



BRIEFING

Regulatory framework for private parking enforcement

Date:	28 June 2018	Priority:	Medium
Security classification:	In Confidence	Tracking number:	3889 17-18

Action sought		
	Action sought	Deadline
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	Note the contents of this briefing. Agree to the recommendations.	5 July 2018

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Jennie Kerr	Manager, Competition and Consumer Policy	04 901 4958	027 214 6120	
Nadia Jones	Policy Advisor	04 901 2269		✓

The following departments/agencies have been consulted:
Ministry of Transport, Commerce Commission

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments:

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Purpose

To provide further advice on the regulatory framework for private parking enforcement and evidence of potential problems to inform your discussion at Cabinet Economic Development Committee. This briefing also provides process options for a review of the regulatory framework for private parking enforcement for your consideration.

Executive summary

1. On 13 June 2018, the Cabinet Economic Development Committee (DEV) deferred consideration of the paper entitled *Proposal to regulate fees charged by wheel clamp operators*, and invited you to provide further advice on the wider regulatory framework relating to parking enforcement on private land [DEV-18-MIN-0111].
2. On 18 June, you asked MBIE to provide advice to inform your discussions with DEV at a later date to be decided by your office.
3. We do not have strong evidence that demonstrates the size of problems related to private parking enforcement. Evidence suggests that the problems are particularly prevalent for wheel clamping, compared to the other enforcement methods of breach notices and towing.
4. While there is a relatively high volume of complaints about breach notices, they do not indicate the same level of harm as is associated with clamping. Anecdotal evidence suggests that some problems, particularly unreasonable fees, may exist for towing.
5. The main challenges with the policy development process thus far have been the lack of evidence, and the lack of consensus between agencies. We think it would be useful to address these issues by talking to stakeholders and agencies and gathering more evidence. We have developed three options which you could consider to look at the regulatory framework for private parking enforcement:
 - a. a targeted review of wheel clamping in parallel with the ongoing policy process
 - b. a targeted review of wheel clamping prior to seeking policy decisions
 - c. a full review of private parking enforcement, including towing and breach notices.
6. If we had to prioritise the aspects of private parking enforcement to address in a short timeframe, we would advise that wheel clamping be addressed in the first instance as the conduct associated with the practice appears to cause the most harm.
7. If you wanted us to undertake a review, we would recommend a targeted review of wheel clamping prior to seeking policy decisions.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that there is some evidence of potential problems with towing and breach notices, but that wheel clamping appears to be associated with more egregious conduct.

Noted

- b **Agree** to one of the following options for conducting a review of the regulatory framework for private parking enforcement:

- a. no further review at this stage
- b. a targeted review of wheel clamping in parallel with the ongoing policy process
- c. a targeted review of wheel clamping prior to seeking policy decisions
- d. a full review of all forms of private parking enforcement, including towing and breach notices.

- c **Note** the Ministry's preferred option is to conduct a targeted review of wheel clamping prior to seeking policy decisions, and that our second preferred option would be a targeted review in parallel with the policy process.

Noted

- d **Note** that we will amend the Cabinet paper entitled *Proposal to regulate fees charged by wheel clamp operators*, according to your preferred option for you to resubmit at your convenience.

Noted

Jennie Kerr
Manager, Competition and Consumer Policy

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

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Background

8. On 13 June 2018, the Cabinet Economic Development Committee (DEV) deferred consideration of the paper entitled *Proposal to regulate fees charged by wheel clamp operators*, and invited you to provide further advice on the wider regulatory framework relating to parking enforcement on private land [DEV-18-MIN-0111].
9. On 18 June, you met with MBIE and asked us to provide advice to inform your discussions with DEV at a later date to be decided by your office.

Regulatory framework that currently applies to private parking enforcement

10. Parking enforcement on private land generally takes three forms: towing, wheel clamping or the issuing of 'breach notices' (i.e. notices informing motorists that they have breached the terms and conditions of parking and are required to pay a fee).
11. There is no sector-specific legislation that governs parking rights and all forms of parking enforcement, or the charges allowed for such enforcement, on private land.
12. A range of statutes and common law (i.e. law which is not written into statute but has developed in the courts over time) may apply. We have provided a recap of the laws that apply to private parking enforcement in **Annex 1**.
13. Issues to do with private parking enforcement span across a number of regulatory systems and various agencies have an interest or role in private parking enforcement.
14. This includes the following agencies:
 - a. MBIE oversees the consumer and commercial regulatory system that works towards promoting the long-term interests of consumers. Our role is applicable to parking enforcement in that consumers may suffer harm from unreasonable trade practices.
 - b. The Ministry of Transport has an interest because affected consumers are motor vehicle users. The Ministry of Transport has responsibility for regulating parking enforcement on public land and it has some specific legislation which applies to towing operators.
 - c. The Ministry of Justice also has a role in its responsibility for general contract law, which is part of the regulatory framework for parking enforcement, and in specific licensing requirements which may apply to some enforcement companies.
15. This illustrates that the regulatory framework for private parking enforcement is complex and is the responsibility of no single agency.

Evidence of potential problems in the wider regulatory framework for private parking enforcement

16. In December 2017, we provided you with information on the potential problems that consumers face in relation to parking enforcement on private land [briefing 1596 17-18].
17. These problems generally fit into one of the following categories:
 - a. Unreasonable or unjustified fees
 - b. Unclear signage
 - c. Intimidating/unreasonable conduct by parking enforcement operators.

18. We do not have strong evidence that demonstrates the size of these problems related to each form of private parking enforcement.
19. Anecdotal evidence suggests that the problems are particularly prevalent for wheel clamping. Below we provide what evidence we have been able to obtain about the potential size and seriousness of these problems for each enforcement method.

Breach notices

20. The Commerce Commission receives a relatively high volume of complaints about companies that use breach notices as their primary method of parking enforcement on private land.
21. For example, Wilson Parking, which primarily uses breach notices, was the ninth most complained about trader to the Commerce Commission in 2016/2017 for alleged breaches of the Fair Trading Act 1986. Over the two years to April 2018, Wilson was the subject of 91 complaints out of a total of 136 unique complaints to the Commerce Commission about the private parking industry.
22. The number of complaints about breach notices is likely to be high because it is a commonly used enforcement method. Wilson Parking is New Zealand's largest parking company, controlling over 300 parking lots across the country spanning 40,000 individual car parks.¹
23. Commerce Commission complaints data about breach notices primarily relate to:

Fees	<ul style="list-style-type: none"> • level of fees • misleading representations of price
Signage	<ul style="list-style-type: none"> • poorly located or inadequate signage
Conduct	<ul style="list-style-type: none"> • enforcement action taken where parking equipment is faulty or where there has been no breach of terms and conditions • handling of appeals

24. The Commerce Commission notes that complaints involving breach notices are the most common, but are not significantly higher than the number of complaints about clamping when taking into account the much larger scale and national coverage of companies that issue breach notices.

Wheel clamping

25. By way of comparison, complaints to the Commerce Commission about wheel clamping primarily relate to:

Fees	<ul style="list-style-type: none"> • charging additional fees beyond those identified in terms and conditions (where terms and conditions are made available)
Signage	<ul style="list-style-type: none"> • poorly located or inadequate signage
Conduct	<ul style="list-style-type: none"> • clampers lying in wait for motorists • unauthorised clamping on public land • handling of appeals (not responding to appeals, not following the appeal process, adding additional fees, inability to contact company) • aggressive behaviour • pursuing paid debts

¹ <https://www.stuff.co.nz/business/100678814/Parking-giant-Wilson-pays-wardens-a-performance-bonus-but-insists-no-quota>

26. This suggests that while there are complaints about breach notices, they do not appear to be the same level of egregiousness as the conduct that is the subject of wheel clamping complaints. As far as we are aware, breach notice complaints are not about intimidation or harassment. There is little evidence of a widespread problem of unreasonable conduct. This could be because breach notices are less likely to result in direct face-to-face contact between a motorist and a parking enforcement operator.
27. While it would be worth examining these issues further for evidence of potential problems, it appears that there is probably more serious harm associated with wheel clamping.

