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WHEEL CLAMPING IN QUEENSLAND

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ABSTRACT

The practice of immobilising motor vehicles by the application of a wheel clamp has been used by the occupiers of private and commercial property as a parking management tool. The bulletin overviews the practice in Queensland and in other parts of Australia. The recommendations of the Inquiry into the Practice of Immobilising and Removing Trespassing Vehicles on Private Property*, by the Victorian Parliamentary Community Development Committee, are outlined together with the legislative response of the Victorian Parliament. There is a discussion of* distress damage feasant *and* contract *as legal bases for wheel clamping in Queensland. Consideration is given to civil actions that could be instituted by the motorist against a wheel clamper as well as actions that could be brought against a motorist who forcibly removes a wheel clamp from his vehicle. Finally there is a discussion of some offences that may be committed in the course of a wheel clamping dispute.*

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1. INTRODUCTION

The problem of cars parked illegally on private or commercial property has left landowners and occupiers seeking effective deterrents for such practices. The local government has power to regulate parking in certain circumstances. The *Traffic Act 1949* (Qld) gives a local government power to regulate parking in its area.[1] The Traffic Act specifically authorises local government to regulate parking on a road.[2] Local government also has power to regulate parking on an *"off street regulated parking area"*.[3] Land that may be defined as an *"off street regulated parking area*" includes land over which a local government may exercise control for the purpose of Part 6A of the Traffic Act *"…under an arrangement with a person who owns or has an interest in the land"*[4]. However, the regulation of parking in Queensland on private and commercial property has generally been left to the owners or occupiers of that property.

As one solution to the problem of unauthorised parking on private property, landowners and occupiers have engaged the services of wheel clamping operators. The practice of wheel clamping involves immobilising the offending vehicle until a fee is paid by the motorist for the release of the vehicle. The practice has generated much public interest as it has the potential to cause heated disputes between motorists and wheel clamping operators. In one reported incident, a motorist alleged she was left stranded late at night, after a clamp had been applied to her vehicle.[5] In another incident, a motorist was alleged to have procured another person to damage a wheel clamp applied to his vehicle.[6]

The Queensland State Government has expressed a desire to resolve the issue of wheel clamping. In a Ministerial Statement, the Attorney-General and Minister for Justice recognised that wheel clamping is "*…an issue which has caused a lot of confusion and anger in the community, and which needs the immediate attention we are giving it.*"[7]

1 *Traffic Act 1949* (Qld), Part 6A.

2 *Traffic Act 1949* (Qld), s 44A(1)(a).

3 *Traffic Act 1949* (Qld), s 44A(1)(c).

4 *Traffic Act 1949* (Qld), ss 44BA(5) and (5A).

5 Peter Hansen & Mick Toal, 'Clampers tested in court', *Sunday Mail,* 24 September 1995, p 45.

6 See *R v Dorfler*, Magistrates' Court, Southport, 22 June 1994, per Mr Owens SM, unreported; discussed in SN Gould, Sergeant of Police, *Wheel Clamping*, Legal Services Branch, Queensland Police Service, October 1994, pp 16-17.

7 Hon Denver Beanland MLA, Attorney General and Minister for Justice, 'Wheel Clamping', 7 March 1996, *Ministerial Media Statements 26 February 1996 to 8 March 1996*, p 13.

More recently, in response to concerns about the control of unauthorised parking on private property, the Queensland Minister for Transport, Hon Vaughan Johnson MLA, said that:

> *Cabinet approved the preparation of legislation not only to ban the practice of wheel clamping but also to implement a formally regulated framework for the management of parking on private property, such as shopping centre car parks, private business properties, unit complexes and the like.*
>
> *The responsibility for the proposed private property parking management arrangements is likely to rest primarily with local governments, some of which have already entered into parking management arrangements with a number of regional shopping complexes. I expect that the new arrangements will involve private property owners and managers entering into agreement with their respective local governments to enforce any misuse of parking facilities on their property. Local governments will be empowered to issue parking tickets to vehicles which are parked without proper authorisation on those properties, similar to the present regulated parking provisions for street parking. Local governments will also have the flexibility of using their own parking enforcement personnel or engaging specialist parking service providers to undertake private property parking surveillance. This option would be particularly attractive to local governments for night-time and non-business hours surveillance. However, specialist parking service providers will need to be properly authorised as security providers, therefore ensuring the public of the highest ethical standards of operational integrity.*[8]

2. BACKGROUND

Wheel clamping has been established in England since the mid 1980s. In Australia the practice was introduced in Victoria in the 1990s and subsequently spread to other states.[9] The practice of wheel clamping first arose in Queensland in 1992.[10] Operators that have used wheel clamping in the course of providing car parking services in Queensland include VIP Car Park Management Services, Lend Lease Property Management (Lend Lease), and Private Parking Services Pty Ltd. Private Parking Services Pty Ltd has now ceased its Queensland operation. Lend Lease currently uses wheel clamping as a management tool at one shopping centre location on the Sunshine Coast (Sunshine Plaza). The Royal Automobile Club of Queensland (the RACQ) has developed a draft Code of Practice for Car Clamping

[8] Queensland. Parliament. Estimates Committee C: Transport and Main Roads, 11 June 1997, p 177.

[9] Victoria. Parliament. Community Development Committee, *Report upon the Review of the Practice of Immobilising and Removing Trespassing Vehicles on Private Property*, Victorian Government Printer, Melbourne, March 1996, p 2.

[10] Victoria. Community Development Committee, p 27.

Operators which is included in **Appendix A**. This code has not been formally adopted. An outline of the practice of wheel clamping as carried out by VIP is set out in **Appendix B** to this *Bulletin*.

Wheel clamping raises the question of the rights of motorists to park on private property and the rights of landowners to regulate the parking of vehicles on their land.[11] Wheel clamping has generated disputes involving both criminal and civil proceedings. The issue has given rise to actions brought by the landowner or occupier of land and by the motorist. In Queensland, although there have been a number of unreported Magistrates Court decisions and a recent District Court decision dealing with different aspects of the issue, uncertainty continues to surround the legality of the practice.[12]

3. WHEEL CLAMPING IN OTHER STATES

Wheel clamping activities have principally been confined to three Australian States - Queensland, New South Wales and Victoria. The New South Wales Parliament has recently commissioned an inquiry into wheel clamping. The Hon Mr J W Shaw made the following comments in reference to that inquiry on 9 April 1997:

> *The inquiry will be focused on, but not confined to, the question of whether the current law adequately protects the rights of all parties. I will ask Mr Riordan to consider whether the trespass law is sufficient to protect the interests of people whose cars have been wheel clamped. The inquiry will also explore the current safeguards for all parties and investigate whether specific legislation or codes of practice are necessary. Mr Riordan is a former Deputy President of the Australian Industrial Relations Commission and has a wealth of experience in mediating complex issues. I will ask him to work towards striking a balance between the legitimate property rights of landowners and the interests of motor vehicle owners. I anticipate that the inquiry will canvass public views. I urge all interested parties with constructive contributions to make to offer their input during this process.*[13]

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[11] Gould, p 2.

[12] For example: *R v Corias*, District Court, Southport, 12 February 1997, per Hall J; *King V Cormead Pty Ltd (CAN 010752 626),* Magistrates Court, Brisbane, Plaint No 3105 of 1996, per Mr Gribbin SM, unreported; *Cormead Pty Ltd (ACN 010 752 626) trading as VIP Car Park Management Services v Bird & Bird*, Magistrates Court, Southport, Plaint No 00428/93, per Mr Weber SM, unreported; discussed in Michael Hocken & Jason Edwards, 'Legal Ramifications of Wheel Clamping', *Proctor,* Vol 2, March 1996, pp 16-18, p 17.

[13] Hon J W Shaw, *New South Wales Parliamentary Debates*, Questions Without Notice, 9 April 1997, p 7272.

The NSW Attorney General's Office is currently finalising this report. Victoria is the other Australian State where the practice of wheel clamping was regularly used by owners of commercial and private property as a means to regulate unauthorised parking of vehicles on private property. In Victoria the practice has now been outlawed. In South Australia, the *Private Parking Areas Act 1986* (SA) makes provision for the regulation of parking in certain "*private parking areas*".[14] Owners of private property can enter into agreements with the relevant local council for the council to enforce parking conditions in these areas.[15] Advice from the Office of Local Government in South Australia is that, although there are currently no known wheel clamping operations in South Australia, regulation 14 made under the *Private Parking Areas Act 1986* (SA), outlawing the practice of immobilising vehicles in "*private parking areas*" will come into operation in December 1997. Advice received indicates that the practice of wheel clamping is not an identifiable problem in other Australian States and Territories.

