PAINTED APPLE MOTH ERADICATION CAMPAIGN

(Legality of Aerial Spraying)

Report to the Prime Minister

October 2004

Hana Blackmore
for the PAM Community Network

REPORT INTO THE PAINTED APPLE MOTH ERADICATION CAMPAIGN
Urgent action required by the Government

The *PAM Community Network* calls on the Government as a matter of urgency to:

1. Set up a full Public Inquiry into the PAM eradication campaign
2. Give an absolute guarantee that no further aerial spraying is carried out against the Painted Apple moth, and
3. Ensure that viable alternatives are fast-tracked and implemented.
4. Instruct the responsible Minister to comply with the legal requirements in the Biosecurity Act exemption regulations, and
5. Enter into immediate consultation with the Auckland Regional Council to implement the provisions of the RMA.
6. Set up an independent body to review, mediate and settle all compensation claims arising from the PAM programme.

INTRODUCTION

Government powers under the Biosecurity Act allow the government to do virtually anything it wants. That they may lead them to go beyond the law, or even the spirit of the law should be of concern to everyone.

Recent events have brought the exercise of these powers during the PAM eradication programme into the spotlight. As detailed in this Report, these events are serious and significant enough to warrant the urgent actions listed above.

1.0 Aerial spraying programme without precedent

The *PAM Community Network* is extremely concerned about the situation of the five year old Painted Apple Moth (PAM) eradication programme.

In particular, the current 'threats' by the Ministry of Agriculture & Forestry (MAF) that aerial spraying will immediately recommence if there are any further moth catches.

There has been to date, aerial spraying for twenty nine continuous months with 47 actual sprays. This does not include at least another 29 additional or double-up applications over many areas.

The extent and duration of this aerial pesticide campaign over an urban area is without precedent anywhere in the world.

To continue with what would in reality be a *failed* two and a half year aerial programme without any public review or consultation, is a community and biosecurity disaster.

2.0 Contempt of the law

Over the past three years there have been numerous calls for parliamentary and public inquiries, investigations or reviews into the adverse and unforeseen effects of this programme.

All such requests have been rejected, sidelined or unanswered, whether these have come from respected scientists, community advocates or politicians.

New evidence that MAF and the Minister have been deliberately circumventing and avoiding any process of public consultation, consideration or input has come to light.

Documents recently released under Official Information, have revealed that MAF had no legal basis for continued aerial spraying for the PAM.

The evidence uncovered by the *Network*, and detailed in the attached Legal Report, raises serious questions about the legality of the continued aerial spraying programme.

But just as worrying, it exposes the contempt in which MAF have held the law, the consultation process and the health and wellbeing of the people of Auckland.

The *PAM Community Network* is convinced that MAF have gone beyond the limit of their powers. The Network believes that nothing short of a full Public Inquiry is now acceptable, and that there are indeed now good grounds for a Judicial Review.

3.0 Fraudulent compensation process

That an Inquiry is urgently needed, is nowhere more obvious than the manner in which people adversely affected by the two and a half year spraying campaign have been treated. This is graphically illustrated in the result of the abrupt closure of the PAM Medical Service in May 2004 because spraying was "officially" over.

The closure left many people struggling to cope with not only the costs of unresolved and ongoing health problems related to the spraying, but a 'compensation' process that is turning out to be fraudulent and unattainable.

Claimants are struggling with a system that appears designed to exclude all and every claim as not falling within the 'rules' of reimbursement or compensation.

'Patients' discharged at the end of aerial spraying were instructed by MAF doctors to put in any outstanding claims as soon as possible. Medically related costs they had incurred would be settled by the PAM Medical Service, and all other compensation claims were to be directed to MAF.

It is clear there was no structure, plan or procedure given to claimants to follow, or even guidelines for which department or body they should be dealing with.

In the ensuing confusion decisions are already being notified and claims rejected, with *no* apparent process for review or mediation with the claimant or the claimant's own doctor, on the merit, justification or even evidence of the individual case.

- Requests for reimbursement or compensation have been rejected on the grounds that MAF doctors had now determined, without claimant involvement or consultation, that their condition was 'not spray related'.