Towing

28. In conversations we have had with the New Zealand Automobile Association (**AA**), the organisation says that prior to regulation of the towing industry, it used to **receive many** complaints about rogue tow truck operators. However, the AA claims that it **no longer** receives many complaints about towing.
29. The Commerce Commission says that it receives few complaints about towing, but that the complaints primarily relate to the level of the fee charged. It may however receive few complaints because it is not the regulator with primary responsibility for the towing industry.
30. The Ministry of Transport and New Zealand Transport Agency (**NZTA**) are responsible for regulating towing as a vehicle recovery service under the Land Transport Act 1998. Tow truck drivers are required to be licensed, carry identification and keep registers of tows and complaints. They must also behave in an orderly and civil manner at all times in their work.
31. We requested data on towing complaints from NZTA. Unfortunately NZTA was unable to provide data in time for this briefing, however we will provide this if it becomes available.
32. The Ministry of Transport is not aware of recent issues with the towing regulatory regime as it relates to towing on private land. The Ministry of Transport has not reviewed the towing regime since the Vehicle Licensing Review in 2012, which concluded that licensing was effective in promoting appropriate behavior by tow truck drivers and staff at tow yards, and that it assisted local Police in administering tow rosters. The industry also reported anecdotally that the licensing regime had been relatively effective at keeping gang-related interests out of the towing industry, which had apparently been an issue.
33. Anecdotally we have heard of some problems with towing in relation to unreasonably high fees, intimidating behaviour and unclear signage. For example, towing has been the subject of complaints in the media and in correspondence from members of the public to Ministers.
34. Given the anecdotal evidence suggests that there may be some problems, it may be worth reviewing how well the regulatory regime is working for the towing sector. However, we suggest that if Ministers are interested in reviewing the regulatory regime for towing, this work would best be led by the Minister of Transport given that this regime is located within the Transport portfolio. Similarly, if any amendment is required to the towing regulatory regime, we would expect this to be led within the Transport portfolio.

Process options for looking at the regulatory framework for private parking enforcement

35. You may wish to proceed by going back to DEV to seek policy decisions and approval to begin drafting legislation on wheel clamping, with no further review of the regulatory framework.

36. We understand that the Government wants to take action to address unreasonable parking enforcement practices in a timely manner. If we had to prioritise the aspects of private parking enforcement to address in a short timeframe, we would advise addressing wheel clamping in the first instance as the evidence available suggests that it attracts the most egregious conduct.
37. However, the two main challenges with the policy development process thus far have been the lack of evidence, and the lack of consensus between interested agencies about the policy direction. We think it would be useful for us to address both of these issues by talking to stakeholders and agencies and gathering more evidence by reviewing the regulatory framework further.
38. We have developed the following options which you could consider as next steps for looking at the regulatory framework for private parking enforcement.

Option 1: Proceed with policy decisions and conduct targeted review in parallel

39. Under this option we would undertake a targeted review of wheel clamping in parallel with the decision-making and legislative process. This would enable us to gather information and data from industry and other stakeholders to support the legislative design process. When DEV next considers the proposals, you could suggest that you proceed with the proposals but conduct a targeted review in parallel.
40. You could suggest a mandated report back, where Cabinet can consider if any further changes or decisions are required.

Timing	You could seek policy decisions at your convenience. A limited review of wheel clamping might take about three months. This would primarily involve consultation with stakeholders.
Scope	The review would be targeted to wheel clamping only, and not look at evidence of other issues with private parking enforcement.
Governance	MBIE would lead this work with support from the Ministry of Transport and other agencies as required.

Benefits

41. This option would enable you to proceed with taking action on wheel clamping in a timely manner, while providing the opportunity for us to gather evidence and consult to support the legislative design process.

Risks

42. A key risk of looking at the issues after policy decisions have been made is if consultation raises new issues or evidence which suggest that changes are required to the high-level policy direction (for example, evidence which might suggest that a fee cap is not the best option). Addressing these types of issues after Cabinet has made its decisions could be difficult, especially if draft legislation is already at select committee or even further along in the legislative process when the evidence arises.
43. We think it is unlikely that the evidence would suggest a ban, although there would be stakeholder support for this option. However, it may suggest some further conduct regulation is required or may provide further data on the costs or other impacts of the fee cap.
44. Another risk is that we do not capture any ongoing issues with other forms of private parking enforcement. This could mean that the law is not clarified and applied consistently across private parking enforcement. This could create implications for other forms of parking enforcement that are not regulated (for example, it could increase the incidence of and fees charged for other forms of enforcement).

Option 2: Targeted consultation on wheel clamping prior to policy decisions (our preferred option)

45. We would do some targeted consultation and gather evidence on wheel clamping before Ministers make policy decisions and legislation has been drafted.

Timing	This could take at least three to five months, depending on scope. We suggest consulting with stakeholders (which might include a targeted discussion paper) and reaching an agreed approach with other agencies and then have an additional month to update the Cabinet paper if required. We could do more robust data-gathering with a consumer survey, although this would extend the timeframe.
Scope	The review would be targeted to wheel clamping only, and not look at evidence of other issues with private parking enforcement.
Governance	MBIE would lead this work with support from the Ministry of Transport and other agencies as required.

Benefits

46. This would allow us to address any new issues or evidence raised in consultation before Cabinet makes policy decisions. This would mitigate the risk of potentially having new issues which require a reconsideration of the wider policy direction.

Risks

47. The risk of this option, as with Option 1, is that we do not capture issues elsewhere, such as with towing and breach notices.

48. At the other end, there is the risk of scope-creep: consultation on wheel clamping would inevitably raise issues with private parking enforcement in general which would be out of our scope to address in the policy process. This could be mitigated by being very clear on the scope of the targeted review, and recording the other issues raised for a possible future review.

Option 3: Full review of regulatory regime for private parking enforcement

49. This would be a full review of the regulatory regime for private parking enforcement, with joint agency and joint Ministerial responsibilities.

50. The process for the review might include:

- a. a Terms of Reference agreed by Ministers and agencies which outlines the scope of issues, options and responsibilities
- b. a consumer survey to gather data on issues and their scale
- c. a public discussion paper on issues and options
- d. engagement with stakeholders.

Timing	We estimate this would take at least nine months: at least two months to set up governance arrangements and draft a Terms of Reference, two months for drafting of a discussion paper with input from various agencies, three months for consultation and evidence-gathering, two months to develop recommendations and seek Cabinet approval.
Scope	The review would examine the issues with the wider regulatory framework for private parking enforcement. It would include clamping, towing, breach notices and other forms of private parking enforcement, if any.
Governance	We would suggest forming a joint agency governance group to include MBIE, the Ministry of Transport, NZTA, the Ministry of Justice, New Zealand Police, the Department of Internal Affairs and the Government Centre for Dispute Resolution. Several Ministers might have joint responsibility for this work.

