

In Confidence

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

Proposals to address problems with wheel clamping

Proposal

- 1 This paper reports back to the Cabinet Economic Development Committee (DEV) on the wider regulatory framework for parking enforcement on private land. It seeks agreement to one of two alternative proposals to improve protections for motorists in relation to wheel clamping. The first proposal seeks to regulate the maximum fees charged. The alternative proposal is an outright ban on wheel clamping on private land.

Executive summary

- 2 On 13 June 2018, DEV deferred consideration of proposals to regulate fees charged by wheel clamp operators, and invited me to provide further advice on the wider regulatory framework relating to parking enforcement on private land [DEV-18-MIN-0111].
- 3 I have looked into whether there are significant problems in the wider private parking enforcement industry. While there is evidence of some potential issues with the other forms of private parking enforcement, the available evidence suggests that problems related to wheel clamping are particularly harmful, compared to the other enforcement methods of breach notices and towing.
- 4 On this basis I do not recommend that this Government initiate a wider review of the regulatory framework for private parking enforcement. I think we should address wheel clamping in the first instance as the conduct associated with the practice appears to cause the most harm.
- 5 I am asking DEV to agree to either of the following options to address the problems associated with wheel clamping:
 - 5.1 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; or
 - 5.2 a ban on wheel clamping on private land.
- 6 I am seeking approval to issue drafting instructions to Parliamentary Counsel Office (PCO) to give effect to one of these proposals through the Land Transport Act 1998.

Background

Regulatory framework that currently applies to private parking enforcement

- 7 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).

- 8 Parking enforcement on private land generally takes three forms: towing, wheel clamping or the issuing of 'breach notices', which inform motorists that they have breached the terms and conditions of parking and are required to pay a fee.
- 9 There is no specific legislation that governs all forms of parking enforcement, or the charges allowed for such enforcement, on private land. A range of statutes and common law, which has developed in the courts over time, may apply. Contract law says that if someone offers a parking service, and a motorist breaches the terms and conditions of that service, the operator is entitled to seek contractual damages. Similarly, trespass law says that if someone parks their car on private land where they do not have permission to do so, the land owner can claim damages for the trespass.
- 10 Issues to do with private parking enforcement span across a number of regulatory systems and various government agencies have an interest.

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

- 11 While there are frequent complaints about companies that issue breach notices, they do not appear to be at the same level of egregiousness as the conduct that is the subject of wheel clamping complaints.
- 12 Complaints about breach notices are primarily in relation to unclear signage and fees. There is little evidence of a widespread problem of unreasonable conduct in relation to breach notices.
- 13 By way of comparison, complaints about wheel clamping are also about signage and (much higher) fees, but many complaints are also about unreasonable conduct. This conduct includes wheel clampers lying in wait for motorists to leave their vehicles, demonstrating aggressive or intimidating behaviour, pursuing debts that have already been paid, and clamping vehicles on property where they do not have the authority to do so.
- 14 As for towing, I understand that there have generally been fewer complaints about the practices of the towing industry now that this is regulated under the Land Transport Act. 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. I believe these laws are sufficient to regulate the conduct of tow truck drivers.
- 15 Anecdotally, I have heard some evidence of complaints about the conduct of tow truck drivers. This may be evidence of a lack of compliance with existing regulation that applies to the towing industry.

I do not think that a wider review of the regulatory framework is necessary

- 16 Based on my scan of practices across the private parking enforcement industry, I do not consider there to be enough evidence to suggest that a more in-depth review is necessary in the short term to deal with urgent problems.
- 17 A wider review would examine issues across the regulatory framework for private parking enforcement. It would look at clamping, towing, breach notices and any other forms of private parking enforcement. Such a review would require joint Ministerial oversight. For example, towing is regulated under the Transport portfolio and as such, its review may require input from Transport Ministers. This would be a substantial piece of work that

would take a significant amount of time. A risk is that such a review would detract from other Government priorities.

- 18 My view is that wheel clamping is the most problematic area and that we should address this in a timely manner. A review could be something to consider in future once we look at how well any wheel clamping regulation is working.

Proposals to regulate wheel clamping

Unreasonable fees and unfair conduct are causing harm to motorists

- 19 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.
- 20 Many cases have been reported of motorists being charged unreasonable fees for the release of their vehicle once clamped. 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.
- 21 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.
- 22 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 wheel clamping fees through the Disputes Tribunal. Consequently, there are few incentives for wheel clamp operators to charge reasonable fees.
- 23 Unfair conduct by wheel clamp operators is also a frequent source of complaint. Common complaints are that wheel clampers lie in wait to clamp vehicles immediately after a motorist has vacated, that clamping is carried out where wheel clampers do not have authority to do so, and that wheel clampers demonstrate aggressive or intimidating behaviour. Motorists can feel unsafe and vulnerable when faced with such behaviour, especially when immediate payment is demanded of them. The law does not specifically regulate the conduct of wheel clampers, except to the extent that conduct such as harassment and coercion is generally prohibited.

