

THE  
PRIORITY REPORT  
CONCERNING MĀUI'S DOLPHIN



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PRE-PUBLICATION VERSION

WAI 898

WAITANGI TRIBUNAL REPORT 2016



## CONTENTS

Letter of transmittal . . . . .	vii
Preface . . . . .	ix
<b>THE PRIORITY REPORT CONCERNING MĀUI’S DOLPHIN . . . . .</b>	<b>1</b>
1 Introduction . . . . .	1
1.1 The scope of this report . . . . .	1
1.2 The claimants and the claims . . . . .	1
1.3 The hearing process . . . . .	3
2 Background, parties’ positions, and issues . . . . .	5
2.1 Factual background and Crown policy . . . . .	5
2.1.1 Traditions concerning Māui’s dolphin . . . . .	5
2.1.2 The claimants’ association with Māui’s dolphin . . . . .	6
2.1.3 The plight of Māui’s dolphin . . . . .	6
2.1.4 Crown response to the plight of Māui’s dolphin . . . . .	7
2.1.5 Block offer process . . . . .	11
2.1.6 Claimants’ concerns with the 2013 TMP . . . . .	12
2.2 The claimants’ and Crown’s arguments . . . . .	14
2.2.1 Wai 2331 . . . . .	14
2.2.2 Wai 2481 . . . . .	15
2.2.3 The Crown . . . . .	16
2.3 Issues for discussion . . . . .	16
3 Is Māui’s dolphin a taonga under the Treaty? . . . . .	17
3.1 What is a taonga? . . . . .	17
3.2 The role of tradition . . . . .	18
3.3 Change over time . . . . .	19
3.4 Endangered taonga . . . . .	20
3.5 Is Māui’s dolphin a taonga? . . . . .	20
4 Treaty duties in respect of Māui’s dolphin . . . . .	21
4.1 Claimants’ and Crown views on Treaty principles . . . . .	21
4.2 The duty of active protection . . . . .	22
4.3 The Crown’s right to kāwanatanga . . . . .	24
4.4 The principle of partnership . . . . .	26
5 Was the Crown’s review of the threat management plan and its consultation with Māori in breach of the Treaty? . . . . .	28
6 Is the threat management plan itself in breach of the Treaty? . . . . .	29
7 Conclusion . . . . .	31

**APPENDIX I: SELECT RECORD OF INQUIRY FOR WAI 898 . . . . . 35**

Record of proceedings . . . . . 35

    1. Statements of claim . . . . . 35

    2. Tribunal memoranda, directions, and decisions. . . . . 35

    3. Submissions and memoranda of parties . . . . . 35

    4. Transcripts . . . . . 36

Record of documents . . . . . 36

**APPENDIX II: SELECT RECORD OF INQUIRY FOR WAI 2331 . . . . . 37**

Record of proceedings . . . . . 37

    2. Tribunal memoranda, directions, and decisions. . . . . 37

    3. Submissions and memoranda of parties . . . . . 37

Record of documents . . . . . 37

Bibliography . . . . . 39



Waitangi Tribunal

Te Rōpu Whakamana i te Tiriti o Waitangi  
*Kia puta ki te whai ao, ki te mārama*

The Honourable Te Ururoa Flavell  
Minister for Māori Development  
The Honourable Christopher Finlayson  
Minister for Treaty of Waitangi Negotiations  
The Honourable Nathan Guy  
Minister for Primary Industries  
The Honourable Maggie Barry  
Minister of Conservation  
Parliament Buildings  
WELLINGTON

2 May 2016

E ngā Minita o Te Karauna tēnei te mihi ki a kōutou i runga i ngā āhuatanga o te wā, tae atu ki o tātou tini aitua. Kua tangihia o tātou mate huri noa te mōtu, kua poroporoakitia rātou. Nō reira waiho te hunga mate kia moe mai i te moenga mutunga kore. Moe mai.

Ka huri mai ināianei ki te hunga ora me te kaupapa kei mua i a tātou. Nā Ngāti Te Wehi i whakatakoto mai te kerēme, nā ētahi atu i tautoko, kia whakarauoratia ngā aihe a Māui kia kore ai rātou e ngaro i te tirohanga kanohi pēnei i te ngaro a te moa. E tokoiti haere tonu ana ngā aihe a Māui. Koia nei a Ngāti Te Wehi i huri mai ai ki Te Tiriti o Waitangi me kore e kitea he huarahi e ora tonu ai ngā aihe nei. Ka whakaae te Karauna he taonga ngā aihe a Māui. Ka haere te kaupapa. Anei e whai ake nei te whakataunga a Te Rōpu Whakamana i Te Tiriti o Waitangi i tēnei o ngā take i whakatakotohia mai e ngā hapū me ngā iwi o Te Rohe Pōtae.

We enclose our priority report concerning Māui's dolphin.

This report is an early outcome of the Te Rohe Pōtae (Wai 898) district inquiry. We have agreed to prioritise reporting on these issues as the

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claimants fear that delaying until our main report would increase the dolphin's risk of extinction.


The prospect that Māui's dolphin may become extinct in the next decade or so should worry us all. However, the Waitangi Tribunal's function is not to pass judgement on the decline of an endangered species but to assess whether the Crown's policy in relation to Māui's dolphin is in breach of the Treaty of Waitangi.

We find that Māui's dolphin is a taonga to Ngāti Te Wehi and Ngāti Tāhinga due to its endangered status. The claimants' interests as kaitiaki therefore deserve the Crown's active protection under the Treaty. But the evidence does not establish that the Māui's dolphin is a taonga of such longstanding or particular cultural significance that it must be protected at all costs. The claimants say that the Crown, in finalising its 2013 Threat Management Plan for the Māui's dolphin, failed to give due regard to their interests as kaitiaki of the dolphin. Based on the evidence we heard, we are unable to conclude that the Crown's processes lacked good faith or were unreasonable.

We similarly find that the 2013 plan itself is not in breach of the claimants' Treaty rights. In addition to scientific evidence concerning the state of the Maui's dolphin population, the Crown, in making its decision, was entitled to take into account wider economic, social, and cultural considerations. In particular, the Crown was required to balance the Treaty interests of Māori in Māui's dolphin as an endangered species with Māori commercial and non-commercial customary fishing interests in the Māui's dolphin habitat.

Ultimately, we do not believe the Crown can be said to have failed to actively protect the claimants' interests, or to have acted unreasonably or without good faith. The claimants have not made out their claim to breaches of the Treaty.

Nāku noa,



Nā Judge David Ambler  
Presiding Officer



PREFACE

This is a pre-publication version of the Waitangi Tribunal's *Priority Report concerning Māui's Dolphin*. As such, all parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Photographs and additional illustrative material may be inserted. The Tribunal's findings and recommendations, however, will not change.

## ABBREVIATIONS

AC	<i>Law Reports, Appeal Cases</i> (UK)
CA	Court of Appeal
doc	document
DOC	Department of Conservation
ed	edition, editor
EEZ	exclusive economic zone
IUCN	International Union for Conservation of Nature
IWCSC	International Whaling Commission's Scientific Committee
MBIE	Ministry of Business, Innovation, and Employment
MPI	Ministry for Primary Industries
n	note
nmi	nautical mile, nautical miles
no	number
NZLR	<i>New Zealand Law Reports</i>
p, pp	page, pages
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
SMM	Society for Marine Mammalogy
TMP	Threat Management Plan
TOKM	Te Ohu Kai Moana
vol	volume
Wai	Waitangi Tribunal claim

# THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

## 1 INTRODUCTION

### 1.1 The scope of this report

This report addresses two claims by Māori that the Crown's current policy in relation to the protection of Māui's dolphin, which is an endangered species, breaches the Treaty of Waitangi.<sup>1</sup> That policy is known as the Threat Management Plan (TMP).

The Crown first introduced the TMP in 2008, reviewed it between 2012 and 2013, and instituted a revised TMP in 2013. The Crown has scheduled a further review in 2018, though any further reported deaths of Māui's dolphin may prompt an earlier review. The claimants say that the 2013 TMP fails to adequately protect Māui's dolphin from likely extinction and is therefore in breach of the Treaty of Waitangi. The Crown denies the claims.

The Māui's dolphin claims are part of the Waitangi Tribunal's Te Rohe Pōtae Inquiry (Wai 898), which conducted hearings from 2012 to 2015 into some 280 historical claims and is now preparing its report.

We have agreed to provide a priority report in relation to these claims as the claimants fear that delaying dealing with the claims until our main report will increase the risk of extinction of the species.<sup>2</sup> Importantly, this report does not address historical issues related to the cause of the decline in the population of Māui's dolphin. The extent to which the Crown bears any responsibility for that decline, if at all, is a topic to which we will return in our main report, where we will address a range of issues that concern environmental change, including in relation to fisheries and the coastal environment.<sup>3</sup>

### 1.2 The claimants and the claims

Davis Apiti filed a statement of claim on 1 September 2008 on behalf of himself and Ngāti Te Wehi concerning Māui's dolphin (Wai 2331). The statement of claim was

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1. We note that according to Crown witnesses, iwi have advised the Crown's Research Advisory Group that they prefer the name 'Māui dolphin'. The Crown said that there will be further investigation before any formal change is adopted: see doc A162, p 13 n 3. We adopt Māui's dolphin as the most common current usage.

2. Memorandum 2.7.9, p 1

3. This approach is consistent with that promoted by claimant counsel: see submission 3.4.231, p 15.

amended on 2 March and 16 May 2011. Mr Apiti presented his evidence regarding Māui's dolphin to the Wai 898 Tribunal on 13 December 2013. The Wai 898 evidential hearings concluded on 11 July 2014. On 31 July 2014, Mr Apiti further amended his statement of claim concerning Māui's dolphin, and sought an urgent inquiry into that claim. That request was declined on 15 October 2014.

On 1 September 2014, Angeline Greensill filed a statement of claim on behalf of herself and Ngāti Tahinga in relation to Māui's dolphin (Wai 2481). This claim was filed in support of Mr Apiti's request for an urgent inquiry. Ms Greensill did not present evidence in support of her claim during the Wai 898 evidential hearings.

Mr Apiti (Wai 2331) claims that Māui's dolphin is a taonga of Ngāti Te Wehi and that the hapū is the dolphin's kaitiaki in and around Aotea Harbour. In 2007, the Crown responded to public and government concern over the effect of human-induced mortality on Māui's dolphin and developed the TMP (implemented in 2008), which comprised various measures to arrest the decline in Māui's dolphin. The 2008 TMP was revised in 2013.

Mr Apiti says the 2013 TMP does not go far enough to avoid likely human-induced deaths of Māui's dolphin. He relies on the views expressed by the International Whaling Commission's Scientific Committee (IWCSC), the International Union for Conservation of Nature (IUCN), and the Society for Marine Mammalogy (SMM), all of whom recommended the complete cessation of fishing by nets and trawlers within the Māui's dolphin's habitat. Those views were also reflected in one of the options contained in a final advice paper from the Ministry for Primary Industries (MPI) to the responsible Ministers of Conservation and for Primary Industries in June 2013. The option in question was to ban gill-net and trawl fisheries in waters less than 100 metres deep from Maunganui Bluff to Whanganui, and including harbours. The 2013 TMP did not adopt that approach and opted for other measures.