Benefits

51. There would be merit in reviewing the regulatory framework because in general the laws around private parking enforcement are considered a legal 'grey area' – except for the licensing and conduct requirements relating to tow truck operators. It would be helpful for consumers to have greater clarity about the laws around reasonable fees, signage and conduct, without them having to test these in a court or the Disputes Tribunal. The problems that consumers face generally stem from this legal ambiguity. For example, because the law is not clear on what exactly constitutes a reasonable parking enforcement fee, parking operators are able to exploit this to charge potentially unreasonable fees.
52. The advantage of conducting a comprehensive review of the wider regulatory framework for private parking enforcement is that it could result in better clarification of the law and the application of the law consistently across private parking enforcement. If we only address one enforcement method, legal ambiguity is likely to continue in other areas.
53. There are also likely to be implications of regulating one enforcement method but not the others. For example, addressing wheel clamping may increase the use of towing. The advantage of a wider review is that it may help to address these potential impacts.

Risks

54. This would be a substantial piece of work that would take the most amount of time. A review of the regulatory framework would need cross-agency, and possibly joint Ministerial, input. As indicated above, it would likely require the Minister of Transport to lead a review of towing regulation given that it is currently regulated under the Transport portfolio.
55. A risk is that this review would take away resource from other Government priorities.

Recommendation

56. We think that Option 2 is the best option. It allows the Government to address the most egregious conduct associated with wheel clamping in a timely manner, while providing us with the opportunity to gather evidence and consult stakeholders further before seeking policy decisions.
57. Option 1 is our second preferred option, as it would allow us to gather evidence to support the legislative design process, even if we do it in parallel with this process.
58. There is not enough evidence at the moment to suggest that a wider review under Option 3 would be necessary in the short term to deal with urgent problems.

Consultation

59. We have consulted both the Ministry of Transport and the Commerce Commission in the preparation of this briefing.

Communications and risks

60. We have not identified any risks in addition to those above.

Next steps

61. As a next step, we suggest you indicate which process option you prefer of the following:

- No further review at this stage
- conduct a targeted review of wheel clamping in parallel with the ongoing policy process
- conduct a targeted review of wheel clamping prior to seeking policy decisions
- conduct a full review of all forms of private parking enforcement, including towing and breach notices.

62. We can then work with you to amend the Cabinet paper for you to take to DEV at your convenience.

Annexes

Annex 1: Regulatory framework for private parking enforcement.

Annex 2: Summary of what we know about private parking enforcement and options for a review

Annex 1: Regulatory framework for private parking enforcement

1. Below is an overview of the various statutes and common law principles that make up the 'regulatory framework' for private parking enforcement. These laws apply depending on the situation (for example, whether the situation is trespass or a parking service has been offered). How these laws interact in each circumstance is not clear.

The law of contract

2. When someone parks on private land, they are implicitly agreeing to a contract. They may breach the contract by staying too long, or by parking where it is prohibited to do so. Contractual charges may be applied to compensate the parking operator or land owner for losses suffered from the breach by the motorist.
3. Under contract law, costs that may be imposed in breach of the parking contract are not penalties or fines imposed to punish the motorist. Rather, they are liquidated damages, for the purpose of compensating the parking operator or land owner for losses suffered from the breach. Traditionally, liquidated damages are enforceable only if the amount payable is a genuine 'pre-estimate' of the possible loss (i.e. an estimate based on actual damages that would be incurred). More recently, courts in the United Kingdom have applied a broader test to liquidated damages, ruling that liquidated damages may also protect the innocent party's "legitimate interest", which could be in deterring overstaying motorists to free up parking for other customers.
4. Motorists have the right to refuse to pay and to challenge the charges through the Disputes Tribunal.

The law of trespass

5. When someone parks on private land and they are not welcome, they may be in breach of trespass law. The common law doctrine of 'distress damage feasant' provides that charges can only cover the 'damage' caused by the driver to the land owner. Damage could be, for example, the lost revenue resulting from someone using a parking space that could otherwise be used by someone else, and may also include the administrative costs of taking enforcement action, such as towing a vehicle, issuing a breach notice or applying a clamp.

The Fair Trading Act 1986

6. The Fair Trading Act applies to anyone in trade, including car park operators and commercial land owners and lessees. Under the Fair Trading Act, signs and information provided by the operator of a car park must be accurate and not misleading. If signage or representations of the terms and conditions of parking (including potential consequences of clamping) are missing key information or make inaccurate statements about legal rights, this may result in a misleading representation.
7. However, the Fair Trading Act does not require signage to be provided. Furthermore, the Act will only apply where a parking service has been offered, and will not necessarily apply to trespass.

The Consumer Guarantees Act 1993

8. The Consumer Guarantees Act applies when a service has been provided to a consumer, including car parking services. The guarantee that a service will be carried out with reasonable care and skill applies to information a trader provides about parking rights. Motorists occupying a car park provided as a service have the right to clear instructions about (where relevant) operating hours, fees and payment, reserved and unreserved parking and consequences of breaching conditions.

9. However, the Consumer Guarantees Act will only apply where a parking service has been offered. We are not aware of any case law that puts a parking operator or property owner in breach of the Act if they have not provided signage, for example.

Licensing requirements

10. Towing is regulated as a vehicle recovery service under the Land Transport Act 1998. Tow truck drivers are required to be licensed, carry identification and keep registers of tows and complaints.
11. There are also specific licensing requirements which apply to persons carrying out parking enforcement who meet the definition of a 'property guard' under the Private Security Personnel and Private Investigators Act 2010, which is administered by the Ministry of Justice. A property guard is defined as a person in the business of guarding property belonging to another person, elsewhere than on premises owned or occupied by the property guard. Based on the definition of a 'property guard', wheel clampers and parking enforcement operators who issue breach notices may meet this definition. Businesses or individuals that undertake wheel clamping on their own premises are excluded from the definition of 'property guard' under the Act. Tow truck drivers may not necessarily meet the definition if they are not actively guarding property.
12. Property guards are required to be licensed by the Private Security Personnel Licensing Authority, which also has a complaints and disciplinary function.
13. The Department of Internal Affairs (DIA), along with the Ministry of Justice, is partly responsible for regulating property guards under this licensing regime. DIA is currently looking at whether those providing wheel clamping services require a Property Guard Certificate of Approval and need to be working for a Property Guard Licence holder. DIA is considering taking legal action against s 9(2)(ba)(ii) to test whether these licensing requirements apply. s 9(2)(b)(ii)

Annex 2: Summary of what we know about private parking enforcement and options for a review

WHAT WE KNOW ABOUT PRIVATE PARKING ENFORCEMENT

	SIZE OF THE PROBLEM	REGULATION AND RESPONSIBILITY
BREACH NOTICES	<ul style="list-style-type: none"> • High number of complaints to Commerce Commission • Complaints about fees and signage • No evidence of particularly egregious conduct 	<ul style="list-style-type: none"> • Contract law – self-enforcement • Consumer law (MBIE, Commerce Commission) • Property guard licensing may apply (Ministry of Justice, DIA)
TOWING	<ul style="list-style-type: none"> • Fewer complaints, especially after licensing regime introduced • Complaints primarily about level of fees • Some anecdotal evidence of unreasonable conduct – may be a compliance/ enforcement issue 	<ul style="list-style-type: none"> • Licensing and conduct regime under the Land Transport Act (Ministry of Transport, NZTA) • Contract law – self-enforcement • Trespass law – self-enforcement • Consumer law may apply (MBIE, Commerce Commission)
WHEEL CLAMPING	<ul style="list-style-type: none"> • High number of complaints and anecdotal evidence • Complaints about fees, unreasonable conduct and signage • Evidence of more widespread problem of egregious conduct 	<ul style="list-style-type: none"> • Contract law – self-enforcement • Trespass law – self-enforcement • Consumer law (MBIE, Commerce Commission) • Property guard licensing may apply (Ministry of Justice, DIA)

