



**Te Ohu Kaimoana's response  
to the Supplemental Petition  
to Ban Imports of All Fish and  
Fish Products from New  
Zealand**

9 October 2020

Te Ohu  
**Kaimoana**  


# RESPONSE TO SEA SHEPHERD SUPPLEMENTARY PETITION TO BAN FISH FROM NEW ZEALAND THAT RESULT IN THE INCIDENTAL KILL OF MAUI DOLPHINS ID: NOAA-NMFS-2019-0013-0001

## We welcome the opportunity to provide comment to the petition

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1. Thank you for providing us with the opportunity to comment on the Supplemental Petition to Ban Imports of All Fish and Fish Products from New Zealand that do not satisfy the United States Marine Mammal Protection Act.
2. Our response to you focusses on New Zealand's fisheries management system and the Government's legislative obligations in the context of the Treaty of Waitangi between the New Zealand Crown and Māori (the indigenous peoples of New Zealand).

## Summary

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3. In New Zealand, indigenous rights to utilise fisheries resources are defined and protected by the Treaty of Waitangi (1840) and the fisheries Deed of Settlement (1992). New Zealand's legislative framework for managing the impacts on all aquatic life was realigned to reflect these constitutional obligations following the passage of the Fisheries Act 1996. This means that the management of Hectors/Māui dolphins, as a matter of law and Treaty in New Zealand has to be designed to provide for the utilisation of fisheries. This is an approach common to indigenous cultures worldwide – including the United States where the harvesting of marine mammals is allowed.
4. Te Ohu Kaimoana works with the New Zealand Government to conserve aquatic biodiversity and protect and support Māori fishing rights, consistent with the spirit of partnership envisaged by New Zealand's founding constitutional document the Treaty of Waitangi. We are concerned that the information provided by Sea Shepherd in the Supplemental Petition contains no consideration of the following matters:
  - a. The Treaty of Waitangi and the 1992 Deed of Settlement guarantee Māori rights and responsibilities in fisheries management. These are an integral part of our fisheries management system. Our fisheries legislation contains obligations in relation to the Deed of Settlement, and is guided by its purpose of sustainable utilisation, along with a set of environmental principles that cover all aquatic biodiversity. This is consistent with a Māori world view, which can be explained through the concept *Te Hā o Tangaroa Kia Ora ai Tāua (the breath of Tangaroa sustains us)*. To reflect these matters, Iwi (Māori tribes) and Te Ohu Kaimoana expect the Crown to make their decisions in partnership with Māori.

- b. Our legislation that provides for the sustainable use of aquatic resources, including the Marine Mammals Protection Act 1978 (as amended to align with the Fisheries Act 1996), is also subject to the Crown's Treaty obligations and administrators of those Acts must respect the focus of the Deed of Settlement.
  - c. The obligations in relation to indigenous peoples, and in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are relevant considerations for the New Zealand Government. These obligations require our Government to honour its obligations to Māori under the Treaty of Waitangi.
  - d. The Treaty and Deed of Settlement recognise the rangatiratanga (authority) of Iwi over their taonga ("treasures," which include fisheries resources) that in relation to commercial fisheries is exercised through management of aquatic resources under the Quota Management System (QMS).
5. In New Zealand management of fisheries-related impacts is underpinned by scientific evidence and mātauranga Māori (Māori knowledge). The Sea Shepherd parties advocate for the removal of fishing from a broad area with an unsound evidence base – the information provided is neither new nor correct. Making use of this information would undermine the Treaty, the 1992 Deed of Settlement and be inconsistent with the purpose of our fisheries legislation.

