

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL AUCKLAND

Period 1 July 2009 to 30 June 2010

Dear Minister

Pursuant to section 87 of the Motor Vehicle Sales Act 2003 ('the Act') I am pleased to submit the following Annual Report summarising the applications I have dealt with during the year, detailing cases which, in my opinion, require special mention and making recommendations for amendments to the Act.

As you will see from the following summary, the Auckland Tribunal has received 26 more applications and heard and issued 21 more decisions this year than last.

The Auckland Tribunal has continued to hear and issue written decisions promptly. In the past year 93 % of all applications heard had a decision issued within 2 months of the date of filing and 95 % of all applications were heard and a written decision given within 3 months of the date the application was filed.

1. Summary of Applications dealt with during the year nationally:

	Applications Y/E 30/6/10	Applications Y/E 30/6/09
<u>Total number of disputes originating from</u>		
❖ Auckland area (New Plymouth north)	184	158
❖ Wellington area (Palmerston North south)	61	70
	245	228
<u>Disputes carried over from previous year</u>		
❖ Auckland Adjudicator	15	17
❖ Wellington Adjudicator	6	15
TOTAL	266	260
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<u>Disputes settled or withdrawn</u>	54	68
<u>Disputes transferred</u> to Disputes Tribunal unheard	1	
<u>Disputes heard</u> (including disputes carried over from Previous year)		
❖ Auckland Adjudicator	153	132
❖ Wellington Adjudicator	26	39

Disputes unheard as at 30 June

❖ Auckland Adjudicator	26	15
❖ Wellington Adjudicator	6*	6
*Includes 2 Reserved decisions		

TOTAL	266	260
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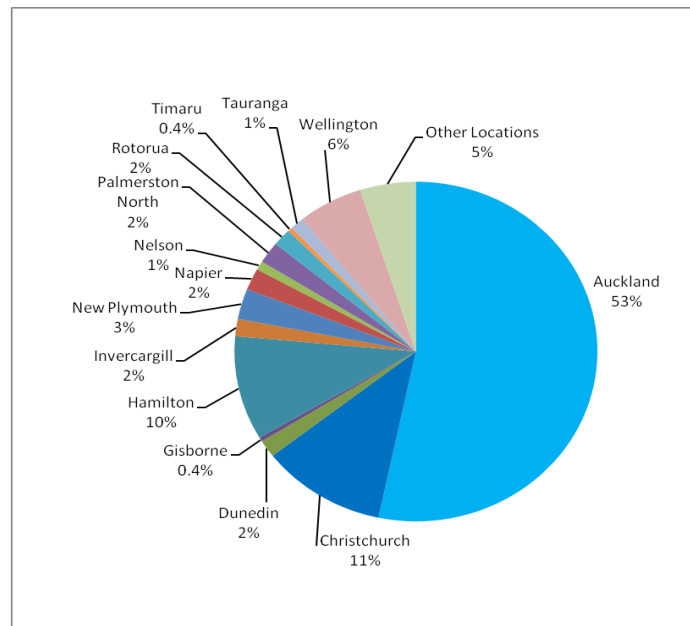
Total cases outstanding as at 30 June
(unheard and reserved decisions)

32	21
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C H Cornwell – Adjudicator

	Year ending 30/06/10		Year ending 30/06/09	
Number of disputes found for Trader	46	30.06%	45	34.09%
Number of disputes found for Purchaser	106	69.28%	81	61.36%
Cases dismissed/ transferred for want of jurisdiction	1	0.66%	6	4.55%
Total Heard and Decisions Delivered	<u>153</u>	100%	<u>132</u>	100%

Of the applications received and heard 78% were decided on the basis of the Consumer Guarantees Act and 11% under the Fair Trading Act. In 10% of the applications the applicant claimed both the Consumer Guarantees Act and the Fair Trading Act had been breached.

Location of Disputes

2. Cases that in the Adjudicator's opinion require special mention:

(a) Carfair trader

The purchaser, a young Spanish holiday maker went to the Auckland Carfair at Ellerslie Racecourse on 8th March 2009 and, without first test driving it agreed to purchase a 14 year old used Japanese import which had travelled 187,558 kilometres at the time of sale for \$2,900. The seller was not a registered motor vehicle trader but described the vehicle as "*187,558 km in good condition runs very good.*"

No sooner had he bought the vehicle than the purchaser began to experience mechanical problems with it and on the following day a mechanic described the transmission as noisy and faulty and that a "*huge shift impact occurs randomly.*" The purchaser attempted to telephone the seller on 12 occasions from 9th March until the 10th March to inform him that the vehicle had several faults. The purchaser says that when he spoke to the seller on the telephone the seller initially agreed to his obtaining a quotation for the cost of repairs but later pretended to be someone other than the seller and claimed no knowledge of the vehicle.

The purchaser was determined to track the seller down. He obtained a VIR report on the vehicle but discovered that the seller had given a non-existent address to the Registrar of Motor Vehicles when he registered the vehicle into his name after purchasing it on 7th March from a trader in Papatoetoe.

