

## Government Response to

### ***'Report of the Opinion of Ombudsman Mel Smith on complaints arising from Aerial Spraying of the Biological Insecticide Foray 48B on the population of parts of Auckland and Hamilton to destroy incursions of Painted Apple Moths and Asian Gypsy Moths, respectively during 2002-2004'***

October 2008

The Ombudsman's *Report* focuses on the painted apple moth and Asian gypsy moth eradication programmes led by the Ministry of Agriculture and Forestry (MAF). Painted apple moth was detected in Auckland in 1999, and declared eradicated in 2006. Asian gypsy moth was discovered in Hamilton in 2003 and declared eradicated in 2005.

Both eradication programmes involved aerial and ground spraying using the biological insecticide Foray 48B, host vegetation removal, vegetation movement restrictions and moth trapping.

The Office of the Ombudsmen investigated two complaints made to it by concerned residents, and has made several recommendations to MAF and the Ministry of Health. The Government's response to these recommendations is set out below.

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### **OMBUDSMAN'S RECOMMENDATION: 1**

The Ombudsman is concerned about the impact of the painted apple moth and Asian gypsy moth eradication programmes on people living within the west Auckland and Hamilton spray zones. He considers it essential that programmes such as these have, and retain, public support.

#### **Ombudsman's Recommendation 1(a):**

a) *"My recommendation is that the spraying agency must provide full and accurate information in relation to the need for the spray programme and about the contents of the spray. It should also unequivocally acknowledge that there may be harm caused to some people residing or present within the spray zone."*

#### **Government Response to Recommendation 1(a):**

##### **(1) Providing full and accurate information in relation to the need for the spray programme**

The Ministry of Agriculture and Forestry (MAF) did provide full and accurate information in relation to the spray programme.

Throughout the painted apple moth and Asian gypsy moth eradication programmes MAF engaged with local communities and provided information, advice and support. MAF listened to community concerns and made operational changes as a result of community feedback. In particular, changes were made to the timing of aerial operations so that disruption to the community was minimised. Where it could be

avoided, aerial operations were not carried out on weekends or public holidays, or while children were on their way to school.

MAF also responded to community concerns by providing the west Auckland and Hamilton communities with a free Health Service. The Health Service could be contacted via a well publicised 0800 number, and provided advice and practical support to people with concerns.

The Government agrees that it is important to provide good information about the need for a spray programme, in order to ensure community understanding and support.

### **Government Response to Recommendation 1(a): (2) Providing full and accurate information about the contents of the spray**

The company that manufactures the Foray 48B spray considers the nature of the formulation to be highly confidential and is not willing to have those details publicly disclosed. In order to retain access to the most tried and researched formulation, MAF has complied with the company's condition of supply that the formulation is kept confidential.

The company's reasons for seeking confidentiality are:

- It regards the details of the formulation as a trade secret and considers the formulation of all its products to be the basis of its commercial success globally.
- Release of any information concerning the formulation ingredients would help its competitors mimic the formulation of Foray 48B and thus erode the market success of Foray 48B worldwide.
- The market for Foray is primarily Northern Hemisphere forests, where there are pests that require annual treatment. New Zealand is not a traditional market and one which the company would not normally enter because there are no sustainable target pests. The entire registration history and use of Foray 48B in New Zealand was at the request of the Government, initially as a contingency, and then later to treat actual incursions of moths. The company was not prepared to jeopardise the success of its Northern hemisphere business by release of formulation details in New Zealand.
- Bioterrorism has added a new perspective to the release of information on microbiological products. Releasing information that could help develop stable and effective formulations of toxic bacteria may have undesirable consequences.

However, the company did allow the full list of ingredients to be made available to relevant regulatory agencies as well as several government agencies and key decision makers. These included the Environmental Risk Management Authority, New Zealand Food Safety Authority, Ministry of Health, Auckland District Health Board, the Director of the Painted Apple Moth Health Service and the Minister and Associate Minister for Biosecurity. Additionally, general information on the contents of the spray was also made publicly available.

