LUKE CUNNINGHAM & CLERE
OFFICE OF THE CROWN SOLICITOR
BARRISTERS & SOLICITORS

COMMUNICATIONS:
PH 04 472 1050
FAX 04 473 3480
(Property and Commercial)
FAX 04 471 2065
(Crown and Litigation)
EMAIL mail@lcc.co.nz

ADDRESS:
Level 10,
Novell House,
89 The Terrace,
PO Box 10-357,
Wellington 6143

28 October 2009

The Registrar
District Court
PO Box 5094
WELLINGTON

Attention: Nancy Raymond

Dear Madam

TRANSPORT ACCIDENT INVESTIGATION COMMISSION v DOMINION POST
OUR REF: 34920

Please find enclosed for filing informant's sentencing memorandum for this matter which is due for sentence on 3 November 2009 at 2.15pm.

Yours faithfully
CROWN SOLICITOR

Per:

Dale La Hood
Partner

Email: dlh@lcc.co.nz
DDI: 471 5727

cc. Izard Weston
Lawyers
P O Box 5348
WELLINGTON

Attention: Robert Stewart

IN THE DISTRICT COURT
AT WELLINGTON

CRN 09085501853

TRANSPORT ACCIDENT INVESTIGATION COMMISSION

Informant

v

FAIRFAX MEDIA PUBLICATIONS PTY LTD

Defendant

INFORMANT'S SENTENCING MEMORANDUM

Presented for Filing by: G J Burston
Crown Solicitor
PO Box 10-357
WELLINGTON

Tel: (04) 472-1050
Fax: (04) 471-2065

(D La Hood / M J Ferrier)

MAY IT PLEASE THE COURT:

INTRODUCTION

1. The defendant company has indicated an intention to plead guilty to an offence under section 14L and 14B of the Transport Accident Investigation Commission Act 1990 (the **Act**). That is, disclosing a record provided in confidence by the Commission to any person.

2. Because the offender is a body corporate, it is liable on conviction to a fine not exceeding $25,000 (section 14L(3)(b) of the Act).

3. The following documents are filed herewith:

   (a) Summary of facts ("**A**");

   (b) A letter from the Informant to the Offender prior to publication of the article ("**B**");

   (c) Copies of the relevant articles ("**C**");

   (d) *Calford Holdings v Waikato Regional Council* (CRI 2008-419-94, High Court, 26 May 2009, Allan J) ("**D**");

   (e) *R v NZ Railway Ltd* (HC Blenheim, 21 December 1995, Greig J) ("**E**").

SUMMARY OF SUBMISSIONS

4. For the reasons articulated below, in the Informant's submission, the admitted breach of the Act is one of the most serious that it contemplates. Accordingly the Informant submits that the starting point should be close to the maximum available.

5. It is acknowledged that the offender indicated its intention to plead guilty at an early opportunity and will be entitled, following the guidance in *R v Hessell* [2009] NZCA 450; CA170/2009, to a discount up to the maximum available (33%).

BACKGROUND

6. The offence relates to the Dominion Post publishing a front page article (among others) on 28 March 2009, disclosing substantive information from a confidential draft investigation report (the **Taharoa Draft**) prepared by the Informant.

7. The full circumstances of the offending are set out in the accompanying summary of facts.

PURPOSES AND PRINCIPLES OF SENTENCING

8. The purposes of sentencing are set out in section 7 of the Sentencing Act 2002. In particular, it is submitted that the following purposes are particularly relevant to this exercise:

   (a) To denounce the offender's conduct *(section 7(1)(e))*; and

   (b) Deterrence, both specific and general *(section 7(1)(f))*. It is submitted that this purpose is particularly important. The offence in question here supports a confidentiality regime established by statute, the existence of which promotes the public interest in effective investigations of serious transport accidents. It is necessary for the effectiveness of that regime that deliberate breaches are met by a significant penalty to ensure the deterrence of any breaches in the future. Offending of this type is also motivated by profit. The more sensational the story, the more copy sold and, therefore, the more attractive the newspaper becomes to potential advertisers. Accordingly, it is submitted that Court's response needs to be sufficiently stern to prevent a sentence being viewed as simply a licensing fee. Without such a stern response, the purpose of deterrence will be frustrated.

