ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL AUCKLAND

Period 1 July 2011 to 30 June 2012

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.

As you will see from the following summary, the Auckland Tribunal has received 33 fewer applications this year and issued 35 fewer decisions this year than last. This is probably attributable to a combination of three factors. First, a national downturn in used vehicle sales during the year offset by higher new car sales. Second, reduced availability of finance to higher risk used car buyers, and third, a number of traders at the lower end of the market ceasing to trade.

The number of disputes settled by the parties prior to hearings remains at 31% of the total applications filed. This reflects the emphasis by the Tribunal on attempting to have parties mediate their dispute.

The Auckland Tribunal has continued to hear and issue written decisions promptly. In the past year 94% of all applications heard had a decision issued within 2 months of the date of filing and 96 % of all applications were heard and a written decision given within 3 months of the date the application was filed.

1. National Summary of Applications received during the year:

	Applications Y/E 30/6/12	Applications Y/E 30/6/11
Total number of disputes originating from		
❖ Auckland area (New Plymouth north)	170	203
❖ Wellington area (Palmerston North south)	50	72
	220	275
Plus Disputes carried over from previous year		
❖ Auckland Adjudicator	17	26
❖ Wellington Adjudicator	9	7
TOTAL	**246**	308

2. National Summary of Applications disposed of during the year:

Disputes settled or withdrawn (both areas)	69 (28%)	95(31%)
Disputes transferred to Disputes Tribunal unheard (both areas)	6	2
Disputes heard (including disputes carried over from Previous year)		
❖ Auckland Adjudicator	110	145
❖ Wellington Adjudicator	28	40
Disputes unheard as at 30 June		
❖ Auckland Adjudicator	23	19
❖ Wellington Adjudicator *Includes 1 reserved decision	10	7
TOTAL	246	**308**

3. Total applications outstanding as at 30 June 2012

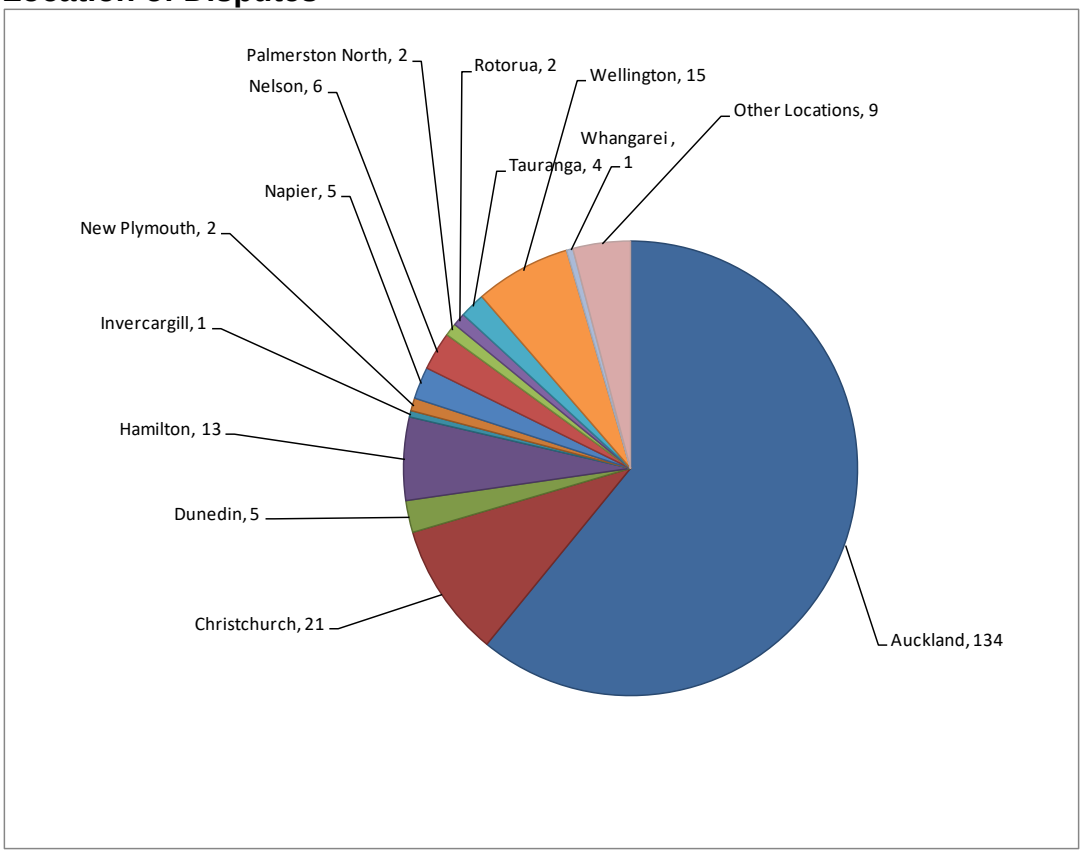
Unheard and reserved decisions (both tribunals)	33	26

