



Annual Report of the

REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

For the 12 months ended 30 June 2021

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

Hon. Aupito Sio
Associate 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 2021.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pamela Andrews', with a small flourish at the end.

Hon. Pamela Andrews CNZM
Chairperson
Real Estate Agents Disciplinary Tribunal

INTRODUCTION

The Real Estate Agents Disciplinary Tribunal (the 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 Authority (the Authority), appeals against decisions made by a Complaints Assessment Committee, and reviews of determinations made by the Registrar of the Authority.

Membership

The current membership of the Tribunal is:

- Hon. Pamela Andrews CNZM (Chairperson)

- Mr Garry Denley
- Ms Catherine Sandelin
- Mr Neil O'Connor
- Ms Fiona Mathieson

Mr Jeremy Doogue resigned as Deputy Chairperson and Member of the Tribunal as from 1 June 2021. The Tribunal thanks Mr Doogue for his contribution to the Tribunal.

I must also pay particular tribute to the Tribunal's administration team within the Tribunals Unit of the Ministry of Justice, for their commitment, expertise and assistance during the past year. Each member of the team has continued to give knowledgeable and enthusiastic support to the Tribunal. Those qualities are very much appreciated.

The Tribunal's function

The Tribunal is established pursuant to s 100 of the Real Estate Agents Act 2008. Its functions are set out in s 102 of the Act, and are:

- (a) to hear and determine any application made by a Complaints Assessment Committee for the suspension of the licence of a licensee pending the determination of a charge that the Committee has laid against the licensee
- (b) to hear and determine any charge against a licensee brought by the Committee
- (c) to hear any appeal under section 111 against a decision by the Committee (including a determination to take no action)
- (d) to conduct any review, under section 112 of a determination of the Registrar, and
- (e) any other functions conferred by the Act.

The major focus of the Tribunal's work is on hearing and determining charges brought by a Complaints Assessment Committee against a licensee, and on hearing and determining appeals against decisions of Complaints Assessment Committees.

Complaints Assessment Committees consider and determine complaints made to the Real Estate Authority about licensees' conduct in carrying out real estate agency work. If the Committee considers a complaint to be justified, it may find that a licensee has engaged in unsatisfactory conduct, pursuant to s 72 of the Act; that is that the licensee's conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee, contravenes a provision of the Act or regulations or rules made under the Act, is incompetent or negligent, or would reasonably be regarded by agents of good standard as being unacceptable. If it makes a finding of unsatisfactory conduct, a Complaints Assessment Committee can make one or more of the orders set out in s 93 of the Act. A person affected by the Committee's determination may appeal to the Tribunal, pursuant to s 111 of the Act.

One of the powers given to Complaints Assessment Committees is to determine that a complaint or allegation should be determined by the Tribunal. In that case, the Committee lays an appropriate charge of misconduct, under s 73 of the Act. Misconduct is, in very general terms, conduct that is more serious than unsatisfactory conduct. It is conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; conduct that is seriously incompetent or seriously negligent; conduct that constitutes a wilful or reckless contravention of the Act, other Acts that apply to the conduct of licensees, or regulations or rules made under the Act; or conduct that constitutes an offence for which the licensee has been convicted, and which reflects adversely on the licensee's fitness to be a licensee.

Many of the cases that come before the Tribunal involve complex issues of law and/or fact, which require careful consideration. The Tribunal has built up a considerable body of precedent decisions, which provide guidance to Complaints Assessment Committees, and the industry as a whole.

Decisions of the High Court and Court of Appeal have added to the case law concerning the meaning and application of the provisions of the Act and the Rules.

Legislative matters

The Tribunal has now had a full two years of working with the amended Act. The most significant changes emerged as being the Tribunal's power to accept late appeals, and its power to make awards of costs. In my last report I noted my concern that while there are cases where awards of costs are usually appropriate (in particular, following disciplinary charges against licensees), the possibility of an application for costs might deter some consumers from pursuing matters in the Tribunal, with the potential to detract from the consumer-protection focus of the Act. I am pleased to note that this does not appear to have been the case.

A further change that has only recently had an impact on the tribunal was the introduction of a "triage" power in s 74(3) of the Act, whereby the Registrar may determine (on receipt of a complaint) that the complaint need not be pursued because it discloses only an inconsequential matter, is frivolous or vexatious or not made in good faith, should be referred to another agency, or has been resolved to the complainant's satisfaction. The Tribunal now has recently ruled that Tribunal's review jurisdiction in respect of Registrar's determinations under s 112 of the Act covers decisions under s 74(3).

On many occasions, the determinations of which review is sought are to cancel a licensee's licence under s 54 of the Act, on the grounds of failure to maintain the prescribed continuing education (s 54(d)), or to pay prescribed fees or levies (s 54(h)). Pursuant to s 37(1)(d)(i) of the Act a person whose has been cancelled under s 54 eligible to hold a licence until five years after the cancellation.

While the Tribunal does not question the importance of licensees' complying with their continuing education requirements, and paying prescribed fees and levies, it considers it would be useful for Parliament to consider whether the Registrar should be given a discretion as to whether a licence is cancelled, or as to whether a new licence may be granted before the expiry of five years, in order to avoid the very harsh consequences of what is often an inadvertent non-compliance. The Tribunal notes that the exercise of any such discretion would be subject to review by the Tribunal under s 112.

