



Motor Vehicle Disputes Tribunal Rōpū Take Tautohenga ā-Waka

ANNUAL REPORT

1 July 2018 to 30 June 2019

Pursuant to section 87 of the Motor Vehicle Sales Act 2003

B R Carter and J S McHerron
Adjudicators

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL

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Dear Minister

Pursuant to section 87 of the Motor Vehicle Sales Act 2003 (the 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. Detail cases which, in our opinion, require special mention.
4. Highlight the ongoing co-operation between the Tribunal and other agencies that have responsibilities in the motor vehicle and consumer protection areas.
5. Make recommendations regarding amendments to the Act.

1. Summary of applications dealt with

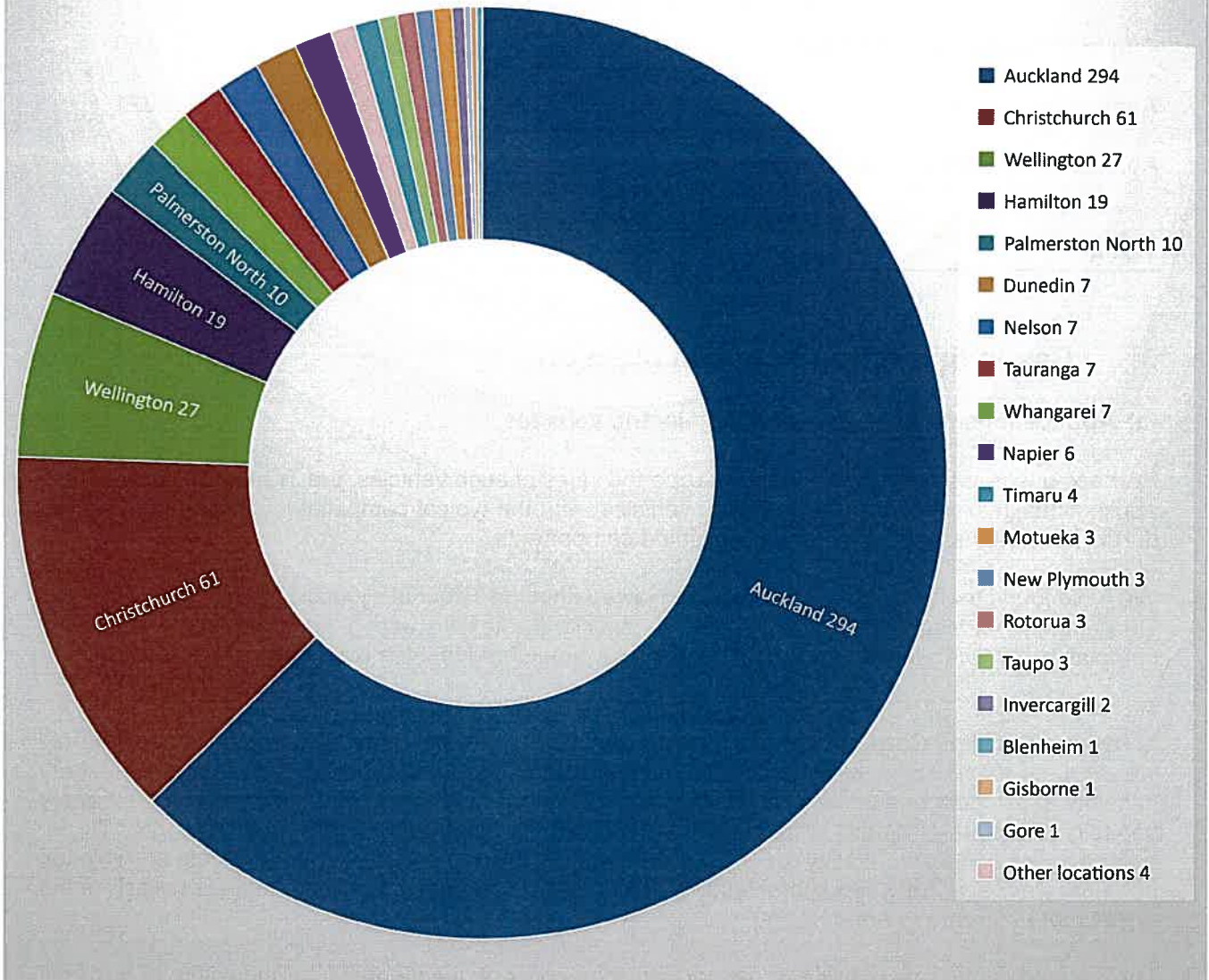
The Tribunal dealt with a total of 567 matters this year, consisting of 470 new applications and 97 matters carried over from 2017-2018. These numbers are consistent with last year's volumes and remain significantly higher than earlier years.

