

# Settlement Agreement

Commerce Commission

Wilson Parking New Zealand Limited

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## Parties

**Commerce Commission** a statutory body established under section 8 of the Commerce Act 1986 (**Commission**)

**Wilson Parking New Zealand Limited** an incorporated company under the Companies Act 1993 (**Wilson Parking**)

(collectively the **Parties**)

## 1 Introduction

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- A On or about 21 June 2016, Wilson Parking entered into a Deed of Lease with the owner of the freehold at 50-60 Boulcott Street, Wellington, to operate car parking services at that site known as the Capital Car Park (the **Capital Car Park**).
- B On 19 July 2018, the Commission commenced proceedings (CIV-2018-485-514, the **Proceeding**), alleging that Wilson Parking's acquisition of the lease of the Capital Car Park substantially lessened competition in a market in breach of section 47 of the Commerce Act 1986 (the **Commerce Act**). Wilson Parking denied the allegations. The Proceeding was to be heard by the High Court from 2 December 2019.
- C Prior to commencement of the hearing of the Proceeding, the Parties entered into a binding heads of agreement (the **Heads of Agreement**) in which they agreed the terms on which the Proceeding (and the Commission's related Investigation) would be resolved.
- D This Agreement now formally records the terms on which the Parties have agreed to settle the Proceeding and Investigation.
- E This Agreement will be made public by the Commission (including on the Commission's website), save for any material identified in this Agreement as confidential.

## 2 Interpretation

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2.1 For the purposes of this Agreement:

**Agreement** means this settlement agreement and accompanying schedule.

**Costs Payment** means Wilson Parking's contribution of NZ\$500,000 (excluding GST, if any) towards the Commission's costs in relation to the Proceeding and the Investigation.

**Days** means working days as defined in the Commerce Act.

**Investigation** means the Commission's investigation into the acquisition of the Deed of Lease for the Capital Car Park by Wilson Parking.

**Related Parties** of Wilson Parking means:

- (a) its directors, officers, employees and agents; and
- (b) its related companies and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993.

**Undertaking** means the Undertaking given by Wilson Parking pursuant to clause 3.2 of this Agreement.

### **3 Terms of settlement**

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- 3.1 The Parties have agreed to resolve the issues arising out of the Proceeding and the Investigation on the terms set out below.

#### **Undertaking**

- 3.2 Within 1 Day of the execution of this Agreement, Wilson Parking will provide to the Commission a duly executed Undertaking on the terms set out in Schedule 1 to this Agreement (which may be executed in counterparts, each of which will be treated as an original).
- 3.3 The Commission will accept the Undertaking given in accordance with clause 3.2 and will provide notice of that acceptance in writing to Wilson Parking as soon as is reasonably practicable.
- 3.4 For the avoidance of doubt, Wilson Parking acknowledges that the Commission's acceptance of the Undertaking, and in particular clauses 7.1 and 7.2 of the Undertaking, does not imply any endorsement by the Commission of any acquisition by Wilson Parking (including lease renewals) not referred to in those clauses.

#### **Payment of costs and discontinuance**

- 3.5 On acceptance of the Undertaking, the Commission will provide to Wilson Parking details of the bank account into which the Costs Payment is to be made.
- 3.6 Wilson Parking will, within 10 Days of the commencement of the Undertaking, pay the Costs Payment to the Commission.
- 3.7 Within 5 Days of the Commission receiving the Costs Payment, the Commission will discontinue the Proceeding recording that there is no issue as to costs between the Parties.

#### **No admissions**

- 3.8 In entering into this Agreement and providing the Undertaking, Wilson Parking makes no admission of liability or breach of the Commerce Act.

### **4 Consideration of matters referred to in Undertaking**

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- 4.1 The Parties agree to act reasonably to give effect to the Undertaking including (without limitation):

- (a) Where the Commission receives a written request or notification from Wilson Parking as required by the Undertaking, the Commission agrees to act promptly and reasonably to consider that request or notification; and
- (b) Where the Commission intends to provide a written request, notice or direction to Wilson Parking under the Undertaking, the Commission agrees to act promptly and reasonably and to permit Wilson Parking a reasonable period to comply.