9. Pursuant to section 8 of the Sentencing Act 2002, it is submitted that the following principles are pertinent:

   (a) the gravity of the offending, and the degree of the offender's culpability *(section 8(a))*;

   (b) the seriousness of this type of offending, in comparison with other types of offences, as indicated by the maximum penalties *(section 8(b))*; and

(c) the Court must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate *(section 8(c))*.

AGGRAVATING AND MITIGATING FACTORS OF THE OFFENDING

Breach of natural justice rights

10. As a matter of natural justice, people have the right to respond to comments and allegations made about them in a public report before that report is finalised and published: *Re Erebus Royal Comission* [1983] NZLR 662. This right is enshrined in the New Zealand Bill of Rights Act 1990 and provided for by section 14(5) of the Transport Accident Investigation Commission Act 1990 (the **Act**), which states:

> Where any preliminary report issued by the Commission states or infers that the conduct of any specified person has contributed to the cause of an accident or incident being investigated by the Commission, the Commission shall, before issuing a final report on the matter:
>
> (a) give that person an opportunity to comment on or refute that statement, either in a statement in writing or at a hearing; and
>
> (b) have regard to that person's statement or other evidence.

11. The Taharoa Draft contained a number of statements about Maritime New Zealand (**Maritime**), which the Informant invited Maritime to comment on as part of the natural justice process. The well-accepted (and long standing) understanding was that the draft report would remain confidential and once all submissions had been considered, a final report would be issued for public distribution.

12. In publishing information drawn from the confidential Taharoa Draft the offender directly prejudiced the interested parties' rights to comment on the substance of the report prior to its finalisation and publication. In the Informant's submission, this was a clear and direct contravention of the interested parties' right to natural justice.

Purpose of the confidentiality provisions

13. The non-disclosure provisions of the Act (including sections 14B and 14L) were inserted by amendment in 1999 to more closely align the Act with international law and best practice relating to transport accident investigations. The essential principle underlying these non-disclosure provisions is that by restricting the

availability of information for other reasons (such as prosecution, civil or disciplinary proceedings), information would be more readily available for the purpose of investigation. Frank disclosure, therefore, is imperative to assist the Informant in the execution of its duties.

14. The amendments were introduced in 1999 after a Select Committee Inquiry which fully assessed the competing public interest considerations involved in making certain transport accident information protected, and used only for the purpose of the investigation by the Informant. Ultimately the amendments were passed by Parliament with cross-party consensus on the public interest. On introducing the Bill after the Select Committee stage the Minister stated as follows (Hannard, 8 September 1999, p19450):

> I shall start by thanking the Transport and Environment Committee for its work on what is a complex and technical Bill. The committee showed just how good this place can be. This place can be, from time to time, as bad as anything can be, then from time to time it amazes me how good it can be. This issue had a lot of complexity to it. There were a lot of difficult issues as to what was the right balance to strike. The committee has made a number of significant changes to the Bill as introduced, and in my view it has struck the right balance between the interests of justice, which Parliament is always trying to foster and the longer-term interests of safety, which to me is a far greater issue.
>
> The Bill is perhaps best known for the protection it offers cockpit voice recorders. However, the Bill also protects a range of other information gathered during the course of a safety investigation. such as witness statements. The Bill has two key components. First, it recognises the special nature of information recorded by cockpit voice recorders, by making that information immune from admissibility in criminal or civil proceedings against flight crew. Secondly, it provides that certain information generated by the Transport Accident Investigation Commission in the course of an accident investigation, may be disclosed only for the purposes of that investigation. This includes cockpit voice recorders, witness statements, and submissions, and applies to all modes of transport.

15. Further, as a signatory to various international conventions, New Zealand is required to conduct "no blame" investigations. Such investigations rely on certain information remaining confidential. The integrity of the no blame system is consistent with the principle of public interest immunity, which the Courts had applied to the Informant's investigations prior to the 1999 amendments.