	Y/E 30/6/17	Y/E 30/6/18	Y/E 30/6/19
Total number of applications filed during the year	399	487	470
Applications carried over from previous year	60	99	97
TOTAL	459	586	567

Those new applications came from throughout the country. As shown in the chart below, the majority involved traders based in Auckland (294), Christchurch (61), Wellington (27) and Hamilton (19). The remainder of the matters heard by the Tribunal were spread evenly throughout the country.

Ordinarily the Tribunal hears applications in the District Court or Tribunal Centre closest to the Trader's place of business, although the Tribunal continues to make extensive use of video-conferencing facilities, with 164 of the matters heard this year involving the use of video-conferencing facilities. This technology enables an affected party or witness to attend from a venue of their convenience, which makes the Tribunal a more accessible forum for the parties.

New applications by Trader location



2. Resolution of applications during the year

Of the 567 matters dealt with by the Tribunal in 2018-2019, 160 (or 28.22%) were settled or withdrawn prior to a hearing. This reflects the Tribunal's aim to encourage the parties to resolve their disputes in a timely and cost-effective way, including by requiring the motor vehicle trader to discuss the application with the purchaser and make a written report to the Tribunal on the outcome of the settlement discussions.

A total of 321 applications proceeded to a hearing. 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 2018-2019, 75.44% of all matters were resolved within three months of the date of filing the application, with 98.06% of all matters resolved within six months. Although the three-month disposal rate is lower than we would like, it is reflective of the complexity of a number of the cases we heard this year, many of which required more than one hearing to resolve.

	Y/E 30/6/17	Y/E 30/6/18	Y/E 30/6/19
Applications settled or withdrawn	123	187	160
Applications heard	237	302	321
Applications unheard as at 30 June 2019	99	97	86
TOTAL	459	586	567

3. Cases that require special mention

(a) Applications involving hybrid and electric vehicles

Perhaps unsurprisingly, given the rise in reported sales of such vehicles, the Tribunal is seeing more applications involving hybrid and electric vehicles, with the typical complaint involving the quality or durability of the vehicle's batteries and related components.

We have found that the consumer protection laws within the Tribunal's jurisdiction (eg the Consumer Guarantees Act and Fair Trading Act) are sufficiently flexible and fit for purpose to deal with complaints involving this emerging technology, as highlighted in the cases below.

In **Khoo v Autolink Cars Ltd**, the purchaser bought a recently imported fully electric seven year old Nissan Leaf for \$12,500. Mr Khoo was attracted to this vehicle because of the state of its battery capacity and battery health. Mr Khoo was then surprised by the rapid depletion of the vehicle's battery capacity and state of health, with the battery capacity reducing from its pre-sale reading of 78 per cent of a new battery's capacity to 69 per cent over a 10 month period. Although the rate of depletion has now stabilised, Mr Khoo submitted that this rate of depletion was unacceptable in breach of the Consumer Guarantees Act.

The Tribunal found that the rate of battery depletion was not unacceptable, or indicative of any fault with the vehicle. Instead, the Tribunal considered it likely that the rate of depletion was consistent with the battery degradation that can occur when an electric vehicle is imported into New Zealand from Japan. The Tribunal found that batteries can deplete substantially when a vehicle is imported into New Zealand from Japan because of factors such as the time taken to import the vehicle into New Zealand, changes in weather conditions and temperature and changes in the vehicle owner's driving and charging habits.