4.2 Without limiting the generality of clause 4.1:

- (a) the Commission agrees that it shall within 20 Days of receipt of a notification from Wilson Parking under clause 6.1 of the Undertaking (or such longer period as may be agreed), advise Wilson Parking either that:
  - (i) it approves or does not approve the person to whom it is proposed to assign or surrender the car park lease; or
  - (ii) it requires additional information from Wilson Parking, the proposed recipient or any other third party;
- (b) where the Commission advises that it requires additional information under clause 4.2(a)(ii) the Commission agrees to, within 15 Days of receipt of that information (or such longer period as may be agreed), advise Wilson Parking either that:
  - (i) it approves or does not approve the person to whom it is proposed to assign or surrender the car park lease; or
  - (ii) it requires additional information from Wilson Parking, the proposed recipient or any other third party.

4.3 In determining whether or not to approve a person to whom it is proposed by Wilson Parking under clause 6.1 of the Undertaking to assign or surrender a car park lease, the Commission shall have regard to whether the party or parties in question:

- (a) is/are not associated with, or an interconnected body corporate of, Wilson Parking or its Related Parties;
- (b) has/have the financial resources, expertise and incentive to operate and develop the Divestment Car Parks as viable and active competitors to Wilson Parking in the relevant markets; and
- (c) is/are not likely to create competition concerns that would result in a contravention of section 47(1) of the Commerce Act 1986; and
- (d) is/are not likely to give rise to a risk that the implementation of the Divestments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant authorities for the acquisition of the Divestment Car Parks.

4.4 For the avoidance of doubt, and despite any agreement as to which aspects of the Undertaking shall not be subject to immediate public release, the Commission may divulge the names and location of the Divestment Car Parks to third parties where it considers it necessary to do so as part of its consideration of whether or not to

approve a person to whom it is proposed by Wilson Parking under clause 6.1 of the Undertaking to assign or surrender a car park lease.

## **5 Closure of the Commission's Investigation**

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- 5.1 On its acceptance of the Undertaking, the Commission will close the Investigation.
- 5.2 The Commission agrees not to issue, encourage or support any legal proceedings against Wilson Parking and/or any of its Related Parties in respect of matters that are the subject of the Proceeding or the Investigation.
- 5.3 Nothing in this Agreement will limit or affect the ability of the Commission to issue proceedings against Wilson Parking in respect of matters not related to the Proceeding or the Investigation, or in respect of conduct Wilson Parking engages in after the date of this Agreement or for breach of this Agreement or of the Undertaking.

## **6 Public statements**

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- 6.1 Subject to clauses 6.2 to 6.4, the Parties may make public statements in relation to the Proceeding, the Investigation and this Agreement after this Agreement has been executed.
- 6.2 The Commission agrees that it will not issue an initial media release in relation to the Proceeding, the Investigation or this Agreement without first giving Wilson Parking 24 hours' notice of its intention to do so.
- 6.3 Wilson Parking agrees that it will not make an initial media release or public statement in relation to the Proceeding, the Investigation or this Agreement before the Commission makes its media release under clause 6.2.
- 6.4 The Parties agree to advise each other of the key messages contained in the media release or public statement referred to in clauses 6.2 and 6.3 at least two hours in advance of publication. A Party will not be obliged to accept the comments of the other Party.
- 6.5 The Parties acknowledge that this Agreement does not prevent either of them from making any public statement regarding their views of Wilson Parking's lease of the Capital Car Park.

## **7 Miscellaneous**

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- 7.1 Each Party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.2 The Parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement, and to demonstrate good faith in performing their obligations under this Agreement and in resolving any issues arising under this Agreement.
- 7.3 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.

