2009 s 50.





*Commencement of period when election signage allowed*

11. An issue of particular concern appears to be the date from which election signage is permitted. A number of features of Auckland local government law and the Electoral Act support the view that a ban up until two months prior to an election is permissible and reasonable.
12. First, the Bylaw was enacted in the context of the amalgamation of the legacy councils into Auckland Council in 2010. In advance of the local authority elections in Auckland in 2010, Parliament directed the legacy Auckland councils to use a bylaw power to make bylaws in their respective areas that conformed with certain specified election signage criteria (Schedule 3 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009, as amended by the Local Government (Tamaki Makaurau Reorganisation) Amendment Act 2010 ("**LG(TMR) Amendment Act**").
13. The LG(TMR) Amendment Act included the provision (Sch 1, inserting a new Sch 3 to the LG(TMR) Act):

**3 Time period that sign may be displayed**

- (1) A sign may be displayed at any time within the 2 months preceding the election.
- (2) Every sign must be removed before the day on which the voting period for the election ends (polling day).
- (3) This clause applies whether the sign is erected on a local authority designated site or on private property.

Those mandatory criteria were for the purpose of streamlining election sign rules for this first election of the new Auckland Council. Significantly, the statutory criteria included a two month restriction on all election signs, and this applied to both public and private sites. The provision was present in the Local Government (Auckland Law Reform) Bill. That Bill became the LG(TMR) Amendment Act, and was reviewed as part of the Attorney-General's normal BORA vetting procedures. The provision was subject to a review for consistency with BORA by the Ministry of Justice. The Ministry of Justice stated that the Bill was consistent with, and raised no issues in respect of, BORA. A copy of that advice is attached.

14. Second, the Electoral Act 1993 implicitly accepts that local authorities may choose to regulate the temporal aspect of election signage including by prohibition outside the two month period preceding an election. Relevantly, the Electoral Act provides:

**221B Display of advertisement of a specified kind**

- (1) During the period beginning 2 months before polling day and ending with the close of the day before polling day, the display of an advertisement of a specified kind is not subject to—
  - (a) any prohibition or restriction imposed in any other enactment or bylaw, or imposed by any local authority, that applies in relation to the period when an advertisement of a specified kind may be displayed; or
  - (b) any prohibition or restriction imposed in any bylaw, or imposed by any local authority, that applies in relation to the content or language used in an advertisement of a specified kind.



15. The effect of this is that the display of election advertisements of a specified kind (being, broadly, election signs as regulated by the Bylaw) is not affected by local bylaws or regulation by local authority during the period beginning two months before polling day.<sup>4</sup>
16. Third, BORA consistency was considered by the AT Board on 30 May 2013, when it passed the Bylaw, and on 29 April 2014, when it introduced cl 7(1)(aa). In each case, the Board considered that the controls included in the Bylaw were reasonable restrictions which were fair to all candidates, would minimise adverse impacts on road safety and amenity values, and ensure the mandate and purpose of AT are appropriately delivered.
17. Fourth, I note that a temporal restriction is a common feature of election sign controls across New Zealand. At least nine other councils throughout New Zealand have made a bylaw that includes a temporal restriction on election signs on both private and public sites. All of the legacy councils within the Auckland region had a similar temporal restriction on election signs prior to 2010, ranging from 30 days to two months.

#### **The purpose of the Bylaw**

18. The purpose of the Bylaw, when enacted, was to ensure safety and amenity values are retained, to discourage the proliferation of signs on public land, and to provide for a consistent set of controls for election signs. AT determined the sites on public places visible from the road that were to be used for the display of election signs across Auckland for parliamentary and local authority elections as well as referenda by determining the sites used by the legacy councils, and seeking input from local Boards, then assessing safety and operational criteria to determine which sites were appropriate for ongoing use as sites for election signs.
19. Transport safety is a key feature of the Bylaw, and it is addressed by the Bylaw in a number of ways:
  - (a) signs are prevented from being displayed in a way that endangers public safety:
    - (i) ensuring adequate visibility for pedestrians and motorists; and
    - (ii) ensuring election signs do not obscure visibility or diminish impact of important traffic control devices such as traffic signals;
  - (b) signs visible from roads can create visual distraction, and accordingly elements such as reflective materials, animation, and internal illumination are prohibited or regulated;
  - (c) proliferation of election signs is restricted, as it can be detrimental to transport safety;
  - (d) the size and form of election signs is regulated to prevent detrimental effects on visibility;
  - (e) maintenance and security of signs is regulated to prevent negative effects on on-road safety; and
  - (f) safe access to approved sites is available for the establishment, removal and maintenance of election signs in order to prevent unsafe parking behaviour by those undertaking establishment, removal and maintenance.

