

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL AUCKLAND

Period 1 July 2008 to 30 June 2009

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.

1. Summary of applications dealt with Nationally

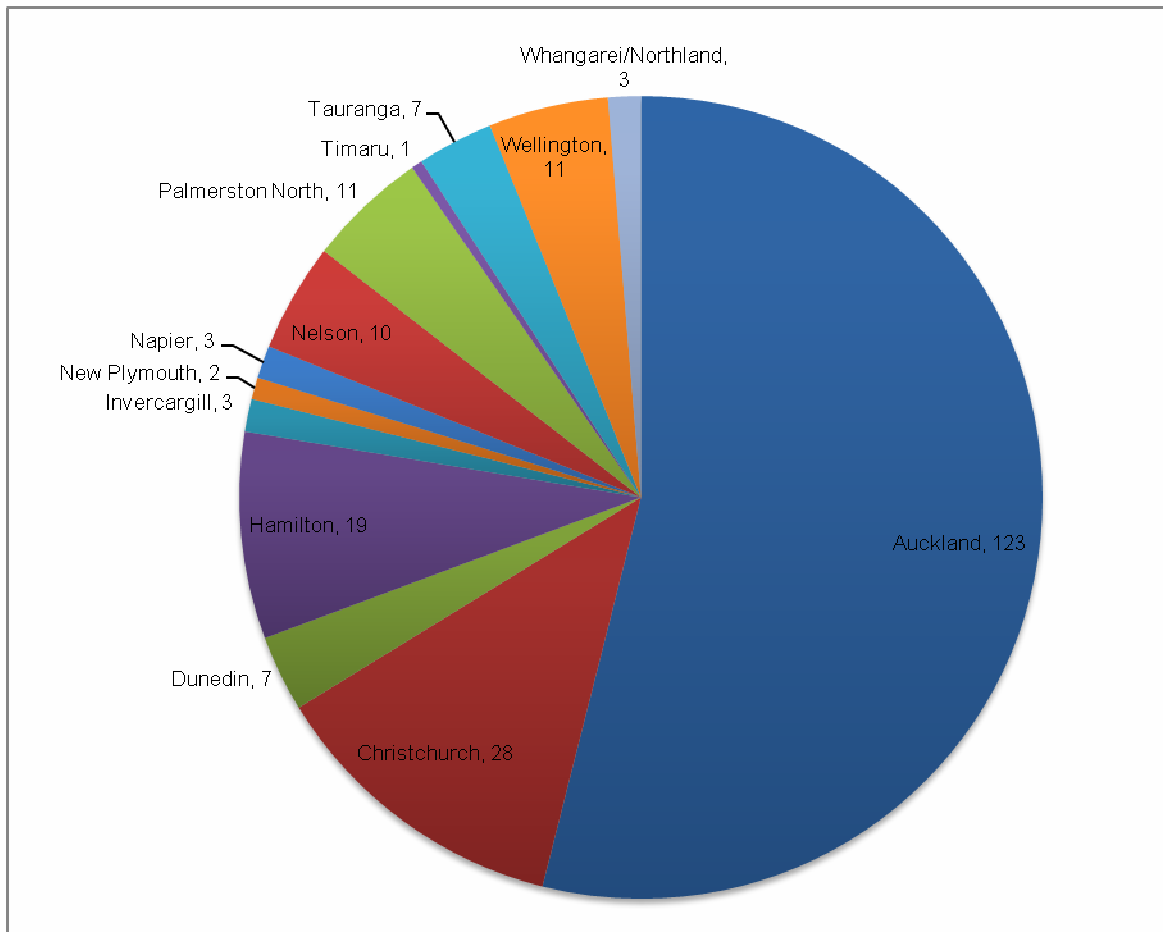
		Applications (Y/E 30/06/2009)	Applications (Y/E 30/06/08)
<u>Total number of disputes originating from</u>			
• Auckland area (New Plymouth north)	158		
• Wellington area (Palmerston North south)	70	228	283
<u>Disputes carried over from previous year</u>			
• Auckland Adjudicator	17		
• Wellington Adjudicator	15	**32	39
<small>** (NB – not 30 as reported previously)</small>			
Total		260	322
<u>Disputes settled or withdrawn</u>			
		68	72
<u>Disputes heard</u> (including disputes carried over from previous year)			
• Auckland Adjudicator	132		
• Wellington Adjudicator	39	171	227
<u>Disputes unheard as at 30 June</u>			
• Auckland Adjudicator	15		
• Wellington Adjudicator	*6	21	23
<small>*Includes 2 reserved decisions</small>			
Total		260	322
Total outstanding cases as at 30 June 2009 (unheard + reserved decisions)		21	30