- People have been told after months of delay and prevarication that either the Medical Service has closed without their claim being dealt with or resolved, or that there is "no funding left".

- Those applying to MAF for compensation have discovered that their sort of claims *do not even fall* within the relevant rules of the Biosecurity Act, which can only deal with damage to property or loss due to restrictions on movement of goods.

Many report feelings of great anger and distress at the delaying tactics being used and the totally unsympathetic and hard line being taken by MAF. As a result there are now a number of cases with the Human Rights Commission, and others have reported consulting lawyers with a view to taking legal action.

The costs of this eradication programme are being deliberately externalised by the Government. They are being borne by the very people who have suffered 'on behalf of the rest of New Zealand'. That their only compensation would appear to be the thanks of the Government for their "patience" is indefensible.

The *PAM Community Network* believes the injustice of the current compensation system and it's patent failure to meet the unique needs of the case, warrants the urgent setting up of an independent body to review, mediate and deal with all claims.

CONCLUSION

The PAM aerial spraying programme is without precedent in this country, as this report shows. It also illustrates the case that when entering uncharted territory where such serious and unprecedented powers are used for the first time, that the greatest care and attention needs to be paid.

That this has fallen far short of what we believe is required of the Government is of great concern, and must be remedied as a matter of urgency.

The absolute guarantee of no further aerial spraying must precede compliance with the Biosecurity Act requirements and the setting up of a necessary public inquiry. The injustice of the compensation system as exists *today* means it must be addressed separately, and as a matter of urgency.

That the sort of claims arising from the PAM programme had not been envisaged when the Biosecurity Act was drawn up, only emphasises the reality of a programme without precedent. The Government must ensure by its actions that this situation *has* been recognised as unique, and given the attention and seriousness that it warrants.

Hana Blackmore
PAM Community Network
PO Box 25743, St Heliers, Auckland

REPORT INTO THE LEGALITY OF AERIAL SPRAYING OF PAINTED APPLE MOTH

Government powers conferred under the Biosecurity Act have been noted as *more severe and far-reaching* than those under almost any other New Zealand statute. These powers allow the government - in this case the Ministry of Agriculture and forestry (MAF) - to do virtually anything it wants.

For the Painted Apple Moth (PAM) aerial spraying programme this has meant the Minister has been able to exempt all MAF actions from requirements of the Resource Management Act (RMA).

The extent and duration of this controversial two and a half year aerial pesticide campaign is without precedent anywhere in the world. So too, is this first use of the Biosecurity Act powers to exclude the provisions of the RMA - and with it the ordinary protections provided by the law.

It has been further noted that the removal of the safeguards of the RMA *should not be undertaken lightly* and that the Minister's power to exclude the RMA should only be exercised in emergency biosecurity situations.

It would seem reasonable therefore, that when such serious and unprecedented powers are used for the first time as in this programme, that the scrutiny required should be more rigorous.

But the very opposite has in fact occurred, with the result that MAF have clearly shown the contempt in which they hold the law and any consultation process, and gone beyond the limit of the powers conferred in them.

SUMMARY

The information that has come to light throws serious doubt on the legality of the Ministry of Agriculture and Forestry's (MAF) aerial spraying in Auckland against the Painted Apple Moth (PAM).

As aerial spraying does not comply with regional and district plans MAF *should* go through the normal process of a resource consent under the Resource Management Act (RMA).

In 2001, citing the need for immediate and emergency action, MAF bypassed RMA requirements, by using exemption regulations in the Biosecurity Act. These allowed them to spray for up to two years without a resource consent.

These regulations expired in January 2004 after two years of continuous aerial spraying. At this point under the Act, the provisions of the RMA should then reapply.

Seeking to continue aerial spraying beyond the expiry of the regulations, MAF was advised by Crown Law that it was not possible to *extend* this exemption.

MAF subsequently entered into a 'consultation' phase with the Auckland Regional Council (ARC) to continue spraying by enacting *new* exemption regulations.

ARC concluded there was no legal basis for doing this, and MAF must comply with the RMA and the expiry requirements set out in the previous exemption regulations.

Deliberately ignoring and refusing to answer ARC's legal concerns and arguments, MAF finally 'dismissed' their participation by stating the agreement of Regional Council was not legally required anyway.

In late 2003 The Minister *again* cited 'emergency' needs, and was granted new regulations exempting MAF from the RMA provisions for a further two years.

Aerial spraying recommenced under the new regulations, and continued until May 2004.

Serious questions asked in this Report about the legality and implications of the actions of MAF and the Minister need to be answered urgently. In the final judgement we believe that MAF have gone beyond the limit of the powers conferred in them, and there is now good grounds for a Judicial Review.

EVENT NOTES

1. In April 1999 a discrete infestation of Painted Apple Moth was discovered in Glendene, West Auckland. The Ministry of Agriculture and Forestry (MAF) commenced an eradication attempt using ground based spraying, surveys, host removal, and vegetation restrictions as the main tools. Extensive spread of the PAM over the next two years resulted in an independent review and a recommendation to move to aerial spraying.

2. In December 2001 under section 7A(1) and (6) of part VI of the Biosecurity Act 1993, the Government made regulations for exempting the Painted Apple Moth aerial spraying programme from the provisions of Part 111 of the Resource Management Act 1991 (RMA), for two years. These regulations expired in January 2004.

3. On the 1st December 2003, the Government repeated the above exercise making new regulations under the same sections for exemption from the provisions of the RMA for a further two years - to expire in March 2006.

4. OIA material released by the Auckland Regional Council (ARC) in August 2004 reveals that ARC believed MAF had no legal basis for making a new exemption from Part 111 of the RMA to continue to aerial spray for the PAM.

5. ARC maintained throughout a two month 'consultation' in 2003 with MAF on the new proposal, that making another exemption under section 7A of the Biosecurity Act was not possible.

6. Clause 7A(6) had been used for the previous 2 year exemption. ARC had pointed out that 7A(9) stated quite clearly that where an exemption under 7A(6) had expired, the provisions of the RMA then apply and the … *"responsible Minister must remedy or mitigate the adverse effects of any action taken " ... (which, but for the exemption) would otherwise have applied".* (Appendix A)

7. Crown Law opinion on the legality of the proposed new exemption was sent to the ARC with MAF's 'closing' letter on the matter in September 2003. This document was withheld from us under OIA, but MAF stated in summary of that legal advice that "nothing" [in that advice] prevented a new exemption being made.

8. ARC in its final reply to MAF in October 2003 confirmed that Crown Law had *not* addressed or answered the issue of clause 7A(9) in this Opinion, and they were 'silent' on the MAF requested 'endorsement' for a further exemption.

9. In fact the Crown Law Opinion sent to the ARC was dated 14 March 2003. This is five months before 'consultation' began with ARC and the issue of compliance with clause 7A(9) being raised.

10. Examination of all the correspondence between MAF and ARC on the proposed new exemption, shows that MAF/Crown Law at all times avoided any mention, discussion or response to all matters and questions on clause 7A(9).

11. Other released OIA documents containing legal advice on this matter is sparse and generalised. (Many legal sections in Ministerial briefs are withheld to "*maintain legal professional privilege"*).

12. Apart from July 2003 advice that it was not possible to *extend* the 2002 regulations, all advice to the Minister that has been found ignores the legal position that exists on the expiry of the previous exemption, and centres only on the criteria that needs to be satisfied with a *new* exemption.

13. This criteria is therefore the same as if this were a *first* exemption from Part 111 of the RMA, to aerial spray for the PAM.

14. This is confirmed in MAF's final letter to ARC of September 2003 (noted in 7 above) which states the only legal proviso to making new regulations is … "*the ability to satisfy the criteria in section 7A*". (sic)

15. Ministerial brief of July 2003 before 'consultation' with ARC began, also advised that the *new* exemption would fall under the same 7A criteria.

16. There are three conditions set out in 7A(1) that must be satisfied before authorisation of an exemption. The third is that the Minister had to be satisfied that ..*"an IMMEDIATE attempt to eradicate the organism is in the public interest"* (Author's emphasis).

17. This question of whether an 'emergency' could still exist two years after the first exemption was made, was also raised by ARC staff at the MAF/ARC meeting of August 2003.

18. The ARC minutes of the meeting made it clear that staff believed the two year limit on the use of 'emergency powers' was designed to give time for creating a strategy for the pest (which had not been done).

