

## Our advice

**Prepared for** Kate Bicknell Young, Auckland Transport

**Prepared by** Pdraig McNamara and Graeme Palmer

**Date** 23 June 2022

PRIVILEGED AND CONFIDENTIAL

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## Activities in the Road Corridor Bylaw

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### Background

1. On 26 May 2022,<sup>1</sup> AT's Board resolved as follows:

The Board approves the Activities in the Road Corridor Bylaw 2022 subject to:

- a. Any final legal amendments.
  - b. A satisfactory legal review of the public consultation process.
  - c. The Board's evaluation of the findings from the legal review process. The Board delegated authority for this evaluation to be made by the Chair and Deputy Chair on behalf of the Board.
2. You have asked us to review the consultation process which was followed for the Activities in the Road Corridor Bylaw (**Bylaw**), by reference to the allegations which have been made by Rodney farmers concerning the livestock provisions of the Bylaw.
  3. You have also asked us to confirm the current status of the Bylaw, given the qualified nature of the 26 May 2022 resolution.<sup>2</sup>

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### Questions

4. Is there any substance to the allegations which have been made about the inadequacy of the consultation process? If so, what is the effect?
5. Was the Bylaw actually made on 26 May 2022 (as the Minister is to be provided with a copy of any bylaw made under s22AB(4) of the Land Transport Act), and if not does the delegation by the Board to the Chair and Deputy Chair create any issues in terms of the prohibition on delegation in section 54(1)(b) of the Local Government (Auckland Council) Act 2009 (**LGACA**)?

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### Answers

6. We do not consider that the consultation process was materially deficient on any of the alleged grounds. Our detailed reasoning for each of the allegations is set out in the body of this advice.
7. In our view the strongest claim is in relation to the failure to provide

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<sup>1</sup> Your instructions say 30 May 2022, but from AT's website and the agenda material it appears the meeting was on 26 May 2022.

<sup>2</sup> Your instructions also included a third question which will be addressed in separate advice, once we have the necessary information.

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certain information. Based on the consultation report, we can understand how the Rodney farmers may have expected AT to provide a more detailed response justifying the need for the Bylaw. However, AT not doing so did not in our view amount to a material breach of the consultation requirements in the Local Government Act 2002 (**LGA**).

8. The Bylaw has not yet been made. It will not be made until the Chair and Deputy Chair have evaluated the legal review of the consultation process, and concluded that consultation was satisfactory. There is no problem legally with the Board having delegated that decision-making power to the Chair and Deputy Chair because it is not the power to make the Bylaw (which is still made by the Board).

## Reasons

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### **Consultation: allegations made**

9. The allegations about the consultation process are contained in several emails,<sup>3</sup> mainly from Bill Foster, Chair of the Northern Action Group (but also Glen Ashton of Rodney Community Voices) to Councillor Sayers and to AT.
10. The focus of the allegations is the provisions relating to livestock on roads in Part 5 of the proposed Bylaw. For convenience we will refer to the complaints as being made by Rodney farmers or the Rodney farming sector (we understand the two organisations referred to above have strong rural landowner membership).
11. We have distilled the following particular allegations from the emails:
  - (a) The minutes of the livestock owners focus group meeting and responses to questions asked were not provided to the participants as promised by AT;
  - (b) The particular questions asked (but unanswered) were:
    - why there was a need for a bylaw given that (1) no bylaw had been in place since 2015; (2) there were no obvious problems with livestock on roads since then; and (3) the national standard (Code of Practice for Temporary Traffic Management or **CoPTTM**) applies anyway and is under review;
    - the number of enforcement actions taken by AT and the value of fines levied in Franklin and Rodney separately under the Livestock Movement Bylaws since December 2015;
    - the number of incidents recorded as breaches of those bylaws since December 2015, again in Franklin and Rodney separately;
    - the number of complaints received regarding stock movements from persons who had relatively recently moved

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3 Dated 19, 22 May and 23 May 2022.

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into an area of livestock movements, both in total and as a percentage of all complaints received;

- (c) There was insufficient time (less than one week) to comment on the Q&A and no opportunity to comment on AT's "edits" of the bylaw;
- (d) The advice to the Board neglected to say there had been no livestock on roads bylaw since 2015 and there was no need for one now;
- (e) There was insufficient reflection of focus group opinions or feedback from farmers in the report to the Board, which gave little or no justification for proceeding with the livestock on roads provisions. The basic complaint seems to be that the claim there was no need for a bylaw was not heard;
- (f) It should have been made clear at the outset of the bylaw-making process that this was a new bylaw for stock movements;
- (g) It was misleading to say that Local Board feedback conformed to feedback received from the general public.

12. We will address each of these points below, but first we will briefly set out the statutory context and associated legal requirements regarding consultation.

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**Consultation:  
process followed  
and legal  
requirements**

13. As the proposal was to make a new bylaw, AT followed the special consultative process (**SCP**), under sections 83 and 86 of the LGA.<sup>4</sup> This involved preparing and making publicly available a statement of proposal (**SoP**) explaining the reasons for the proposal, including a draft of the proposed new bylaw, and seeking submissions. AT also prepared and made available a "quick guide" to the proposed bylaw.

14. The formal submission period, which started on 27 January 2022, was initially until 20 February 2022 but was extended to 27 February 2022. Feedback was received from 49 individuals, together with 9 long-form submissions. Seven individuals/groups took up the offer to present to the hearing panel. We do not know if that included the Rodney farmers but based on the key themes in the consultation report we assume it did not.

15. As part of the consultation AT also:

- engaged with, and received feedback from, all local boards;
- organised a range of engagements with key stakeholders, including the Rural Advisory Panel and Federated Farmers;
- organised four focus groups sessions, including one for livestock owners;
- held public Q&A sessions online.

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<sup>4</sup> See section 156 of the LGA.

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16. Following the four focus group sessions, AT sent a Q&A document to everyone who had attended. This covered the technical questions received at the sessions and AT's response to those questions. This document was sent on 8 April 2022 and the covering letter advised that:

During the consultation period a number of questions were raised with the project team which required investigation from subject matter experts across the business. Responses to all questions have now been received and we are keen to share these with you.

...

If, having received these answers below you have continuing concerns please get in touch with the project team. Please email [ATEngagement@at.govt.nz](mailto:ATEngagement@at.govt.nz) and note 'activities in the road corridor bylaw' in the subject line. We need any further responses by **Thursday 14 April**. We have decided to provide this subsequent opportunity as we recognise that the answers may help inform your views and there was a delay on our part in getting these answers to you, for which I apologise.

17. The covering email also said that "You'll note we have offered one further opportunity to provide further comments by 14 April, in line with when we expect to receive final comments from the Local Boards."
18. The general consultation principles in s 82(1) of the LGA also applied to this process. These include, most relevantly:
- (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:  
  
...
  - (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
  - (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
  - (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:
19. These are not absolute requirements – like local authorities, AT has a discretion as how to comply with them, to be exercised having regard to various matters including the nature and significance of the matter, and the extent to which views and preferences are already
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known.

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**Consultation  
process:  
consideration of  
allegations**

20. We will now consider each of the allegations.
- Alleged failure to give minutes of focus group meeting and to answer questions*
21. We will assume for the purposes of this advice that AT did indicate that the minutes would be provided and that the questions were asked as alleged, notwithstanding that we do not know that for certain.
22. At the outset we note that these alleged failures arose out of the livestock owners focus group meeting, which was a targeted form of engagement with that stakeholder group over and above what AT was legally required to undertake. In other words, in conducting that meeting (and the other focus group meetings) AT was already consulting more comprehensively than it was required to. In our view that is important context for considering these complaints.
23. In relation to the alleged failure to provide the minutes, we do not know what the purpose of the request for the minutes would have been (besides perhaps enabling the participants to share what had been said with people who were not there). Whatever the purpose, we do not consider failure to provide a record of what happened is a material defect in the consultation process. The purpose of the meeting was to consult with the focus group, and that consultation occurred at the meeting irrespective of whether minutes were later circulated.
24. In any event, AT's follow-up from the focus group meetings occurred by way of the Q&A document which asked recipients to advise any continuing concerns by 14 April 2022. The farming sector representatives apparently did not do that.
25. Mr Foster, who was sent the Q&A document and covering email on 8 April 2022, did not reply until 18 May 2022, saying "This email seems to have slipped past me sorry." That was over a month after the deadline given. Therefore, even if the minutes had been provided, it seems that Mr Foster would not have read them until it was too late.
26. We do not consider there is any merit in the allegation relating to the minutes, primarily because the minutes were not sufficiently relevant information about the issues under consultation, but also because it was Mr Foster's own default in failing to read his email which was responsible for not raising "additional concerns" with AT within the time frame given.
27. In relation to the alleged questions, these were questions about the proposed Bylaw. The farmers' stance underlying the questions was that there was no need for the livestock provisions of the Bylaw because there was no existing bylaw and no existing problem.
28. We do not consider that AT was obliged to answer the question as to
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why there was need for the livestock provisions in the Bylaw. The proposed Bylaw contained such provisions, implicitly on the basis that they were needed. It was largely a policy issue whether they were in fact needed and the farmers were free to make a submission on that point. This was not really a request for “information” about the proposal which might inform the consultation process. In particular, we do not consider there was a breach of the most potentially relevant consultation principle in section 82(1) of the LGA, i.e. the principle in paragraph (a) referring to the provision of “reasonable access to relevant information”.