## We are Te Ohu Kaimoana

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6. Prior to the colonisation of Aotearoa by the British Crown, Māori enjoyed complete authority over their fisheries resources. Te Āo Māori's relationship with Tangaroa, and ability to benefit from that relationship, was and remains underpinned by whakapapa – descent from Ranginui, Papatūānuku and their children.
7. In 1840 The Treaty was signed between Māori and the British Crown. The signing of this document established a partnership through which Māori were said to have ceded sovereignty to the British Crown, in exchange for the guarantee of continued rights of ownership of their property – including fisheries resources. The rights protected by the Treaty are also recognised as customary rights – and they contain commercial and non-commercial elements.
8. From the signing of the Treaty in 1840 until 1992 there was recognised failure of the Crown upholding its obligations to Māori in terms of their fisheries rights. To resolve claims and litigation involving fisheries, an interim settlement of fishing claims that acknowledged the full spectrum of Māori interests in fisheries was entered into between Māori and the Crown in 1989. Following this,

the Fisheries Deed of Settlement, implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, was the final settlement of all Māori claims to customary fishing rights.

9. Te Ohu Kai Moana Trustee Ltd (Te Ohu Kaimoana) was established to protect and enhance the Deed of Settlement. The Deed of Settlement and the Maori Fisheries Act 2004<sup>1</sup> are expressions of the Crown's legal obligation to uphold the Treaty.
10. Our purpose, set out in section 32 of the Maori Fisheries Act, is to "advance the interests of iwi<sup>2</sup>, individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities, in order to:
  - a) ultimately benefit the members of Iwi and Māori generally
  - b) further the agreements made in the Deed of Settlement
  - c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
  - d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement."
11. We work on behalf of 58 Mandated Iwi Organisations (MIOs)<sup>3</sup> who represent all Iwi throughout New Zealand. Asset Holding Companies (AHCs) hold Fisheries Settlement Assets on behalf of their MIOs. The assets include Individual Transferable Quota (ITQ) and shares in Aotearoa Fisheries Limited, New Zealand's largest fishing company.
12. MIOs have approved our Māori Fisheries Strategy and three-year strategic plan, which has as its goal "that MIOs collectively lead the development of Aotearoa's (New Zealand's) marine and environmental policy affecting fisheries management through Te Ohu Kaimoana as their mandated agent". We play a key role in assisting MIOs to achieve that goal.

## Te Ohu Kaimoana's interest

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13. The Treaty of Waitangi guaranteed Māori tino rangatiratanga over their "taonga" (treasures), which include fisheries resources<sup>4</sup>. Tino rangatiratanga is about Māori acting with authority and independence over their own affairs. It is practiced through living according to tikanga (customs)

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<sup>1</sup> Māori Fisheries Deed of Settlement 1992. The Deed is given effect to by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and the Māori Fisheries Act 2004.

<sup>2</sup> Iwi: (a Māori tribe; the largest of the groups that form Māori society)

<sup>3</sup> MIO as referred to in The Maori Fisheries Act 2004: in relation to an iwi, means an organisation recognised by Te Ohu Kai Moana Trustee Limited under section 13(1) as the representative organisation of that iwi under this Act, and a reference to a mandated iwi organisation includes a reference to a recognised iwi organisation to the extent provided for by section 27.

<sup>4</sup> Under New Zealand's Fisheries Act, **fisheries resources** means "any 1 or more stocks or species of fish, aquatic life or seaweed". **Aquatic life** means "any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead" and includes seabirds.

and mātauranga Māori (Māori knowledge), and striving wherever possible to ensure that the homes, land, and resources guaranteed to Māori under the Treaty are protected for the use and enjoyment of future generations.

14. Of particular note are the comments in a landmark case, that “since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and...whether or not there is a reference to the treaty in the statute.”<sup>5</sup>

## Guiding Principles

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### The significance of Tangaroa to Te Ao Māori

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15. The relationship Māori have with Tangaroa (god of the sea and sea creatures) is intrinsic, and the ability to benefit from that relationship was and continues to be underpinned by whakapapa (genealogical descent). Tangaroa is the son of Papatūānuku, the earth mother, and Ranginui, the sky father. When Papatūānuku and Ranginui were separated, Tangaroa went to live in the world that was created and has existed as a tipuna to Māori ever since.<sup>6</sup>
16. Protection of the reciprocal relationship with Tangaroa is an inherent part of the Deed of Settlement – it’s an important and relevant part of modern fisheries management for Aotearoa.

### We base our advice on Te hā o Tangaroa kia ora ai tāua

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17. *Te Hā o Tangaroa kia ora ai tāua* is an expression of the unique and lasting connection Māori have with the environment. It contains the principles we use to analyse and develop modern fisheries policy, and other policies that may affect the rights of Iwi under the Deed of Settlement (see Figure 1). In essence, *Te Hā o Tangaroa kia ora ai tāua* highlights the importance of humanity’s interdependent relationship with Tangaroa to ensure our mutual health and wellbeing.
18. Māori rights in fisheries can be expressed as a share of the productive potential of all aquatic life in New Zealand waters. They are not just a right to harvest, but also to use the resource in a way that provides for social, cultural and economic wellbeing. When considering or developing fisheries-related policy, *Te Ohu Kaimoana* is guided by the principle of ‘*Te Hā o Tangaroa kia ora ai tāua*’.

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<sup>5</sup> Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179, 184.

<sup>6</sup> Waitangi Tribunal. “Ko Aotearoa tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity.” Te taumata tuatahi (2011).

In this context Tangaroa is the ocean and everything connected to and within, on and by the ocean. This connection also includes humanity, one of Tangaroa's descendants.

19. Te Hā o Tangaroa kia ora ai tāua does not mean that Māori have a right to use fisheries resources to the detriment of other children of Tangaroa: rights are an extension of responsibility. It speaks to striking an appropriate balance between people and those we share the environment with. Access to and use of robust science and mātauranga Māori is important to inform how that balance is struck.
20. In accordance with this view, "conservation" is part of "sustainable use", that is, it is carried out in order to sustainably use resources for the benefit of current and future generations. The Fisheries Act's purpose is to "to provide for the utilisation of fisheries resources while ensuring sustainability." The purpose and principles of the Act echo Te Hā o Tangaroa kia ora ai tāua.

## The Fisheries Act is the framework for implementing the Deed of Settlement

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21. The Fisheries Act 1996 binds the Crown when performing its duties, to act in a manner consistent with the Treaty and the Deed of Settlement. The agreements made between the Crown and Māori and documented in the 1992 Deed of Settlement support the approach of managing the effects of fishing on biodiversity as part of the fisheries management regime under the Fisheries Act 1996. Under the Fisheries Act, conservation of fisheries resources is carried out to enable utilisation while ensuring sustainability. We have already outlined the Māori principles and values encapsulated by *Te Hā o Tangaroa Kia ora Ai Tāua* that ensures rights to use the resource go hand in hand with responsibilities to ensure sustainability.
22. **The purpose and principles of the Fisheries Act 1996 echo *Te Hā o Tangaroa Kia ora Ai Tāua* in their approach to managing fisheries and the effects of fishing on biodiversity**  
There has never been any disagreement by beneficiaries of the Fisheries Settlement that quota rights secured under the Settlement are subject to a responsibility to ensure sustainability – this requirement was a key reason for Māori and Iwi accepting the QMS. Furthermore, Māori understand that the protection of biodiversity is an important subset of what sustainability means. This is clear in the way the Fisheries Act 1996 describes what it means to achieve its purpose to "provide for the utilisation of fisheries resources while ensuring sustainability". Under section 8 of the Fisheries Act 1996, utilisation means "conserving<sup>7</sup>, using, enhancing, and developing fisheries

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<sup>7</sup> Under s 2 of the Fisheries Act, **conservation** means "the maintenance or restoration of fisheries resources for their future use; and **conserving** has a corresponding meaning". See note 4 for a definition of **fisheries resources**.

resources to enable people to provide for their social, economic, and cultural well-being". Ensuring sustainability means:

- a. Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations
- b. Avoiding, remedying or mitigating the effects of fishing on the aquatic environment.

23. Moreover, section 9 of the Fisheries Act 1996 includes three explicit environmental principles that:

- a. associated or dependent species should be maintained above a level that ensures their long-term viability
- b. biological diversity of the aquatic environment should be maintained
- c. habitat of particular significance for fisheries management should be protected.

24. In addition to the environmental principles, the Fisheries Act 1996 provides information principles for decision makers to take into account when performing its duties.

- a. decisions should be based on the best available information:
- b. decision makers should consider any uncertainty in the information available in any case:
- c. decision makers should be cautious when information is uncertain, unreliable, or inadequate:
- d. the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

## Conservation legislation is subject to the Treaty and must also uphold the Deed of Settlement

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25. The Marine Mammals Protection Act 1978 (MMPA) and other conservation statutes recognise and bind the Crown to the Treaty and the principles of fisheries use as provided for under our fisheries legislation.

26. The MMPA sets out a process for developing population management plans for marine mammals and provides for the Minister of Conservation to recommend actions to be taken under statutes that manage the full range of threats to the relevant species. The Fisheries Act 1996 enables the matters that need to be dealt with under that legislation to be put into effect. Other related legislation was updated following the passage of that Act to enable management of non-fisheries threats. In this way it is a matter of law and Treaty in New Zealand that sustainable use of aquatic resources is provided for in an integrated way.

## The United Nations Declaration of Indigenous Peoples 2007 provides recognition of the importance of sovereign states to protect indigenous rights

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27. The Treaty of Waitangi and settlements arising from that Treaty have a unique global context in that the Treaty not only provides a legal framework for recognition of indigenous rights to own and use natural resources but also carries with it an obligation on the State to protect those rights now and into the future. Māori rights to use marine resources in accordance with their world view and associated customs is supported by the United Nations Declaration on the Rights of Indigenous Peoples and international agreements and practice for social cultural and economic development. The Declaration includes the right to use and develop lands, territories and resources, the right to fair treatment and redress and the right to the conservation and protection of the environment and its production capacity.
28. It is important therefore that marine protection and the development of strategies and mechanisms for protecting biodiversity within the marine environment are implemented in a manner that properly recognises and protects those interests. It is not only in the best interests of Māori to pursue such action but also an obligation of the New Zealand Government to follow such a path.

## Sea Shepherd's Supplemental Petition

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29. In 2019, Sea Shepherd Legal, Sea Shepherd New Zealand Ltd, and Sea Shepherd Conservation Society (Sea Shepherd) formally petitioned the Department of Homeland Security, the Department of the Treasury, and the Department of Commerce pursuant to the Imports Provision. The petition call for the Agencies:

*to immediately ban all fish and fish products originating from fisheries in the Māui dolphin's range, along the west coast of New Zealand's North Island, that employ either gillnets or trawls — the fishing gear responsible for the near extinction of the Māui dolphin.<sup>8</sup>*

This petition was denied by the National Marine Fisheries Service ("NMFS") on the basis that New Zealand already had regulatory processes in place to manage fisheries risk to Māui dolphins comparable to United States standards.

30. In 2020, Sea Shepherd filed a lawsuit claiming violation of procedure against the United States Court of International Trade. In this secondary complaint the petitioners then claimed a larger geographic area as the Māui dolphin habitat than previously stated in their initial petition and called

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<sup>8</sup> Supplemental petition to ban imports of fish and fish products from New Zealand that result in the incidental kill or serious injury of Māui dolphins in excess of United States standards pursuant to Marine Mammal Protection Act Section 101



for further fisheries restrictions in this broader area. Sea Shepherd claim that the reason for the extension of this area is from sighting data from the New Zealand Government.

