

COMPLAINT NUMBER	19/372
COMPLAINANT	D Blake & R Mitchell
ADVERTISER	Seafood New Zealand
ADVERTISEMENT	Seafood New Zealand Newspaper
DATE OF MEETING	12 November 2019
OUTCOME	Not Upheld No further action required

Description of Advertisement

The newspaper advertisement for Seafood New Zealand showed a photo of a fisherman sitting in his boat. The headline read “Curly Brown represents a critically endangered species”. The text included the statement “...the last confirmed Māui death from commercial fishing happened 17 years ago...”.

Summary of the Complaint

There were two complaints about this advertisement. The Complainants are concerned the advertisement is misleading because it says the “last confirmed death of a Māui dolphin by commercial fishing happened 17 years ago”. The Complainants say the Department of Conservation (DOC)’s Māui dolphin “incident database displays the death of a Māui dolphin in 2012 with cause of death as ‘known bycatch in commercial set net’” and therefore this statement is not correct. The complainants refer to the low level of observer activity and how this is likely to have led to low rates of captures being reported.

Issues Raised:

- Truthful Presentation
- Advocacy Advertising

Summary of the Advertiser’s Response

The Advertiser defended the advertisement and said to the best of their knowledge, it was not confirmed by DNA testing that the dolphin which was caught by a commercial trawler in 2012 was a Māui dolphin.

Summary of the Complaints Board Decision

The Complaints Board did not uphold a complaint about a newspaper advertisement for Seafood New Zealand. The Board said the Advertiser had provided sufficient evidence to support the statement “...the last confirmed Māui death from commercial fishing happened 17 years ago...”.

Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2 (b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2 (e) Advocacy advertising: Advocacy advertising must clearly state the identity and position of the advertiser. Opinion in support of the advertiser's position must be clearly distinguishable from factual information. Factual information must be able to be substantiated.

Complaints Board Discussion

Consumer Takeout

The Complaints Board agreed the consumer takeout of the advertisement was those who work in the fishing industry need support to keep their jobs because the Government proposal to enlarge the ban on set netting and trawling is a threat to their livelihood. The advertisement compares fishers with the critically endangered species, the Māui dolphin.

Is it an advocacy advertisement?

The Complaints Board agreed the advertisement fitted the definition of an advocacy advertisement. The Complaints Board said the identity of the Advertiser, Seafood New Zealand, was sufficiently clear, and Seafood New Zealand is a well-known organisation.

The Complaints Board noted the requirements of Rule 2(e) of the Advertising Standards Code. This Rule required the identity of the advertiser to be clear; opinion to be distinguished from factual information and factual information must be able to be substantiated. The Advocacy Principles developed by the Complaints Board in previous decisions considered under Rule 11 of the Code of Ethics remain relevant. They state:

1. That section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the rights granted by section 14 to ensure there is fair play between all parties on controversial issues. Therefore, in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.

4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.
5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

The Complaints Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations. Therefore, the Complaints Board considered the rest of the complaint in conjunction with this liberal interpretation under the application of the Advocacy Principles.

Is the advertisement misleading?

The Complaints Board said the advertisement was not misleading. This is because the Advertiser provided sufficient evidence to support the statement "...the last confirmed Māui death from commercial fishing happened 17 years ago...".

The Complaints Board noted the Advertiser's comment that Māui and Hector's dolphins are visually indistinguishable, and a mitochondrial DNA analysis is the only unequivocal means to identify the subspecies. The Complaints Board noted that no DNA sample had been available to unequivocally assess the subspecies of the dolphin referred to in the 2012 DOC "incident database" and therefore it was not possible to say this had been a "confirmed" death of a Māui dolphin. Based on the information provided, the Board agreed it was acceptable for the advertisement to say "...the last confirmed Māui death from commercial fishing happened 17 years ago...".

The Complaints Board said the advertisement was not misleading, taking into account context, medium, audience and product and was not in breach of Principle 2, Rule 2(b) or Rule 2(e) of the Advertising Standards Code.

Outcome

The Complaints Board ruled the complaint was **Not Upheld**.