3.1 WHEEL CLAMPING IN VICTORIA

A Victorian State Parliamentary Committee, the Victorian Community Development Committee, conducted an *Inquiry into the Practice of Immobilising and Removing Vehicles Trespassing on Private and Commercial Property* in 1996. The Inquiry was a Government response to growing community concern in Victoria regarding what are described in the report as "*… unfettered practices of business operators responsible for immobilising and removing trespassing vehicles on private and commercial property …*".[16]

The resulting 12 recommendations from that inquiry are in **Appendix C** of this *Bulletin*. The Community Development Committee ultimately accepted the notion of abolishing wheel clamping as the best way of dealing with the issue.[17] Before reaching this conclusion, the Community Development Committee considered a number of options for reform of the wheel clamping industry. These are outlined below.

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[14] *Private Parking Areas Act 1986* (SA), s 4 and Part III.

[15] *Private Parking Areas Act 1986* (SA), s 9.

[16] Victoria. Community Development Committee, p 1.

[17] Victoria. Community Development Committee, pp 189 & 197.

3.1.1 Options For Reform

The Community Development Committee identified and reviewed five options for reform of the wheel clamping industry in Victoria.[18] These options were:

1. Self regulation.
2. Establishment of an industry code of practice.
3. Statutory regulation.
4. Establishment of a licensing authority.
5. Abolition of wheel clamping.

Self Regulation

Self regulation was rejected as an option because it was concluded that the wheel clamping industry in Victoria lacked the willingness and organisation to effectively regulate itself. The reasons given by the Community Development Committee for this conclusion were that:

- previous attempts at self regulation had been unsuccessful.
- there were a number of short term wheel clamping operators without long term commitment to the industry.
- a number of wheel clamping operators in Victoria used wheel clamping as a profit generating operation rather than as a means of protecting private property.
- the Committee considered that self regulation would perpetuate reliance on distress damage feasant (a common law remedy for trespass discussed at **paragraphs 4.1.1 & 4.1.2** below) as a basis for wheel clamping.[19]

Code of Practice

Development of a code of practice was not considered an appropriate form of regulation for the Victorian wheel clamping industry because of:

- the absence of consensus on "*standards of best practice*" amongst wheel clamping operators.
- the failure of the wheel clampers to formulate their own code in response to the public outcry over their operations.
- the difficulty of enforcing a code of practice.[20]

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[18] Victoria. Community Development Committee, Chapter 6.

[19] Victoria. Community Development Committee, pp 189-191.

[20] Victoria. Community Development Committee, pp 191-192.

Statutory Regulation

Statutory Regulation was considered inappropriate for the following reasons:

- uncertainty as to whether financial penalties would be sufficient discouragement for wheel clamping operators.
- the possibility that there would be insufficient police resources for the effective enforcement of the statutory scheme.
- the prospect of continuing confrontations between the clamping operators and the motorist.
- wheel clamping would be more appropriately regulated by local government.[21]

Licensing Authority

The establishment of a system of State Government approved wheel clamping operators, controlled by a licensing authority, was rejected as a means of regulating the industry because the Community Development Committee concluded:

- the practice of wheel clamping operators in Victoria suggested that the operators would *"struggle"* to conform to standards set by a licensing authority.
- there was a limited market for wheel clampers.
- a licensing authority could lead to an increase in the number of wheel clampers in Victoria.
- a licensing system, without strict conditions, could encourage the participation of small operators with inadequate resources and business standards.
- there was the possibility that a licensing authority may be manipulated by clamping operators in response to financial constraints.
- there was doubt as to the knowledge of wheel clamping operators about parking-related issues, retail and business realities, body corporate issues and the difficulties that can arise in medium to high density residential living.
- the nature and structure of wheel clamping companies evidenced that much of the wheel clamping sector comprises companies *"… without assets, insurance or acceptable business infrastructure"*.[22]

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[21] Victoria. Community Development Committee, pp 192-193.

[22] Victoria. Community Development Committee, pp 194-196.

3.1.2 Road Safety (Wheel Clamping) Act 1996 (Vic)

Subsequent to the release of the Community Development Committee's report, the Victorian Government enacted the *Road Safety (Wheel Clamping) Act 1996* (Vic). The *Road Safety (Wheel Clamping) Act 1996* (Vic) amended the *Road Safety Act 1986* (Vic) by inserting a new Part 7A.[23] The new Part 7A deals principally with the regulation and control of parking on land other than a *public highway*[24], *road*[25] or *public parking area*.[26] The legislative approach in Victoria has been to make:

- The immobilisation of a vehicle (which includes wheel clamping), done without the consent of the owner, unlawful, except in defined circumstances.
- Provision for establishment of *council controlled areas* where local municipal councils provide parking services to private and commercial landowners.

The Detention or Immobilisation of Vehicles made Unlawful

The new s 90C of the *Road Safety Act 1986* (Vic) outlaws the practice of wheel clamping of vehicles of vehicles that are *"… parked or left standing …"* on land not being a road, a public highway or public parking area. The new s 90C(1) makes it unlawful for a person other than

> *(a) a member of the police force; or*
>
> *(b) the sheriff or any other person authorised by law to execute a warrant against the motor vehicle; or*
>
> *(c) a person authorised to do so by or on behalf of the owner or driver of the motor vehicle¾*

to detain or immobilise a parked vehicle.

Any agreement authorising a person to clamp or remove a vehicle from private land is made void to the extent that it authorises something which is otherwise prohibited by the new section 90C of the *Road Safety Act 1986* (Vic).[27] Agreements for the supply of wheel clamping services became void from the date of commencement of the new s 90C.

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[23] *Road Safety (Wheel Clamping Act) 1996* (Vic), s 4.

[24] *Road Safety Act 1986* (Vic) (as amended), s 90C(2)(a).

[25] *Road Safety Act 1986* (Vic) (as amended), s 90C(2)(b).

[26] *Road Safety Act 1986* (Vic) (as amended), s 90C(2)(c).

[27] *Road Safety Act 1986* (Vic) (as amended), s 90H.

Provision of Parking Services in Council Controlled Areas

In strictly defined circumstances, local municipal councils are authorised to provide services for regulating parking on private land. A new section 90D makes provision for agreements to be entered into between property owners or occupiers and the relevant municipal council, for the council to provide parking services. Areas in respect of which there is such an agreement are called **council controlled areas**.[28] Agreements pursuant to s 90D must provide for certain matters as set out in s 90D(2) including:

- installation and maintenance of signs on the property.
- restrictions on access to the property.
- moneys (if any) to be paid by the property owner or occupier to the council for the provision of the parking services.

A new section 90E makes it an offence for a person to park a vehicle contrary to signposted parking regulations on council controlled property. A new section 90F provides for the removal of vehicles from a council controlled area if such vehicles infringe a parking regulation.[29] The removal of an infringing vehicle can only be undertaken by a member of the police force after certain preconditions as set out in s 90F(2) have been satisfied.[30] There are provisions regulating the manner in which a member of the police force may deal with offending vehicles including regulation of the amount of release fee that may be charged to the motorist in the event that a vehicle is detained.[31]

Agreements that have been entered into between municipal councils and property owners since these provisions have come into force, have generally provided for the council parking services on a "*call out*" basis rather than on the basis of regular patrols by the council.[32] The "*call out*" arrangement involves the council responding to a request from the property owner to attend at the property after the property owner has identified a breach of a parking restriction on the property.[33]

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[28] *Road Safety Act 1986* (Vic) (as amended), s 90A.

[29] *Road Safety Act 1986* (Vic) (as amended), s 90 F.

[30] *Road Safety Act 1986* (Vic) (as amended), s 90C.

[31] *Road Safety Act 1986* (Vic) (as amended), s 90F(2)-(6).

[32] Information supplied in telephone interview with Mr J O'Donahue, Municipal Association of Victoria, 23 June 1997.

[33] A draft form of agreement, prepared by the Municipal Association of Victoria and issued as a guide for municipal councils entering into s 90D arrangements, together with a circular from the Municipal Association of Victoria on acceptable parking signs for council controlled areas, is held in the Queensland Parliamentary Library.