Mr Apiti says that the 2013 TMP breaches the principles of the Treaty of Waitangi in failing to actively protect a taonga of Ngāti Te Wehi to the fullest extent practical, by failing to act reasonably and with utmost good faith towards Ngāti Te Wehi, and by failing to recognise and uphold Ngāti Te Wehi's customs and practices. He says that he and Ngāti Te Wehi will suffer various forms of prejudice as a result of the Crown's breaches, including the likely extinction of the dolphin, the loss of mana, mauri, and rangatiratanga, an adverse international reputation for Ngāti Te Wehi as kaitiaki, and wider implications for New Zealand and its ecology. He seeks a recommendation that the Crown immediately implement far greater protective measures that remove the risk of Māui's dolphin being killed by human-induced means and becoming extinct.<sup>4</sup>

Ms Greensill's claim (Wai 2481) echoes that of Mr Apiti. She says Māui's dolphin is a taonga of Tangaroa, and that Ngāti Tahinga also exercise kaitiakitanga over it in and around Aotea Harbour. Her claim similarly focuses on the 2013 TMP and the fact that it does not reflect the recommendations of the IWCSC or the SMM. She claims similar prejudice and relief to that claimed by Mr Apiti.<sup>5</sup>

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4. Statement 1.1.286(a), pp 1, 6–7; doc P6, pp 5–6

5. Statement 1.1.287, pp 4–8

### 1.3 The hearing process

Davis Apiti presented his claim at hearing week nine of our inquiry, at Parawera Marae on 13 December 2013. His evidence addressed a range of issues relating to Māui's dolphin, including the recently revised TMP, which was finalised in late November 2013. Mr Apiti was the only witness to give evidence in support of his claim in relation to Māui's dolphin. As noted, Angeline Greensill's claim was filed after the conclusion of the Tribunal's evidential hearings, and her later evidence concerning Māui's dolphin was not received onto the record of inquiry.

The Crown presented evidence in response to Mr Apiti's claim at hearing week 14 at Te Kūiti between 7 and 11 July 2014. Jeff Flavell, a director of policy with the Department of Conservation (DOC), gave evidence on behalf of the department,<sup>6</sup> and Stephen Halley, the acting inshore fisheries manager with MPI, gave evidence on behalf of the Ministry.<sup>7</sup> Both Mr Flavell and Mr Halley were cross-examined by Mr Apiti's counsel on measures taken by the Crown to protect Māui's dolphin, including the recently finalised TMP.

However, after the Tribunal had concluded its evidential hearings, Mr Apiti applied on 31 July 2014 for an urgent inquiry into his amended claim, on the grounds that the threat of extinction to Māui's dolphin was such that Ngāti Te Wehi would suffer significant and irreversible prejudice if the protective measures under the TMP were not increased as soon as possible. Although his claim had already been presented in the Wai 898 inquiry, Mr Apiti argued that new issues had arisen relating to the contemporary policy decision surrounding the Crown's review and revision of the TMP in 2012–13. He noted that the 2013 TMP was finalised 19 days before his original hearing, limiting his ability to respond in evidence, and that new recommendations had since emerged from the IWCSC. Counsel for Mr Apiti argued that the standard Tribunal reporting process was not a reasonable alternative to an urgent hearing, as this could take many years to complete.<sup>8</sup>

Mr Apiti's request was supported by affidavits from himself and Dr Elisabeth Slooten, an associate professor at the University of Otago, lecturing in the Department of Zoology.<sup>9</sup> Dr Slooten is an expert in marine mammals, a member of the IWCSC, and an expert in the Māui's dolphin.

The request for an urgent inquiry was also supported by Ms Greensill. Other claimants also supported an urgent hearing, though they did not separately bring claims in relation to Māui's dolphin. We simply note that claimants who supported an urgent hearing included those with claims on behalf of Ngāti Tahinga (Wai 537) and the Ngāti Te Wehi cluster (Wai 1448, Wai 1495, Wai 1501, Wai 1502, Wai 1592, Wai 1804, Wai 1899, Wai 1900, Wai 2125, Wai 2126, Wai 2135, and Wai 2183).<sup>10</sup>

The Crown opposed the application for urgency and filed a joint affidavit from Graham Angus, manager of marine species and threats with DOC, and Stephen

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6. Document T3

7. Document T7

8. Submission 3.3.1333; Wai 2331 ROI, memorandum 3.1.2

9. Document A161

10. Wai 2331 ROI, memoranda 3.1.5–3.1.6

Halley,<sup>11</sup> and an affidavit of James Stevenson-Wallace, general manager of New Zealand petroleum and minerals with the Ministry of Business, Innovation and Employment (MBIE).<sup>12</sup>

On 15 October 2014, presiding officer Judge David Ambler declined to grant an urgent hearing or to admit the bulk of the further evidence filed.<sup>13</sup> Judge Ambler found that the application for urgency was, in effect, a request for a rehearing or to adduce further evidence, and disallowed it on that basis. Mr Apiti's amended claim was not, in substance, any different to his earlier claim, and the evidence cited was, for the most part, an amplification of what had already been presented. To allow Mr Apiti a second chance at presenting his claim would be unfair to other Wai 898 claimants and would set an unhelpful precedent. Although he acknowledged that Ngāti Te Wehi might arguably suffer significant and irreversible prejudice as a result of the Crown's failure to protect Māui's dolphin, Judge Ambler identified a number of alternative remedies to an urgent hearing. He noted that Mr Apiti's counsel could address his amended claim in closing submissions, and indicated that the Tribunal would consider delivering a discrete report on the issue within an earlier timeframe.

While he was generally of the view that the additional evidence presented in support of urgency would not have an important influence on the outcome of the claim, Judge Ambler made an exception in the case of Dr Slooten's affidavit outlining her 2014 efforts to convince the Crown to revisit the revised TMP, which he considered relevant and potentially influential. He therefore allowed it to be placed on the Wai 898 record of inquiry.<sup>14</sup> In order to enable the Tribunal to consider the Crown's substantive response to Dr Slooten's evidence, Judge Ambler also allowed the Crown's affidavits in reply to the urgency application (the joint affidavit of Graham Angus and Stephen Halley, and the affidavit of James Stevenson-Wallace) to be placed on the record of inquiry.<sup>15</sup> As the Wai 898 evidential hearings had concluded, these witnesses did not appear before the Tribunal to present their evidence and were not cross-examined.

Because the Crown affidavits had not formally been included on the record of inquiry when Mr Apiti's counsel prepared their closing submissions, Judge Ambler accepted a request for counsel's submissions in support of the application for urgency, which address the Crown evidence, to be added to the Wai 898 record of inquiry.<sup>16</sup>

The Wai 898 Tribunal heard the claimants' closing arguments concerning Māui's dolphin in November 2014. At this time, counsel for Wai 2481 attempted to file a further affidavit by Ms Greensill in support of Ngāti Tahinga's claim in relation to Māui's dolphin. At such a late stage, the Tribunal could only permit new evidence if it was merely contextual and uncontested by the parties. Judge Ambler therefore

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11. Document A162

12. Document A163

13. Wai 2331 ROI, paper 2.5.3

14. Wai 2331 ROI, paper 2.5.3, p 13

15. Paper 2.6.104, p 6

16. Paper 2.6.106, p 4

did not allow this evidence onto the record.<sup>17</sup> The Crown made its closing submissions in February 2015.

## 2 BACKGROUND, PARTIES' POSITIONS, AND ISSUES

In this part of our report we outline the factual background behind the Māui's dolphin claims, and the positions of the parties. Based on these factors, we then set out the issues for Tribunal determination in this report.

### 2.1 Factual background and Crown policy

In this section we discuss what the claimants told us about their traditions and modern-day associations with Māui's dolphin. We then describe the scientific background, and the various phases of the Crown's policy response to the plight of the Māui's dolphin from 2002 until the present. After a brief description of MBIE's block offer process, the section concludes with a summary of the claimants' concerns with the 2013 TMP.

#### 2.1.1 Traditions concerning Māui's dolphin

There is no evidence before this Tribunal of specific traditional associations of Māori with Māui's dolphin. That situation may be contrasted with other species that are the subject of claims before us, such as tuna, kererū, and whitebait, about which we heard substantial evidence.

Notwithstanding that Māui's dolphin was only recognised by scientists as a genetically distinct sub-species of the closely related Hector's dolphin in 2002, we heard no evidence of traditional Māori associations with either Hector's dolphin or Māui's dolphin, and only limited evidence of associations with dolphins generally.

In hearing week nine at Parawera Marae, Mr Apiti told us that Ngāti Te Wehi use the name pōpoto for dolphins in general, although other terms are known. Mr Apiti also spoke about the kōrero of his late uncle, John Apiti, who told him that the taniwha who accompanied the Tainui waka from Hawaiiiki to Aotearoa, known as Paneiraira, was in fact a dolphin.<sup>18</sup> In response to questions from the Tribunal, Mr Apiti clarified that he does not believe that Paneiraira was a Māui's dolphin. Rather, he uses the story to demonstrate the general importance to Ngāti Te Wehi of dolphins, of whatever species, in and around Aotea Harbour.<sup>19</sup>

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17. Paper 2.6.100, pp 3–4

18. We note some variation in the spelling of Paneiraira. In his Wai 898 evidence, Mr Apiti used Paneireira, however in news articles he submitted as appendices it is also spelt Panereira: doc P6, pp 1–2; doc P6(a), pp 63, 66, 68. We prefer Paneiraira, which seems to be the more common spelling, as used for example in a parliamentary debate and in *Te Ara – the Encyclopaedia of New Zealand*; Nanaia Mahuta, 6 May 2010, *New Zealand Parliamentary Debates*, vol 662, p 10852; Bradford Haami, 'Te whānau puha – whales – Whales and Māori voyaging', *Te Ara – the Encyclopaedia of New Zealand*, <http://www.TeAra.govt.nz/en/te-whanau-puha-whales/page-2>, last modified 22 September 2012.

19. Document P6, pp 1–2; transcript 4.1.14, p 1366

2.1 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

Apart from that evidence, we did not receive any other evidence regarding traditions concerning Māui's dolphin or dolphins in general, whether from Mr Apiti or any other claimants.

**2.1.2 *The claimants' association with Māui's dolphin***

Nevertheless, Mr Apiti says that Māui's dolphin is a taonga for Ngāti Te Wehi as it is an endangered species whose habitat lies partly within the rohe moana of Ngāti Te Wehi. Mr Apiti and Ngāti Te Wehi have developed an association with Māui's dolphin in the last two decades, since the dolphin's endangered status became known.

In recent years Mr Apiti and others in the Aotea and Whaingaroa Harbour areas have joined with wider community efforts to raise the profile of the dolphin and promote measures to protect it. Ngāti Te Wehi established an environmental arm, known as Moana Rahui o Aotea Incorporated Society, and in 2002 that body developed a strategic plan to promote and be actively involved in preserving Hector's dolphin, and other endangered species in the Aotea Harbour, including Māui's dolphin.

In Mr Apiti's evidence before the Wai 898 Tribunal he outlined some of his and Ngāti Te Wehi's activities in relation to Hector's and Māui's dolphins, including raising the issue of the dolphin's plight in the press and meeting with the leader of a political party to discuss potential actions to protect the local dolphin population.<sup>20</sup> Mr Apiti's affidavit in support of the application for an urgent inquiry also contained a timeline of actions taken in this regard between the 1990s and 2013.<sup>21</sup> However, Judge Ambler did not accept this onto the record of inquiry, and we must therefore disregard its detail.<sup>22</sup> Nevertheless, the Crown does not appear to dispute Mr Apiti and Ngāti Te Wehi's general interest in the welfare of Māui's dolphin.

