



Motor Vehicle Disputes Tribunal WELLINGTON

ANNUAL REPORT

1 July 2012 to 30 June 2013

**Pursuant to section 87 of the Motor Vehicle Sales
Act 2003**

**Nicola Wills
Adjudicator**

ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL WELLINGTON

Period 1 July 2012 to 30 June 2013

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.

The Wellington Tribunal is part-time, has a more spread-out catchment and overall lower case volumes than the Auckland Tribunal. This has some effect on disposal rates (in lower population areas, there are less cases so circuits are held less often). The majority of cases have however been dealt with in less than two months (60%) and only four cases took more than four months.

It is difficult to draw any conclusions about the number of cases found for the purchaser or trader, particularly given that a case "found" for a party does not necessarily indicate that party has succeeded in the case they put forward. Historically, when an order is made for the trader to pay the purchaser compensation, that decision has been recorded as a case "found" for the purchaser even when the tribunal may have agreed with the case put forward by the trader.¹

I would like to note my general impression that a significant number of traders who appear before the Wellington Tribunal do not appear to fully understand their obligations under the Consumer Guarantees Act. What appears to be a common misconception is the belief that traders have the right to remedy any problem (that amounts to a failure in the guarantee of acceptable quality) including substantial failures. In fact if there is a "substantial" failure in the guarantee of acceptable quality, purchasers have the right to choose to reject the vehicle without giving the trader the opportunity to remedy the problem.

As noted in more detail below, the efficiency of the tribunal could be improved with the addition of inquisitorial powers and a wider discretion to award costs.

¹ For example, in *Udovenko v Olgo Commerce Ltd* MVD 250/11 the purchaser applied to have his rejection of a vehicle upheld and for an order refunding the purchase price. The purchaser's rejection was not upheld and the order made by the tribunal was limited to \$60 compensation to be paid to the purchaser

1. Summary of Applications received (nationally) during the year:

	Applications Y/E 30/6/13	Applications Y/E 30/6/12
Total number of disputes filed during the year	216	220
Plus Disputes carried over from previous year		
❖ Auckland Adjudicator	25	17
❖ Wellington Adjudicator	8	9
TOTAL	249	246

2. Summary of Applications disposed of (nationally) during the year:

Disputes settled or withdrawn (both areas)	72 (29%)	69 (28%)
Disputes transferred to Disputes Tribunal unheard	0	6

Disputes heard (including disputes carried over from previous year)

❖ Auckland Adjudicator	126	110
❖ Wellington Adjudicator	22	28

Disputes unheard as at 30 June 2013

❖ Auckland Adjudicator	17*	23
❖ *Includes 1 reserved decision		
❖ Wellington Adjudicator	12	10

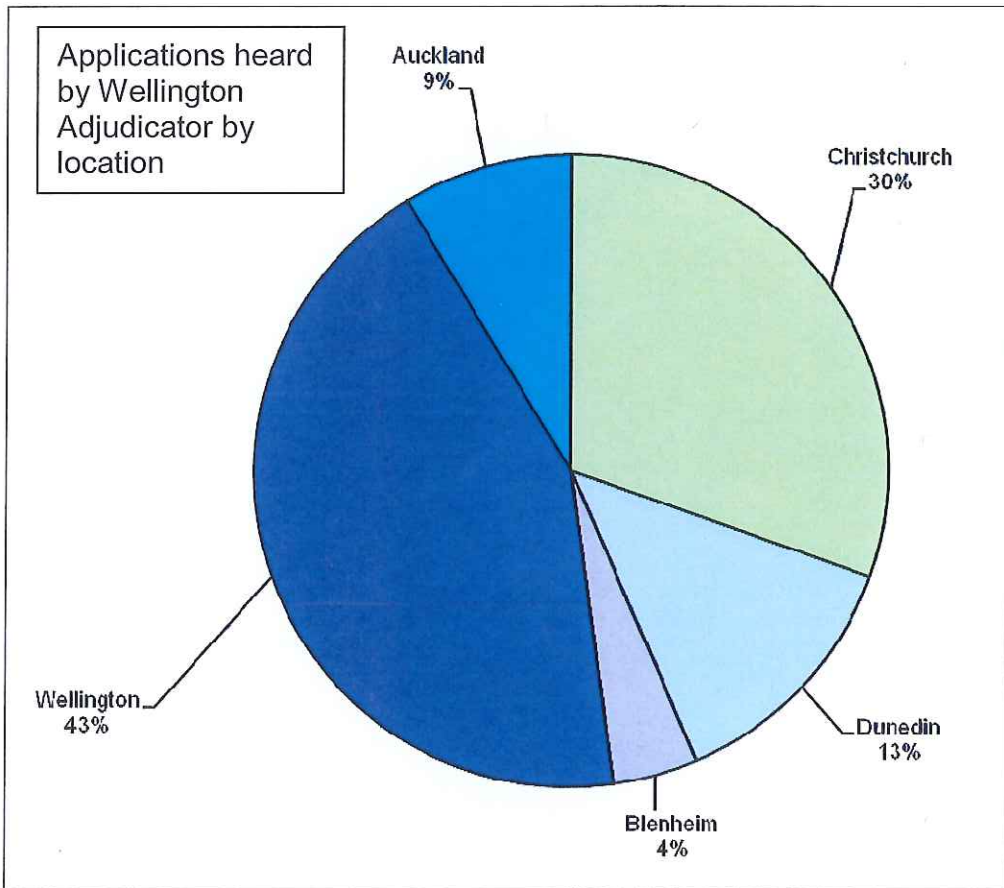
TOTAL	249	246
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Total applications outstanding as at 30 June 2013

