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# ANNUAL REPORT

## **MOTOR VEHICLE DISPUTES TRIBUNAL RŌPŪ TAKE TAUTOHENGA Ā-WAKA**

For the 12 months ended 30 June 2021

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*Presented to the Minister of Commerce and Consumer Affairs*

# ANNUAL REPORT OF THE MOTOR VEHICLE DISPUTES TRIBUNAL

1 July 2020 to 30 June 2021

Dear Minister

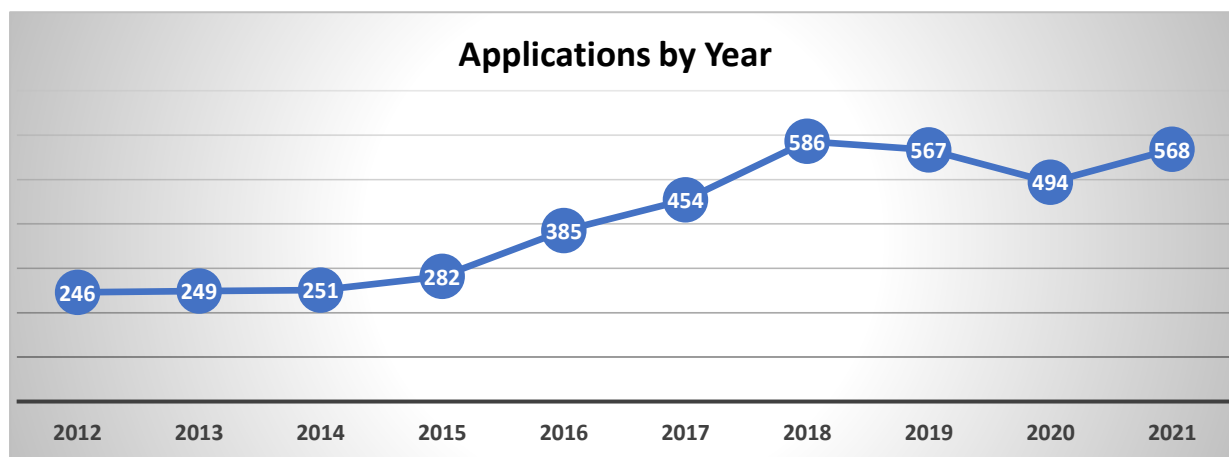
Pursuant to section 87 of the Motor Vehicle Sales Act 2003 (the MVS Act) we are pleased to submit the following Annual Report. In this Annual Report we:

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 Tribunal's continued use of audio-visual technology.
5. Make recommendations for legislative amendments.