The purchaser obtained a quotation of \$1,200 to remedy the vehicle's faulty transmission but because he could not afford to pay that amount he had some repairs done and incurred costs in having the problems with the transmission electronically diagnosed.

The purchaser was convinced that the seller was a trader and through sheer perseverance and several visits to the Car Fair the purchaser photographed the seller displaying and offering to sell six other vehicles. The purchaser produced photographs of each car offered for sale by the seller at the Carfair each of which bore the seller's telephone number.

The Tribunal was satisfied on the basis of the evidence produced by the purchaser that although the seller did not hold out that he was in the business of motor vehicle trading, the seller had displayed for sale or offered to sell more than 6 motor vehicles in the last 7 months and was thus to be treated by s.8 of the MVSA as a motor vehicle trader.

The Tribunal said in its decision that a reasonable purchaser buying such an old well-travelled cheap vehicle at a Carfair could not reasonably expect much for their money. However the Tribunal was satisfied on the evidence of the purchaser, and also the mechanics reports he produced that the vehicle's transmission was faulty at the time of sale and that a reasonable purchaser- even of an old high-mileage vehicle such as this would not expect to have problems with the transmission on the day he or she bought the vehicle. Accordingly the

Tribunal had no hesitation in finding that the vehicle was not of acceptable quality at the date of sale.

The purchaser wished to reject the vehicle but he had been unable to notify the seller of his decision to reject or the grounds of rejection. For that reason, and because he had not rejected the vehicle within a reasonable time from the supply, the Tribunal was unable to grant him rejection. However the purchaser remained entitled to recover from the seller the reasonable costs he incurred in having the faulty transmission repaired. The purchaser proved that he had incurred \$880 in repairing the vehicle and hence the Tribunal ordered the seller to pay that sum to the purchaser.

(b) Faulty transmission in a 6 year old vehicle which had only traveled 34,000kms

Many of the applications the Tribunal receives are in respect of 10-15 year old imported cars with high mileages and unknown service histories which are sold for less than \$10,000. One application the Tribunal heard in October 2009 was unusual in that it concerned the sale of a NZ new car with a known service history which had been supplied by a reputable Auckland trader.

In January 2003 the purchaser bought a new European car for \$37,490 from an Auckland trader specialising in selling new European marques. The vehicle was sold with a 3 year manufacturer's warranty which expired in January 2006. The vehicle's transmission started to malfunction in June 2009 and its transmission failed in July 2009 after the vehicle had travelled some 34,000 kilometres. The purchaser claimed that the vehicle was not of acceptable quality because a reasonable purchaser would expect the transmission to function without failing for more than 34,000 kilometres. The purchaser sought the Tribunal's assistance in recovering her repair costs of \$5,707.50 from the trader under the Consumer Guarantees Act 1993.

The purchaser proved that the vehicle had been serviced regularly for the first three years following purchase by the trader, and then, following a 2 year interval in which the vehicle was not serviced, it was serviced each year by two other mechanics. None of the service invoices produced by the purchaser record any work was done on the vehicle's transmission, which is a sealed unit. None of the invoices contained any record of transmission fluid being added or leaks detected from the transmission assembly.

In June 2009 the purchaser noticed the transmission was malfunctioning. She took the vehicle to the trader on 15 July when the vehicle's odometer was 34,134 kilometres. The trader downloaded new transmission software to the ECU (electronic control unit) and the vehicle was road tested and the invoice records "all OK". The trader charged the purchaser \$64.70 for this work but soon after the vehicle's transmission became erratic and the vehicle lost power. The purchaser feared that the vehicle was unsafe.

The trader's representative gave evidence to the Tribunal that the transmission in the vehicle supplied to the purchaser is a sealed unit with a service life or expected life of 100,000 kilometres but that this may be reduced if a vehicle is

operated on short stop start trips where the transmission components and lubricant do not reach full operating temperature.

The Tribunal obtained the evidence of a transmission specialist who had inspected the parts from the failed transmission and gave a written opinion to the purchaser as to the cause of failure and his opinion on what the average life of an automatic transmission should be. The transmission specialist told the Tribunal first, that in his opinion from an examination of the components the cause of the failure was probably low oil pressure within the clutch unit. Secondly, there was no evidence of a mechanical loss of transmission oil pressure from the sealed transmission unit and, third, that he would expect the average life of an automatic transmission to be between 160,000 and 300,000 kilometres and that failure at 34,000 kilometres cannot be considered as anything other than premature failure.

The Tribunal had to decide if the vehicle was as durable as a reasonable purchaser of such vehicle would regard as acceptable. The Tribunal did not consider that any reasonable purchaser of a vehicle of this age for which they had paid \$37,490 would find it acceptable for the transmission to fail after only 34,134 kilometres of use and that its transmission was not durable.

The Tribunal also considered that the vehicle's failure to comply with the guarantee of acceptable quality because of its lack of durability was one of substantial character under s.21(a) of the Act for two reasons. First, without a working transmission the vehicle was useless. Second, the failure was substantial because the vehicle would not have been acquired by a reasonable consumer aware of the problem.

The trader was ordered to reimburse the purchaser with her repair costs of \$5,700.