Ms Greensill's evidence, filed after evidential hearings had concluded, was similarly not accepted onto the record of inquiry, and we are unable to comment on Ngāti Tahinga's association with Māui's dolphin.

**2.1.3 *The plight of Māui's dolphin***

Māui's dolphin was recognised as a sub-species of Hector's dolphin in 2002. It is the world's smallest and one of its rarest dolphins. In 1999, Hector's dolphin was gazetted as a threatened species under the Marine Mammal Protection Act 1978 (MMPA), and that classification applies to Māui's dolphin today. In 2004, the population of Māui's dolphin was estimated at 111, and by 2013 the adult population was estimated at 55. In 2009, DOC listed Māui's dolphin as 'nationally critical', giving it a high possibility of becoming extinct in the near future. Internationally, they are listed as 'critically endangered'.

Māui's dolphins are endemic to New Zealand and are today found exclusively off the west coast of the North Island. It is thought that in the nineteenth century they were found from Tauroa Point, west of Ahipara on the west coast of Northland,

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20. Document P6, p 5; doc P6(a), pp 63–67

21. Wai 2331 ROI, doc A1, pp 2–5, 8–10

22. Wai 2331 ROI, paper 2.5.3



down the whole of the west coast and up the east coast to mid-Bay of Plenty.<sup>23</sup> Today, they are found only on the west coast from Maunganui Bluff, north of the Kaipara Harbour, to just south of New Plymouth. They are most commonly found between Manukau Harbour and Port Waikato.

Māui's dolphin's close inshore habitat overlaps with many coastal activities that pose a threat to their survival. Threats from human activities include becoming entangled in fishing gear and drowning (set netting, trawling, and drift netting), being hit by boats, being entangled in or ingesting marine litter, pollution, and the effects of marine mining and construction, including seismic surveys. Other types of threat include disease, predation from sharks and orcas, and extreme weather.<sup>24</sup>

#### **2.1.4 Crown response to the plight of Māui's dolphin**

Māui's dolphins are fully protected in New Zealand waters under the MMPA. The Minister of Conservation is responsible for protecting marine mammals under that Act. Māui's dolphin is classified as 'nationally critical', the highest 'at risk' classification in the New Zealand Threat Classification System.

The Minister for Primary Industries is responsible for the Fisheries Act 1996. Under that Act, the Minister has powers to avoid, remedy, or mitigate any adverse effects of fishing on the aquatic environment. Under section 15(2), the Minister, in the absence of a population management plan, and after consultation with the Minister of Conservation, may take the measures they consider necessary to avoid, remedy, or mitigate the effects of fishing-related mortality on Māui's dolphin.<sup>25</sup>

In 2003, the Crown put in place a series of measures to protect Māui's dolphin. The then Ministry of Fisheries, now MPI, instituted a ban on set nets on the west coast of the North Island to four nautical miles between Maunganui Bluff in Northland and Pariokariwa Point at Pukearuhe, New Plymouth.

In March 2007, the Ministry of Fisheries and DOC released a discussion document outlining the threats facing Hector's and Māui's dolphin, and options to mitigate those threats.

In August 2007, the Ministry of Fisheries and DOC released a draft TMP for the Hector's and Māui's dolphins for public consultation. A TMP is not a statutory document but a management plan. The draft TMP proposed a variety of measures. A series of public meetings were held along the west coast of the North Island. Consultation ended on 24 October 2007 and 2,400 submissions were received, with 29 from iwi and hapū groups. According to the Crown, submissions on the proposed measures, including those of iwi and hapū, were mainly against the options in the draft TMP.

Te Ohu Kai Moana (ТОКМ) is a statutory body established in 2004 to advance the fishing interests of iwi Māori. The Crown's witnesses for DOC and MPI, Mr Angus and Mr Halley, told us that, in response to the 2007 draft TMP, ТОКМ submitted that additional measures were not needed and would impose unnecessary

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23. Document P6, p 2

24. Document T3, pp 34–35; doc T7, pp 24–28; doc A162, p 1

25. Document A162, p 1

2.1 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

restrictions on the ability of hapū and iwi to use commercial and non-commercial fishery settlement assets. TOKM further claimed that the proposals would have significant and debilitating impacts on most if not all iwi on the west coast of the North Island. Mr Angus and Mr Halley also said that a number of iwi and hapū submitted that existing measures managed fishing-related threats sufficiently, and that the draft TMP exaggerated the distribution and range of Māui's dolphin. (They did not state whether these were iwi and hapū from affected areas of the west coast, or outside groups with fishing interests in the Maui's dolphin habitat.<sup>26</sup>)

In July 2008, the Ministers of Fisheries and Conservation announced their decisions on the Hector's and Māui's dolphin TMP. This included a five-yearly review, the next one being in 2013.

As part of the 2008 TMP, the Minister of Conservation established the West Coast North Island Marine Mammal Sanctuary, which extends from Maunganui Bluff, north of Kaipara Harbour, to Oakura Beach, Taranaki, being 2,164 kilometres of coastline extending to the 12 nautical mile territorial sea limit. This sanctuary includes restrictions on seabed mining activities and acoustic seismic surveys.

In addition, the Minister of Fisheries extended the existing 2003 bans on recreational and commercial set netting into the entrances to Kaipara and Raglan Harbours, the lower part of Port Waikato and further into the Manukau Harbour. The set net ban was extended from four nautical miles offshore to seven nautical miles offshore between Maunganui Bluff and Pariokariwa Point. The ban on trawling was also extended from one to two nautical miles offshore between Maunganui Bluff and Pariokariwa Point, and out to four nautical miles offshore between Manukau Harbour and Port Waikato. Recreational and commercial drift netting was banned in Port Waikato (the whole of the port and river system).

DOC also facilitated a Māui's dolphin Recovery Group to coordinate research and management actions to protect Māui's dolphin from extinction. The Recovery Group has since been superseded by the Māui's dolphin Research Advisory Group, which was implemented in 2014.

In 2008, the commercial fishing industry issued High Court proceedings challenging the Minister of Fisheries' decision as part of the 2008 TMP to extend the set net ban from four to seven nautical miles from Maunganui Bluff to Pariokariwa Point, and the extension of the closed areas further into the harbours. Interim relief was granted. Eventually, in March 2011 the Minister of Fisheries reconsidered his decision but maintained the set net prohibition out to seven nautical miles.<sup>27</sup>

In early 2012, two events triggered an earlier review of the 2008 TMP.

In January 2012, a dolphin was caught as by-catch by a commercial set net fisher off Cape Egmont, Taranaki. The dolphin was thought to be a Hector's dolphin, and could possibly have been a Māui's dolphin, but the necessary scientific testing was not undertaken to determine the exact species as the dead dolphin was returned to the sea.<sup>28</sup>

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26. Document A162, pp 2-4

27. Document A162, pp 4-5

28. Document A161, p 2; doc A162, p 5

In March 2012, a DOC-commissioned genetic study estimated the Māui's dolphin population to consist of 55 individuals aged more than one year. An earlier abundance estimate in 2004 had estimated 111 individuals. Although the Crown says the methods used in the two studies are not directly comparable, the 2012 research nevertheless confirmed that the Māui's dolphin population was small and likely to be declining.<sup>29</sup>

As a result of this new information, in early 2012 the Ministers for Primary Industries and Conservation announced that a review of the Māui's dolphin component of the 2008 TMP would be brought forward from 2013 to 2012.

In April 2012, DOC and MPI sought submissions on interim measures to protect Māui's dolphins in the Taranaki region while the TMP review was undertaken. New interim fisheries restrictions in southern Taranaki came into effect on 28 July 2012, which extended set net restrictions from Pariokariwa Point south to Hawera, with an offshore boundary of two nautical miles. Other measures were put in place.

In June 2012, an expert panel of domestic and international specialists in marine mammal science and ecological risks was established by MPI, DOC, and the IWCSC for the Māui's dolphin risk assessment workshop. The workshop informed the development of options for the TMP consultation document.

The expert panel reviewed sightings and strandings data, and determined that Māui's dolphins range as far south as Whanganui. The panel concluded that the 'total human-induced mortality for the Māui's dolphin is higher than the population can sustain'. The level of by-catch of gill net and trawl fisheries was estimated at 4.97 Māui's dolphins per year, exceeding the sustainable level of human impact by more than 75 times. The probability of population decline was estimated at 95.7 per cent, with 95.5 per cent of the risk attributed to fisheries mortalities.<sup>30</sup>

In July 2012, the IWCSC expressed concerns about the critically endangered status of Māui's dolphin and recommended the Crown extend the protected area to include the entire range of where Māui's dolphins are found, being out from the shoreline to the 100-metre depth contour of the coastline. The effect of such a measure would be to ban gill net and trawl net fishing to that depth. The IWCSC expressed similar views in 2013 and 2014.

In September 2012, DOC and MPI published a report, *A Risk Assessment of Threats to Māui's Dolphins*, followed by a consultation paper on the review of the Māui's dolphin component of the 2008 TMP. DOC and MPI undertook public consultation as part of the review, including with iwi and hapū. Submissions closed in November 2012.

The consultation paper contained a range of regulatory and non-regulatory options to address human-induced threats to the Māui's dolphin. Among the options presented were retaining the interim fisheries restrictions in southern Taranaki from Pariokariwa Point south to Hawera and varying the West Coast

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29. Document T7, p 27

30. Document A161, pp 2-4; doc A162, pp 5-6; doc T7, p 27

2.1 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

North Island Marine Mammal Sanctuary established in 2008 to include a greater area of southern Taranaki.<sup>31</sup>

More than 70 iwi organisations across the west coast of the North Island were advised of the review and consultation process, including iwi in the Te Rohe Pōtae inquiry district. Over 70,000 submissions were received from the public. Submissions from iwi in general supported a collaborative or integrated approach to the management of human-induced threats to Māui's dolphin. Some submissions supported a complete ban on set net and trawl activity. Others considered the information on the distribution of the dolphin and the level of fishing-dolphin interactions was too uncertain and unfairly balanced to the detriment of the fishing industry. According to the Crown, TOKM submitted there was insufficient information to justify the proposed measures around Taranaki, and that more needed to be done to improve the science and information on the dolphin's range.<sup>32</sup>

Mr Apiti, Ngāti Te Wehi, and Moana Rahui o Aotea Incorporated Society did not make any submissions on the review of the TMP.

In June 2013, a final advice paper was put by MPI to the Minister for Primary Industries and the Minister of Conservation. The paper included an option to ban gill-net and trawl fisheries in waters less than 100 metres deep from Maunganui Bluff to Whanganui and including harbours. That option was not preferred by the Ministers.<sup>33</sup>

On 6 September 2013, the Minister of Conservation announced his intention to vary the West Coast North Island Marine Mammal Sanctuary to prohibit commercial and recreational set net fishing between two and seven nautical miles offshore between Pariokariwa Point and Waiwhakaiho River, immediately north of New Plymouth.