In **Vaioleti v Coogo Auto Ltd**, the purchaser bought an 11 year old Honda Civic Hybrid for \$6,800. The vehicle is a gasoline/electric hybrid, which has integrated motor assist (IMA) technology that uses an electric motor mounted between the internal combustion engine and transmission to act as a starter motor, engine balancer and to recharge the vehicle's nickel-metal hydride battery (or IMA battery). The vehicle also has a DC/DC converter, which converts the voltage level from the IMA battery to a voltage level that the vehicle's 12-volt battery can use. The IMA battery and DC/DC converter are essential to the operation of this vehicle.

Within four months of purchase, the vehicle developed faults with its IMA battery and DC/DC converter, which required replacement at a cost exceeding \$3,500. The trader failed to perform the required repairs within a reasonable time and the Tribunal upheld Ms Vairoletti's claim to recover the cost of the repairs.

This case highlights a point that is common in the cases we have heard regarding hybrid and electric vehicles. We commonly hear applicants express surprise at the cost of replacing the vehicle's batteries and related components, and it seems that many purchasers of hybrid and electric vehicles are not aware that these components will degrade over time and require expensive replacement.

That fact was evident in two other cases heard by the Tribunal last year, in which the vehicles required expensive repairs, but the applications were dismissed because the faults occurred too long after purchase for the protections in the Consumer Guarantees Act to continue to apply.

In **Singh v Mohin Abraham t/a August Cars NZ**, which also involved an 11 year old Honda Civic Hybrid, the purchaser sought orders requiring the trader to replace the vehicle's depleted IMA battery, at an approximate cost of \$3,300. The vehicle's depleted IMA battery first became apparent in February 2018, eight months after purchase and by which time the purchaser had travelled approximately 11,000 km in the vehicle. The Tribunal considered that the fault arose too long after purchase and the purchaser had travelled too far in the vehicle for the protections in the Act to continue to apply.

In **House & Home Ltd v Moss-car Services Ltd**, the purchaser bought a three year old Toyota Prius for \$25,000 in June 2017. The vehicle is a plug-in hybrid and its battery is charged by a combination of mains power, which is transferred to the vehicle using a charging unit, and power generated by the internal combustion engine. About one year after purchase, by which time the purchaser had driven approximately 21,000 km in the vehicle, the charging unit failed and required replacement at a cost exceeding \$4,000. The Tribunal recognised that the cost of the required repair is relevant in determining whether the vehicle has been of acceptable quality. However, taking account of the purchase price, the age and mileage of the vehicle at the time of sale, the length of time after purchase before the fault arose and the distance travelled in that time, the Tribunal considered that the vehicle had been sufficiently durable.

In our view, although the existing laws are fit for purpose, the cases discussed above suggest the need for better consumer information about the risks and ongoing costs of owning an electric or hybrid vehicle, particularly regarding the expense of replacing batteries and related components.

(b) Contracting out of the Consumer Guarantees Act

In recent Annual Reports, the Tribunal commented on cases where traders have improperly tried to exclude the important consumer protections in the Consumer Guarantees Act. We have seen little sign of improvement and the Tribunal continues to regularly see instances where traders try to unlawfully constrain the protections in the Consumer Guarantees Act.

Attempts to exclude the Consumer Guarantees Act because the vehicle was sold on an "as is" basis

In **Cook v SGT Holdings Ltd**, the purchaser bought a 19 year old Jeep Cherokee with a pre-existing differential fault. The trader attempted to limit the application of the Consumer Guarantees Act by saying that the vehicle was "sold as is" and that the vehicle was not up to its "normal high standards so will be sold as traded" and that "repairs and maintenance are to be expected in its future". The Tribunal upheld the purchaser's claim and ordered the trader to rectify the differential fault within a reasonable time.

