



ANNUAL REPORT

MOTOR VEHICLE DISPUTES TRIBUNAL RŌPŪ TAKE TAUTOHENGA Ā-WAKA

For the 12 months ended 30 June 2022

Presented to the Minister of Commerce and Consumer Affairs

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL

1 July 2021 to 30 June 2022

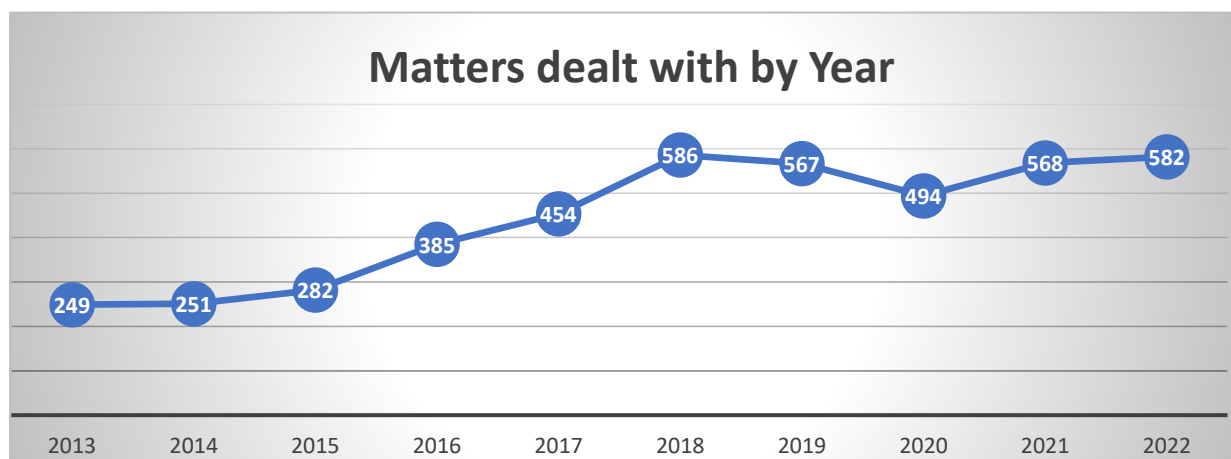
Dear Minister

Pursuant to section 87 of the Motor Vehicle Sales Act 2003 (the MVS Act) we are pleased to submit the following Annual Report. In this Annual Report we:

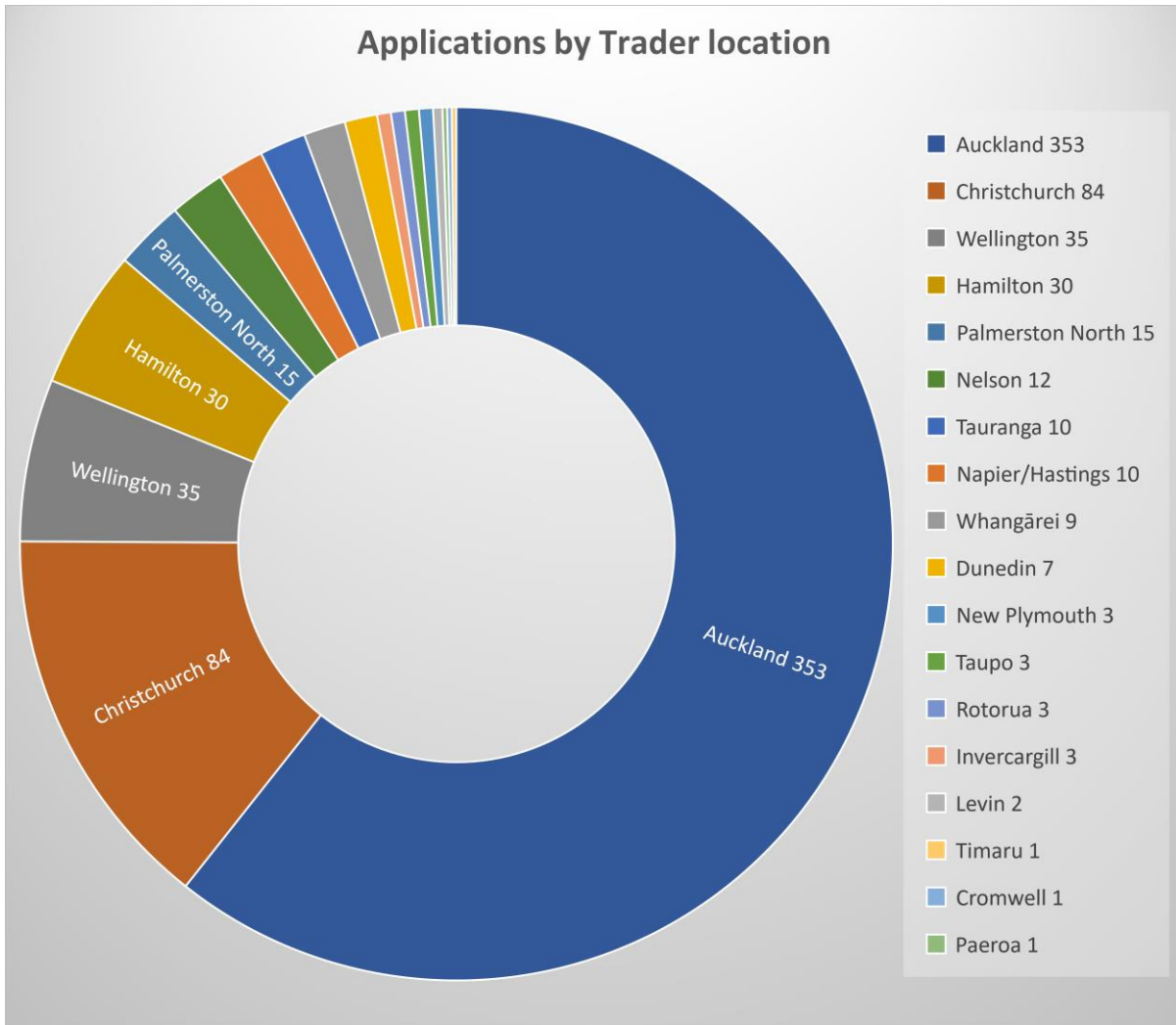
1. Summarise the applications the Motor Vehicle Disputes Tribunal has dealt with during the year.
2. Explain how those applications were resolved.
3. Highlight changes in Tribunal membership.
4. Detail cases which, in our opinion, require special mention.
5. Highlight the Tribunal's continued use of audio-visual technology.
6. Make recommendations for legislative amendments.