Option 1: regulate fees charged for wheel clamping

- 24 The first option which I am asking Cabinet to consider is a proposal 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.
- 25 Regulating the fee amount 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, should

they be charged in excess of the cap. While a fee cap does not directly address concerns about unfair behaviour, these concerns often relate to the conduct of wheel clamp operators in attempting to extract fees from motorists. Regulating fees could 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.

- 26 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.
- 27 The proposals only apply to wheel clamping carried out on private land. This means they would not affect any abilities that local authorities may have to clamp vehicles, including vehicles associated with freedom camping. Local authorities deal with freedom camping on land managed or administered by each authority under the Freedom Camping Act 2011, but they cannot conduct enforcement on private land.

Maximum fee for wheel clamping

- 28 Under this option, I would propose to set a maximum allowable fee in respect of wheel clamping. The maximum fee will be the total amount, including both the charges for the parking breach and any costs related to applying and releasing the clamp.
- 29 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 on private land. Fees for these other methods are not capped. These proposals focus on wheel clamping because this appears to be the source of the most egregious behaviour in private parking enforcement.
- 30 There is a risk that regulating wheel clamping may have flow-on consequences, such as an increase in towing. I consider that these potential trade-offs are justified by the need to address motorists' concerns about wheel clamping. Whilst there is a risk of increased towing, in New Zealand tow truck operators are already required to be licensed, carry identification and keep registers of tows and complaints. As such, there are already protections in place for motorists if they have to deal with tow truck operators.
- 31 It is not my intention that regulating fees for wheel clamping will restrict towing. 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 towing costs.

Amount of maximum fee

- 32 Under this option, I would propose that the maximum fee be set at \$50, inclusive of GST. This is sufficient to act as a deterrent for most 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 initial amount should be set by Parliament in primary legislation and should be consulted on through the select committee process.
- 33 There is 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, this risk is mitigated as property owners can use other enforcement methods instead of wheel clamping in these circumstances, such as breach notices or towing.

- 34 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.
- 35 There will be appropriate safeguards around amending the maximum fee. Any amendment could require consideration of:
- 35.1 changes to consumer prices (i.e. inflation) since the fee was last set; and
 - 35.2 whether the maximum fee adequately deters parking breaches on private land.

Offences and penalties

- 36 A person would commit an offence at the point at which they demand and/or accept payment of more than \$50 for the parking breach.
- 37 I consider that this needs to be an offence rather than only being a matter for civil dispute. At the moment, charges for parking on private land are a civil matter. It is up to a motorist to take action against the wheel clamp operator. This may require them to go to the Disputes Tribunal to dispute the charge.
- 38 For most consumer problems, very few are prepared to go to the Disputes Tribunal. There needs to be a greater deterrent for wheel clampers to overcharge, rather than relying on motorists to take action against them.
- 39 I believe that making this an offence, with an appropriate enforcement agency, will be a greater deterrent to operators charging unreasonable fees, rather than leaving this only as a civil matter for an individual motorist to dispute.
- 40 Under this option, I would 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.
- 41 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.
- 42 If a person is charged in court, rather than being issued an infringement notice, individuals will be liable for a maximum penalty of \$3,000 and bodies corporate for a maximum penalty of \$15,000. 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.

Enforcement agency

- 43 I consider that the New Zealand Police is the most appropriate agency to enforce this proposal under the Land Transport Act. Police are best placed to respond because they

are often viewed as the first port of call by motorists faced with unreasonable demands from wheel clampers. Currently, when Police are called to respond to such incidents, they cannot intervene in the amount of payment demanded, as this is a civil matter. A fee cap will be an improvement on the status quo if Police are called to the scene, as they can take appropriate enforcement action against the wheel clamp operator.

- 44 I expect that offences related to wheel clamping are unlikely to be high on the priority list for Police. However, I expect the penalties for breaching the fee cap to deter wheel clampers from overcharging. As such I do not expect this to take up a lot of Police time away from other priorities.

