



8 April 2021

Mr Nick Coyle

Email: [fyi-request-14820-6b569c98@requests.fyi.org.nz](mailto:fyi-request-14820-6b569c98@requests.fyi.org.nz)

DOIA 2021-1689

Dear Mr Coyle

Thank you for your email on 2 March to the Ministry of Business, Innovation and Employment. Under the Official Information Act 1982 (the Act), you requested the following information in regards to the regulatory framework around private parking enforcement, referring to the Land Transport (Wheel Clamping) Amendment Bill:

*Any internal memos, research papers, issues papers, etc. which were produced in the course of preparing the cabinet paper and regulatory impact statement along with any briefings to the Minister, etc.*

As well as

*any information MBIE holds in regards to how the law around private parking enforcement is applied in the Courts (such as summaries of Disputes Tribunal and District Court decisions)*

You later agreed to the scope of the request being narrowed to

*The briefings produced by MBIE containing advice on the regulatory framework and how the law around private parking is applied in the courts to the previous Minister of Commerce and Consumer Affairs for the purpose of informing the Cabinet paper and regulatory impact statement,*

Given that

*[MBIE] advise whether your review of the information held by MBIE suggests that any other Government agencies have prepared substantial briefings for their respective Ministers and/or Cabinet in relation to these issues*



Twelve documents have been identified as being within the scope of your request. In relation to three of these documents, MBIE has decided to withhold them. This is under section 18(d) of the Act, as the information requested is already publicly available. The titles of these documents and the internet links through which they can be accessed are as follows:

- *2523 17-18 Wheel Clamping Cabinet paper:*  
<https://www.mbie.govt.nz/dmsdocument/4581-proposals-to-address-problems-with-wheel-clamping-cabinet-paper>
- *1596 17-18 Annex 2 - Code of Practice for Private Parking Enforcement:*  
<https://www.consumerprotection.govt.nz/assets/PDFs/Code-of-Practice-Parking-Enforcement-on-Private-Land.pdf>.
- *2884 17-18 Annex 3 - MBIE Impact Summary – Wheel clamping:*  
<https://www.mbie.govt.nz/dmsdocument/4583-impact-summary-wheel-clamping>

The other nine documents within the scope of your request are:

- *1227 18-19 Briefing - Next steps for drafting wheel clamping Bill*
- *2884 17-18 Briefing - Updated Cabinet paper: wheel clamping proposals*
- *2884 17-18 Annex 1 - Updated wheel clamping Cabinet paper*
- *2884 17-18 Annex 2 - Letter from CCA Minister to Minister of Transport confirming responsibility for wheel clamping regulation*
- *2523 17-18 Draft Cabinet paper: wheel clamping proposals*
- *2018-03-12 Wheel clamping bill - presentation for Minister Faafoi*
- *1596 17-18 Briefing - Private parking enforcement background and options*
- *1596 17-18 Annex 1 - Land Transport (Wheel Clamping Protection) Amendment Bill*
- *3889 17-18 Briefing – advice on regulatory framework for private parking enforcement*

I am releasing these nine documents to you, subject to a redaction of certain information in the document titled *3889 17-18 Briefing – advice on Regulatory framework for private parking enforcement*, made for the following reason under the Act:

- Section 9(2)(b)(ii) – to protect information where its release would be likely to unreasonably prejudice the commercial position of the person who is the subject of the information

I do not consider that the withholding of this information is outweighed by the public interest in making the information available.

Finally in regards to the latter part of your request, MBIE does not hold a list of agencies that have prepared substantial briefings on the subject. We do believe the Ministry of Transport may have previously briefed their Minister on the issue. However, since MBIE has been the lead advising agency, most of the substantive briefings on this issue sit with MBIE.

I trust you find the information helpful. You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at [www.ombudsman.parliament.nz](http://www.ombudsman.parliament.nz) or freephone 0800 802 602.

Yours sincerely,



Daniel O'Grady  
**Manager, Competition and Consumer Policy**



# BRIEFING

## Next steps for drafting Wheel Clamping Bill

|                                 |                |                         |            |
|---------------------------------|----------------|-------------------------|------------|
| <b>Date:</b>                    | 9 October 2018 | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | In Confidence  | <b>Tracking number:</b> | 1227 18-19 |

### Action sought

**Hon Kris Faafoi**  
Minister of Commerce and  
Consumer Affairs

### Action sought

### Deadline

**Note** the contents of this briefing.

22 October 2018

**Agree** to a tentative timeframe of March 2019 for introduction of a Bill.

**Agree** to MBIE gathering information from clamping companies on the level of fees they currently charge for wheel clamping.

**Agree** that the fee cap will apply to wheel clamping for parking breaches, except where an enforcement authority clamps under a by-law or other authority under an enactment.

### 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

### 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

### Next steps for drafting Wheel Clamping Bill

|                          |                |                  |            |
|--------------------------|----------------|------------------|------------|
| Date:                    | 9 October 2018 | Priority:        | Medium     |
| Security classification: | In Confidence  | Tracking number: | 1227 18-19 |

#### Purpose

To update you on the progress of drafting the proposed Wheel Clamping Bill and seek your agreement to suggested timeframes. This briefing also seeks your agreement for MBIE to gather information on the level of fees currently charged for wheel clamping.

#### Executive summary

1. On 13 August 2018, Cabinet agreed to a proposal to cap the fees that can be charged for wheel clamping [CAB-18-MIN-0379.02].
2. A joint press release from you and the Minister of Transport on 22 August 2018 indicated that Ministers' preference is to introduce legislation by the end of this year. While the Ministry of Transport has drafted instructions with this timeframe in mind, the Parliamentary Counsel Office considers that introduction by the end of 2018 may not be workable. We think that introduction early next year is more feasible, given other drafting priorities in your portfolio this year.
3. Cabinet has agreed that fees charged for wheel clamping will not be able to exceed \$100 (including GST). We expect that officials will be asked about the evidence basis for setting the fee cap at \$100 when the Bill is referred to select committee.
4. We would like to informally engage with a few clamping companies about how much they currently charge, and what their costs are. This will help us to understand more about the impacts of the fee cap on these businesses.
5. The Cabinet paper also stated that the fee cap will apply to wheel clamping undertaken on private land. There are some examples of car parks that are technically on "public land" but are not controlled by an enforcement authority under an enactment, such as council owned

car parks that are not part of the public road system. We consider that such car parks should be subject to the same rules as commercial operators.

### **Recommended action**

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

- a **Note** that drafting instructions are currently being written for a Wheel Clamping Bill, but that a draft Bill may not be ready for introduction until early next year.

*Noted*

- b **Agree** to a tentative timeframe of March 2019 for introduction of a Bill.

*Agree / Disagree*

- c **Agree** to MBIE consulting clamping companies on the level of fees they currently charge for wheel clamping.

*Agree / Disagree*

- d **Agree** that the fee cap will apply to wheel clamping for parking breaches, except where an enforcement authority clamps under a bylaw or other authority under an enactment.

*Agree / Disagree*

Jennie Kerr  
Manager, Competition and Consumer Policy

Hon Kris Faafoi  
Minister of Commerce and Consumer  
Affairs

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## Background

6. On 13 August 2018, Cabinet agreed to a proposal to cap the fees that can be charged for wheel clamping at \$100 [CAB-18-MIN-0379.02]. Cabinet agreed to you issuing drafting instructions to the Parliamentary Counsel Office (PCO) to give effect to the proposal.
7. At your weekly MBIE Officials' Meeting of 17 August, we updated you that the Ministry of Transport would be leading the drafting instructions, since the proposals will amend the Land Transport Act 1998, which the Ministry of Transport administers.
8. The Ministry of Transport issued a first set of drafting instructions to PCO in the first week of October, in consultation with MBIE and New Zealand Police. Further instructions are yet to be issued on some additional policy matters.

## Timeframes

9. A Wheel Clamping Bill is not currently on the Government's 2018 Legislation Programme, which means that PCO has not received any indication of the Government's priority for drafting this legislation.
10. A joint press release from you and the Minister of Transport on 22 August 2018 indicated that Ministers' preference is to introduce legislation by the end of this year. While the Ministry of Transport has drafted instructions with this timeframe in mind, PCO has been tasked with other drafting priorities in your portfolio this year, such as the Credit Contracts and Consumer Finance Amendment Bill, which currently has a Category 5 priority (to be referred to a select committee in the year) on the 2018 Legislative Programme. We anticipate that this may delay introduction of a Wheel Clamping Bill from the end of this year. Alternatively, you could prioritise a Wheel Clamping Bill, however this may delay the drafting of other Bills.
11. We have suggested the tentative timeframes below. PCO has indicated that the below timeframes appear to be more workable than attempting to introduce legislation by the end of 2018.

| Step   | Tentative date |
|--|----------------|
| Final drafting instructions sent to PCO  | October 2018   |
| Bill provided to the Ministry of Justice for an assessment of consistency with the New Zealand Bill of Rights Act 1990 | January 2019   |
| Bill before Cabinet Legislation Committee (LEG) and Cabinet for approval for introduction                              | February 2019  |
| Introduction of the Bill   | March 2019     |
| Report back from select committee  | September 2019 |
| Enactment  | Late 2019      |
| Commencement   | Late 2019      |

12. This timeframe assumes that we will not be releasing an exposure draft of the Bill for consultation prior to introduction, as this would further delay introduction. Without the release of an exposure draft of the Bill, the first opportunity for public consultation will be during the select committee stage.
13. We are seeking your indication that you are comfortable with the above tentative timeframes.
14. Depending on where the Bill is at by the next LEG bid process, a formal LEG bid may need to be prepared to give the Bill a priority on the Government's Legislation Programme.
15. As set out above, we anticipate that there will be additional policy decisions to make in order to finalise a draft Bill. Cabinet authorised you to make additional policy decisions [CAB-18-

MIN-0379.02], consistent with the proposals it has agreed to, to be reported to LEG. This can be reported to LEG when you seek approval to introduce a draft Wheel Clamping Bill.

### **Research on fee amounts charged in the current market**

16. Cabinet has agreed that fees charged for wheel clamping will not be able to exceed \$100 (including GST).
17. The select committee process will provide an opportunity for stakeholders (including individual members of the public, consumer groups and wheel clamping companies) to raise concerns and submit their views on the fee cap. We expect that officials will be asked about the evidence basis for setting the fee cap at \$100 when the Bill is referred to select committee.
18. In particular, we would be interested in information from stakeholders about how much wheel clamping companies currently charge, and what their costs are.

### **Information we hold on fee amounts**

19. We have limited information about fee levels in the wheel clamping market. Our evidence is limited to companies that maintain a website and publish their fees (very few appear to do so), or otherwise appear in media articles, or are the subject of complaints in letters written to you or made to the New Zealand Automobile Association (AA).
20. Based on this, it appears that companies such as Valley Parking Services, Elite Parking Services and First Recovery Services charge around \$200. Complaints in correspondence to you and to the AA reference a range of fees from \$150 to \$480.
21. There are of course cases where significantly higher amounts have been charged, such as a \$760 fee charged by Bashford Antiques in a one off case. We believe such amounts are likely to be uncommon.