- 7.4 The Parties agree that the New Zealand Courts will have exclusive jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates, including any proceedings brought by the Commission.
- 7.5 This Agreement constitutes the entire agreement between the Parties in relation to resolving the Proceeding and the Investigation. It supersedes all prior communications, understandings or representations whether oral or written between the Parties, including the Heads of Agreement.
- 7.6 No amendment to this Agreement will be effective unless it is in writing and signed by both of the Parties.
- 7.7 Any failure by any Party to enforce any provision of this Agreement at any time will not operate as a waiver of that provision in respect of that act or omission or any other act or omission.
- 7.8 Any person signing this Agreement on behalf of one of the Parties warrants by signing that they have all the necessary authority from that Party to sign this Agreement on their behalf.
- 7.9 Each Party warrants that it has the necessary powers to carry out its obligations under this Agreement and the Undertaking.
- 7.10 The Parties may enter into this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A Party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A Party's delivery of a signed pdf counterpart of this Agreement by email will have the same legal effect as that Party's delivery of a signed original counterpart.
- 7.11 Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:
- (a) If addressed to the Commission, by hand delivery or email to the following address:
- Commerce Commission  
Level 9  
44 The Terrace  
Wellington 6011
- Attention: Mary-Anne Borrowdale, General Counsel, Competition and Consumer  
Commerce Commission
- Email: mary-anne.borrowdale@comcom.govt.nz
- (b) If addressed to Wilson Parking, by hand delivery or email to the following address:
- Wilson Parking New Zealand Limited  
Level 12  
151 Queen Street  
Auckland 1010
- Attention: Ryan Orchard

Email: [REDACTED]

## Execution

Signed by and on behalf of **New Zealand  
Commerce Commission**



\_\_\_\_\_  
Chair

Anna Rawlings

\_\_\_\_\_  
New Zealand Commerce Commission

Signed by and on behalf of **Wilson Parking  
New Zealand Limited**

\_\_\_\_\_  
Director

\_\_\_\_\_  
Wilson Parking New Zealand Limited

\_\_\_\_\_  
Director

\_\_\_\_\_  
Wilson Parking New Zealand Limited

Email: [REDACTED]

## Execution

Signed by and on behalf of **New Zealand  
Commerce Commission**

\_\_\_\_\_  
Chair

\_\_\_\_\_  
New Zealand Commerce Commission

Signed by and on behalf of **Wilson Parking  
New Zealand Limited**

  
\_\_\_\_\_  
Director

**JOSE DA SILVA**  
\_\_\_\_\_  
Wilson Parking New Zealand Limited

\_\_\_\_\_  
Director

\_\_\_\_\_  
Wilson Parking New Zealand Limited



Email: [REDACTED]

**Execution**

**Signed by and on behalf of New Zealand  
Commerce Commission**

\_\_\_\_\_  
Chair

\_\_\_\_\_  
New Zealand Commerce Commission

**Signed by and on behalf of Wilson Parking  
New Zealand Limited**

  
\_\_\_\_\_  
Director

\_\_\_\_\_  
Wilson Parking New Zealand Limited

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Director

\_\_\_\_\_  
Wilson Parking New Zealand Limited

## Schedule One: Form of Undertaking

# UNDERTAKING UNDER SECTION 74A OF THE COMMERCE ACT 1986

DEED dated     day of

GIVEN BY     WILSON PARKING NEW ZEALAND LIMITED (**Wilson Parking**)

IN FAVOUR OF NEW ZEALAND COMMERCE COMMISSION (the **Commission**)

## PART ONE – INTRODUCTION, COMMENCEMENT AND DEFINITIONS

### 1 Introduction

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- A Wilson Parking offers the Commission a divestment undertaking in the form of this deed (the **Undertaking**).
- B This Undertaking is a Court enforceable undertaking under section 74A of the Commerce Act 1986 (the **Commerce Act**).
- C This Undertaking will be made public by the Commission (including on the Commission's website), save where material has been identified in this Undertaking as confidential. Information which has been identified as confidential will be made public by the Commission at such time as that confidentiality lapses.

### 2 Commencement

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- 2.1 This Undertaking comes into effect once accepted by the Commission under section 74A of the Commerce Act.

### 3 Definitions

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- 3.1 In this Undertaking

**Approved Person** means a person independent of Wilson Parking or its Related Parties who has been approved by the Commission to accept the assignment or surrender of one or more of the Divestment Car Parks.