The Government agrees that any treatment used in biosecurity operations should be approved for use in New Zealand by relevant regulatory authorities.

The Government considers that to ensure that New Zealand retains access to use of Foray 48B and other important pest control products, confidentiality agreements covering the formulation details of biosecurity treatments should not be breached.

**Government Response to Recommendation 1(a):**

**(3) Acknowledging that there may be harm caused to some people residing or present within the spray zone**

Public health and safety were key considerations for officials and Ministers throughout the eradication programmes. Independent and peer reviewed health risk assessments were carried out prior to each programme. Health surveillance was undertaken during operations to identify any unexpected health impacts. Post operation studies aimed to determine the characteristics, incident presentation and possible causation of any adverse health effects.

Government officials and Ministers have received consistent and compelling advice from medical specialists over the more than ten years of these moth programmes that aerial operations using Foray 48B pose no significant risk to human health, but that some individuals exposed to the spray might experience short term effects.

The Health Risk Assessments were made widely available, and people with concerns were encouraged to contact the free Health Service.

The Government agrees that any spraying operation in an urban setting should be informed by independent health risk assessments, and that any risks to the community should be communicated in an accurate and timely manner.

**Ombudsman's Recommendation 1(b):**

*b) "That publication should be made as early as possible to enable those who may wish to do so, to seek medical advice and to take steps to limit, or avoid, exposure to the spray."*

**Government Response to Recommendation 1(b):**

MAF went to great lengths to inform the community about health risks and support mechanisms.

As noted above, the health risks assessments were made widely available, and access to a free health service was provided for people with concerns. Practical support plans were implemented for any individuals assessed as being at risk from the spray. These plans included assisting people to avoid exposure to the spray.

The Government agrees that there should be early communication with the public about any potential health risks associated with a spraying programme, and that support should be provided for individuals at risk.

### **Ombudsman's Recommendation 1(c):**

c) *"There would need to be a well planned communications strategy which should encompass details on demographic groups, food allergies, respiratory problems, family disruptions, and the opportunities for access to medical general practitioners and specialists. Basically, there should be a health service that is sensitive to the community it serves, and is proactive."*

### **Government Response to Recommendation 1(c):**

#### **(1) Well planned communications strategy**

It was recognised early that public understanding and support for the programmes would be critical to their success. A communications strategy was developed to:

- inform the community what was happening;
- understand what the community as a whole was thinking and needed; and
- address the community's needs.

Underlying communications principles included a policy of being upfront and open with the public and media, and using ongoing research to ascertain public awareness of the pest and attitudes towards spraying. Communications mechanisms included media releases and briefings, media interviews, an interactive 0800 number, web site information, wide distribution of the health risk assessments and operational information, television and radio advertising, public meetings, and one-off presentations to key interest groups. A particular effort was made to communicate with schools and early childhood education centres

### **Government Response to Recommendation 1(c):**

#### **(2) Proactive, sensitive health service**

MAF responded to community concerns by providing the west Auckland and Hamilton communities with a free Health Service. The Health Service could be contacted via a well publicised 0800 number, and provided advice and practical support to people with concerns.

People contacting the Health Service initially had their concerns assessed by a trained health professional. This included recording personal details, medical history, current concerns, and any known allergies. If this assessment indicated that the concern was possibly spray related, the person was referred to a Health Service GP. The GP would discuss details of the person's concerns and if necessary recommend a practical support plan to minimise contact with the spray.

Practical support plans could involve a number of measures, including MAF paying for day or night time accommodation outside the spray area for the duration of aerial operations.

The Health Services offered to residents in western Auckland and Hamilton were well utilised by the local communities. In western Auckland some 3,600 people contacted

the Health Service resulting in about 700 practical support plans being developed to help people avoid contact with the spray. In Hamilton about 7,500 enquiries were received by the Health Service, resulting in some 320 practical support plans. In general MAF considers the health programme worked well in both locations, with few formal complaints received about the service provided.