To remove any doubt that the wheel clamper can no longer rely on the common law to provide a legal basis for wheel clamping activities, the new s 90B abolished the remedy *distress damage feasant* to the extent that it applies to trespass on land by motor vehicles (see **paragraph 4.1.2** below).[34]

4. LEGAL BASIS FOR WHEEL CLAMPING IN QUEENSLAND

Wheel clamping involves an interference with another person's vehicle. There is currently no legislation in Queensland specifically dealing with the practice of wheel clamping. Although there is no legislation specifically outlawing the practice in Queensland, in the absence of a legal basis for the immobilisation of a vehicle, a person applying a wheel clamp to another's vehicle is likely to face criminal charges or a civil action for interference to the property of another (see **paragraphs 5 and 7** below). The principal legal bases for wheel clamping that have been relied upon by wheel clamping operators are:

1. As a remedy for trespass called *distress damage feasant*.
2. As a right arising from a contract.[35]

4.1 WHEEL CLAMPING AS A REMEDY AGAINST TRESPASSES

The rights of landowners and occupiers to regulate the parking of vehicles on their land by detaining trespassing vehicles are central to the issue of wheel clamping. Some operators have asserted their right to clamp as a remedy against trespassing motor vehicles.[36]

A trespasser is a person who enters upon a property with no authority. If a motorist parks on property without authority then the motorist is trespassing on the land. The proper person to take action against a motorist for unlawful parking on property is the person in possession of the land. The person in possession of the land is the person who is in control of the land at any given time. This will not always be the owner of the land. For example, if the land is leased, then it will be the person who holds the lease. For the purpose of this discussion, the person who is in possession of the land will be referred to as the occupier.

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[34] *Road Safety Act 1986* (Vic) (as amended), s 90B.

[35] For a discussion of these and other possible legal bases for the application of a wheel clamp, see Victoria. Community Development Committee, pp 98-128.

[36] See generally C E M Chatterton, 'Wheel Clamping and the Trespassing Motorist - Again? (Volenti or Distress Damage Feasant)', *Justice of the Peace and Local Government Law*, Vol 17 April 27 1996, pp 279-281; P Sparkes, 'Car Clamping - A New Life For Distress Damage Feasant?', *The Conveyancer*, March-April 1986, pp 107-121.

Trespass to land can be committed by doing any of the following acts without authority or justification:

- entering onto another's land.
- remaining on another's land.
- placing or projecting any object upon another's land.[37]

An occupier is able to bring an action in trespass against a motorist who brings a vehicle onto the occupier's land without authority, irrespective of whether or not the trespasser has caused harm to the land.[38] The occupier has several remedies available at common law against motorists who trespass on his or her land. The occupier could bring an action for damages. This remedy puts the occupier to the inconvenience and expense of an action in the courts. Another remedy, sometimes available to the occupier of a property against a trespasser, is called *distress damage feasant*. What is attractive to the occupier about *distress damage feasant* is that it is a self-help remedy. A **self-help remedy** is action that can be taken by a person whose legal rights have been infringed, to correct the infringement, without application to the courts. Some occupiers and wheel clampers (as agents for those occupiers) have claimed their right to clamp vehicles is based on the remedy of *distress damage feasant.*

4.1.1 Distress Damage Feasant

Distress damage feasant is a remedy that *"… allows a chattel, which is unlawfully on the land of another, to be seized there and detained until the occupier has been compensated for the wrong"*.[39]

A **distress** is a seizure of chattels (which could include the seizure of a motor vehicle). **Damage feasant** is derived from a French term which means *"causing loss"*.[40] It is an old remedy that has its origins in usage by landowners who were authorised to impound stock trespassing on their land until compensation had been paid by the owners of the animal for any damage caused to the land. From its original use, it has been extended to apply to objects brought onto land including motor vehicles.[41] The remedy acts as a form of security for payment for compensation for damage suffered by the occupier. It allows the occupier (or his or her agent) to retain a chattel until the damage caused has been paid for.

[37] R F V Heuston & R S Chambers, *Salmon & Heuston on the Law of Torts* (18th ed), Sweet & Maxwell, London, 1981, p 36.

[38] *Halsbury's Laws of England*, vol 45, 4th ed, 1985, para 1384.

[39] R P Balkin & J L R Davis, *Law of Torts*, (2nd ed), Butterworths, Sydney, 1996, p 161.

[40] *Arthur & another v Anker & another*, [1996] 3 All ER 783, per Neill LJ at 793.

[41] Hocken & Edwards, p 16.

The objects of the remedy are:

- to prevent further damage being caused by the chattel.
- to obtain speedy compensation for damage already done.[42]

4.1.2 Limitations on the Exercise of the Distress Damage Feasant

The remedy can only be exercised by the occupier or the occupier's agent.

The remedy can only be exercised by the occupier of the land.[43] A wheel clamping operator could only rely on the remedy of *distress damage feasant* as a basis for clamping a vehicle if he or she is acting as agent for the occupier.[44] The appointment of such an agent could be by contract between the occupier of the land and the wheel clamper. Whether a true agency agreement exists between the occupier of the land and the wheel clamper will be determined on a case by case basis.

The vehicle must not be in use

The seizure of chattels pending payment of money due is called a **distraint**. A limitation on the remedy of *distress damage feasant* is that the chattel cannot be distrained if it is in use.[45] This restriction on the exercise of the remedy is to prevent a breach of the peace which would be likely to occur if the landowner or occupier attempts to distrain the vehicle in the presence of the motorist.[46] If at the time of the clamping (ie the distraint) the owner of the vehicle is in possession or has control of the vehicle, it is likely that the remedy would not be available to the wheel clamper.[47] It is uncertain what would constitute control of a vehicle in this context. It seems that the remedy of *distress damage feasant* could not be exercised if the vehicle was in use, for instance, if the driver was sitting in the vehicle with the motor running.

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42 Balkin & Davies, p 161.

43 R Merkel, QC, 'Advice on Wheel Clamping and Removal of Vehicles from Private Carparking Areas', 8 December 1992, p 11, citing the decisions of *Burt v Moore* (1793) 5 TR 329 and *Churchill v Evans* (1809) 1 Taunt 529, in Victoria. Community Development Committee, p 121.

44 There has been an argument advanced in support of a wheel clamper's attempt to assert a remedy for distress damage feasant that the right of distress could be assigned to the clamper by the occupier. However, there is doubt as to whether the right could be assigned. See Victoria. Community Development Committee, p 123 citing J Bickley, 'Trespassing and Vagrant Vehicles', 1983 *NZLJ* 154 at p 157.

45 Balkin & Davis, p 162; see also *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 at 150, per Quilliam J.

46 *Swenson v Drayton Shire Council* [1932] St R Qd 98 at 112, cited in Balkin and Davis, p 162.

47 *Jamieson's Tow & Salvage Ltd* v *Murray* [1984] 2 NZLR 144 at 150, per Quilliam J.

However, it is uncertain if the mere presence of the owner would be enough to establish control of the vehicle. At least one commentator considers that mere presence of the owner of the vehicle would not be sufficient to establish control.[48]

Damage must have occurred

In order to rely on the remedy of *distress damage feasant* the damage must have occurred as a consequence of the trespass and the damage must have been suffered by the occupier. The damage caused by a trespassing motorist could take a number of forms. Examples could include physical damage to the property or inconvenience caused to the occupier as a result of a motorist parking in a loading zone or across an access way.[49] However, issues relating to what constitutes damage in the context of distress damage feasant are unresolved in Australian law. Of relevance to the wheel clamping issue are:

- whether the mere presence of the motor vehicle on the property (a technical trespass) is enough to constitute damage.
- whether the costs associated with fitting and removing the clamp constitutes damage.

Technical trespass

In some circumstances a technical trespass may be committed without any damage, physical or otherwise, resulting from the trespass. Most authorities support the conclusion that the mere presence of the vehicle on the property will not constitute damage.[50] In *Salmond & Heuston on the Law of Torts* the view is expressed that:

> *There must be actual damage done by the thing distrained; for it is rightly taken and detained only as a security for the payment of compensation, and when there is no damage done there can be no compensation due.*[51]

It follows that in circumstances where there is a mere technical trespass, it is unlikely that the wheel clamper would be able to successfully rely on *distress damage feasant* as the legal basis for the clamping activities.

