Motor Vehicle Disputes Tribunal

ANNUAL REPORT

1 July 2015 to 30 June 2016

Pursuant to section 87 of the Motor Vehicle Sales Act 2003

C H Cornwell and J S McHerron
Adjudicators

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL

Period 1 July 2015 to 30 June 2016

Dear Minister

Pursuant to section 87 of the Motor Vehicle Sales Act 2003 ("the Act") we are pleased to submit the following Annual Report summarising the applications the Motor Vehicle Disputes Tribunal has dealt with during the year, detailing cases which, in our opinion, require special mention, and making recommendations for amendments to the Act.

The Tribunal received 342 applications this year, 84 more than last year, which equates to a 32.5% increase in applications.

The number of disputes settled by the parties prior to a hearing was 116 (30%), compared with 83 (29%) last year, of the total applications filed. This reflects the continuing emphasis by the Tribunal on encouraging the parties to meet and attempt to mediate their dispute before a hearing which is part of the process for resolving disputes set out in the Act.

The Tribunal has a case disposal target of hearing and issuing decisions on at least 75% of all applications received within two months of the date of filing and disposing of 95% of applications within three months of the date of filing.

In the past year the Tribunal's case disposal rate was 72.51% within 2 months of the date of filing (up from 60.15% the previous year) and 91.81% (up from 77.82% the previous year) within 3 months of the date of filing the application.

However in Auckland and the upper North Island, where the bulk of the applications are determined by a full time Adjudicator, the disposal rate was 92.08% within 2 months and 93.07% within 3 months of the date of filing.

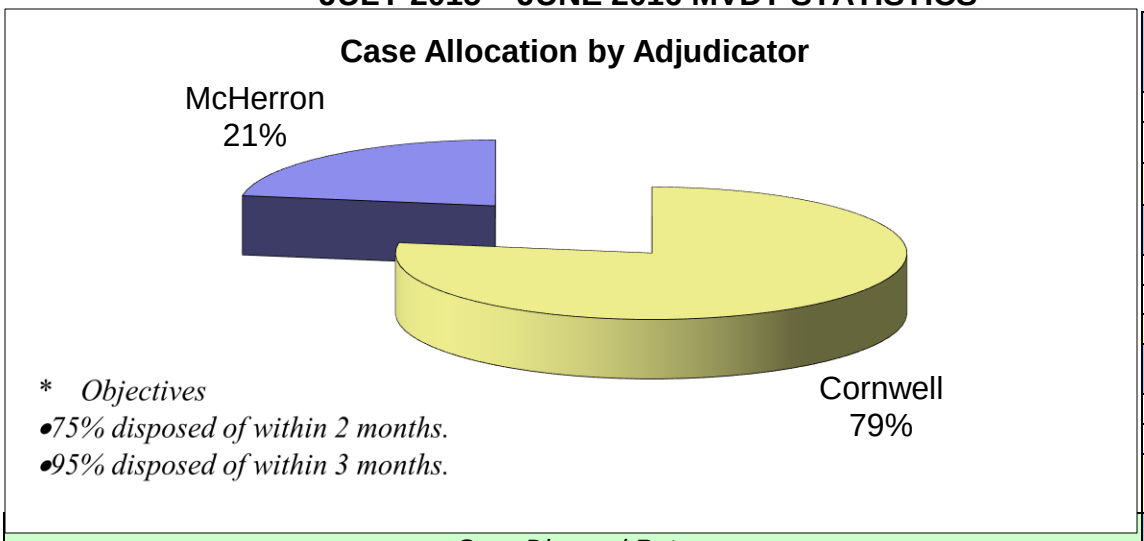
1. **Summary of Applications received during the year:**

	Applications Y/E 30/6/15	Applications Y/E 30/6/16
Total number of disputes filed during the year	258	342
Plus Disputes carried over from previous year	24	43
TOTAL	282	385

2. Summary of Applications disposed of during the year:

Disputes settled or withdrawn	83	116
Disputes heard (Including disputes carried over from previous year)	154	209
Applications unheard as at 30 June 2016	43	60
TOTAL	282	385