19. There is no precedent for 'repeating' this use of Section 7A for exemption from the RMA, as this section of the Act has been used for the first time for the PAM.

20. MAF had in fact obtained legal exemption from the RMA (from Nov 2001 to June 2002) under a previous regulation - *Resource Management (Exemption) Regulations 1996.* This exemption was used for the White Spotted Tussock Moth. The regulation was not limited to the WSTM and did not have an expiry date.

21. MAF changed regulations (mid-stream as it were) when it was discovered that this 1996 exemption did not comply under the Waitakere City Council District Plan related to rule 1.6 (flight paths/noise control of helicopter use).

22. At the time Crown Law opinion concluded that Waitakere Council's rule 1.6 was *ultra vires* - beyond their power. (Appendix B) Four options were considered to resolve this problem - (including declaring a biosecurity emergency under the Biosecurity Act 1993), but MAF opted for exemption under 7A.

23. MAF also consulted Waitakere City Council in 2003 on the proposed new RMA exemption, but no mention was made by MAF of any of the legal issues raised by the ARC. Auckland City Council has stated it was not consulted at all.

QUESTIONS**:**

1. What is the legality of MAF/Crown Law *avoiding mention of,* or *refusing to acknowledge* clause 7A(9) when advising on the making of a new exemption (even when questioned *directly* on the matter)?

2. What are the implications of this decision to 'over-rule' clause 7A(9)? For instance, has a legal precedent now been made that cannot be altered?

3. Does the use of the word "*immediate"* in the exemption regulations not imply that the exemption is only to be used for an *initial* or *emergency* response? Therefore, how can an exemption be made again two years down the track on the same basis?

4. Are MAF's actions in over-riding 7A(9) not themselves *ultra vires* given Crown Law's earlier conclusion about Waitakere City Council's District Plan?

5. Are there, in fact, now good grounds for a judicial review on the basis:

   - That MAF have misused/abused their authority.
   - That they have acted unfairly and unreasonably in failing not only to consult in an honest manner, but failing to consider and answer valid criticisms and questions relevant to that process.
   - That the balance of the case to be made for exempting the RMA again is *not* the same as it was in 2001 before the aerial spraying began.
   - That information on adverse health effects, and alternative strategies for eradication of the PAM etc are available, that were not when the first exemption application was made.
   - That in subverting the RMA process again, there is no public consultation opportunity to scrutinise, review and take into account these valid matters.
   - That MAF are unjustified in continuing to use aerial spraying as an 'emergency' strategy, and avoiding the implementation of mitigation measures.

Hana Blackmore
PAM Community Network
October 2004

APPENDIX A

Extract from the Biosecurity Act

7A. Relationship with Resource Management Act 1991—

(1) Where any action taken in accordance with any provision in Part VI of this Act in an attempt to eradicate any organism would be in breach of the provisions of Part III of the Resource Management Act 1991, the responsible Minister may exempt the actions taken in relation to that organism from the provisions of Part III of the Resource Management Act 1991 for up to 20 working days if that Minister is satisfied that it is likely that —

(a) The organism is not established in New Zealand, the organism is not known to be established in New Zealand, or the organism is established in New Zealand but is restricted to certain parts of New Zealand; and

(b) The organism has the potential to cause all or any of significant economic loss, significant adverse effects on human health, or significant environmental loss if it becomes established in New Zealand or if it becomes established throughout New Zealand; and

(c) It is in the public interest that action be taken immediately in an attempt to eradicate the organism.

(2) Before making a decision under subsection (1), the responsible Minister must consult the relevant consent authority (to the extent that is possible in the circumstances), and may consult such other persons as the responsible Minister considers are representative of the persons likely to be affected by the eradication attempt.

(3) After making a decision under subsection (1), the responsible Minister must give public notice of the Minister's decision in such a manner as the Minister thinks fit.

(4) The public notice must specify—

(a) The organism to be eradicated; and

(b) The principal actions that may be taken in the attempt to eradicate the organism; and

(c) The areas affected by the action.

(5) A failure to comply with the provisions in subsections (2) and (3) does not affect the validity of any exemption given under this section.

