

# ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL AUCKLAND

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Period 1 July 2010 to 30 June 2011

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 19 more applications but heard and issued 8 fewer decisions this year than last. Through increased emphasis by the Tribunal on pre-hearing mediation by traders, the number of applications which have settled or been withdrawn has increased from 20% of total applications last year to 31% this year

The Auckland Tribunal has continued to hear and issue written decisions promptly. In the past year 74 % of all applications heard had a decision issued within 2 months of the date of filing and 98 % of all applications were heard and a written decision given within 3 months of the date the application was filed.

## 1. National Summary of Applications dealt with during the year:

|  | Applications<br>Y/E 30/6/11 | Applications<br>Y/E 30/6/10 |
|--|-----------------------------|-----------------------------|
| <u>Total number of disputes originating from</u>     |                             |                             |
| ❖ Auckland area (New Plymouth north)                 | 203                         | 184                         |
| ❖ Wellington area (Palmerston North south)           | 72                          | 61                          |
|  | <b>275</b>                  | <b>245</b>                  |
| <u>Plus Disputes carried over from previous year</u> |                             |                             |
| ❖ Auckland Adjudicator                               | 26                          | 15                          |
| ❖ Wellington Adjudicator                             | 7                           | 6                           |
| <b>TOTAL</b>   | <b>308</b>                  | <b>266</b>                  |

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## 2. National Summary of Applications disposed of during the year:

|  |            |            |
|--|------------|------------|
| <u>Disputes settled or withdrawn (both areas)</u>                          | 95 (31%)   | 54(20%)    |
| <u>Disputes transferred</u> to Disputes Tribunal unheard (both areas)      | 2          | 1          |
| <u>Disputes heard</u> (including disputes carried over from Previous year) |            |            |
| ❖ Auckland Adjudicator   | 145        | 153        |
| ❖ Wellington Adjudicator   | 40         | 26         |
| <u>Disputes unheard</u> as at 30 June                                      |            |            |
| ❖ Auckland Adjudicator   | 19         | 26         |
| ❖ Wellington Adjudicator   | 7          | 6          |
| *Includes 1 reserved decision  |            |            |
| <b>TOTAL</b>   | <b>308</b> | <b>266</b> |

## 3. Total applications outstanding as at 30 June 2011

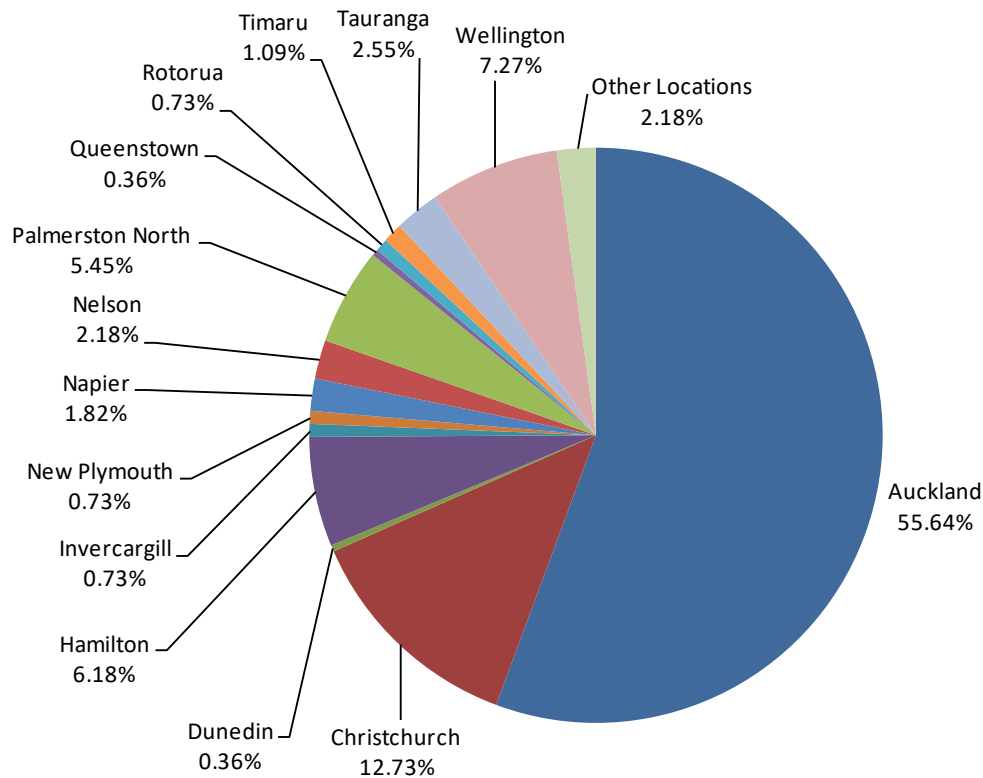
|   |    |    |
|---|----|----|
| Unheard and reserved decisions (both tribunals) | 26 | 32 |
|---|----|----|