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<sup>4</sup> Electoral Act s 221B.



20. I note, however, the LTA empowers AT to make any bylaw that it thinks fit for the purpose of regulating, controlling, or prohibiting the display or continuance of the display of signs, including election signs. There is no strict requirement in the section that the sole purpose for the exercise of the power be traffic or safety. Additionally, as stated above, because signs, including election signs, are placed in locations that are visible within the Auckland transport system, AT is required to regulate those signs. In this case, multiple factors were required to be addressed by AT, including:

- (a) preventing nuisance;
- (b) preventing damage to public property;
- (c) preventing interference with the public's ability to use public spaces;
- (d) providing certainty for candidates;
- (e) providing consistency and compliance with other legislation; and
- (f) providing a safe transport environment.

21. The Bylaw was considered to be the best mechanism to ensure election signs within public places, private places or on vehicles did not create a nuisance, impact on public safety, cause damage to public property or interfere with the public's ability to use public places. Taking these considerations into account was reasonable and was not outside the scope of the LTA or inconsistent with BORA.

22. I now turn to answer the particular questions set out in your letter dated 29 April 2016.

**Consistency with the LTA**

*1. What problem or issue is the Bylaw seeking to address?*

23. As set out above at paragraph 124, the introduction of the Bylaw was desirable, consequent on the amalgamation of the legacy councils in Auckland.

24. The Bylaw seeks to address the issues set out above at paragraph 20.

*2. How is the problem or issue being addressed a matter of transport safety?*

25. As stated above at paragraph 19, the Bylaw addresses matters of transport safety in a number of ways. Providing a safe transport environment is one of the key concerns of the Bylaw.

*3. How is the use of section 22AB(1)(y) of the LTA to control signs erected for a particular purpose, without any obvious regard to the impact of a sign on traffic or safety, consistent with the purposes of the Act?*

26. As set out in response to Question 2, traffic safety is addressed in the Bylaw in a number of ways.

27. However, as set out above at paragraph 20, AT is empowered to make any bylaw that it thinks fit for the purpose of regulating, controlling or prohibiting the display of election signs. AT is able to control signs with a purpose other than traffic safety in mind.





4. *Why does signage need to be prohibited, from a transport safety perspective, at certain times and not others?*

28. From a traffic safety perspective, the temporal limitation on election signage serves a number of purposes including reducing visual distraction and preventing safety issues caused by damaged or obsolete signs.

#### **Consistency with the BORA**

5. *What is the policy justification for the Bylaw and, in particular, the policy rationale behind clause 7 and sub-clause 7(1)(aa)?*

29. Clause 7 is a justified limitation on the right to freedom of expression.
30. The policy justification for s 7(1)(aa) was:
- (a) bringing consistency to the restrictions on election signs on public and private sites;
  - (b) reducing confusion caused by inconsistent rules; and
  - (c) removing unnecessary visual distraction.

31. Clause 7(1)(aa) renders public and private sites regulated by the same rules. Once that objective is achieved, the reasons for the restrictions consequent on cl 7(1)(aa) are the general justifications for cl 7 set out above. I consider that cl 7(1)(aa) is a justified limitation on the right to freedom of expression.

6. *With reference to section 5 of BORA, or otherwise, does Auckland Transport consider the Bylaw consistent with that Act?*

32. Yes. AT considers that the Bylaw is a justifiable limit on freedom of expression.
33. The provision responds to the legislative intention in the LG(TMR) Act, which was reviewed as part of the Attorney-General's normal BORA vetting procedures, and was held to be consistent with, and raise no issues in respect of, BORA.