Clamping costs as damage

It is uncertain whether the costs of the clamping process itself would constitute actual damage. On this point there is inconsistency between the approach of the

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48 Sparkes, p 110.

49 Sparkes, pp 111-113.

50 Victoria. Community Development Committee, p 113.

51 Heuston & Chambers, p 574. Note the comments of Hirst LJ, in *Arthur and another v Anker and another,* at p 797, who considered that it should not be necessary to prove actual damage to exercise the remedy of distress damage feasant.

New Zealand and Canadian courts.[52] The Canadian authorities deny the availability of the distress damage feasant remedy in these circumstances.[53] However, Quilliam J, in the New Zealand decision of *Jamieson's Tow and Salvage Ltd* v *Murray,* stated:

> *If the remedy of distress damage feasant is to be applied to modern conditions then it seems to me inevitable that the cost of removing an illegally parked vehicle would need to be regarded as actual damage. For myself I should be most hesitant to extend the remedy any further than is absolutely necessary but in this I think one is left with no sensible option.*[54]

Some commentators have indicated that Australian courts would be more likely to follow the New Zealand position rather than that of the Canadian authorities.[55] However, in the English Court of Appeal, Sir Thomas Bingham MR in the relatively recent decision of *Arthur & another v Anker & another,* shed doubt on the view expressed in *Jamieson's Tow and Salvage Ltd v Murray,* stating that wheel clamping:

> *… amount*[ed] *in effect to a self -inflicted wound. … effected as a deterrent, not to stop an existing trespass or prevent future damage by the trespassing chattel on the occasion when it* [was] *clamped.*[56]
>
> and further concluded that:
>
> *If there is no actual damage otherwise entitling the landowner to distrain, he …*[the landowner] *cannot become entitled to distrain simply because the distress itself will have a cost.*[57]

In other words, Sir Thomas Bingham considered that the cost of the wheel clamping could not be treated as damage for the purposes of relying on *distress damage feasant.* Whilst this issue appears unresolved in Australian courts, the Victorian Community Development Committee preferred the view of Sir Thomas Bingham MR.[58] The Committee cited the following passage from an article by Bickley to illustrate its position, saying it:

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52 *R v Nash* [1991] 28 MVR (2d) 131; *R v Howsen* [1966] 3 CCC 348; contrast *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144.

53 *Foreham & Read Estates v Hallet & Vancouver Auto Towing Service*, [1959] 19 DLR (2d) 756, discussed in Sparkes, p 112.

54 *Jamieson's Tow & Salvage Ltd v Murray* [1984] 2 NZLR 144 at 149.

55 Gould, p 11.

56 *Arthur & another v Anker & another,* pp 789-790.

57 *Arthur & another v Anker & another,* p 791. However see also pp 798-800, where the dissenting view expressed by Hirst LJ was that, if it were necessary to establish that actual damage had occurred, the costs associated with the clamping could constitute such damage.

58 Victoria. Community Development Committee, p 119.

> *… appears to be illogical that the cost of exercising the remedy should be taken as the damage which justifies it. The essence of distress is seizure of a chattel as security for damage which* has been or is being done. *The timing is important. It should not be possible for an occupier to point to the cost of seizing the chattel and say, 'look, there is the cost to me, and that is my damage justifying the seizure'.*[59]

The amount of the clamping fee

The person who clamps a vehicle, relying on distress damage feasant as the legal basis for the clamping, must not demand a sum that he or she does not honestly believe to be reasonable compensation for the damage.[60] Consequently the fee charged to release the clamp should be relative to the amount of damage, whether it be physical damage, economic loss, inconvenience to the occupier or otherwise. Sir Thomas Bingham MR of the English Court of Appeal considered that:

> *… a flat charge for release … imposed irrespective of the period of the trespass, and the time of day … at which it occurs, and paid, not to the leaseholder who has suffered the damage, but to augment the profit of an agent who has suffered no damage, has no compensatory element at all.*[61]

The contrary view, expressed by Hirst LJ, was that a fixed charge could be compensatory if it was a commercial figure covering the clamping firm's expenses and an appropriate profit element.[62] There is also an argument that the seizure of a valuable motor vehicle for a relatively small amount of compensation would not be proportionate.[63] This issue is unresolved in the Australian courts.

Conclusion

Whether an operator could successfully rely on *distress damage feasant* as the legal basis for wheel clamping activities would depend on the circumstances of each case. Difficulties faced by the wheel clamper in relying on distress damage feasant as a legal basis for his or her activities include:

- The need for the wheel clamper to establish that he or she is acting as agent for the occupier.

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[59] J Bickley, 'Trespassing Vehicles - a Postscript', [1984] *NZLJ* 81 at p 83, cited in Victoria. Community Development Committee, at 117.

[60] Victoria. Community Development Committee, p 117-118, citing Glanville Williams, *Liability for Animals,* Cambridge University Press, Cambridge, 1939, p 117-118.

[61] *Arthur & another v Anker & another,* at p 791, per Sir Thomas Bingham MR.

[62] *Arthur & another v Anker & another*, p 800, per Hirst LJ.

[63] Victoria. Community Development Committee, p 123.

- The mere presence of a trespassing vehicle on property (a technical trespass) may not be a sufficient ground for relying on the remedy.
- The application of a wheel clamp to a vehicle, without removal of the vehicle from the property, may perpetuate any damage that is being caused by the presence of the vehicle.[64]

4.2 CONTRACT

Where the motorist accepts an invitation to park on private property and then parks in contravention of stated parking conditions, an occupier could rely on a contract with the motorist to justify the application of a wheel clamp. Queensland operator, VIP, relies on contract as the basis for its wheel clamping activities.[65]

If an occupier wishes to rely on a contract between himself and the owner of a vehicle to authorise the wheel clamping, the occupier will have to establish the essential conditions for a contract. These essential conditions are that:

- there is an agreement between the motorist and the occupier (or clamping operator as agent of the occupier).
- consideration has passed.[66]

Additionally, there must be an intention on the part of both the motorist and the occupier to enter into legal relations.[67]

This discussion will initially deal with the situation where the motorist is the owner of the vehicle.

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64 Victoria. Community Development Committee, p 106. The Victorian Community Development Committee concluded that a wheel clamper who did not remove the vehicle from the property where it was unlawfully parked would be less likely to succeed in relying on this remedy than one who removed the vehicle from the property. This is because the remedy is for damage already committed, however clamping and leaving the motor vehicle on the property perpetuates the trespass.

65 Telephone interview with Richard Moon, spokesman for VIP, 16 June 1997. See also 'Coast lawyers at odds over wheel clamping', *Gold Coast Bulletin*, 30 October 1995, p 6.

66 J G Starke QC, N C Seddon & M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (6th ed), Butterworths, Sydney, 1992, p 47.

67 Starke, Seddon, & Ellinghaus, chapter 3.

4.2.1 The Agreement

In legal terms, an agreement is concluded after there has been the acceptance by one party of an offer made by the other.[68] In the case of an occupier and a motorist, it is unlikely that there will be a signed written contract executed by both parties containing conditions on which a motorist may park on a property. Nor would there usually be an oral agreement between the parties as to the terms of the parking. However a contract could be found to exist between the parties even though they have not entered into an oral or written agreement. The parties' conduct could evidence that there is a mutual understanding as to the existence of a contract.[69]

The Offer

An offer is a clear statement of terms by which a person making the offer is prepared to be bound.[70] An offer does not have to be made to a particular person and can be made to the world at large.[71] In the context of car parking on private property, such an offer could take the form of a conspicuously displayed sign at the entrance to the private property or the offer could be contained in a document provided to the owner of the vehicle or his or her agent prior to the vehicle entering upon the property. The invitation to enter onto the property is open for acceptance by any motorist conditional upon the motorist complying with the displayed conditions of parking. The occupier (or wheel clamping company as agent for the occupier) as the offeror, must do all that is reasonably sufficient to bring the conditions to the attention of the motorist.[72] What is reasonably sufficient is a question of fact to be decided on a case by case basis.

An offer could be made on a sign or perhaps on a printed ticket provided to the motorist prior to the motorist entering upon the property for parking. A court has found that, at automatic carparking stations, an offer is made by the presence of the ticket dispensing machine.[73] An example of a case where a contract was found to have been in existence between the motorist and the wheel clamper was in *Cormead*

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68 Starke, Seddon, & Ellinghaus, pp 47-88.