Unheard and reserved decisions (both tribunals)	29	33
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3. Wellington Tribunal Summary: Adjudicator Nicola Wills

	Year ending 30/06/13		Year ending 30/06/12	
Number of disputes found for Trader	2	09.09%	5	17.85%
Number of disputes found for Purchaser	20	90.91%	23	82.15%
Total Heard and Decisions Delivered	<u>22</u>	100.00%	<u>28</u>	100.00%



4. Cases that in the Adjudicator's opinion require special mention

(a) Auction process

In *Cornelius v Turners Auctions Ltd*, MVD 139/12, the tribunal considered when an auction starts and finishes and found that the auction concluded when the car was passed in at auction, having not met the reserve price. The effect of that conclusion in the *Cornelius* case was that the sale contract included a guarantee of acceptable quality under the Consumer Guarantees Act because the sale was not a sale by way of auction.

The Consumer Law Reform Bill removes the auction exception from the Consumer Guarantees Act so the guarantees in that Act apply to sales by way of auction. In my view this is a welcome change but I would like to note an issue with the proposed new section 36Y of the Fair Trading Act. The proposed section deals with when an auction starts and ends (Clause 18 of the Bill inserting new section 36Y of the Fair Trading Act) and extends the notion of an auction to a sale negotiated after bidding as closed. If a person who attended the auction makes an offer that is accepted by the auctioneer within one working day following the day of the close of bidding the sale is treated as a sale by auction. Presumably this clause is a response to the lack of clarity around the existing definition of an auction. My view (informed by a number of cases including that mentioned above), is that consumers generally understand an auction to be concluded when the bidding is closed. The purpose of this definition is not clear (particularly given the change made to the Bill at Select Committee so that the CGA applies to sales of second-hand cars) and I believe it will create confusion for consumers attending auctions.

(b) Warrant of fitness inspections

There have been a number of cases where purchasers have brought up concerns about the quality of warrant of fitness inspections. My impression is that this type of problem is on the increase. It is not uncommon for mechanical problems to emerge after sale which throw significant doubt on whether the warrant of fitness issued just prior to sale ought to have been issued. See for example *Adam v Orange Autos*, MVD112/12, *Claridge v Max Motors Ltd*, MVD 109/12. In these two cases questions were raised about warrant of fitness inspections. In a considerable number of other cases, although the quality of a warrant of fitness inspection has not been put at issue in a hearing, the nature of the mechanical concern raised by a purchaser places a question mark over the quality of the warrant of fitness inspection conducted just prior to sale.

The impression gained from cases before the Wellington Tribunal is that it is difficult for NZTA to respond to these types of complaints because of the problems inherent in reviewing the state of a vehicle some time after a warrant of fitness inspection has been completed.

5. Recommendations for amendments to the Act

(a) Extension of jurisdiction to include contract based claims

I have previously recommended this. Cases do occur where the dispute is about enforcement of a contract term and the dispute cannot be resolved under the Tribunal's existing jurisdiction.

(b) Amend jurisdiction

As previously noted, section 89 of the MVSA does not include the jurisdiction to award damages under the Sale of Goods Act 1908. Similarly, there is no jurisdiction to award damages for mis-representation under the Contractual Remedies Act 1970. These omissions both appear to be drafting errors.

(c) Costs and/or powers to require information/witness attendance

The tribunal has an inquisitorial function. The current practise is to review documentation prior to a hearing and request parties to provide particular information and/or arrange for particular witnesses to attend the hearing. The tribunal has no statutory power to require information or to require witnesses to attend. It is not unusual for parties to turn up to a hearing with "surprise" evidence or witnesses. This will sometimes mean that a hearing must be adjourned. The lack of power to require information/witness attendance combined with the inability to impose costs on a discretionary basis does not incentivise co-operation with the tribunal. An extension of the tribunal's jurisdiction to encompass both of these issues would greatly assist in the efficient operation of the tribunal.



Nicola Wills