

17 August 2018



Dear 

### Official Information Act #18.023 Toyota New Zealand Limited (Toyota)

1. We refer to your request of 20 July 2018 about whether the Commerce Commission (Commission) has reached any decision in relation to its comments in a Stuff article of 10 March 2017, "Raging' businessman takes Toyota to Tribunal over \$525 key".<sup>1</sup>
2. In the article, the Commission said a Disputes Tribunal decision about replacement car key pricing raised some interesting issues that it would consider.
3. We have treated this as a request for information under the Official Information Act 1982 (OIA).

### Our response

4. We have decided to grant your request.
5. We note that while the Disputes Tribunal considered issues relating to the Fair Trading Act 1986 (namely, misleading conduct), the Tribunal's decision against Toyota was made solely by virtue of section 12 of the Consumer Guarantees Act (CGA) (failure to take reasonable action to ensure that parts are reasonably available for a reasonable period after the good is sold).<sup>2</sup> The Commission has no role in overseeing or enforcing CGA, but we may take action where consumers are being misled about their CGA rights. **Attachment A** to this letter contains a copy of the Tribunal decision.
6. Following the Stuff article we did create a record of the Tribunal decision in our complaints database. We use the information contained in our complaints database as intelligence to help us decide what work we should prioritise. At this stage we have not decided to investigate this particular matter further.
7. On 9 August 2018, the Commission published our priority focus areas for the upcoming year.<sup>3</sup> One area we have chosen to focus on is motor vehicle sales; this will

<sup>1</sup> <https://www.stuff.co.nz/business/90293847/raging-businessman-takes-toyota-to-tribunal-over-525-key>

<sup>2</sup> CIV-2016-094-001538 at [9 – 12] & [13]

<sup>3</sup> <https://comcom.govt.nz/news-and-media/media-releases/2018/commission-releases-201819-priorities>

include misrepresentations about consumer rights under the CGA. We will be considering the Tribunal decision as we plan our work in this area.

8. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.
9. Please note the Commission intends to publish this response to your request on its website. Personal details will be redacted from the published response.
10. If you have any questions in regards to this request, please do not hesitate to contact us at [uia@comcom.govt.nz](mailto:uia@comcom.govt.nz)

Yours sincerely



Rosie Brown  
OIA Coordinator



(Disputes Tribunals Act 1988)  
**ORDER OF DISPUTES TRIBUNAL**

District Court: Auckland

Case number: CIV-2016-094-001538

**APPLICANT**      **Choice Technology Limited**  
Level 1  
1 New North Road  
Eden Terrace  
Auckland 1021

**RESPONDENT**    **Toyota New Zealand Limited**  
PO Box 44  
Palmerston North Central  
Palmerston North 4440

**The Tribunal hereby orders:**

Toyota New Zealand Limited is to pay Choice Technology Limited \$325.62 by Monday 6 March 2017.