69 See generally Starke, Seddon & Ellinghaus, pp 46-112.

70 Starke, Seddon & Ellinghaus, p 53.

71 *Carlill* v *Carbolic Smoke Ball Co* [1893] 1 QB 256 at 262 per Lindley LJ, at p 268 per Bowen LJ, and at p 274 per Smith LJ.

72 *Parker* v *South East Railways* [1877] 2 CPD 416 cited in Gould, pp 6-7.

73 *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169 per Lord Denning MR.

Proprietary Limited v *Bird and Bird.*[74] There signs were erected at the entrance to the carpark setting out the terms and conditions for the use of the parking facility and there were further signs at the individual parking bays.

Acceptance

Acceptance is communication to the offeror of unqualified assent to the terms of the offer.[75] Whether there has been acceptance of an offer can be determined objectively with reference to words or actions of the offeree. Acceptance of the offer could be made by unambiguous performance of the conditions stated in the offer.

In the context of wheel clamping, acceptance could be implied by the motorist driving the vehicle onto the property after the conditions for entry upon the property have been made known to the owner or the owner's agent. There is authority that entering onto a controlled parking area and accepting a ticket from an automatic dispenser constitutes an acceptance of an offer. The offer is made by the presence of the ticket dispenser. The contract is concluded once the customer activates the automatic ticket dispenser.[76]

However, for a court to find that a motorist had consented to a term in a contract that the motorist's vehicle be clamped for non-performance of certain conditions, the circumstances in which wheel clamping could occur would have to be made clear to the motorist. Notice of such conditions must be given to a motorist before the motorist accepts the offer to bring the vehicle onto the property. Where notice of the parking conditions and the risk of clamping are displayed only on a ticket that is given to the motorist upon the activation of a ticket machine, it is unlikely that those conditions would be found to have been incorporated into a contract between the motorist and the clamper.[77]

Agreement in the context of regulated parking was considered in the Magistrates Court decision, made at Southport, in *Cormead Proprietary Limited (trading as VIP Car Park Management Services)* v *Phyllis Bird and Alan Bird.* In considering an argument by the motorist, that he did not see the signs displayed at the parking bay setting out the terms and conditions of entry, the Magistrate said:

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[74] Southport Magistrates Court, Plaint No 428/93, per Mr Weber SM, unreported, see discussion in Gould, p 7.

[75] Starke, Seddon, & Ellinghaus, p 59.

[76] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169.

[77] *Thornton v Shoe Lane Parking Ltd,* p 169.

> *I am satisfied that the signs which were affixed to the car park did in fact constitute an offer … Acceptance of the offer of course must be complete, and such an acceptance may be implied by the conduct of the parties. I am satisfied that the signs displayed did amount to an offer and that by his conduct in parking his vehicle in bay 15, the defendant clearly accepted the offer without condition and that by accepting the offer, he agreed to all terms and conditions contained in the offer.*[78]

There is Canadian authority to support the position that the mere entering of a private parking lot where there was a clear sign outside to instruct the driver to purchase a ticket from a meter, is not evidence of the motorist having accepted an offer but rather evidence that the motorist had entered upon the property as a licensee for the purpose of contracting for car parking.[79]

The analysis of when a contract is concluded may be different in the case of a "pay and display" car park. In a "pay and display" carpark the motorist first parks, then goes to a machine to purchase a ticket that is displayed in a prominent position on the vehicle. In the Canadian decision of *Controlled Parking Systems v Sedgewick*[80] where a motorist left a parking area without paying the required parking fee, it was held that there was no concluded contract because it was held that the contract was accepted by the payment of the parking fee, not by merely parking the vehicle in the parking area. This decision has been criticised as ignoring the modern reality of parking practice.[81]

The clamping fee must not be a penalty

The parties to a contract may stipulate what sum may be payable by way of damages in the event of a breach. Any amount demanded of the motorist for unauthorised parking must be an estimate of the damage and not a penalty.[82] The sum would be a penalty if it were *"out of all proportion"* to the damage caused by the motor vehicle or if it were *"extravagant, exorbitant, or unconscionable"*.[83] In the context of wheel clamping, it is important whether the amount of money demanded by the wheel clamper for the release of the vehicle is related to the damage caused by the

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78 Magistrates Court, Southport, Plaint No 428/93, per Mr Webber SM, unreported, cited in Hocken & Edwards, p 17.

79 *Controlled Parking Systems Ltd v Sedgewick* [1980]4 WWR 425, cited in Hocken & Edwards, p 17.

80 *Controlled Parking Systems Ltd v Sedgewick* [1980]4 WWR 425, cited in Hocken & Edwards, p 17.

81 Sparkes, p 114.

82 Starke, Seddon, & Ellinghaus, p 809.

83 *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, at 190, cited in Starke, Seddon & Ellinghaus, p 809.

vehicle. A direct relationship between the damage suffered and the release fee charged by the clamper would be difficult to show where the release fee is a flat charge.

4.2.2 Consideration.

Consideration has been defined as "… *some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other"*.[84] In the case of a motorist entering onto a regulated car parking area, a benefit accrues to the motorist from being able to use the parking facilities.[85]

4.2.3 Intention to Create Legal Relations.

The intention to create legal relations can be implied in circumstances where the agreement is of a commercial nature.[86] An agreement between a motorist and an occupier or wheel clamping operator concerning the use of car parking facilities can rightly be classified as a commercial agreement. The onus of proving that there was no intention to create legal relations in the context of a commercial agreement lies on the person alleging such lack of intention.

4.2.4 Position of the Non-Owner Driver

If the driver of the vehicle is not the owner, and it could not be established that the driver entered into the parking agreement as agent for the owner of the vehicle, then the position of the wheel clamper is weaker. If such agency could not be established, the wheel clamper would not be able to rely on any contract with the driver of the vehicle to withhold the car from the owner pending payment of a clamping fee. In the absence of a right to clamp, the owner of the vehicle would be able to demand immediate release of the vehicle. A failure to release the car could give rise to an action by the owner which may include actions in trespass to goods, detinue or conversion (see **paragraph 5** below).[87]

The issue of whether a contract was in existence would depend on an examination of all the circumstances of the case which would be complicated in some circumstances where the driver may not have the capacity to contract, for example, if the driver is a minor.[88]

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84 *Currie* v *Misa* [1875] LR 10 Exch 153, per Lush J at 162.

85 See discussion in Gould, p 6.

86 Starke, Seddon & Ellinghaus, p 174.

87 Hocken & Edwards, p 17.

88 Hocken & Edwards, p 18.

5. CIVIL ACTIONS BY THE MOTORIST

If an occupier or wheel clamper does not have a lawful basis for the application of a wheel clamp, the owner of a motor vehicle may have several civil remedies open to him. Some of the civil actions that may be brought by a motorist against a wheel clamping operator are discussed below.

5.1 TRESPASS TO GOODS

Detaining a motor vehicle by use of a wheel clamp could constitute a trespass to the motor vehicle. A person who is successful in an action for trespass to a motor vehicle could be awarded damages that may include, for instance, a component for inconvenience in having the motor vehicle detained, for frustration and shock at having the vehicle immobilised and if the detention of the motor vehicle prevented the motorist from earning any income, for loss of income. In the recent decision of *King v Cormead,* a motorist was successful in maintaining a claim for damages for trespass to a motor vehicle after it was clamped at Toowong Village carpark.[89] The magistrate found that the motor vehicle had been parked in the carpark in accordance with the conditions of parking and consequently that the clamping was unlawful.

5.2 CONVERSION

Conversion is an intentional dealing with goods which is seriously inconsistent with the possession or right to immediate possession of another person.[90] The mere taking of goods that is not accompanied by an intention to exercise control over them is not conversion.[91] There is New Zealand authority that gives support to the proposition that a refusal by a wheel clamping operator to return or release a vehicle until a payment is made amounts to conversion.[92]

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89 Magistrates Court, Brisbane, Plaint No 3105/96, per Mr Gribbin SM, unreported.

90 Balkin & Davis, p 64.

91 *Fouldes v Willoughby* [1841] 8 M & W 540, cited in Victoria. Community Development Committee, p 131.

92 *Wellington v Singh* [1971] NZLR 1025 at 1029, cited in Victoria. Community Development Committee, p 131.