16. Despite factual and procedural differences, comments of the Court in *R v New Zealand Rail Limited* (High Court, Blenheim, 21 December 1995, Greig J) are relevant, as the case involved upholding a claim of public interest immunity associated with the Informant's investigations. The case involved a challenge to the admissibility of evidence in criminal proceedings of an investigator who was

employed by the Commission against one of the contributors to an investigation report. In arriving at a decision, the case contemplated the tension between protection from criminal proceedings to encourage full and frank disclosure and the need for justice to be done.

17. On behalf of the Commission, it was argued that (page 9):

> ...the TAIC has a duty to claim public interest immunity and that, balancing the competing public interest between the administration of criminal justice and the maintenance of an effective accident investigation and safety control system, the weight is in favour of the latter.
>
> ...
>
> The concern is that [the Commission's investigator giving evidence] may inhibit in future the free flow of information to TAIC in relation to accidents and, in particular, in relation to incidents. There is, it is said, an element of the breach of confidentiality between TAIC and the [New Zealand Rail] staff who have given information in the course of an investigation.
>
> ...
>
> ...there was a substantial private interest to be protected and the breach of that will result in limitation on the disclosure of relevant material, both in accidents and in incidents.

18. The Court held (page 14):

> I accept the evidence that was put before me that anything which might alter the perception of the no blame approach or the predominance of safety considerations might well affect the way in which information was made available. I have no doubt that [New Zealand Rail] would continue to promote safety and to promote the free and honest provision and supply of information to the TAIC in respect of both accidents and of incidents. But I am sure that there could well be some effect on individuals who might believe that they could incriminate themselves or give information which could end up in the hands of the police or other investigating authorities as a result of a TAIC investigation and would therefore moderate their approach, reserving their position, and perhaps doing what might be no more than sufficient to meet the needs of TAIC investigators.

19. It is submitted that the same principle applies to the ability to freely disclose relevant information for the purposes of a draft report, on the express understanding that the confidentiality regime applies, and the draft report will remain confidential until the consultation process is complete and a final report is issued.

20. Here information that was central to the Informant's investigations, provided under the protection of the confidentiality regime, has been disclosed in a front page newspaper story in a manner highly critical of one of the key participants in the Informant's investigation. Such adverse publicity based on information provided to

the parties by the Informant undermines the integrity of the confidentiality regime, and undermines the no-fault investigation.

21. Any erosion of these principles (which are applicable to disclosure of all protected records, not just ones of this type), no matter how small, could seriously undermine the Informant's ability to obtain important evidence about an accident. This, in turn, could seriously affect the Informant's ability to determine the exact causes of an accident and thereby avoid similar accidents from occurring in the future.

22. This is the first case of such an offence since the 1999 amendments introducing the offence, and it will inevitably set a precedent for future in terms of deterrence, and the seriousness with which the Courts will deal with any future breaches. It may be difficult for the Informant to emphasise the importance of confidentiality being maintained by participants in investigations if an act of deliberate and widespread publicity in breach of the regime were responded to leniently by the Court. The Informant accordingly sees the penalty on this occasion as very important in terms of public interest considerations that lead Parliament to create the offence to support that regime.

Deliberate and premeditated offending

23. As is evident from the summary of facts and the **attached** correspondence, the Informant wrote to the defendant on 27 March 2009 (which was sent to the editor of the Dominion Post by email). That letter reiterated oral advice that the Taharoa Draft was a confidential document and expressed concern that it had been illegally disclosed to the defendant. It further drew the defendant's attention to the relevant offence provision and noted the Informant's concern that the defendant "was about to engage in behaviour that may amount to an offence".

24. Despite those express warnings, the offending article was published the following day, as the lead story, and took up the bulk of the front page. In the informant's submission, this is clear indication that the offending was both deliberate and premeditated.