This announcement involved further consultation which concluded on 11 October 2013. Over 45,000 submissions were received from the public on the announced variation to the sanctuary.<sup>34</sup> Mr Apiti's counsel stated that according to Dr Slooten, an overwhelming majority of these submissions (some 45,807) sought protective measures over a larger area of coastline than that provided for in the revised plan. We did not hear directly from Dr Slooten on this point, so we are unable to verify the accuracy of this figure.<sup>35</sup>

In November 2013, the Ministers for Primary Industries and Conservation announced the following changes to the TMP:

- 1 Retain the existing set net, drift net, and trawl fisheries controls put in place under the Fisheries Act [1996], including the interim set net measures that were put in place between Pariokariwa Point south to Hawera, Taranaki, in July 2012;

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31. Document A161, pp 1–2, citing Ministry for Primary Industries and Department of Conservation, *Review of the Maui's Dolphin Threat Management Plan*, 2012, <http://www.doc.govt.nz/Documents/conservation/native-animals/marine-mammals/maui-tmp/mauis-tmp-discussion-document-full.pdf>

32. Document A162, pp 7–9; doc A161, pp 4–5

33. Document A161, p 6

34. Document A162, pp 9–10

35. Paper 3.4.231, p 23

- 2 Vary the West Coast North Island Marine Mammal Sanctuary under s22 of the MMPA to extend prohibitions on commercial and recreational set net fishing between two and seven nautical miles offshore between Pariokariwa Point and the Waiwhakaiho River, Taranaki;
- 3 Increase observer coverage in the commercial trawl fishery to 100% over a period of four years, focusing that coverage between two and seven nautical miles offshore from Maunganui Bluff to Pariokariwa Point;
- 4 Develop a Code of Conduct for inshore boat racing off the west coast of the North Island;
- 5 Require the Code of Conduct for Minimising Acoustic Disturbance to Marine Mammals from Seismic Survey Operations to be implemented as a mandatory standard for all territorial and EEZ waters [referenced] under s28 of the MMPA;
- 6 Develop and implement a strategic, collaborative advisory group for engaging interested parties (national and local government, industry, environmental non-government organisations, tangata whenua and science providers) in the prioritisation and funding of future conservation research on Maui's dolphins; and
- 7 Retain the existing controls over seabed mining out to two nautical miles along the full length of the West Coast North Island Marine Mammal Sanctuary and to four nautical miles from south of Raglan Harbour to north of Manukau.<sup>36</sup>

This is the regime in place at the time of writing our report. DOC and MPI are to review the 2013 TMP in 2018, although any further Māui's dolphin mortality in the interim may prompt an earlier review.

In early 2014, DOC and MPI established a Māui's dolphin Research Advisory Group. Prior to the Research Advisory Group's first stakeholder meeting, DOC undertook consultation with regional stakeholders including iwi. Māori are able to engage with the Research Advisory Group on an ongoing basis. Angeline Greensill participated in the stakeholder meeting on 27 November 2014.<sup>37</sup>

The Crown says that in arriving at its revised 2013 TMP it took into account the submissions and recommendations of the IWCS, the IUCN, and the SMM between 2012 and 2014. While the Crown recognised the science underpinning the management recommendations, those recommendations reflect 'different management objectives that are narrower in scope than those established in the TMP'. In particular, those bodies do not take into account economic, social, and cultural factors. Consequently, DOC and MPI did not consider the IWCS's 2014 recommendations warranted reconsideration of the 2013 TMP.<sup>38</sup>

#### **2.1.5 Block offer process**

In his affidavit in support of the application for an urgent inquiry, Davis Apiti also complained about the 17 June 2014 Crown announcement of the process to allocate oil and gas exploration permits within the Māui's dolphin habitat, being the

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36. Document A162, pp10–11

37. Submission 3.4.310(a), p 12

38. Document A162, pp13–14, 16

2.1 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

West Coast North Island Marine Mammal Sanctuary.<sup>39</sup> Although that affidavit was not accepted onto the record of inquiry, and Mr Apiti made no mention of oil and gas exploration in his amended statement of claim, we nevertheless consider it important to mention here in the context of Crown conduct in relation to the habitat of the Māui's dolphin.

James Stevenson-Wallace's evidence addressed these matters on behalf of MBIE. The 'Block Offer' process is governed by the Crown Minerals Act 1991 and, more particularly, the Minerals Programme for Petroleum 2013.

On 2 April 2014, the Minister of Energy and Resources opened bids through the block offer process, which included an overlap of 3,360.077 square kilometres within the West Coast North Island Marine Mammal Sanctuary. MBIE officials undertook consultation with 99 iwi and hapū and various other interest groups. Mr Apiti was sent a consultation letter on 18 September 2013 via Moana Rahui o Aotea Incorporated Society. Consultation occurred between 18 September and 14 November 2013. No submissions were received from iwi and hapū related to the West Coast North Island Marine Mammal Sanctuary or Māui's dolphin, whether from Mr Apiti, Ngāti Te Wehi, or other iwi or hapū.<sup>40</sup>

Notwithstanding the block offer process, if an exploration permit is granted in an area that overlaps with the West Coast North Island Marine Mammal Sanctuary, any permit holder will need to apply to the relevant authority for consents before development takes place. That will afford Māori a further opportunity to make submissions.<sup>41</sup>

**2.1.6 Claimants' concerns with the 2013 TMP**

The claimants say the 2013 TMP fails to adequately protect Māui's dolphin from likely extinction and rely primarily on the affidavit evidence of Dr Slooten.

Dr Slooten set out in her affidavit her qualifications and expertise, her involvement with efforts to protect Māui's dolphin, and the various measures the Crown has instituted in response to the situation. She points to the acknowledged endangered status of the dolphin, and the scientific data and expert views that back up her opinion that the 2013 TMP will fail to halt the extinction of Māui's dolphin.

Relying on the population estimates of 111 dolphins in 2004 and 55 adults in 2012, Dr Slooten notes the expert panel's 2012 conclusion that the 'total human-induced mortality for the Maui's dolphin is higher than the population can sustain'. The level of by-catch of gill net and trawl fisheries was estimated at 4.97 Māui's dolphins per year, exceeding the sustainable level of human impact by more than 75 times. The probability of population decline was estimated at 95.7 per cent, with 95.5 per cent of the risk attributed to fisheries mortalities.<sup>42</sup>

In September 2012, the IUCN World Conservation Congress noted that the IUCN Species Survival Commission and its Cetacean Specialist Group had advised the

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39. Wai 2331 ROI, doc A1, p 10

40. Document A163, pp 1-3

41. Document A163, p 6

42. Document A161, pp 3-4

New Zealand Government 'on the need to expand the areas of protection from gill netting and trawling to cover the entire range of the Māui's and Hector's Dolphins'. The congress recommended that the New Zealand Government:

1. urgently extend dolphin protection measures and in particular to ban gill net and trawl net use from the shoreline to the 100-metre depth contour in all areas where Hector's and Māui's dolphins are found, including harbours;
2. increase immediately the level of monitoring and enforcement; and
3. report such action to the IUCN.<sup>43</sup>

In 2013, the SMM provided scientific advice that in order to successfully conserve the Māui's dolphin sub-species, it would be necessary to reduce the risk of Māui's dolphins being caught in nets to zero. This could only be done by extending the proposed netting closures to cover the entire range of Māui's dolphin. That same year the IWCSC reiterated 'its extreme concern about the survival of the Maui's dolphin given the evidence of population decline, contraction of range and low current abundance'.<sup>44</sup>

Dr Slooten considers that the ban on gill net and trawl fisheries in waters less than 100 metres deep, from Maunganui Bluff to Whanganui and including harbours, included as an option in the final advice paper from MPI to the Ministers of Conservation and for Primary Industries in June 2013, was the most effective option given to the Ministers. This option was consistent with the views of the IWCSC, IUCN, and SMM.<sup>45</sup>

Dr Slooten also noted that in 2014 the IWCSC reviewed new estimates of the number of Māui's dolphins killed in fishing nets each year. The 2012 expert panel's estimate was 4.97 Māui's dolphins killed in gill nets and trawl nets each year. The 2013 TMP is estimated to reduce this to 3.28 to 4.16 dolphin deaths per year. The sustainable level of human impact, including fishing, is 0.044 to 0.1 dolphins per year – being one dolphin every 10 to 23 years. This means that the Māui's dolphin by-catch has been reduced from more than 75 times to more than 54 times the sustainable level of total human impact. In Dr Slooten's view, that change will be too slow to avoid the extinction of Māui's dolphin.

Dr Slooten cites the example of the baiji, or Chinese river dolphin, which is the only dolphin known to have become extinct due to human impact. In 1998, the population of baiji dolphins was estimated at 40. In 2006, none could be found. Dr Slooten says the situation for the baiji dolphin was far more difficult and complex than is the case for Māui's dolphin, as the sole habitat of the baiji dolphin was a river which has about 10 per cent of the world's human population in its catchment, and is used for transport, fishing, sand mining, and other activities.

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43. Although Dr Slooten quotes resolution M035, we note that according to the IUCN website this specific wording was in fact adopted by the congress as a recommendation: doc A161, pp 4–5; IUCN World Conservation Congress, 'WCC-2012-Rec-142-EN', [https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC\\_2012\\_REC\\_142\\_EN.pdf](https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_REC_142_EN.pdf).

44. Document A161, p 5

45. Document A161, p 6

2.2 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

The situation of Māui's dolphin is the opposite to that of the baiji dolphin. The most serious human impact is readily avoidable, through transition to dolphin-safe fishing methods. In Dr Slooten's view: 'This problem literally could be solved overnight in my view. There are no scientific, technical or economic obstacles. Political will is the only obstacle in my opinion.'<sup>46</sup>

Dr Slooten says it is almost too late to save Māui's dolphin from extinction. She does not support the 'wait and see' approach of the Crown, in conducting further research and awaiting the reporting of a further Māui's dolphin death. The scientific evidence is that the gill net and trawl fishery must be banned to the 100-metre depth contour, which means an extension of the various existing bans to 20 nautical miles off the west coast of the North Island from Maunganui Bluff to Whanganui, including all harbours.<sup>47</sup>

**2.2 The claimants' and Crown's arguments**

**2.2.1 Wai 2331**

Davis Apiti's counsel note that Māui's dolphin is a taonga species and is therefore entitled to the protections under article 2 of the Treaty of Waitangi. This entails a duty of active protection of the taonga species. The critical issue is, how vigorous does the active protection need to be in order for the Crown to discharge its Treaty duty?<sup>48</sup>

In counsel's view, because of the plight of Māui's dolphin, the Crown's duty of protection is at a significantly high level. That is, it has a duty to act with 'particular vigour in circumstances where there is sufficient evidence that an accepted taonga is likely to become extinct'.<sup>49</sup>

The 2013 TMP is simply an inadequate measure. In essence, Mr Apiti argues the Crown was obliged to adopt the gill net and trawl fishery ban to the 100-metre depth contour, that is, to 20 nautical miles, from Maunganui Bluff to Whanganui including all harbours, as recommended at various stages by the IWCS, the IUCN, and the SMM. Indeed, the Crown's own evidence does not dispute the expert panel's findings that far greater measures are needed to save Māui's dolphin from the likelihood of extinction. The Crown's failure to adopt this extended fishery ban as the outcome of the 2012–13 review of the TMP was unreasonable in the circumstances and in breach of the Crown's duty to protect a critically endangered taonga.<sup>50</sup>

Counsel acknowledged that in setting its policy the Crown must take into account other considerations such as the interests of commercial and recreational fishers. However, those interests 'must be secondary to [the Crown's] duty to protect taonga, especially when the threat of extinction is real'.<sup>51</sup> The competing interests, whatever they may be, are not sufficiently important to outweigh the taonga interests in the Māui's dolphin.