### **Targeted information gathering from the industry**

22. If you agree to us gathering information on fee amounts prior to a Wheel Clamping Bill being introduced, we would like to informally engage with a few wheel clamping companies.
23. This would also enable us to gauge industry views on the wider proposal at the same time. While the data will remain anecdotal, it will help us to understand more about the business models of clamping companies and the impacts of the proposed fee cap on these businesses.
24. For example, Valley Parking Services is a wheel clamping company that has requested a meeting with you – we expect that they would agree to meet with us instead.

### **Types of clamping the fee cap will apply to**

25. The Cabinet paper stated that the fee cap will apply to wheel clamping undertaken on private land. The intent was to capture situations where more unscrupulous operators are likely to operate, and where enforcement authorities do not enforce parking breaches on public roads under the Land Transport Act. The paper also stated that the fee cap would not affect the ability of councils to clamp vehicles, including vehicles associated with freedom camping.
26. We have identified a few instances where some councils clamp without using any bylaws or other authority under an enactment, but rely instead on contract law, as many commercial



car park operators on private land do. This means councils rely on signage as the implied terms and conditions of a contract, and clamp to enforce breaches of that contract.

27. For example, Greater Wellington Regional Council states that it may clamp vehicles at its Park & Ride car parks (and charge up to \$350). This land is not considered a public road under the road controlling authority of councils. As a result, enforcement of this type of car park is not regulated by land transport rules or regulations. In practice, there may be little distinction between a council-owned car park that is not part of the public road system and a commercial car park (particularly if the management of a council car park is outsourced to a private company).
28. There are also other examples of car parks that might technically be on 'public' land and which would be captured unless Crown land or government owned freehold is specifically excluded. For example, Canterbury University and the University of Auckland both use wheel clamping as an enforcement method on what could be considered 'public' land. Canterbury University charges escalating levels of fines (between \$50 to \$150, depending on the number of previous breaches).
29. We do not think there is a justification for excluding these types of clamping from the fee cap. Our view is that the fee cap should apply unless an enforcement authority is using it as an enforcement tool via a bylaw under the Land Transport Act or the Freedom Camping Act 2011. Consequently, if the council owns or operates what is effectively a commercial car park, and is clamping as a contractual condition of entry, then we believe they should be subject to the same rules as private operators.
30. We want to test whether you are comfortable with including council-owned car parks that are not part of the public road system, and other car parks on 'public' land within the fee cap. We do not consider that this will affect the ability of councils to clamp where they have authority under an enactment or bylaw.

## Consultation

31. The Ministry of Transport was consulted on this briefing.

## Communications and risks

### Consultation

32. Introducing legislation without gathering information from the industry on specific fee amounts is a risk. If we do not do further research, this risk can be partially mitigated by the fact that consultation will occur during the select committee process.
33. On the other hand, if we do targeted information-gathering, the risk is that Cabinet has already agreed to the fee cap of \$100 and this may create a perception that we are seeking to amend Cabinet's decision. However, the purpose is not to ask Cabinet to change its

decision, but to gather information to support the legislative process, particularly at select committee.

### Timing

34. A potential risk is that the press release indicated that legislation would be drafted with the aim of it being introduced to Parliament this year, and this timeframe may not be met.
35. If asked about this, you could respond that the Government has a busy Legislative Programme and this means that the legislative drafting has to be prioritised across government.

### Next steps

36. We anticipate the following next steps:
  - Indicate whether you are comfortable with the timeframes proposed and whether you would like us to do further consultation.
  - We will continue to work with the Ministry of Transport and PCC on drafting.
  - We will keep you updated on the progress of drafting and any additional policy decisions that you need to make.
  - If you would like us to do targeted information-gathering with industry, we will conduct this in parallel with drafting of legislation.

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# BRIEFING

## Regulatory framework for private parking enforcement

|                                 |               |                         |            |
|---------------------------------|---------------|-------------------------|------------|
| <b>Date:</b>                    | 26 June 2018  | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 3889 17-18 |

|   |   |                 |
|---|---|-----------------|
| <b>Action sought</b>  |   |                 |
|   | <b>Action sought</b>  | <b>Deadline</b> |
| Hon Kris Faafoi<br>Minister of Commerce and<br>Consumer Affairs | Note the contents of this briefing<br>Agree to the recommendations. | 5 July 2018     |

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

|  |
|--|
| <b>The following departments/agencies have been consulted:</b> |
| Ministry of Transport, Commerce Commission                     |

Minister's office to complete:

- Approved
- Noted
- Seen
- See Minister's Notes

- Declined
- Needs change
- Overtaken by Events
- Withdrawn

Comments:

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# BRIEFING

## Regulatory framework for private parking enforcement

|                                 |                      |                         |            |
|---------------------------------|----------------------|-------------------------|------------|
| <b>Date:</b>                    | 26 June 2018         | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | <b>In Confidence</b> | <b>Tracking number:</b> | 3889 17-18 |

### 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

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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

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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

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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.<sup>1</sup>
23. Commerce Commission complaints data about breach notices primarily relate to:

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

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

<sup>1</sup> <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**

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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.

|                   |   |
|-------------------|---|
| <b>Timing</b>     | 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. |
| <b>Scope</b>      | The review would be targeted to wheel clamping only, and not look at evidence of other issues with private parking enforcement.   |
| <b>Governance</b> | 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.

|                   |  |
|-------------------|--|
| <b>Timing</b>     | 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. |
| <b>Scope</b>      | The review would be targeted to wheel clamping only, and not look at evidence of other issues with private parking enforcement.  |
| <b>Governance</b> | 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.

|                   |  |
|-------------------|--|
| <b>Timing</b>     | 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. |
| <b>Scope</b>      | 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.   |
| <b>Governance</b> | 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**

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

### **Communications and risks**

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

## Next steps

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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

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Annex 1: Regulatory framework for private parking enforcement.

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

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## **Annex 1: Regulatory framework for private parking enforcement**

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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

S9(2)(b)(i)

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

### OPTIONS FOR A REVIEW OF PRIVATE PARKING ENFORCEMENT

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



# BRIEFING

## Updated Cabinet paper: wheel clamping proposals

|                                 |               |                         |            |
|---------------------------------|---------------|-------------------------|------------|
| <b>Date:</b>                    | 18 April 2018 | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 2884 17-18 |

### Action sought

**Hon Kris Faafoi**  
Minister of Commerce and  
Consumer Affairs

### Action sought

**Note** the contents of this briefing.

**Deadline:**  
23 April 2018

**Agree** to the recommendations.

**Sign and send** the attached letter to the Minister of Transport.

**Provide** feedback on the attached draft Cabinet paper.

**Agree** to lodge the attached draft Cabinet paper with the Cabinet Office before 10am on 26 April.

### 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 | ✓            |

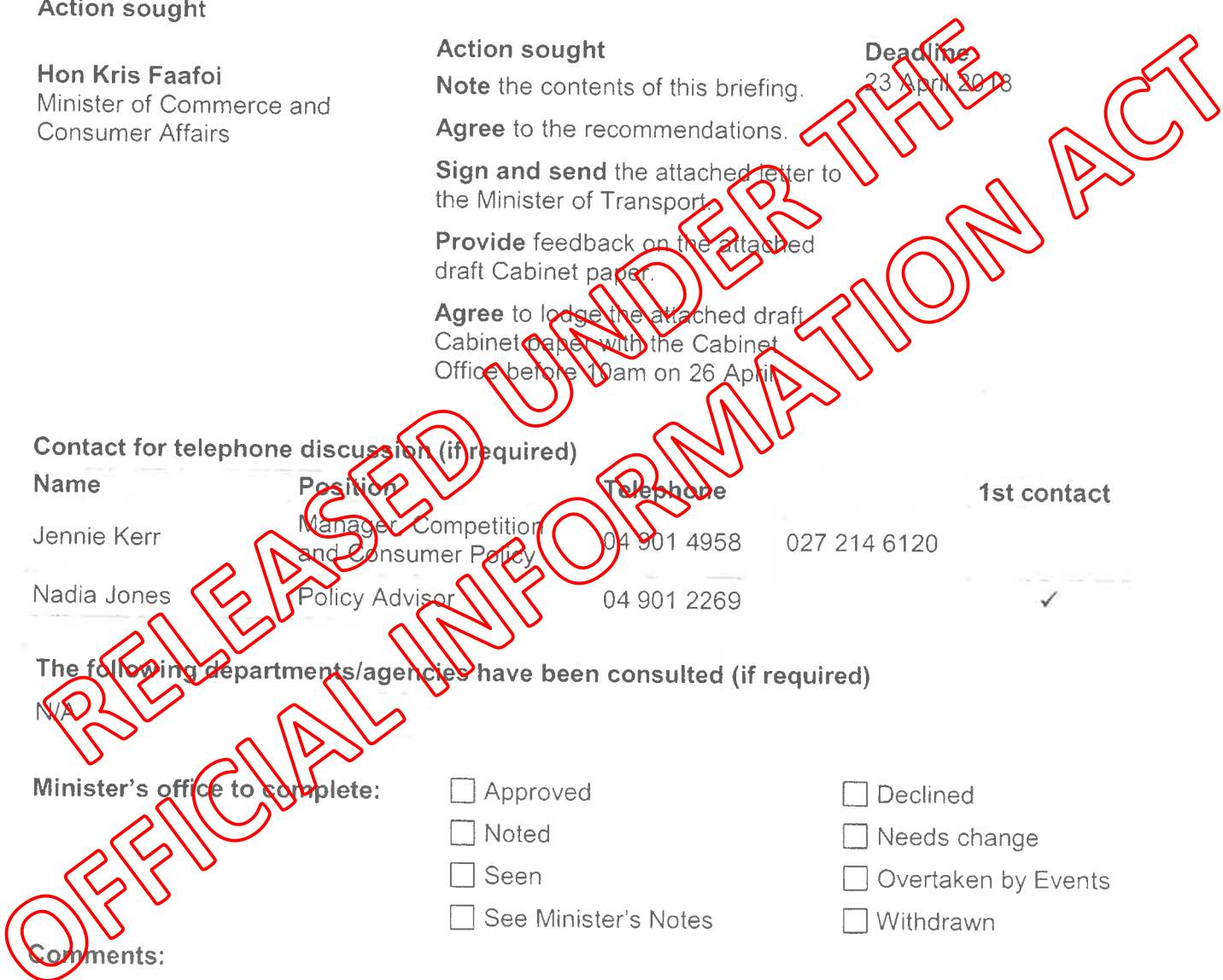
### The following departments/agencies have been consulted (if required)

N/A

### 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

## Updated Cabinet paper: wheel clamping proposals

|                                 |               |                         |            |
|---------------------------------|---------------|-------------------------|------------|
| <b>Date:</b>                    | 18 April 2018 | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 2884 17-18 |

### Purpose

We provided you with a draft Cabinet paper on 29 March 2018 on the proposal to regulate wheel clamping fees. This briefing provides an explanation of, and seeks your agreement to, the key amendments we have made to the Cabinet paper to incorporate your feedback and that of departments. We also attach a draft letter to the Minister of Transport as per your earlier request for your consideration.