**Reasons:**

1. Mr Damien Funnell of Choice Technology Limited has brought this claim to the Disputes Tribunal because he is unhappy with the amount he was charged by a Toyota dealer for a replacement key for a vehicle owned by his company. Armstrongs Auckland Limited charged Choice Technology Limited \$525.62 to replace the key. This included a programming fee of \$50.
2. Mr Funnell's complaint is that the charge is excessive. He has some IT background and was able to dismantle the key and make the following observations. He says the components that make up the key can be purchased and assembled for approximately \$33. Replacement keys for many American brand vehicles are available from 3<sup>rd</sup> party suppliers for anywhere between NZ\$30 and NZ\$100 and the programming can be done by the consumer. He claims the price charged to him of \$525.62 is a result of dishonest conduct and price fixing on the part of Toyota New Zealand Limited, which he says is a breach of the Commerce Act 1986. He says that his dealer told him that the price was determined by Toyota New Zealand (thus out of their hands).
3. Toyota New Zealand was represented by Ms Viki Richardson at the hearing. She said that Toyota New Zealand strongly denies Mr Funnell's accusation of price fixing, price gouging, or anticompetitive behaviour. She pointed out that Armstrongs Auckland Limited is an independent entity from Toyota New Zealand and that although it is part of a franchise agreement it is free to depart from the recommended retail price given by Toyota New Zealand if it so wishes. Ms Richardson pointed out that Toyota New Zealand did not import the car in question. She stated that Toyota New Zealand reviewed its pricing on parts regularly and set those prices "*with reference to cost, competitive pressures and other factors such as time stocked.*" At the hearing Toyota New Zealand also stated that the price was largely determined as a result of the price from Toyota Japan who was entitled to recoup its development costs and leverage its intellectual property, which provided a better more secure system for its customers. Part of the added security, it was asserted, comes from the fact that the keys are not available on a third party market. Toyota offered no evidence as to the actual cost of manufacturing and supplying the key.
4. Toyota New Zealand declined to provide a price breakdown of the key from Toyota Japan through Toyota New Zealand and then to Armstrongs Auckland Limited at the hearing because Ms Richardson did not have this information and she said the company would be unwilling to provide it to Mr Funnell because it was commercially sensitive. I offered the company the opportunity to provide the evidence "*in camera*" following the hearing, i.e. to the Tribunal privately. The Tribunal received an email from Ms Richardson stating the likely margin placed

on the key by Toyota New Zealand to Armstrongs and the margin placed by Armstrongs before selling the key to Choice Technology Limited.

### What is the claim?

4. Mr Funnell stated that his claim is under the Commerce Act for anticompetitive behaviour. The Tribunal has no jurisdiction under the Commerce Act. In relation to the fact scenario the Tribunal can arguably consider a claim under section 9 of the Fair Trading Act 1979 for misleading conduct in trade, or under section 12 of the Consumer Guarantees Act 1993 for breach of the warranty to ensure a supply of spare parts are "*reasonably available*".

### Is there a claim of misleading conduct?

5. It was put to Toyota New Zealand at the hearing that a business is arguably entitled to set its prices where it sees fit, but it cannot make misleading statements about how those prices are set or what controls them. Mr Funnell says he was told by Armstrongs that the price was fixed by Toyota New Zealand and subsequently by Toyota New Zealand that it was substantially set by Toyota Japan, who was entitled to recover its investment in research and development for a superior product.
6. Based on the margin information supplied by Toyota New Zealand, I find that the statement that the price was fixed by Toyota New Zealand is misleading because it did not disclose that a significant portion of the price charged is a healthy margin added by Armstrongs and suggested that Armstrong was not free to deviate from charging this margin, which it was. The statement also contained a suggestion that there was no margin, which was also misleading. This misleading statement however was not a statement by Toyota New Zealand and the company is not responsible for it. Toyota New Zealand did clarify that it gave a recommended retail price and that the dealership had no obligation to charge that.
7. I find Toyota New Zealand's suggestion at the hearing that the price was largely governed by Toyota Japan is also a misleading statement. I do not want to breach the company's trust in disclosing the margin information, but I am satisfied that that information does not support Toyota New Zealand's explanation for its pricing. In my view, in order not to be misleading, given the information I have been provided, any statement of how the price is comprised needs to at least reference the fact that Toyota New Zealand and Armstrongs are adding significant margins to the price charged by Toyota Japan. The margins are not insignificant and therefore cannot be downplayed as beyond the control of the entities involved.
8. I accept there has been misleading conduct in how Armstrong and Toyota New Zealand has presented their pricing and responded to Mr Funnell's complaint. However, the Disputes Tribunal only has jurisdiction under section 43 of the Fair Trading Act to award Choice Technology Limited **damages or losses** it has suffered **as a result of** the misleading conduct. I do not accept there has been a loss suffered by the company as a result of the way the companies represent their pricing. If Mr Funnell had known the truth before he went to the dealership, it would not have changed the price. He would still have been presented with the same options he had, i.e. pay \$525.62 or go elsewhere. I am not aware of a cheaper alternative option that he had available to him. He has been misled, but has not suffered a loss as a result of that conduct alone.