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46. Document A161, pp 6, 10–11

47. Document A161, pp 12, 15

48. Submission 3.4.231, p 6

49. Submission 3.4.231, p 7

50. Submission 3.3.1333, p 13

51. Submission 3.4.231, p 21



In answer to the Tribunal's questions regarding the Crown's duty to balance its obligations in relation to a taonga species, such as Māui's dolphin, with its duties in relation to the Māori commercial and non-commercial customary fishery, Mr Apiti's counsel acknowledged there was no easy answer, but that, because the dolphin was at the point of extinction, the Crown needed to do whatever was necessary to arrest that decline in population. In essence, this involved a change in the method of fishing, which counsel, quoting Dr Slooten, concluded could be put in place 'overnight'.<sup>52</sup>

Mr Apiti's counsel did not directly address Crown evidence citing the claims of TOKM and other iwi and hapū that greater protective measures would harm their customary and commercial fisheries. Counsel did note, however, that the Crown does not state how many of the submissions on the revised TMP were for or against greater protection for Māui's dolphin, and further argued that the Crown's own evidence suggests a lack of unanimity among Māori groups engaging with the consultation process.<sup>53</sup>

In the case of consultation on variations to the West Coast North Island Marine Mammal Sanctuary in late 2013, counsel for Mr Apiti stated in their submissions in response to Crown evidence that according to Dr Slooten, an overwhelming majority (some 45,807) sought greater protective measures than that provided for in the revised plan.<sup>54</sup>

In terms of Mr Apiti and Ngāti Te Wehi's lack of engagement with the Crown's review of the TMP, counsel acknowledged that they did not engage with that process though they had been involved in dolphin conservation since the 1990s. (Nor did they engage with MBIE's block offer process in relation to oil and gas exploration.) Nevertheless, counsel submitted that such non-engagement should not be fatal to the substantive claim in relation to the effectiveness of the 2013 TMP.<sup>55</sup>

### 2.2.2 *Wai 2481*

We also received submissions from counsel on behalf of Angeline Greensill's Wai 2481 claim, which were incorporated into the general submissions on behalf of Whaingaroa claimants under Wai 125.<sup>56</sup> Those submissions pursued the same arguments as those of Mr Apiti's counsel, namely that the Crown's policy in relation to Māui's dolphin gives inadequate protection to a precious taonga, and fails to recognise the right of Māori to kaitiakitanga.

We note that we are unable to consider those aspects of counsel's submissions that rely on an additional brief of evidence put forward by Ms Greensill in October 2014. This document was not accepted onto the record of inquiry as it was filed long after evidential hearings for the Wai 898 inquiry had concluded.<sup>57</sup>

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52. Transcript 4.1.22(a), pp 260–264

53. Submission 3.3.1333, p 16

54. Submission 3.3.1333, p 16

55. Submission 3.4.231, p 23

56. Submission 3.4.210, pp 90–94

57. Memorandum 2.6.100, pp 3–4

2.3 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

**2.2.3 The Crown**

The Crown accepts Māui's dolphin is a taonga to some Māori. It acknowledges the critical state of the dolphin, though it says there is uncertainty about the distribution of Māui's dolphin and the distribution of fishing effort within the Māui's dolphin habitat.

The Crown acknowledges the Treaty duty to take reasonable steps in the prevailing circumstances to protect Māui's dolphin. The 'nationally critical' status of Māui's dolphin may require the Crown to take especially vigorous action to ensure its protection. However, the Crown is unable to guarantee outcomes.

The Treaty does not specify how protection should be effected. Where the Crown has a range of options available to achieve protection, the Crown will satisfy its Treaty obligations if it elects between those options reasonably and in good faith. The Crown says that the measures it has adopted in the TMP are vigorous, effective, and reasonable in the prevailing circumstances, and that the Crown's process has been Treaty-compliant.

The Crown considered a range of views in reviewing the 2008 TMP, including those of the IWCS and other such bodies. The IWCS's recommendations reflect different management objectives to those of the TMP, and in particular do not take into account economic, social, and cultural factors or the various statutory regimes at play, such as the Fisheries Act 1996. The Crown also points to TOKM's submissions opposing changes to the TMP on the basis that they would impact on hapū and iwi commercial and non-commercial fisheries settlement assets.

The Crown's process for review of the 2008 TMP has provided for consultation with Māori, and many iwi and hapū made submissions as part of that process. However, Mr Apiti and Ngāti Te Wehi did not engage with that process. So too, other claimants in the inquiry district failed to engage with the process, although Ms Greensill has since attended the Research Advisory Group's stakeholder meeting on 27 November 2014. The failure of Mr Apiti to engage with the Crown's process is relevant to the merits of his substantive claim.

Of importance, the Crown notes that the claimants have not challenged the Treaty compliance of the Crown's process for review of the 2008 TMP. Rather, the claimants challenge the ultimate decision of the Crown, which they do not accept.

The Crown says that, consistent with its kāwanatanga right under article 1 of the Treaty, it was entitled to make the decisions it has made regarding the TMP. Further, some of the changes to the TMP have reflected measures that Mr Apiti had sought, including increased observation and monitoring of fishing vessels and further research, and the variation of the West Coast North Island Marine Mammal Sanctuary to increase the set net restrictions.<sup>58</sup>

**2.3 Issues for discussion**

The claimants and the Crown agree Māui's dolphin is a taonga under the Treaty of Waitangi. However, for the purposes of this report we still need to consider the

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58. Submission 3.4.310(a)

nature of the dolphin's status as a taonga and how this affects the Crown's duties towards the claimants. We then need to ask whether those obligations, including the duty to consult, were upheld by the Crown in its 2013 revision of the TMP.

In our view, there are four issues for discussion in this report:

1. Is the Māui's dolphin a taonga under the Treaty and, if so, why?
2. If it is a taonga, what Treaty duties apply in respect of Māui's dolphin?
3. Was the Crown's review of the TMP and its consultation with Māori in breach of the Treaty?
4. Finally, and most importantly, is the TMP itself in breach of the Treaty?

### 3 IS MĀUI'S DOLPHIN A TAONGA UNDER THE TREATY?

In this section we examine what past Tribunal reports have said about taonga, in order to determine whether and how Māui's dolphin fits into this category.

#### 3.1 What is a taonga?

Article 2 of the Māori version of the Treaty guarantees Māori tino rangatiratanga over, among other things, 'ō ratou taonga katoa' – all of their taonga. The Te Reo Māori Tribunal accepted the claimants' translation of 'ō ratou taonga katoa' as 'all their valued customs and possessions'.<sup>59</sup> By way of contrast, the equivalent passage in the English version of the Treaty translates taonga as 'other properties'.

Over the years, taonga found by the Tribunal to be protected under the Treaty have included a wide range of objects, organisms, and phenomena, including natural features or resources (such as awa, fishing grounds, or wāhi tapu),<sup>60</sup> species or populations of flora and fauna (such as harakeke, kūmara, and tuatara),<sup>61</sup> and intangibles (such as te reo Māori and the intellectual property behind certain waiata or tā moko).<sup>62</sup>

The Tribunal has generally adopted a broad definition of taonga, in accordance with the Māori text of the Treaty. Thus, the Ngawha Geothermal Tribunal defined a taonga as a 'valued possession, or anything highly prized', noting that taonga may include 'any material or non-material thing having cultural or spiritual significance for a given tribal group'.<sup>63</sup> The Petroleum Tribunal similarly stated:

59. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993), p 20

60. Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999), p 47; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* (Wellington: Waitangi Tribunal, 1983), p 50; Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 165

61. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, pp 113–234

62. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 20; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, pp 31–112

63. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), p 20

3.2 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

Though the term has a number of other more mundane meanings, successive carefully reasoned reports of the Tribunal over many years now have come to treat 'taonga', as used in the Treaty, as a tangible or intangible item or matter of special cultural significance.<sup>64</sup>

**3.2 The role of tradition**

A common theme in Tribunal reports is that taonga are things that Māori have sought to protect and preserve over time through the exercise of traditional knowledge and protocols. As the Ngawha Geothermal Tribunal observed, traditionally taonga were 'objects of protection and conservation, [which] acquired a value heightened by the formal attention paid to them by ritual prohibition and sanction, mythical explanation and the like'.<sup>65</sup>

Conversely, where evidence of traditional associations was not forthcoming, the Tribunal has sometimes been unable to sustain claimant arguments that a certain resource or practice constitutes a taonga. In deciding whether petroleum was a taonga for the purposes of the Treaty, the tentative conclusion of the Petroleum Tribunal was that the evidence presented by claimants was 'insufficient to justify that leap'. In particular, the Tribunal cited a need for 'stronger and more detailed kōrero or traditions about the separate nature of these resources and their place in the histories and tikanga of these iwi'.<sup>66</sup>

In its discussion of Māori intellectual and cultural property rights in 'taonga species' that may be at risk from genetic modification, bio-prospecting, or intellectual property regimes, the Wai 262 Tribunal noted several characteristics that taonga species shared:

Taonga species have mātauranga Māori in relation to them. They have whakapapa able to be recited by tohunga (expert practitioners). Certain iwi or hapū will say that they are kaitiaki in respect of the species. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status, and what obligations this creates for them. In essence, a taonga species will have kōrero tuku iho, or inherited learnings, the existence and credibility of which can be tested.<sup>67</sup>

While the Wai 262 Tribunal accepted for the purposes of its inquiry that 'taonga species are what claimant communities say they are', that did not mean such claims were unaccountable or unreviewable.<sup>68</sup> In that Tribunal's view, the environment as a whole is not a taonga in the sense that the term is used in the Treaty. In other words, some aspects of the natural world are more precious to Māori than others. It follows that '[n]ot all taonga will be of the same worth – some will be more important

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64. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), p 42

65. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993* (Wellington, Legislation Direct, 1993), p 20

66. Waitangi Tribunal, *The Petroleum Report* (Wellington, Legislation Direct, 2003), pp 42–43

67. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, pp 114–115

68. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 114

than others, and more deserving of protection.<sup>69</sup> Whether and to what extent a species is a taonga depends on the strength of the knowledge and traditions by the iwi or hapū claiming kaitiaki status.

### 3.3 Change over time

The Wai 262 Tribunal described the taonga species considered in its report as 'flora and fauna with which Māori have developed intimate and multifaceted relationships over 40 or so generations'.<sup>70</sup> Other Tribunals have considered whether taonga relationships can arise in respect of resources and other phenomena that were not part of Māori life in traditional times, or at the signing of the Treaty. The Radio Frequencies Tribunal, for example, concluded that taonga 'may be things which are not yet known' or which were not explicitly declared to be taonga at 1840.<sup>71</sup> The majority decision of the Radio Spectrum Tribunal agreed, citing the opinion of the Motunui–Waitara Tribunal that the Treaty 'was not intended to fossilise the status quo', and the finding of the Court of Appeal in *Te Runanga o Muriwhenua v Attorney-General* that the Treaty is 'a living instrument' to be applied in the light of developing circumstances.<sup>72</sup> Similarly, the Fisheries Settlement Tribunal stated:

Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances.<sup>73</sup>

It is perhaps significant that questions about the changing status of taonga have often arisen in the context of customary and commercial fisheries. The Muriwhenua Fisheries Tribunal stated '[t]here is no rule of the Treaty that Maori are confined to the fishing bands or grounds proven to have been used by them [at 1840]'.<sup>74</sup> The Tribunal ultimately found that the Treaty protects both Māori rights to the fisheries they prized at 1840, and the right to develop offshore fisheries – in part because large-scale offshore fishing did not develop in New Zealand until the 1970s.<sup>75</sup> Following this, the Ahu Moana Tribunal found that 'the Maori interest in

69. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), pp 110, 112

70. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 19

71. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), pp 40–41

72. Waitangi Tribunal, *The Radio Spectrum Management and Development Interim Report* (Wellington: Legislation Direct, 1999), p 6, citing Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 52 and *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641, 655 (CA)

73. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 11

74. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: Waitangi Tribunal, 1988), p 236

75. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, pp xix, 236–239

3.4 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

marine farming forms part of the bundle of Maori rights in the coastal marine area that represents a taonga protected by the Treaty of Waitangi.<sup>76</sup>

**3.4 Endangered taonga**

Consistent with their focus on protection, where Tribunal reports have considered a taonga to be endangered, its status as a taonga, and consequently the need for Crown intervention to safeguard it, are duly heightened.

