



Annual Report of the

REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

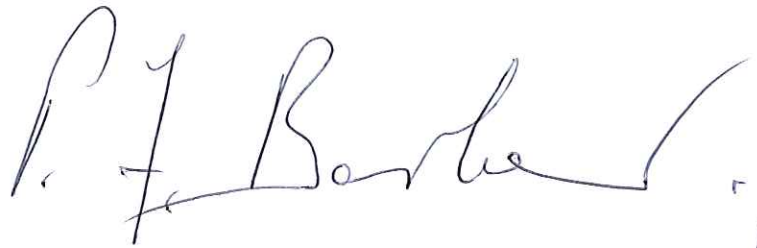
For the 12 months ended 30 June 2014

Presented to the House of Representatives pursuant to regulation 17 (b) of the Real Estate Agents (Complaints and Discipline) Regulations 2009

Hon Christopher Finlayson
Acting Minister of Justice

Pursuant to regulation 17(b) of the Real Estate Agents (Complaints and Discipline) Regulations 2009, I have pleasure in presenting the Annual Report of the Real Estate Agents Disciplinary Tribunal for the 12 months ended 30 June 2014.

Yours sincerely



24/9/2014.

Judge Paul F. Barber
Chairperson
Real Estate Agents Disciplinary Tribunal

INTRODUCTION

The Real Estate Agents Disciplinary Tribunal was established in 2009 under the Real Estate Agents Act 2008. The Tribunal hears and determines charges against licensees laid by a Complaints Assessment Committee of the Real Estate Agents Authority, appeals against decisions made by a Complaints Assessment Committee, and reviews of decisions made by the Registrar of the Authority.

MEMBERSHIP

The current membership of the Tribunal is:

Judge Paul F. Barber QSO (Chairperson)
Kate Davenport QC (Deputy Chairperson)
Nola Dangen
Garry Denley
John Gaukrodger
Catherine Sandelin

MATTERS ARISING IN THE LAST 12 MONTHS

Caseload

The caseload of the Tribunal is directly attributable to the workload of the Real Estate Agents Authority and its Complaints Assessment Committees.

In total, the Tribunal received 109 cases in the 2013/2014 financial year, up from 96 cases received in 2012/13. We are just able to keep up-to-date with the necessary fixtures and procedures. Accordingly, appeals are dealt with in a timely manner. With the Real Estate Agents Authority managing and deciding cases in a fair and efficient manner, the workload of the Tribunal in 2014/2015 is unlikely to increase.

Legislative matters

In terms of my report last year, Minister, I am appreciative that my suggestions for legislative changes to the Act have been considered and, likely, will be implemented. They related to giving this Disciplinary Tribunal more extensive powers to award costs; cessation of appeals to us against the decision of a Committee to lay misconduct charges, but the licensee may still defend those charges before us; the enforcement of breaches of non-publication or suppression orders made by us; and extending the expiring warrant of any of our members for the limited purpose of completing all extant proceedings.

I now raise the effect of the High Court decision *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 (per Brewer J). That has proved somewhat restrictive for us in terms of stating our lack of power to compensate complainants for errors or omissions by licensees found guilty of "unsatisfactory conduct" as distinct from "misconduct". Those terms of "unsatisfactory conduct" and "misconduct" are respectively defined in ss.72 and 73 of the Real Estate Agents Act 2008; and the latter is a higher level of offending than the former.

Where we find that a licensee has been guilty of "misconduct" we may, inter alia, award compensation pursuant to s.110(2)(g) of the Act which reads:

"(g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000".

However, where the licensee's conduct does not reach the threshold for "misconduct" but is found to be "unsatisfactory conduct", we (and the Committee) have a rather restricted power to award compensation to a complainant in terms of s.93(1)(f) of that Act which reads that we may:

"(f) order the licensee –

- (i) to rectify, at his or her or its own expense, any error or omission; or*
- (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her own expense, relief, in whole or in part, from the consequences of the error or omission."*

In *Quin*, Brewer J, very helpfully, addressed the application of s.93(1)(f) of the Act and held that, with regard to unsatisfactory conduct by a licensee, neither a Committee of the Authority nor our Tribunal on appeal can order licensees to pay complainants money as compensation for errors or omissions (i.e. compensatory damages) under s.93(1)(f).

Justice Brewer held that, under s.93(1)(f)(i), licensees can only be ordered to do something or take actions to rectify or put right an error or omission and that, if the licensee can no longer put right the error or omission, that licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission by virtue of s.93(1)(f)(ii). Any expenses incurred by the licensee, as a result of doing what he or she is ordered to do, must be borne by the licensee. He put it that even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. He also held that an order under s.93(1)(f) cannot be made in respect of a straight monetary loss for a drop in market value of a property.