5.3 DETINUE

Detinue is an action to recover goods which are being wrongfully detained.[93] Unlike conversion where only damages can be awarded, detinue allows a person to claim the return of a vehicle. The remedy is available after a proper demand has been made for the return of the goods. The question to be satisfied in the context of wheel clamping is whether the immobilisation of a vehicle, by way of wheel clamps, would amount to a wrongful detention of the vehicle. If the wheel clamper or occupier could not establish a lawful basis for the detention of the vehicle, for example in contract or distress damage feasant, then it is likely that a motorist could succeed in this action.

5.4 THE DEFENCE OF VOLENTI NON FIT INJURIA

The defence of Volenti Non Fit Injuria (volenti) may be open to a wheel clamper in response to claim by a motorist. This defence is based on the premise that "*One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong*."[94]

A plea of volenti will succeed only if the person assuming a risk does so intentionally. In the context of wheel clamping, it could be argued that by driving onto the private property, where there are signs warning that trespassing vehicles may be immobilised, the motorist must be aware of the risk of the wheel clamping. There is uncertainty whether such consent could be withdrawn by the motorist once he returns to find his car clamped. The authorities are divided on this point.[95] There is also authority that, even if the motorist is aware of the risk of the wheel clamping, the clamper could not exact an unreasonable amount for the release of the vehicle.[96]

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93 Balkin & Davis, p 105. The tort of detinue was abolished in England by the *Torts (Interference with Goods) Act* 1977 (UK), s 2(1).

94 *Smith v Baker & Sons* [1891] AC 325 at 360 per Lord Herschell, cited in Victoria. Community Development Committee, p 139.

95 *Lloyd v DPP* [1992] 1 All ER 982 where it was held that the defendant had consented to the risk of having the wheel clamped and thus consent could not be withdrawn once the possibility of being clamped became a certainty. Other authority suggests that consent could be withdrawn, see *Devoe v Long* [1951] 1 DLR 203, discussed in G Virgo 'Criminal Regulation of Wheel Clamping', *Cambridge Law Journal,* 1992, pp 411-413, p 412.

96 *Arthur and another v Anker & another,* per Bingham MR, p 791.

6. CIVIL LIABILITY OF THE MOTORIST

In an attempt to reclaim a vehicle, some motorists have removed a clamp by force. This could give rise to actions brought against the motorist by the owner of the clamp.

6.1 TRESPASS TO GOODS

An intentional or negligent interference with goods in the possession of another is a trespass. In the context of the damage to a wheel clamp, this action is directed to protect several interests of the owner of the clamp:

- the owner's interest in the possession of the clamp.
- the owner's interest in the physical condition of the clamp.
- the owner's interest in protecting the clamp from interference by the motorist.[97]

The nature of damages awarded on a successful claim could include, for example, components for the cost of replacing or repairing a damaged clamp and inconvenience suffered by the owner of the clamp.

If the motorist could establish that the vehicle was being held wrongfully, he or she may be able to rely on recaption as a defence to the action of trespass to goods. **Recaption** would be relevant as a defence to trespass to the clamp if it can be established that the clamped car was being wrongfully withheld and reasonable force was used to recapture the car. The force which can be used to reclaim the motor vehicle is reasonable force and it would be a question of fact as to what constitutes reasonable force in the circumstances.[98] Even in circumstances where the clamping operator had immobilised the vehicle without lawful authority, the motorist could only retake the car so long as no unnecessary damage was caused.[99] Recaption is a self help remedy and such remedies should only be resorted to in the event that there is no reasonable alternative.[100]

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[97] Balkin & Davis, p 97.

[98] Balkin & Davis, p 158.

[99] See generally, Virgo, p 412.

[100] *Lloyd v DPP*, p 992.

7. CRIMINAL OFFENCES

7.1 CRIMINAL LIABILITY OF WHEEL CLAMPING OPERATORS

In the absence of a right to clamp, it is possible that the owner of the property and or the clamper as his servant or agent may be prosecuted for an offence arising out of the clamping. Some of the offences that may be relevant in this context are discussed below.[101]

7.1.1 Demanding Property, Benefit or Performance of Services With Threats

Section 415 of the *Criminal Code Act 1899* (Qld) (the Criminal Code) creates the offence of **Demanding property, benefit or performance of services with threats**. It is possible that a demand for money, in return for the release of a wheel clamp on a vehicle, could in some circumstances, be an offence under s 415 of the *Criminal Code*. Section 415(1) provides:

415(1) *Any person who with intent to extort or gain any property or benefit or the performance of services from any person¾*

(a) knowing the contents of the writing, causes a person to receive a writing demanding without reasonable or probable cause¾

(i) any property or benefit or the performance of services from any person; or

(ii) that anything be done or omitted to be done or be procured by any person;

and containing threats of injury or detriment of any kind to be caused to that person or any other person or to the public or any member or members of the public or to property, by the offender or any other person, if the demand is not complied with; or

(b) orally demands without reasonable or probable cause¾

(i) any property or benefit or the performance of services from any person; or

(ii) that anything be done or omitted to be done or be procured by any person;

with threats of injury or detriment of any kind to be caused to that person or any other person or to the public or any member or members of the public or to property, by the offender or any other person, if the demand is not complied with,

is guilty of a crime and is liable to imprisonment for 14 years.

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[101] See generally Gould, pp 21-37.

The definition of **property** contained in s 1 of the *Criminal Code* includes *money*. A demand by the wheel clamper for a release fee could constitute a demand for property. The release fee could also be construed as a "*benefit*" to the wheel clamper within the terms of section 415(1). The detriment to the motorist could be the withholding of his motor vehicle. The important question may be whether the clamper has a "*reasonable or probable cause*" for withholding the vehicle. The test is an objective one.[102] The wheel clamper's honest belief that there was a reasonable cause is not relevant to the section.[103] It is likely that if the wheel clamper could establish a lawful basis for the clamping such as in *distress damage feasant* or contract (see **paragraph 4** above) unauthorised parking by a motorist on private property could constitute a *reasonable or probable cause* for withholding the vehicle.[104]

7.1.2 Stealing

The crime of stealing is found in s 398 of the *Criminal Code*. **Stealing** is defined in s 391 of the *Criminal Code*:

> ***391.(1)*** *A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen is said to steal that thing.*

Section 391(2) defines "*fraudulently*" for the purposes of section 391(1). Paragraph (c) of s 391(2) is of most relevance in the context of wheel clamping. It provides:

> *(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if the person does so with any of the following intents, that is to say¾*

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102 Gould, p 23.

103 *R v Dymond* [1920] 2 KB 260, cited in J M Herlihy & R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (3rd ed), Butterworths, Sydney, 1990, p 266.

104 In the Scottish decision of *Black v Carmichael* 1992 SCCR 709 it was decided that the demand for a release fee for vehicles that had been clamped, whilst parked without authority on private property, amounted to extortion under the Scottish Criminal Law. However, the Lord Justice-General indicated his conclusion may have been different if there had been a legitimate debt owed by the motorist to the occupier of the land. It was suggested that, if it could be established that there was a contract between the motorist and the wheel clamper resulting in a debt arising in favour of the wheel clamper, then the existence of such an agreement might provide a defence to the charge of extortion under the Scottish Criminal law. See *Black v Carmichael* at p 717 cited in A F Phillips, 'Criminal and Civil Aspects of Wheel Clamping on Private Property', *Journal of the Law Society of Scotland*, May 1993, pp 187-193 at 188.

... (c) an intent to use the thing as a pledge or security;

In Western Australia the corresponding section of the *Criminal Code Act Compilation Act 1913* (WA) (the Criminal Code (WA)) is s 371(2)(c). There it has been held that the interpretation "*pledge or security*" is:

> *... confined to the case where the intent of the taker is to pledge the property or give security over it to a third person and does not apply where a person takes property with the intent of holding it until a debt owing to him by the owner is paid.*[105]

The equivalent section of the *Criminal Code (WA)* was held not to apply to a situation where an accused took goods to retain temporarily until such time as the owner made payment of a debt due to the accused.[106] In the light of this decision it may be unlikely that a charge of stealing against a wheel clamper would be made.

7.1.3 Fraud

The sections of this offence that could be relevant to the actions of a wheel clamper are ss 408C(1)(a), (b), (c), (d), (e) and (f) of the Queensland Criminal Code. They provide:

> ***408C.(1)*** *A person who dishonestly,*
>
> *(a) applies to his or her own use or to the use of any person-*
>
> *(i) property belonging to another; or*
>
> *(ii) property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or*
>
> *(b) obtains property from any person; or*
>
> *(c) induces any person to deliver property to any person; or*
>
> *(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or*
>
> *(e) causes a detriment, pecuniary or otherwise, for any person; or ...*
>
> *commits the crime of fraud.*

As noted at **paragraph 7.1.1** above, **property** is defined in the *Criminal Code* to include money.[107] The interpretation of the word "*dishonestly*" is central to the

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105 *Bowman v R* [1980] WAR 65, cited in Gould p 25.

106 *Bowman v R* cited in Herlihy & Kenny, p 249.

107 Criminal Code, s 1 of the Code as amended by s 6(1) of the *Criminal Law Amendment Act* 1997 (Qld).

operation of this section.[108] The test for whether the clamper has a dishonest intention to satisfy the elements of this offence is both subjective and objective. The term "*dishonestly*" is not defined in the *Criminal Code*. In *R v Laurie*[109] Connolly J outlined the approach to the term as provided in the earlier decision of the English Court of Appeal in *R v Ghosh*[110] saying:

> *… the jury in determining whether an accused has acted dishonestly should first consider whether what he did was dishonest by the standards of ordinary honest people and, if they found that it was, they had then to consider whether the accused must have realised that what he was doing was by those standards dishonest.*

It would not be enough for the prosecution to establish that the clamping operator had no lawful basis for applying wheel clamps. For a wheel clamper to be liable under this section of the *Criminal Code* he or she must have realised that applying a clamp to the car was dishonest.[111]

In order to convict a wheel clamper under paragraph (a), it would be necessary to establish that immobilising a vehicle constituted an application of the vehicle to the *"use"* of the wheel clamper. Whether the immobilisation of a vehicle would constitute a *"use"* for the purposes of this offence is uncertain.[112]

7.1.4 Unlawful Use/Possession of a Motor Vehicle

Section 408A(1) of the *Criminal Code* provides:

> ***408A.(1)*** *A person who—*
>
> *(a) unlawfully uses any motor vehicle, aircraft or vessel without the consent of the person in lawful possession thereof; or*
>
> *(b) has in the person's possession any motor vehicle, aircraft or vessel without the consent of the person in lawful possession thereof with intent to deprive the owner or person in lawful possession thereof of the use and possession thereof either temporarily or permanently;*
>
> *is guilty of a crime and is liable to imprisonment for 7 years.*

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[108] See Herlihy & Kenny, p 258 which refers to the operation of the section prior to its amendment by the *Criminal Law Amendment Act 1997* (Qld).

[109] *R V Laurie* [1987] 2 Qd R 762.

[110] *R v Ghosh* [1982] Q B 1053 as cited in *R v Laurie* at p 763.

[111] See generally, Herlihy & Kenny, p 258.

[112] See by comparison the discussion of the term 'use' in the context of the *Crimes Act 1958* (Vic) in Victoria. Community Development Committee, p 147.

Whether a prosecution of a wheel clamper would be successful under s 408A(1)(a) would in part depend on whether the immobilisation of a vehicle constituted a *"use"* of the vehicle. The term "*use"* is not defined in the C*riminal Code*. Although there is opinion that "*use"* for the purposes of this section should be construed to include non-driving uses of the vehicle, it is uncertain whether immobilisation of the vehicle falls within the definition.[113]

It may be easier for the prosecution to make out the offence under section 408A(1)(b) against a wheel clamping operator. Once a vehicle is clamped it could be said to be in the possession of the wheel clamper. If there was no lawful basis for the application of the clamp it would be possible for a court to find that the wheel clamper contravened section 408A(1)(b).

7.1.5 Unlawful Interference with Vehicles and the Mechanism of a Motor Vehicle.

Section 60(1) of the *Traffic Act 1949 (Qld)* makes it an offence to drive or use or interfere with the mechanism of a motor vehicle in certain circumstances. Section 60 of the *Traffic Act* provides:

> *Any person who drives or in any manner uses on any road any vehicle or tram without the consent of the owner or of the person in lawful possession thereof or who without such consent wilfully destroys, damages, removes, or otherwise interferes with any mechanism or other part of or equipment attached to a vehicle or tram which is on any road or elsewhere … shall be guilty of an offence.*

The first part of the section would be unlikely to have any relevance to the issue of wheel clamping on private property because of the requirement that the acts occur on a road. However, the second part of the section relating to interference *"…with any mechanism or other part of or equipment attached to a vehicle…"* could be wide enough to include the application of a wheel clamp to a vehicle.

7.1.6 Section 29 of the Vagrants, Gaming and Other Offences Act 1931

Section 29(1) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) provides:

> *Any person who takes or in any manner uses any vehicle the property of any other person without the consent of the owner or person in lawful possession thereof is guilty of an offence …*

It is uncertain whether either the words *"takes or in any manner uses"* would be interpreted to include the immobilisation of a vehicle using a wheel clamp.

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[113] Herlihy & Kenny, pp 260-261.

The defences of Honest Mistake of Fact and Honest Claim of Right under the C*riminal Code* are discussed briefly below. These statutory defences are available to offences under the *Vagrants, Gaming and Other Offences Act* by virtue of s 52 of that Act.

7.1.7 Statutory Defences That May Be Available to the Wheel Clamper

Honest Claim of Right

Section 22(2) of the *Criminal Code* provides that

> *… a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud.*

This section applies in the event that an accused is mistaken as to the legal conclusion to be drawn from a set of facts. If a wheel clamper was under an honest belief that the immobilisation of a vehicle was lawful, then he could rely on this defence whether in fact the immobilisation of the vehicle was lawful or otherwise. The claim of right need not be reasonable but must be with intention not to defraud.

Mistake of fact.

Section 24(1) of the *Criminal Code* provides that:

> *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*

This defence is available only in relation to mistakes of fact, not law, and the mistake must be both reasonable and honest. There is both a subjective and objective test applied to the mistake. An example of a mistake of fact that could be alleged by a wheel clamper is that he or she believed that the motorist had consented to the immobilisation of the vehicle by contract.[114]

7.2 OFFENCES COMMITTED BY THE MOTORIST

In an attempt to reclaim an immobilised vehicle, a motorist may act in a way that could give rise to charges being brought against the motorist. For example, if the motorist caused damage to the wheel clamp while removing it from his or her vehicle, such act could give rise to a charge of wilful damage under s 469 of the *Criminal Code*.

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[114] Gould, p 36.

In order to make a successful prosecution under this provision, it must be established that the damage was unlawful. It is possible that a motorist would argue that his actions were lawful as the clamper was not entitled to immobilise the vehicle. There have been English and Scottish cases where the motorist has relied on a defence of recaption. **Recaption** is a defence to an action in trespass that reasonable force was being used to retake goods which were being wrongfully withheld.[115] In the context of wheel clamping, the English decision of *Stear v Scott* held that recaption was no defence to a charge of criminal damage under the *Criminal Damage Act 1971* (UK) when the car's presence on the property was due to the motorist's own wrongful trespass.[116] This was followed in the decision of *Lloyd V DPP*.[117] Nolan LJ in the latter case said that:

> *… as a general rule, if a motorist parks his car without permission on another person's property knowing that by doing so he runs the risk of it being clamped, he has no right to damage or destroy the clamp.*[118]

Contrast this with the decision of Mr Owens SM in the Magistrates Court at Southport in *R v Dorfler,* where a claim of wilful damage against a motorist was dismissed because the Magistrate was not satisfied that *"… the damage inflicted to the wheel clamping device … was an unlawful act …".*[119]

In that case there were signs displayed at the entrance to the car park on property controlled by a body corporate, which advised that cars would be immobilised and a release fee would be charged if a car was parked without authority. However, the magistrate was not satisfied that the motorist had parked without the requisite authority.[120]

8 CONCLUSION

The problem of preventing unauthorised parking on private property continues to be a problem for occupiers of private and commercial land. The use of wheel clamping as a parking management tool has raised legal issues, some of which remain unresolved in Queensland. *Distress damage feasant* and contract are two possible legal bases for the immobilisation of vehicles using wheel clamps. The current

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[115] Balkin & Davies, p 158.

[116] *Stear v Scott* [1992] RTR 226n discussed in L Aitken, 'The Abandonment and Recaption of Chattels', *Australian Law Journal*, 68(4), April 1994, pp 263-284, at p 277.

[117] *Lloyd v DPP*, at 982.

[118] *Lloyd v DPP*, at 992.

