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Date: 05/01/2000 15:39:22
Subject: AWINZ

Mark

Happy New Year and all of that.

Please regard this as a discussion paper. I think we can fine-tune this a lot by e-mail but it would be productive if we could meet in Auckland in the next week or so to put the finishing touches on it.

I would like to get this resolved by the end of the month. The longer we go the greater the risk of system decay. We have a transitional protocol in place between MAF-EU, Auckland SPCA and WCC but it is temporary. I have received a letter from Jim Sutton as Minister of Agriculture so I assume that the Animal Welfare Act 1999 has been allocated to his portfolio.

The Minister's letter has identified 4 broad issues:

(a) the lack of clear distinction in the respective powers and roles of AWINZ and the Waitakere City Council (WCC), the employment arrangements of Inspectors, and the accountability arrangements between each of the three parties,

(b) whether the principal purpose of AWINZ is animal welfare and the boundaries between animal welfare and animal control responsibilities,

(c) the long term financial robustness of AWINZ, and,

(d) the proposal that it, from the outset, should have national geographical coverage.

But you will know this as I assume you drafted his letter.

Principal purpose

The principal purpose of AWINZ is the promotion of animal welfare.

While in general this means that AWINZ's principal function will be overseeing the performance of its inspectors in relation to the Animal Welfare Act 1999 there will be other functions of promoting animal welfare that are not related to the Act, e.g., educational programmes in schools, lobbying for better legislation, promoting public awareness of animal welfare issues, promoting public awareness of the link between animal abuse and child abuse, animal welfare aspects of conservation issues such as whaling.

The intention is that AWINZ will operate as quality assurance body directly accountable for the performance of inspectors, rather than as an employer. AWINZ will have no function in pursuing matters of animal control where animal welfare is not an overriding purpose.

The Act provides that an approved organisation has the promotion of animal welfare as its principal purpose, not its sole purpose. As discussed, an organisation can have other purposes provided the promotion of animal welfare is the first in ranking.

The Act refers to the "principal purpose". That's not the same as "principal function". A purpose or object arises out of a function or action.

One action can have different purposes, e.g. when an officer attends to a dog that is barking incessantly he or she could have the purpose of controlling the dog or promoting its welfare. In such a case then the inspector must always have the promotion of animal welfare as the principal function. If an inspector pursues controlling the dog and ignores its welfare the inspector is in breach of section 126 (2) and the Minister has the ultimate sanction in section 124 (6) (b).

There will be functions that arise from the Dog Control Act 1996 that are animal welfare by nature. For example-

- * an officer doing school talks on responsible dog ownership and the welfare of dogs

- * an officer following up a complaint of a dog barking and determining that the cause is a lack of proper care and attention

* an officer advising a new dog owner on proper care of a dog
-are all promoting the welfare of animals.

It is not possible to quantify the proportion of animal welfare work to animal control work. I think that to say a particular organisation does not have animal welfare as its principal purpose would necessitate pointing to a principal purpose that is clearly not promoting animal welfare.

Despite this, it is the organisation that must have the promotion of animal welfare as its principal purpose, not the individual inspectors. The potential for conflict is a perception more than a reality.

Catherine Petrie's major concern 3 years ago was that unscrupulous dog control officers could use an inspector's powers to go into places to enforce dog registration. That has not happened in Waitakere and now the Act legislates against it in section 126 (2) and 124 (6) (b).

If there was a potential for a conflict of interest between animal control and animal welfare MAF Compliance Unit has had 5 years to comment through 3 compliance audits of Waitakere. No such conflict has occurred.

Take a hypothetical situation. A complaint is received that a dog is barking incessantly, is continually tied to a short chain, rarely exercised, and looks thin. This could be an investigation under section 54 of the Dog Control Act 1996 or section 10 of the Animal Welfare Act 1999. Is there a conflict of interest? As soon as an inspector identifies a possible conflict between two pieces of legislation the resolution is clear-the inspector must proceed under the Animal Welfare Act 1999 or be in breach of section 126 (2). There is no choice.

Training emphasises this-in particular Unit Standard 4223 version 2-Describe the powers of a compliance office .

element 3

Identify situations in which compliance officer's powers change.

Range: power to act ceases, increases or transfers to a different agency, or changes to different legislation.

If an inspector uses a power to enter and inspect a commercial animal production unit and the information gained is used in a political campaign against a particular form of animal husbandry, there is a real conflict of interest. If that happened I would expect MAF to act swiftly and probably recommend the withdrawal of the inspector's appointment or at the very least give a warning.

Employment arrangements

As we have agreed section 122 (1) (c) does not mean that an inspector must be employed under a contract of service. It can also include an arrangement for services in other than an employer/employee relationship.

