

# Neil E Wells

Barrister

BA LLB (HONS)

1156 HUIA ROAD, HUIA,  
WAITAKERE CITY 1007, NEW ZEALAND  
TEL: +64 9 811 8020 : FAX + 64 9 811 8010  
E-MAIL: neil.wells@amcom.co.nz

18 August 2000

23 AUG 2000

**CONFIDENTIAL**

Professor Bruce Ross  
Director-General  
Ministry of Agriculture and Forestry  
P O Box 2526  
WELLINGTON

Dear Bruce

## Animal Welfare Institute of New Zealand

1. It is with reluctance that I write to you in confidence about a matter that has concerned me increasingly over the past year.
2. In my view MAF Policy is not providing MAF and the Minister with timely policy advice that is consistent with implementing sound practical policy initiatives. There seems to be a fundamental problem with the approach some MAF policy analysts have to their brief. It raises the question: Is it their task to determine policy, or is it to provide professional advice with policy options to those who do make policy decisions?

Let me explain.

## Background

3. Over the past 26 years I have worked with various MAF officials (Peter O'Hara, John Hellstrom, Barry O'Neil and David Bayvel), both as National President and National Director of the RNZSPCA, and in latter years as a consultant. I have always been accorded the utmost courtesy and consideration in any connections with MAF and have been accustomed to a relationship characterised by openness and "getting the job done" cost effectively within agreed timelines.
4. More than 10 years ago I worked with Royce Elliot on the first concept of an Animal Welfare Advisory Committee. In the developmental stages of the Animal Welfare Bill I worked with MAF Policy, MAF Legal and MAF RA and was engaged by MAF Policy to write the early Cabinet Policy Papers.
5. I am very familiar with the origins of the Animal Welfare Act 1999, first because I had been involved in developing AWAC policy, and latterly because I wrote the Private

Member's Bill along with Pete Hodgson. I should say at this point that in 1998 when I was approached to write the Bill I discussed it openly with MAF RA officials to clarify any perception of a conflict of interest or breach of confidentiality. It was agreed that I would develop the Bill only with material that was in the public domain.

6. I detected increasing distrust of my involvement with MAF from some MAF Policy officials, first I believe, because I had written the Private Member's Bill, and later, because Parliament engaged me as an independent specialist adviser during the consideration stages of the 2 Animal Welfare Bills.

#### **Waitakere City pilot programme**

7. In 1995 I brokered an arrangement between MAF RA and the Waitakere City Council to pilot a programme whereby WCC animal control officers were trained and warranted under the Animals Protection Act 1960. The record will show that this pilot programme was successful in determining that there is a synergy between animal welfare and animal control.
8. Three successive Ministers were briefed on the programme, and the related charitable trust proposal by the Animal Welfare Institute of New Zealand, and supported its continuation. There was a belief that there might be a seamless transition between the pilot programme and a new arrangement under the Animal Welfare Act 1999.
9. The current Minister of Agriculture expressed a wish that a decision could be made early this year. We are now 8 months into the new Act. The issue has still not been resolved and the process seems to be paralysed by endless policy analysis.

#### **The *ultras vires* question**

10. In 1996 MAF Policy officials seemed to be manoeuvring to bring to an end the MAF/WCC pilot programme. MAF Policy questioned whether the Waitakere City pilot programme was *ultra vires*. Each time a question was raised satisfactory answers were given. Some of the questions were iterative and naive to say the least.
11. It was about this time that I became concerned that there appeared to be a change in MAF's policy modus operandi. Instead of working with MAF regulatory officials in determining new policy initiatives MAF Policy officials appeared to be taking an independent stance to the point whereby they considered that they and they alone could determine policy. On more than one occasion I have been met with a comment from a MAF policy analyst, "I have not made a decision." Surely it is the Minister who makes decisions based on robust policy advice and consideration of identified policy options.
12. It seemed that there was a determination by some MAF Policy officials to undermine the MAF/WCC programme. Each time a question was raised and answers provided MAF Policy would shift the goal posts. Throughout this time I kept MAF Biosecurity Authority fully briefed.

13. In 1997, after discussion with the Local Government Division of Internal Affairs, it was clear that the pilot programme was not *ultra vires* after all.
14. MAF papers obtained recently show that in 1997 it was considered that the pilot programme came within the scope of section 37T of the Local Government Act 1984. But there was a rider that section 37T should only be used where the Crown is paying for a service and could not be relied on other than as a temporary measure. It does not take a lawyer to see that section 37T makes no reference to the Crown paying for a service, nor that such an arrangement could only be temporary.
15. MAF Policy then wanted to terminate the pilot programme on the grounds that there was a Parliamentary review of the Rating Powers Act in progress. The Rating Powers Act had no relevance to the issue.

#### **Pro forma application**

16. As indicated, while the Animal Welfare Bills were under consideration I was engaged by Parliament as an independent specialist adviser. In 1998 I had submitted to MAF a *pro forma* application for the Animal Welfare Institute of New Zealand to be an approved organisation. The application could not be made formally until the Bill was passed into law. The *pro forma* application was submitted in the interests of resolving any outstanding matters that might arise from the AWINZ application before the Bill was enacted.
17. Drafts of the application were in the possession of MAF in 1998 and yet 2 years later MAF Policy is raising new issues.