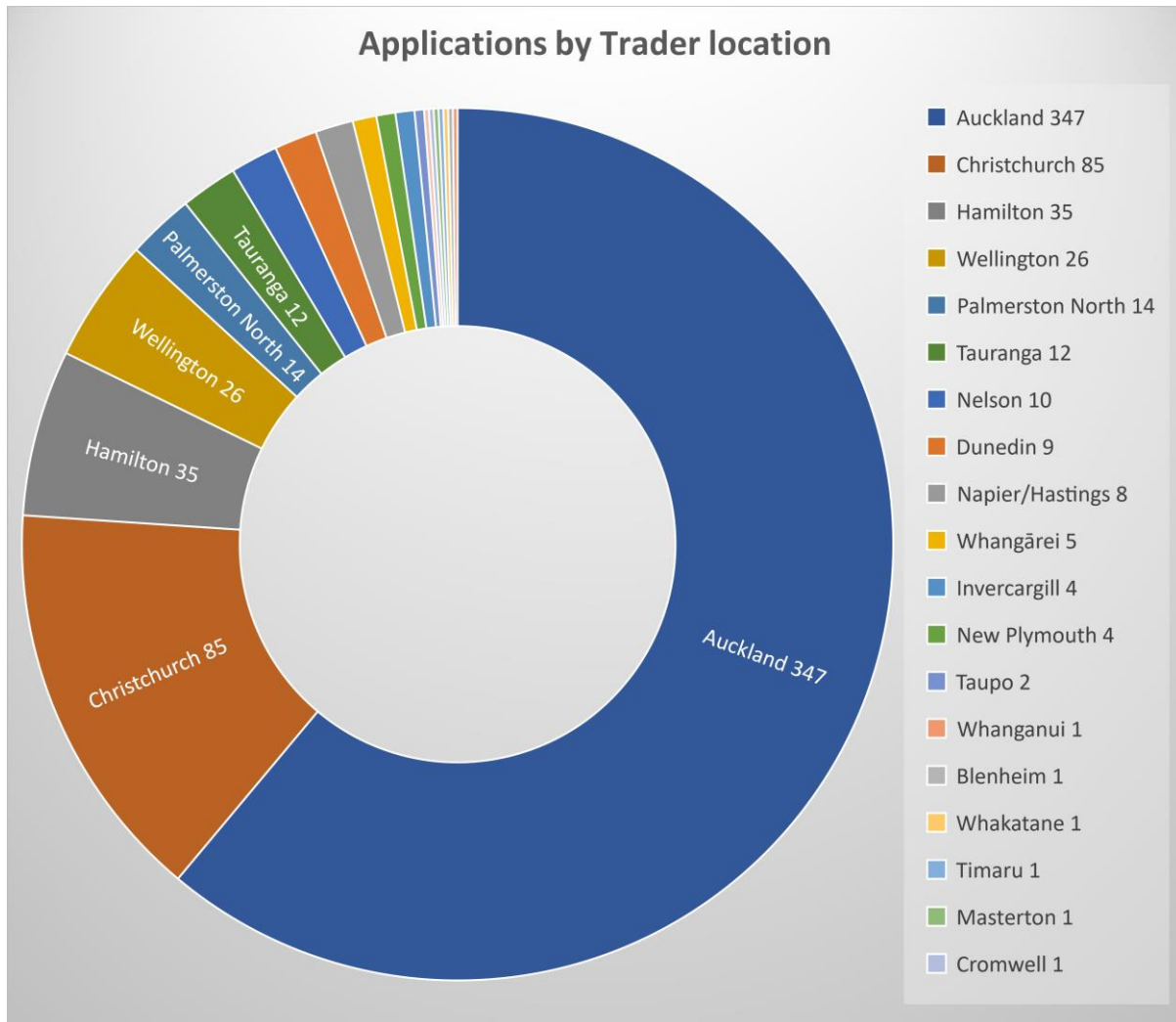
## 1. Summary of applications dealt with

The Tribunal dealt with a total of 568 matters this year - 484 new applications and 84 matters carried over from 2019/2020. The number of new applications was up significantly on the previous year, in which motor vehicle sales were affected by Covid-19 lockdown periods.

The number of matters handled by the Tribunal this year is a continuation of the increasing workload of the Tribunal in the last 10 years, with applications received by the Tribunal more than doubling over that time, as shown in the table below.



The applications handled this year came from throughout the country. As shown in the chart below, the majority involved traders based in Auckland (347) Christchurch (85), Hamilton (35) and Wellington (26). The remainder of the matters heard by the Tribunal (75) were spread throughout the country.



## 2. Resolution of applications during the year

Of the 568 matters dealt with by the Tribunal in 2020-2021, 184 or 31.6% were resolved (by settlement, withdrawal or consent orders recording an agreement reached by the parties) without the Tribunal being required to determine the claim. 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 289 applications proceeded to a hearing and were determined by the Tribunal (with many of those requiring more than one hearing to resolve all the issues). 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 2020-2021, 75% of all matters were resolved within three months of the date of filing the application, with 98% of all matters resolved within six months. A total of 96 claims remained unheard at the end of the year.

### 3. Cases that require special mention

#### **Motor vehicle traders attempting to pass a transaction off as a private sale**

The Tribunal continues to determine claims where a person who meets the definition of a motor vehicle trader in sections 7 to 9 of the MVS Act has attempted to pass the transaction off as a private sale.

**Jones v Chevron Quality Cars 2018 Ltd and Nicholas Jeffrey Purvis** involved the sale of a recently imported highly modified Mazda RX7 by an employee of a motor vehicle trader. The purchaser applied to the Tribunal for a refund of the \$80,000 purchase price alleging that the seller had failed to disclose that the vehicle had previously been damaged and had been classified as “imported as damaged” at the border.

The purchaser asserted that he had purchased the vehicle from the dealership. The dealership’s primary defence was that the vehicle was sold by its employee and the transaction was a private sale. After considering the evidence, the Tribunal concluded that the vehicle was sold by the employee, but the circumstances of the case were such that the employee was himself acting as a motor vehicle trader when he sold the vehicle. The Tribunal ordered that the employee should refund the purchase price to the purchaser. This case highlights the potential pitfalls that can arise when an employee of a motor vehicle trader sells a motor vehicle and behaves as if he or she were a motor vehicle trader, including by using the registered motor vehicle trader’s Trade Me listing and premises when selling the vehicle.

**Jaques v Jamal Nasser and Seven Seas Motors Ltd** involved the sale of a \$30,000 2011 Jaguar XJ, which had been recently imported from Singapore. The applicant applied to the Tribunal seeking to reject the vehicle and alleged that the vehicle, which was advertised as having an odometer reading of 17,300 km, had defects inconsistent with that mileage and that its odometer had been tampered with. The motor vehicle trader’s principal grounds of defence were that the vehicle was sold by its director, as a private sale and that it was sold “under as is where is basis no warranty to be given” and that the odometer reading was accurate.

The Tribunal was satisfied that the vehicle was sold by the registered motor vehicle trader, which had attempted to pass the sale off as a private sale. The Tribunal also concluded that the evidence, including service records from Singapore, showed that the vehicle’s odometer had been tampered with and the vehicle’s true mileage was much higher than represented. The trader was therefore ordered to refund the purchase price to Mr Jaques.

**Singh v TM Trading Group Ltd** involved the sale of a \$4,700 2005 BMW 320i, where the Tribunal rejected an argument by the trader’s director Treat Mahara (also known as Tony Surano) that he sold Mr Singh a vehicle “personally” on an as is where is basis. Apart from the fact that traders cannot evade their responsibilities to provide guarantees and remedies under the Consumer Guarantees Act 1993 by using phrases such as “as is where is”, a document signed by Mr Mahara expressly stated that Mr Singh had bought the vehicle from TM Trading Group Ltd. TM Trading Group was ordered to refund the purchase price to Mr Singh because the vehicle had significant pre-existing engine defects that would be expensive to repair.

## **Failure to adequately disclose previous accident damage**

In previous Annual Reports, the Tribunal has mentioned cases where the seller has failed to adequately disclose that a vehicle had previously been written off and repaired. That information is important to prospective purchasers as the value of a vehicle can be significantly affected by the stigma that attaches to a repaired insurance write off. The Tribunal continues to hear claims where that history is not adequately disclosed to purchasers.

In **Clemens v A Grade Wholesales Ltd**, Mr Clemens purchased 2006 Ford Focus for \$14,000 in March 2020. Mr Clemens then discovered that the vehicle had previously been written off because of accident damage and had several defects, including a damaged turbo, a disconnected left hand front driveshaft and damaged inner CV joint, a loose engine mount, broken left rear sway bar link, and damaged radiator support panel. The Tribunal found that A Grade Wholesales Ltd had an obligation to disclose that the vehicle had been previously written off and repaired and that Mr Clemens had suffered loss because of its failure to do so. Mr Clemens was therefore entitled to a refund of the vehicle's purchase price.

In **Law v YJK Cars Ltd**, Mr Law purchased a 2013 Holden Colorado ute for \$26,000 in August 2020. YJK Cars disclosed that the vehicle had been imported from Australia, re-registered and designated as an "imported as damaged" vehicle, but did not disclose that the vehicle had been written off for insurance purposes in Australia due to structural and panel damage to its front and sides. That structural damage had not been properly repaired when the vehicle was sold to Mr Law. Despite passing a pre-sale warrant of fitness inspection, the evidence showed that the vehicle had structural damage that should have caused it to fail that warrant of fitness inspection. YJK Cars has since repaired that damage, and although the Tribunal found that YJK Cars had engaged in misleading conduct by failing to disclose that the vehicle had previously been written off due to structural accident damage, the Tribunal declined Mr Law's application to obtain a refund of the purchase price. That is because Mr Law did not prove that he had suffered any financial loss as a result of purchasing the vehicle, which was sold to him at a discounted price to reflect its history.