1. Summary of applications dealt with

The Tribunal handled a total of 582 matters this year – 490 new applications and 92 matters which were carried over from the 2020/2021 reporting year. The number of matters handled by the Tribunal is consistent with the increase in the Tribunal's workload in the last 10 years, with applications handled by the Tribunal more than doubling over that time, as shown in the table below.



The applications handled came from throughout the country. As shown in the chart below, the majority involved traders based in Auckland (353) Christchurch (84), Wellington (35) and Hamilton (30). The remainder of the applications (80) involved traders based in 14 other locations.



2. Resolution of applications during the year

The Tribunal closed 469 matters in 2021-2022, 195 or 41.6% were resolved (by settlement, withdrawal or consent orders recording an agreement reached by the parties) without the Tribunal being required to determine the claim. This reflects the Tribunal's aim to encourage the parties to resolve their disputes in a timely and cost-effective way. This includes requiring the motor vehicle trader to discuss the application with the purchaser and make a written report to the Tribunal on the outcome of these discussions.

The Tribunal heard 318 applications, with many of those requiring more than one hearing to resolve all issues. Where a hearing is required, the Tribunal aims to have the matter heard and a decision issued within three months of the application being filed. In 2021-2022, 66% of all matters were resolved within three months of the date of filing, with 98% of all matters resolved within six months. A total of 113 claims remained outstanding at the end of the year.

3. Changes in membership of the Tribunal

Two new part-time adjudicators were appointed to the Tribunal in 2022. They are Deirdre Watson, based in Auckland and David Jackson, based in Christchurch. Their appointments bring the total number of adjudicators to four, giving the Tribunal added capacity to manage its increasing workload.

We also acknowledge with sadness the death of Ross Dixon, in February 2022. Ross made an outstanding contribution to the Tribunal's work as an assessor based in Christchurch since 2015, and he is greatly missed.

4. Cases that require special mention

Motor vehicle traders purporting to sell vehicles on behalf of another person

The Tribunal continues to hear claims where a person who meets the definition of a motor vehicle trader in sections 7 to 9 of the MVS Act attempts to avoid liability for any issues that may arise by claiming that the vehicle was sold on behalf of another person.

Latu v Forward Motion Ltd involved the sale of a 2005 Nissan Murano, which developed a starting fault within two days of purchase. As part of its defence, Forward Motion Ltd, which is a registered motor vehicle trader, claimed that it had no liability for the vehicle's defects as it is a "car market operator" and sold the vehicle on behalf of an unidentified third party.