#### **Select Committee consideration**

18. In 1999 during the consideration stages of the Bills MAF Policy attempted yet again to frustrate the WCC/AWINZ concept by introducing a late paper to the Select Committee that would not only have defeated the AWINZ proposal but would also have had the flow-on effect of undermining long standing arrangements in place with the SPCA. That proposal was that Inspectors must be directly employed by the approved organisation.
19. At a tense meeting of the Select Committee MAF Policy officials were closely questioned by Pete Hodgson who was acting with the support of all members of the Committee. A senior MAF Policy official at first denied that there was any knowledge of any potential application for approval as an approved organisation when the new advice had been drafted. Then the official had to admit that the AWINZ proposal had been seen by MAF Policy. When pressed by Pete Hodgson the official admitted that there had been an attempt to mislead the committee and apologised.
20. Parliamentary Counsel was asked by the Select Committee to re-draft clause 105 and came back with the term "properly accountable". MAF Policy officials were then asked by the Committee, with the knowledge of what was being proposed by AWINZ, would such a proposal meet the new wording, and that assurance was given.

### Crown Law opinion

21. In January this year at a meeting with a MAF Policy official it was stated both verbally and in writing that "MAF believes that it is the responsibility of Waitakere City Council, which should be knowledgeable about the legislation within which it operates, rather than MAF, to assure the Minister that the proposed arrangement with AWINZ is not *ultra vires* relevant legislation."
22. AWINZ accepted that and Waitakere City decided to obtain an independent legal opinion from Kensington Swan (now KPMG Legal). That opinion provided the assurance asked for by MAF Policy.
23. I was astounded to learn that instead of accepting the assurance requested, MAF Policy had asked Crown Law for a legal opinion. When I asked the MAF Policy official why, I was told, "MAF didn't like the opinion because it was not robust so MAF has changed its mind".
24. On a separate issue I had some weeks earlier discussed with MAF Legal a central issue related to a legal interpretation of minimum standards in Codes of Welfare. I asked if a Crown Law opinion had been obtained and was informed that a Crown Law opinion is expensive and MAF would not waste money on it. I reminded the MAF Policy official of that but his response was an emphatic, "MAF is getting a Crown Law opinion. Cost is not an issue."
25. In 1996 MAF Policy was aware that the pilot programme was valid by virtue of section 37T of the LGA yet in 2000 Crown Law was not asked to comment on whether section 37T was a way to validate the proposed programme. The narrow and leading question put to Crown Law was whether the proposal was *ultra vires*.

### Meeting with Ministers

26. We now have the situation whereby MAF Policy officials have advised the Minister that the scheme is *ultra vires*. At a meeting in June this year with two Ministers (Hon Jim Sutton and Hon Pete Hodgson) MAF officials were reminded by Pete Hodgson of the advice given to the Select Committee 12 months earlier and he suggested that the Committee had been "mal-advised" by MAF. Pete Hodgson went on to suggest that MAF had a duty to find a way through the problem.
27. The meeting concluded positively with the Minister asking for a pros and cons briefing paper to be taken to caucus. The Minister asked that the caucus paper be written jointly by MAF Policy and me.
28. However, MAF Policy's recollection of the outcome of the meeting bears no resemblance to mine, nor to anyone else's present at the meeting. The draft caucus paper introduces new issues related to a review of local government devolution that are irrelevant to the AWINZ proposal. Until now MAF has advised the Minister that the only outstanding issue was the question of *ultra vires*. I amended this draft



substantially and returned my comments on 17 July pending receipt of the KPMG legal opinion.

29. In a letter dated 10 July 2000 signed by the Minister is a paragraph in which it is said, "I recall that Mr Higgins (Waitakere City) offered to obtain a legal opinion...". The Minister was not present during that conversation which took place in the outer office after the ministerial meeting concluded. I am not suggesting that a Minister can read every draft letter line by line but I would have thought that it is of primary importance that letters drafted for the Minister contain no inaccuracies. How can anyone have any degree of confidence in MAF Policy when there appear to be no checks nor balances of accuracy in the material that is presented to a Minister of the Crown.

### KPMG legal opinion

30. KPMG Legal has now provided a further robust legal opinion that shows a way ahead. A copy is attached. Not only does the legal opinion show that such a programme is not *ultra vires* it also shows that despite the *ultra vires* question an agreement under section 37T is a valid way to proceed.

### The way ahead

31. The Minister clearly wants to find a win-win way forward. MAF has a choice of facilitating this or prevaricating with endless iteration and legal opinions.
32. Five years ago MAF RA saw the Waitakere pilot programme as a way to ensure that the voluntary sector could provide the necessary animal welfare compliance activity to supplement MAF compliance activities. Should for any reason an existing organisation cease to provide compliance activities, MAF has estimated that it could cost up to \$5M of tax funded revenue to provide even elementary compliance activities. It is logical that MAF should seek to encourage rather than hinder the approval of organisations that meet the criteria of the Act.
33. A final concern is the unprofessional and unhealthy criticisms made by MAF Policy officials regarding MAF Biosecurity Authority officials.
34. Some years ago one MAF Policy official questioned the ability of MAF RA to develop policy advice and suggested that none of the work that had gone into the Animal Welfare Bill was professional and had to be done again. This caused considerable delay in the development of the Bill. Latterly, another MAF Policy official expressed the view to me that MAF Biosecurity Authority officials, including the Group Director, are not capable of developing policy advice, implying that this is the sole preserve of policy analysts.
35. I would suggest that MAF Policy officials with no experience of practical organisational implementation cannot provide competent policy advice without full consultation with those MAF officials who have practical experience.

36. I regret having to be so detailed and can provide further information if requested. I trust a satisfactory resolution can be found to this ongoing, frustrating and costly saga without resorting to an official complaint to the Minister, the Ombudsman or the Administrative Division of the High Court.
37. I would like to meet to discuss and hopefully resolve this issue with you, Barry O'Neil and Larry Ferguson and will liaise direct with your personal assistant to arrange a convenient time for this.

*Kind regards*  
Sincerely,

*Neil Wells*

Neil Wells  
Barrister

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT