BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 21

READT 026/19

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1902
AGAINST	CRAIG MURRAY HANFORD Defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissions received from:	Ms E Mok, on behalf of the Committee Mr Hanford, Defendant
Date of Decision:	12 May 2020

DECISION OF THE TRIBUNAL
(Charge, Penalty, Costs, Application for Restriction on Publication)

Introduction

[1] On 30 October 2019, Complaints Assessment Committee 1902 ("the Committee") charged Mr Hanford with misconduct under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 ("the Act"). In the alternative, it charged Mr Hanford with misconduct under s 73(c)(iii) of the Act, alleging a wilful or reckless breach of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").

[2] On 14 February 2020, the parties advised the Tribunal that Mr Hanford would plead guilty to the alternative charge under s 73(c)(iii) of the Act, and that the Committee would withdraw the charge under s 73(a). An Agreed Statement of Facts has been filed.

[3] Although an oral hearing was scheduled for this matter, the parties subsequently agreed that the Tribunal would consider it on the papers.

Facts

[4] At all relevant times the defendant, Mr Hanford, was a licensed salesperson under the Act. Between July 2017 and March 2019, he was engaged as a salesperson by Wanganui Real Estate Limited, trading as Ray White Wanganui ("the Agency"). He gave notice of his resignation from the Agency on 11 March 2019, then began a two-week notice period, during which he worked from home.

[5] On 12 March, the Agency's general manager noticed that an email had been sent to Mr Hanford's Agency email address from his personal email address. Attached to the email was a spreadsheet which contained confidential property appraisal information belonging to the Agency, which was only accessible to licensees employed at the Agency ("the confidential information"). Mr Hanford had prepared the spreadsheet from the Agency's Appraisal Book, without the Agency's permission. The confidential information included dates, addresses, agents, prices, and outcomes for more than 100 properties, and was of commercial value to the Agency.

[6] Mr Hanford's email was part of an email thread with a third party, from whom he had requested another person's email address. Although he purported to send the confidential information to the third party, he did not in fact do so.

[7] On 13 March, the Agency's solicitors requested an explanation from Mr Hanford as to how he had come to be in possession of the spreadsheet and the confidential information. They also asked him to sign an undertaking agreeing to return the confidential information and to destroy any copies taken of it.

[8] On 15 March, Mr Hanford advised the Agency that he had deleted all material relating to the Agency from his computer, and provided the signed undertaking.

[9] At the Agency's request, Mr Hanford attended a video meeting on 22 March with the Agency's general manager and its solicitors. During that meeting, Mr Hanford advised that:

[a] he had copied the information from the Appraisal Book into the spreadsheet, and was aware at the time that it was confidential to the Agency;

[b] he had intended to use the spreadsheet for his own personal benefit and use in the future;

[c] he had deleted all the Agency's confidential information from his computer, and was prepared to provide his laptop to the Agency so that further checks could be carried out; and

[d] he had not sent the confidential information to any third party.

Finding as to charge

[10] Rule 6.3 provides:

> 6.3 A licensee must not engage in conduct likely to bring the industry into disrepute

[11] In its decision in *Jackman v CAC 10100* the Tribunal held that conduct will be in breach of r 6.3 if it is conduct that:[1]

> … if known by the public generally, would lead them to think that licensees should not condone it or find it to be acceptable. Acceptance that such conduct is acceptable would … tend to lower the standing and reputation of the industry.

[12] Mr Hanford's acknowledgment that his conduct was in breach of r 6.3 was properly given. We are satisfied that his conduct was such that, if known by the public, was more likely than not to lead members of the public to think that licensees should not condone it, or find it to be acceptable.

[13] No evidence has been provided that could lead us to conclude that Mr Hanford's breach of r 6.3 was wilful (that is, that he intended to bring the industry into disrepute). However, we are satisfied that his conduct, as described in the Agreed Summary of Facts, was reckless.

[14] We find Mr Hanford's breach of r 6.3 was reckless and that he is guilty of misconduct under s 73(c)(iii) of the Act.

Penalty

Penalty principles

[15] The principal purpose of the Act is to "promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."[2] The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[3]

[16] In order to meet these purposes, penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of

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1 *Jackman v CAC 10100* [2011] NZREAD 31, at [65]. See also *Complaints Assessment Committee 414 v Goyal* [2017] NZREADT 58, at [28]–[32].

2 Section 3(1) of the Act.

3 Section 3(2).

conduct in the industry, the need for consumer protection and the maintenance of confidence in the industry, and the need for deterrence, both in relation to the licensee concerned, and the industry as a whole.

[17] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.[4]

[18] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

[a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act;

[b] Impose a fine of up to $30,000;

[c] Order cancellation or suspension of the licensee's licence;

Relevant Tribunal penalty decisions

[19] We were referred to the following Tribunal decisions as providing some assistance in assessing the seriousness of Mr Hanford's conduct, and the appropriate penalty.

[20] In its substantive decision in *Miller v The Real Estate Agents Authority (CAC 20003),*[5] the Tribunal considered an appeal brought by Mr Miller against the decision of a Complaints Assessment Committee to take no further action on his complaint against a fellow licensee (Mr Robinson). A purchaser had been introduced to a property by Mr Robinson while he was employed at Mr Miller's agency (Edinburgh Realty), and the sale was concluded by Mr Robinson after he had left Edinburgh Realty

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4 See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30; *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128]; and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

5 *Miller v The Real Estate Agents Authority* [2013] NZREADT 14 (substantive decision) and *Miller v The Real Estate Agents Authority (CAC 20003)* [2013] NZREADT 33 (penalty decision).

and was working with another agency. Mr Miller alleged that the vendor was exposed to a risk of paying two commissions.

[21] The Tribunal found that Mr Robinson had exposed the vendors to liability for a double commission, but there were a number of mitigating factors: he had explained the risk to the vendors but they were anxious to retain his services, and he had given his word that, one way or another, they would not be required to pay two commissions. It found there had been no breach of r 9.11 (which sets out requirements as to advice to be given as to potential commission claims, when an agency agreement is cancelled).

[22] Mr Miller also alleged that Mr Robinson had removed the file for the transaction from Edinburgh Realty. The Tribunal found that Mr Robinson had retained the file, intending to use it, and that it constituted unsatisfactory conduct, but not at the high end of the scale of offending.

[23] In its penalty decision, the Tribunal censured Mr Robinson, and ordered him to pay a fine of $1,000, and Tribunal costs of $1,000.

[24] In *Real Estate Agents Authority (CAC 20004) v Vessey*,[6] the Tribunal considered a charge of misconduct under s 73(a) of the Act, following a complaint that Mr Vessey had altered property and contact details on the database of properties and present, past, and prospective clients and customers maintained by an agency after he resigned from the agency. As a result, the database contained inaccurate information, which required considerable time and effort to rectify.

[25] In its substantive decision, the Tribunal found that Mr Vessey's conduct "represented a marked or serious departure from the standards of an agent of good standing", and was therefore a breach of s 73(a). It considered Mr Vessey's conduct to "amount to a type of commercial sabotage", but could be regarded as being at the lower end of the scale of misconduct.

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6 *Real Estate Agents Authority (CAC 20004) v Vessey* [2015] NZREADT 10 (substantive decision); and *Real Estate Agents Authority (CAC 20004) v Vessey* [2015] NZREADT 46 (penalty decision).

[26] In its penalty decision, the Tribunal ordered that Mr Vessey's licence be suspended for one month, that he pay a fine of $3,000, that he pay prosecution and Tribunal costs of $4,000, and that he pay compensation of $3,000 to his former agency.

[27] In *Complaints Assessment Committee 402 v Zhang,*[7] the Tribunal found Mr Zhang guilty of misconduct under s 73(a) of the Act. He had taken a photograph of a communication by a prospective purchaser to his solicitor, in which the solicitor was given instructions as to price options and other matters relating to negotiations for the purchase of a property for which Mr Zhang was listing agent. The solicitor discovered his actions immediately, and insisted on the photograph being deleted.

[28] In determining penalty, the Tribunal accepted that Mr Zhang had acted impulsively, and had obtained no commercial advantage. Mr Zhang was censured and ordered to pay a fine of $2,000.

Submissions

[29] Ms Mok submitted that Mr Hanford's conduct was more serious than that considered in *Miller*, in which the licensee was found to have engaged in unsatisfactory conduct, whereas Mr Hanford has admitted misconduct. She submitted that Mr Hanford's actions were on a larger scale, involving compiling information relating to a large number of properties, which he appreciated was confidential to the Agency, for his own personal future use and benefit.

[30] Ms Mok accepted that *Vessey* involved more serious conduct, as the licensee had engaged in deliberate sabotage of his former employer's database, which caused loss and serious inconvenience. She accepted that there was no direct loss caused to the Agency in the present case, and no evidence to suggest that he had actually used any of the confidential information for his own commercial benefit. However, she submitted, Mr Hanford's conduct had the potential to cause loss to the Agency, had it not been discovered through his apparently inadvertent email to his work address.

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7 *Complaints Assessment Committee 402 v Zhang* [2016] NZREADT 25.

[31] Ms Mok submitted that the Committee accepts that Mr Hanford's conduct falls at the lower end of the range of seriousness, taking into account that no actual loss was caused, no member of the public was affected by his actions, there is nothing to suggest that he in fact used the confidential information or provided it to any third party, and he gave an undertaking, when approached by the Agency, that he had deleted the confidential information from his computer and offered his computer for checking.

[32] Against that, Ms Mok submitted that Mr Hanford's actions were motivated by personal gain, and he had purported to send the confidential information on to a third party after his resignation. She submitted that the penalty imposed should reflect the Tribunal's expectation that licensees maintain proper professional standards in their day to day conduct.

[33] Ms Mok accepted that Mr Hanford will be entitled to some credit for his lack of any previous disciplinary history, and his guilty plea. She submitted that the appropriate penalty would be orders for censure and to pay a fine of $3,000 to $4,000.

[34] Mr Hanford submitted that the appropriate penalty is an order of censure and the imposition of a fine of $1,000. He submitted that he had accepted responsibility for his actions, both with the Agency's solicitors, and with the Committee, then entered his guilty plea at the earliest opportunity. He submitted that his agreement to a hearing on the papers ensured that costs were kept lower, and a conclusion expedited. He submitted that he had left a number of active listings at the Agency, and would be forever sorry for taking information he should not have taken.

[35] Mr Hanford recorded in his submissions that in order to ensure that there will be no further lapse, he has taken it upon himself to complete educational training, through the Real Estate Institute of New Zealand, and the Real Estate Authority. He listed these as "2020 verifiable training video: ethics", "2020 verifiable training video: AML – due diligence", "2018 real estate compliance review – staying safe with the REA", "REA supervision course Webinar", Code of Conduct Webinar", and "2019 Compliance Review Webinar".

[36] Mr Hanford submitted that the conduct in *Miller* was more serious than his own, because it involved a member of the public, and the potential to expose a vendor to the risk of double commission. He submitted that *Zhang* was also more serious, as it also involved someone outside the real estate industry, and had the potential to incur real costs. He submitted that the Committee had submitted that the conduct considered in *Vessey* was far more serious than in his case, yet asked for a fine at a similar level to that imposed in that case.

Discussion

[37] It is appropriate to refer to the Tribunal's observation in its substantive decision in *Miller*:[8]

> … We expect that it is quite common for agents to wish to move on from one agency to another from time to time for various understandable reasons. However, they must always act with honesty and transparency in all respects in the course of such a transition. They must respect the property and know-how which they have been using on behalf of their former employer. In particular, it is fundamental that no consumer be put at risk by such a transition and, particularly, not to the possibility of a double commission, or even any type of litigation, or even the cost of obtaining legal advice. …

[38] Mr Hanford's actions in compiling the spreadsheet of the confidential information, for his own use and benefit after resigning from the Agency, was a failure to act with the required honesty and transparency, and to respect the Agency's property and know-how.

[39] While we accept Ms Mok's submission that Mr Hanford's conduct falls within the lower end of the range of seriousness for a misconduct charge, we also accept her submission that the fact that there was no loss to the Agency, that Mr Hanford did not actually use the information and deleted it from his computer, and that information was not in fact provided to any other party, resulted from the Agency discovering it when monitoring his emails. We accept that Mr Hanford had intended to use the confidential information, and to provide it to a third party.

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8 *Miller*, fn 5, above, at [76].

[40] Mr Hanford is entitled to be given credit for his acceptance of wrongdoing, co-operation with the Committee, and early guilty plea. He is also entitled to be given credit for the steps he has taken in relation to completing further training.

[41] We do not accept Mr Hanford's submission that the penalty imposed in *Vessey*, for more serious offending, was equivalent to that suggested in his case. The fine Mr Vessey was ordered to pay ($3,000) cannot be considered in isolation, as his licence was suspended for one month, and he was ordered to pay compensation of $3,000 to his former employer.

[42] We have concluded that in order to meet the principles as to penalty referred to earlier, and the particular circumstances of Mr Hanford's offending, he must be censured, and ordered to pay a fine of $2,500.

Application for award of costs

[43] Section 110A of the Act provides:

> (1) In any proceeding under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
>
> (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether and to what extent, any party to the proceedings–
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> (a) has participated in good faith in the proceedings:
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> (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
>
> (c) has acted in a manner that has facilitated the resolution of the issues that were the subject of the proceedings.

[44] Ms Mok sought an award of costs in favour of the Committee.

Submissions

[45] Ms Mok submitted a statement that the costs and expenses incurred by the Committee in the prosecution of Mr Hanford were $6,857.00, exclusive of GST and disbursements.

[46] She submitted that when a licensee is found guilty of charges filed by a Complaints Assessment Committee, the Committee should generally (although not invariably) be awarded some costs, and the licensee should generally expect to pay at least some of the Committee's costs. She submitted that this reflects the purposes of the Act, in particular accountability through a disciplinary process that is independent, transparent and effective, and recognises that the costs associated with charges matters are borne by members of the industry.

[47] She submitted that an order requiring Mr Hanford to pay a reasonable contribution to costs is appropriate in this case, in recognition of the principle that members of the industry should not be expected to bear all the costs incurred in the disciplinary process. She submitted that a general starting point would be around 50 percent of costs.

[48] Ms Mok acknowledged that taking into account, in particular, Mr Hanford's co-operation in the course of the Tribunal proceedings, the Tribunal may consider it appropriate to consider a reduction from the general starting point when awarding costs in this case.

[49] Mr Hanford accepted that his conduct had caused there to be costs incurred by the Committee and the Tribunal, which he regretted.

[50] He also submitted that the Tribunal has a discretion as to awards of costs in disciplinary proceedings, and that the matters that can be considered in exercising the discretion include the defendant's response to the charge, and financial means, if known.

[51] Mr Hanford noted the Committee's acknowledgement that he had accepted the misconduct charge and co-operated with the Committee. In relation to his financial means, he provided a statement of his earnings from his current employment, up to 31 March 2020. He also provided a letter from a barrister, setting out an estimate of the costs of representation at a defended hearing. He submitted that the estimated costs led to his not being represented in this matter. He further submitted that "unlike most

cases appearing before the Committee and the Tribunal", his fine and costs would not be covered by insurance.

[52] In her submissions in reply. Ms Mok submitted that although he had provided information regarding his annual salary, Mr Hanford had provided insufficient information to support a conclusion that he has no, or limited, ability to pay any costs awarded by the Tribunal. She submitted that in the absence of further information such as bank statements, the Committee's position is that there should be no reduction in any award of costs on the basis of Mr Hanford's financial circumstances.

Discussion

[53] In its decision in *Complaints Assessment Committee 521 v Wright*, in relation to an application by the Committee for an award of costs following the Tribunal's having found Mr Wright guilty of misconduct under s 73(a) of the Act, the Tribunal referred to the principles applicable to awards of costs in professional disciplinary proceedings.[9] The Tribunal noted that the Tribunal's discretion to award costs is to be exercised in accordance with the Act, on the particular circumstances of the case before the Tribunal. The Tribunal also referred to *TSM v A Professional Conduct Committee*, in which his Honour Justice Palmer set out established principles, as follows:[10]

> (a) professional groups should not be expected to bear all the costs of the disciplinary regime;
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> (b) members who appeared on charges should make "a proper contribution" towards costs;
>
> (c) costs are not punitive;
>
> (d) the practitioner's means, if known, are to be considered;
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> (e) a practitioner's defence should not be deterred by the risks of a costs order; and
>
> (f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[54] We accept that an award of costs should be made in favour of the Committee. We also accept that a reduction should be made from the "general guide" of 50 percent, to acknowledge Mr Hanford's acceptance of his wrongdoing, and co-operation

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9 *Complaints Assessment Committee 521 v Wright* [2019] NZREADT 56, at [12].

10 *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21].

(although we note Ms Mok's submission that because of that acceptance and co-operation, the Committee incurred lower costs than would have been the case if a defended hearing were required, such that any award of costs will necessarily be lower).

[55] We do not accept Ms Mok's submission that the Tribunal has insufficient information on which to consider Mr Hanford's financial circumstances. We accept that the statement he provided as to earnings for the latest financial year provide us with a basis on which we can reasonably infer that his financial means are limited.

[56] We have concluded that an appropriate outcome is that Mr Hanford contributes $2,000 towards the Committee's costs.

Application for order prohibiting publication

Submissions

[57] While accepting that it is normal practice for the Tribunal's decisions to be published, Mr Hanford sought an order prohibiting publication of this decision. He submitted that he is currently working in a small sales team of three people, and that publishing the decision would create suspicion on the other two members of the team. He submitted that while the offending was his, alone, and occurred before he joined the sales team, publication of the decision may cause undue hardship to the other two members of the team.

[58] Ms Mok submitted that the risks referred to by Mr Hanford are speculative. She submitted that the charge and Agreed Summary of Facts do not identify the "third party" to whom Mr Hanford purported to send the confidential information, nor do those documents suggest that the third party works for Mr Hanford's current agency. She submitted that the Agreed Summary of Facts states that Mr Hanford intended to use the confidential information for his own future personal benefit and use. She submitted that there is no real risk that Mr Hanford's colleagues will be implicated in his offending in the event of publication.

[59] Ms Mok also submitted that Mr Hanford's admitted misconduct is a powerful factor weighing against his application. She submitted that although his conduct involved a breach of his obligations to his employer, rather than a client or customer, it was of a nature that risked bringing the industry into disrepute. She submitted that there is a strong public interest on publication of Mr Hanford's name, so that the public is informed of his conduct, taking into account the consumer protection objectives of the Act.

Discussion

[60] Section 108 of the Act provides, as relevant:

> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if (any)) and to the public interests, it may make 1 or more of the following orders:
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> (a) an order prohibiting the publication of any report or account of any part of the proceedings before it, whether held in public or in private:
>
> …
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.
>
> …

[61] As the Tribunal has said previously, the starting point must always be the principle of open justice, and that there is a clear public interest in disciplinary proceedings being transparent and open to public scrutiny. This encourages public confidence in the disciplinary regime and the performance of real estate agency work.[11]

[62] The Tribunal has an unfettered discretion as to whether to make an order prohibiting publication.

[63] In *X v Complaints Assessment Committee 10028*, the Tribunal accepted that the Tribunal should take into account the seriousness of the offending, the public interest

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[11] See *X v Complaints Assessment Committee* [2011] NZREADT 2, citing *R v Liddell* [1995] 1 NZLR 538 (CA) and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA); *Graves v Real Estate Agents Authority (CAC 20003)* [2012] NZREADT 4; and *Morgan v Real Estate Agents Authority (CAC 20003)* [2013] NZREADT 76, at [27].

in knowing the character of the person seeking non-publication (particularly taking into account the consumer-protection objectives of the Act), and any circumstances that are personal to the applicant, his or her family or those who work with him or her, and the impact on financial and professional interests. The Tribunal observed that the fact that a licensee had been found to have engaged in unsatisfactory conduct was "a powerful factor against the prohibition of publication of his name".[12]

[64] We accept Ms Mok's submission that Mr Hanford has admitted a charge of misconduct, which is a powerful factor against prohibiting publication.

[65] We have considered Mr Hanford's submissions regarding his work colleagues. We accept Ms Mok's submission that there is no reference to Mr Hanford's present employment in the charge or the Agreed Summary of Facts, and it is clear that the charge relates only to events occurring in Mr Hanford's previous employment. There is no identification, or suggested identification, of any other person involved in the offending. Further, there is no reference to Mr Hanford's present employment, or identification, or suggested identification, of any other person involved in the offending in this decision.

[66] Accordingly, we are not persuaded that Mr Hanford has established grounds on which we could exercise our discretion to prohibit publication of this decision. His application under s 108 must be declined.

Orders

[67] In relation to the charge against him, we find Mr Hanford guilty of misconduct under s 73(c)(iii) of the Act (reckless contravention of r 6.3 of the Rules).

[68] We order that Mr Hanford is censured. He is also ordered to pay a fine of $2,500. The fine is to be paid to the Authority within 20 working days of the date of this decision.

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12 *X v Complaints Assessment Committee 10028* [2011] NZREADT 2, at [37]–[39].

[69] Pursuant to s 110A of the Act, Mr Hanford is ordered to pay $2,000 towards the Committee's costs. Payment is to be made to the Authority within 40 working days of the date of this decision.

[70] Mr Hanford's application under s 108 of the Act, for an order prohibiting publication, is declined.

[71] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Ms C Sandelin
Member

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Mr N O'Connor
Member