Inspectors will not be employed directly by AWINZ but will remain employed by their principal employer. When an Inspector is performing a function under the Animal Welfare Act 1999 he or she will be doing so on a voluntary basis. That is to say that the inspector will not be paid by AWINZ for performing that function.

Distinction of powers

Section 122 (1) (c) of the Animal Welfare Act 1999 provides that the functions and powers of the organisation must not conflict with the powers and functions of an approved organisation. It is not intended that AWINZ pursues any function unless it has a purpose of promoting animal welfare. The Act does not give the organisation any powers but duties are imposed by section 141 The Act only gives powers to individuals who are appointed inspectors.

The ultimate test on conflict of powers of an inspector is clearly set out in section 126 (2) which provides that where there is a conflict of interest the powers, duties, and functions conferred by the Animal Welfare Act 1999 prevails.

Distinction of Roles

It is not conclusive that New Zealand legislation makes a distinction between animal welfare and animal control. While that may have been the case prior to the Dog Registration Act 1955 and the Hydatids Act 1968 the synergy between local government and central government started with the merger of the two functions in the Dog Control and Hydatids Act 1982. Some of the functions were administered by local government and some by MAF. Subsequent legislation has shown an intention by Parliament to include animal welfare in dog control by including welfare offences in section 54 of the Dog Control Act 1996 and importing powers of inspectors through section 8A of the Animals Protection Act 1960 and now section 174 of the Animal Welfare Act 1999. The enforcement powers are now similar.

* Compare section 127, Animal Welfare Act 1999 with section 14, Dog Control Act 1996

* Compare section 130, Animal Welfare Act 1999 with section 15, Dog Control Act 1996

Parliament itself has inherently linked dog welfare and dog control.

Financial robustness

The Act uses the term "financial arrangements" rather than "financial robustness".

AWINZ will not be directly employing its inspectors. They will act on a voluntary basis. The financial arrangement with the employer of each inspector will be that the employer will meet the costs of the employee while performing voluntary duties for AWINZ during the normal course of employment. Hence the budget of AWINZ does not need to provide for inspectors' wages.

Inspectors will also be expected to volunteer their services outside normal employment if necessary. This is not likely to arise other than in an emergency situation.

AWINZ will not require a large budget. To ensure that AWINZ can adequately provide for the services it will provide under the proposed Memorandum of Understanding with MAF, a fee will be charged to each linked organisation based on-

* an annual hook-on fee of \$1250 plus GST per linked organisation

* an annual fee of \$350 plus GST for each inspector appointed

* a fee of \$95 an hour plus GST for each biannual audit of the linked organisation

* continuing education on a cost basis.

A budget is attached as Appendix I.

AWINZ will also attract general funding from community welfare funding.

AWINZ has recently been given a grant from the Waitakere Community Welfare Fund to assist in adapting Waitakere City's procedure manuals to generic manuals.

Fundraising will focus on funding for the promotion of animal welfare.

This cannot start until AWINZ is functional. Form will follow function.

Accountability arrangements

Where an inspector is also a dog control officer the inspector will be accountable to AWINZ for his or her actions when acting under the powers, duties and functions imposed by the Animal Welfare Act 1999.

If the officer is functioning in an area where animal welfare is not an issue AWINZ will have no responsibility for the officer's actions.

Reports on any complaint that requires the exercise of any powers, duties or functions of the Act will be submitted to AWINZ.

AWINZ will be responsible to MAF Biosecurity Authority for the exercise of those powers, duties and functions.

The employer will be accountable to AWINZ by permitting the employee to exercise the powers, duties and functions of an inspector through a memorandum of understanding and will be responsible for providing support but will have no role in the way the powers, duties and functions are carried out.

In the event of a failure to perform the inspector will be accountable

to AWINZ, not to the employer.

Where an issue of neglect of duty or misconduct arises AWINZ will be responsible to account to MAF for the inquiry, not the employer.

The linked organisation will be accountable to AWINZ for providing funding, support, and equipment for the inspector, permitting the inspectors to operate, and facilitating compliance audits.

Geographical coverage

Restricting an approval of an organisation geographically may create a bureaucratic bog. It is arguable that the Minister does not have the power to restrict the approval of an organisation geographically. Even if it is intra vires of the Minister to restrict an organisation geographically, which is not accepted, there is no power for the Minister to vary an approval.

Section 121 provides that an application must include information on the area in which the approved organisation will operate. The word "area" is ambiguous. It is arguable whether it means "region" or "scope" or "extent".

If it was intended to mean "geographical region" then the draughtsman should have used the words section 124 (b) (i) "a particular district or part or parts of New Zealand."

Even if it can be said that the word "area" means "geographical region" that is not included in the criteria set out in section 122.

It is arguable that the reason why an application needs to include the area (if it is accepted that it means geographical area) is so that the Minister can determine whether appointments need to be restricted geographically by section 124 (b) (i).