### Auckland Tribunal Summary Adjudicator C H Cornwell

|   | Year ending<br>30/06/11 |        | Year ending<br>30/06/10 |        |
|---|-------------------------|--------|-------------------------|--------|
| Number of disputes found for Trader                   | 51                      | 35.17% | 46                      | 30.06% |
| Number of disputes found for Purchaser                | 93                      | 64.14% | 106                     | 69.28% |
| Cases dismissed/ transferred for want of jurisdiction | 1                       | 0.69%  | 1                       | 0.66%  |
| <b>Total Heard and Decisions Delivered</b>            | <b><u>145</u></b>       | 100%   | <b><u>153</u></b>       | 100%   |

Of the applications received and heard 79.86% were decided on the basis of the Consumer Guarantees Act, 17.37% under the Fair Trading Act and 2.77% under the Sale of Goods Act 1908.

## Location of Disputes



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

The Auckland Tribunal has continued to see examples of two situations in which traders attempt to avoid their obligations under the Consumer Guarantees Act 1993 to provide a safe, fault free and reasonably durable vehicle to purchasers. First, by a trader claiming they sold a vehicle "by tender" when it was not sold by competitive tender to bring it within the exclusion in s41(3)(b) of the Act. Second, by claiming a vehicle was supplied by auction when in fact it was not, to try and bring it within the exception in s41(3)(a) of the Act. The following three cases are examples that have occurred in the past year.

### (a) Sales by tender

During the year the Auckland Tribunal has heard several applications where a trader has claimed, as a defence to a purchaser's claim that the vehicle was sold by "tender". In each case the Tribunal has found the sale was not made by competitive tender.

One such application concerned a young woman who purchased a 12 year old Nissan Pulsar for \$3,500 from a Whangarei trader in November 2010. The vehicle's odometer was 123,755 kilometres at the time of purchase. The Tribunal found that the trader's salesman had telephoned the purchaser after she had been to the trader's premises to inspect the vehicle and offered to sell her the vehicle for \$3,500. The purchaser accepted that offer and went to the trader's premises on the afternoon of 29 November to pay for the car and complete the transaction.

However before she paid for the vehicle the purchaser was handed and required to sign a document headed "TENDER FORM" which had been filled in by the trader which described the vehicle and the purchaser's details and which then contained the following:-

*"I/We hereby tender the amount of \$3,500 Plus \$10 (change of ownership) for the above vehicle.*

*I/We confirm that we are aware that this vehicle is being sold by tender and is accepted in an "as is where is" condition and as such carries no warranty and therefore is not subject to the "Consumer guarantees act 1993" Or the "Sales (sic) of goods act 1908". I/We also confirm that we have read the "terms and conditions" set out by [the trader]. I hereby confirm that I am over 18 years of age and authorised to submit this tender."*

The trader also had the purchaser sign another document which stated that the vehicle was sold "as is where is" and without any warranty or guarantee. The purchaser noticed the vehicle's engine "stuttered" when she drove the vehicle on the afternoon she purchased. A few days later the radiator tank boiled when she stopped the vehicle after only travelling about 100kms.