#### **Consistency with electoral legislation**

7. *Why should transport legislation impose temporal restrictions on the display of election signs when this is not a feature of electoral legislation?*

34. Although temporal restrictions on the display of election signs are not a feature of electoral legislation, such restrictions are implicitly accepted by the Electoral Act, which - as set out above - anticipates that either prohibitions or restrictions on the display of election signs may be imposed by a bylaw or a local authority.

#### **Unreasonableness or undesirability in so far as the Bylaw relates to or may affect traffic**

8. *Has Auckland Transport assessed the implications for road safety of creating a regime that concentrates election signs on particular places, as opposed to signage being more widely dispersed, for example the effect on a driver trying to read a number of signs in quick succession?*

35. AT has not formally assessed the implications for road safety of a regime that concentrates election signs on particular places as opposed to more dispersed signage. However, the public locations on which signs are permitted have been assessed by AT





(following consultation with local boards) as the safest possible sites for election signs. The public sites are based on legacy council sites, where signs have been erected at each election for many years. Private sites are not regulated in this way, and this allows the dispersal of election signs across Auckland.

36. Additionally, under the Bylaw, candidates and parties are permitted one sign at each approved location. Requiring greater dispersal rather than concentration in these approved sites would restrict the number of election signs that candidates may erect, as having fewer signs per site may not allow all candidates to erect a sign. This would have negative implications for freedom of expression.

*9. If so what was the outcome?*

37. AT adopts an overall assessment of the safest place for the erection of election signs, as opposed to a discrete assessment of the implications of dispersal.

*10. In either case does Auckland Transport consider there is or is not potential for an unreasonable or undesirable effect on traffic? Why?*

38. Both concentrating and dispersal of election signage have an undesirable effect on traffic, but on balance concentrating is considered to have a lesser effect. This is because the possible effect of signage dispersal on visibility, and obscuring Traffic Control Devices would likely pose a greater risk to traffic and pedestrians than the risk of driver distraction associated with concentration of signage.

*11. As noted above, an "election sign" will be prohibited outside the specified period, or allowed with the specified period, because of it being an election sign. However, there is no question of safety. A sign that is not an election sign, which may be equally distracting to traffic is not controlled. How is this reasonable or desirable from the perspective of effect on traffic?*

39. The power to amend, replace or disallow the Bylaw may be exercised if the Bylaw is unreasonable or undesirable as it relates to or may affect traffic. However, in this case, no argument is made that the Bylaw has an unreasonable or undesirable effect on traffic. If, as postulated in the question, the nature of the sign is neutral as to traffic safety or other effects on traffic, any restriction on election signs will not have an unreasonable or undesirable effect on traffic.

40. However, in contrast, the Bylaw is reasonable and desirable from the perspective of its effect on traffic, as it promotes traffic safety, driver and pedestrian safety, and reduction of visual distraction.

41. Having set out answers to your questions, I next address the potential exercise of the power to amend, replace or revoke.

#### **The exercise of the power to amend, replace or revoke**

42. First, I note that the 2016 local government election is currently scheduled to take place on 8 October 2016, a little over four months away.

43. AT intends to review the Bylaw following the October 2016 local government election to deal with any further issues which may arise. That process is likely to include the ability for candidate and interested members of the public to give AT feedback on how the Bylaw operated and what changes (if any) could/should be made.