OPTIONS FOR A REVIEW OF PRIVATE PARKING ENFORCEMENT

	BENEFITS	RISKS
OPTION 1: Targeted review of wheel clamping in parallel with legislative process <i>(three months)</i>	<ul style="list-style-type: none"> • Able to proceed with policy decisions in a timely manner • Allows consultation to support legislative design 	<ul style="list-style-type: none"> • New evidence may lead to amendments and/or new policy decisions • Does not capture issues with other enforcement methods
OPTION 2: Targeted consultation on wheel clamping prior to policy decisions <i>(three to five months)</i>	<ul style="list-style-type: none"> • Allows consultation and evidence-gathering to inform policy decisions 	<ul style="list-style-type: none"> • Does not capture issues with other enforcement methods • Scope-creep – may raise issues with other enforcement methods which are out of scope to be addressed in the policy process
OPTION 3: Full review of regulatory regime for private parking enforcement <i>(at least nine months)</i>	<ul style="list-style-type: none"> • Captures issues with all enforcement methods • Could result in more consistent clarification and application of the law 	<ul style="list-style-type: none"> • Would take the most amount of time and cross-agency resource



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Wheel clamping legislation

12 March 2018



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Key decisions needed

- High level approach: 4 options
- Scope: wheel clamping only or other enforcement methods?
- Fee regulation
- Timeline and process



Background

Problem

- Clamping is a cheap and effective mechanism of enforcing parking breaches, which has attracted unscrupulous operators into the market
- This has created the following problems:
 - Unreasonable fees
 - Unclear terms and conditions
 - Unreasonable conduct

Current regulatory framework

- Common law of contract
- Common law of trespass
- Consumer law (Fair Trading Act, Consumer Guarantees Act)
- Specific licensing requirements:
 - Private Security Personnel and Private Investigators Act 2010 (PSPPIA)
- Voluntary industry code
 - MBIE view: the code has not been effective

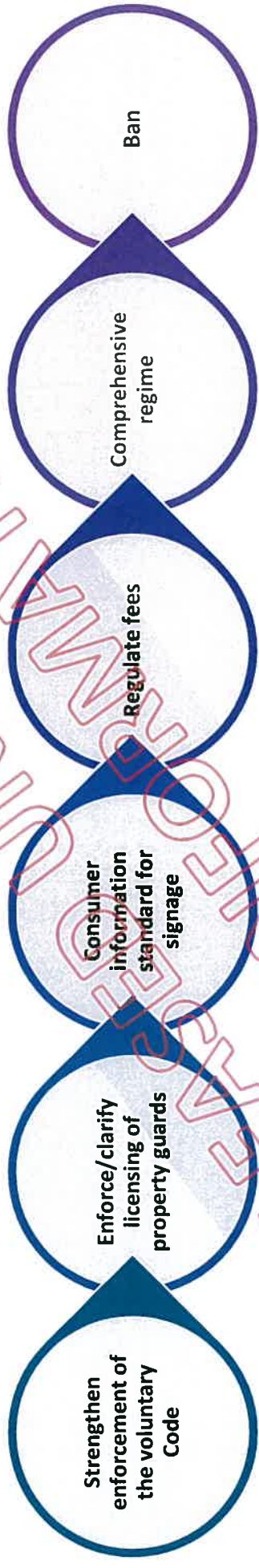


Recap: member's Bill in its current form

- The Bill amends the Land Transport Act 1998 to:
 - require wheel clamp operators to be licensed
 - require clampers to carry identification and display signage
 - set parameters around the ways in which payment can be recovered from motorists
 - set maximum fees at \$50
 - create an appeal process for consumers
 - impose penalties for a breach of wheel clamping requirements.



Options to address the problem



Lighter touch

Heavy-handed



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How options could be implemented

Option 1: Ban wheel clamping

- would alleviate:
 - unreasonable fees
 - unclear terms and conditions
 - conduct
- \$ - low implementation/enforcement cost
- international jurisdictions have banned (UK, QLD)
- controversial: would limit the mechanisms available to enforce parking breaches
- would increase towing to a greater extent

Comprehensive regime

Option 3: Multi-pronged approach

- clarify application of licensing regime in PSPPIA
 - would address conduct
- regulate fees (Land Transport Act or PSPPIA)
 - would address unreasonable fees
- information requirements (Fair Trading Act)
 - would address unclear signage by those providing parking service 'in trade'
- multiple regulators –consumer confusion
- \$\$\$ - significant additional resourcing

Option 2: Focus on regulating fees

- would address unreasonable fees
- could be implemented via Land Transport Act or PSPPIA
- \$\$ - moderate additional resourcing
- might increase fees charged for towing and/or breach notices (as would all options that regulate fees)

Option 4: Bill in its current form

- would address:
 - unreasonable fees
 - unclear terms and conditions
 - conduct
- \$\$\$ - would require significant resourcing to set up and enforce. NZTA does not currently do on-the-ground enforcement
- overlaps with property guard regulation –PSPPIA



Scope: application to wheel clamping

- Our starting position is to build a regime around wheel clamping
- There may be justification for a wider scope if there are problems elsewhere

	Clamping	Towing	Breach notices
Problem: Unreasonable fees <ul style="list-style-type: none"> • Examples: <ul style="list-style-type: none"> • \$760 for half an hour • \$480 for 5 minutes • \$200 for 4 minutes 	Little evidence of widespread problem – but could increase if clamping fees are capped	AA data: fee complaints are primarily in relation to breach notices. Fees approx. \$65.	Little evidence of widespread problem
Problem: Unreasonable conduct e.g. intimidating behaviour <ul style="list-style-type: none"> • Various anecdotes in media: <ul style="list-style-type: none"> • Clampers lie in wait • Clamped while passengers in car • Unauthorised persons clamping 	Note: towing operators are required to be licensed, carry identification etc	Little evidence of widespread problem	Little evidence of widespread problem
Problem: Unclear/absent terms and conditions	Anecdotal evidence	Little evidence of widespread problem	Half of AA complaints about signage, mostly about companies that use breach notices. Wilson Parking: 9 th most complained about trader for alleged Fair Trading Act breaches.



Implications of widening scope

- Higher monitoring and enforcement costs for the regulator
- Higher compliance costs for all parking operators, not just wheel clamp operators
 - including upfront and ongoing costs (licensing, updating signage, identification)
 - potential reductions in revenue from fee caps
- Pre-emptive impact of regulating wheel clamping on other enforcement methods (i.e. regulating clamping in isolation is likely to increase towing)



Regulation of fees: options

	Option 1: Prescribe cap in regulations (MBIE's preferred option)	Option 2: Cap tied to public parking offences	Option 3: Reasonable fees
Description	Provide that Minister can prescribe cap in regulations	Tie cap to maximum fines that councils can charge for public parking offences (approx. \$60)	Provision that fees must be reasonable and related to cost recovery
Benefits	Clarity for consumers and operators about what fees are reasonable – makes breaches easier for consumers to self-enforce	Less administrative cost for government in making and updating regulations	Not prescriptive – does not have risk of requiring operators to charge below cost or allowing them to charge above cost
Costs	Cap may be set below what operators need to recover costs – however regulations provide flexibility if fees need to be updated e.g. for inflation	Maximum for public parking offences may not always be appropriate e.g. if it does not allow operators to recover reasonable costs. Provides less flexibility than a prescribed cap	Difficult to interpret and enforce in practice, particularly if it is up to the consumer to understand and enforce



Timeline and process

- MBE's view is that public consultation would help to inform policy proposals.
- We recommend a longer timeline in order to do so.
- If the Bill needs to be introduced in May, we suggest the following timeline:

Activity	Date
Draft DEV paper to Minister	Wed 21 March
Departmental consultation	Wed 21 March
Minister's feedback	By Tue 27 March
DEV paper lodged	Thurs 29 March
DEV meeting	Thurs 5 April
Cabinet	Mon 9 April
PCO drafting*	From 9 April
Draft LEG paper to Minister	Mon 24 April
LEG paper lodged	Thurs 3 May
LEG meeting	Wed 9 May
Introduction	Thurs 10 May

*Due to tight timeframes for PCO drafting, we suggest getting approval from the Attorney General to issue drafting instructions in advance of Cabinet policy decisions





BRIEFING

Private parking enforcement: background and options

Date:	21 December 2017	Priority:	Medium
Security classification:	In Confidence	Tracking number:	1596 17-18

Action sought		
	Action sought	Deadline
Hon Kris Faafoi Minister of Commerce and Consumer Affairs	<p>Note that there are a range of options to address problems with private parking enforcement.</p> <p>Note our comments on the Land Transport (Wheel Clamping Protection) Amendment Bill (a private member's bill).</p> <p>Forward this briefing to the Minister of Transport.</p> <p>Provide feedback on this briefing</p> <p>Agree to discuss with the Minister of Transport (and if desired other colleagues with an interest) how this work should be advanced.</p>	2 February 2018

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Karen Chant	Acting Manager, Competition and Consumer Policy	04 470 2538		
Nadia Jones	Policy Advisor	04 901 2269		✓

The following departments/agencies have been consulted in the course of preparing this briefing
Ministry of Transport

- Minister's office to complete:**
- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments:



BRIEFING

Private parking enforcement: background and options

Date:	21 December 2017	Priority:	Medium
Security classification:	In Confidence	Tracking number:	1596 17-18

Purpose

To respond to your request for background information and advice on next steps for progressing work on private parking enforcement (including wheel clamping).

Executive summary

1. There is no specific consumer legislation relating to car parking enforcement on private land, although certain aspects such as signage may be covered by the Fair Trading Act 1986 and Consumer Guarantees Act 1993.
2. Parking enforcement on private land generally takes three forms: towing, wheel clamping or the issuing of 'breach notices'. Tow truck operators are required to be licensed under transport regulations. Depending on the situation, wheel clamp operators may be required to be registered as property guards under the Private Security Personnel and Private Investigators Act 2010.
3. A voluntary industry code of conduct for private parking enforcement ('the Code') came into effect in 2015. MBIE's view is that the Code has not been effective in changing behaviour because not all players have signed up, there is a lack of mechanisms to enforce the Code and there are continuing consumer complaints about private parking enforcement.
4. However, we do not have evidence that demonstrates the size of the problems related to private parking enforcement. It is possible that the type of conduct which has been receiving complaints is attributable to a small number of rogue operators, rather than being an industry-wide problem.
5. We have outlined some possible options for action, but public consultation and a more detailed cost and benefit analysis is desirable before one of these options is adopted. The options are:
 - a. strengthening enforcement of the voluntary Code
 - b. requiring parking operators to disclose information to consumers
 - c. introducing a cap on enforcement fees
 - d. setting comprehensive rules for the private parking enforcement sector
 - e. banning wheel clamping.
6. The Land Transport (Wheel Clamping Protection) Amendment Bill is a member's Bill sponsored by Greg O'Connor MP which has been placed in the ballot but has not yet been drawn. This would set comprehensive rules for wheel clamping, including introducing a licensing regime for clamping operators. The Minister of Transport has expressed interest in adopting this Bill as a Government Bill, which would have the effect of bringing this matter under the Transport portfolio.

7. We have commented on the Land Transport (Wheel Clamping Protection) Amendment Bill in this briefing and can provide you with further advice as required. Our initial view is that this Bill could provide consumers with greater protections, but further work is desirable to ensure the regulatory costs do not outweigh these consumer benefits. We can provide you with further advice as required.
8. As a next step, we suggest that you meet with the Minister of Transport to discuss how this work should be advanced and which Minister should take the lead. Given their interest in this matter, you may also wish to invite the Minister of Justice (who has responsibility for the Private Security Personnel and Private Investigators Act) and Greg O'Connor MP.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that the Ministry has identified a range of possible options which could be analysed further to address problems with private parking enforcement. *Noted*
- b **Note** that the Land Transport (Wheel Clamping Protection) Amendment Bill, a member's Bill sponsored by Greg O'Connor MP, has been placed in the ballot but has not yet been drawn. *Noted*
- c **Note** that the Minister of Transport has expressed an interest in adopting the proposed Land Transport (Wheel Clamping Protection) Amendment Bill as a Government Bill, which would bring this issue under the Transport portfolio. *Noted*
- d **Forward** this briefing to the Minister of Transport. *Forwarded*
- e **Agree** to discuss with the Minister of Transport, and any other interested colleagues, how this work should best be advanced, including which Minister should take the lead. *Agree/Disagree*
- f **Provide** feedback to the Ministry on this briefing. *Provided*

Karen Chant
Acting Manager, Competition and Consumer Policy

.... / /

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs

..... / /

Background

Introduction

9. On 15 December, your office requested a briefing setting out the problems relating to wheel clamping, possible options for reform and an assessment of the Land Transport (Wheel Clamping Protection) Amendment Bill.

Regulation of private parking enforcement in New Zealand

10. Rules for when motorists park unlawfully or for too long vary depending on whether it is on public land (such as roads and council car parks), or private land (such as commercial car park buildings and shop car parks).
11. Public parking enforcement is regulated in the New Zealand Road Code, the Land Transport Road User Rule 2004 and the Land Transport Act 1998.¹ There is no specific consumer legislation regulating parking enforcement on private land, although aspects such as signage may be covered by the Fair Trading Act 1986 and Consumer Guarantees Act 1993.
12. Parking enforcement on private land generally takes three forms: towing, wheel clamping, or the issuing of 'breach notices' that inform motorists that they have breached the terms and conditions of parking and are required to pay a penalty.
13. Towing is regulated as a vehicle recovery service under the Land Transport Act. Tow truck drivers are required to be licensed, carry identification and keep registers of tows and complaints. This regulation does not set requirements for release fees for towed vehicles.
14. Wheel clamp operators may meet the definition of a "property guard" under the Private Security Personnel and Private Investigators Act 2010 (administered by the Ministry of Justice). The Act does not specify wheel clampers under the definition of a property guard – which is defined as a person in the business of guarding property belonging to another person, elsewhere than on premises owned or occupied by the property guard. However, previous court cases have found wheel clamp operators to be guilty of operating without a license under the Act. The Act would not apply to persons carrying out wheel clamping on their own place of business.

How the law applies to parking enforcement on private land

15. Depending on the situation, private land owners may seek to enforce rights related to parking on private land using one of the following legal principles:
 - a. **The law of contract:** Clear and visible signage or other information displaying the terms and conditions of parking in a car park generally serves as the contract between the motorist and the car park owner/operator. Contractual charges (such as a breach notice fee) may be applied to compensate the parking operator or land owner for losses suffered from the motorist's breach of the contract.
 - b. **The law of trespass:** A motorist who parked under a contract but breached terms and conditions (that were clear and visible) may be considered a trespasser. An owner or occupier of land has the right to protect his or her land against trespassers. Damages may be claimed or an injunction applied to prevent further trespass, such as by towing or clamping a vehicle.²

Recourse for consumers if they feel enforcement action is unreasonable or unjustified

¹ These rules and regulations fall within the responsibilities of the Associate Minister of Transport.