The Government agrees that a well planned communications strategy and a proactive, sensitive health service are essential for any programme involving aerial spraying.

**Ombudsman's Recommendation 1(d):**

*d) "Part of that strategy could involve the establishment of a community liaison group with a wide range of relevant experience and interests."*

**Government Response to Recommendation 1(d):**

Understanding the views of the local community was important for shaping both the painted apple moth operational schedules and community support services. Throughout the programme, MAF commissioned regular surveys to determine the community's information needs, views and level of support.

In September 2001, MAF established a Community Advisory Group by calling for nominations at a public meeting. Unfortunately, most of those who volunteered proved to have a non-negotiable agenda opposed to aerial operations. In MAF's view the Community Advisory Group did not represent the community, and was not adding value as a means for assessing community opinion. MAF disbanded the Group in November 2002.

In January 2003, MAF formed a Community Liaison Group to provide a forum for stakeholder groups to communicate their views on the impact of the project on local people, and to provide another communications avenue for the painted apple moth project team. Members were appointed from community groups and organisations that represented the groups most concerned about aerial spraying. The group included members representing the Auckland Asthma society, Allergy New Zealand, Plunket, Health link, a local school principal, the Auckland Regional Chamber of Commerce, the Employers and Manufacture's Association, an independent scientist, and Te Kauwerau a Maki. This successful model was later used in Hamilton during the gypsy moth programme.

MAF also worked closely with elected members of the council, council employees, iwi and schools to understand their respective needs.

The Government agrees that a community liaison group was useful to help understand the views of the local community, and that this model would also be used in any future aerial spraying programme.



## **OMBUDSMAN'S RECOMMENDATION: 2**

The Ombudsman expresses concern with the Government's decision to use section 7A of the Biosecurity Act 1993 to exempt the moth eradication programmes from the requirements of Part 3 of the Resource Management Act 1991, and suggests that:

*"It should be possible to devise a procedure which provides a sufficient opportunity for the Environment Court to furnish an independent judgement. I therefore recommend that amendments to the relevant legislation be considered and enacted as a matter of urgency so that they are immediately available should the need arise."*

### **Government Response to Recommendation 2:**

Parliament inserted section 7A into the Biosecurity Act in 1997, enabling the responsible Minister to exempt actions taken to eradicate an organism from Part 3 of the Resource Management Act for a period of 20 working days, subject to the Minister being satisfied on a number of criteria. This exemption can be extended for up to two years by Order in Council.

The use of section 7A for the moth eradication programmes seems entirely consistent with what Parliament intended when it made this provision. Moth eradication programmes involve decisions that are nationally significant – if a moth is not eradicated from the location of its incursion, it will spread rapidly throughout the country. Ministers are better placed than local government politicians or the Environment Court to make nationally significant policy decisions.

The Ombudsman's recommendation is short on rationale and specifics. In discussions with the Ombudsman's Office following receipt of the report, it has been clarified that the intention of this recommendation is to provide an opportunity for public engagement. The Ombudsman's Office has suggested that the Environment Court could operate in some sort of advisory capacity to Cabinet, rather than as the final decision maker. It could hear public submissions and form an independent view on whether the benefits of a biosecurity eradication programme outweighed the costs and risks.

The Environment Court is a specialist court established under the Resource Management Act, and its functions are prescribed in that Act. The Biosecurity Act and possibly the Resource Management Act would need to be amended if the Environment Court were to be given a statutory role to advise the Cabinet on nationally significant biosecurity decisions. This would require careful consideration. For example, it is not normally the case that a Court advises the Cabinet on policy decisions, and some biosecurity response decisions must be made rapidly given the biological nature of the risks being managed.