*An amendment to the Bylaw*

44. If, regardless of AT's position that the Bylaw is justifiable, you consider that it would be appropriate to use your power under the LTA to amend the Bylaw, I respectfully propose some limited amendments that would address the key issues raised by complainants, while avoiding the risk that any large scale amendment would lead to confusion among electors and candidates in the lead-up to the election. Additional risks of a large scale amendment process at this stage include amendments that are rushed and not well knitted together; and public dissatisfaction that the amendments have not been the subject of public consultation.
45. The targeted amendments that I suggest could be considered are:
- (a) an amendment to cl 7(1)(aa) to operate for a period of 12 weeks prior to polling day, rather than nine weeks prior to polling day; and/or
  - (b) an amendment which provides exemptions for signs that have been granted resource consent.
46. The proposed amendment to cl 7(1)(aa) would decrease the temporal limit on election signs by three weeks. This would have the effect of permitting the erection of signs from the time that nominations open, and therefore allow candidates to advertise their candidacy from that point.
47. An exemption for signs that have been granted resource consent may address some concerns relating to overregulation where traffic impacts and safety concerns are considered at the time that a resource consent application is granted. A particular example is billboards, the regulation of which has led to a number of complaints. As billboards are generally regulated through the resource consenting process, it could be considered less important for AT to regulate election signage on billboards. There is, however, a good case to be made for consistency of treatment of all signs related to elections.
48. I note, however, given the politicised nature of the complaints received by you and by AT, there is a risk of perceived favouritism if billboards are de-regulated at this time.

*A decision to replace the Bylaw*

49. A decision to replace the Bylaw would have the same detrimental consequences as a decision to make large scale amendments to the Bylaw.
50. Additionally, any replacement bylaw would likely be produced in a rushed manner, and without fulsome consultation with electors. In contrast, if AT were to replace the Bylaw at any stage, it would do so following a consultation process.

*A decision to disallow the Bylaw*

51. A decision to disallow, but not to replace, the Bylaw would have significant detrimental effects.
52. Currently, the field of election signs is entirely regulated by the Bylaw, as the field is carved out from the Signage Bylaw 2015, which regulates signage in the Auckland area generally.<sup>5</sup> Accordingly, if the Bylaw were disallowed but not replaced, there would be no regulation of election signage in the Auckland region. In the lead-up to the October 2016 election, this would be unworkable for candidates, and confusing for electors. A

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<sup>5</sup> Signage Bylaw 2015 cl 3(4)(b).



decision to disallow the Bylaw would have significant negative impacts on freedom of expression.

I look forward to hearing from you once you have had the opportunity to consider this matter. As noted above, the AT and Auckland Council legal teams are willing to discuss potential next steps with your legal team, if this would assist.

Yours faithfully



David Warburton  
CHIEF EXECUTIVE

**Attachment : Local Government – Auckland Law Reform Bill (advice)**

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT





- 
- Services ▪ Courts ▪ Tribunals ▪ **Policy** ▪ Justice sector ▪ Treaty settlements
  - Consultations
- 

## Local Government (Auckland Law Reform) Bill

9 December 2009

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:  
LOCAL GOVERNMENT (AUCKLAND LAW REFORM) BILL

1. We have considered whether the Local Government (Auckland Law Reform) Bill (PCO 14028/17.0) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act'). We understand that this Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 10 December 2009.
2. We have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with the right to freedom from discrimination (s 19 of the Bill of Rights Act). Our analysis is set out below.

### Purpose of the Bill

3. The Bill is the third and final Bill required to implement the Government's decisions on local governance arrangements for the Auckland region: the other two pieces of legislation being the Local Government (Tāmaki Makaurau Reorganisation) Act 2009 and the Local Government (Auckland Council) Act 2009.
4. The Bill makes the necessary interim and transitional provisions for the operation of the Auckland Council from 1 November 2010. It does so by providing further provisions to enable the establishment of the various new local governance arrangements in Auckland; facilitate the smooth transition of staff and assets to the new structures; prepare for local elections in Auckland; and provide clarity regarding planning and reporting arrangements for the period up until 1 November 2010. The Bill also provides the substantive detail for the Auckland Council to be able to operate effectively from its establishment on 1 November 2010, including:
  - Further detail of the relationship between the Council's governing body and its local boards
  - Arrangements for the management of transport and water supply and wastewater services
  - Provision for the development of a spatial plan for Auckland
  - Arrangements for a Board to promote issues of significance for mana whenua and Māori of Tāmaki Makaurau and
  - Arrangements relating to the governance of council-controlled organisations, development contributions, and representation reviews.
- The Bill also provides for transitional planning, funding and rating arrangements for the Auckland Council until at least July 2012.