Attempts to put arbitrary time limits on the Consumer Guarantees Act protections

In **Police v Minami Motors Ltd**, the purchaser acquired an inexpensive 2007 Honda Fit in July 2018. Within two months of purchase, the vehicle developed a fault that caused it to shudder, misfire and then stall. The trader refused to rectify the fault (which breached the acceptable quality guarantee in s 6 of the Consumer Guarantees Act) because it claimed that the vehicle only came with with a “one month, 1500 km warranty”.

In **Magdalena v Mars Motors Ltd**, the trader sought to avoid its obligations under the Consumer Guarantees Act for defects with the vehicle’s brakes and drive belt that arose just over one month after purchase. The trader claimed that it had no responsibility for those faults as the mechanical warranty that came with the vehicle only covered mechanical issues such as engine and transmission faults that occur within 30 days of purchase.

In **Savage v Park N Sell Ltd**, the trader claimed that it had no obligations under the Consumer Guarantees Act by telling the purchaser that, “under the Consumer Guarantees Act you have 30 days from the date of sale 14/08/2018 to come back to me if the goods are not fit for purpose”.

These cases are symptomatic of an unfortunate and continuing misapprehension in some sectors of the used motor vehicle sales industry that the guarantees in the Consumer Guarantees Act apply only for a limited period of time (such as 30, 60 or 90 days). That is not the case because the guarantees in the Act apply for as long as is reasonable in the circumstances of each case, and they apply to all aspects of the vehicle.

In each of the cases discussed above, the Tribunal considered that the trader’s conduct was likely to breach s 13(i) of the Fair Trading Act 1986, which prohibits misleading representations about a consumer’s rights. The Tribunal therefore referred those matters to the Commerce Commission, which has jurisdiction to investigate conduct that may breach the Fair Trading Act.

The use of extended warranties to avoid Consumer Guarantees Act obligations

The Tribunal also continues to see many cases where traders sell expensive extended warranty agreements to consumers as optional extras, often on credit at interest rates exceeding 15% per annum. Then, if problems arise with the vehicle, purchasers are told they must seek assistance from the warranty company rather than from the trader under its Consumer Guarantees Act obligations.

In our last Annual Report, the Tribunal suggested that consideration ought to be given to further public education campaigns on consumers’ rights and traders’ obligations under the Consumer Guarantees Act. We repeat that recommendation and consider that consumers and traders would benefit greatly from more information about the Act and how it applies to the motor vehicle industry.

Attempts to argue that the vehicle was sold by a trader “on behalf” of someone else

Another common way in which traders mistakenly attempt to avoid their obligations under the Consumer Guarantees Act is by arguing that they are merely selling on behalf of a private seller. For example, in **Redmayne v Sell Your Car Ltd** the trader argued it was acting as a “car market operator” and selling the vehicle on behalf of a private seller. It also argued that the purchaser was bound by a special condition in the vehicle offer and sale agreement which said that the vehicle was “sold on behalf of a private person with no warranty”. However, the Tribunal found that Sell Your Car Ltd was in fact the supplier of the vehicle and was liable under the Consumer Guarantees Act. The car market operator exception in the Motor Vehicle Sales Act did not apply as there was no evidence of any transaction between Ms Redmayne and a private seller. Rather, Sell Your Car handled every aspect of the transaction. Even if it was acting as an agent of a private seller, it was still carrying on the business of motor vehicle trading in selling the car to Ms Redmayne.

(c) Non-disclosure by traders that vehicles are statutory write offs or imported as damaged

In our 2017 Annual report, we identified several cases in which unsuspecting buyers have discovered their vehicles had been written off in Australia, but that this has not been disclosed to them. We are still seeing cases where this information is not being disclosed, although in 2018-2019 there have been fewer than in previous years.

One example was **Dobbie v 0800 Best Deal Cars Ltd** in which the Tribunal found that the trader did not proactively disclose to the purchasers that the vehicle had been damaged by hail and was an Australian statutory write off. The trader argued that it had orally disclosed this information to the purchasers and that the information was contained in the Trade Me listing for the vehicle. However, the Tribunal preferred the purchasers' evidence that they did not see the Trade Me listing and were not told. The Tribunal awarded them \$5,000 damages under the Fair Trading Act to reflect the reduction in value of the vehicle because it was a statutory write off.