(c) Contaminated diesel or faulty fuel injection system?

The Tribunal received an application to reject a diesel utility vehicle purchased in 2006 for \$34,500 sold with the benefit of a 5 year manufacturer's warranty. The purchaser claimed that after three and a half years of satisfactory use the vehicle suddenly started to misfire on starting cold. The purchaser asked the trader to remedy the fault. The trader refused to do so- otherwise than at the purchaser's cost- because it said that the vehicle's diesel fuel had been contaminated which caused damage to the vehicle's high pressure fuel injection system. The purchaser then sought to obtain the manufacturer's agreement to remedy the fault under the manufacturer's warranty but the manufacturer refused to do so for the same reason.

The manufacturer's warranty contained a number of exclusions one of which was as follows:

"Repairs or corrosion resulting from fire, theft, contamination, sand, salt, hail, stones, chemicals, industrial fall-out, negligence (such as the driver ignoring gauges, lights or signals) or other causes beyond the control of [the manufacturer] or your dealer."

The manufacturer said that contaminated fuel was the cause of the damage to the fuel injection system and was a cause beyond the manufacturer's control.

The purchaser told the Tribunal that she had the vehicle serviced by the trader and the purchaser's husband, a qualified automotive engineer and an experienced diesel mechanic carried out regular oil and filter changes at regular intervals between the services carried out by the trader.

When the vehicle started to misfire on cold start in September the vehicle had travelled 98,283 kilometres. The trader inspected the vehicle and agreed that it misfired on cold start up. The trader checked and recorded data on the vehicle's engine's performance using computer diagnostic tools and enabled the trader to conclude that the initial common rail pressure on start up was below specification. The fuel pump was sent to a diesel specialist who striped and inspected it and says it found excessive scoring and brown sludge build up on the fuel pump which would have resulted in a loss of pressure in the common rail system. The tolerances of the parts are as small as one micron so that if any dirt or sludge is present there can be a loss of pressure in the system. The view of the trader's diesel specialist was that the fault was caused by some form of fuel contamination.

The purchaser did not accept that and took the matter up with the manufacturer without success. The purchaser then had the common rail fuel pump components examined by its technical advisor who claimed to be unable to find any evidence of sludge deposit or substance staining marks or effects of rust on any of the metal surfaces within the fuel pump components. His evidence was that all the parts are in "new pristine condition". The four fuel injectors removed from the vehicle were in excellent condition overall and functioning correctly. The purchaser had another firm of scientific analysts inspect the fuel pump parts using a microscope to determine whether the surface of the parts shows the presence of any surface damage or contamination. They did not observe scouring, damage or contamination and there was no surface deposits or corrosion observed on the suction valve. The Tribunal asked the parties to have samples of the oil and diesel fuel in the vehicle's sump and fuel tank independently analysed. There was no evidence of contamination by diesel bug or any significant quantity of water in the fuel.

The Tribunal found on the basis of the fuel analysis in the tank that it appeared unlikely that the fuel had been contaminated by water and concluded that although the trader and the manufacturer claimed the vehicle's fuel pump had been damaged by contaminated fuel and whilst the Tribunal accepted that was a possible explanation, the Tribunal was not satisfied that the damage to the fuel injection system had been caused by contaminated fuel.

The Tribunal considered, having regard to the nature of the goods and also having regard to the representations made by the manufacturer as to the reliability, durability and dependability of the vehicle, that a reasonable consumer fully acquainted with the state and condition of the vehicle, including the defect with the fuel system would not regard the vehicle's fuel pump as durable. The

Tribunal considered such a purchaser would not expect the fuel pump to fail within the first 100,000 kilometres of use.

The Tribunal considered that the estimated cost to repair the fuel injection system of \$7,000 in the context of the price paid for the vehicle of \$34,500 in 2006 appeared to the Tribunal to be serious and the failure was probably one of substantial character because no reasonable purchaser of a new \$34,500 diesel utility vehicle would have bought the vehicle knowing the fuel injection system would require replacement at a retail cost of \$7,000 after 98,000 kilometres and three and a half years of use.

The Tribunal decided that the purchaser had lost her right to reject the vehicle 45 months after the time of supply but ordered the manufacturer to pay the purchaser her reasonable repair costs.

3. Recommendations for amendments to the Act that the adjudicator thinks desirable based on the experience of the Disputes Tribunal.

The only recommendation I would like to make for amendment to the Act concerns section 94(1)(b). Section 94 is the provision which requires the Tribunal, for the purpose of protecting the public, to direct the chief executive of the Department for Courts to publish a notice in the *Gazette* if the Tribunal in determining an application, decides against a motor vehicle trader. This section appears not to impose any such requirement on the Tribunal when it determines an application against a manufacturer. In the last case described above, the manufacturer was found to have breached the Consumer Guarantees Act but because of the wording of s.94(1)(b) the Tribunal was unable to direct the publication of the manufacturer's name in the *Gazette*. That may be considered a gap which the Minister may wish to close by amending s.94(1)(b) to include manufacturers.

C H Cornwell

Auckland Motor Vehicle Disputes Adjudicator

26 July 2010