No further action required.

APPEAL INFORMATION

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website www.asa.co.nz. Appeals must be made in writing via email or letter within 14 days of receipt of this decision.

APPENDICES

1. Complaints
 2. Response from Advertiser
 3. Response from Media
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Appendix 1

COMPLAINT FROM D BLAKE

The 'advertising standards code' which states:

All advertising must be legal, decent, honest and truthful and respect the principles of fair competition, so that the public can have confidence in advertising. Advertising and advertisement(s)" means any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed. Seafood new zealand is advertising it's brand and attempting to influence it's audience but the information in the advertisement is extremely misleading. Seafood new zealand state: the "last confirmed death of a māui dolphin by commercial fishing happened 17 years ago". Bycatch data sourced from "dragonfly data science" indicated zero observed bycatch associated with set net or trawl commercial fisheries between 2003 and 2017. Set net commercial fisheries on the west coast of the north island averaged observer coverage of less than one percent, while trawls were between four and 55 percent during this time period.

It is suggested set nets attribute 84 percent of fisheries risk to māui dolphins. However, department of conservation statistics from 2019 confirm trawls had far greater coverage of observers.

It would be more accurate if Seafood New Zealand said the last confirmed death willingly recorded by the commercial fishing industry happened 17 years ago.

Doc's māui dolphin incident database displays the death of a māui dolphin in 2012 with cause of death as "known bycatch in commercial set net". This is well within the previous 17 year time period and was reported by a commercial fisherman.

COMPLAINT FROM R MITCHELL

The 'advertising standards code' states that:

All advertising must be legal, decent, honest and truthful and respect the principles of fair competition, so that the public can have confidence in advertising.

"advertising and advertisement(s)" means any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.

Seafood new zealand is advertising it's brand and attempting to influence it's audience but the information in the advertisement is extremely misleading.

Seafood new zealand state: the "last confirmed death of a māui dolphin by commercial fishing happened 17 years ago".

This statement is based on observer coverage. Bycatch data sourced from “dragonfly data science” indicated zero observed bycatch associated with set net or trawl commercial fisheries between 2003 and 2017.

However, those facts alone are misleading as set net commercial fisheries on the west coast of the north island averaged observer coverage of less than one percent, while trawls were between four and 55 percent during this time period.

It is suggested set nets attribute 84 percent of fisheries risk to māui dolphins. However, department of conservation statistics from 2019 confirm trawls had far greater coverage than observers.

It would be more accurate if seafood new zealand said the last confirmed death willingly recorded by the commercial fishing industry happened 17 years ago.

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Appendix 2

RESPONSE FROM ADVERTISER, SEAFOOD NEW ZEALAND

I write in response to Complaint 19/372 - the complaints laid by D Blake and R Mitchell in respect of the Seafood New Zealand advertisement featuring Curly Brown.

The Complaint

The complainants consider the comment “*The last confirmed death of a Maui dolphin by commercial fishing happened 17 years ago*” to be misleading.

Their support for this statement rests on the level of observer coverage in the west coast North Island area and the reference in the Department of Conservation Maui dolphin incident website to the capture of a Maui dolphin in 2012 by a commercial fisher.

Comments on the Complaint

The complainants infer that the low level of observer activity is likely to have led to low captures being reported. An observed capture of a dolphin is but one way in which a capture can be reported. Captures of marine mammals, including dolphins, by commercial fishing can be reported in three ways.

- Under section 16 of the Marine Mammals Protection Act 1978, any fisher who in the course of lawful commercial fishing accidentally or incidentally kills or injures a marine mammal is required to report the capture to a DOC officer or a fisheries officer. That requirement is reflected in provisions in the commercial fishing reporting regulations. The fisher is required by law to return the animal to the sea
- An observer on a vessel will report the capture in his report. However the responsibility is on the fisher, not the observer, to make the official report of a capture. The observer may retain the animal.
- A by-caught dolphin may be observed either at sea or beach cast by a third party by the finder notifying DOC of the find. DOC attempt to retrieve any beach-cast animal for necropsy and in doing so, seek to ascertain the cause of death.