### Recommended action

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

- a **Agree** to set the maximum fee of \$50 in primary legislation, with the ability to amend the fee in regulations.

*Agree / Disagree*

- b **Note** the Ministry does not recommend progressing the ability to build in additional regulation of wheel clamping.

*Noted*

- c **Provide** feedback on the attached draft Cabinet paper by 5pm Monday 23 April.

*Provided*

- d **Agree** that a version of the attached draft Cabinet paper, amended to take account of feedback from you, should be submitted for consideration by the Cabinet Economic Development Committee at its meeting of Wednesday 2 May.

*Agree / Disagree*

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- e **Agree** to lodge the attached Cabinet paper with the Cabinet Office before 10am on Thursday 26 April.

*Agree / Disagree*

- f **Sign and send** the draft letter attached as **Annex 2** to the Minister of Transport.

*Sent*

Jennie Kerr  
**Manager, Competition and Consumer Policy**

Hon Kris Faafoi  
**Minister of Commerce and Consumer Affairs**

..... / .....

..... / .....

## **Background**

1. In March, you asked us to develop a policy proposal to regulate the fees that wheel clamp operators may charge, with a view to introducing legislation via an amendment to the Land Transport Act 1998.
2. Wheel clamping is a relatively cheap and unregulated mechanism to deal with illegal parking on private land. A lack of clarity in the law and difficulties in disputing fees create incentives for wheel clamp operators to charge excessive fees. While there is some evidence of problems associated with other private parking enforcement methods, the most egregious behaviour appears to be attributed to wheel clamping.
3. We provided you with a draft Cabinet paper on wheel clamping proposals on 29 March [Briefing 2523 17-18 refers].
4. In our previous advice, we advised that our preferred regulatory option is to cap the fee that wheel clampers can charge. This option would have the greatest impact in addressing the

underlying cause of the problem (that clamping is a potentially lucrative activity that attracts unscrupulous operators) without significant administrative cost.

5. We have since incorporated feedback from you and from departments we consulted into a second draft of the paper. The key amendments are explained below. The updated Cabinet paper is attached as **Annex 1**.
6. We have also attached a draft letter (**Annex 2**) for you to send to Minister Twyford to confirm that the transport portfolio will administer wheel clamping regulation in the long term.

## Key amendments

---

7. This section notes the key changes from the previous draft of the Cabinet paper.

### Cap on fee for parking breach

8. Previously we advised that the policy intent of the proposal should be to cap the total fee that a person is charged. We have inserted an explanation in the Cabinet paper of why the proposal involves capping the fee for the parking breach and not, as the Ministry of Transport has recommended, just the fee for the removal of the clamp. Our view is that merely capping the amount that a wheel clamp operator may demand for the removal of a clamp would not fully address the issues that motorists face around unreasonable fees. It would also create opportunities for rogue wheel clamp operators to evade the cap and pressure motorists to pay additional, unreasonable fees.
9. In response to feedback from departments, we have also inserted comments noting the discrepancy this will create between wheel clamping and other parking enforcement methods, as well as potential flow-on effects for other enforcement methods. We have noted that these potential trade-offs are justified by the need to address motorists' concerns about wheel clamping, which is where the most egregious behaviour has been apparent.

### Amount of maximum fee

10. We are seeking your agreement to propose that the \$50 maximum be set in primary legislation, with the ability to adjust the maximum fee in regulations. This differs from our previous advice, which recommended that the maximum fee initially be set in regulations. After further consideration of the fact that the maximum fee will greatly reduce the revenue from wheel clamping and will have a major impact on the business models of operators, we think that the particular amount is likely to be seen as a significant public policy matter to be determined by Parliament. Setting it in primary legislation would also allow the opportunity for affected parties to be consulted during the select committee stage.
11. A potential risk with allowing the maximum fee to be adjusted in regulations is that it may be seen as a 'Henry VIII clause'. A 'Henry VIII clause' refers to a clause in a Bill that would allow regulations to amend primary legislation, thereby giving the executive the power to amend legislation made by Parliament and bypass parliamentary scrutiny in doing so. The Legislative Design and Advisory Committee guidelines suggest that these types of clauses should be used with caution and sparingly. We think the approach can be justified in this instance, given that the regulations will allow the fees to be updated over time to take into account inflation and whether the maximum fee is adequately deterring parking breaches on private land. There are precedents for amending monetary amounts of fees in primary legislation through regulations, such as in the Financial Markets Conduct Act 2013.
12. Several agencies raised the concern that \$50 may be considered a cheap alternative to paying for long-term parking, which could incentivise motorists to opt to bear the risk of paying a \$50 breach fee rather than pay for the parking service. We have amended the

paper to note that other enforcement methods such as breach notices and towing can be used instead of clamping where the maximum fee may be insufficient.

### **Infringement offence**

13. You indicated that you would prefer to create an infringement offence, rather than the main alternative of a summary offence. An infringement offence is likely to make breaches easier to enforce as it will not require court prosecution. However, as it is an infringement, it does not provide for the possibility of a conviction.
14. We have updated the paper to propose an infringement offence, with an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate. We suggest that a higher-than-usual infringement fee may be necessary to deter wheel clamp operators, who charge up to \$800 for the release of a clamped vehicle.

### **Ability to regulate wheel clamping further**

15. You asked about building in the ability to regulate wheel clamping further, for example through including regulation-making powers in the Bill. Further regulation could be used to prescribe conduct requirements of wheel clampers or specific signage that needs to be present. For example, regulations could provide that in order for wheel clamping to take place:
  - a. A warning sign must be made clearly visible to a motorist upon entering a car park, and that the sign must specify the terms and conditions of parking, the consequences of a breach, the maximum fee for a breach and the contact details of the wheel clamp operator
  - b. A grace period of 10 minutes must be provided for each vehicle before a clamp may be applied
  - c. Wheel clamp operators must provide a receipt on payment, or a statement of the motorist's rights
  - d. Wheel clamp operators must keep records of the details of parking breaches, when clamps were applied, when they were released, and the relevant record must be provided to a motorist who has been clamped on request.
16. This could be desirable if the fee cap does not limit egregious behaviour by wheel clampers to the extent desired, or if wheel clampers respond by engaging in even more aggressive and problematic practices to maximise revenue with a reduced fee per clamp.
17. However, we have considered this option in consultation with the Ministry of Transport and we do not recommend that this be added to the proposals, for several reasons.
18. Additional requirements around conduct and information disclosure would require increased monitoring and enforcement and have the potential to significantly increase costs for an enforcement agency.
19. There is an argument that including a broad power to enable regulation of wheel clamping in an otherwise narrow Bill would delegate excessive power to the executive, particularly where it is unclear what that further regulation would involve. This needs to be weighed against the risk that additional measures may be needed more quickly than changes can be made through primary legislation. It would be preferable therefore to make any further amendments in primary legislation.
20. Making the potential regulations would further exacerbate problems caused by differences in the regulation of wheel clamping and other forms of parking enforcement. Many of the requirements should logically apply to all forms of parking enforcement, rather than just

wheel clamping, i.e. motorists would expect to see signage in line with prescribed requirements for breach notices or towing, if they experience this for wheel clamping. Also, if motorists have a 10 minute grace period before their car is clamped, they would also expect to have such a grace period for breach notices or towing.

21. The Ministry of Transport has expressed concerns that additional regulation would significantly expand the scope of wheel clamping regulation and make the Land Transport Act a vehicle for regulating private parking enforcement in general. This would be inconsistent with the current purposes of the Act.
22. However, if you do wish to include regulation-making powers in the Bill, we could include this in the Cabinet paper, with recommendations along the following lines:

**agree** that regulation-making powers be provided to make regulations and land transport rules for any of the following purposes:

- Regulating the circumstances in which wheel clamping can occur (for example, specific signage, or minimum grace periods)
- Prescribing any actions that the wheel clamp operator must take before or after applying a wheel clamp (for example, keeping records of the application and release of wheel clamps)
- Prescribing any information that must be displayed or provided by the wheel clamp operator (for example, a receipt of payment or a statement of the motorist's rights);

**agree** that where the wheel clamp operator breaches any regulations or land transport rules made in accordance with paragraph 6:

- An infringement offence will apply with the same penalties as under paragraph 3
- The motorist will be able to recover the full amount of any fee paid through the Disputes Tribunal.

#### **Legislative vehicle**

23. The Ministry of Transport and the New Zealand Transport Agency (NZTA) have concerns about using the Land Transport Act 1998 as the legislative vehicle. Specifically, NZTA is concerned that it could be responsible for administering the regulation of wheel clamping activities on private land. The view of NZTA is that regulating wheel clamping on private land is unrelated to its statutory objective of contributing to an effective, efficient and safe land transport system.

24. In the paper we have noted some of these concerns, but have stated that the Land Transport Act appears to be the most appropriate legislative vehicle as it currently regulates towing services and public parking, which are similar to wheel clamping. The general public could reasonably expect to see wheel clamping regulation in the Land Transport Act.
25. We have drafted a letter for you to send to the Minister of Transport to confirm long-term responsibility for wheel clamping regulation. This is attached as **Annex 2**.

## Regulatory impact analysis

26. MBIE has prepared a Regulatory Impact Summary for the wheel clamping proposals (attached as **Annex 3**). We have inserted a statement in the Cabinet paper that the analysis has been assessed as meeting the regulatory impact analysis criteria.

## Consultation

27. We consulted the Treasury, New Zealand Police, Ministry of Justice, the New Zealand Transport Agency, Ministry of Transport and the Government Centre for Dispute Resolution on the draft Cabinet paper and have incorporated their feedback into the latest version.
28. While we have not gone out for formal public consultation, we expect that the general public is likely to support the regulation of wheel clamping, as this issue is one which has the potential to affect many motorists.
29. We have engaged with consumer and motorist advocacy groups previously on wheel clamping. The preferred option of the Automobile Association and Consumer NZ is to ban the practice outright, but we expect they will support the fee cap approach provided that the cap is set at the right level.
30. We have not consulted with wheel clamp operators, car park operators or small business owners in the time available. We do not expect them to support the proposed regulation. Parking enforcement companies have already commented in the media that they do not support the government regulating how people enforce private property rights. The views of these stakeholders will likely be drawn out more during the select committee consultation process.