Auckland Tribunal Summary Adjudicator C H Cornwell

	Year ending 30/06/12		Year ending 30/06/11	
Number of disputes found for Trader	39	33.6%	51	35.17%
Number of disputes found for Purchaser	71	61.2%	93	64.14%
Cases dismissed/ transferred for want of jurisdiction	6	5.2%	1	0.69%
Total Heard and Decisions Delivered	**116**	100%	**145**	100%

Of the applications received and heard 87% were decided on the basis of the Consumer Guarantees Act, 7% under the Fair Trading Act and 6% under the Sale of Goods Act 1908.

Location of Disputes



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

(a) Barber v Ezy Buy Car Auctions Ltd

In my 2008, 2009 and 2011 annual reports I have drawn previous Ministers' attention to the incidence of sham tenders and their potential to deceive consumers.

The issue arises because there is an exemption in s41(3)(b) of the Consumer Guarantees Act . The Act does not apply to goods sold by "competitive tender". There is no definition in the Act of the term "competitive tender".

Ezy Buy Car Auctions Ltd ("Ezy Buy") arranges for purchasers of vehicles it sells to acknowledge in writing at or after they agree to buy a vehicle that they have bought it by competitive tender on an "as is where is" basis. In fact no such competitive tender sale process takes place.

The first case against Ezy Buy this year concerned Miss Barber who on 14 January 2011 purchased a 1997 Land Rover Discovery station wagon for $5,760. The purchaser claimed the vehicle was faulty and she applied to the Tribunal to reject it.

Miss Barber did not get the vehicle inspected before agreeing to buy it and it was faulty from the time it was supplied to her. The vehicle overheated on a trip back from Hokianga within two weeks of its purchase and when she returned to Auckland she telephoned Ezy Buy and spoke to its manager, Mr Clarke, to tell him about the problem and ask for a refund of her purchase price. She says Mr Clarke told her the vehicle had been sold to her on an "as is where is basis" and the trader was not responsible for rectifying the overheating fault.

Ezy Buy were willing to swap the vehicle for another but when the purchaser was told the exchange vehicle was unsuitable for towing a boat she decided to keep the vehicle.

The purchaser produced a document which purported to be a tender form which she signed at the time she agreed to buy the vehicle. From the answers given by the purchaser to questions put to her at the hearing the Tribunal was satisfied that the vehicle was not supplied to the purchaser by competitive tender.

The words "competitive tender" are not defined in the Act. There was no evidence that any competing offers had been made for the vehicle or that it had been sold in competitive circumstances. There was no process in place whereby tenderers could compete to buy the vehicle. The trader's sales manager who represented Ezy Buy at the hearing did not attempt to argue that the vehicle had been sold by competitive tender. The Tribunal decided that the vehicle had not been supplied by competitive tender and the Consumer Guarantees Act had not been excluded.

The Tribunal found that the vehicle was not free from defects at the time of sale because it overheated after a few hundred kilometres of use. A mechanic's report contained a formidable list of 17 faults many of which raised the question as to how the vehicle obtained a warrant of fitness. After only 2,577kms of use 10 more faults were found. At least 6 of these faults would probably have resulted in the vehicle failing a warrant of fitness if it could have been started and driven to a WOF issuer to be tested.

The Tribunal had little doubt that the vehicle was not of acceptable quality and did not comply with the guarantee of acceptable quality in s6 of the Act even allowing for its age, high mileage, and low price. The Tribunal was also satisfied that the purchaser had attempted to get the trader to remedy the vehicle's faults but the trader had shown no inclination to do so. The Tribunal ordered Ezy Buy to refund the purchaser with her full purchase price.

Since this application was heard in August 2011 there have been seven other applications filed in the Tribunal against Ezy Buy; the most applications filed against any single trader in the past year. Each of those applications has involved the completion of a "tender" offer by the purchaser. Of the applications filed six have been settled by Ezy Buy a day or two before the date set for the hearing and one remains to be heard. Although the Tribunal is not always told the settlement details it understands that in most cases the purchasers have received a full refund of their purchase price.