The following paragraphs of Brewer J's judgment outline his findings:

"[58] In my view, the wording of ss 93 and 110 makes it clear that a limited jurisdiction is conferred. Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s 110, but to a limit of \$100,000.

[59] Section 93(1)(f)(i) empowers a Committee to make orders directed at the taking of actions. So, a Committee may order a licensee 'to rectify, at his or her or its own expense, any error or omission'. Rectify means to put right or to correct. That is the focus of the provision. It is, in my view, a power to order a licensee to do something to put right or correct an error or omission by the licensee, at the licensee's expense.

[60] Similarly, s 93(1)(f)(ii) is focused on the taking of action to provide relief from the consequences of an error or omission where rectification is not practicable. This is clear from the framing of the power to order a licensee 'to take steps to provide' relief 'in whole or in part'. This inclusion in the power of the ability to order that this be done at the licensee's expense is a necessary incident of the power to direct the taking of steps".

...

In his paragraphs [65] and [66] Brewer J concluded:

"[65] I conclude that the 2008 Act gives a Committee the power to order a licensee to rectify an error or omission, or to take steps to provide relief from its consequences, where the error or omission resulted from the licensee's unsatisfactory conduct. Whatever is ordered would be at the licensee's expense. In situations where a complainant has already done what was necessary to rectify the error or omission, or to provide relief from its consequences, the power would extend to requiring the licensee to reimburse the complainant.

[66] However, the 2008 Act does not give a Committee the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. The 2008 Act does give the Tribunal the power to award compensation for loss where there is a finding of misconduct against a licensee ..."

At para [75] of his decision Brewer J stated:

"[75] If I am wrong in my view that s 93(1)(f) does not empower a Committee to order compensatory damages, I would nevertheless accept the appellant's submission that the power does not extend to expectation damages ..."

Essentially, in *Quin* the High Court held that, where a licensee is guilty of unsatisfactory conduct, Committees cannot order that licensee to pay complainants money as compensation for errors or omission in respect of pure market or economic loss (i.e. compensatory damages).

When sentencing a licensee for unsatisfactory conduct, we are limited to the same penalty powers as are Committees of the Authority.

Of course, we accept, as Brewer J pointed out, that the primary focus of the Act is not on the provision of a forum in which complainants can seek monetary compensation, but on the regulation of the real estate industry so as to promote and protect the interests of consumers. His Honour also added "This includes conferring on regulators powers to grant consumers relief from harm, resulting from the licensees acting contrary to the standards required of them".

As a Disciplinary Tribunal dealing with appeals from decisions of Committees of the Authority, which are of a very high standard, we consider that it would be helpful to better enable us to dispense justice if we had a similar discretionary power to award compensation in situations of unsatisfactory conduct by a licensee as we do for situations of misconduct by a licensee. Of course, it is always open for complainants to pursue such compensatory issues in the civil courts.

Jurisdiction – property management

We again respectfully suggest that the jurisdiction of the Real Estate Agents Act 2008 could be widened to include licensing of those persons who manage rental properties or vacant properties (both commercial and residential). It seems to us that the consumer is entitled to expect a professional standard from such managers.

Restorative Justice

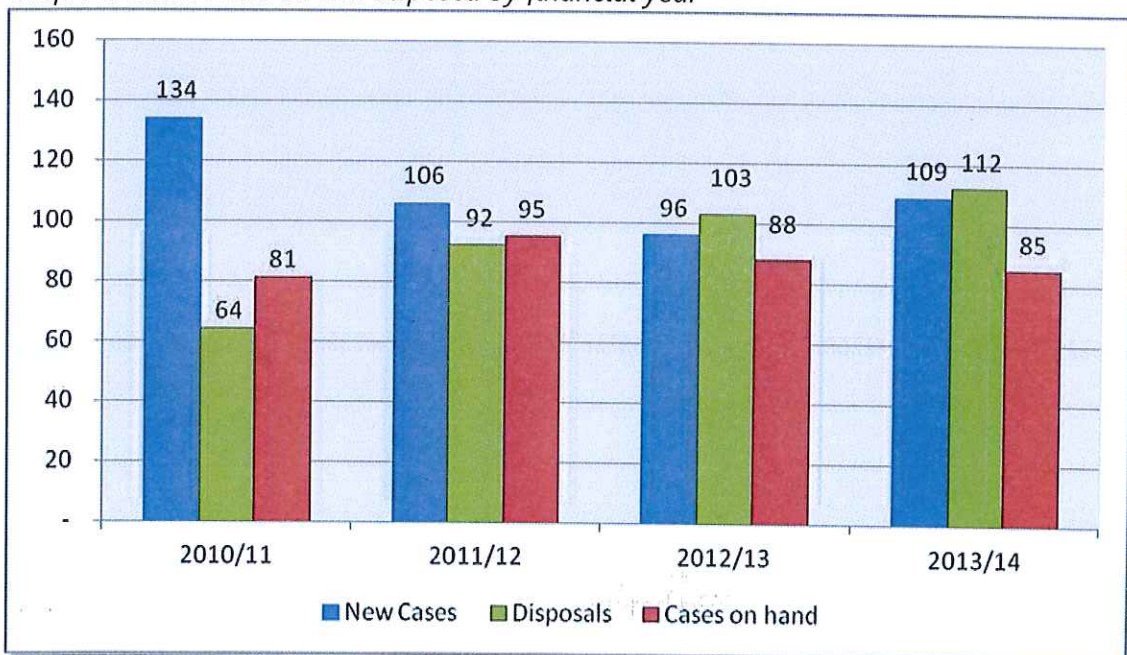
We record that we are seriously exploring whether a more positive approach to offering settlement procedures to parties coming before us (on appeal from Committees of the Authority) may lead to acceptable outcomes and final resolution of the litigation.