In **Whitcombe v A Grade Wholesales Ltd** the Tribunal upheld the purchaser's claim that the trader had failed to disclose that the vehicle was imported as a damaged vehicle. In fact, the trader had expressly represented that the vehicle was not imported as a damaged vehicle. Because of its imported as damaged status, Mr Whitcombe had difficulty selling the vehicle. The Tribunal ordered the trader to compensate him for his losses, in effect requiring the trader to buy the vehicle back from him at a fair market price.

(d) Vesting collateral credit agreements in trader

The Tribunal has power to vest the purchaser's rights and obligations under a vehicle loan in the trader if it upholds the purchaser's rejection of the vehicle under the Consumer Guarantees Act or declares the contract for sale to be void under the Fair Trading Act. We have observed that purchasers who are dependent on loans to buy vehicles, often at high-interest rates, are encouraged by traders, and sometimes even the finance companies themselves, to buy low quality, high-mileage, vehicles at high prices. A vesting order is an effective remedy and is used reasonably frequently by the Tribunal where the purchaser establishes grounds for rejection of the vehicle. For example, **Padgett v Turners Group NZ Ltd** and **McPhee v Taieri Motor Court Ltd**. An advantage of this remedy is that it immediately requires the trader to make arrangements with the finance company to settle the loan, leaving the purchaser with no ongoing payment obligations.

4. Co-operation with other agencies and outreach activities

We continue to participate in quarterly meetings with MBIE, the Commerce Commission, the Ministry of Transport and the New Zealand Transport Agency, where issues relevant to the motor vehicle industry are considered and discussed.

We also assisted MBIE in developing its motor vehicle content on the Consumer Protection website and have spoken about the Tribunal's work during meetings with the Citizens Advice Bureau and a Community Law Centre.

We regularly refer copies of our decisions to outside agencies such the Registrar of Motor Vehicle Traders, including for non-compliance with Tribunal orders or for trading without being registered. As a result, the Registrar has recently banned several traders from motor vehicle trading. We also refer some of our decisions to the Commerce Commission, where further consideration of enforcement action under the Fair Trading Act may be warranted and to Trade Me where potentially unlawful conduct is occurring on its website.

5. Recommendation for amendments to the Motor Vehicle Sales Act

Several amendments to the Motor Vehicle Sales Act were made by the Tribunal Powers and Procedures Legislation Act, which received Royal assent on 13 November 2018. Those amendments will assist the Tribunal to perform its functions in an orderly and efficient manner and in a way that achieves the purposes of the Act. Some of the amendments, including those relating to forms used in the Tribunal and summoning witnesses, are yet to come into force.

We have been working with Ministry of Justice officials to develop a new application form for the Tribunal. One further initiative to which we would like to encourage the Ministry to devote resources is the development of an online application process, as is available in other jurisdictions such as the Disputes Tribunal and the new Canterbury Earthquakes Insurance Tribunal.

In last year's Annual Report we recommended consideration be given to amending the Motor Vehicle Sales Act to require motor vehicle traders to satisfy the Registrar of Motor Vehicle Traders that they are aware of applicable legal obligations, including consumer protection laws such as the Consumer Guarantees and Fair Trading Acts. We suggested that this requirement, which could take effect as a condition of registration as a trader under the Act, could be satisfied by proving attendance at an approved training course, with perhaps a requirement for an annual "refresher" on renewal of a trader's registration. While many of the larger traders appear to train their staff on their basic legal obligations, we regularly encounter registered traders in Tribunal proceedings who appear to have very little knowledge of the law applicable to motor vehicle sales. We would like to take the opportunity to repeat this recommendation. We would be happy to discuss our suggestion with relevant agencies.



B R Carter
27 September 2019



J S McHerron