## Communications and risks

31. We will provide you with talking points for the DEV meeting closer to the time.
32. We also suggest that you issue a press release informing the public of the policy proposal after Cabinet has made a decision. We will work with your office to prepare a draft press release.

## Next steps

33. We anticipate the following next steps:

|  |                        |
|--|------------------------|
| Your feedback to MBIE on the Cabinet paper | By 5pm Monday 23 April |
| Lodge Cabinet paper                        | Thursday 26 April      |
| DEV meeting                                | Wednesday 2 May        |
| Cabinet                                    | Monday 7 May           |
| Drafting                                   | May – July             |
| Introduction                               | July TBC               |

## **Annexes**

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Annex 1: Cabinet paper: Proposal to regulate fees charged by wheel clamp operators.

Annex 2: Draft letter to Minister of Transport confirming responsibilities.

Annex 3: Impact Summary: Wheel clamping.

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Office of the Minister of Commerce and Consumer Affairs  
Chair, Cabinet Economic Development Committee

## Proposal to regulate fees charged by wheel clamp operators

### Proposal

- 1 This paper seeks approval to improve protection for motorists in relation to wheel clamping on private land. It seeks to regulate the maximum fees charged to alleviate concerns about disproportionate fees.

### Executive summary

- 2 Wheel clamping is a common method of parking enforcement on private land. Wheel clamp operators are not currently regulated and the practice of wheel clamping is causing harm to motorists as a result of unreasonable fees being charged.
- 3 To address these problems I propose to introduce a cap on the amount that wheel clamp operators can charge in relation to a parking breach that requires the removal of a wheel clamp. The purpose of the cap is to protect motorists from unreasonable fees. I propose to make it an infringement offence to charge more than a maximum fee of \$50 including GST.
- 4 I am seeking approval to issue drafting instructions to Parliamentary Counsel Office (PCO) to give effect to these proposals via an amendment to the Land Transport Act 1998.

### Background

*Wheel clamp operators are not regulated*

- 5 Parking 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).
- 6 Wheel clamping is a common method of parking enforcement on private land. It involves immobilising a vehicle by attaching a clamp to a wheel to prevent or restrict its movement.
- 7 There is no specific legislation regulating wheel clamping as a method of parking enforcement on private land. The conduct of wheel clamp operators is often the subject of complaints from motorists.
- 8 A voluntary industry code of conduct for parking enforcement on private land came into effect in 2015. In my view it has not been effective in changing behaviour across the industry. Wheel clamp operators and the car park operators who engage them have not agreed to abide by the code. There is a lack of mechanisms to enforce the code, and there is evidence of a continuing volume of complaints about wheel clamping. I consider that regulation is needed given that voluntary initiatives have not alleviated harm.

### *Unreasonable fees are causing harm to motorists*

- 9 Rules governing parking rights and enforcement on private land are unclear and seldom tested in the courts. There is very little New Zealand case law on the application of contract and trespass law to wheel clamping. In practice, it is up to wheel clamp operators or property owners to set the amount of release fees.
- 10 Many cases have been reported of motorists being charged disproportionate fees for the release of their vehicle once clamped, from \$150 up to several hundred dollars. Fees may be disproportionate to the period of time the vehicle has overstayed or to the possible costs to the property owner of the parking breach (such as the cost of applying and removing the clamp and any loss of income caused by the parking). This can cause harm to motorists in the form of direct financial loss, as well as indirect emotional harm if the motorist feels threatened or harassed by demands for unreasonable fees.
- 11 These fees can be inconsistent with fines, infringement fees and towing charges for parking offences on public land. I am aware of examples where motorists have been charged over \$400 in some cases and over \$700 in at least one case.
- 12 As the law is not clear on the exact charges that are reasonable, motorists are unlikely to understand the circumstances in which they might successfully dispute a fee. Combined with the cost and inconvenience of lodging a dispute, this makes it unlikely that motorists will dispute a fee through the Disputes Tribunal. Consequently, there are few incentives for wheel clamp operators to charge reasonable fees.

### **Proposal to regulate fees charged for wheel clamping**

- 13 I propose to set a maximum fee that can be charged in relation to wheel clamping on private land. This will apply both to persons contracted to carry out wheel clamping on behalf of another person or business, as well as to landowners and tenants who carry out wheel clamping on their own land. Charging a higher fee will be an offence.
- 14 Regulating fee amounts will reduce harm to motorists resulting from excessive fees and make it easier for motorists to quantify the amount they may be able to recover.
- 15 The proposals will provide a means by which motorists can complain to the New Zealand Police to enforce the offence, or to seek redress through normal civil dispute processes such as the Disputes Tribunal.
- 16 I consider that the New Zealand Police is the most appropriate agency to enforce these proposals under the Land Transport Act. I do not think that the New Zealand Transport Agency would be appropriate as it does not currently carry out enforcement of parking breaches. Police may be better placed to respond because they are often viewed as the first port of call by motorists faced with unreasonable demands from wheel clampers. Currently, Police are sometimes called to respond to such incidents, but they cannot intervene in the amount of payment demanded, as this is currently a civil matter. A fee cap will be an improvement on the status quo if Police are called to the scene, as they will be able to intervene to prevent overcharging.

*Maximum fee for wheel clamping*

- 17 I propose a maximum allowable fee in respect of wheel clamping. The maximum fee will be the total amount covering both the charges for the parking breach and any costs related to applying and releasing the clamp.
- 18 Capping the charges for a parking breach for which a vehicle has been clamped does create a discrepancy between operators that clamp vehicles, and operators that use barrier arms, towing and/or breach notices as enforcement methods. These proposals focus on wheel clamping because this appears to be the source of the most egregious behaviour in private parking enforcement.
- 19 An alternative, which I do not propose, is to only cap the amount which a wheel clamp operator may demand for removing the clamp. This would allow a wheel clamp operator to charge two fees – the fee for removing the clamp (which is capped) and the remaining fee for the parking breach (which is uncapped). The wheel clamp operator could not make release of the clamp conditional on payment of the remaining fee, but could separately request the motorist pay the remaining fee, or invoice the motorist for the remaining fee. However, this would leave uncertainty about the fees that are allowable for the parking breach. In addition, the ability to charge the remaining fee may be misused by wheel clamp operators who may pressure motorists to pay the full amount at the time of the breach, even if they release the clamp after payment of the capped amount.
- 20 There is a risk that regulating wheel clamping may have flow-on consequences, such as an increase in towing or an increase in parking breaches. I consider that these potential trade-offs are justified by the need to address motorists' concerns about wheel clamping.
- 21 It is not my intention that regulating fees for wheel clamping will restrict towing in any way. For example, if a car is clamped and has not been removed by the motorist after several hours, the property owner will still be entitled to tow the car, and recover the full costs of towing.

*Amount of maximum fee*

- 22 I propose that the maximum fee be set at \$50, inclusive of GST. This is sufficient to act as a deterrent for parking breaches and is at the lower end of the range of fees currently charged for the release of clamped vehicles. Given that this proposed maximum will greatly reduce the revenue from wheel clamping and have a major impact on the business models of operators, the particular amount is a significant matter of public policy. As such I consider the amount should be set by Parliament in primary legislation and should be consulted on through the select committee process.
- 23 There is also a risk that \$50 may not be an adequate deterrent to motorists breaching parking conditions in some circumstances. For example, if applied to long-term parking, it could incentivise motorists to overstay and choose to pay \$50 for the release of their clamped vehicle, rather than pay for parking services. However, property owners can use other enforcement methods instead of wheel clamping in these circumstances, such as breach notices or towing.
- 24 There should be an ability to amend the maximum fee in regulations, to provide flexibility if the fees need to be updated over time. While it may be unusual to amend primary legislation in this way, it is not unprecedented to amend dollar amounts through regulations.

25 There will be appropriate safeguards around amending the maximum fee. Any amendment could require consideration of:

25.1 changes to consumer prices (i.e. inflation) since the fee was last set; and

25.2 whether the maximum fee adequately deters parking breaches on private land.

#### *Offences and penalties*

26 A person commits an offence at the point at which they demand and/or accept payment of more than \$50 for the parking breach.

27 I propose to create an infringement offence for wheel clamp operators who breach the requirements, with an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate. I consider that a higher-than-usual infringement fee for wheel clamping is important and justified by the need to deter wheel clamp operators, who sometimes charge over \$700 for the release of a clamped vehicle.

28 An infringement offence will make it easier to enforce obvious breaches and will not require prosecution through the courts. The enforcement agency will be able to make use of the existing infringement offence regime in the Land Transport Act.

29 If a person is charged in court, rather than being issued an infringement notice, individuals will be liable for a maximum penalty of \$4,000 and bodies corporate for a maximum penalty of \$20,000. I imagine that in most instances a person will only be charged with an offence if the conduct is of a significant level of seriousness such that a court prosecution may be necessary.

#### *Access to redress for motorists*

30 Motorists will have the right to obtain a refund of any payments made in excess of the maximum allowable fee if the wheel clamp operator has breached the fee. The maximum fee will make it easier for motorists to identify and take action against unreasonable fees. In most cases, I would expect wheel clamp operators to provide a refund without the motorist needing to go through a civil dispute process such as the Disputes Tribunal. If the motorist does take a case, they will be much more confident about the refund they will receive.

#### **Additional policy decisions**

31 I am considering options on remaining policy issues to make these proposals work. I am seeking authorisation to make additional policy decisions, consistent with the policy framework of this paper. I will report to the Cabinet Legislation Committee on additional decisions. This may include:

31.1 issues related to provisions for taking civil disputes, including through the Disputes Tribunal; and

31.2 any additional detail that is needed around the circumstances in which a fee can be charged.

## Consultation

- 32 The Treasury, Ministry of Justice, Ministry of Transport, the New Zealand Transport Agency and New Zealand Police have been consulted on this paper.
- 33 The Department of Prime Minister and Cabinet has been informed.
- 34 The Ministry of Justice's view is that wheel clamping should be treated as a civil matter between private parties, to be heard by the Disputes Tribunal. There is a risk that making it an offence may interfere with the Disputes Tribunal's ability to hear these matters.

## Financial implications

- 35 The proposals have no financial implications.

## Human rights

- 36 The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## Legislative implications

- 37 The proposals outlined in this paper are to be given effect in a Bill amending the Land Transport Act. The Land Transport Act does not currently regulate parking enforcement on private land. It has the purpose of promoting transport safety, which wheel clamping does not directly relate to. However, I consider that the Land Transport Act is the most appropriate legislation for wheel clamping regulation as it currently regulates towing services and public parking, which are similar to wheel clamping. The general public could reasonably expect to see wheel clamping regulation in the Land Transport Act.
- 38 I am proposing a legislative priority Category 5 (to be referred to select committee in the year) in the 2018 Legislation Programme.
- 39 It is intended that the Bill will be binding on the Crown.