29. In any event, the SoP stated:

The draft bylaw puts in place rules around safely moving stock across a road. If someone wants to move stock other than in line with those rules, they will need approval from AT. People will also need approval if they want to graze or locate stock on the side of the road or keep beehives on the side of the road. These rules are made to keep other road users safe.

30. Further, the Q&A document included the following:

How many crashes involve livestock?	We have discussed this with Auckland Transport's Road Safety team and our understanding is that there have been 25 crashes in Auckland recorded in the last 10 years that involve livestock.
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31. These are statements of why AT considered there was need for the Bylaw to regulate livestock on roads. It was also responding to the contention made as part of the question that there had been no obvious problem with livestock on roads since 2015.

32. In our view the question, to the extent that it required answering, was sufficiently answered in the SoP and Q&A. At the very least, if the Rodney farmers considered the answer inadequate, they could have advised AT of their “continuing concerns” as the Q&A invited them to do. The reason for not doing so was apparently due to Mr Foster's default in not reading AT's 8 April 2022 email at the time it was sent.

33. As for the claim in the question about the application of the CoPTTM, this does not have regulatory effect unless incorporated into some other legal obligation such as a bylaw. The statement was therefore prefaced on an incorrect legal understanding and was not a request for information as such.

34. The more detailed questions (as to numbers of complaints, enforcement action, incidents etc) in Mr Foster's 23 May 2022 email were asked well after the date advised by AT as the final date for comments (which was already later than the formal consultation period). The request was not therefore for information as part of a consultation process and could not have influenced that process. The request itself implicitly recognises this by saying “If that answer [sic] is not readily available please regard these questions as a LGOIMA query.”

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35. In summary, we do not see any substance in the claim of failure to answer the questions. The questions allegedly asked at the focus group meeting were not really requests for information of the type which engaged the consultation principles, but more in the nature of requests for justification of AT's policy position. These were sufficiently addressed in the Q&A document but in any event did not prejudice the farmers' ability to make a submission in opposition (and indeed claims that the livestock provisions were unnecessary were still made in the focus group meeting). The more detailed information requests were made after consultation had finished.

*Alleged insufficient time to comment on the Q&A document*

36. We do not consider that the 6-day period given in the Q&A document to advise of any "continuing concerns" was too short. The purpose of the Q&A document was not primarily to seek feedback, but to provide information about issues previously raised. The circulation of the Q&A document was after the conclusion of the formal consultation period, and there had already been ample time to make submissions. Given the stage the process had reached, we do not regard the final deadline of 14 April as unreasonable.
37. In any event, we have not seen any evidence of actual prejudice as a result of the time frame given. Mr Foster, who is the one making this complaint, was not prejudiced because he did not apparently read AT's email until a month or so after it was sent, which would still have been later than any reasonable extended period for further response.

*No opportunity to comment on the "edits"*

38. We are not sure what edits are being referred to here, but we assume they are the proposed amendments to the Bylaw following consultation.
39. There is no right on the part of members of the public to comment on proposed changes to the proposal following consultation, before final adoption. The SCP gives one opportunity for feedback, at the initial proposal stage, and for that feedback to be used in preparing the final bylaw for adoption. The process does not involve continual feedback on drafting changes throughout the entire process.