I am concerned that Ezy Buy is still using the fiction of a competitive tender. Many of the purchasers of vehicles from Ezy Buy are unsophisticated consumers who are buying solely on price.

(b) Moorman v Autofind NZ Ltd

This case concerned the purchase in December 2011 by Mrs McIntosh-Moorman of a 2003 Porsche Cayenne Turbo from Autofind NZ Limited $50,990.

The purchaser claimed that the vehicle had a number of serious faults which the trader has refused to remedy. She rejected the vehicle under the Consumer Guarantees Act 1993 and sought the Tribunal's order upholding her rejection and ordering the trader to refund the full purchase price.

The trader's defence that the purchaser had the vehicle examined by a mechanic before she bought it and the mechanic had not found any faults with the vehicle was true but that did not prevent the purchaser from returning the vehicle to the trader and requiring it to rectify the faults.

The Tribunal found the vehicle had a number of faults present at the time of sale and several faults which had occurred since it had been sold to the purchaser. The Tribunal decided that the vehicle failed to comply with the guarantee of acceptable quality because it was not as durable as a reasonable purchaser would regard as acceptable for a $50,990 eight year old fairly low mileage prestige European car.

The Tribunal therefore found the purchaser became entitled under s 18(2)(b) of the Act to make an election to either have the failures remedied elsewhere and obtain from the trader all reasonable costs incurred in doing so or to reject the goods.

The Tribunal upheld the purchaser's rejection of the vehicle and ordered the trader to pay to the purchaser the full purchase price of $50,990 and the Tribunal's hearing costs of $550.

Since making its decision on 13 June 2012 the Tribunal understands from the purchaser that the trader has since ceased to trade and has transferred its stock to another company and that the Ministry of Economic Development are seeking to ban the trader and its director from participating in the business of motor vehicle trading.

(c) Traders are swapping worn for new parts following compliance

When newly imported vehicles come into New Zealand they are subject to a stringent checking process called compliance to ensure that only safe and properly repaired vehicles are permitted to be registered for use on our roads. Very often as part of compliance an imported vehicle is required to have parts considered to be worn or damaged parts replaced.

During the past year there has been three occasions where a vehicle, the subject of an application has been required, as part of the compliance testing process, to have parts replaced. The traders concerned have replaced the worn or damaged part with a new part in order to get the vehicle complied but have, the Tribunal

believes, subsequently removed the new part and replaced it with the old worn or damaged part previously removed. The new part is thus available to be re-used as a replacement on the next occasion that an imported vehicle of the same type requires it to pass compliance.

One such situation involved a trader in Auckland who imports and sells BMW and Volkswagen vehicles. In November 2011 it sold a BMW vehicle to for $10,800. The trader had, as a condition of compliance been required to replace the front and rear brake pads and rotors on the vehicle. The trader produced a quotation (but no invoice) for the brake pads and rotors and claimed it had fitted them to the vehicle. However within 4 months of purchasing the vehicle and 2,140km of use the purchaser was told the front brake pads were worn out and she would have to pay $328 to replace them.

The Tribunal asked the BMW agent for a report and photographs of the front brake pads and rotors and sent the report it received to the trader for comment. None was received. The Tribunal's Assessor advised the Tribunal that the photographs clearly showed that the front brake pads were well worn and had been used for more than 2,140kms of motoring. There was extensive rust on the hat of the rotors showing these were not new either. The Tribunal ordered the trader to replace both the front brake pads and rotors.

In June of 2011 another trader in Auckland sold a 2003 Mazda Atenza to a purchaser for $12,500. Three or four weeks after purchasing the vehicle the purchaser noticed when she drove the vehicle at night that oncoming drivers would flash their headlights to notify her that her high beam was on. When she had the vehicle checked by a mechanic he found the vehicle had suffered a frontal impact which had damaged the headlight adjusters and that the adjusters were only sold with headlights which would cost her $1275 to replace.

The purchaser contacted VTNZ who did the compliance and issued a warrant of fitness when the vehicle was imported. She discovered that some of the original faults have now reappeared. She told the Tribunal it was curious that the head lights in the vehicle had been rechecked and warranted by VINZ with aligned and working adjusters but the headlights now in the vehicle were not fit for a WOF.