Purpose and nature of the article, and its placement in the newspaper

25. Prior to publishing the offending article, the defendant had published a series of articles criticising Maritime, and particularly its Director. While the newspaper's right to campaign is not in dispute, the article about the Taharoa Draft appears to have been a tactic to 'add more fuel to the fire' in order to maintain the momentum of its campaign.

26. The article appeared on the front page of the weekend edition of the paper. It was accompanied by a prominent, full colour photograph of the Taharoa Express and a large headline reading – *"ALL AT SEA – Report Blasts Maritime NZ"*.

27. Most of that front page was dedicated to the article, and the article, in turn, largely contained statements from the Taharoa Draft. The likelihood of a reader or passerby missing the article (and its confidential content), therefore, was minimal.

28. It is submitted that the commercial imperative which manifested in the lead story and front page layout, is obvious. Any suggested defence (or mitigation) based on the defendant's right to publish such information in the public interest is an unsustainable argument when viewed in context. It is clear that the defendant has a right to freely disseminate the Informant's findings and recommendations as contained in a *final* report. However, by pre-empting that report, and reporting the contents of a draft, the inescapable inference is that the defendant was simply attempting to beat other media outlets to a story (and thus improve circulation), with an exclusive and sensational story. In that context, it is submitted that any claim for "media expression" becomes less laudable, and more overtly commercial.

29. Such action clearly places the interests' of the defendant before the greater public interest in its state institutions discharging their duties lawfully and defending their ability to do so; and in community members – including the newspaper – obeying the law.

The article was misleading as to its source material

30. As noted above, the article was prominent, taking up the bulk of the front page of the paper and was accompanied by a large headline – *"ALL AT SEA – Report blasts Maritime New Zealand"*. It is submitted that this clearly misrepresented the source material for the article as a report (in the complete sense), rather than a *draft* report.

31. The Informant accepts that actual body of the article made reference to a "draft report". However, it is submitted that this does not adequately ameliorate the harm created by the misleading headline. Many readers or passers-by who observed the headline would not have gone on to read the full article and would have been left with the misleading impression created by the headline.

32. Even those who did go on to read the article may have been prejudiced in their understanding of the source material by the prominent headline.

AGGRAVATING AND MITIGATING FACTORS PERSONAL TO THE OFFENDER

33. The Informant does not have access to criminal histories and, accordingly, cannot comment on any previous convictions the defendant company may have. It is accepted that this is the first time the offender has been sentenced under this particular Act.

34. It is acknowledged that the offender indicated an intention to plead guilty at an early opportunity. Credit is due in that regard.

35. The judgement of the full bench of the Court of Appeal in *R v Hessell* [2009] NZCA 450; CA170/2009, applies to all sentencing from 3 October 2009 onwards. It provides guidance on the amount of reduction to be given to offenders for pleading guilty. The Court's clear approach is intended to ensure consistency and predictability, which will allow defence lawyers to advise their clients with some certainty as to the favourable consequences of pleading guilty: at [6].

36. The calculation of the appropriate reduction for a guilty plea should be the final step in the sentencing process. The Full Court in *Hessell* emphasised that sentencing judges should clearly state both the sentence that the offender would have received had he or she not pleaded guilty, then the amount or nature of the reduction made: at [19]. This means the percentage reduction is to be applied once all other aggravating and mitigating factors have been taken into account.

37. The Court set out the reasons why a guilty plea justifies a reduction in sentence at [13]:

> First, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. Secondly, it avoids the need for a trial, with the attendant advantages of a reduction in court delays and cost savings. Thirdly, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending.

38. It was held that the appropriate reduction for a guilty plea should be calculated as a percentage of the sentence which would have been imposed had the defendant not pleaded guilty. The amount of that reduction depends upon the stage at which the offender pleaded guilty or indicated a willingness to plead guilty. The Court adopted a "sliding scale" approach with three "benchmarks" at [15]:

> *First reasonable opportunity*
>
> - A 33% reduction (1/3) if the guilty plea is entered, or the willingness to plead guilty is communicated, at the first reasonable opportunity;
>
> *At status hearing or first callover*
>
> - A 20% reduction (1/5) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, at a status hearing or equivalent stage of proceedings in summary cases, or at first callover after committal in cases proceeding by way of indictment;
>
> *Three weeks before trial or hearing*
>
> - A 10% reduction (1/10) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, three weeks before the commencement of the trial or hearing.