JULY 2015 – JUNE 2016 MVDT STATISTICS



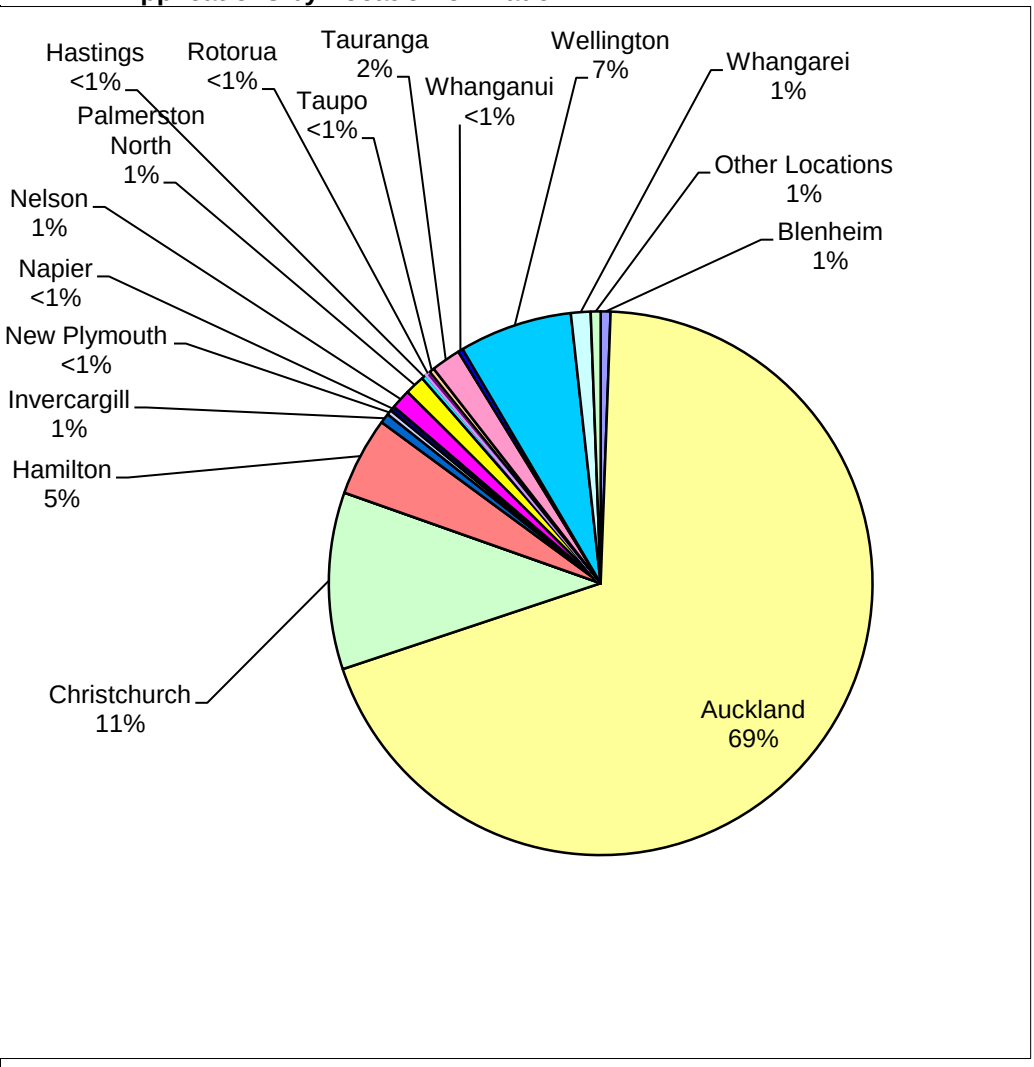
Case Allocation Actual Values	
Cornwell	265
McHerron	77
TOTAL	342
Decisions issued by Adjudicator	
Cornwell	173
McHerron	36
TOTAL	209
Applications settled per Adjudicator	
Cornwell	94
McHerron	22
TOTAL	116
Cases outstanding by Adjudicator	
Cornwell	39
McHerron	21
TOTAL	60