### Section 19: Right to be free from discrimination

- Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in s 21 of the Human Rights Act 1993. These grounds include age, which means any age commencing with the age of 16 years, disability, race, and ethnic or national origin.
- In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under s 19 exists are:



- does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
  - does the distinction involve disadvantage to one or more classes of individuals?
- If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under s 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under s 5 of that Act.

*Establishment and composition of the Board promoting issues of significance for mana whenua and Māori of Tāmaki Makaurau*

- Clause 45 of the Bill inserts five new Parts to the Local Government (Auckland Council) Act 2009. New Part 7 proposes the establishment of a board to promote issues of significance for mana whenua and Māori of Tāmaki Makaurau.
- The Board is to assist the Auckland Council in making decisions, performing functions and exercising powers and the Council must take the Board's advice into account (new clause 73). The Board must appoint a maximum of 2 persons to sit on each of the Auckland Council's committees that deal with the management and stewardship of natural and physical resources (new clause 70(1)). The Auckland Council must meet the Board's reasonable costs in carrying out its functions (new sched 3, clause 20(1)).
- While the Council is not required to follow the Board's advice, this arrangement gives the mana whenua and Māori of Tāmaki Makaurau a sponsored platform from which to promote issues that are significant to them.
- Other ethnic and racial groups are able to make representations to the Council in accordance with standard consultation processes. In this connection, we note that the Bill also requires the Mayor of the Auckland Council to establish a Pacific Peoples Advisory Panel and an Ethnic Peoples Advisory Panel to identify and communicate to the Council the interests and preferences of the Pacific peoples and Ethnic communities of Auckland respectively (cl 111).
- However, there is no requirement for the views of these groups to be taken into account and the Bill provides that the Advisory Panels will be disestablished in 2013 (cl 111(4)). Together with the ratepayer funding provided to the Board and automatic membership rights on Council committees dealing with natural and physical resources, it is arguable that this arrangement gives the mana whenua and Māori of Tāmaki Makaurau an advantage on the basis of race. The concomitant disadvantage for non-Māori might be said to give rise to a prima facie issue of discrimination.
- In addition, the composition of the Board is limited to 2 *taura here* representatives and 7 *mana whenua* representatives (sched 3, cl 1). As this provision effectively excludes persons who are not of Māori descent from being on the Board, the Bill draws a distinction on the basis of race.
- We consider any potential issue of inconsistency with s 19 of the Bill of Rights Act arising from the establishment of the Board to be demonstrably justified under s 5 of that Act.
- The active protection of the indigenous people of New Zealand and those that have been historically disadvantaged is a significant and important objective. The Board furthers this objective by giving special recognition to the mana whenua and Māori of Tāmaki Makaurau as *tangata whenua*. It only goes so far as is necessary to ensure their informed participation and input, and does not confer a right of veto. The Bill does not attempt to assign a particular weight to the Board's advice and the Council is not required to follow it.
- We note that the current legislative framework for the governance of local authorities provides a mechanism to encourage local authorities to meaningfully engage with Māori and mana whenua to ensure that their interests are known and where possible acted upon. [1 (#1-see-for-example)] The participation mechanism proscribed under the Bill will better enable the Auckland Council to carry out these legislative responsibilities to accurately capture and reflect the views of mana whenua and Māori of Tāmaki Makaurau. This, in turn, will improve the quality of decision-making by the Auckland Council.
- In our view, the arrangements in the Bill strike an appropriate balance between promoting the specific participation of mana whenua and Māori of Tāmaki Makaurau and the right to freedom from discrimination.

*Disqualification of members of the Board*

- We have further considered whether the provision relating to the disqualification of the members of the Board raises issues of discrimination on the grounds of age and disability (see sched 3, cl 5 of the Bill).