² However, motorists have a comparable right not to have their property interfered with. This generally means that a land owner may have the right to tow or clamp the trespassing vehicle and hold it until damages have been paid, but only if the motorist has consented to, or willingly assumed, the risk of the vehicle being clamped or towed.

16. Consumer law may be applicable in certain situations. To the extent that parking facilities provide a parking "service", the Fair Trading Act 1986 prohibits traders from engaging in misleading or deceptive conduct, while the Consumer Guarantees Act 1993 requires services to be carried out using reasonable skill and care.
17. In this context, if signage about the terms and conditions of parking is absent or not visible, is missing key information, or makes misleading representations about legal rights, these Acts may have been breached. In this case, individuals may be able to complain to the Commerce Commission and may dispute payment of the breach notice, towing or clamping release fee at the Disputes Tribunal.
18. In addition, the Consumer Guarantees Act may apply to unreasonable fees. The Consumer Guarantees Act provides that a price for a service (if not agreed through contract) must not be unreasonable. This might apply to the costs of towing or other 'services'. If an individual believes that fees are unreasonable (for reasons unrelated to the signage), they can dispute the amount of payment at the Disputes Tribunal.

The Code of Practice for Parking Enforcement on Private Land

19. In December 2015 members of the parking industry signed a voluntary industry Code of Practice for Parking Enforcement on Private Land ('the Code' – attached as Annex 2). The Code sets out that land owners should first seek to deter unauthorised parking through signage and physical barriers before moving to enforcement. When enforcement is required, it states that breach notices should be the default option, with towing and wheel clamping used only as a last resort.
20. The Code does not set out maximum charges, or methods for calculating charges (including damages), for parking enforcement fees in relation to breach notices, clamping or towing. These fees are a major source of complaint.³
21. Secure Parking, Tournament Group and Wilson Parking (and their parking enforcement subsidiaries) have agreed to be bound by the Code. We do not have an accurate sense of the market shares across the industry, however we understand that the Code signatories comprise a large share of the market for private parking enforcement.
22. Several smaller companies have not signed up.⁴ Generally, the companies who have not signed up are those that appear more often in the media as a source of consumer complaints regarding wheel clamping. However, there is also evidence that consumers complain about Code signatories – Wilson Parking was the ninth most complained about trader to the Commerce Commission last year for Fair Trading Act complaints.

³ Agreements between competitors to fix prices for services provided in competition with each other are unlawful under the Commerce Act 1986 (i.e. a 'cartel provision'). The Commerce Act may have deterred the parties from agreeing parking enforcement fees; however further legal advice would be required to determine if the fees charged for a breach could be considered an aspect on which the parking companies "compete".

⁴ We are aware of the following companies who have not signed up to the Code:

- a. New Zealand Enforcement Services (appears to use only breach notices, rather than towing or clamping)
- b. Care Park (appears to use only breach notices and towing)
- c. Valley Parking Services (uses clamping but was a signatory to the old version of the Code)
- d. Amalgamated Car Parking Services (has appeared in the media as a source of concern for its conduct)
- e. Elite Parking Services (has appeared in the media as a source of concern for its conduct).

23. We understand that not all parking companies are signatories because:
- a. Some do not use wheel clamping as a method of enforcement and may feel that they are already conducting themselves in a way which complies with the Code.
 - b. Others may not be aware of the Code.
 - c. For smaller operators in particular, breach notices and towing may be less feasible than clamping given that the former mechanisms require greater investment (i.e. breach notices may require some form of barrier to prevent a vehicle exiting the parking facility, while towing requires a tow truck).
 - d. Clamping is often more lucrative than issuing breach notices, meaning that some companies depend on the practice of clamping for revenue.

MBIE's view of the Code

24. MBIE supports self-regulatory measures by the parking sector to improve the standard of enforcement practices. We consider that the conduct requirements in the Code have the potential to reduce consumer concerns about parking enforcement and improve consumer protection, but only to the extent that the Code is adopted and adhered to.
25. However, we cannot conclude that the Code has been effective in changing behaviour across the industry. The Code has been in effect for two years but appears not to have significantly reduced the type of behaviour which it seeks to prevent. There continues to be consumer complaints about private parking enforcement.
26. This is because not all industry players have signed up and there is a lack of robust monitoring and enforcement mechanisms. The current means of monitoring compliance has been to monitor whether the AA and Consumer New Zealand receive complaints from consumers about breaches of the Code by signatories. As the Code may not be widely known or understood by consumers, in our view this is not a robust means of monitoring compliance.
27. Furthermore, the Code does not set out penalties for breaching its provisions. A breach may not necessarily incur punitive action unless that action is also a breach of the law.

Problem definition

28. The problems that consumers face in relation to parking enforcement on private land are varied. These problems generally fit into one of the following categories:
- a. Unreasonable or unjustified fees
 - b. Unclear terms and conditions
 - c. Intimidating/unfair behaviour by parking enforcement operators.
29. We do not have clear evidence of the size of these problems. It is possible that the type of conduct which has been receiving complaints, particularly in relation to wheel clamping, is attributable to a small number of "rogue" operators, rather than being an industry-wide problem.

Fees

30. Consumers complain about being charged disproportionate fees. Fees may be considered out of proportion to the period of time in breach, or may be out of proportion to the cost incurred by the property owner in taking the enforcement action. Fees appear to be a particular concern where a vehicle has been clamped, as consumers do not understand the justification for the amount charged to release a vehicle but are often expected to pay up on the spot without negotiation.
31. The law does not provide guidance on the exact charges that are allowable, with most cases being handled between motorists and parking enforcement companies or by the Disputes Tribunal.

32. Previously the only financial remedy for breach of contract was damages calculated to represent the amount of financial loss suffered as a result of the breach i.e. a genuine pre-estimate of damages and not a penalty. In the case of parking fees, damages could be calculated based on the revenue lost as a result of someone using a parking space that could otherwise be paid for by someone else, plus the administrative costs of issuing a breach notice or applying a clamp.
33. In May 2017 however, the New Zealand Court of Appeal changed its position in relation to contractual penalties based on a 2015 decision in the United Kingdom, which found that a parking company had a legitimate interest in penalising motorists for overstaying to ensure the availability of parking spaces. Currently, if the law of contract is applicable, the land owner may be able to impose financial consequences for a breach of the contract provided that it is proportionate to their legitimate interest in enforcing the contract. At this stage, there is little case law to provide guidance on what types of payments the courts will regard as proportionate.
34. Fees may be:
- Unjustified:** Enforcement of fees could be unjustified if the parking did not break any laws or contract terms. For example, the sign stated that the parking was for 90 minutes only and the motorist parked for less than that amount yet was charged a breach fee.
 - Unreasonable:** Fees could be unreasonable if they are disproportionate to the legitimate interests of the agent or land owner. Possible costs include applying and removing a wheel clamp, and sometimes any loss of income caused by the parking, such as if the motorist parked in a space reserved for customers only or blocked access to or from a business. For example, a motorist might challenge a clamping release fee for several hundred dollars if parked in the car park of a business after hours.
35. Assessing whether fees are unjustified or unreasonable is not always straightforward for a consumer. Consumers may need to pull together their own case for why they feel the fee was unjustified or unreasonable.
36. Part of the problem in relation to unreasonable fees is that there is no clear law on the exact charges that are legal in each instance of breach. Consumers are unlikely to understand in what circumstances they might successfully dispute a fee and are thus less likely to have the confidence to do so. Consumers also may not wish to pay the cost of lodging an application with the Disputes Tribunal if parking enforcement charges are not substantially higher than the cost of an application.