### Is there a claim for breach of the guarantee of "*reasonably available*" spare parts?

9. Section 12 of the Consumer Guarantees Act requires that a "*manufacturer*" (which in this context includes importer) guarantee the reasonable availability of spare parts. This guarantee is intended to be a protection against the supply of products that are rendered of unacceptable quality by virtue of the fact that there is no support for repair or servicing when that ought to be reasonably available.
10. It is conceivable that a manufacturer might technically supply spare parts, but set the price so high that few, if any, people will want to pay the cost. Thus avoiding the necessity of actually setting up a supply chain or honouring the guarantee. The guarantee therefore has a

component where “reasonable availability” entails “reasonably priced”. To put it another way, a part may become not reasonably available where it is sufficiently unreasonably priced.

11. There are sections of the Consumer Guarantees Act that require the Disputes Tribunal to determine what is a reasonable price for **services** and what is not. The Tribunal must exercise caution when imposing a price on commercial entities, but it must not shy away from the responsibility placed on it to protect consumers.
12. I am satisfied that the priced charged by Armstrong was not a price whereby Toyota New Zealand could say the keys (as spare parts) are “reasonable available”. In finding this I rely on two factors: the apparent inherent manufacturing and supply cost of the key (circa \$33), and the reasonable expectation of a consumer who owns a used vehicle of this type which over time has depreciated to only a few thousand dollars. The part is simply not “reasonable available” when what is being charged is more than 10 times its manufacturing cost and that cost is likely to grow to some 10-20% of the value of the vehicle within the reasonable lifetime of the vehicle. If this were to have a component of “recovering research investment” (which I doubt) then it is not reasonable to load that cost so heavily onto the small percentage of customers who need replacement keys and not onto the cost of the vehicle up front. It seems fairly obvious that the cost is largely governed by the fact that Toyota is a monopoly supplier of the spare part. This is born out by observing what happens to the price when the manufacturer does not have a monopoly on the supply (the price becomes a fraction of what it formally was).

#### **Can Toyota New Zealand be liable to Choice Technology even though it did not import the car?**

13. As I have noted above, Toyota New Zealand have pointed out that it did not import the vehicle Mr Funnell has purchased a replacement key for. However, where the Consumer Guarantees Act defines “manufacturer” (section 2) and imposes a guarantee (section 12) there is no express requirement that the importer be the importer of the actual good in question, only that it be the importer of “those goods”. Section 2 states:

*“manufacturer means a person that carries on the business of assembling, producing, or processing goods, and includes—*

- (a) *any person that holds itself out to the public as the manufacturer of the goods;*
- (b) *any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods;*
- (c) *where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods”*

12. The intention of the Act is that where a manufacturer resides overseas and has no presence in New Zealand that consumers will still have a remedy against the person who is in the business of bringing “those goods” into New Zealand. I note that Toyota New Zealand acknowledged that it was the only person in New Zealand that would be able to supply the replacement key. This is due to an exclusive supply arrangement between Toyota Japan and Toyota New Zealand. It is therefore arguably justified that Toyota New Zealand be responsible for ensuring the “reasonable availability” of an item it has negotiated exclusive rights to import into New Zealand.
13. For the reasons stated above I find that Toyota New Zealand is in breach of section 12 of the Consumer Guarantees Act requiring the company to make reasonable efforts to ensure replacement keys are reasonably available in the New Zealand market. I find the total cost of \$200 is an upper price that the key might reasonably be supplied not in breach of the Act. Toyota New Zealand is to pay Choice Technology the difference of \$325.62.

Referee:



Clayton Luke

Date: 20 February 2017





## Information for Parties

### Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available or a mistake was made.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 28 days of the decision having been made. If you are outside of time, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

### Ground for Appeal

There is only one ground for appealing a decision of the Tribunal. This is that the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings.

A Notice of Appeal may be obtained from the Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 28 days of the decision having been made. There is a \$200 filing fee for an appeal. You can only appeal outside 28 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, and serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

### Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

### Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.