### Disability discrimination

- We note that a person is disqualified from being on the Board if he or she is subject to a property order under the Protection of Personal and Property Rights Act 1988 ('PPPRA') (new sched 3, cl 5(2)(d)); or a personal order made under that Act that reflects adversely on the person's competence to manage his or her own affairs in relation to their property or capacity to make or communicate decisions relating to any particular aspect of his or her personal care or welfare (new sched 3, cl 5(2)(e)).
- The Bill applies similar disqualification criteria in respect of the directors of Auckland Transport (new sched 2, cl 3(c) and (d)).
- A Court may issue orders under the PPPRA where it determines that an individual lacks capacity, in whole or in part, to manage his or her property interests or lacks capacity to communicate his or her wishes with respect to those interests. The provisions, where they introduce a PPPRA order as a proxy for competence, are plainly aimed at addressing the issue of people that lack the capacity to perform the functions associated with membership of the Board, which includes the management of certain funds.
- There is an argument that the use of PPPRA orders for the purposes of disqualification of members of the Board does not make a distinction based on a disability, as they require the Court to consider a person's competence. Balanced against this, there is a counter argument that the use of PPPRA orders effectively treats persons subject to an order differently from those who are not subject to such an order. As these orders are more likely to affect individuals who lack capacity by reason of their disability, the use of these provisions may disproportionately affect persons with a disability.
- For completeness, we consider that the use of PPPRA orders in the disqualification provisions in the Bill is justified in terms of s 5 of the Bill of Rights Act.
- The objective of introducing the PPPRA test is to immediately remove people from a position of trust, where they cannot communicate choices, understand relevant information, appreciate a situation and the consequences, and rationally manipulate information. We consider that disqualification from the Board based on a Court finding that a person is not competent to manage their affairs, whether fully or in part, is an important and significant objective.
- We consider there to be a rational and proportionate connection between the need to remove people from public or fiduciary office for reasons of incompetence and the use of the PPPRA test to do so. This provision represents an appropriate balance between the right to be free from discrimination based on disability and the requirement to be fully able to carry out the duties under those offices.
- In reaching this view, we note that the reference to personal orders is nuanced to reflect that the order must adversely reflect on the person's ability to manage property or communicate decisions. These abilities are integral to being a member of the Board. If a personal order did not reflect adversely on the ability to manage property or communicate decisions then there would be no bar on appointment, as a member of the Board.

### Age discrimination

- Schedule 3, cl 5(2)(a) provides that a person under 18 years of age is disqualified from being a member of the Board. We consider that this provision creates a disadvantage for persons under 18 years of age and thereby also gives rise to a prima facie issue of discrimination on the grounds of age. However, we do not consider that this provision is unjustified in terms s 5 of the Bill of Rights Act. Because of the activities the Board is required to undertake – including sitting as a member of particular committees of the Auckland Council and negotiating the annual funding of the Board with the Council – the members of the Board are required to possess a satisfactory level of life-experience, judgment and financial awareness to enable them to make considered and balanced decisions. Setting a threshold for membership based on a minimum age will provide the Board with the appropriate level of decision-making maturity and will give confidence that its members have sufficient experience.

### Conclusion

- This advice has been prepared by the Public Law Group and the Office of Legal Counsel. We have reached the conclusion that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
Chief Legal Counsel  
Office of Legal Counsel

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Footnote:

1. See, for example, ss 4, 14(1)(d), 77(1)(c), and 81(1)(a)(b) and (c) of the Local Government Act 2002 and ss 6(e), 7(a), 61(2A), 62(1), 66(2A) and 74(2A) of the Resource Management Act 1990.

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In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Local Government (Auckland Law Reform) Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter.

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OFFICIAL INFORMATION ACT





## Office of Hon Simon Bridges

MP for Tauranga

Minister of Energy and Resources

Minister of Transport

Deputy Leader of the House

Associate Minister for Climate Change  
Issues

Associate Minister of Justice

24 JUN 2016

Dr David Warburton  
Chief Executive Officer  
Auckland Transport  
Private Bag 92250  
**AUCKLAND 1142**

Dear Dr Warburton

### **AUCKLAND TRANSPORT ELECTION SIGNS BYLAW 2013**

Thank you for your letter dated 20 May 2016, which provided answers to a number of questions about the Auckland Transport Election Signs Bylaw ('the Bylaw'). As you know, I have been asked to exercise my powers under section 22AC of the Land Transport Act 1998 (the Act). I wrote to you on 29 April 2016 seeking information with respect to the Bylaw, covering consistency with the Act, consistency with the New Zealand Bill of Rights Act 1990, consistency with electoral legislation and unreasonableness, in so far as the Bylaw relates to or affects traffic.