Focusing on observed captures does not provide the full range of reported captures.

Observer Coverage

Observer coverage for recording protected species interactions is determined by the Department of Conservation and the Ministry for Primary Industries. For safety reasons, not all vessels are capable of carrying an observer. Observers can only be placed on those vessels which are capable of carrying an additional person and it is safe to do so. As a consequence, the placement of observers will not match the distribution of assessed risk to Maui dolphins.

Spatial closures for set netting have been effective on the west coast of the North Island since 2002 when industry first introduced a closure in the coastal area from Manukau to Port Waikato area. This was extended in 2008 to include the area to 7 nautical miles between Maunganui Bluff in the north and Pariokariwa Point in the south. The area was again extended southwards to the Waiwhakaiho River in 2012 and a 2 nm closure established for the area to Hawera. Any fishing between 2 and 7nm between Waiwhakaiho and Hawera requires an observer to be carried.

As a consequence of those closures, set netting off the west coast of the North Island has since 2008 been limited to north of Maunganui Bluff and south of Waiwhakaiho, within harbours and in deeper waters – all areas where there is only a very low level of assessed risk to Maui dolphins. Over 95% of the setnetting on the west coast of the North Island is undertaken in harbours by fishers operating trailer boats less than 6 metres long. It is not possible to safely place observers on such vessels. This results in the low rate of observer coverage for the set net fleet. Observer coverage for the set netters operating in southern Taranaki is at high levels, totaling over 1,000 days.

As a consequence of being able to place observers on vessels, observer coverage in the inshore trawl fleet on the west coast has been higher. Since 2013, in line with the Minister's request, observer coverage levels in the inshore trawl fleet in the Maui habitat has increased.

During the 2003-2018 period, observers have not recorded any interactions with Maui dolphins nor reported seeing such a dolphin.

The January 2012 Dolphin Capture

Maui and Hector's dolphins are subspecies of the *Cephalorhynchus hectori* dolphin species and are visually indistinguishable. A mitochondrial DNA analysis is the only unequivocal means to identify the subspecies.

On 2 January 2012, a setnet fisherman reported that he had caught a Hector's dolphin off Cape Egmont. The Marine Mammal Protection Act requires all caught marine mammals are returned to the sea, dead or alive. It is also an offence to mutilate or retain any part of the marine mammal unless a Department of Conservation officer authorises the retention of the body or part. Having been unable to obtain permission from DOC to retain the dolphin, the fisher returned the dead dolphin to the sea as required. He reported the capture to MPI as required.

No DNA sample was available to unequivocally assess the subspecies.

On 25 April 2012, a dolphin, genetically analysed to be a Hector's dolphin, was found beachcast at Opunake to the south of Cape Egmont.

The issue raised is the subspecies identification of the January 2012 dolphin captured in Taranaki. There is no unequivocal identification of the dolphin being a Maui dolphin.

References to the subspecies identification of the dolphin are as follows:

- 31 January 2012 MPI Press Release -On 31 January 2012, MPI issued a press release stated that MPI believed the dolphin caught off Taranaki was likely a Maui dolphin.
- MPI Review – February 2012, in late February 2012, an MPI aquatic scientist provided a report that the dolphin captured was probably a Maui dolphin on the basis that:
 - Maui dolphins are found on the West Coast of the North Island and Hector's dolphins are distributed around the South Island;
 - While it might have been a migrant Hector's dolphin, 97% of dolphins DNA tested on the WCNI were Maui dolphins;
 - While the dolphin was captured beyond the southern limits of what was considered the Maui dolphin range, with low densities, the extent of the Maui range was difficult to accurately determine.

On the above basis, the scientist concluded the dolphin was likely to be a Maui's dolphin.