In finding that the Māori language was 'an essential part of the culture' and a taonga that the Crown was obliged to recognise and actively protect, the Te Reo Māori Tribunal accepted the whakatauki 'Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa' (if the language be lost, man will be lost, as dead as the moa).<sup>77</sup> In addition to the language's centrality to Māori culture, the Tribunal also acknowledged that its uniqueness in the world and its endangered status heightened the need to protect it. The Tribunal stated:

It is quite obvious that the language and its preservation is important. It is unique, spoken nowhere else in the world, and is part of a rich heritage and culture that is also unique. There is a great body of Maori history, poetry and song that depends upon the language. If the language dies all of that will die and the culture of hundreds and hundreds of years will ultimately fade into oblivion. It was argued before us that if it is worthwhile to save the Chatham Island robin, the kakapo parrot or the notornis of Fiordland, is it not at least as worthwhile to save the Maori language?<sup>78</sup>

The Wai 262 Tribunal acknowledged a tension between the preservationist philosophy held by DOC and many Pākehā, and Māori notions of kaitiakitanga and customary use, which allow for ongoing interaction with the environment.<sup>79</sup> Yet given the threatened status of many of the taonga species named by claimants in that inquiry, the Tribunal was concerned not to overstate such differences:

All parties in this claim shared a concern for the state of the environment and the taonga within it; and all would agree that the survival and health of a species should be the first object of human engagement with it. For kaitiaki, there can be no relationship with taonga if the taonga no longer exist; nor, without the taonga, can the mātauranga survive.<sup>80</sup>

**3.5 Is Māui's dolphin a taonga?**

We are persuaded that Māui's dolphin has *become* a taonga species for Ngāti Te Wehi and Ngāti Tahinga because of the dolphin's endangered status. However, the lack of traditions that apply to dolphins in general, let alone Māui's dolphin specifically,

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76. Waitangi Tribunal, *Ahu Moana: The Aquaculture and Marine Farming Report* (Wellington: Legislation Direct, 2002), p 63

77. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, pp 7, 20

78. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 7

79. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, pp 347–349

80. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 340

means there is no basis for us to conclude that Māui's dolphin is a taonga of long-standing or particular cultural significance to Māori or to those iwi and hapū.

A striking feature of the claimants' evidence was the lack of kōrero regarding Māori traditions concerning dolphins, including Māui's dolphin. We heard that Ngāti Te Wehi use the name pōpoto, among other terms, for dolphins in general. However, what term, if any, Māori used for Māui's or Hector's dolphin remains unclear, as does the question of who dubbed the species 'Māui's dolphin' in the first place.

We acknowledge that according to Ngāti Te Wehi the tradition of Paneiraira guiding the Tainui waka to Aotearoa relates to a dolphin. Yet there is no suggestion that Paneiraira was a Māui's (or a Hector's) dolphin. Moreover, while the tradition that Paneiraira was a dolphin speaks to the importance of dolphins at the time of the Tainui migration from Hawaiiki, there is little evidence before us of traditional or historical interaction between Māori and dolphins in the time since. While it is quite possible that traditions which existed among previous generations have since been lost, we resist speculating.

If Māui's dolphin had been of 'special cultural significance' or 'an essential part of the culture' and therefore a 'valued possession', like other taonga species, we would have expected claimants to tell us about particular mātauranga Māori, whakapapa, purākau, waiata, tuku iho, and so forth that had been passed down to current generations. That lack of evidence of traditions distinguishes this species from the various taonga species discussed in the Wai 262 report, each of which have traditional associations with particular iwi or hapū going back many generations. It is a different category of taonga; one whose 'taonga' status is due more to the threat of extinction than because it has held a particular cultural value amongst Māori.

It is, nonetheless, a taonga as the claimants say and the Crown acknowledges. We therefore accept Mr Apiti's rationale that, as Ngāti Te Wehi undertake the role of kaitiaki within their rohe moana, the hapū has a responsibility to care for species that are endangered or under threat, and such species may *become* culturally important to hapū and iwi, and thereby be considered to be taonga. As the various Tribunal reports have emphasised, the Treaty is not frozen in time, and new taonga may emerge.

But as the Wai 262 report noted, not all taonga are equal, and some are more deserving of protection (in Treaty terms) than others. Where Māui's dolphin sits in that spectrum of taonga and protection under the Treaty is the issue that underpins this report.

#### **4 TREATY DUTIES IN RESPECT OF MĀUI'S DOLPHIN**

##### **4.1 Claimants' and Crown views on Treaty principles**

The claimants argue the Crown must not only actively protect Māui's dolphin as a taonga under article 2 of the Treaty, but must 'act with particular vigour in

4.2 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

circumstances where there is sufficient evidence that an accepted taonga is likely to become extinct.<sup>81</sup>

The claimants also point to the wider principle of partnership, arguing that the Crown's usurpation of the claimants' rangatiratanga as kaitiaki of Māui's dolphin in and around Aotea Harbour has prevented Ngāti Te Wehi from playing its role as a Treaty partner in conservation matters.<sup>82</sup>

The Crown accepts the Treaty requires it 'to take reasonable steps in the prevailing circumstances to protect the Māui's dolphin [and t]hose circumstances include the current status of the Māui's dolphin as "nationally critical", which the Crown acknowledges may require it to take especially vigorous action to ensure protection.'<sup>83</sup> However the Crown also highlights that under article 1 of the Treaty, the Crown has a right of kāwanatanga and any decision it makes on a particular policy is not necessarily 'invalid in terms of the Treaty principles merely because the Crown has chosen one option for meeting its Treaty obligations over other available options.'<sup>84</sup>

The Crown further argues that while the claimants have questioned its ultimate policy decision, they have not challenged the consultation process by which that decision was arrived at, which the Crown describes as 'a robust and Treaty-compliant process which has had full regard to Māori interests'.<sup>85</sup>

We find the following Treaty principles and duties are relevant to this discussion:

- ▶ the duty of active protection;
- ▶ the Crown's right to kāwanatanga; and
- ▶ the principle of partnership.

**4.2 The duty of active protection**

It is beyond controversy that the Crown has a duty under article 2 of the Treaty to protect things that are treasured by Māori. The question before us is not whether the principle of active protection applies, but how it should be applied in the circumstances.

Many Tribunal and court decisions have referred to the principle and duty of active protection. As early as 1985, the Manukau Tribunal stated that: 'The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them.'<sup>86</sup> The president of the Court of Appeal, Justice Cooke, agreed in *New Zealand Maori Council v Attorney-General* that under the Treaty, 'the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'. Justice Cooke also likened the Treaty partnership between the Crown and

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81. Submission 3.4.231, p7

82. Submission 3.4.231, pp 6–7

83. Submission 3.4.310(a), p 2

84. Submission 3.4.310(a), p 3

85. Submission 3.4.310(a), p 3

86. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), p70



Māori to a fiduciary relationship, creating obligations 'analogous to fiduciary duties', such as a trustee has towards their beneficiaries.<sup>87</sup>

The Te Reo Māori Tribunal likewise found that the Crown was obliged to undertake rigorous and affirmative action to protect the Māori language:

[It is] clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place.<sup>88</sup>

An important theme running through Tribunal reports is that the Crown's duty of active protection is greater where taonga are in danger of being damaged or lost. The Petroleum Tribunal stated this in the strongest possible terms, finding that the diminishment or irrevocable loss of wāhi tapu 'cannot be consistent with Treaty principles'.<sup>89</sup> The Tauranga Moana Tribunal found that the Crown's responsibility to protect threatened taonga is heightened further still where the threat is due to previous Crown actions or omissions, such as the wrongful alienation of land on which wāhi tapu are situated.<sup>90</sup> The Pouakani Tribunal went as far as to find that Crown's duty extends to restoring some taonga: 'In the preservation of indigenous forest resources and wildlife habitats, a valued taonga, the Crown has an obligation not only to preserve the remaining forest but also actively to seek to replant suitable adjacent lands in indigenous species'.<sup>91</sup>

Yet, even where taonga are in extreme danger, the Crown's duty of active protection is never absolute. Thus, the Te Arawa Geothermal Tribunal and the Ngawha Geothermal Tribunal both conceded that even the Crown's obligation to ensure the protection of 'very highly valued rare and irreplaceable taonga of great spiritual and physical importance to Maori' may in certain cases be overridden, albeit 'in very exceptional circumstances'.<sup>92</sup>

In closing submissions,<sup>93</sup> the claimants' counsel rely on Lord Woolf's statement in the *Zealand Māori Council v Attorney-General Privy Council* case, that 'especially vigorous action' may be required of the Crown where taonga are in a vulnerable state:

If . . . a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations, and may well require the Crown to take especially vigorous action for its protection. This may arise,

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87. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA)

88. Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 1

89. Waitangi Tribunal, *The Report on the Management of the Petroleum Resource* (Wellington: Legislation Direct, 2011), p 165

90. Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 2, p 631

91. Waitangi Tribunal, *The Pouakani Report 1993* (Wellington: Brooker's Ltd, 1993), p 288

92. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brookers and Friend Ltd, 1993), p 32; *Ngawha Geothermal Resource Report*, p 100

93. Submission 3.4.231, p 6

4.3 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.<sup>94</sup>

However, Crown counsel observed<sup>95</sup> that, earlier in the same passage of his decision, Lord Woolf also stated that the protective obligations of the Crown depend on the context of each case. In carrying out its obligations, the Crown

is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.<sup>96</sup>

**4.3 The Crown's right to kāwanatanga**

It is equally without contention that under article 1 of the Treaty the Crown has the right to kāwanatanga. The Petroleum Tribunal described the cession of kāwanatanga in return for the protection of tino rangatiratanga as 'the essential exchange in the Treaty', through which 'Māori agreed to give up sufficient authority to enable the Crown to establish and operate a system of central government based on the English Westminster model'.<sup>97</sup> Under that system, the government of the day has authority to enact laws and pursue the policy agenda upon which it was elected to office, including decisions relating to conservation and resource management. Thus, the Muriwhenua Fishing Tribunal found that '[t]he cession of sovereignty or kwanatanga gives power to the Crown to legislate for all matters relating to "peace and good order"; and that includes the right to make laws for conservation control'.<sup>98</sup>

Yet, the Crown's right to perform its legitimate kāwanatanga role is not unconstrained. That is, although article 1 confers on the Crown the right of kāwanatanga (or 'sovereignty' in the English text), this is immediately qualified by its promise under article 2 to protect the Māori right to rangatiratanga over their lands, forests, fisheries, and other taonga. Essentially, the Crown's kāwanatanga role should always be balanced by a respect for Māori rangatiratanga (and through that, kaitiakitanga).<sup>99</sup>