[119] *R V Dorfler*, quoted in Gould, p 17.

[120] *R V Dorfler* discussed in Gould, pp 16-17.

situation in Queensland continues to cause uncertainty for motorists, land occupiers and wheel clamping operators alike.

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APPENDIX A

RACQ DRAFT CODE OF PRACTICE FOR CAR CLAMPING

12 January 1996

Property Owners (or Lessees) should:

1. Alternatives: Consider carefully the implications of, and alternatives to, clamping before introducing it.

2. Layout: Physically restrict access to parking areas to defined, well signed entry points, and ensure the traffic routes, parking bays, and exits, are clearly laid out and signed.

3. Signage: Sign the entry to all parking areas and applicable individual parking spaces in an obvious and easily readable manner, showing the conditions applying to entry, parking, clamping and release including the charge.

4. Conditions: Impose only those conditions which are reasonable and easily followed, allowing some flexibility in their application to meet special circumstances, eg disabled persons.

5. Warnings: Consider a system of warnings for first offenders.

6. Service: require that their staff and their contractors provide a friendly, helpful service to parking motorists to reduce the possibility of conflict.

7. Service Fee: Pay contractors a reasonable fee which reflects the costs of the establishment and ongoing provision of the service on the property.

Parking Contractors should:

1. Instructions: Obtain precise instructions from the property owners and follow them exactly, applying the conditions as required by the owners.

2. Staff: Ensure all staff are properly trained in correct procedures, tidily dressed, and clearly display corporate identity tags when on duty.

3. Courtesy: Treat all motorists with courtesy and, where practical, warn any seen about to infringe the parking conditions of the consequences.

4. Availability: Be always available to release clamped cars in the shortest possible time.

5. Charge: Levy the drivers of clamped cars with a charge relating only to the reasonable costs of actually clamping and releasing the vehicle.

6. Non-payment: Have clearly defined and responsible procedures for dealing with motorists who cannot, or refuse to, pay for the release of their car.

7. Towing Reasons: Not tow away any car without a legitimate reason, such as causing an obstruction, posing a safety hazard, or on a ‘no go’ area, ie lawn, garden, etc.

8. Towing Procedure: Not tow away any car before informing the police, and then, move it in a careful manner to a secure location within, or as close as practical to, the parking area.

9. Towing Recovery: Leave clear instructions for the motorist to recover the car when it is moved.

10. Dispute Resolution: Establish an easy and independent dispute resolution system for motorists with complaints.

Motorists should:

1. Intent: Not enter private parking areas with the intent of infringing the parking conditions.

2. Conditions: Observe and conform to all conditions posted in private parking areas and seek clarification if uncertain. Where appropriate retain proof on doing business in specified stores, etc.

3. Non-infringement: Leave parking areas when it becomes apparent that to stay and park would infringe the posted conditions.

4. Respect: Respect the advice or instructions from staff of the owner or contractor and treat them with courtesy.

5. Clamp: Follow the instructions left with their car if it is clamped, and in no way tamper with the clamp.

6. Complaints: Register any legitimate complaint they may have with both the owners and contractor.

7. General: Be aware that ignorance of the law is no defence, property owners have civil rights, and that the police will not intervene in disputes over civil matters.

APPENDIX B

VIP CAR PARK MANAGEMENT

A spokesman for VIP Car Park Management (VIP) provided the following information about the operational practices of the company. According to the spokesman:

Wheel clamping is used by VIP as a last resort in an attempt to combat the problem of unauthorised parking on private property. Unauthorised parking of motor vehicles causes inconvenience to property owners and occupiers and also economic loss to commercial property owners when potential customers are unable to access proximate parking spaces because they are occupied by motorists, parking without authorisation.

VIP provides services to property owners, shopping centres, universities and small businesses. A significant part of VIP's clientele consists of bodies corporate that have been unable to effectively control unauthorised parking on common property in community titles plans. For small businesses the services of VIP are a financially viable alternative to those unable to afford full time in-house security. VIP has established operational procedures for dealing with motorists parked without authority on private or commercial property. VIP makes use of prominent signs and uniformed staff. Where VIP is operating a parking management service it gives notice to the motorist of the parking restrictions in the form of large signs made of reflective material which set out the conditions of entry to the property. Prior to erecting signs VIP each property is individually surveyed to ensure that the location of signs and the parking restrictions are appropriate. A large sign is always erected at the entrance to the property with dimensions of 600 mm x 1200 mm. Where practical to do so, signs are also erected at individual parking bays on the property. Such signs are erected when a parking bay has been allocated to a particular use, for example disabled parking, or when the bay has been allocated for the use of a particular person or group of persons. Where VIP is engaged to provide parking services to large parking areas such as universities or shopping centre carparks, it is not feasible to have a parking sign at each individual parking bay. Where individual parking bays are signposted the dimensions of the signs conform with the dimensions of uniform traffic control devices as provided for in Australian Standard 1742.11 ie the signs are 225 x 450 mm in dimension. The signs advise the motorist that if the motorist does not comply with the signposted conditions of parking that immobilisation of the vehicle could occur by wheel clamping and that a charge of $80.00 will be made for the release of the immobilised vehicle. The signs advise the motorist that by parking contrary to the displayed conditions the motorist consents to the clamping of the vehicle. In the event that VIP immobilises a vehicle, a notice is attached to the vehicle advising that the clamp has been applied for the contravention of the displayed conditions of parking and that the removal of the clamp can be effected by VIP in exchange for a release fee of $80.00. A contact telephone number is provided on the adhesive sticker together with advice that VIP will dispense an employee to remove the clamp if contacted on the number provided.

APPENDIX C

Victoria. Parliament. Community Development Committee, *Report upon the Review of the Practice of Immobilising and Removing Trespassing Vehicles on Private Property*, Victorian Government Printer, Melbourne, March 1996, pp ix-x.

RECOMMENDATIONS

1. The Committee recommends that the practice of immobilising motor vehicles by means of wheel clamping be banned in Victoria.

2. The Committee is aware of the period of time between the tabling of the Report and the Government's response. It therefore recommends as a matter of urgency that the Government seek to put in place an interim measure that will in effect provide a temporary abolition of wheel clamping.

3. The Committee recommends the Government pass legislation requiring councils to enact a new Local Law: 'Leave a Vehicle While Standing on Private Property Without Authority'.

4. The Committee recommends the *Road Safety Act 1986* and the Road Safety (Traffic) regulations 1988 be amended, to permit owners or occupiers of private and commercial property to apply to have their property placed under the control of the appropriate public authority, so that Local Laws Officers and Victoria Police can deal with unauthorised parking.

5. The Committee recommends that on receipt of a complaint from the owner or occupier of the property, Local Laws Officers be permitted to issue infringement penalties against vehicles, either on property included in the 'Schedule of Specified Private Properties', or where properly posted signs on private or commercial property are ignored.

6. The Committee recommends the *Road Safety Act 1986* be amended to reflect a uniform 'Schedule of Infringement Penalties' for parking on private and commercial property without authorisation.

7. The Committee recommends that the Government amend either the *Road Safety Act 1986* or the *Local Government Act 1989* so that council tow away practices can, on the ratification of an authorised officer, and in strictly limited circumstances, be extended to private and commercial property, irrespective of whether they are included in a 'Schedule of Specified Private Properties'.

8. The Committee recommends, in accordance with section 115 of the *Local Government Act 1989*, that a 'Schedule of Fees' be established in relation to the costs of releasing vehicles towed and deposited at authorised council depots.

9. The Committee recommends appropriate amendments to the *Road Safety Act 1986* and the *Local Government Act 1989* which make owners or occupiers of property, who wish to address unauthorised parking on their land, responsible for the provision of perimeter fencing.

10. The Committee recommends that both the *Road Safety Act 1986* and the *Local Government Act 1989* be amended to provide for the use of uniform, standard parking signs for private and commercial property, and that this be the responsibility of the owners or occupiers.

11. The Committee strongly urges the Office of Local Government, the Municipal Association of Victoria, and councils to be alert to the possible ramifications of private organisations issuing infringement notices as a result of the Compulsory Competitive Tendering and Contracting (CCTC) process.

12. The Committee recommends a campaign of public education on issues about vehicular trespass on private and commercial property. It also encourages VicRoads, the Office of Local Government, the Department of Transport, the Royal Automobile Club of Victoria, councils, and other relevant bodies, to participate in this campaign.