## Regulatory impact analysis

- 40 The regulatory impact analysis requirements apply to the proposals in this paper. A regulatory impact statement (RIS) has been prepared and is attached.

### *Quality of the impact analysis*

- 41 The Regulatory Impact Analysis Review Panel (RIARP) has reviewed the attached Regulatory Impact Summary (RIS) prepared by the Ministry of Business, Innovation and Employment. They acknowledge the information and time constraints on the analysis, and note that the agency's preferred approach is to undertake consultation and research on the scale and nature of the problems related to wheel clamping before recommending a course of action. Given the Minister's preference to take immediate action, RIARP considers that the RIS meets the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper.

## Publicity

- 42 I propose to issue a press release once Cabinet has made a decision.

43 This paper will be published on the Ministry of Business, Innovation and Employment's website.

## Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

### Policy proposal

- 1 **agree** that a person may not charge more than the maximum amount for both a parking breach on private land that requires the removal of a wheel clamp attached to a vehicle, and for the wheel clamping itself;
- 2 **agree** that the maximum amount will be set at \$50 inclusive of GST;
- 3 **agree** that a breach of the requirement in paragraph 1 will be an infringement offence with:
  - 3.1 an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate;
  - 3.2 a fine of up to \$4,000 for an individual and up to \$20,000 for a body corporate (if the person is charged with the offence in court);
- 4 **agree** that, if a wheel clamp operator has breached the maximum fee, motorists will have the right to recover payments made in excess of the maximum fee through normal civil claims processes, including the Disputes Tribunal;
- 5 **agree** to create a power for the responsible Minister to recommend regulations to amend the amount of the maximum fee;

### Legislative implications

- 6 **agree** to give effect to these proposals with an amendment to the Land Transport Act 1998;
- 7 **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions, consistent with the policy framework in this paper, with those decisions to be reported to the Cabinet Legislation Committee;
- 8 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the proposals in this paper;

### Communication

- 9 **note** that the Ministry of Business, Innovation and Employment will publish a copy of this paper on its website.

Authorised for lodgement

Hon Kris Faafoi  
Minister of Commerce and Consumer Affairs

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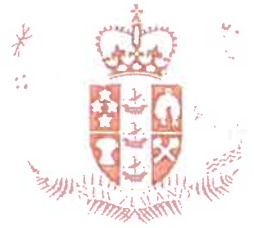
# Hon Kris Faafoi

MP for Mana

Minister of Civil Defence

Minister of Commerce and Consumer Affairs

Associate Minister of Immigration



Hon Phil Twyford  
Minister of Transport  
Parliament Buildings  
Wellington

Dear Phil,

## Update on wheel clamping proposals

I am writing to you regarding the proposals to regulate fees charged by wheel clamp operators. My officials have prepared a Cabinet paper which I am keen to take to DEV on 2 May, with a view to introducing legislation to give effect to the proposals sometime in July 2018. The proposals seek to introduce a \$50 cap for a parking breach that requires the removal of a wheel clamp. I believe this will strike the right balance between protecting motorists from unreasonable fees and the property rights of car park owners such as small businesses.

As discussed with you previously, I will seek Cabinet's agreement to introduce these proposals through an amendment to the Land Transport Act 1998. While the Land Transport Act does not currently regulate parking enforcement on private land, I consider that it is the most appropriate legislation for wheel clamping regulation. It currently regulates towing services and public parking, which have similarities to wheel clamping. The general public could reasonably expect to see wheel clamping regulation in the Land Transport Act.

As these proposals are to be given effect in transport legislation, it will be important to provide clarity about the Ministerial portfolio and the government agencies that will be responsible for implementing and administering the regulation of wheel clamping.

I envisage that your portfolio will administer the new provisions once they are passed. This might include the making of regulations under regulation-making powers in the proposed amendments, should the maximum fee for wheel clamping need to be updated in future.

Under the amendments I am seeking, overcharging for wheel clamping on private land will be an infringement offence to be administered by New Zealand Police, as the most appropriate enforcement agency under the Land Transport

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Act. A person whose vehicle is clamped will also be able to take civil action to recover the amount charged in excess of the cap.

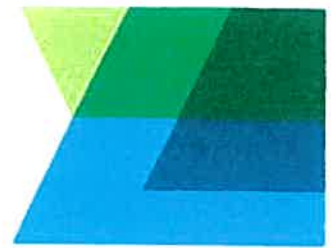
I am happy to discuss these matters in further detail.

Yours sincerely,

Hon Kris Faafoi  
Minister of Commerce and Consumer Affairs

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# BRIEFING

## Draft Cabinet paper: wheel clamping proposals

|                                 |               |                         |            |
|---------------------------------|---------------|-------------------------|------------|
| <b>Date:</b>                    | 29 March 2018 | <b>Priority:</b>        | High       |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 2523 17-18 |

### Action sought

**Hon Kris Faafoi**  
Minister of Commerce and  
Consumer Affairs

### Action sought

**Provide** feedback on the attached  
draft Cabinet paper.

**Agree** to lodge the attached Cabinet  
paper with Cabinet Office.

### Deadline

As soon as reasonably  
practical

### Contact for telephone discussion (if required)

| Name        | Position                                    | Telephone   | 1st contact  |
|-------------|---|-------------|--------------|
| Jennie Kerr | Manager, Competition<br>and Consumer Policy | 04 901 4958 | 027 214 6120 |
| Nadia Jones | Policy Advisor                              | 04 901 2269 | ✓            |

### The following departments/agencies have been consulted (if required)

Ministry of Transport, Ministry of Justice, Parliamentary Counsel Office, New Zealand Police

### Minister's office to complete:

Approved

Noted

Seen

See Minister's Notes

Declined

Needs change

Overtaken by Events

Withdrawn

### Comments:

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## BRIEFING

### Draft Cabinet paper: wheel clamping proposals

|                          |               |                  |            |
|--------------------------|---------------|------------------|------------|
| Date:                    | 29 March 2018 | Priority:        | High       |
| Security classification: | In Confidence | Tracking number: | 2523 17-18 |

#### Purpose

To seek your agreement to submit the attached Cabinet paper (following any amendments to reflect your feedback and that of other departments) to the Cabinet Office for consideration by the Cabinet Economic Development Committee.

#### Executive summary

1. You asked MBIE to draft a Bill to amend the Land Transport Act 1998 to regulate the maximum fees charged by wheel clamp operators. Your office has requested that a Bill be ready for introduction to the House on 10 May 2018.
2. As discussed with you on 12 March, the proposals are more targeted than the original regime outlined in the Land Transport (Wheel Clamping Protection) Amendment Bill (a member's Bill), with the aim of making the requirements more enforceable in practice without requiring significant additional resourcing. They do not include a licensing regime or conduct requirements.
3. A key decision needed from you is the legislation that wheel clamping regulation will sit in. The Ministry of Transport has concerns about the appropriateness of wheel clamping provisions sitting in the Land Transport Act. As such, we have provided alternative options in this briefing for your consideration. Our view is that the Land Transport Act or the Summary

Offences Act 1981 would be most appropriate. This is because enforcement by New Zealand Police under either of these Acts would make sense.

4. We are undertaking departmental consultation at the same time as you are reviewing the draft Cabinet paper.

### Recommended action

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

- a **Note** that the Ministry's preferred approach remains that a full policy process be undertaken to assess issues and potential solutions across all forms of parking enforcement, prior to regulating. *Noted*
- b **Note** that, given Ministers' direction that wheel clamping should be regulated, our preferred approach is to amend the Land Transport Act or Summary Offences Act with enforcement by New Zealand Police. *Noted*
- c **Note** that the proposals in the draft Cabinet paper focus on regulating the fees that wheel clamp operators may charge. *Noted*
- d **Provide** feedback on the attached draft Cabinet paper. *Provided*
- e **Agree** that a version of the attached draft Cabinet paper, amended to take into account feedback from you and from inter-agency consultation, should be submitted for consideration by the Cabinet Economic Development Committee. *Agree / Disagree*

Jennie Keir  
Manager, Competition and Consumer Policy

Hon Kris Faafoi  
Minister of Commerce and Consumer Affairs

... / ... / ...

... / ... / ...

## Background

### Context

1. We met with you on 12 March to discuss a proposal that the Land Transport (Wheel Clamping Protection) Amendment Bill (a member's Bill) be adopted as a Government Bill and introduced to the House on 10 May 2018.
2. The Land Transport (Wheel Clamping Protection) Amendment Bill was a member's Bill sponsored by Greg O'Connor MP which was placed in the ballot but not drawn. The member's Bill included a comprehensive regulatory regime for wheel clamp operators, including licensing and a maximum fee.
3. You directed MBIE to target the focus of the Government Bill to regulating the fees that wheel clamp operators may charge. This was on the basis that the comprehensive regime in the existing member's Bill would require substantial resourcing to set up and enforce, as it would create new licensing, monitoring and enforcement functions for the New Zealand Transport Agency (NZTA).
4. You also agreed that the maximum fee would be prescribed in regulations, rather than in primary legislation (as in the member's Bill). This provides more flexibility if fees need to be updated.

### General policy justification for regulating wheel clamping on private land

5. The objectives of the policy proposals are to improve protection for motorists in relation to wheel clamping by addressing disproportionate fees.
6. The proposals do not seek to address issues with towing companies or to parking operators who use breach notices as their only method of enforcement. While there is some evidence of problems associated with other parking enforcement methods, the most egregious behaviour appears to be attributed to wheel clamping.
7. Wheel clamping is a relatively cheap and unregulated mechanism to deal with illegal parking on private land, which has attracted unscrupulous operators into the market. The costs of enforcement fall on the motorist rather than the property owner, making it a preferred enforcement mechanism for some property owners and tenants, as well as a potentially lucrative activity for wheel clamp operators.
8. A lack of clarity in the law and difficulties in disputing fees create incentives for wheel clamp operators to charge excessive fees. The law is not clear about the exact charges that are reasonable for a parking breach. This means that motorists are unlikely to understand in what circumstances they might successfully dispute a fee. Combined with the cost and inconvenience of lodging a dispute, this makes it unlikely that motorists will lodge a claim through the Disputes Tribunal. Consequently, there are few incentives for wheel clamp operators to charge reasonable fees.
9. Regulating fees for wheel clamping could reduce harm to motorists from excessive fees and improve access to redress.