*Advice to Board did not say that there was no existing livestock on road bylaw and no need for one now*

40. The background section of the SoP for the new Bylaw advised that the Rodney District Council General Bylaw 1998 chapter 6 stock on roads and the Franklin District Council Livestock on Roads Bylaw 2010 had both already expired without review. The table provided as part of the Proposal section said under status "Expired (under LGA02)." Further, as noted in paragraph 29 above, the SoP stated that the "draft bylaw **puts in place** rules around safely moving stock across a road" (our emphasis).
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41. In the email from Mr McGill of AT to Mr Foster on 23 May 2022 he advised that chapter 6 of the Rodney Council General Bylaw was made under the LTA and therefore had not expired (as expiry only applied to LGA bylaws) and was still in force. The report to the Board described in general terms the review and expiry provisions applying to LGA but not LTA bylaws, but did not identify where the former Rodney and Franklin bylaws sat.
  42. We have not confirmed the legal position, but it is at least arguable that the Rodney livestock bylaw, if made under the LTA of the time, had not expired. If that is the case it would of course have been incorrect to give contrary advice to the Board.
  43. More to the point, whether those bylaws had already expired was not material, because the proposal was to make a new Bylaw covering the same subject matter. In his 23 May 2022 email, Mr Foster acknowledges that this point is "moot".
  44. The more potentially relevant aspect of this allegation is that there was no need for the livestock on roads provisions of the Bylaw, and this had not been drawn to the Board's attention. One difficulty with that allegation is that it is a matter of opinion rather than fact whether the Bylaw is needed.
  45. We have not identified any express statement in the Board report that the livestock provisions are needed. In our opinion, however, this was not required. It was implicit in proposing the Bylaw that AT considered the need existed; and AT held some information (set out in the Q&A document) as to crashes involving livestock (and there may be further information) to apparently justify that stance.
  46. It was also implicit from the statement in the Board paper that some of the legacy livestock bylaw provisions were "excessive", that the need for those provisions had been considered.
  47. In our view the Board paper did not need to contain an express statement that the livestock provisions were necessary, or evidence to support that position.

*Insufficient reflection of focus group opinions or feedback from farmers in the report to the Board*

48. For the purposes of this section of our advice, we are assuming that the feedback allegedly not reflected in the Board report is that referred to by Mr Foster in his emails, namely that the new livestock provisions were unnecessary for the reasons he gave (but noting that some of those reasons were not necessarily legally sound, as set out above). We are not aware of any other feedback which was allegedly not taken into account.
  49. As is normal, the report to the Board contained high level discussion of the overall consultation process, and focused mainly on the
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proposed changes as a result of consultation. This included some changes to the livestock on roads provisions (including a change to accommodate the fact that CoPTTM was under review, one of the issues referred to by Mr Foster.) The report also noted:

Following initial concerns expressed by the Rural Advisory Panel, we held a specialised meeting with Federated Farmers which addressed the immediate concerns and resulted in a constructive and positive environment at the subsequent Livestock focus group session.

50. Further, the table in paragraph 16 of the report to the Board noted that “feedback received” included, on the issue of livestock movements, that “some of the requirements are excessive, for example the requirement for two drovers for livestock crossings. . . It was strongly expressed that droving and crossing are different and need a separate set of requirements each”.
51. The more detailed information about consultation is contained in the consultation report, which was an attachment to the Board report. This report refers to the targeted consultation with farmers, noting that commercial livestock owners and holders were sent letters to advise them of the proposal; and detailing the workshop with Federated Farmers on 17 February 2022 and the livestock focus group meeting (with 13 farming sector attendees) on 25 February 2022.
52. The consultation report covered the livestock on roads issue in Part 5. It appears that after a slow start, engagement by the farming community had increased significantly by the end of the consultation process.
53. Of relevance to the allegations made by the Rodney farmers, the consultation report includes the following statements:

Concern was raised around over-regulation and unfeasibility. Participants in focus group four [ie the livestock focus group] expressed that the introduction of enforcement to an area and industry which has worked productively for a long time was unnecessary and felt invasive.

Further comments were made seeking clarification on whether this bylaw is reactive or proactive. Participant requested evidence which demonstrates that regulation is required to better manage livestock movements. They ask if this bylaw addresses actual or potential risks.

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As stated in the Temporary traffic management section, NZTA is in review of CoPTTM. Farmers expressed concern that the bylaw's reliance on CoPTTM could result in even more restrictions on farmers if the review results in an increased regulatory standard.

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A focus group four participant requested a breakdown of the origin of complaints filed against farmers, speculating they are probably from new arrivals to the area who are unfamiliar with the realities of production farming. The other side of this argument can be seen in the online survey submissions. A submitter states that they have been greatly inconvenienced by the stock movements of a neighbouring farm and request stricter enforcement.