The purchaser wrote to the trader rejecting the vehicle claiming the vehicle's faults were serious because the vehicle was not of warrantable standard and if she had known of the faults she would not have purchased the vehicle. The trader wrote back immediately saying it had no problem with repairing the vehicle and replacing all parts mentioned by the purchaser and getting a new WOF.

The Tribunal found that the vehicle did not comply with the guarantee of acceptable quality but that the faults were not of substantial character so as to entitle the purchaser to reject the vehicle. It ordered the trader to deliver a loan car to the purchaser whilst it repaired her vehicle including replacing the broken head lamp adjusters and headlamps within 10 working days. It also recommended the purchaser take the vehicle to her mechanic to check that the work had been properly done when the vehicle was returned to her.

In October 2011 the same trader sold a 2002 Mazda Atenza for $13,000 to a purchaser who was told five months after buying it that its brake pads had worn out and the left hand rotor had been damaged. He had the work done at a cost of $569.

The Tribunal found that the trader had not replaced the rear brake pads in terms of the requirement listed on the VINZ Compliance Inspection Sheet to *"replace rear brake rotors & pads"* in October 2011 because when the vehicle was inspected in April 2012 the left and right rear brake pads both had only 3mm of depth whereas the left and right front brake pads both had 7mm of depth.

The vehicle had travelled 8,808kms in the 6 months the purchaser had owned and driven it and the Tribunal, on the advice of its Assessor thought it was unlikely for there to have been such extraordinary wear in the rear brake pads during that period if new brake pads were replaced on the rear brakes in October 2011.

The trader was ordered to pay the purchaser $569 for the brakes.

These three cases may be the tip of the iceberg. Replacement of worn parts on vehicles after compliance may be endemic within the imported vehicle industry, or it may be confined to a few dishonest traders. The Tribunal has no way of knowing.

It is however clearly profitable for a trader importing a number of the same type of vehicles each year to save itself the cost of replacing brake rotors and pads by re-using a new set of brake rotors and pads whenever this is required by compliance and later replacing the brake pads and rotors with the old ones.

I would like to recommend that the practice be deterred by the introduction of a requirement by the Ministry of Transport that whenever as a condition of compliance a worn or damaged part has to be replaced on a vehicle, the person seeking compliance approval be required, as a condition of compliance, to provide both the invoice for the replacement part (which should be retained as part of the compliance documentation available to the public) and also provide the compliance agent with the worn or damaged part for retention and destruction.

5. Recommendations for amendments to the Motor Vehicle Sales Act 2003 that the adjudicator thinks desirable based on the experience of the Tribunal.

I would like to recommend the following changes to the Motor Vehicle Sales Act 2003 ("MVSA"):

a) Extend Tribunal's jurisdiction to include contract based claims

The Tribunal does not have jurisdiction to hear contract based claims. In the last year I have had to transfer six applications to the Disputes Tribunal because they were contract based. It would be convenient to applicants to have the Tribunal hear such claims where one of the parties to the application is a motor vehicle

trader. I recommend that consideration be given to extending the Tribunal's jurisdiction to allowing it to hear and determine contract based claims.

b) Amend banning provision

There is provision in s68 of the MVSA for a person to be banned from participating in the business of motor vehicle trading if *"more than once"* within a period of 10 consecutive years fail to comply with an order of the Tribunal. I believe that in the interests of protecting both the public and honest motor vehicle traders, that any person who fails to comply with an order of the Tribunal should be immediately liable to be banned.

I would also like to recommend that the following changes be considered to the Consumer Guarantees Act 1993 ("CGA"):

c) Recognition of depreciation through use

There is no provision in the CGA for account to be taken, when a consumer rejects faulty goods, of the extent of the consumer's use of the goods before he or she rejected them.

This is not an issue where the goods are an appliance sold to a consumer for a few hundred dollars. However where the goods are an expensive motor vehicle and the purchaser has had many months of use of the vehicle before rejecting it, the situation can be very unfair to the supplier who may be ordered to refund a purchaser with the full purchase price and take a vehicle back which has many thousands of kilometres more on its odometer than at the time of sale.

I recommend that an amendment be made to the CGA to allow the Tribunal to reduce the purchase price refunded to an applicant for depreciation of the vehicle commensurate with the purchaser's use of it prior to rejection.

d) Remove from s41(3) of the CGA the exemption in respect of goods supplied by competitive tender

The CGA does not apply to goods supplied by competitive tender. This exemption is unnecessary, appears to be abused by traders to the detriment of consumers and I recommend it be deleted.

C H Cornwell
1 August 2012