(6) Where any action has been exempted from Part III of the Resource Management Act 1991 under subsection (1) and the responsible Minister considers that it is necessary to continue action beyond the duration of the exemption to attempt to eradicate the organism, that Minister may recommend that regulations be made continuing the exemption and the Governor-General may from time to time, by Order in Council, make regulations for that purpose.

(7) Regulations made under this section come into force on the date of notification in the Gazette, or at the time specified in the regulations, whichever is the later, and continue in force until revoked or until a date not later than the day 2 years after the regulations came into force when the regulations expire and are deemed to have been revoked.

(8) Where an exemption is granted under subsection (1) or by regulations made under subsection (6), the provisions of Part III of the Resource Management Act 1991 do not apply to the actions taken to eradicate the organism while the exemption is in force.

(9) Where an exemption from the provisions of the Resource Management Act 1991 has been granted under subsection (1) or by regulations made under subsection (6) and that exemption has ended (either by the expiry of the exemption under subsection (1) or by the revocation of the regulations, as the case may be), the provisions of the Resource Management Act 1991 then apply and the responsible Minister must remedy or mitigate the adverse effects of any actions taken under Part VI and to which the provisions of the Resource Management Act 1991, but for the exemption under this section, would otherwise have applied.

(10) For the purposes of this section, ``consent authority'' has the same meaning as in section 2(1) of the Resource Management Act 1991.

APPENDIX B

Ultra vires

[Latin: beyond the power] "Describing an act by a public authority, company or other body that goes beyond the limits of the powers conferred in it. *Ultra vires* acts are invalid. The *ultra vires* doctrine apples to all powers, whether created by statute or by a private document or agreement … In the field of public (especially administrative) law it governs the validity of all delegated (including subdelegated) legislation. This is *ultra vires* not only if it contains provisions not authorised by the enabling power but also if it does not comply with any procedural requirements regulating the exercise of power…" " …Similarly, the exercise of an administrative power is *ultra vires* not only if unauthorised in substance, but equally if (for example) it is procedurally irregular, improperly motivated, or in breach of the rules of natural justice (where applicable) …" (Oxford reference - *A concise dictionary of law* 1990)

REFERENCE MATERIAL

Stop Aerial Spraying, Feb 2003. Submission on the Draft Biosecurity Strategy.

Chen Palmer & Partners, Dec 2002. Painted Apple Moth Memorandum to *Stop Aerial Spraying.*

Ministry of Agriculture and Forestry various briefs to the Minister, including:

- 01/36 10th October 2001. *Government Response to the incursion of Painted Apple Moth. 42 Legal Issues (RMA)*
- 01/367 14th Dec 2001, *Decision on use of S7A of the Biosecurity Act.*
- 01/347 5th Dec 2001. *9. Waitakere City Council District Plan Rule.*
- 02/796, 1st July 2003. *Moth Incursion Responses - RMA Exemptions*

Office of Hon. Jim Sutton, October 2001. *PAM Response - RMA Issues. Authorisation of Exemption.*

Auckland Regional Council. Notes of meeting with MAF, 12th August 2003

ARC Correspondence:
Letter 23 July 2003 from Ian Gear (MAF) to Gwen Bull (ARC)
Email 14 August 2003 from MAF to ARC
Email 18 August 2003 from ARC to MAF
Email 19 August 2003 from MAF to ARC
Email 21 August 2003 from ARC to MAF
Email 22 August 2003 from MAF Legal Services to ARC
Letter 27 August 2003 from MAF to ARC
Letter 3 Sept 2003 from ARC to MAF
Letter 19 Sept 2003 from MAF to Chief Exec ARC
Letter 10 October 2003 from Chief Exec ARC to MAF
Letter 11 August 2004 from Hana Blackmore to ARC
Letter 19 August 2002 from ARC to Hana Blackmore

Waitakere City Council correspondence, various. Letters of 23 July 2003, 8 Sept 2003, 15 Sept 2003, between WCC and MAF. 13 August 2004, 3 September 2004, 6 September 2004, 21 September 2004 between WCC and Hana Blackmore.

Biosecurity (RMA Exemption) Regulations (no2) 2003, Order in Council.1 December 2003.

Auckland City, letters of 13 August 2004, 20 September 2004