2. C H Cornwell – Adjudicator

	Year ending 30/06/2009		Year ending 30/06/2008	
Number of disputes found for Trader	45	34.09%	56	39.4%
Number of disputes found for Purchaser	81	61.36%	85	59.9%
Cases dismissed/ transferred for want of jurisdiction	6	4.55%	1	0.7%
Total Heard and Decisions Delivered	<u>132</u>	100%	<u>142</u>	100%

Of the applications received and heard 71% were decided on the basis of the Consumer Guarantees Act and 17% under the Fair Trading Act. In 11% of the applications the Tribunal found that both the Consumer Guarantees Act and the Fair Trading Act had been breached. Only 1% involved the Sale of Goods Act.

2. Location of Disputes



Details of Cases Requiring Special Mention

Of the 132 applications I heard during the year there are several cases which I consider require special mention.

(a) Sham “competitive tender” sales- a continuing trend

In my 2008 Report to the then Minister I referred to a dispute in which a Taupo trader had attempted to avoid its responsibilities under the Consumer Guarantees Act by having the purchaser sign a “tender document” which the Tribunal found misled the purchaser as to his rights under the Consumer Guarantees Act. I gave the case as an example of dressing up a normal sale as a “competitive tender” and advised that this was not an uncommon practise.

I regret to report that the practice is still being used by other traders to deceive purchasers as to their rights under the Consumer Guarantees Act. It appears to have become a business model adopted by some South Auckland based traders.

In an application heard by the Tribunal in July 2008 (MVD 135/08) a Penrose trader sold a 1996 Subaru Legacy GT to a purchaser for \$4,390 after advertising it on TradeMe for \$4,900. The purchaser saw the advertisement, visited the trader’s yard and offered to buy it subject to a satisfactory mechanical inspection. The trader then had him pay a small deposit and complete a form headed “Tender Form” with his personal particulars and sign at the foot of the form a clause that read:

I/We confirm that we are aware this vehicle is being sold by tender and is accepted in an “as-is, where-is” condition and as such carries no warranty. I also confirm that I have read and understand [the trader’s] Rules of Auction Tender.”

The trader then recommended that the purchaser obtain his mechanical inspection from an inspection firm nominated by the trader because the inspection could be done that day. The inspector’s report disclosed a lengthy list of faults that indicated the vehicle was very worn and had been poorly maintained. Remarkably the purchaser still decided to purchase the vehicle and paid the trader the balance of the purchase price.

At the time he paid the trader the balance of the purchase price the trader asked him to sign a form headed “[Traders] Tenders Rules of Auction tender” which contained some 16 clauses amongst which was the following:

“Note: The consumer guarantees act 1993 (the act) does not apply to any sale by auction or competitive tender. Therefore, none of the warranties set out in the Act are implied into any sale by auction or competitive tender. All vehicles sold by [Trader] are sold by competitive tender or auction. Therefore none of the warranties set out in the act apply to any vehicle sold by [Trader].”

When the vehicle failed some 4 days after he had purchased it the purchaser telephoned the trader who told him “*we are a tender centre and the Consumer Guarantees Act does not apply to cars we sell.*”

At the hearing the trader’s Sales Manager claimed the trader had received other online offers for the vehicle but had not received any offers for it on the day it was sold to the purchaser.

The Tribunal found that the vehicle had not been sold by competitive tender because there were none of the indicia of a competitive tender present. The Tribunal found the trader’s Tender Form and the Rules of Auction Tender were both sham documents intended to mislead and deceive potential purchasers into believing they had forfeited their rights under the Consumer Guarantees Act. The trader was ordered to pay the purchaser’s repair costs.