Your 20 May 2016 letter provided responses to the above points and I note your two suggested amendments that provide:

1. An amendment to clause 7(1)(aa) to extend the time period during which election signs may be erected by three weeks, so that election signs may be erected for the 12 week period prior to midnight on polling day.
2. An amendment to the Bylaw that provides an exemption for signs that have been granted resource consent to address perceived overregulation where traffic safety concerns are considered at the time that a resource consent is granted.

### **Further questions**

In response to your letter, it would be helpful if you could provide the following further information about your proposed resource consent exemption:

1. Is the resource consent exemption only for billboards, or do you envisage this will apply to all signs that might obtain resource consent – and what is the justification for this exemption?
2. How will this exemption work with the Auckland Council/Auckland Transport Signage Bylaw 2015 and its requirements for approval under the Resource Management Act 1991?
3. What implication will an exemption for signs subject to resource consent have on the overall functioning of the Bylaw?



4. Prior to the Bylaw was there a similar exemption for signs subject to resource consent?

Alternatively, given the local body election is on 8 October 2016, it may be that you are considering a process for making one or both of the above proposed changes either now or after the local election to improve aspects of the Bylaw. As you can see from my questions, my interest is in relation to the resource consent overregulation issue.

Such a review is relevant to whether or not I should exercise my powers in the present case, noting the present time constraints. Accordingly, can you also please advise whether Auckland Transport plans to initiate a further review of the Bylaw in light of the concerns that have been raised – and the likely timing of this review?

I look forward to receiving your response.

Yours sincerely



Hon Simon Bridges  
Minister of Transport

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OFFICIAL INFORMATION ACT

15 July 2016

Hon Simon Bridges  
Minister of Transport  
Private Bag 18041  
Parliament Buildings  
**WELLINGTON 6160**

Dear Minister

**AUCKLAND TRANSPORT ELECTION SIGNS BYLAW 2013**

Thank you for your letter dated 24 June 2016. My apologies for the delay in responding. You have asked further questions in relation to the Auckland Transport Election Signs Bylaw.

In particular, you asked for information in relation to the proposed resource consent exemption from the Bylaw and about Auckland Transport's proposed plans and the timescales for a review.

Given time constraints before the Local Government elections in October 2016 and the need for clarity with all candidates leading up to these elections, we consider it unwise to attempt any changes to the Bylaw before October.

We recognise the benefit of reconsidering the status of Resource Consented Signs being treated in a separate category and would propose a review and public consultation on this matter after October 2016 and in time for the 2017 National Elections. This review is likely to consider releasing some of the constraints on these signs from the election signs control process.

I trust you are in agreement with this process.

Yours faithfully



David Warburton  
CHIEF EXECUTIVE



## Office of Hon Simon Bridges

MP for Tauranga  
Minister of Energy and Resources  
Minister of Transport  
Deputy Leader of the House

Associate Minister for Climate Change  
Issues  
Associate Minister of Justice

10 AUG 2016

David Warburton  
Chief Executive  
Auckland Transport  
[david.warburton@at.govt.nz](mailto:david.warburton@at.govt.nz)

Dear David

Thank you for your letter of 15 July 2016 regarding the Auckland Transport Election Signs Bylaw 2013 (the Bylaw).

I agree that it would be unwise to attempt to change the Bylaw before the Local Government elections in October 2016.

On the basis that Auckland Transport will undertake a review and consultation on the Bylaw following the October elections, I do not propose taking any further action at this time with regard to the possible exercise of my powers under section 22AC of the Land Transport Act 1998.

Yours sincerely

Hon Simon Bridges  
Minister of Transport