How then, does the Crown go about balancing the exercise of kāwanatanga with the duty of active protection? Understandably, courts and Tribunals have been hesitant about being overly prescriptive. As the Napier Hospital Tribunal stated:

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94. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

95. Wai 2331 ROI, submission 3.1.4, p 9

96. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

97. Waitangi Tribunal, *Petroleum Report*, p 58

98. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 232

99. Waitangi Tribunal, *The Mohaka ki Ahuriri Report* (Wellington: Legislation Direct, 2004), p 22

Establishing where the balance lies between governing in the interests of all New Zealanders and protecting the rangatiratanga of Maori is often controversial and anyway difficult to achieve by means of a generalised approach. The Tribunal must assess each claim on its merits.<sup>100</sup>

In their discussion of Māori natural resource claims, the Radio Frequencies and Ngawha Geothermal Tribunals both spoke of a 'hierarchy of interests':

based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.<sup>101</sup>

In *Ngai Tahu Maori Trust Board v Director-General of Conservation*, the Court of Appeal considered DOC's Treaty obligations in the context of Ngāi Tahu's Kaikōura whale-watching operation. While it found that the Crown's duty to Ngāi Tahu went beyond mere listening or consultation without any intent to give weight to their interest in the final decision-making process, the Court of Appeal upheld the Crown's power to enact legislation for the protection and conservation of the environment and natural resources.<sup>102</sup>

The Wai 262 Tribunal considered that the preservation and protection of taonga species should be paramount over all other interests, including those of Māori. Yet the Tribunal was anxious to emphasise that kaitiaki too are concerned ultimately with the survival of their taonga, despite Pākehā suspicion towards Māori control of conservation management, especially concerning the idea of customary use. In this respect, 'the existence of the species themselves, and the ecosystems within which they live, are interests which impinge upon kaitiakitanga'.<sup>103</sup>

In the end, the Tribunal's main recommendation in balancing kāwanatanga and active protection has been for the Crown to keep talking to its Treaty partner. Thus, when the Mohaka ki Ahuriri Tribunal considered a scenario where a native species has become endangered, bringing kāwanatanga and rangatiratanga into conflict, it concluded that 'constant consultation was needed between the Treaty partners, even though the responsible exercise of kawanatanga might ultimately require the Crown to make the final decision'.<sup>104</sup> As the Te Urewera Tribunal has recently found in regard to the cultural harvest of kererū:

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100. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57

101. Waitangi Tribunal, *Report on Allocation of Radio Frequencies*, p 42, cited in Waitangi Tribunal, *Ngawha Geothermal Resource Report*, p 136

102. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 558 (CA)

103. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 311

104. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 29

4.4 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

[T]he Crown has a duty to govern in the interests of all New Zealanders, and to conserve resources for future generations. In particular, the Crown has a Treaty duty to protect taonga. But the extent and form of protection necessary is something that a Treaty-compliant Crown must decide in partnership with Maori, especially where a taonga is concerned. The Crown's right to govern is qualified by the need to respect and protect te tino rangatiratanga of the peoples of Te Urewera.<sup>105</sup>

**4.4 The principle of partnership**

The principle of partnership has been discussed by many previous Tribunals and courts. It is in some ways the central tenet of the Treaty, 'the only context within which the principles of kāwanatanga and rangatiratanga can be understood.'<sup>106</sup> At its heart is an expectation that both parties will conduct themselves with honour. The most common duties arising from this principle are that the partners must act with the utmost good faith towards each other and be able to engage in meaningful consultation on matters that affect Māori.

The Te Whanau o Waipareira Tribunal described the Treaty relationship as resembling a 'marriage contract' with the success of the 'vows' dependent on the parties' commitment to 'work through problems in a spirit of goodwill, trust, and generosity'.<sup>107</sup> Like any marriage, these obligations go both ways. Thus, in *New Zealand Māori Council v Attorney-General*, Justice Cooke stated:

the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.<sup>108</sup>

The Napier Hospital Tribunal found similarly that, while article 1 of the Treaty transferred to the Crown the power to exercise kāwanatanga, Māori 'undertook a corresponding duty of reasonable cooperation'.<sup>109</sup>

While consultation is a central obligation of partnership, a number of Tribunals have found that consultation, in and of itself, is not enough to fulfil all Crown duties. For example, the Petroleum Tribunal considered that the only way the principles of active protection and partnership can be achieved is if the Crown ensures 'all key decision-making processes involve Māori participation of a kind that is appropriate to the decisions being made'. Depending on the circumstances, 'such processes may require more than consultation with Māori'.<sup>110</sup>

The Crown must also make sure that its Treaty partner is provided with adequate information during the consultation process. The Foreshore and Seabed Tribunal

105. Waitangi Tribunal, *Te Urewera Pre-Publication Report: Part v1* (Wellington: Waitangi Tribunal, 2015), p153

106. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 372

107. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: Legislation Direct, 1998), p 222

108. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA); Waitangi Tribunal, *Mohaka ki Ahuriri Report*, vol 1, p 23

109. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 57

110. Waitangi Tribunal, *Report on the Management of the Petroleum Resource*, pp 150–151

referred to this as the claimants' right to certainty – a right to know what the outcome of the policy would be. The Tribunal found that the Crown's consultation on the proposed foreshore and seabed legislation failed, in a number of fundamental ways, to provide the claimants with certainty of outcomes, and thus was in breach of the principle of partnership.<sup>111</sup>

Māori, too, have obligations in relation to engaging with Crown consultation processes. The Napier Hospital Tribunal referred to the Court of Appeal's judgment in *Wellington International Airport Ltd v Air New Zealand*, which stated 'We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement.'<sup>112</sup> The Court of Appeal had cited with approval a quotation used by Justice McGechan when the same case was in the High Court:

To 'consult' is not merely to tell or present. Nor, at the other extreme, is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus.

'Furthermore,' the Napier Hospital Tribunal added, 'the party consulted does not acquire a right of veto over the decision to be made, or the right to cause unreasonable delay.'<sup>113</sup>

It follows that Māori must be willing to compromise and be reasonable in their requests of the Crown. As the Motunui–Waitara Tribunal held, 'it is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.'<sup>114</sup>

More fundamentally still, as part of the expectation of reasonable cooperation, it is incumbent on Māori, when consulted, to inform the Crown of how they will be affected by the Crown's proposed action. As the Wai 262 Tribunal has stated in the context of the Crown's consultation with Māori when entering into international agreements,

it is for Māori to say what their interests are, and to articulate how they might best be protected . . . That is what the guarantee of tino rangatiratanga requires. It is for the Crown to inform Māori as to upcoming developments in the international arena, and how it might affect their interests. Māori must then inform the Crown as to whether and how they see their interests being affected and protected. This is necessarily a dialogue: Māori and the Crown must always be talking to one another, whether it is occasional consultation as needed or something more regular, fixed, and permanent.<sup>115</sup>

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111. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 118–123, 130–132

112. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, 676 (CA); Waitangi Tribunal, *Napier Hospital and Health Services Report*, p 70

113. Waitangi Tribunal, *Napier Hospital and Health Services Report*, p 70

114. Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 52

115. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 681

**5 WAS THE CROWN'S REVIEW OF THE THREAT MANAGEMENT PLAN AND ITS CONSULTATION WITH MĀORI IN BREACH OF THE TREATY?**

In recent years, Tribunal reports have increasingly emphasised the overarching importance of ongoing communication and dialogue to the Treaty partnership. By the same token, contemporary claims of Crown Treaty breach in implementing current policies have focused more and more on the Crown's processes, in particular, the manner and extent of consultation with Māori.

The Crown says its process for the 2012–13 review of the TMP was Treaty-compliant, in part because it engaged in consultation with TOKM and other iwi and hapū groups with fisheries interests in the Māui's dolphin habitat. In seeking to consult with Māori and others within the fishing industry, as well as those Māori and non-Māori who favour greater protection for the dolphin, the Crown says it acted in good faith. The Crown says this is borne out by the fact that the present claimants do not in fact challenge the Crown's processes. Rather, they focus on the substantive merits of the 2013 TMP.

The claimants, for their part, do not distinguish between process and outcome. They say that the nature of the revised TMP shows that the Crown's decision-making process failed to give proper regard to scientific evidence of the dolphin's 'critically endangered' status, and to the fact that Māui's dolphin is a taonga to Ngāti Te Wehi and Māori generally. In response to Crown evidence of consultation, the claimants say there was less unanimity among Māori, and more opposition, than the Crown is prepared to admit.

We agree with the Crown that the claimants' case is focused squarely on the substance of the 2013 TMP rather than the process by which the Crown made its decision. In fact, not only do the claimants not complain about the Crown's processes, they did not engage with those processes when given the opportunity to do so. That is, Mr Apiti and Ngāti Te Wehi, and Ms Greensill and Ngāti Tahinga, did not engage with the 2012–13 review of the TMP. Nor, for that matter, did they engage with the 2014 block offer.

While we recognise the work of the claimants in raising the profile of Māui's dolphin and promoting measures for its protection, we also note their obligations as kaitiaki to engage with Crown conservation processes when the opportunity arises. As a number of past courts and Tribunals have said, the principle of partnership goes two ways. It is hard to understand how the Crown can be found to have failed in its duty of active protection if Māori have not advised the Crown of the importance of their taonga, when asked.

In any case, it is very difficult to assess whether the Crown has acted with utmost good faith or has carried out consultation in a Treaty-compliant manner when the claimants themselves have not participated with the Crown's processes.

The Waitangi Tribunal is tasked with answering the claims that come before it. In the absence of claims expressly about the Crown's processes, there is very little basis for us to find a breach of the Treaty in regard to the TMP review process or in the

## IS THE THREAT MANAGEMENT PLAN ITSELF IN BREACH OF THE TREATY? 6

manner of consultation with Māori. We certainly did not detect any obvious flaws in the process, based on the limited evidence we reviewed.

Nevertheless, we do allow ourselves one caveat, and reserve for our main report any comment on the Crown's environmental management regimes, in particular, the capacity of iwi and hapū to engage with those regimes in general. In the Wai 898 hearings we heard from claimants who complained about the challenges of engaging with such Crown processes. While those claims did not single out the processes concerning Māui's dolphin, it may be that when we return to the general topic in our main report, there is a basis to comment on the TMP review process within that wider context.

However, with that one caveat in mind, there is no reason to conclude in the context of the present report that the Crown's processes for review of the TMP or the block offer were contrary to the Treaty.

### **6 IS THE THREAT MANAGEMENT PLAN ITSELF IN BREACH OF THE TREATY?**

The prospect for Māui's dolphin is grim. The scientific evidence before us – albeit from one party, untested through hearings – suggests the likely mortality rate for Māui's dolphin means that the species will become extinct in the next two or so decades. The 2013 TMP will reduce that mortality rate to some degree, but the evidence is apparently pointing to the extinction of the species.

Notwithstanding that prospect, this Tribunal's function is not simply to assess whether the available science demonstrates that the 2013 TMP will arrest the decline in Māui's dolphin. Rather, we are tasked with assessing whether the interests of Māori under the Treaty have been or will be breached by the 2013 TMP. Further, the claims are not about the 'rights' of Māui's dolphin itself, but the rights and interests of Māori in relation to Māui's dolphin, and also the marine environment and fishery in which it lives.

The claimants presented their arguments in a way that suggested the Treaty answer to the Māui's dolphin question is simple: the Crown is obliged to implement the 100-metre depth contour ban on gill net and trawl fishing in the whole of the Māui's dolphin habitat. That amounts to a ban on all gill net and trawl fishing out to 20 nautical miles off the west coast of the North Island from Maunganui Bluff to Whanganui, including all harbours. Indeed, Dr Slooten suggests the transition to dolphin-safe fishing methods could be achieved overnight, though she did not explain how.