## Te Ohu Kaimoana's view

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31. Te Ohu Kaimoana is committed to ensuring the conservation of marine mammals at both the species and subspecies level. We are particularly concerned that human-related impacts pose a threat to the ongoing existence of Māui dolphins.
32. The Sea Shepherd Petition on the other hand seeks to have the full focus of regulatory measures to apply to the fishing sector and ignores more problematic non-fishing effects. It is also deficient in that it pays no regard to indigenous rights guaranteed under the Treaty of Waitangi in New Zealand – and recognised in an international declaration. The Sea Shepherd parties advocate for the removal of fishing from a broad area with an unsound evidence base – the information provided is neither new nor correct. Making use of this information would undermine the Treaty, the Deed of Settlement and the legislation that has been put in place to manage impacts on the aquatic environment.
33. The measures promoted by the Sea Shepherd petition are inconsistent with the Fisheries Act 1996, the purpose of which is to provide for sustainable utilisation of fisheries resources. Further, and fatally, they are not based on the best available information. Proposals such as this undermine our Treaty compliant fisheries legislation. The management of the aquatic biodiversity of our oceans requires a broad range of measures to be put in place and rules out a singular and myopic focus on the impacts of fishing. This is important when the areas of greater risk are demonstrably shown to arise from activities on land.
34. In our view, fishing controls to protect the dolphins are more than sufficient. The prospect that further fishing controls should be implemented is a matter that needs to be worked through between the Government and Iwi as its Treaty partners, with our support. Sea Shepherd has failed to recognise this obligation by taking its case to an international arena.

### **The geographical distribution of Māui dolphins is not as wide as claimed**

35. Te Ohu Kaimoana does not support the position made by Sea Shepherd pertaining to the geographical distribution of Māui dolphins. The dataset they claim as evidence does not support this claim. The database records these validated dolphin sightings as the Hector's dolphin subspecies. While transient Hector's or Māui dolphins may occur in the East Coast of the North Island, there is no evidence for resident or breeding sub populations. The only record of a fisheries-related death on the East Coast North Island is a Hector's dolphin caught in a set net in 1974.
36. There have been no Māui dolphins identified on the East Coast of the North Island through genetic testing. The declaration provided by Dr Slooten asserts that dolphins on the East Coast of the North

Island are Māui dolphins despite genetic evidence that identifies them as Hector's. This is a misrepresentation of fact.

37. Sea Shepherd claim that the New Zealand Government has deemed the Southern portion of the West Coast North Island to be a part of the Māui dolphin distribution. This is not a correct portrayal of the information provided by Government. The New Zealand Government conducted a thorough scientific process which included Te Ohu Kaimoana and stakeholders to provide a geographic distribution of fisheries risk to Māui and Hector's dolphins. Using the best available information, the Southern portion of the West Coast North Island was considered to be transient Hector's area. Considering this area was deemed important for potential genetic flow, the New Zealand Government decided to put in place fisheries restrictions to minimise risk to Hector's dolphins in this area.
38. In the Supplemental Petition, Sea Shepherd continuously claim all sightings of dolphins in the North Island to be Māui dolphins and that they represent fragments of resident populations. This is at best an unsubstantiated opinion.

#### **Threats and risk to Māui dolphins**

39. Sea Shepherd's claims are based on the opinion that incidental fisheries captures are driving the Māui dolphin population to extinction. Again, Te Ohu Kaimoana disagrees with this position on the basis that it does not reflect the best available information. Since 2002, scientific research has developed and improved our understanding of the relative threats to Hector's and Māui dolphins, in conjunction management measures have been put in place to manage the risk posed by fisheries. In time the New Zealand Government can be expected to move to develop a population management plan for Hector's/Māui dolphins. This is the required process for identifying all threats under our legislation.

#### **2012 Review of the TMP**

40. To inform the 2012 review of the Māui dolphin part of the TMP a semi-quantitative risk assessment was conducted. The method for the risk assessment involved an expert panel conducting five key steps: defining Māui's dolphin distribution, threat identification, threat characterisation including the spatial distribution of the threat, threat scoring, and quantitative analysis.
41. A qualitative approach (based on expert judgement) was used to assess the importance and manageability of threats to Māui dolphin population viability. Selected experts judged to what extent the threats applied to the Māui dolphin population and whether these threats would have a material effect on the population in the next five years. The panel provided an estimate of what they termed "human induced" mortalities and estimated that there would be a median of 5.97 such mortalities each year over the next 5 years (with 95% of the distribution of scores being between 0.97 and 8.40 dolphins deaths per annum). The panel attributed 95.5% of these mortalities to commercial, recreational, customary and/or illegal fishing-related activities, and the remaining 4.5% to non-fishing-related threats.