## MBIE view of the proposal and its costs and benefits

10. Our first best advice is that MBIE should undertake consultation and research on the scale and nature of the problems related to private parking enforcement in general and the range of possible solutions before recommending a course of action.
11. However, in light of Ministers' direction that wheel clamping should be regulated, our preferred option is to regulate fees.
12. We expect fee regulation to have the greatest impact in addressing the underlying cause of the problem (that clamping is a potentially lucrative activity that attracts unscrupulous operators into the market), without significant administrative cost. We think the second best option would be a total ban on wheel clamping, which would also deliver significant benefits for motorists compared to the status quo. A ban would potentially have more merit than a comprehensive regulatory regime, because the latter would address problems but would require significant additional resourcing and would be complex to set up and administer.
13. The preferred approach of regulating fees means that the maximum fee could be set at \$0 in future, should that ultimately be desirable. This would have a similar effect to a ban.
14. Overall, we consider that fee regulation is likely to reduce complaints about disproportionate fees, and would provide greater clarity to motorists and to wheel clamp operators about what fees are reasonable. While it does not directly address concerns about unfair or intimidating behaviour, these concerns often relate to the conduct of wheel clamp operators in attempting to extract fees from motorists. Regulating fees should go some way to alleviating 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.

### *Costs and benefits of the proposal*

15. We think the main benefits of the proposal are:
  - a. It would provide clarity to motorists and to operators about what fees are considered reasonable for the release of a clamped vehicle. It would make breaches of the fee cap easier for motorists to self-enforce, which is more appropriate for these lower value transactions and will not need to be tested in a court or the Disputes Tribunal.
  - b. It will help to alleviate harm to motorists from excessive fees in relation to wheel clamping.
  - c. A cap may result in the exit of unscrupulous operators from the market if it makes clamping no longer a lucrative activity.
  - d. It would be lower cost to enforce compared to other regulatory options as it is relatively easy to prove a breach of a fee cap.

16. The costs and potential risks of the proposal are:

- a. It would limit the revenue that wheel clampers can obtain. A risk is that the cap may be set below what operators need to recover costs.
- b. A potential risk is that a cap may be set above what some companies currently charge and these companies may raise their prices to meet the cap. We do not think this risk is high because unscrupulous operators appear to be maximising their profits already.
- c. Fee regulation might have an effect on other enforcement methods for which fees are not regulated i.e. this might drive up the use of towing and/or breach notices.
- d. It relies on motorists to take steps to resolve breaches, to some extent. While the proposal will make it easier for consumers to enforce, there is still the risk that many will not do so because they are unaware of the law or are not willing to dispute a breach.

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## Key features of the proposal

17. The draft Cabinet paper proposes:
  - a. An offence if a wheel clamp operator charges more than a prescribed amount
  - b. Penalties for a breach of the prescribed maximum amount
  - c. That motorists will have a right to obtain a refund of any amount overpaid if a wheel clamp operator has breached the prescribed maximum amount
  - d. That the maximum fee be set at \$50 (inclusive of GST) in regulations.
18. The requirements will apply to any person who clamps a vehicle on private land, whether the wheel clamping is carried out by the land owner or tenant, or by a parking enforcement firm. We think this is necessary to address the problem because high fees are charged in both of these situations.

### Maximum fee

#### *Capping the maximum fee that can be charged for a parking breach enforced by wheel clamping*

19. We think the policy intent of a fee cap is to cap the total fee that a person is charged for the parking breach which has led to their vehicle being clamped. We do not think that the policy intent is to merely cap the amount which the wheel clammer may demand on the spot for the act of removing the clamp only. The difference is that the latter only prohibits the wheel clammer's immediate demands for the release of the vehicle, but it still allows a wheel clammer to then invoice the motorist for remaining charges in excess of the prescribed maximum. Our preferred approach would prohibit a wheel clammer from demanding that a motorist pay \$50 for the release of the clamp and then invoicing the motorist for another \$710.
20. The Ministry of Transport disagrees on the policy intent. Their advice is not to cap the fee, but only to cap the initial demand for a fee. This does not stop the breach fee being higher – it just stops it having to be paid upfront. Their view is that the property owner should be allowed to seek additional recompense for contractual or tort damages.
21. Our view is that merely capping the amount that a wheel clammer can demand on the spot for the removal of a clamp would not address the issues that motorists face around unreasonable fees. The problem is that currently, wheel clampers have little incentive to charge reasonable fees because the common law is unclear on the exact charges that are reasonable for a breach. Capping the fee that can be charged for the *parking breach* for which the vehicle was clamped, rather than just for the act of *removing the clamp*, would provide certainty to motorists about the maximum fees that are allowable.

#### *Prescribed amount*

22. As enforcement of the primary legislation depends on the amount in regulations, it is important that the legislation and regulations come into force at the same time. We have inserted a recommendation in the Cabinet paper seeking approval for you to issue drafting instructions to the Parliamentary Counsel Office (PCO) for regulations setting a maximum fee at \$50. This was the amount proposed in the original member's Bill. We think this amount is sufficient to act as a deterrent for parking breaches and is at the lower end of the range of fees currently charged for the release of clamped vehicles.

## Offences and enforcement

### Maximum penalties

23. The Cabinet paper sets out that a breach will be an offence and that the maximum fine upon conviction should be \$4,000 for an individual and \$20,000 for a body corporate.
24. An alternative would be to create an additional infringement offence. We have set out the pros and cons of both approaches below, as it is a point on which there is disagreement between agencies. Specifically, NZ Police support an infringement offence as they say it would make it easier for them to enforce breaches. The Ministry of Transport supports a simple offence.

|                     | Pros  | Cons  |
|---------------------|---|---|
| <b>Infringement</b> | <ul style="list-style-type: none"> <li>It does not require prosecution through the courts, making it easier to enforce obvious breaches.</li> <li>It would be appropriate for this type of breach as it involves a straightforward issue of fact (i.e. whether or not a person has charged more than \$50).</li> <li>Is suitable where there is a high volume of regular offending.</li> <li>Is suitable for conduct that is a low level of seriousness that does not justify the full imposition of the criminal law.</li> </ul> | <ul style="list-style-type: none"> <li>It does not result in a criminal conviction.</li> <li>It has a lower deterrent effect than an offence.</li> </ul>  |
| <b>Offence</b>      | <ul style="list-style-type: none"> <li>An offence results in a criminal conviction, which can have a greater deterrent effect.</li> <li>Is suitable for a low level of offending. It would be suited to addressing a handful of rogue operators.</li> </ul>   | <ul style="list-style-type: none"> <li>It requires prosecution through the courts.</li> <li>It may overburden the courts and Police resources if there is a high level of offending.</li> </ul> |

25. Given the conflicting agency views on the matter, we think the issue of exactly what offence(s) will be created still needs to be worked through after Cabinet has agreed to the high-level policy proposal. The draft Cabinet paper seeks authorisation to allow you to make additional policy decisions during drafting, consistent with the overall policy framework. One of these decisions may be regarding the creation of an additional infringement offence regime.

### Enforcement of an offence

26. The agency responsible for enforcing the offence depends in part on the legislative vehicle. For example, if you create an offence in the Summary Offences Act or Land Transport Act,

the natural enforcement agency would be NZ Police. We have provided more information about the legislative vehicle below.

27. The original Bill envisaged NZTA to be the enforcement agency. This is not the kind of enforcement activity that NZTA would be involved in as it does not carry out enforcement on the ground. The main enforcement body for offences in the Land Transport Act is NZ Police.
28. We think that NZ Police may be the most appropriate enforcement agency for an offence based on the assumption that there is no additional government funding available for enforcement of wheel clamping regulation. Additionally NZ Police may be best placed to deal with a breach that requires a quick response and they are likely to be thought of as the first port of call by motorists faced with demands for unreasonable payment.
29. Other enforcement options could be considered. Local authorities could be an option. NZ Police is of the view that primary responsibility for enforcing the proposals should sit with local authorities. However, it would be unusual for local authorities to enforce parking fees on private land. It is not a role they have currently. Their existing investigatory and enforcement powers are insufficient to deal with the issues that would arise.

*Ministry of Justice view on the creation of an offence*

30. The view of the Ministry of Justice is that wheel clamping would be better treated as a civil dispute between two private parties, rather than as an offence. In their view, an offence creates an unrealistic expectation that the State will intervene before the motorist actually pays the fee. In reality it would be unlikely that the situation would deserve the immediate attention of the Police. Further, there is unlikely to be sufficient public interest in prosecuting wheel clampers who charge more than the prescribed maximum to make an offence worthwhile. The motorist, as the injured party, would not receive any reparation for an offence unless the matter goes to court.
31. However, our preference is that private civil action should not be the only redress available to motorists, particularly given the cost and time involved in lodging a dispute.

*We suggest creating an offence enforced by the Police and the ability to take a civil dispute*

32. Our advice is that there should be two options available to the motorist: either contacting the Police to enforce an offence, or taking a civil claim after the incident. Given that the claim is likely to be of low monetary value, in most cases this will be with the Disputes Tribunal. While this mechanism of redress does provide a cost for the motorist, it is better than the status quo because there will be greater clarity in the law about the exact charges that are allowable for wheel clamping (unlike the current situation, in which a motorist cannot be sure that the charge they are disputing is legal or not).
33. If a wheel clumper charges more than \$50, the motorist can either:
  - a. Refuse to pay and threaten to call the Police. If the Police arrive, they will step in and stop the person from demanding the money.
  - b. Pay the wheel clumper instead of calling the Police. The motorist can later complain and seek to recover the debt (the amount overpaid) through normal civil dispute

processes. If there was sufficient evidence of a problem, the Police could investigate and charge the person with an offence.

34. Motorists should have the right to obtain a refund of any amount overpaid if the wheel clamp operator is found to have breached the prescribed maximum fee if they take a civil dispute.
35. Generally, we expect that the proposed fee regulation will cause some rogue operators to exit the market, which would resolve most of the issues faced by motorists without the need for enforcement action.

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### *Disputes Tribunal jurisdiction*

36. The Ministry of Justice has raised a possible issue if we provide recourse for motorists to take a claim to the Disputes Tribunal. An explicit exemption may be required from statutory limitations on the jurisdiction of the Disputes Tribunal. The Disputes Tribunal's jurisdiction does not extend to any claim related to debt due under any enactment. In the case of wheel clamping, if the legislation is clear that anything above \$50 needs to be repaid, then it maybe a debt due under an enactment.
37. While an exemption can be made in legislation, we will need to seek the view of the Principal Referee of the Disputes Tribunal and the Chief District Court Judge in order to do so. We anticipate that they can be consulted after Cabinet policy decisions, given that the Cabinet paper does not currently specify the Disputes Tribunal as the mechanism for taking a civil dispute. However, we would need your permission to consult the judiciary since it sits outside the executive.