## **4. The Tribunal's use of audio-visual technology**

As reported in last year's annual report, the Tribunal has made increasing use of audio-visual technology in recent years. That trend has continued, with 283 (or 81.1%) of the hearings conducted by the Tribunal this year involving the use of audio-visual technology for a party, witness and/or a Tribunal member. We anticipate that this increased use of audio-visual technology will continue in future years.

## **5. Recommendation for legislative amendments**

### **Amendment to enable the Tribunal to make money orders where it has also made work orders**

The Tribunal commonly makes orders (work orders) under the Consumer Guarantees Act 1993 requiring the trader to perform repairs or other work on a motor vehicle. Most traders comply with those orders.

However, the Tribunal has encountered several claims where the trader has failed to comply with a work order and the applicant has had to file another claim to the Tribunal seeking a further remedy (such as an order to recover the cost of performing those repairs itself). Those applicants are required to file a new claim to seek that remedy because the Tribunal's work orders are not enforceable by the applicant if the trader fails to comply.

The Tribunal's decisions are enforceable as if they are a final judgment of the District Court in its civil jurisdiction.<sup>1</sup> The types of enforcement proceeding that can be pursued in the District Court are found in s 131 of the District Court Act 2016, which states that the following enforcement proceedings can be brought in the District Court:

- a proceeding to enforce a judgment or an order for the payment of money;
- a proceeding to enforce a judgment or an order for the recovery of land, or
- a proceeding to enforce a judgment or an order for the delivery of specific chattels.

There is no provision in the District Court Act for the enforcement of a judgment or order for the performance of work.

We therefore recommend that the MVS Act (or other laws such as the Consumer Guarantees Act) be amended to enable the Tribunal to, where the cost of the required repair or work is readily ascertainable, also make a money order at the same time as it makes a work order, which can be complied with and enforced as an alternative to the work order. Such an order would give the trader the option of paying the money order rather than performing the repairs (which is often more convenient for a trader – particularly if the vehicle is located elsewhere in New Zealand) and would also enable the purchaser to enforce the money order in the District Court in the event that the trader fails to comply.

Such an amendment would also align the MVS Act with the Disputes Tribunal Act 1988. Under s 19(3) of the Disputes Tribunal Act, that Tribunal has the power to make money orders at the same time as it makes a work order.

### **Service of notices and documents by email**

We reiterate the recommendation made in last year's annual report that the MVS Act should be amended to make it easier for notices and other documents to be served by email.

Currently, notices can be emailed to traders under s 142(1)(a)(ii) of the MVS Act, but only to the email address stated in the trader's application for registration under s 32 of the MVS Act. Currently the Tribunal has no access to traders' email addresses supplied to the Registrar of Motor Vehicle Traders and very few (if any) listings on the Register contain the trader's email address. Accordingly, to comply with the service requirements in the MVS Act, hard copies of notices and other documents must be sent by post or courier.

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<sup>1</sup> Motor Vehicle Sales Act 2003, sch 1, cl 15(2).

That requirement has created barriers to the Tribunal operating efficiently during COVID-19 Level 3 and Level 4 restrictions, where Tribunal staff (who are working from home) have not been able to send hard copy notices or documents by post or courier.

One option would be to amend s 142(1)(b) of the MVS Act to allow the Tribunal to serve documents by sending those documents to an email address nominated by or on behalf of that person in response to a request by the Tribunal. That amendment would recognise that so much of business and legal correspondence now occurs by email rather than more traditional methods and would also bring the Tribunal's service requirements in line with other jurisdictions, which allow documents to be served by email to an address nominated by the parties.

In certain circumstances such as those outlined above it would also be helpful for service to be able to be effected by email to an email address recorded on the Register of Companies, another official database, or even on the party's own website. To allow this to occur, we also recommend that the MVS Act be amended to include a provision such as that in rule 10 of the Dispute Tribunal Rules 1989, which allows the Disputes Tribunal in any particular case to direct that a document be served on a person by any other means that the Tribunal considers proper.



**B R Carter**  
Adjudicators  
29 September 2021



**J S McHerron**