42. Following the 2012 workshop, new research identified the protozoan *Toxoplasma gondii* as the cause of death for 7 of 28 Hector's and Māui's dolphins that were in fresh enough condition to be examined for this disease since 2007. The Panel's assessment of the risk posed by disease did not include this information, because it was not available at the time of the workshop.
43. The Supplemental Petition relies heavily on the outdated 2012 assessment by Currey et al. This assessment is no longer the best available information and therefore should not be used to inform management decisions.

#### **2018 Review**

44. In 2018, a new analysis of the relative threats to Hector's and Māui dolphins was undertaken in 2018 using quantitative methods in the form of a Spatially Explicit Fisheries Risk Assessment (SEFRA). The assessment not only included new information about toxoplasmosis mortality but also mapped risks spatially to assess their relative risk to discrete subpopulations. This provided a more objective assessment to the relative risks to Māui dolphins.
45. The SEFRA suggested that fisheries risk had generally reduced since 2003 due to a reduction in fisheries effort and a reduction in fishing interactions with dolphins due to the spatial restrictions. However, there still remained a proportion of human induced mortalities that were unmanaged the single greatest of which was the disease toxoplasmosis. Demographic modelling indicated that without management of the toxoplasmosis threat, the Māui dolphin sub species in particular was predicted to decline towards extinction. This modelling also indicated that removal of all fisheries risk would not materially affect this trajectory.
46. Sea Shepherd claim that there is "immediate need for stronger, more expansive protections" for Māui dolphins. Te Ohu Kaimoana considers that the measures put in place to manage fisheries risk are comprehensive and precautionary. The spatial restrictions put in place reduced the residual fishing risk from 0.10 (0.054 – 0.17) dolphins per year to less than 0.058 dolphins per year. This in conjunction with electronic monitoring of fisheries activities and a fishing related mortality limit of one dolphin deliver a highly precautionary package of measures to manage fisheries risk.

#### **Risk assessment uncertainties**

47. Sea Shepherd claims that the 2018 risk assessment is flawed. Te Ohu Kaimoana acknowledges that all scientific assessments have their uncertainties and weaknesses. However, we do not support the claim that the uncertainties in the risk assessment have not been thoroughly acknowledged and addressed in the assessment. Further, the majority of Sea Shepherd's claims against the scientific assessment appear to be based on a critique released by Elisabeth Slooten and Stephen Michael Dawson, Departments of Zoology and Marine Science, University of Otago. This critique has been rebutted by the author of the assessment, who provides a clear explanation of the process and inputs to the model.
48. Te Ohu Kaimoana are aware that the New Zealand Government are providing detailed information on the technical aspects of the risk assessment and management approach. We do not intend to duplicate the provision of this advice and therefore provide a position of support for this analysis.

## **Conclusion**

49. Te Ohu Kaimoana is committed to the conservation of marine mammals at both the species and subspecies level. We are particularly concerned that human-related impacts pose a threat to the ongoing existence of Māui dolphins. We support the management of all threats to Māui dolphins to ensure their long-term viability. We disagree with a narrow approach that disregards new evidence in favour of opinion.
  
50. The Supplemental Petition has misrepresented fact and has not provided new data. We disagree that the contents of the Supplemental Petition will generate benefits to the management of threats to Māui dolphins.
  
51. Importantly, the Supplemental Petition gives no regard to the protection of indigenous rights guaranteed under Te Tiriti in that it proposes management interventions within New Zealand that extend beyond the Fisheries Act 1996. This would undermine the ability for Māori to exercise rangatiratanga over their taonga.

Te Ohu  
**Kaimoana**