Alternative enforcement agencies

- 45 I have also considered the option of making enforcement the responsibility of local authorities.
- 46 There would be a number of difficulties with requiring local authorities to enforce parking on private land. Their existing investigatory and enforcement powers under the Land Transport Act are insufficient to deal with wheel clamping breaches on private land. For example, council parking wardens would need new authority to enter private property. They would also need new powers to obtain a clamper's personal details to issue them with an infringement notice.
- 47 Local authorities are also not resourced in such a way to enforce disputes that may occur at any time of day and that may require staff to intervene in acrimonious disputes. Local authorities would need to consider whether staff were competent to undertake that sort of enforcement role safely and, if not, whether further training was practicable to mitigate any risks and at what cost. As such I do not think that local authorities would be well placed to enforce these proposals.
- 48 I also considered other enforcement options, such as the New Zealand Transport Agency and the Commerce Commission, but I do not think they are suitable for the nature of the enforcement work required, for the reasons outlined below.
- 49 The New Zealand Transport Agency does not carry out enforcement on-the-ground so this is not the kind of activity it would be involved in. The statutory role of the New Zealand Transport Agency is about contributing to an effective, efficient and safe land transport system and does not extend to regulating parking activity on private land.
- 50 The Commerce Commission might be an option if these proposals were implemented through the Fair Trading Act 1986. However, the Fair Trading Act would not be an appropriate legislative vehicle because it only applies to persons providing a good or service in trade, so not all persons who clamp vehicles would be covered. Additionally, I do not think the Commerce Commission is appropriate because they have a small number of enforcement staff across a breadth of activities and they do not provide on-the-ground enforcement.
- 51 I have considered the option of leaving wheel clamping as a civil matter with no agency directly responsible for enforcement. Individuals would be required to take disputes to the Disputes Tribunal. As I have stated earlier in this paper, I do not believe this would provide a sufficient deterrent.

- 52 As such I consider Police to be the agency best placed to undertake the type of enforcement action required.

Access to redress for motorists

- 53 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 charged in excess of 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 on the proposal to regulate fees

- 54 I am considering options on a few 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 any additional decisions. This may include:

- 54.1 issues related to provisions for taking civil disputes, including through the Disputes Tribunal; and
- 54.2 any additional detail that is needed around the circumstances in which a fee can or cannot be charged.

Option 2: ban wheel clamping on private land

- 55 As an alternative to the approach of regulating the fees that wheel clampers may charge, Cabinet could instead agree to implement a prohibition on wheel clamping where it occurs on private land.
- 56 This proposal would significantly reduce concerns about unfair conduct and unreasonable fees related to clamping. An outright ban would make it easier for motorists to identify and resolve inappropriate behaviour, which would have a significant deterrent effect. It would likely limit the incidence of disputes, which would reduce the need for enforcement.
- 57 The downside of a ban is that it would limit the recourse that property owners, such as small businesses, have to prevent parking breaches. Without clamping, many property owners would be forced to tow instead, which can be more costly and time-consuming and is not always suitable. This could place motorists in a worse-off position than if they were clamped, because they may be required to travel to fetch their vehicle and pay higher towing release fees.
- 58 However, if Cabinet prefers to implement a ban on wheel clamping, I propose some limitations to the ban. I suggest that the practice be prohibited on private land, except in certain situations, such as where the person clamping a vehicle:
- 58.1 is the driver or person in charge of the vehicle – e.g. the owner of a trailer may use a clamp to secure the trailer;

- 58.2 does so under the terms of a credit contract – the Credit Contracts and Consumer Finance Act 2003 regulates how creditors with a security interest use disabling devices, such as wheel clamps, in connection with a credit contract;
- 58.3 does so under the terms of a court order – e.g. to enforce court-ordered fines; or
- 58.4 is legally entitled to do so under an enactment – e.g. the Summary Proceedings Act 1957 sets out that bailiffs or constables with a warrant may clamp vehicles.
- 59 A ban on wheel clamping where it occurs on private land would not limit any abilities that local authorities may currently have to clamp vehicles, including any vehicles associated with freedom camping on land controlled by local authorities.
- 60 I would propose that a breach of a ban be an infringement offence enforced by the Police, with an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate, and a fine of up to \$3,000 for an individual and up to \$15,000 for a body corporate (if the person is charged with the offence in court).
- 61 In the event that a person clamps a vehicle in breach of the ban, the motorist should be entitled to remove the clamp without incurring criminal or civil liability, provided that they cause as little damage as is reasonable to the clamp. Motorists should also have the right to recover compensation through normal civil claims processes.

Additional policy decisions on the alternative proposal to ban wheel clamping

- 62 I am seeking authorisation to make additional policy decisions if Cabinet agrees to ban wheel clamping on private land. I will report to the Cabinet Legislation Committee on any additional decisions taken. This may include:
- 62.1 any additional detail that is needed around defences for an offence;
- 62.2 the relationship between criminal proceedings and the recovery of any amount paid; and
- 62.3 issues related to provisions for taking civil disputes, including through the Disputes Tribunal.