In our view, as far as the Treaty is concerned, the situation is far from as simple as the claimants and Dr Slooten suggest.

We do not accept the claimants' argument that the principles of the Treaty *oblige* the Crown to adopt the recommendations of the IWCSC, the IUCN, and the SMM – and, for that matter, the expert panel. It is the Crown, and not those bodies, who has the right to govern, and it has responsibility for making decisions regarding

fisheries and the protection of marine mammals. It is not obliged to defer to the views of such outside bodies.

The IWCSC, the IUCN, and the SMM have important contributions to make to the Crown's assessment of options for protection of marine mammals. But those bodies do not have to take into account the wider economic, social, and cultural considerations that the Crown has to take into account. More to the point, they do not owe Treaty duties to Māori. The claimants' arguments risk the Treaty being effectively used to impose the views of outside bodies on the Crown, and therefore on Māori also. That would in itself be inconsistent with the concepts of *kāwanatanga* (for the Crown) and *rangatiratanga* (for Māori), which are so central to the Treaty.

In weighing up the measures that are appropriate to protect Māui's dolphin the Crown is, among other things, required to balance the competing and conflicting views amongst Māori as to what measures should be implemented. Significantly, those competing and conflicting views stem from core Treaty rights and interests.

On the one hand, TOKM and its constituent iwi and hapū have significant rights and interests in the commercial and non-commercial customary fisheries. These are otherwise described as Treaty settlement assets. These rights, interests, and assets have been hard-fought over for the last three or so decades in the Waitangi Tribunal, the courts, and within the wider political setting. This is not to say that TOKM and iwi and hapū with fisheries interests in the Māui's dolphin habitat may not also regard the Māui's dolphin as a taonga that is worth saving at some cost to their Treaty fishing interests. However, in the case of the 2012–13 review of the TMP, the Crown told us that these groups argued that the information the Crown provided about the dolphin's range and distribution and the effect of fishing on dolphins, did not justify the proposed extended measures, or was unfairly balanced to the detriment of the fishing industry. Indeed, it appears that the protective measures the Crown eventually adopted in the 2013 TMP were more restrictive than TOKM and some iwi and hapū wanted.

On the other hand, some hapū and iwi who assert specific kaitiaki interests, such as Ngāti Te Wehi and Ngāti Tahinga, would like to see more restrictive measures in place.

We are not convinced that the Crown has breached the Treaty in balancing those Māori interests when striking the 2013 TMP. We reject in particular the submission that in these circumstances the Treaty interest in Māui's dolphin is such that the Crown is, in effect, obliged to modify or compromise those other Treaty fisheries rights.

As we have concluded earlier, we accept that Māui's dolphin has *become* a taonga to the claimants. But the evidence does not establish that it is of such 'special cultural significance' or is 'an essential part of the culture' or is a 'very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Māori' that it must be protected at all cost. We resist promoting any intricate 'ranking' of taonga and leave open the possibility that claimants in any future inquiry may bring stronger evidence of their past associations with Māui's dolphin, or other



related dolphin species. But on the evidence before us, Māui's dolphin is not an iconic taonga such as, for example, te reo Māori, or tuna, or many other species that are integral to Māori culture and identity.

There is a real risk that implementing the IWCSC, IUCN, and SMM's recommendations would conversely cause prejudice to Māori and their Treaty rights in the commercial and non-commercial customary fisheries. We heard from the Crown that the submissions of TOKM and some iwi and hapū with fisheries interests in the Māui's dolphin habitat argued, in the lead up to the 2008 and 2013 TMP, that the Treaty interests of Māori in those fisheries would be adversely impacted by a more restrictive TMP regime. That view has not been seriously challenged by the claimants.

In our view, implementing dolphin-safe fishing practices within a 20 nautical mile coastal strip from Maunganui Bluff to Whanganui (an area that extends well beyond our inquiry district) is a far more complex task than the claimants make out, especially given the multiple competing interests at stake, not least the commercial and customary interests of Māori.

In hearing week nine at Parawera Marae, Mr Apiti told us how in the past, if Ngāti Te Wehi were worried about the state of a taonga such as Māui's dolphin, they would 'put a rāhui or a tapu over an area to shut it off', in order to allow the species time to recover.<sup>116</sup> As the Wai 262 report tells us, the reality of our modern era of conservation and resource management is that the role of kaitiaki is performed in partnership with Crown initiatives and Crown resources. In the contemporary setting, if the claimants seek to act as kaitiaki in respect of Māui's dolphin, they have little choice but to engage fully with the Crown's processes so that the Crown can be fully informed as to what is at stake. In the present circumstances, they have not done this.

As mentioned, we reserve the right to comment in our main report on the wider historical events and environmental regimes that have led us to where we are today, including what the claimants have told us about the usurpation of their rangatira-tanga as kaitiaki.

However, in the case of the 2013 TMP, ultimately we do not believe the Crown can be said to have failed to actively protect the claimants' interests in relation to Māui's dolphin, or to have acted unreasonably or without good faith. The claimants have not made out their claim to breaches of the Treaty.

## 7 CONCLUSION

We should all be concerned that a species such as Māui's dolphin faces the prospect of extinction in the next decade or so. Whether the Crown's 2013 TMP will arrest the decline in population sufficiently to avoid extinction is in doubt. But the principal Treaty interest of the claimants is as kaitiaki of the dolphin, rather than in the dolphin itself. Although the Treaty promises that the Crown will actively protect

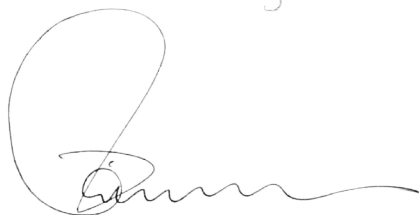
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116. Transcript 4.1.14, p 1368

taonga, and by extension the kaitiaki relationship, in the circumstances before us it does not guarantee the survival of a species, particularly where there are competing Treaty rights that need to be carefully balanced.

Whether Māori can in the future reach a consensus on the appropriate measures to protect Māui's dolphin, only time will tell. In the meantime, iwi and hapū who perform the role of kaitiaki in respect of Māui's dolphin will need to engage fully with Crown policy processes. The Crown, for its part, must continue to implement and monitor its policies for the protection of Māui's dolphin, in line with its stated goal of ensuring that human activities do not threaten the long-term viability of this rare and vulnerable species.

Dated at *Wellington* this *2nd* day of *May* 2016



Judge David Ambler, presiding officer



John Baird, member



Dr Aroha Harris, member



Professor Sir Hirini Mead KNZM, member



Professor William Te Rangiuwa (Pou) Temara, member





APPENDIX I

SELECT RECORD OF INQUIRY FOR WAI 898

RECORD OF PROCEEDINGS

**1. STATEMENTS OF CLAIM**

**1.1.286** Davis Apiti, statement of claim for Wai 2331 on behalf of Ngāti Te Wehi, 1 September 2008; first amended statement of claim, 2 March 2011; second amended statement of claim, 16 May 2011

**(a)** Davis Apiti, third amended statement of claim for Wai 2331 on behalf of Ngāti Te Wehi, 31 July 2014

**1.1.287** Angeline Greensill, statement of claim for Wai 2481 on behalf of Ngāti Tahinga concerning Māui's dolphin, 1 September 2014

**2. TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS**

**2.6.100** Judge DJ Ambler, memorandum concerning claimant-specific closing submission requests and other matters, 24 October 2014

**2.6.104** Judge DJ Ambler, memorandum following teleconference, 13 November 2014

**2.6.106** Judge DJ Ambler, memorandum concerning follow-up matters from hearing week 15 and outstanding claimant closing submissions, 24 November 2014

**2.7.9** Judge DJ Ambler, memorandum concerning claims relating to Maui's dolphin, 22 January 2016

**3. SUBMISSIONS AND MEMORANDA OF PARTIES**

**3.3.1333** Aidan Warren and Jerome Burgess, submissions for Wai 2331 supporting application for urgent inquiry into Crown's failure to adequately protect Maui's dolphin from likely extinction, no date

**3.4.210** Annette Sykes and Bryce Lyall, closing submissions for Wai 125, 21 October 2014

App1 THE PRIORITY REPORT CONCERNING MĀUI'S DOLPHIN

3.4.231 Aidan Warren and Jerome Burgess, closing submissions for Wai 2331 concerning protection of Maui's dolphin, 24 October 2014

3.4.310(a) Geoffrey Melvin, claim-specific closing submission for Crown concerning Maui's dolphin, 2 February 2015

**4. TRANSCRIPTS**

4.1.14 Transcript of hearing week nine, Parawera marae, Kihikihi, 9–13 December 2013

4.1.22(a) Transcript of hearing week 15, Napinapi marae, Piopio, 3–7 November 2014

**RECORD OF DOCUMENTS**

A161 Dr Elisabeth Slooten, brief of evidence in support of application seeking an urgent inquiry into the Crown's failure to adequately protect the Maui's dolphin from likely extinction, 1 August 2014

A162 Graham Ian Angus and Stephen Ashley Halley, joint brief of evidence, 22 August 2014

A163 James Stevenson-Wallace, brief of evidence, 22 August 2014

P6 Davis Apiti, brief of evidence, no date

(a) Appendixes to brief of evidence, no date

Appendix 1: news articles and correspondence

pp 63–66: Transcript of 'Plight of the Maui's Dolphin', *Waikato Times*, 12 April 2003

pp 66–67: Transcript of Jeanette Fitzsimons, letter to Davis Apiti, 29 June 2000

pp 67–68: Transcript of 'Ban Sought Over Dolphins', *Waikato Times*, 21 June 2000

pp 68–69: Transcript of 'Dolphin Saviours', *Waikato Times*, 4 May 2000

T3 Jeff Flavell, brief of evidence, 9 June 2014

T7 Stephen Halley, brief of evidence, 23 June 2014

APPENDIX II

**SELECT RECORD OF INQUIRY FOR WAI 2331**

**RECORD OF PROCEEDINGS**

**2. TRIBUNAL MEMORANDA, DIRECTIONS, AND DECISIONS**

**2.5.3** Judge DJ Ambler, decision on Maui's dolphin urgency application, 15 October 2014

**3. SUBMISSIONS AND MEMORANDA OF PARTIES**

**3.1.2** Aidan Warren and Jerome Burgess for Wai 2331, application seeking urgent inquiry into Crown's failure to adequately protect Maui's dolphin from likely extinction, 31 July 2014

**3.1.5** Tui'nukutavake Afeaki and David McCarthy for Wai 537, memorandum concerning Wai 2331 urgency application, 23 August 2014

**3.1.4** Geoffrey Melvin, Liam McKay, and Kate Stone for the Crown, submissions on application for urgency, 22 August 2014

**3.1.6** David Stone and Augencio Bagsic for Wai 1448, Wai 1495, Wai 1501, Wai 1502, Wai 1592, Wai 1804, Wai 1899, Wai 1900, Wai 2125, Wai 2126, Wai 2135, and Wai 2183, memorandum in support of Maui's dolphin claim, 27 August 2014

**RECORD OF DOCUMENTS**

**A1** Davis Apiti, brief of evidence in support of application seeking urgent inquiry into Crown's failure to adequately protect Maui's dolphin from likely extinction, 30 July 2014





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