Government does not consider that urgent legislative amendments are necessary, but does agree that the desirability of, and process for, involving communities in major biosecurity decisions could be further considered.

The Government agrees that no immediate change is required to current legislation, which allows Ministers and Cabinet to exempt a biosecurity eradication programme from Part 3 of the Resource Management Act.

MAF will review how section 7A of the Biosecurity Act has been implemented, and assess whether any change to this provision is necessary, as part of a wider review of the Biosecurity Act scheduled to commence in 2009/10.

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### **OMBUDSMAN'S RECOMMENDATION: 3**

The Ombudsman stresses the importance of Cabinet receiving appropriate independent advice where there are significant public health issues. The Ombudsman considers that the Ministry of Health should be charged (and be seen to be charged) with the responsibility of ensuring that the health concerns of the population receive at least equal consideration with ecological or biosecurity issues.

The Ombudsman was concerned that the Ministry of Health tended to approach the matter from the standpoint of considering whether there was a "macro" public health issue, when the issue was one of "micro" public health, that is, affecting a comparatively small number of people, but nevertheless, having a significant impact on their health.

The Ombudsman recommends a senior official in the Ministry of Health be tasked to "look critically at all relevant human health implications, and to be prepared to express an independent viewpoint when there appears to be conflict between the spray operation itself and the human health implications for people living or operating in the relevant area."

#### **Ombudsman's Recommendation 3(a):**

a) *"It is accordingly my recommendation that in the circumstances outlined in paragraphs 35 to 37 such a senior official be appointed with the duties indicated. This is desirable for the well-being of the public within the sprayed area and for the maintenance of public confidence."*

#### **Government Response to Recommendation 3(a):**

The Ministry of Health fully accepted the need for it to provide independent health advice on both the impacts of exotic organisms of public health significance, and on the potential public health risks associated with proposed eradication or pest management programmes. When Ministry of Health officials became aware that the agreed whole of Government practice of MAF leading the public and media responses to issues had led to a perception that the Ministry of Health was not involved in providing such health advice, the Ministry then directly commented on health issues. The use of the Director of Public Health as the Ministry's lead official was to reinforce the fact that the Ministry was providing independent health advice on

the programme, as the Director of Public Health is both a senior Ministry official and has a degree of statutory independence.

The Ministry of Health will continue to provide independent health advice on both the impacts of exotic organisms of public health significance, and on the potential public health risks associated with proposed eradication or pest management programmes.

The Ministry of Health also will continue to provide this independent health advice through appropriate senior officials. This may require the involvement of more than one individual, depending on the expertise required.

**Ombudsman’s Recommendation 3(b):**

*b) “In the meanwhile, it is desirable that further research at an appropriate level be conducted into the relationship to human health of the frequency, duration and intensity of spray operations.”*

**Government Response to Recommendation 3(b):**

MAF and Health officials discussed the need for long-term research towards the completion of the eradication programme, and the Ministry of Health’s Public Health Intelligence section prepared a report summarising the relevant research. Long term research was not felt justified at that time. The report concluded that *“there is little risk to human health from the aerial spray application of Foray 48B. This is not to say that no ill-health effects were reported... these effects are similar across all of the studies... [and] can be categorised as medically minor...”*

However, the Health Research Council, as the agency responsible for managing the Government’s investment in public good health research, should consider this recommendation and determine whether further research is warranted, compared to other priorities for health research funding.

The Ministry of Health will discuss this recommendation with the Health Research Council, and consider whether there is a need to update the Public Health Intelligence report.

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**OMBUDSMAN’S RECOMMENDATION: 4**

*“It is my recommendation that the steps necessary to resolve outstanding questions regarding the formulation of Foray 48B be taken forthwith.”*

**Government Response to Recommendation 4:**

MAF, the Ministry of Health, the Environmental Risk Management Authority and the former Minister for Biosecurity and Associate Minister of Health do not consider that there are any outstanding questions regarding the formulation of Foray 48B.