STATISTICS

This section outlines the number of matters considered and disposed by the Tribunal.

The Tribunal received 109 new cases in 2013/2014, and disposed of 112. As shown in *Graph 1* below, the workload in 2013/2014 compares similarly with the workload in the previous financial year 2012/13.

Graph 1: Cases received and disposed by financial year



Cases on hand

At the end of the 2013/14 financial year the Tribunal had 85 cases on hand. The majority of these cases were either awaiting information from parties (39 cases), scheduled for hearing (30 cases) or reserved decisions (16 cases).

By September 2014 the number of reserved decisions had reduced to 13.

Cases received 2013/14

The Tribunal receives three types of cases, Notices of Appeal, Charges, and Applications to Review:

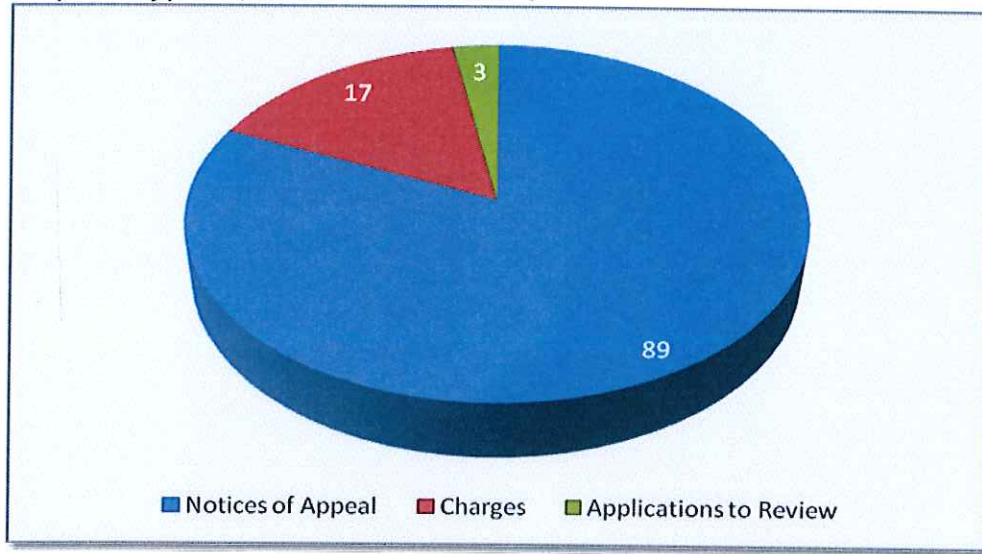
- A **Notice of Appeal** is an appeal to the Tribunal against a determination made by a Complaints Assessment Committee of the Real Estate Agents Authority.
- A **Charge** is a complaint referred to the Tribunal by a Complaints Assessment Committee.
- An **Application to Review** is an application to the Tribunal to review a determination made by the Registrar of the Real Estate Agents Authority.

Table 1 and Graph 2 below show the number of cases received by the Tribunal for the 2013/14 financial year, broken down by the three case types.

Table 1: Types of cases received 2013/14

| | |
|---|------------|
| Notices of appeal against decisions of a Complaints Assessment Committee | 89 |
| Charges of misconduct | 17 |
| Applications to review decisions of a Registrar declining registration as a licensee | 3 |
| TOTAL | 109 |

Graph 2: Types of cases received 2013/14



Cases disposed 2013/14

Table 2 below shows a breakdown of the cases disposed by the Tribunal in the 2013/14 financial year.

Table 2: Cases disposed 2013/14

| | |
|----------------------------|------------|
| Cases withdrawn or settled | 18 |
| Cases with final decisions | 94 |
| TOTAL | 112 |

In its final decisions, the Tribunal imposed penalties ranging from fines to suspensions to cancellation of licences. It has power to award compensation up to \$100,000.

In addition, the Tribunal issued 16 interim decisions (including suspension or suppression orders) and 13 separate penalty decisions.