**Days** means working days as defined in the Commerce Act.

**Divestments** means the divestments contemplated by clause 4.1.

**Divestment Car Parks** means the three car parks currently operated by Wilson Parking known as the Capital Car Park (comprising 659 bays), [REDACTED] – [REDACTED] **confidential until the earlier of Divestment or the expiry of the Divestment Period**].

**Divestment Period** means [REDACTED] – **confidential until the expiry of the Divestment Period**] from the commencement of this Undertaking.

**Investigation** means the Commission's investigation into the acquisition of the Deed of Lease for the Capital Car Park by Wilson Parking.

**New Car Park** means any car park of more than 100 bays not currently operated or managed by Wilson Parking or a Related Party.

**Proposed Acquisition** means any acquisition, lease or management agreement which Wilson Parking (or a Related Party) proposes to enter into.

**Related Parties** of Wilson Parking means:

- (a) its directors, officers, employees and agents; and
- (b) its related companies and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993.

**Wellington Central Area** means the Central Area as defined in the Wellington City District Plan (which became operative on 27 July 2000) as at the date of this Undertaking.

## **PART TWO – DIVESTMENT**

### **4 Divestment**

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- 4.1 Wilson Parking undertakes to the Commission that it will, within the Divestment Period, dispose of each of the leases of the Divestment Car Parks by way of assignment or surrender to an Approved Person or Approved Persons.
- 4.2 If any of the leases of the Divestment Car Parks have not been disposed of within the Divestment Period, Wilson Parking undertakes to the Commission that it will instead follow the procedures and processes set out in Schedule 1 to this Undertaking.
- 4.3 Wilson Parking undertakes to the Commission that it will:
  - (a) prior to Divestment, prepare a proposal as to how customers of its monthly parking services at each of the Divestment Car Parks will be notified of the Divestment and may be transferred to the Approved Person. That proposal will include:
    - (i) provision for Wilson Parking to provide information regarding existing customers of monthly parking services at the Divestment Car Park to the Approved Person to whom the car park will be transferred;
    - (ii) details of any information relating to customers of monthly parking services at the Divestment Car Park which Wilson Parking intends to seek to retain; and
    - (iii) where Wilson Parking intends to retain information relating to customers of monthly parking services at the Divestment Car Park, provision that, for a period of 12 months after the completion of the Divestment, Wilson Parking may not use that information to seek to persuade customers to switch from the Divestment Car Park; and
    - (iv) details of all communications Wilson Parking intends to have with customers of monthly parking services at the Divestment Car Park

relating to the Divestment of that car park and the transfer to the Approved Person;

- (b) seek approval of that proposal from the Commission (and, in the event that the Commission declines to grant that approval, amend its proposal until it is in such a form as the Commission agrees to approve); and
- (c) act in relation to those customers of its monthly parking services only in a manner consistent with a proposal which has been approved by the Commission.

4.4 In respect of each Divestment Car Park, Wilson Parking undertakes to take all reasonable steps to ensure the orderly transfer of the car park to the Approved Person and not to take any steps to hinder that transfer.

4.5 Wilson Parking further undertakes to the Commission that it (and any Related Parties) will not reacquire (via purchase, lease, management agreement or any other means) any of the Divestment Car Parks within a period of five years from the date of the assignment or surrender of each lease.

## **5 Preservation obligations**

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5.1 Until such time as each Divestment Car Park is divested, Wilson Parking undertakes that it will (either directly or via any Related Party), in relation to each Divestment Car Park, use all reasonable endeavours to:

- (a) preserve the reputation and goodwill of each of the Divestment Car Parks;
- (b) preserve their economic viability, marketability and competitiveness;
- (c) continue to provide services at those car parks in a manner consistent with the provision of services as at the commencement of this Undertaking; and
- (d) maintain a level of staffing at the car parks that is materially the same as at the commencement of this Undertaking.

5.2 Until such time as each Divestment Car Park is divested, neither Wilson Parking nor any Related Party will carry out any act upon its own authority that would have a significant adverse impact on the value, management or competitiveness of each Divestment Car Park or that might alter the nature and scope of activity which might be carried out there.

