

CAPTION SHEET

Transport Accident Investigation Commission v Fairfax Media Publications Pty Ltd

ADDRESS:

Level 3
40 Boulcott Street
WELLINGTON

Charge: Disclosing a record provided in confidence by the Commission to any person
Sections 14L and 14B of the Transport Accident Investigation Commission Act 1990

Penalty: \$25,000 fine

SUMMARY OF FACTS

The Transport Accident Investigation Commission (“the Commission”) commenced an investigation into a maritime incident that occurred off the coast off Cape Egmont, Taranaki, in June 2007 during which a ship named the Taharoa Express came close to capsizing.

On 15 December 2008 a preliminary report of the investigation was sent by the Commission to interested persons for submission pursuant to section 14(5) of the Transport Accident Investigation Commission Act 1990 (“the Act”).

A preliminary report is in essence a draft of the final report and sets out detailed information relating to the investigation. The Commission is obliged under s 14(5) of the Act to provide the draft report to anyone whom the report infers may have contributed to the cause of the incident being investigated in order for those persons to have an opportunity to comment on the contents of the report before it is finalised and published. The requirement to provide an opportunity to comment under s 14(5) is a statutory embodiment of the right to natural justice provided for both at common law and in s 27 of the New Zealand Bill of Rights Act 1990.

Section 14B(1) of the Act provides that a record specified in section 14B(2) may only be disclosed by the Commission or other person with the written consent of the Commission for the purposes of an investigation by the Commission into an accident or incident to which the record relates. Pursuant to s 14B(2)(d) a record includes any information relating to an investigation provided in confidence by the Commission to any person.

In the covering letter provided with the draft report to interested persons dated 15 December 2008, the Commission advised that the preliminary report was provided to them pursuant to section 14B(2)(d) of the Act and as such it was required to be kept confidential. The letter stated that the draft report was:

“...provided to you in confidence pursuant to section 14B(2)(d) of the Transport Accident Investigation Commission Act 1990. As such, further disclosure of the preliminary report is restricted, and there is an offence for illegitimate disclosure.”

The draft report also had a “footer” which read:

“Private and confidential preliminary report to interested parties only for the purpose of comment to the Commission. Any breach of this confidence may result in legal action being taken by the Commission.”

On or about Friday 27 March 2009 the Commission was advised by Maritime New Zealand that they had been approached by a reporter from the Dominion Post seeking their comment in relation to a story the Dominion Post was intending to publish into criticism of Maritime New Zealand contained in the Commission’s draft report.

As a consequence, the Commission’s Communications Manager, Mr Peter Northcote, contacted the Dominion Post’s Chief Reporter, and subsequently the Editor (Mr Tim Pankhurst) to advise of the Commission’s concern that a potential offence had been committed by the provision of the draft report to the Dominion Post and to warn the Dominion Post that it would be potentially committing an offence by publishing content from the draft report. Mr Northcote outlined the relevant provisions of the Act, explained that these existed to ensure natural justice and emphasised the Commission’s obligation to protect its processes under the Act. Whilst Mr Northcote conveyed the potential for committing an offence, he obtained inconclusive information on whether the Dominion Post intended to publish a story. Mr Northcote explained that his warning would be reinforced by a letter from the Commission.

As a consequence, by letter dated Friday 27 March 2009, sent by email at 4.30pm, the Commission’s Chief Executive wrote to Mr Pankhurst warning him that the draft report had been provided to interested persons in accordance with section 14B(2)(d) of the Act, and that publication of the contents of the draft report could amount to an offence. The letter indicated that the Dominion Post’s legal advisors could contact the external counsel instructed by the Commission to discuss the position.

Despite these warnings, on Saturday 28 March 2009 the Dominion Post published a front page article disclosing substantive information relating to the investigation from the draft report.

On 30 March 2009, the Dominion Post published a further article disclosing substantive information relating to the investigation from the draft report. In that article the Dominion Post stated that the director of Maritime New Zealand had said that she could not discuss the report until it was complete because commenting would breach the Act. On the same date, the Dominion Post published an editorial referring to the draft report and criticising Maritime New Zealand.

The Dominion Post followed up with a further article and an editorial on Tuesday 7 April 2009. In the editorial the Editor of the Dominion Post outlined his view that the steps taken by the Commission to warn the Dominion Post of the potential offence, and a subsequent warning the Commission made in relation to a further suspected issue of improper disclosure, was “*misplaced*”. In that editorial the Editor stated:

‘For the record, the Dominion Post has seen excerpts of the Commission’s draft Report on the near-capsize of the Tabaroa Express. They were published 10 days ago.

....

Neither the Dominion Post nor its lawyer accept that publication of material from the Commission’s preliminary report on the Tabaroa Express incident breaches the law. But more importantly than that, we believe that the Commission is misdirecting its energies...’

The defendant has not previously been charged with or convicted of a breach of s 14L of the Act.