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Feeling unnecessarily regulated is a concern among members of the rural community.

54. In our view these comments reflect the issues in the complaints made by Mr Foster and the Rodney farmers, namely that:
- Farmers are being overregulated and there is no need for the livestock provisions;
  - The status quo was working well and there was no need to introduce regulation or enforcement;
  - Evidence was sought which demonstrated that the regulation was required;
  - Evidence was also sought about the breakdown of complaints;
  - There were potential problems in reliance on the CoPTTM.
55. We consider that it is untenable to say that the matters raised by the Rodney farmers, as articulated by Mr Foster, were not made known to the Board or considered as part of its decision-making. They were not specifically referred to in the main body of the report to the Board, but they did not need to be (and of course the same comment can be made about most of the submissions which were made). The concerns, as expressed in the consultation report, were however known to AT staff who were considering changes to the Bylaw in light of consultation, and they were provided to the Board as part of the consultation report which was attached to the Board paper.
56. We note that the issue of whether the requested 'evidence' was provided, and the significance of that, is a separate one, and is already dealt with above. The consultation report does however tend to confirm that the request was made.
57. The Rodney farmers' complaints may, in substance, be a complaint that their argument that the livestock provisions in the Bylaw were unnecessary was not accepted. Obviously, however, a submitter cannot have any expectation of their submission carrying the day.
58. We note as well that the consultation report discusses in some detail other submissions made by the rural sector as to aspects of the livestock provisions i.e. inconsistent with the idea that no regulation at all was needed.
59. For the above reasons, we do not agree that the material which went to the Board insufficiently reflected the Rodney farmers' position that the livestock provisions were not needed at all.

*It should have been made clear at the outset of the bylaw-making process that this was a new bylaw for stock movements*

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60. There is no factual basis for this allegation. The SoP, the Quick Guide and AT's relevant website page clearly stated that the Bylaw would cover stock movements in the road corridor, and that is also apparent from the draft Bylaw that was part of the SoP.

*Misleading to say that Local Board feedback conformed to feedback received from general public.*

61. We do not have sufficient information to fully understand the basis for this allegation. However the statement in the Board report is the report writer's very high level assessment of the Local Board feedback, which is unlikely to be objectionable unless patently incorrect. Even then, it would not be material given that the full Local Board feedback was outlined in Appendix A to the consultation report, itself an attachment to the Board report.

#### *Overall*

62. For the above reasons, we do not consider that the consultation process was materially deficient for any of the alleged reasons.
63. The strongest claim is in relation to the failure to provide certain information. Based on the consultation report, we can understand how the Rodney farmers may have expected to receive a more detailed response from AT justifying the need for the Bylaw. However, we do not consider that a failure to do so (if there was a failure) was a material breach of the consultation principles. In any event there is a question mark over the practical impact (if there was a failure), given that Mr Foster apparently failed to read his email in a timely fashion anyway.

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#### **Current status of the Bylaw**

64. In our opinion the Bylaw has not yet been made. In terms of the Board's resolution, the making of the Bylaw is conditional on evaluation of the findings of the legal review of the public consultation process, and that has not yet occurred. We do not consider that conditions in the resolutions amount to the Board having delegated the power to make the Bylaw, contrary to section 54(1)(b) of the LGACA.
65. It would be possible to remove any "conditionality" from the decision to make the bylaw by the Board revoking its delegation to the Chair and Deputy Chair to evaluate the findings of the legal review into the public consultation process. This would reduce the scope *even to argue* that the Board had delegated the power to make the Bylaw, contrary to section 54(1)(b) of the LGACA. On that basis, we recommend that the Board make resolutions along the following lines, at its next meeting:

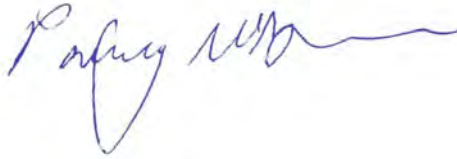
The Board:

1. Notes its delegation on 26 May 2022 to the chair and deputy chair to evaluate the findings of the legal review of the public consultation process;
2. Revokes that delegation on the basis that it wishes to undertake that

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- evaluation itself;
3. Notes and accepts the findings of the legal review, and is satisfied as to the adequacy of the consultation process;
  4. Makes the bylaw.
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**Please call or  
email to discuss  
any aspect of this  
advice**

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