### **Licensing has not been included**

38. As instructed by you, we have not included any options in the Cabinet paper requiring wheel clamp operators to be licensed. If you think a licensing regime is desirable, we suggest a possible vehicle would be the existing licensing regime under the Private Security Personnel and Private Investigators Act 2010 (**PSPPI Act**).
39. While there would be some benefits of a licensing regime (it would eliminate rogue operators, help to bar repeat offenders, and allow a code of conduct to be prescribed under the Act to impose additional conduct requirements), we do not think that licensing is necessary at this stage as the proposed fee cap is likely to result in some rogue operators exiting the market.
40. The PSPPI Act does not currently require wheel clamp operators to be licensed. Some wheel clamp operators may hold a licence under the regime, but this is generally because other areas of their work are of a nature that requires licensing under the Act (for example, security guards or repossession agents who also carry out wheel clamping activities).
41. While the PSPPI Act could be amended to clarify that wheel clamp operators are intended to be covered by the licensing requirements, the preliminary view from the Ministry of Justice is that wheel clamping activities are not a natural fit within the PSPPI Act licensing regime. Including wheel clamp operators would have implications for the existing regime, both in terms of policy (for example, what licensing and training requirements should apply to wheel clamp operators specifically) and operationally (for example, how many operators would be captured and what would be required for the regime to work). An increased scope may have resourcing implications for the Department of Internal Affairs and the Private Security Personnel Licensing Authority, both of which have a role in administering the regime. It would also impact on the resources of NZ Police because they vet all applications for licences and certificates of approval.

### **Legislative vehicle**

42. As instructed by you, the draft Cabinet paper sets out that it seeks to amend the Land Transport Act to regulate wheel clamping.
43. The Ministry of Transport has concerns about the appropriateness of wheel clamping provisions sitting in the Land Transport Act, given that the Act does not currently set out rules around parking enforcement on private land. While this does not preclude the Land Transport Act from being an option, we have identified alternative legislation in consultation with the

Ministry of Transport and PCO which could be considered as possibilities for implementing these proposals.

44. If you want to amend another Act, you may need to consult with colleagues such as the Minister of Transport and Minister of Justice.
45. The options below have been assessed in terms of whether the proposal fits within the purpose of the overall legislation and regulatory system, whether the legislative vehicle is accessible for users (i.e. would they expect to find wheel clamping regulation in that legislation), and whether there is an effective enforcement body under that legislation to administer the regime.

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| Act   | Purpose  | User accessibility  | Enforcement   | Offences   |
|---|--|---|---|--|
| <b>Land Transport Act 1998</b>              | The Act promotes transport safety, which wheel clamping does not directly relate to. The Act currently extends only to parking enforcement on public land. However, it regulates towing on public land, which the public would consider to be similar.   | Users could reasonably expect to see wheel clamping regulation here.  | NZ Police are the main enforcement body. Local authority parking wardens enforce some parking offences.   | The Act has existing offence and infringement offence regimes.   |
| <b>Summary Offences Act 1981</b>            | The Act provides for offences against public order, against persons or property, trespass and nuisance. An offence for charging more than a maximum amount for the release of a clamped vehicle could fit in this Act as a single offence.   | Less accessible for users as one does not contemplate this Act to be an enforcement act for parking policy.           | This would be enforced by NZ Police.  | The Act creates offences. It provides an infringement offence regime specifically for persons drinking in public places who are under the age of 18. |
| <b>Fair Trading Act 1986</b>                | The proposal would fit within the purpose of the Act, which is to contribute to consumer protection. Bespoke wheel clamping provisions may not be a good fit for the principles-based approach in the Act. There is currently no direct price regulation in the Act. Additionally, the Act only applies to those providing a good or service "in trade" so would not apply to all persons clamping vehicles. | Consumers might expect to see regulation protecting consumers from unreasonable fees charged for wheel clamping here. | This would be enforced by the Commerce Commission. Our view is that this is not appropriate to the type of complaint and the need for quick access to redress at the time of being clamped. | The Act has both offence and infringement offence regimes.   |
| <b>Property Law Act 2007</b>                | The Act sets out the law relating to real and personal property. Wheel clamping involves the right to property in terms of the vehicle that is clamped and the property right that is infringed upon by the motorist's breach, so this might be a good fit.  | Not many users would expect to find wheel clamping regulation here.   | There is no specific enforcement agency for the Act.  | The Act provides for some offences, however there is no infringement offence regime in the Act.  |
| <b>Contract and Commercial Law Act 2017</b> | The Act sets out the law on contracts and other commercial matters. We do not think it is a good fit for declaring wheel clamping to be an offence.  | Not many users would expect to find wheel clamping regulation here.   | There is no specific enforcement agency for the Act. The court seems to be the main arbiter of disputes.  | The Act does not create criminal offences so this would be an unusual addition.  |

## MBIE view

46. MBIE's view is that the Summary Offences Act or the Land Transport Act are likely to be better legislative options to create an offence related to fees charged for wheel clamping.
47. We do not consider the Fair Trading Act to be appropriate because it is focussed on persons who provide goods and services "in trade". In our view, it would not be appropriate to limit the application of any wheel clamping regulation to persons carrying out wheel clamping who are providing a parking service "in trade". This does not sufficiently address the problems related to wheel clamping; for example, it would not apply where a vehicle has been clamped because the motorist parked without permission in a car park reserved for a purpose other than to provide a parking service.
48. Three of the Acts (Property Law Act, Summary Offences Act and Contract and Commercial Law Act<sup>1</sup>) are administered under the Justice portfolio. We do not know whether the Minister of Justice has an appetite for amending legislation to regulate wheel clamping within the Justice portfolio. This would require a conversation with the Minister of Justice.
49. A risk with amending legislation in another portfolio is that it may create confusion about where responsibility will sit for wheel clamping legislation in the long term. Ministers will need to be clear on where long term responsibility will lie. As discussed with you at the weekly officials meeting of 5 March 2018, you expect that responsibility for wheel clamping regulation will sit in the Transport portfolio in the long term. We understand that you have agreed this with the Minister of Transport.

## Consultation

50. The Ministry of Transport, Ministry of Justice, NZ Police and PCO have been consulted in the development of this briefing.
51. The Treasury, Ministry of Justice, Ministry of Transport, the Department of Internal Affairs, New Zealand Police and the New Zealand Transport Agency are being consulted on the draft Cabinet paper.
52. The Department of the Prime Minister and Cabinet has been informed.

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<sup>1</sup> Parts of the Contract and Commercial Law Act are administered by MBIE, in particular parts relating to commercial law, such as the sale and carriage of goods. The Ministry of Justice administers parts of the Act relating to contract law. If wheel clamping regulation were to be inserted into the Act, it would likely be a commercial law matter, although there is currently no obvious place for it in the Act.



## Communications and risks

53. We will provide you with a draft press release and draft first reading speech closer to the expected date for introduction of the Bill (10 May).
54. You sent a letter on 19 March seeking the approval of the Attorney General to issue drafting instructions to PCO in advance of Cabinet policy decisions. The Attorney General declined the request on 27 March, on the basis that there are still discussions taking place about which legislation to amend and how best to implement the policy. This is likely to pose a risk to the intended introduction date. PCO has also advised us that the expected date for introduction may not be a feasible timeframe in which to draft.

## Next steps

55. We previously anticipated the following next steps. However, because the Attorney General has not authorised drafting in advance of policy decisions, it is unlikely to be possible to meet the timeline below.

| Activity   | Date                                 |
|--|--------------------------------------|
| MBIE will consult departments on the draft Cabinet paper and inform you of any changes or risks. | Wednesday 28 March – Tuesday 3 April |
| Please provide feedback on the draft Cabinet paper.  | By Tuesday 3 April                   |
| We will provide you with the final draft Cabinet paper.  | Wednesday 4 April                    |
| Your office will lodge the Cabinet paper.  | By 10am Thursday 5 April             |
| DEV will meet to discuss the proposals.  | Wednesday 11 April                   |
| PCO drafting   | Up to 24 April                       |
| We will provide you with a draft LEG paper.  | Monday 24 April                      |
| Your office will need to lodge the LEG paper.  | Thursday 3 May                       |
| We will provide you with a draft first reading speech and draft press release.                   | Week of 7 May                        |
| LEG will meet to discuss the introduction of the Bill (with power to act for Cabinet).           | Thursday 10 May                      |
| The Bill will be introduced.   | Thursday 10 May                      |

56. If these proposals are still a high priority, we suggest finalising policy and Cabinet decisions in April, with a view to introducing legislation in the third or fourth quarter of the year, depending on House time.
57. We are also carrying out regulatory impact analysis to accompany the proposals and will aim to have a final assessment to accompany the Cabinet paper when it is lodged.

## Annexes

- Annex 1: DRAFT Cabinet paper: Proposal to regulate fees charged by wheel clamp operators



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# Wheel clamping legislation

14 February 2014



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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



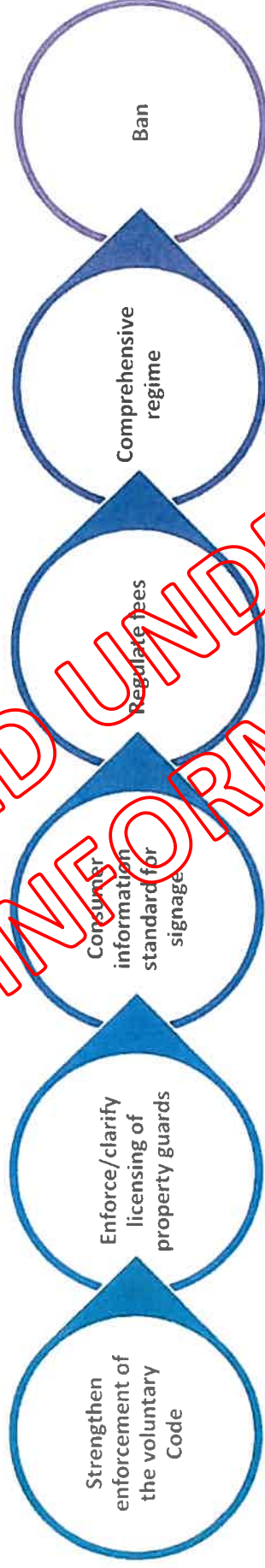
## Recap: member's Bill in its current form

- 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.