## **6 Approval of recipient**

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6.1 Wilson Parking undertakes to the Commission that it will notify the Commission in writing of the identity of the person or persons anticipated to receive the surrender or assignment of each Divestment Car Park and seek the Commission's approval of that person or persons as soon as practicable and no later than 20 Days before the anticipated closing of each Divestment. Such notification must be accompanied by copies of the proposed agreement (including, where relevant, any transitional service agreements and any ancillary agreements) under which the surrender or assignment would take place.

6.2 Wilson Parking undertakes to the Commission that it will ensure that:

- (a) before accepting a binding tender; or
- (b) entering into any final binding agreements

providing for the surrender or assignment of one or more of the Divestment Car Parks, Wilson Parking will have either obtained the Commission's written approval or shall ensure that the agreements are conditional on obtaining the Commission's written approval of the proposed recipient or recipients.

- 6.3 Wilson Parking undertakes to provide to the Commission any information within Wilson Parking's control which the Commission considers necessary or desirable for the purposes of determining whether or not to approve a person or persons.

## **PART THREE – ANCILLARY MATTERS**

### **7 Notice of further acquisitions**

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- 7.1 Wilson Parking undertakes to the Commission that it will notify the Commission in writing of any Proposed Acquisitions of New Car Parks in the Wellington Central Area for five years commencing on the date of commencement of this Undertaking. Notice for the purposes of this clause will be given as soon as possible and no later than 20 Days before the completion of any Proposed Acquisition to which that notice relates.
- 7.2 Wilson Parking undertakes to the Commission that, where the Commission advises Wilson Parking in writing that it considers it necessary or desirable, Wilson Parking will seek clearance under section 66 of the Commerce Act in respect of any Proposed Acquisitions of New Car Parks in the Wellington Central Area for three years commencing on the date of commencement of this Undertaking.

### **8 Monitoring and compliance with the Undertaking**

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- 8.1 Wilson Parking undertakes that it will:
- (a) By the 10<sup>th</sup> Day of each month during the Divestment Period provide to the Commission (on a confidential basis) a report signed off as being true and correct by the Chief Executive of Wilson Parking (or his/her delegate) and containing the following information:
    - (i) the prior month's normalised profit and loss report for each of the Divestment Car Parks;
    - (ii) the number of casual, daily and monthly parkers at each of the Divestment Car Parks in the prior month along with a statement setting out Wilson Parking's understanding of any reasons for any changes to the numbers reported in Wilson Parking's prior monthly report;
    - (iii) details (including rostered hours) of staff assigned to operating and maintaining each of the Divestment Car Parks in the prior month;
    - (iv) any changes to the terms and conditions for customers using any of the Divestment Car Parks in the prior month along with a statement setting out Wilson Parking's reasons for any such changes;

- (v) any changes to the hours of operation at any of the Divestment Car Parks in the prior month;
  - (vi) any complaints received by Wilson Parking in respect of any of the Divestment Car Parks in the prior month; and
  - (vii) the steps taken to divest each car park;
- (b) at the Commission's request and within any time period specified by the Commission, give the Commission any further information and documents it requires:
- (i) about the Divestments and Wilson Parking's progress towards carrying out the Divestments; and
  - (ii) demonstrating Wilson Parking's compliance with the Undertakings.

8.2 Nothing in this Undertaking requires Wilson Parking to provide legally privileged information or documents.

## 9 Miscellaneous

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- 9.1 Any notice or communication that Wilson Parking is required to provide under or in connection with this Undertaking will be given by hand delivery or email to the following address or to such other address or email or Commission employee that the Commission notifies to Wilson Parking in writing.

Commerce Commission  
Level 9  
44 The Terrace  
Wellington 6011

Attention: Mary-Anne Borrowdale, General Counsel, Competition and  
Consumer  
Commerce Commission

Email: mary-anne.borrowdale@comcom.govt.nz

Executed as a deed on behalf of Wilson Parking New Zealand Limited

\_\_\_\_\_  
Signature of Authorised Representative

\_\_\_\_\_  
Print Name and Title

\_\_\_\_\_  
Signature of Authorised Representative

\_\_\_\_\_  
Print Name and Title



**SCHEDULE ONE - NON-DIVESTED CAR PARKS [Confidential until  
Divestment has been completed]**