Intimidating unfair behaviour by parking enforcement operators

37. Evidence of intimidating and unfair behaviour is frequently reported in the media. For example, stories suggest that some wheel clampers lie in wait to clamp vehicles after the motorist has parked for a short period of time. There have also been alleged instances of cars being clamped with passengers inside and threatening behaviour exhibited by clampers.
38. The problem here is that consumers feel unsafe or powerless in the face of intimidating behaviour. The law does not specifically regulate the conduct of private parking enforcers. The Fair Trading Act does prohibit harassment in connection with the supply of services, but it is unclear whether some of the conduct would be considered harassment (e.g. clamping a car not long after the motorist has vacated it may be unlikely to be considered harassment).

Unclear terms and conditions

39. In some situations, consumers may find the terms and conditions of parking to be absent, unclear or misleading. For example, signs may be partially obscured or there may be one small sign far from the entrance to a parking facility.

40. Recourse for this problem exists under consumer law. Consumers are able to dispute enforcement action if they feel that signage about the terms and conditions of parking is either absent or not visible, is missing key information, or makes misleading representations about their legal rights.

Options

41. We have outlined some possible options for further consideration below, which are considered in light of our conclusion that the voluntary Code has not been a sufficiently effective mechanism for regulating conduct across the industry, but also that the size of the problem is currently unclear. Consultation with interested parties and further cost and benefit analysis would be required to fully assess the merits of these options.

Option 1: Strengthen enforcement of the voluntary Code

42. As the existing Code is non-binding on signatories, there are currently limited means of enforcing it and penalising breaches. A possible way of strengthening the Code would be to make it binding on signatories and to establish an independent parking disputes adjudicator, who would be responsible for hearing complaints and facilitating dispute resolution. The adjudicator would be funded by, and manage complaints about, signatories to the Code.
43. While we would see this as an industry-led initiative, there could be some role for the government to encourage the industry to develop this approach.
44. An adjudicator would serve as an intermediary step between parking companies' internal appeals processes and the more formal Disputes Tribunal process. This could be modelled on the UK's Parking on Private Land Appeals (POPLA) scheme, an independent web-based dispute resolution service for recipients of parking charge notices. Car users can complain to POPLA after unsuccessfully appealing their parking charge notice to the car park operator.
45. In principle, a web-based independent parking disputes adjudicator could be a cost-effective means of improving access to justice. For example, if such an adjudicator is free to consumers, it will allow them to avoid the \$45 fee associated with Disputes Tribunal cases, which may in practice act as a barrier to pursuing claims (although consumers would likely incur the costs of this new scheme by other means, such as in higher parking charges). The scheme could also support the early resolution of disputes. However, to be effective it would be important that an adjudicator be set up in accordance with best-practice dispute resolution principles of accessibility, customer focus, objectivity, fairness, efficiency, effectiveness and accountability.
46. This option could reduce consumer concerns about parking enforcement issues such as fees (subject to advice on any Commerce Act risk), unclear signage and unfair conduct, as it would not only improve access to justice in these cases, but would incentivise proactive compliance on the part of Code signatories. However, this option would only improve consumer outcomes in cases involving Code signatories, as there is no non-regulatory mechanism to compel industry to abide by the Code or by the decisions of an adjudicator. As such, on its own this option may be unlikely to achieve the objective of preventing unfair practices across the private parking industry.

Option 2: Require parking operators to disclose information to consumers

47. Section 27 of the Fair Trading Act enables the Minister responsible for consumer affairs to recommend regulations prescribing the disclosure of information in respect of goods or services. It could be used to prescribe regulations requiring all companies that provide a parking service to provide certain information about their terms and conditions, and to prescribe the way in which the information must be disclosed to ensure that this it is visible and clear to consumers (for example, requiring that terms and conditions be displayed at the entry to a parking facility and that the size of the font be readable from a specified distance).
48. A consumer information standard might solve the problem of unclear or absent signage, but it would only apply to companies providing a parking service 'in trade'. It would not solve the fees

issue (other than increasing consumers' awareness of the possible penalties for a breach) and would be unlikely to address the problem of unfair conduct (other than improving information for consumers about what they can do if they experience unfair conduct).

49. The Commerce Commission would be responsible for enforcing a consumer information standard. We have not consulted the Commerce Commission to consider the resourcing implications of this work, but without additional funding it could divert limited resources from some of the Commerce Commission's other consumer work.

Option 3: Caps on enforcement fees

50. One option is to regulate the maximum fees, or fee structure, that clamping or towing companies may charge to ensure that fees are proportionate to the breach and to the administrative costs of enforcement. This would likely reduce consumer complaints about disproportionate fees, and would provide greater clarity to consumers and to parking enforcers about what fees are reasonable. It would potentially provide more visibility to consumers about the terms and conditions of parking i.e. it would provide them with certainty about the maximum penalties they might be charged for a breach.
51. While it does not directly address concerns about unfair or intimidating behaviour, these concerns largely relate to the conduct of parking enforcers in attempting to extract fees from motorists. Regulating fees could go some way to alleviating consumer concerns if both parties have certainty about the legality of fees, as this may reduce the level of on-the-spot disputes between the parties.
52. Depending on the extent of the problems currently caused by each type of enforcement action (clamping, towing, breach notices), fees could be regulated for some or all enforcement types. It would be important to consider the effects that fee regulation of one type of enforcement might have on another type of unregulated enforcement i.e. if a maximum fee for wheel clamping was imposed, this might drive up the use of towing and/or breach notices and the fees associated with both, if these fees are not regulated.
53. If the government were to design a cap on enforcement fees, an important consideration would be whether fees should be regulated so that they only relate to the costs incurred by the land owner or whether it would allow for contractual penalties to be applied. Determining a method of calculating reasonable costs could be complex.
54. There is currently no ability to regulate fees within the legislation in your portfolio. This would require a legislative amendment. We would not recommend that fees be set in primary legislation, as this would provide less flexibility if the fees need to be updated in the event that they have unintended effects or to take into account the effects of inflation over time.
55. The Land Transport Act contains regulation-making powers to prescribe fees and charges and to specify the matters for which fees or charges are to be paid under any enactment relating to transport legislation. Further consultation with the Ministry of Transport would be required to explore whether this option would be viable as a way of regulating fees.

Option 4: Set comprehensive rules for the private parking enforcement sector

56. This option could take the form of prescribing conduct requirements of persons who carry out private parking enforcement. It could include requirements similar to the guidance in the voluntary Code or to the requirements for parking enforcement on public land, and could include requirements around:
- a. the circumstances in which certain enforcement methods may be used
 - b. processes for complaints and appeals
 - c. specifications for signage
 - d. training of parking enforcers
 - e. limits for fees which may be charged of consumers, or requirements that fees must be "reasonable" (not currently in the voluntary Code)

- f. penalties for breaches of conduct requirements (not currently in the voluntary Code).
57. The main benefit of a regulated comprehensive set of rules is that, while it would provide broadly similar requirements to the guidance already contained in the Code, it would increase industry participation, compliance and enforcement and thus have a greater likelihood of reducing consumer harm. This approach also has the advantage of aligning with similar licensing and other requirements that already apply to towing.
58. Introducing a more prescriptive conduct regime would likely require significant enforcement costs for the regulator and significant compliance costs for parking operators.
59. The Government could implement this option in a number of ways, which we provide more detail on below:
- a. prescribing a mandatory code
 - b. legislative amendment (including the proposed member's Bill on this issue).