Case Disposal Rate

2 Months	3 Months	4 Months	Cases over 4 Months
72.51%	91.81%	98.83%	1.17%

Applications by Location of Trader

Application Location Count	
Location	Count
Blenheim	2
Auckland	237
Christchurch	36
Hamilton	16
Invercargill	2
New Plymouth	1
Napier	1
Nelson	4
Palmerston North	4
Hastings	1
Rotorua	1
Taupo	1
Tauranga	6
Whanganui	1
Wellington	23
Whangarei	4
Other Locations	2
Total Cases	342



Cases filed by jurisdiction*	
Wellington and South Island	21%
Upper North Island	79%

3. Cases that require special mention

(a) Australian Statutory Write-Offs

During the past year the Auckland Tribunal has heard four applications involving the purchase by New Zealand consumers of vehicles which had previously been designated as statutory write-offs by Australian authorities and subsequently imported into New Zealand. Two of the cases illustrate the difficulties that arise where Australian statutory write offs, which cannot be re-registered in Australia, are imported into New Zealand and sold to unsuspecting buyers.

The first case was **Rodrigues & Wallman** v **Nikan Cars Limited** heard on 22 July 2015 and concerned the purchase in January 2015 by Mr Rodrigues and Ms Wallman of a 2014 Mazda 3 from Farzad Nikanjam for $30,000. The vehicle was represented by Mr Nikanjam as being "brand new." In March 2015 the purchasers discovered that the vehicle was not "brand new" but had been previously written off in Australia and imported as a damaged vehicle into New Zealand. They were advised that the vehicle's bonnet, front bumper cover, right head lamp, right front guard and inner fittings had all been replaced with second hand components. Paint had peeled off the vehicle's bonnet due to poor workmanship. The purchasers also discovered that Mr Nikanjam was a director of Nikan Cars Limited, a registered motor vehicle trader. The purchasers rejected the vehicle under the Consumer Guarantees Act 1993 and sought the Tribunal's orders upholding their rejection, and in the alternative they sought a remedy under the Fair Trading Act 1986.

Mr Nikanjam appeared briefly at the hearing and declined to take part because he claimed to have a legally binding agreement signed by the purchasers that the sale of the vehicle was a private sale. He claimed that the Tribunal had no jurisdiction to hear the application.

The Tribunal, for a number of reasons, found that the "private sale" agreement was a sham. It also found that the respondent trader was a party to the transaction and the Tribunal had jurisdiction to hear the purchasers' application. The Tribunal also found that Mr Nikanjam's conduct in representing that the vehicle was "brand new" when he knew it had been written off and imported damaged, was misleading, and amounted to a breach of s 9 of the Fair Trading Act.

The Tribunal made an order under the Fair Trading Act that the sham agreement for the purchase of the vehicle was void *ab initio* and ordered the trader to refund the purchasers with their purchase price of $30,000 by bank cheque. The Tribunal also found that the vehicle did not comply with the guarantee of acceptable quality in s 6 of the Consumer Guarantees Act at the time of sale because it was not free from minor faults and that the failure to comply was one of substantial character entitling the purchasers to reject the vehicle.

The second case, which has already been the subject of a report on the television show "Fair Go," was **Perry v Mukesh Chand trading as Car Connection.** In June 2015, Mrs Perry, after obtaining an AA pre-purchase inspection, bought a 2013 Mazda 3 for $18,491 from Mukesh Chand trading as Carconnection. In August 2015, the purchaser discovered that the vehicle had been imported as a flood damaged vehicle which had been written-off in Australia. She claimed Mr Chand misled her into believing the vehicle had not been involved in an accident and she thus claimed that he had misrepresented the vehicle to her. Mrs Perry applied to have the Tribunal grant her a remedy under the Fair Trading Act 1986 and the Consumer Guarantees Act 1993.

Mr Chand attended the Tribunal's hearing at which he denied that he was a motor vehicle trader at the time he sold the vehicle to the purchaser and claimed that the Tribunal did not have jurisdiction to hear the purchaser's application.