The Tribunal found that Forward Motion Ltd's conduct in selling the vehicle to Ms Latu went well beyond that of a car market operator (a provider of premises or facilities for the sale of motor vehicles by others – e.g. a car fair or the Trade Me website) and was more consistent with it acting as a motor vehicle trader. The Tribunal also found that even if Forward Motion sold the vehicle on behalf of a third person (of which there was no evidence) it still has liability under the Consumer Guarantees Act 1993 (CGA), as the definition of "supplier" under that Act extends to those who act as an agent for a private seller.

Ms Latu's application to reject the vehicle was declined, but the Tribunal held she was entitled to have the starting fault and other minor issues rectified by Forward Motion Ltd.

In **Li v What Next Cars Ltd**, Mr Li purchased a 2011 Audi A4 Avant for \$13,350 in February 2022. Mr Li initially thought that he had purchased the vehicle from Nikhil Kher, who had advertised the vehicle on his personal Trade Me account and advised Mr Li that he was selling the vehicle on behalf of a friend. Mr Li signed a purchase agreement that named the vehicle's previous owner (Ms C) as the seller of the vehicle. Mr Kher signed the purchase agreement on behalf of Ms C.

Mr Li quickly discovered that the vehicle had a pre-existing transmission fault, with an estimated repair cost of between \$6,000 and \$10,000. Mr Li then conducted research and discovered that Mr Kher is a director of What Next Cars Ltd and that the vehicle had, at various times, appeared on What Next Cars' website and social media pages. Mr Li therefore alleged that What Next Cars was the seller of the vehicle.

Mr Kher claimed that What Next Cars did not sell the vehicle. He gave evidence that a customer (Ms C) had purchased the vehicle from What Next Cars in August 2021 for \$16,300 but then contacted him a few months later saying that she would like What Next Cars to sell the vehicle on her behalf because she had experienced financial difficulties and needed a larger vehicle. Mr Kher says that Ms C could not afford to pay What Next Cars' usual commission, so he agreed to sell the vehicle for Ms C as a "one-off". Mr Kher says that he then listed the vehicle on his Trade Me account and sold the vehicle to Mr Li.

The Tribunal did not accept Mr Kher's evidence that he sold the vehicle on Ms C's behalf. Instead, the evidence showed that the vehicle had appeared on What Next Cars' website and social media and that Ms C had received a full refund of the \$16,300 in October 2021 (which was inconsistent with Mr Kher's evidence that he only transferred the proceeds of sale to Ms C after the vehicle was sold to Mr Li). The Tribunal therefore considered that it was much more likely that What Next Cars accepted the return of the vehicle from Ms C (possibly due to an existing defect), refunded the entire purchase price to Ms C and then on sold the vehicle to Mr Li using Mr Kher's personal Trade Me account.

The Tribunal upheld Mr Li's rejection of the vehicle, and ordered What Next Cars to pay \$13,350 to Mr Li.

We do not speculate as to why some motor vehicle traders attempt to avoid their consumer law obligations by purporting to sell vehicles on behalf of another person. However, this does appear to be an area where further education about a trader's responsibilities for vehicles sold on behalf may be beneficial for both consumers and motor vehicle traders.

Illegitimate attempts to contract out of or impose arbitrary time limits upon the protections afforded to consumers under the Consumer Guarantees Act

The Tribunal continues to see many cases where the supplier attempts to avoid their obligations under the CGA by claiming that the Act does not apply because the vehicle was sold to a business and/or used for business purposes. This conduct by traders can influence customers to purchase unnecessary insurance add-ons and deters customers from returning to the trader when things go wrong with their vehicles.

For example, in **Kritika Enterprises Ltd v 2 Cheap Cars Ltd**, a 2012 Toyota Aqua developed a problem with its hybrid battery about two months after Kritika Enterprises purchased it. The battery needed to be replaced. 2 Cheap Cars refused to assist with the cost of the repair because the vehicle had been purchased in the name of a company and for business use. 2 Cheap Cars argued that Kritika Enterprises' director had agreed the car was purchased for business purposes and that the CGA would not apply. The Tribunal determined that it was not fair and reasonable for Kritika Enterprises to be bound by the agreement to contract out of the CGA, as it had not been able to negotiate the application of the exclusion. Rather, it was presented on a take it or leave it basis. The Tribunal noted that 2 Cheap Cars wrongly considered it was entitled to insist that a company purchasing a car from it was required to agree to contract out of the CGA. 2 Cheap Cars' template exclusion clauses did not account for the fact that, since it was amended in 2014, section 43 of the CGA no longer allows a trader to impose blanket exclusion where a purchaser is acquiring a vehicle for a business purpose. The Tribunal ordered 2 Cheap Cars to replace the battery at its expense and referred the decision to the

Commerce Commission to consider whether 2 Cheap Cars had committed an offence under section 13(i) of the Fair Trading Act 1986.

The Tribunal also sees a significant number of cases where the supplier asserts that the statutory guarantees imposed by the CGA are time limited. The Tribunal sees common reference in supplier correspondence with purchasers or in submissions to the Tribunal that any of one – three – six – or twelve month limitations apply to the statutory guarantees. It would appear that in most instances this is an honest but mistaken belief on the part of the suppliers involved, but the CGA does not impose a time limit on its guarantees at all and directs their assessment and application by reference to what is reasonable in the circumstances of the case. The genesis of the mistaken belief amongst suppliers appears to stem from industry “best practice” guidelines (on how to respond to claims from consumers) or similar advice in industry focussed literature. The problem is that the advice is wrong and ultimately confuses or misleads consumers as to their rights under the CGA.

Purchase of vehicles online

The Tribunal continues to hear cases involving the online purchase of vehicles, sight unseen. Often, these purchases involve a trader based in Auckland and purchasers based elsewhere in New Zealand. Purchasers will be given access to any photographs and other information about the vehicle but unless they choose to do a pre-purchase inspection, or visit Auckland to inspect the vehicle themselves, they are essentially buying the vehicle sight unseen. The Covid pandemic has no doubt contributed to the prevalence of this form of sale method but it is expected that with online purchases being generally a more acceptable manner of purchasing goods, the Tribunal will continue to see such instances.

For example, in **Henare v Autoist Ltd**, Mr Henare acquired a 2008 Jaguar vehicle for \$27,990, sight unseen, after initially seeing it advertised for sale on Trade Me. He had a number of exchanges with the trader (who tried to persuade Mr Henare to have the vehicle inspected) before agreeing to buy the vehicle. The vehicle was subsequently proven to suffer from a number of faults. These included the presence of bearing material in the oil filter, the front tyres continuously rubbing on the suspension, the faulty condition of the space saver tyre, lack of a wheel brace, a broken sway bar link, leaking differential seals, leaking transmission, a dented sump and the need for a wheel alignment. Cumulatively, the faults amounted to a failure of a substantial character. It was found that Mr Henare was entitled to reject the vehicle.

Another example is **Valle v Youth Garage Ltd**. Mr Valle purchased a 2012 Audi S3 for \$19,974 without inspecting the vehicle in person. The vehicle was found to have faults with its shock absorbers, suspension, brake pads and brake rotors and it needed a wheel alignment and balancing. These failures were not a failure of a substantial character, but the Tribunal ordered the trader to remedy them as they amounted to a failure to comply with the guarantee of acceptable quality.

5. The Tribunal's use of audio-visual technology

The Tribunal continues to make increasing use of audio-visual technology in recent years, with 89% of hearings held using audio-visual technology such as Microsoft Teams, Audio Visual Links (from Courthouse to Courthouse) or a Virtual Meeting Room (VMR) for a party, witness and/or a Tribunal member.

Audio-visual hearings are now an established hearing method in the Tribunal, and we anticipate that a significant proportion of all future hearings will be conducted in this way.

6. Recommendation for legislative amendments

Amendment of section 88 of MVS Act to mirror adjudicator reappointment provisions

Under s 84(2) of the MVS Act, an adjudicator whose term of office has expired continues in office until reappointment or replacement (or being told they will not be reappointed). This provision ensures that the Tribunal's work can continue uninterrupted while (re)appointment processes continue in the background.

However, the assessors, who are critical members of the Tribunal, are subject to different re-appointment/replacement rules. Under s 88(5) of the MVS Act, once an assessor's term of office expires, they can only complete existing proceedings that have been partly or wholly heard. That assessor cannot hear new matters. In most circumstances, the Tribunal cannot sit without an assessor, meaning the Tribunal's work may be interrupted pending the reappointment or replacement of that assessor (which can take some time).

We therefore recommend that s 88 of the MVS Act is amended to add a provision like s 84(2), to enable assessors to continue to hear matters until they are reappointed, replaced or advised that they are not to be reappointed. This will provide consistency in the rules applying to Tribunal members and will also ensure continuity if there is any unforeseen delay in reappointing or replacing an assessor. Implementing this change also provides an opportunity to remove the remaining gendered language in the MVS Act.

B R Carter
Adjudicators

J S McHerron

D Watson

D M Jackson

29 September 2022