Option 4A: Set comprehensive rules through a mandatory code

60. The Government could create a mandatory code for the private parking enforcement sector. This could be along similar lines to the existing voluntary Code, but would apply to the entire sector rather than to signatories only. This would strengthen adherence and enforcement, and could help to alleviate consumer concerns about unfair conduct, unclear information and unreasonable fees.
61. There is currently no mechanism in the consumer legislation in your portfolio that would enable the making of a statutory code for a particular sector or service. Prescribing such a code within your portfolio would therefore require a legislative amendment.
62. The Private Security Personnel and Private Investigators Act is a possible mechanism. The provides the responsible Minister with the ability to prescribe codes of conduct for classes of private security personnel.
63. To the extent that parking enforcers are considered private security personnel and are regulated by the Act, a code of conduct could be prescribed under section 115 of the Act to set out requirements for parking enforcers similar to the matters covered in the voluntary Code.
64. A key limitation is that it would be difficult to justify prescribing a cap on fees, if the Government wished to do so, in regulations which have as their main purpose to prescribe a code of conduct. The code of conduct would also only apply to professional parking operators who fit the definition of a property guard, and would not apply to, for example, owners or operators of private land who carry out enforcement themselves. For example, in a recent case of wheel clamping involving alleged unreasonable fees and intimidating behaviour, the clamping was carried out by the operators of the Bashford Antiques shop in Auckland.

Option 4B: Set comprehensive rules through a legislative amendment

65. This could be implemented by creating a new Government Bill, by relying on the member's Bill described below, or adopting the member's Bill as a Government Bill (as we understand the Minister of Transport may be interested in doing).

Land Transport (Wheel Clamping Protection) Amendment Bill

66. The Land Transport (Wheel Clamping Protection) Amendment Bill is a member's bill which seeks to introduce stricter regulation of wheel clamping. It was originally placed in the member's bill ballot by Hon Phil Twyford but has not yet been drawn. Greg O'Connor is the current sponsor of the Bill.
67. The Bill seeks to amend the Land Transport Act 1998 to:
- a. require clamping operators to be licensed
 - b. impose a maximum clamping release fee of \$50
 - c. require clear signage
 - d. mandate that an already clamped car may not also be towed

- e. require those who clamp cars to wear visible clamping photo identification
 - f. dictate that no more than one person may clamp a car, to prevent intimidation.
68. The Bill imposes penalties for breaches of these requirements. It also creates an appeal process whereby complaints can be lodged with the New Zealand Transport Agency (NZTA).

MBIE's assessment of the Bill

69. Overall the Bill would likely improve consumer protection in relation to wheel clamping by introducing measures to prevent intimidating and unfair conduct, alleviate concerns about disproportionate fees and improve consumer information about the terms and conditions of parking.
70. On the other hand, prescriptive conduct requirements and a licensing regime are likely to be costly to administer and enforce for NZTA as the regulator, as well as increase the compliance costs for parking enforcement operators, which may be passed on to property owners who purchase their services. The relationship between this Bill and the Private Security Personnel and Private Investigators Act might also need to be considered.
71. If this Bill is to be adopted as a Government Bill, we consider that further analysis and consultation would be desirable to ensure that it balances consumer protection with overall costs.
72. For example, the maximum fee of \$50 for clamping has the potential to render many clamping businesses unviable, especially with the effects of inflation over time. As noted above in our discussion of a fee regulation option, it would be desirable to consider the effects that regulation of one type of parking enforcement might have on other types of enforcement if these are not regulated. If setting a maximum fee is desirable, this type of detail should be prescribed in regulations, rather than set in primary legislation as it would be more difficult to change over time.
73. The Bill may also benefit from the inclusion of additional rules or regulation-making powers to prescribe other requirements, such as the instances in which wheel clamping cannot be applied (e.g. when a vehicle is occupied, to emergency service vehicles, when a car is legally parked but has exceeded the time limit) and any requirements around reasonable grace periods before a vehicle may be clamped.

Option 5: Ban wheel clamping

74. One option which is supported by Consumer NZ and the Automobile Association is an outright prohibition of wheel clamping as a parking enforcement method.
75. Banning wheel clamping would address consumer concerns about perceived unfair conduct related to clamping and disproportionate release fees. It would improve compliance and enforcement, as an outright prohibition would be accompanied by penalties for breaches of the prohibition, thus reducing the current level of offending by rogue operators. A ban would be easier to monitor and enforce compared to more prescriptive requirements, and would therefore require less resource.
76. However, we are not certain that the positive effects of banning wheel clamping would be outweighed by the negative effects, such as increased enforcement costs for property owners (as we understand that breach notices and towing are more costly mechanisms than clamping). The threat of clamping can also serve as a deterrent in cases where people would otherwise repeatedly breach the terms and conditions of parking. Banning clamping may also lead to increased use of towing. For example in Queensland, where clamping is banned, complaints about unfair and misleading conduct in relation to towing companies have increased.
77. Banning wheel clamping altogether may therefore not be an appropriate solution. We do not recommend it at this time while we have insufficient evidence of the nature and extent of the problems.

78. Wheel clamping (and other means of immobilising vehicles such as towing) on private land has been banned in some international jurisdictions, including some Australian states and in the United Kingdom.⁵

Consultation

79. The Ministry of Transport has been consulted in the preparation of this briefing and agrees with the broad options outlined above.

Communications and risks

Pressure for urgent and immediate action

80. The issue of wheel clamping has been highlighted in the media recently. Some groups have called for urgent and immediate action.

81. You may wish to comment that:

- The Government would like to explore ways in which the standard of parking enforcement practices can be improved across the sector.
- The Government will be considering the nature and scale of the problems before deciding on a course of action.

Effectiveness of the Code

82. You may be asked for your views on how effective the Code has been in changing industry behaviour.

83. You could respond along the following lines:

- To the extent that the Code is adopted and adhered to, it has the potential to reduce consumer concerns about parking enforcement practices.
- I am aware that not all members of the parking enforcement industry have signed up to the Code.
- I encourage more parking enforcement businesses to sign up to the Code.
- Car park owners and managers should ensure that they are not employing over-zealous towing and clamping firms.

Directing people to information and advice that is available

- I encourage people who are unsure about their consumer rights to visit MBIE's Consumer Protection website. This provides information and advice on consumers' rights with fees, clamping and towing.

Next steps

84. We anticipate the following next steps:

- We suggest that you discuss the issue with your colleagues, in particular the Minister of Transport.
- You may also wish to discuss who the lead Minister and agency will be for this work.

⁵ In 2012 England and Wales banned clamping and towing on private land, in light of issues similar to those faced by New Zealand consumers. Scotland banned clamping in 1992. The UK Government estimated that approximately 500,000 clamping incidents took place each year on private land, with an average release fee of £112, and that the prohibition would save consumers £55 million a year in clamping charges. The prohibition has been criticised by some groups for not being a substitute for proper industry regulation.

- MBIE officials are available to provide you with further advice as required.
85. It is not yet clear who the lead Minister and agency would be on this work. If the Minister of Transport wishes to advance the Land Transport (Wheel Clamping Protection) Amendment Bill as a Government Bill, responsibility for this issue is likely to be transferred to the Transport portfolio.
86. The main risk of progressing this work within your portfolio is that it may divert resources from other priorities in the consumer space. In particular, it may risk causing delays to the completion of the review of the Credit Contracts and Consumer Finance Act 2003.

Annexes

Annex 1: DRAFT Land Transport (Wheel Clamping Protection) Amendment Bill

Annex 2: Voluntary Code of Practice for Parking Enforcement on Private Land

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

**Annex 1: DRAFT Land Transport (Wheel Clamping Protection)
Amendment Bill**

Out of Scope

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

Annex 2: Voluntary Code of Practice for Parking Enforcement on Private Land

RELEASED UNDER THE
OFFICIAL INFORMATION ACT