The Tribunal found, after hearing how the vehicle came to be imported into New Zealand and that the New Zealand Customs Service were misled as to the identity of the importer, that Mr Chand had imported a number of vehicles from Australia. It also heard that Mr Chand had sold a number of vehicles in New Zealand during a specified 12 month period and therefore found Mr Chand was to be treated as a motor vehicle trader for the purposes of s 8(1) (b) and (c) of the Motor Vehicle Sales Act.

The purchaser gave evidence that the vehicle was showing rust and electrical faults. The Tribunal decided that the vehicle did not comply with the guarantee of acceptable quality at the time of sale because it was water damaged.

The Tribunal also decided that Mr Chand had engaged in misleading conduct and misrepresented the vehicle to the purchaser by stating the vehicle had no accident record when he knew it had been written-off and by failing to disclose that information to the purchaser.

The Tribunal declared the contract for the sale of the vehicle to be void *ab initio* and ordered Mr Chand to refund the full purchase price to the purchaser and to uplift the vehicle from the purchaser.

(b) Buying Sight Unseen and then accepting delivery at night of a modified, uncomplied, 20 year old car

In previous reports the Tribunal has drawn attention to the risk which purchasers run in buying vehicles sight unseen from motor vehicle traders. The Auckland Tribunal hears at least one application most weeks involving purchasers who buy vehicles sight unseen, often by auction on Trade Me, or on the basis of the trader's salesman's description of the vehicle given over the phone. Most frequently, over-trusting South Island buyers who fail to even have a third party do a pre-inspection report are the victims of Auckland traders.

However some buyers who could readily inspect a vehicle before agreeing to buy it fail to do so in the mistaken belief that they can safely buy sight unseen from a registered motor vehicle trader.

An application which the Tribunal heard in April 2016 illustrates the gullibility of some buyers and the risk of buying an uncomplied modified vehicle, sight unseen from a trader. In **Sanders v Good as Gold Motors Limited,** Mrs Sanders agreed to buy a 20 year old Japanese imported highly modified Nissan Skyline with 84,000kms on its odometer, sight unseen, for $19,500 from Good as Gold Motors Limited. The vehicle had not been complied following its importation from Japan and the purchaser said she had no experience of the risk and costs involved in obtaining compliance certification of an imported modified vehicle. The purchaser arranged a mortgage over her property to finance the purchase price. The purchaser and the trader did not complete a vehicle offer and sales agreement and the trader failed to provide the purchaser with a Consumer Information Notice. The purchaser did not even find out the name of the bank account into which she deposited the purchase price, as required by the trader's agent, a Mr Clough.

The purchaser arranged for the vehicle to be delivered to her on the evening of 24 October 2015. Mr Clough delivered the vehicle to the purchaser in Waipu where they met about 10pm that night. The vehicle had not been complied, was unregistered, unwarranted and should not have been driven on the road. The purchaser says that when Mr Clough delivered the vehicle to her it had dealer plates on it. There was a sticker on the vehicle's windscreen showing the matters that had to be done to obtain compliance. Mr Clough sent the purchaser the Japanese export certificate for the vehicle but he did not supply her with legible compliance documentation as he had promised.

The trader's director claimed, without any supporting evidence, that Mr Clough bought the vehicle himself and that he and not the trader had sold the vehicle to the purchaser. The Tribunal did not accept that argument and found, for a number of reasons, that the trader company was the seller of the vehicle.

The purchaser claimed that she was misled by the trader's "guess", included in its advertisement on Trade Me, that compliance would cost $1,000 to $2,000. On 6 November 2015, the purchaser took the vehicle to VINZ for a compliance inspection. VINZ supplied her with a long list of defects with the vehicle and at the hearing the purchaser's mechanic gave evidence that he had examined the vehicle and it was not suitable for road use in New Zealand. In his opinion it was unsafe in its present state and uneconomic to repair. He estimated it would cost $3500 to $4000 to remove the roll cage from the vehicle which would be unlikely to pass an engineer's certification because it had been constructed from a type of steel which was not acceptable for roll cages approved for New Zealand vehicles. The vehicle's floors needed to be repaired and a reconstructed roll cage certified and installed. The existing roll cage has been welded to the vehicle's chassis and the chassis has been weakened by the heat of welding. As a result the vehicle's chassis would also need to be replaced. The vehicle had been imported damaged and the trader's

"guess" as to the cost of bringing the vehicle to compliance standard of $1,000 to $2,000 was greatly understated and hence misleading. The Tribunal found the vehicle was uneconomic to repair.