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# 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 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

### 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)



# 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  |
|--|---|---|---|
| <b>Problem: Unreasonable fees</b>                                | <p>Examples:</p> <ul style="list-style-type: none"> <li>• \$750 for half an hour</li> <li>• \$480 for 5 minutes</li> <li>• \$200 for 4 minutes</li> </ul>                                       | <p>Little evidence of widespread problem – but could increase if clamping fees are capped</p>   | <p>AA data: fee complaints are primarily in relation to breach notices. Fees approx. \$65.</p>  |
| <b>Problem: Unreasonable conduct e.g. intimidating behaviour</b> | <p>Various anecdotes in media:</p> <ul style="list-style-type: none"> <li>• Clampers lie in wait</li> <li>• Clamped while passengers in car</li> <li>• Unauthorised persons clamping</li> </ul> | <p>Little evidence of widespread problem</p> <p><b>Note:</b> towing operators are required to be licensed, carry identification etc</p> | <p>Little evidence of widespread problem</p>  |
| <b>Problem: Unclear/absent terms and conditions</b>              | <p>Anecdotal evidence</p>   | <p>Little evidence of widespread problem</p>  | <p>Half of AA complaints about signage, mostly about companies that use breach notices.</p> <p>Wilson Parking: 9<sup>th</sup> most complained about trader for alleged Fair Trading Act breaches.</p> |





## 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: Prescribed cap on regulations (BIE's preferred option)  | Option 2: Cap tied to public parking offences  | Option 3: Reasonable fees  |
|--------------------|---|--|--|
| <b>Description</b> | Provide that Minister can prescribe cap in regulations  | Give 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  |
| <b>Benefits</b>    | 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 |
| <b>Costs</b>       | 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

- MBIE'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                 |
|------------------------------------|----------------------|
| <b>Draft DEV paper to Minister</b> | <b>Wed 21 March</b>  |
| Departmental consultation          | Wed 21 March         |
| Minister's feedback                | By Tue 27 March      |
| DEV paper lodged                   | Thurs 29 March       |
| <b>DEV meeting</b>                 | <b>Thurs 5 April</b> |
| Cabinet                            | Mon 9 April          |
| <b>PCO drafting*</b>               | From 9 April         |
| <b>Draft LEG paper to Minister</b> | <b>Mon 24 April</b>  |
| LEG paper lodged                   | Thurs 3 May          |
| <b>LEG meeting</b>                 | <b>Wed 9 May</b>     |
| 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

|                                 |               |                         |            |
|---------------------------------|---------------|-------------------------|------------|
| <b>Date:</b>                    | 17 March 2021 | <b>Priority:</b>        | Medium     |
| <b>Security classification:</b> | In Confidence | <b>Tracking number:</b> | 1596 17-18 |

#### Action sought

**Hon Kris Faafoi**  
Minister of Commerce  
and Consumer Affairs

#### Action sought

**Note** that there are a range of options to address problems with private parking enforcement.

**Note** our comments on the Land Transport (Wheel Clamping Protection) Amendment Bill (a private member's bill).

**Forward** this briefing to the Minister of Transport.

**Provide** feedback on this briefing.

**Agree** to discuss with the Minister of Transport (and if desired other colleagues with an interest) how this work should be advanced.

#### Deadline

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:                    | 17 March 2021 | 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

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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**

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Hon Kris Faafoi  
**Minister of Commerce and Consumer  
Affairs**

..... / ..... / .....

## Background

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### 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.<sup>1</sup> 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.<sup>2</sup>

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

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

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<sup>1</sup> These rules and regulations fall within the responsibilities of the Associate Minister of Transport.

<sup>2</sup> 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

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.<sup>3</sup>
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.<sup>4</sup> 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.

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damages have been paid, but only if the motorist has consented to, or willingly assumed, the risk of the vehicle being clamped or towed.

<sup>3</sup> 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".

<sup>4</sup> 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**

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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:
  - a. **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.
  - b. **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 Act 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

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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.<sup>5</sup>

## Consultation

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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

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### *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

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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.



- 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

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

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

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<sup>5</sup> 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.

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# DRAFT FOR CONSULTATION

## Land Transport (Wheel Clamping Protection) Amendment Bill

Member's Bill

### Explanatory note

#### General policy statement

This Bill amends the Land Transport Act 1998 (the Act) to impose requirements on wheel clamping in order to protect motor vehicle users. At this stage the Government only has a voluntary code on clamping with loose requirements that allow steep clamping fines inconsistent with the more serious driving offences.

This Bill will ensure a maximum price for clamping, that there must be clear signage, that an already clamped car may not also be towed, that those who clamp cars must wear visible clamping photo ID, and that no more than one person may clamp a car—to prevent intimidation. The Bill imposes penalties for breach of these and an appeal mechanism.

#### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* is the commencement clause. It provides that the Bill comes into force on the day after the date on which it receives the Royal assent.

*Clause 3* is the purpose clause.

*Phil Twyford*

## **Land Transport (Wheel Clamping Protection) Amendment Bill**

Member's Bill

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The Parliament of New Zealand enacts as follows:

- 1 Title**  
This Act is the Land Transport Act (Wheel Clamping Protection) Amendment Act **2012**.
- 2 Commencement**  
This Act comes into force on the day after the date on which it receives the Royal assent.
- 3 Principal Act**  
This Act amends the Land Transport Act 1998 (the principal Act).
- 4 Purpose**  
The purpose of this Act is to impose requirements on wheel clamping in order to protect motor vehicle users.
- 5 Section 2 amended (Interpretation)**
- (1) In section 2, insert in their appropriate alphabetical order:
- “**clamping agent** means a person who clamps another person’s motor vehicle
- “**off-road parking** means the stopping or standing of a vehicle on land that is not a road
- “**vehicle clamping service licence** means a licence granted or deemed to be granted under subpart 3 of Part 4A that authorises its holder to carry out vehicle clamping
- “**vehicle clamping service**—
- “(a) means the service whereby a device is affixed to another person’s motor vehicle that prevents that vehicle being moved; and
- “(b) does not include any vehicle specified as an exempt vehicle clamping service vehicle in the regulations or the rules”.
- (2) In section 2, replace the definition of **transport service** with:
- “**transport service**—
- “(a) means any goods service, passenger service, rental service, or vehicle recovery service; but

*Clause 4* provides that the Land Transport Act 1998 is the principal Act.

*Clause 5* amends the interpretation section to insert definitions required for the new clamping provisions, and to include vehicle clamping services as a type of transport service so that some of the rules applying to towing will apply to clamping.

*Clause 6* amends section 30D to include vehicle clamping service licences in the licences for which the Agency must check for good character.

*Clause 7* amends section 30J to provide that vehicle clamping services must be licensed.

*Clause 8* creates a new Part to allow clamping within strict rules including—

- the maximum clamping fee is no more than \$50;
- clamping agents must be licensed;
- clamping agents must wear photo ID;
- no more than 1 agent may clamp cars—to prevent intimidation;
- approved signs must be clearly displayed in order for clamping to be allowed;
- if a car is also towed the costs of clamping may not be recovered;
- a clamp must be released as soon as possible after payment is made;
- penalties of \$2,000 for staff and \$20,000 for the company for breaching *new section 79W*.

*Clause 9* amends section 158 to allow the creation of further rules and regulations around clamping should they be needed.

- “(b) does not include—
- “(i) licensed rail participants under the Railways Act 2005; and
  - “(ii) any service specified as an exempt transport service in the regulations or the rules”.
- (3) In section 2, in the definition of **transport service licence**, insert after paragraph (c):
- “(d) a vehicle recovery service licence
  - “(e) a vehicle clamping service licence”.
- (4) In section 2, replace the definition of **transport service vehicle** with:
- “**transport service vehicle** means any goods service vehicle, passenger service vehicle, rental service vehicle, vehicle clamping service vehicle, or vehicle recovery service vehicle, but does not include—
- “(a) a rail vehicle under the Railways Act 2005; or
  - “(b) a vehicle running on self-laying tracks or rollers; or
  - “(c) a vehicle that operates solely on or in areas to which the public does not have access as of right (whether or not that vehicle is used on a road in connection with that vehicle’s inspection, servicing, or repair, or for the purposes of a practical driving test required under any enactment); or
  - “(d) a vehicle used as a place of abode to the extent that it is not used in a rental service; or
  - “(e) a vehicle listed as a farm vehicle in Part 1 of the Schedule of the Land Transport Management (Apportionment and Refund of Excise Duty and Excise Equivalent Duty) Regulations 2004 or in any provisions made in substitution for that schedule; or
  - “(f) a tractor (being a motor vehicle designed principally for traction at speeds not exceeding 50 km per hour); or
  - “(g) a forklift (being a motor vehicle designed principally for lifting and stacking goods by means of 1 or more forks, tines, platens, or clamps); or
  - “(h) a hearse; or
  - “(i) a traction engine”.

- 6 **Section 30D replaced (Additional criteria for small passenger service vehicles and vehicle recovery service)**  
Replace section 30D with:

**“30D Additional criteria for small passenger service vehicles, vehicle clamping service, and vehicle recovery service**

Without in any way limiting the matters that the Agency may consider under section 30C(2), when the Agency is assessing whether or not a person is a fit and proper person in relation to any passenger service involving the use of small passenger service vehicles, any vehicle clamping service, or to any vehicle recovery service, the Agency must consider, in particular,—

- “(a) any history of serious behavioural problems;
- “(b) any offending in respect of offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities;
- “(c) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges;
- “(d) any persistent offending of any kind;
- “(e) any complaints in respect of the person or any transport service operated by the person that are of a persistent or serious nature.”

7 **Section 30J amended (Transport service operators may not carry on certain transport services unless licensed to do so)**

In section 30J, insert after paragraph (d):

- “(e) vehicle clamping service.”

8 **New Part 6D (Offences relating to private parking)**

After section 79V, insert:

**“Part 6D**

**“Offences relating to private parking**

**“79W Clamping for off-road parking**

- “(1) Where a person allows off-road parking on their land, a clamping agent may carry out a vehicle clamping service on that property subject to the following conditions:



- “(a) the vehicle must have breached a term or condition displayed clearly on a sign authorised by the Agency:
- “(b) the clamping agent must hold a vehicle clamping service licence:
- “(c) to prevent intimidation, only 1 agent may conduct a vehicle clamping service at one location at the same time:
- “(d) the clamping agent must wear photo identification in the form approved by the Agency.
- “(2) Where a clamping agent has clamped a vehicle, they may recover the costs of that clamping and any unpaid off-road parking fees, subject to the following conditions:
- “(a) costs recovered under this section may not exceed \$50:
- “(b) where a car has been towed following being clamped the costs associated with the vehicle clamping service may not be claimed:
- “(c) the costs of clamping a vehicle may not be recovered for off-road parking except in accordance with this section.
- “(3) Where a person has made payment under **subsection (2)** any clamp affixed to their vehicle must be removed as soon as possible.
- “(4) It is an offence for any person or company to breach **subsection (1), (2) or (3)**.
- 79X Appeal process**
- “(1) Any person who believes their vehicle has been unfairly clamped must first complain to the company or person responsible.
- “(2) After a person has complained in accordance with **subsection (1)** they may lay a complaint with the Agency.
- 79Y Penalties for breach of clamping rules**
- “(1) The maximum penalty on conviction for a clamping agent who commits an offence against **section 79W** is a fine not exceeding \$2,000.
- “(2) The maximum penalty on conviction for a company, manager, or director who commits an offence against **section 79W** is a fine not exceeding \$20,000.”

**9 Section 158 amended (Rules concerning licensing, standard-setting, etc)**

- (1) Replace section 158(b)(xiv) with:

“(xiv) provide for the display of identification on goods service vehicles, vehicle recovery service vehicles, vehicle clamping service vehicles, and large passenger service vehicles.”

- (2) After section 158(b)(xx), insert:

“(xxi) specify requirements for a vehicle clamping service including identification, driver duties and conduct, operator duties, complaints management, record keeping, and clamping restrictions and authorisations.”

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