The report omitted any reference to

- the 2010/11 genetic based survey that detected Hector's dolphins were mingling with Maui dolphins on the west coast of the North Island but found no Maui/Hector dolphins south of Kawhia Harbour;
 - a Hector's dolphin had been found beachcast near the mouth of the Manukau Harbour in October 2011
 - Hector's dolphins were known to transit through the Taranaki area
 - DOC had undertaken a number of unsuccessful aerial and boat based surveys to detect dolphins in the Taranaki region. No Maui/Hector's dolphins were sighted in those surveys.
- The 2012 Threat Management Review - September 2012 - In September 2012, MPI and DIC jointly released the Maui Dolphin Threat Management Plan consultation paper. The consultation document¹ included the following:

3.2.1 New information available

3.2.1.1 Maui's dolphin mortalities

On 2 January 2012, a Hector's or Maui's dolphin died in a commercial set net off Cape Egmont, Taranaki ('the January mortality')³. The mortality was reported by the fisher to be a Hector's dolphin but the dolphin was not retained to confirm subspecies identity. It is however, not possible to visually distinguish between Hector's and Maui's dolphins. This mortality occurred outside of the area subject to fishing-related closures put in place during the 2008 TMP review.

On 26 April 2012, an unrelated dolphin stranding (cause of death was found to be natural) was discovered south of where the January mortality occurred (Kina Road Beach, near Opunake, Taranaki). DNA testing on this dolphin found it to be a Hector's dolphin.

Given the DNA findings from the Opunake stranding in April, the likely subspecies identity (a Hector's or Maui's dolphin) of the January mortality is equivocal.

The final advice paper to the Ministers again described the dolphin as either a Hector's or a Maui dolphin, with no preferred subspecies attribution given.

¹ <https://www.doc.govt.nz/globalassets/documents/conservation/native-animals/marine-mammals/maui-tmp/mauis-tmp-discussion-document-full.pdf>

- The Extension of the West Coast Marine Mammal Sanctuary - August 2013 -On 20 August 2013, the then Minister for Conservation sought an extension of the West Coast Marine Mammal Sanctuary and advised Cabinet as follows:
 15. In January 2012 a Maui's or Hector's dolphin was caught in a commercial set-net off Cape Egmont. While identification of sub-species was not confirmed, 95% of tissue samples taken from live or beachcast dolphins in the area north of Hawera have been found to be the Maui's dolphin sub-species (Appendix 1a). Based on increased concerns for the Maui's dolphin, the previous Minister of Conservation and the previous Minister for Primary Industries directed DOC and the Ministry for Primary Industries (MPI) to investigate an interim package of protection measures to provide immediate protection while a review of the Maui's dolphin portion of the Hector's and Maui's dolphin TMP was undertaken by end of 2012.

Throughout the consultation paper², any reference to dolphins in the defined area (Pariokariwa Point to Waiwhakaiho River) uses the text "*Maui's and/or Hector's dolphins*" or "*Maui's/Hector's dolphins*". Nowhere in the document is the specific term "Maui dolphin" only used when referring to dolphins in the defined areas.

- Ministry for Primary Industries Fact Sheet November 2013³ -In November 2013, MPI released a factsheet in relation to the new measures. The sheet contained the following comments:

In light of a new population estimate and the accidental capture of either a Maui's or Hector's dolphin off the coast of Taranaki in January 2012 (there is no certainty over what the dolphin actually was), the review of the Maui's dolphin section of the TMP was given high priority by the Government, and brought forward to 2012.

- DOC Website as at 25 September 2019 - In addition to the references in the documents listed above, the DOC website has the following references to the capture:
 - Timeline of Research and Protection Events for Maui Dolphins⁴
2012 January Reported by-capture of a Hector's or Māui dolphin off Taranaki
 - Maui dolphin sightings⁵
The northern-most recorded sighting is a public sighting recorded in 2006 at Ripiro Beach, 5km north of Bayleys Beach. We do not know if southern sightings are of Māui or Hector's dolphins.
 - Maui and Hector's Dolphin Sightings Database Spreadsheet
 - The spreadsheet denotes the 2 January 2012 sighting as a Maui dolphin in the column headed "Vernacular Name" with the following note in the column headed "Comments in Incident / Stranding Report"

² <https://www.doc.govt.nz/globalassets/documents/getting-involved/consultations/2013/west-coast-ni-marine-mammal-sanctuary-consultation-paper.pdf>