The Tribunal noted:

> *"The purchaser, in buying this highly modified, imported, ten year old performance vehicle, sight unseen and uninspected, knowing it had not passed compliance certification and was thus unwarranted, and then agreeing to accept delivery of it in a poorly lit provincial town at night, displayed deplorable judgment and a lack of any commercial common sense. Nevertheless she was entitled to expect an honest and truthful description of the vehicle and the trader, by giving an estimate of the cost of compliance, was bound to do that honestly and accurately"*

The Tribunal considered the appropriate remedy was to declare the contract for the purchase of the vehicle void, and the trader was ordered to refund the purchaser with the purchase price of $19,500 and when it had done so to collect the vehicle from the purchaser.

(c) Recall of motorcycles by supplier for service initiative work did not entitle buyers to reject otherwise faultless motorcycles

The Tribunal heard two almost identical applications from buyers of a particular model of Yamaha motorcycle in **Collier v Northern Accessories T/A Motorcycle Central** and **Higgins v Bayride Motorcycles**. The buyers, both of whom had bought their bikes new, received a recall notice from Yamaha NZ Ltd to have their bikes' transmission gear cluster assembly replaced free of charge as part of a Yamaha service initiative. Both buyers then purported to reject their motorcycles on the grounds, first, that the replacement of the gear cluster assembly might be done improperly by the dealer and result in subsequent damage to the motorcycle or injury to the rider. Second, each of the buyers, whilst acknowledging that there were no faults present in their motorcycles, also claimed that the work involved was substantial and that the act of recalling the motorcycles to have the gear assembly replaced amounted to an admission by Yamaha that the transmissions were faulty. The Tribunal was not persuaded on either ground and dismissed both applications.

(d) Undiagnosed electrical problem in Ford Focus results in full refund

In November 2015, the Tribunal heard an application involving a Ford Focus with an undiagnosed electrical problem causing the vehicle to go into limp mode with a severe loss of power: **Pittman v MS Motors (1998) Ltd**. The purchasers had given the trader several opportunities to fix the problem, but it had been unable to do so and, despite much diagnostic effort, was unsure what was causing the vehicle to behave in this way. The

vehicle was near-new when it was sold to Mr and Mrs Pittman, and it was still under factory warranty at the time of the Tribunal hearing.

Mrs Pittman was very concerned for her safety when, on 8 June 2015, she was unable to accelerate up to speed on State Highway 6 near Atawhai. A logging truck was bearing down on the vehicle, sounding its horn and having to brake to avoid a crash. Shortly after that incident, Mr and Mrs Pittman rejected the vehicle. The Tribunal upheld Mr and Mrs Pittman's rejection on the basis that the trader had not succeeded in remedying the failure within a reasonable time. The Tribunal ordered a full refund of the purchase price.

In previous annual reports, the Tribunal has recommended an amendment to section 23 of the Consumer Guarantees Act to allow discretionary reduction of the amount awarded to a consumer who has rejected goods, to reflect depreciation of the goods commensurate with the purchaser's use prior to rejection. The Pittman case may have provided a suitable opportunity for the use of such a discretion.

4. Recommendation for amendment to the Consumer Guarantees Act

In 2014, the contracting-out provisions in section 43 of the Consumer Guarantees Act were amended to bring them into line with new contracting-out provisions in the Fair Trading Act. We have observed that many, if not most, traders seem unaware that the law has changed and references in vehicle offer and sale agreements to the former "for the purposes of a business" test remain common. The new section 43 is very intricate and uses the term "in trade" in different ways that are not easy to reconcile, as was noted by Cynthia Hawes in "Contracting Out of Consumer Guarantees" (2015) NZBLQ 157. Associate Professor Hawes concluded that "the new contracting out regime in the Act may lack clarity in its scope and application [and] its introduction may be of doubtful value". We recommend that further attention be given to section 43 to review whether it is operating as intended.

C H Cornwell J S McHerron
26 September 2016