The Minister also has the power to restrict an appointment for a particular purpose. While "purpose" is not defined it could be, for example, that the appointment of inspectors could be restricted to cats or horses as the case may be if they are nominated from organisations that operate only in the area of cat or horse protection.

But could this raise a question that an organisation that has as its principal purpose the promotion of the welfare of one species of animal is not an organisation that has the promotion of the welfare of animals as its principal purpose. That would, in my opinion, place a restriction not intended by Parliament.

It could also refer to a purpose under the Act. An appointment could for instance be restricted for the purpose of Part 3 or Part 6 of the Act.

There is no issue with restricting the district or part of New Zealand in which the inspectors' appointments apply. To restrict this to a territorial district would be overly restrictive- but to restrict Waitakere and North Shore inspectors to say, the Auckland Region, would not be overly restrictive. That restriction can be reviewed on each reappointment on a case-by-case basis.

Continuing Education

This was not raised in the Minister's letter but it was in our discussions.

The initial training standard determined by MAF is the National Certificate in Compliance and Regulatory Control (Animal Welfare). This standard has been determined by the Group Director, MAF Biosecurity Authority. There is no reason to suggest that the technical expertise required will be other than the National Certificate.

All officers of both Waitakere and North Shore have completed the National Certificate-the first in New Zealand to do so.

Continuing education is a requirement and this will be met by each inspector undertaking a 4 hour workshop each 6 months that will include-

- * legal problems

- * review of procedures

- * case studies.

The current RNZSPCA criteria is that each inspector must attend one weekend refresher course of about 14 hours each 3 years. These refresher

courses are now facilitated by MAF.

Whether continuing education is a matter for MAF Biosecurity Authority to facilitate or left to each approved organisation is not fatal to the application. It is sufficient at this stage to state that AWINZ will provide for continuing education of 8 hours a year. Again form can follow function.

Confirming letters to Minister

Obtaining letters of confirmation addressed to the Minister from Waitakere City Council, North Shore Animal Care and Control and the individual inspectors can be assumed as done.

I have drafted form letters in the Appendices. You might want to comment on these.

Duties of Approved Organisations

The Minister's reference to section 141 has been noted. This was covered in paragraph 10.8 of the application dated 21 November 1999.

Rating Issue

There was one other issue that we identified at our meeting with Barry O'Neil-the legal status of rating. This question seems to be whether it is intra vires a territorial authority to fund animal welfare. This question was canvassed at length when Catherine Petrie first raised it when she was in John Falloon's office in 1996 and later when she returned to MAF Policy.

The answers can be found in the following-

(a) Section 6 of the Dog Control Act 1996 enables territorial authorities to "undertake, promote, and encourage the development of such services and programmes as it considers desirable to promote responsible dog ownership and the welfare of dogs."

(b) Functions under the Dog Control Act 1999 are funded by revenue received under that Act and expended for the purposes authorised by or under that Act. The use of rates is not a direct issue as the dog control account is a stand alone fund. Despite this there is not a territorial authority in New Zealand that does not supplement dog control from rates-some as high as 35%.

(c) Local government is able to deliver "appropriate facilities and services on behalf of central government." - Local Government Act 1974 section 37K (f).

(d) This is a wide purpose and there appears to be no bar to those services being delivered through a third party; e.g. AWINZ. Despite this it is the individual inspector who is delivering the service, not his or her employer.

(e) A Council may-

(i) Encourage the development of such services and facilities as it considers necessary in order to maintain and promote the general well-being of the public and may promote or assist in promoting co-operation in and co-ordination of welfare activities in the district

(ii) Meet the cost of any such expenses as may be necessary for the establishment, management, and maintenance of community welfare services or activities

(iii) Facilitate the undertaking by ...other organisations ... of appropriate ... activities

(iv) Make grants of money ... to any organisation ...whose object or principal object is conserving or promoting the welfare of the community

...

-Local Government Act 1974, section 598

This information, including a letter from Anthony Higgins, a staff solicitor of Waitakere City Council, was provided to MAF Policy 3 years ago, Does it need further iteration?

Structure and Purpose

It's worth noting that on 21 June 1994 the President of the Law Commission, K J Keith (now Justice Sir Kenneth Keith) wrote to the Minister of Fisheries, "We also face the difficulty of considering

structure ahead of purpose. Form should follow function."

This is reflected in section 122 (2) in that the establishment of performance standards and technical standards may be imposed as a condition of approval. In other words, form follows function.

If the form is not provided post approval the Minister can revoke the approval.

The Court of Appeal decision of Takaro needs to be kept in the background. A Minister must act within the powers conferred by legislation, cannot take into account irrelevant considerations and cannot act to secure objects other than those contemplated in the legislation.

Appendix II

DRAFT LETTER

From Waitakere City Council
To Minister of Agriculture

In 1995 a pilot programme between MAF Regulatory Authority and Waitakere City Council resulted in a number of officers being trained to standards approved by the Chief Veterinary Officer of MAF.