(b) Sales claimed to have been made “ by auction”

The Tribunal has had several applications lodged by purchasers of vehicles where the trader has claimed that the sale was made by auction but a review of the facts by the Tribunal has shown that the sale of the vehicle was clearly made some time after the vehicle failed to sell at auction.

An example is MVD 254/08 where the purchaser of a 1997 VW Golf sold by a Tauranga trader bought the vehicle by negotiation the day after it failed to sell at auction. The trader provided the purchaser with a “25 hour” warranty which purported to limit the purchaser’s rights against the trader to claims made within 25 hours of the time of purchase and stipulated the vehicle must not have been driven for more than 60 kilometres. The purchaser had problems with the vehicle on the day she bought it and soon afterwards found the vehicle’s radiator was blocked and required removal and cleaning. The trader was not prepared to assist the purchaser. Within 2 weeks of the date of sale it overheated and blew its head gasket. The purchaser and her father went to discuss the repairs required with the trader but once again the trader refused to accept any responsibility for the vehicle despite the purchaser having found an invoice in the vehicle’s glove box that the vehicle had overheated and leaked water whilst in the ownership of the previous owner.

The Tribunal found first that the vehicle had not been sold by auction and that the Consumer Guarantees Act applied. Second that the vehicle was not of acceptable quality because it was not as durable as a reasonable purchaser of such a vehicle would regard as acceptable. The Tribunal also found the trader’s conduct in attempting to exclude the purchaser’s rights under the Consumer Guarantees Act with the 25 hour warranty had breached The Fair Trading Act. The trader was ordered to pay the purchaser’s repair costs of \$2,351.96.

(c) Internet sales and extravagant claims by traders

The Tribunal has noticed that many traders advertise their vehicles on TradeMe, and, regrettably as reported in my 2008 Annual Report, some purchasers buy vehicles from internet traders sight unseen. Some traders make extravagant claims in the text of their TradeMe advertisements that the Tribunal has found to be misleading. An example which illustrates this is MVD6/09 which involved a Palmerston North trader who sold a 1996 Nissan Silvia for \$4,721 by means of an on-line auction to a young Tauranga purchaser. The trader claimed in its TradeMe advertisement that -

“car is hard to fault and only thing I see missing is a little bit of plastic between steering wheel and dash.”

The trader also claimed the vehicle had just had a full service and was in very good condition and *“runs smooth no problems with gearbox or clutch”*.

The purchaser, relying on the accuracy and truth of those statements, bought the vehicle by internet auction sight unseen. Within 2 days of receiving the vehicle the purchaser found the clutch was slipping and took it to his mechanic who also found that the vehicle had not been serviced because its oil was dirty and the oil filter was old, the brake fluid level was low, the shock absorbers were defective, and in the mechanic’s opinion the vehicle should not have been issued with a warrant of fitness. The vehicle was immediately taken for a warrant of fitness which it failed due to defects in the front assembly and worn shock absorbers.

The Tribunal found that the vehicle had numerous faults and the trader had misrepresented the vehicle’s quality. The trader’s claim that *“car is hard to fault”* went beyond mere puff; it was a statement intended to convey to purchasers both astute and naïve that the car had no faults. The Tribunal ordered the trader to pay a total of \$3,011 to the purchaser covering his repair costs, inspection fees, and the purchaser’s costs in travelling from Tauranga to Palmerston North to attend the Tribunal’s hearing.

5. Recommendation for Amendment to the Act

I recommend that a change be made to section 94 of the Act. This section provides for a process by which, the Tribunal must, for the purpose of protecting the public, direct the Chief Executive of the Ministry of Justice to publish a notice in the *Gazette* if the Tribunal finds against a motor vehicle trader.

Given the large number of people who use the internet to search for vehicles it seems appropriate that a far more effective way of protecting the public would be for such a notice to be published and maintained for a period of, say, 3 years from the date of the decision as part of a register of delinquent traders on a website kept for that purpose by the Ministry of Consumer Affairs.

The Tribunal has authority under section 94(4) of the Act to direct the Chief Executive of the Ministry of Justice to give the news media a copy of a Tribunal decision but this appears to be less likely to protect the public than a register of delinquent traders.

C H Cornwell
Adjudicator
Auckland Motor Vehicle Disputes Tribunal

21 August 2009