39. This particular matter was originally set down for its first call on 25 August 2009. Prior to that date, both parties consented to a registrar's adjournment (without plea) until 22 September 2009, to allow discussions to continue. Prior to that date, on the intimation of a guilty plea, the matter was adjourned to a sentencing fixture on 3 November 2009.

40. It is accepted that the offender has indicated an intention to plead guilty essentially at the first reasonable opportunity and that accordingly a 33% discount is available.

SENTENCING AUTHORITIES

Sentencing Approach

41. The approach to sentencing for regulatory offending has been the subject of recent comment in both the Court of Appeal and the High Court (most recently in *Calford Holdings v Waikato Regional Council* (CRI 2008-419-94, High Court, 26 May 2009, per Allan J) (**attached**). Paragraphs 29 and 30 are instructive.

42. It is clear that the Court should adopt the same approach to this type of sentencing as it does in other sentencing exercises. Amongst other cases, that approach is articulated in *R v Taueki* [2005] 3 NZLR 372. This approach ensures consistency and transparency.

43. Importantly, the Court should settle on a starting point taking into account the mitigating and aggravating features of the offending itself. This should be articulated.

44. From there, the Court must take into account any personal aggravating and mitigating features before articulating a fine which is, on its face, appropriate.

45. Once the Court has settled upon a fine using the method set out above, it must then consider the offender's financial capacity to pay (section 14 Sentencing Act).

Previous Sentencing for Offending of a Similar Nature

46. There is no tariff for this type of offending, nor is counsel aware of any authorities which will assist the Court in terms of setting an appropriate starting point.

47. It is noteworthy that the Act specifies different maximum penalties depending on the status of the offender. The relevant part of the offence provision is in the following terms:

> **14L Offences relating to disclosure of records –**
>
> (3) every person who commits an offence against this section is liable on summary conviction, -
>
> (a) in the case of an individual, to a fine not exceeding $10,000;
>
> (b) in the case of a body corporate, to a fine not exceeding $25,000.

48. Importantly, the select committee report recommended (at the time the legislation was in Bill form) that the offence provisions be amended (p viii):

> by including a separate penalty of $25,000 for body corporate. The Ministry of Justice supports this recommendation. With this amendment, body corporate will be subject to a higher penalty than an individual for committing an offence. We agree that the fine of $10,000 may be enough to deter an individual, but believe it would not be sufficient to deter, for example, a newspaper publishing a sensational front page story.

49. The result was express statutory recognition that a penalty imposed upon a newspaper must be sufficiently stern to achieve the purpose of deterrence.

INFORMANT'S SUBMISSIONS ON SENTENCE

50. For the reasons articulated above, it is submitted that this offending is close to the most serious contemplated by the particular section. Broadly, it is submitted that the following factors are aggravating; publishing the offending article:

(a) Breached the interested parties' rights to natural justice;

(b) Undermined the Informant's public role as a commission of inquiry responsible for inquiring into transport occurrences;

(c) Was deliberate and premeditated, and was committed in the face of express warnings;

(d) Misleadingly referred to the source material as a report rather than a draft report; and

(e) (because of the purpose, placement and subsequent editorial comment) indicated a desire to place the newspaper's interests above the greater public interest at stake.

51. In light of those factors (and the principle the Court must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed) the Informant submits that the Court should adopt a starting point at, or close to, 100% of the maximum available ($25,000).

52. No uplift is sought for any aggravating factors personal to the offender.

53. It is acknowledged that the offender will be entitled to full credit for indicating an intention to enter a guilty plea at the first reasonable opportunity. In accordance with the guidance in *Hessel*, the discount should be approximately 33% of the fine which would have otherwise been appropriate.

DATED at Wellington this 27th day of October 2009

D La Hood / M J Ferrier
Counsel for the Informant