CASES RECEIVED, DISPOSED AND ON HAND

Caseload

As noted below, the Tribunal received 34* new cases during 2020/2021. This is a decrease from the previous year, when we received 51 new cases. Without extensive research, I am not able to offer any comment as to why this should be, or whether it indicates a trend for the future.

* 2 cases were closed in the previous year but upon appeal to higher courts, were reopened.

In 2020/21, the Tribunal disposed of 39 cases.

Cases received in 2020/2021

The Tribunal receives three types of cases:

- A **Notice of Appeal** is an appeal to the Tribunal against a determination made by a Complaints Assessment Committee of the Real Estate Authority.
- A **Charge** is a charge of misconduct against a licensee 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 Authority.

Table 1 shows the number of cases received by the Tribunal in 2020/21, broken down by case type.

Table 1: Cases received in 2020/21, by case type

| Case type | Number | Percentage of total cases received |
|-----------------------------|---------------|---|
| Notices of Appeal | 21 | 66% |
| Charges | 12 | 18% |
| Applications to Review | 1 | 16% |
| TOTAL CASES RECEIVED | 34 | 100% |

Cases disposed in 2020/21

Table 2 sets out the outcome of the cases disposed by the Tribunal in 2019/20.

Table 2: Cases disposed in 2020-2021, by outcome

| Case outcome | Number | Percentage of total cases disposed of |
|------------------------------|---------------|--|
| Withdrawn or settled | 4 | 10% |
| Tribunal made final decision | 35 | 90% |
| TOTAL CASES DISPOSED | 39 | 100% |

The percentage of cases in which the Tribunal made a final decision is consistent with previous years which have been 70-80%.

As was reported in my previous Annual Reports, the Tribunal has continued to reduce the average age of cases at disposal. All new cases are assigned a date for a Directions Telephone Conference immediately upon receipt by the Tribunal, a hearing date is set for the earliest available date, and that the Tribunal's decisions are issued within as short a time as is practicable. That said, there will always be cases that present particular difficulties in disposal.

Analysis of disposals, by case type

Notices of Appeal

Cases considered by the Tribunal may relate to a Complaints Assessment Committee's decision concerning one or more appellants and/or respondents. Where that occurs, the outcome of each appeal is recorded separately. In 2020/21, 24 'final' appeal decisions were made, of these, 12 appeals were dismissed, and 6 appeals were upheld, one was upheld by consent and referred back to a Committee. Four appeals were dismissed but appeals against the Committee's decision on orders were upheld. One decision upheld an appeal but dismissed the cross appeal. No appeals were struck out.

Charges

Similarly, where multiple charges of misconduct are laid against one licensee, the outcome of each charge is recorded separately as one decision. In 2020/21, 9 charges against 11 licensees were found proved and none were dismissed.

Penalty decisions

Penalty decisions were made by the Tribunal against licensees both following charges of misconduct being found proved against a licensee, and on appeals against findings of unsatisfactory conduct made by a Complaints Assessment Committee. In 2020/21, the Tribunal issued six penalty decisions (three following charges and three following an unsatisfactory conduct finding on appeal). Two charges had penalty included in their substantive decisions.

Applications to Review

One application to review was dismissed and one application to review resulted in the Registrar's decision being overturned.

Interim Decisions and Rulings

In any case before it, the Tribunal may be required to issue an interim decision or ruling; for example, an application for interim suppression of name, or as to the admissibility of evidence. In 2020/21, the Tribunal issued 20 such decisions or rulings. Ten rulings were regarding applications to adduce new evidence, one declined an application for third party to be appointed for cross-examination of a witness, two rulings declined applications for a stay of proceedings (two applications made for one matter), two rulings declined applications to recall decisions, one ruling granted an application to recall. One ruling granted an interim order for restriction of publication of the applicant's name, one declined an application for an order prohibiting publication. One ruling directed that a charges application and an appeal be heard separately but by the same Tribunal panel and one directed that more information be filed.

There were no separate rulings or decisions on costs, as these are now generally included in penalty (or final if penalty included in final) decisions.

Cases on hand at the end of 2020/21

At the end of 2020/21, the Tribunal had 23 cases on hand. These cases were either awaiting information or submissions from parties (16 cases), scheduled for hearing (two cases) or awaiting reserved decisions (four cases). One is waiting for a hearing but due to the appellant being overseas without access to audio visual equipment, a hearing date is unable to be set. Five of the "awaiting information" cases had active timetables to address preliminary matters, two were early appeals waiting for the Committee matter to be completed, three were adjourned pending High Court decisions, and one more adjourned at the request of the appellant. Three were charges applications waiting for the defendant to respond to the charges, and two were scheduled for a telephone conference with the intention of setting a hearing date.

I noted in my 2019/20 Annual Report that eight scheduled oral hearings were directly impacted by the New Zealand COVID-19 alert level 4 restrictions. As at 30 June 2021, only one of these matters still required scheduling and this was a result of the appellant being overseas and affected by communication issues. The seven other scheduled hearings either continued as “on the papers” determinations or were scheduled for an oral hearing as soon as the alert level allowed.