The purchaser took the vehicle to her repairer a week later who tested the cooling system and found the radiator was leaking. They sent the radiator to be repaired and but the purchaser told the Tribunal that when she got the vehicle back the engine was still overheating and the engine smelt hot. In January 2011 the purchaser took the vehicle back to her repairer who found that there was either a crack in the cylinder head or the head gasket had blown. They recommended the vehicle's cylinder head needed to be removed and checked or a second hand engine fitted.

The trader's defence was that it had sold the vehicle by competitive tender but the trader acknowledged that it had not received any other competitive bids for the vehicle before it sold it to the purchaser. The Tribunal was therefore satisfied from the evidence that the supply of the vehicle to the purchaser did not take place by competitive tender in the sense that the tender offer made by the purchaser was not made or considered in a rivalous or competitive situation. Accordingly the Tribunal found as a fact that the vehicle was not sold by competitive tender. The Tribunal expressed the view that the Tender Form and the Disclosure Document by which the purchaser appeared to purchase the vehicle by tender and on an "as is where is" basis were both sham documents intended to create the false impression in the purchaser's mind that she had contracted out of the Act and had no recourse against the trader for the condition of the vehicle.

The Tribunal considers the trader, in having the purchaser sign the Disclosure Document which purported to exclude all warranties, breached s 43(4) of the Consumer Guarantees Act which makes it an offence against s 13(i) of the Fair Trading Act 1986 to purport to contract out of any provision in the Consumer Guarantees Act other than in accordance with s43(2) or s43A.

The Tribunal was satisfied on the evidence produced by the purchaser and that given by the purchaser's mechanic that the vehicle probably had a cracked cylinder head or a weeping head gasket when it was sold by the trader because the purchaser travelled only 100kms before the vehicle first overheated. The Tribunal's Assessor also advised the Tribunal that it was entirely possible for a vehicle with a cracked cylinder head or a weeping head gasket to travel 1892kms (which the purchaser appeared to have travelled in the vehicle). The Tribunal therefore considered that at the time of sale the vehicle was not free from minor defects, fit for the purpose for which vehicles are commonly supplied, or as durable as a reasonable consumer would regard as acceptable- even for a \$3,500 12 year old Nissan Pulsar which had travelled 123,755kms when it was sold. Accordingly the Tribunal concluded that the vehicle failed to comply with the guarantee of acceptable quality in s6 of the Act and found that the failure was one of substantial character which entitled the purchaser to a refund of her purchase price.

**(b) Sale made after a vehicle failed to sell at auction**

A Wellington couple agreed to buy a 2001 VW Golf from an Auckland trader for \$6,500 sight unseen on the basis of the trader's TradeMe advertisement which described the car as "driving well". The vehicle had been offered for sale by auction but when the highest bidder failed to complete the purchase the trader offered it for a fixed price of \$6,500 to all who had taken part in the auction.

When the purchasers paid for the vehicle the trader put a stamp on the GST invoice and on the Consumer Information Notice which read:

*"This vehicle has been purchased by way of a no reserve auction and is [sold] as is where is with no warranty expressed or implied whatsoever."*

The purchasers noticed that the vehicle's transmission was faulty as soon as they drove the vehicle from Auckland towards Wellington. They had the vehicle's transmission checked by a transmission specialist in Wellington and were quoted \$6,600 to overhaul the transmission. The purchasers emailed the trader and asked if they wanted the vehicle back in exchange for the purchase price, or wanted to have the vehicle's transmission repaired. They received no response. They then sent the trader a letter rejecting the vehicle.

Initially the trader promised to have the transmission replaced but later withdrew that offer and claimed the purchaser had caused the fault by driving the vehicle to Wellington with dirty transmission fluid and without first servicing the transmission.