The pilot programme was extended following agreement with the Minister for Food, Fibre, Biosecurity and Border Control that this continue until the repeal of the Animals Protection Act 1960 (1 January 2000).

The programme has been audited 3 times by MAF Compliance Group. Each audit was reported favourably.

In 1996 Waitakere City Council considered strategic options for its various business units including Animal Welfare Services.

Over the past 3 years the City Business Advisory Unit and Animal Welfare Services have been developing the concept of forming a charitable trust. This process commenced before the policy of "approved organisations" was included in the Animal Welfare Bill (No.2) and lead to the establishment of the Animal Welfare Institute of New Zealand.

No decision has been made as to whether Waitakere City will contract its animal welfare and control services to Animal Welfare Institute of New Zealand. That is merely a possibility.

Council is aware that the Animal Welfare Institute of New Zealand has applied to be an approved organisation. Council supports that application.

In the event of AWINZ being an approved organisation Council will agree to-

- (a) Provide the necessary funding to enable each inspector appointed to comply with the programme;
- (b) Provide funds to meet hook-on fees with AWINZ.
- (c) Provide support services and necessary equipment for Inspectors;
- (d) Adhere to a quality system provided by AWINZ for the administration of the programme;
- (e) Permit the Inspectors to carry out their powers, duties and functions in relation to each complaint or matter that arises from his or her performance as an Inspector;
- (f) Provide day to day supervision of inspectors;
- (g) Facilitate auditing of the quality system by AWINZ and provide access to documentation as requested by AWINZ quality auditors;
- (h) Advise AWINZ by facsimile or e-mail when an investigation is likely to result in a prosecution under the Animal Welfare Act 1999 and where necessary permit the investigating inspector to act under the direction of AWINZ;

- (i) Advise AWINZ of each occasion a search warrant is obtained and executed;
- (j) Advise AWINZ of any decision not to prosecute where the investigation reveals that an offence has been committed but the circumstances warrant that no further action be taken or that a warning be given;
- (k) Refer to AWINZ any serious complaint made against an Inspector and advise AWINZ of any trivial complaint made against an Inspector and the manner in which it was dealt with;
- (l) Execute a formal memorandum of understanding with AWINZ containing the heads of agreement in this letter.

Council accepts that each Inspector will act under the direction of the Director-General of Agriculture and Forestry in the exercise of the powers, duties and functions imposed by the Animal Welfare Act 1999 and acknowledges that in the event of any conflict of interest arising between the powers, duties and functions conferred or imposed on an inspector as an employee and the powers, duties and functions conferred or imposed on the inspector by the Animal Welfare Act 1999, the powers, duties and functions imposed under the Act will prevail.

Yours faithfully

Appendix III DRAFT LETTER

From Inspector

To Minister of Agriculture

In the event of my being appointed an inspector under the Animal Welfare Act 1999 I agree to-

- (a) Carry out the powers, duties and functions of an Inspector in accordance with the Act;
- (b) Be available to act in a voluntary capacity outside hours of employment as and when required by AWINZ in an emergency;
- (c) Complete all training in accordance with the performance standards and technical standards in section 124 (1) (e) (ii) and as imposed by the Minister in accordance with section 124 (2) of the Act;
- (d) Act under the direction of the Director-General of Agriculture and Forestry in the exercise and performance of the powers, duties, and functions conferred or imposed on me under the Animal Welfare Act 1999.
- (e) Adhere to the procedures set out in the AWINZ quality system.

Yours faithfully

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APPENDIX I

ANIMAL WELFARE INSTITUTE OF NEW ZEALAND

Budget for Year 2000

Income

Fees

| | | | | |
|----------------------|----|---------|------------|-------------|
| Linked organisations | 2 | \$1,250 | \$2,500.00 | |
| Inspectors | 14 | \$350 | \$4,900.00 | |
| Audits | 4 | \$760 | \$3,040.00 | \$10,440.00 |

Grants & donations

| | | | | |
|------------------|--|--|-------------|-------------|
| Community | | | \$1,500.00 | |
| Key donors | | | \$10,000.00 | |
| Public donations | | | \$5,000.00 | |
| Public appeals | | | \$12,000.00 | |
| Sponsorships | | | \$15,000.00 | \$43,500.00 |

total income \$53,940.00

Expenditure

| | | | | |
|-------------------|--|--|-------------|-------------|
| Consultants | | | \$36,000.00 | |
| Administration | | | \$5,000.00 | |
| Fundraising | | | \$4,000.00 | |
| total expenditure | | | | \$45,000.00 |

| | | | | |
|---------------|--|--|-------------------|--|
| Excess | | | <u>\$8,940.00</u> | |
| GST exclusive | | | | |