Consultation

- 63 The Treasury, Ministry of Justice, Ministry of Transport, the New Zealand Transport Agency, Department of Internal Affairs, and New Zealand Police have been consulted on this paper.
- 64 The Department of Prime Minister and Cabinet has been informed.
- 65 The Ministry of Justice's view is that excessive charges for the removal of wheel clamps 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.
- 66 Police supports the Ministry of Justice's position that wheel clamping remain a civil matter and that no offence be established. If either offence is created, Police does not agree that it be the enforcement agency for that offence. This would detract staff away from more significant priorities contributing to the goal of making New Zealand the safest country.

- 67 The Department of Prime Minister and Cabinet supports the view that overcharging should be a civil rather than a criminal matter.
- 68 The Ministry of Transport's preferred option is the introduction of a maximum fee, through the Summary Offences Act 1981 rather than the Land Transport Act, and enforced by Police. A maximum fee would effectively respond to the problem of rogue operators and minimize any risks of unintended consequences associated with banning wheel clamping outright. The Ministry of Transport agrees that it is inappropriate to make local authorities responsible for enforcement.
- 69 The New Zealand Transport Agency agrees with the Ministry of Transport.

Financial implications

- 70 Any costs will be met within existing baselines.

Human rights

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

Legislative implications

- 72 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.
- 73 I will consult the Ministry of Transport on any drafting instructions to amend the Land Transport Act.
- 74 I am proposing a legislative priority [REDACTED] in the 2018 Legislation Programme.
- 75 It is intended that the Bill will be binding on the Crown.

Regulatory impact analysis

- 76 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

- 77 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

- 78 I propose to issue a press release once Cabinet has made a decision.
- 79 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:

- 1 **note** that on 13 June 2018, the Cabinet Economic Development Committee deferred consideration of the paper entitled *Proposal to regulate fees charged by wheel clamp operators*, and invited the Minister of Commerce and Consumer Affairs to provide further advice on the wider regulatory framework relating to parking enforcement on private land [DEV-18-MIN-0111];
- 2 **note** that the Minister of Commerce and Consumer Affairs has looked at evidence of problems with the wider regulatory framework for private parking enforcement and concluded that while there is some evidence of potential issues in other areas, problems related to wheel clamping appear to cause the most harm;
- 3 **note** that the Minister of Commerce and Consumer Affairs does not recommend initiating an in-depth review of private parking enforcement and recommends that wheel clamping be addressed in the first instance;

Policy proposal

EITHER

- 4 **agree** that a person may not charge more than the maximum amount for a parking breach on private land that requires the removal of a wheel clamp (including the charge for the application and removal of the wheel clamp itself);
- 5 **agree** that the maximum amount be set at \$50 inclusive of GST;
- 6 **agree** that a breach of the requirement in recommendation 4 be an infringement offence with:
 - 6.1 an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate;
 - 6.2 a fine of up to \$3,000 for an individual and up to \$15,000 for a body corporate (if the person is charged with the offence in court);
- 7 **agree** that, if a wheel clamp operator has breached the maximum fee, motorists have the right to recover payments made in excess of the maximum fee through normal civil claims processes, including the Disputes Tribunal;
- 8 **agree** to create a power for the responsible Minister to recommend regulations to amend the amount of the maximum fee;

OR

- 9 **agree** that wheel clamping of motor vehicles be prohibited on private land, except in certain situations, such as where the person clamping a motor vehicle:
- 9.1 is the driver or person in charge of the motor vehicle;
 - 9.2 does so under the terms of a credit contract;
 - 9.3 does so under the terms of a court order; or
 - 9.4 is legally entitled to clamp under an enactment;
- 10 **agree** that a breach of the requirement in recommendation 9 be an infringement offence with:
- 10.1 an infringement fee of \$1,000 for an individual and \$5,000 for a body corporate;
 - 10.2 a fine of up to \$3,000 for an individual and up to \$15,000 for a body corporate (if the person is charged with the offence in court);
- 11 **agree** that, if a wheel clamp is applied in breach of the requirement in recommendation 9, motorists have the right to recover compensation through normal civil claims processes, including the Disputes Tribunal;
- 12 **agree** that, if a wheel clamp is applied in breach of the requirement in recommendation 9, the motorist should be entitled to remove the clamp without incurring criminal or civil liability, provided that they cause as little damage as is reasonable;

Legislative implications

- 13 **agree** to give effect to these proposals with an amendment to the Land Transport Act 1998;
- 14 **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions, consistent with Cabinet's agreement to either recommendations 4 to 8 or 9 to 12 of this paper, with those decisions to be reported to the Cabinet Legislation Committee;
- 15 **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;
- 16 **agree** that the Ministry of Transport will be consulted on the drafting instructions;

Communication

- 17 **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