³ <https://fs.fish.govt.nz/NR/ronlyres/3F942AD0-FEE7-4796-BAB8-0DBD1ABC1CE9/0/hectorsmauidolphinfactsheetfinal26112013.pdf>

⁴ <https://fs.fish.govt.nz/NR/ronlyres/3F942AD0-FEE7-4796-BAB8-0DBD1ABC1CE9/0/hectorsmauidolphinfactsheetfinal26112013.pdf>

⁵ <https://www.doc.govt.nz/our-work/our-work-with-maui-dolphin/maui-dolphin-sightings/>

Originally reported as a Hector's dolphin on the fishermans report, MAF later reported that it was likely a Maui's dolphin because there is a known Maui's dolphin population within close proximity to where the mortality occurred and there are no known Hector's dolphin populations found on the North Island. The nearest known Hector's dolphin populations are found at the top of the west and east coasts of the South Island

and no entry in the column headed "DNA test results Haplotype". The attribution as a Maui dolphin is not confirmed. While the MPI report referred to in the entry is not identified, it is likely that the report referred to was the February 2012 report and does not reflect later advice as to the unknown subspecies of the dolphin.

Distribution of Maui Dolphins

There is no definitive statement as to the range of Maui dolphins and in particular the southern extent of that range.

Maui dolphins historically frequented Taranaki waters, the last confirmed presence being a beachcast specimen in November 1989. Ongoing attempts by MPI and DOC to locate any dolphins in the Taranaki area since 2008 have been unsuccessful, the southernmost observation being just south of Kawhia. Conversely, the presence of Hector's dolphins on the west coast of the North Island since 2010 has been confirmed by genetic analyses and there have been sightings and genetic sampling of Hector's dolphins on the southern west coast area. Hector's dolphins are known to transit north to the area frequented by Maui dolphins but Maui dolphins have not been observed far south of Kawhia for the past two decades.

On the basis of the above scientific evidence, it is more likely that the January 2012 dolphin was a Hector's dolphin, as reported by the fisher, than a Maui dolphin.

Comment that "the last confirmed death of a Maui dolphin happened 17 years ago"

We stand by our statement.

The subspecies of the January 2012 capture cannot be confirmed but it was more likely a Hector's dolphin than a Maui dolphin.

The DOC Maui and Hector's dolphin incident website contains an entry for a beachcast dolphin reported in February 2002 by a commercial fisher. It is not clear from the entry whether the commercial fisher caught the dolphin or merely found the dolphin and reported it. We are unable to locate the fisher who reported the dolphin to confirm whether or not he caught the dolphin. Putting aside the January 2012 capture, there are no other entries in the database where deaths are attributed to commercial fishing. In the absence of confirmation as to the involvement of commercial fishing in the February 2002 reporting, we adopted a cautious approach in our advertisement to say the last confirmed death of a Maui dolphin by commercial fishing happened 17 years ago.

Appendix 3

RESPONSE FROM MEDIA, NZME

We are writing on behalf of NZME (the publisher) in response to the above complaint regarding Seafood New Zealand's advertising in the NZ Herald on 4 September 2019.

The ASA has identified Advertising Standards Code - Principle 2, Rule 2(b) and Rule 2(e) as potentially being breached:

Advertisements must be truthful, balanced and not misleading.

Truthful presentation

Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise.

Obvious hyperbole identifiable as such is not considered to be misleading.

Advocacy advertising

Advocacy advertising must clearly state the identity and position of the advertiser.

Opinion in support of the advertiser's position must be clearly distinguishable from factual information.

Factual information must be able to be substantiated

We understand that Seafood New Zealand has provided a response on this matter. However, for prudence, we note that the wording in the advertisement reflects personal, lived experiences of the fishers, or observers on their boats. Further, Seafood New Zealand disputes the 2012 death; to the best of their knowledge, the understanding is that it was not confirmed by DNA testing that the dolphin which was caught in 2012 by a commercial trawler was a Maui dolphin.

As such, we do not consider that statements in the advertisement are misleading or inaccurate.