At the hearing the purchasers produced evidence from their transmission specialist that the transmission had a pre-existing fault and that servicing the transmission would have made no difference. The vehicle had only been driven 658kms when it was inspected by the specialist.

The purchasers also produced a copy of the trader's advertisement on TradeMe which showed that another prospective purchaser had asked the trader if the vehicle's transmission had been fixed since the car had been offered for sale with an obvious transmission problem at a Turners auction a few months previously. The trader had not replied to the question and so it did not appear on the Q&A beneath the trader's advertisement. The purchasers claimed the trader's silence indicated it probably knew the transmission was faulty.

The Tribunal had regard to the age of the vehicle, the fact that it had travelled 109,000kms at the time of sale, and was a Singaporean import, and also that the trader's advertisement represented it was "driving well." The Tribunal found that the vehicle was probably not supplied free of minor defects by the trader and was certainly not as durable as a reasonable purchaser would regard as acceptable for a \$6,500 car. The Tribunal also found the failure was one of substantial character because no reasonable buyer would pay \$6,500 for a car to be faced with a \$6,600 repair bill after only 658kms of use.

The Tribunal also found the trader's conduct in stamping the invoice and CIN notice that the vehicle had been sold "*by way of a no reserve auction and sold as is where is with no warranty express or implied whatsoever*" was in breach of s13(i) of the Fair Trading Act because it contained a false or misleading representation concerning the existence of the purchasers' rights under the Consumer Guarantees Act. The Tribunal ordered a full refund of the purchase price and other costs incurred by the purchasers and required the trader to collect the vehicle from them in Wellington at its expense.

The writer welcomes the Government's announcement that a Consumer Law Reform Bill is to go before Parliament to change the law so that all goods sold via online auction sites will be subject to the acceptable quality provisions in the Consumer Guarantees Act.

**(c) Claim that a supply by auction could be up to 20 hours after auction ended**

An example of a trader attempting to avoid its responsibilities under the Consumer Guarantees Act occurred when the Branch Manager of a listed public company which conducts vehicle auctions throughout New Zealand claimed that in circumstances where a vehicle did not sell "under the hammer" at auction, it was the trader's practice for sales consultants to obtain the seller's consent to negotiate a sale with the highest bidder or under-bidder to attempt to conclude a sale. The Branch Manager told the Tribunal that he considered that in such circumstances the vehicle was still sold by auction so long as the negotiated sale took place by 11am of the morning following the auction. He was unable to cite any legal or other authority for this approach or as to why a negotiated sale of a vehicle which was not sold at auction but subsequently sold within 20 hours of being "passed in" at auction became a "supply by auction" other than that he had always done it.

The Tribunal was unable to accept this argument and found the trader's sale by negotiation of VW Golf with a faulty transmission on the day after the auction

finished was not a supply by auction and accordingly was subject to the Consumer Guarantees Act. The quality guarantee of which had been breached. The Tribunal ordered the trader to pay the purchaser \$3,795 to repair the transmission fault.

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

The only recommendation for amendment to the Motor Vehicle Sales Act 2003 ("the Act") I would like to propose concerns the jurisdiction of the Tribunal which is contained in s89 of the Act. The Tribunal's jurisdiction was extended by s16 of the Motor Vehicle Sales Amendment Act 2010 to permit the Tribunal to make orders under the Contractual Remedies Act 1979.

Unfortunately s16 of the Motor Vehicle Sales Amendment Act 2010 only permits the Tribunal to make orders under s9 of the Contractual Remedies Act which is the section that deals with the granting of relief when a contract is cancelled. The Tribunal has not been given power to award damages or cancel a contract for misrepresentation under the Contractual Remedies Act 1979 and so, in my opinion is unable to exercise the power to grant relief under that Act.

My recommendation therefore is that a further amendment be made to section 89 of the Motor Vehicle Sales Act 2003, to grant the Tribunal power to make orders under sections 6 to 9 of the Contractual Remedies Act 1979.

**C H Cornwell**

Auckland Motor Vehicle Disputes Adjudicator

1 August 2011