

**TAX RATIONALITY, POLITICS, AND MEDIA SPIN: A CASE
STUDY OF THE FAILED 'CAR PARK TAX' PROPOSAL**

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FAILED 'CAR PARK TAX' PROPOSAL**

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ABSTRACT

The Generic Tax Policy Process (“GTPP”) is designed to ensure open and consultative development of tax policy and law in New Zealand. Despite complying with the GTPP, a proposal to extend fringe benefit tax to certain employer-funded car parking was withdrawn in the face of media criticism. This paper uses the failed ‘car park tax’ proposal as a case study to illustrate how a rational development process, such as GTPP, is insufficient in tax discourse. Government also needs to “out spin” its opponents.

This paper outlines the GTPP and the progress of the “car park tax” proposal through that process. The paper then tells the story of the proposal’s failure using a timeline which focuses on print media reports. The proposal was flawed in certain regards; nevertheless this narrative demonstrates the ineffective “spinning” of the proposal to the media and public, and, in contrast, the effective opposition by an alliance of special interest groups. The consequences for rational tax measures of this case study are discussed and conclusions drawn.

Key words: fringe benefit tax – tax principles – framing – environmental taxes

1 Introduction

The Generic Tax Policy Process (“GTPP”) is designed to ensure open and consultative development of tax policy and law in New Zealand. Changes are signalled well in advance and interested parties have genuine opportunities to engage in a discursive process that identifies problems with and objections to tax proposals. In 2012, the government introduced an omnibus tax Bill,¹ whose augmented provisions included an initiative to extend the scope of fringe benefit tax (“FBT”) in relation to employer-funded car parking in the Auckland and Wellington central business districts (“CBDs”).² This proposed extension of FBT (“the proposal”) followed the GTPP. Lulled, perhaps, into over confidence by the apparent smoothness of the GTPP exercise, government, particularly the Inland Revenue Department (“IRD”) and Peter Dunne, the Minister of Revenue (outside of Cabinet), appear to have displayed a degree of casualness in presenting the case for the proposal to the media and thus the general public. “[A]t the 11th hour”,³ government withdrew the proposal. This paper argues that the hastily formed FBT Action Group (“FBTAG”) effectively captured media attention and thereby was instrumental in the reversal. Despite having numerous communications staff,⁴ pejoratively

¹ The Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill 64-1 (the Bill) released on 13 September 2012. The Bill was augmented on 11 December 2012 by a supplementary order paper (“SOP 167”) which included the terms of the proposal. Supplementary order papers have been used to circumvent the deliberative stages of a Bill: see Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [11.6.3(e)] However, there is no indication that SOP 167 was intended to avoid scrutiny.

² Had the CBD of Christchurch, the country’s other major urban area, not been devastated by an earthquake in February 2011, it would presumably have been included in the proposal.

³ Struan Little, Geof D Nightingale and Ainslie Fenwick “Development of Tax Policy in New Zealand: The Generic Tax Policy Process” (2013) 61(4) *Can Tax J* 1043 at 1054.

⁴ As at 30 June 2013, IRD employed 24.5 full time equivalent specialist communications staff: see State Services Commission “Capping Data to 30 June 2013” (2013) at 16 <www.ssc.govt.nz>. Government departments typically engage contractors for specific projects; these contractors are excluded from government employment caps.

referred to as “spin doctors”,⁵ government was prompted by this unlikely coalition of business interest groups and trade unions to abandon the proposal.⁶

This paper uses the proposal as a case study to illustrate how following a rational process of consultation is insufficient to succeed in contemporary tax discourse. Government also needs to “out spin” its opponents.⁷ The proposal is outlined in the context of current FBT rules, the GTPP and tax principles generally accepted in New Zealand. The paper then tells the story of the proposal’s failure, using a timeline which focuses on print media reports. This narrative demonstrates the perfunctory introduction of the proposal, unsupported by robust evidence or media-friendly arguments, and the effective opposition by a small alliance of special interest groups. The communications concepts of frames and spin are applied to the proposal. Finally, the consequences for tax rationality in the light of this case study are discussed and conclusions drawn.

2 The Proposal

This part of the paper outlines the proposal in the context of current FBT rules and the GTPP. The proposal is then measured against tax principles which are generally accepted in New Zealand.

2.1 Current FBT Rules

Monetary benefits arising from employment are taxed in an employee’s hands as assessable income,⁸ whereas non-cash benefits are potentially taxable as fringe benefits in the hands of

⁵ The *Oxford English Dictionary* (online, draft additions 1993) defines “spin doctor” as “a political press agent or publicist employed to promote a favourable interpretation of events to journalists”.

⁶ The breadth and heterogeneity of FBTAG can easily be overstated. At the time of its submissions to the Finance and Expenditure Committee (the Committee), FBTAG did not include unions among its foundational members. Without the Unite union, FBTAG essentially comprised large property owners and their tenants.

⁷ Compare the proposal with the effective marketing campaign for goods and services tax (GST) in New Zealand, which included a leaflet explaining the benefits of the new tax being distributed to every household: see Jeff Todd “Implementing GST – Information, Education, Co-ordination” in Richard Krever and David White (eds) *GST in Retrospect* (Brookers, Wellington, 2007) 27 at 33-35. Cedric Sandford, Michael Godwin and Peter Hardwick *Administration and Compliance Costs of Taxation* (Fiscal Publications, Bath, 1989) at 213 note the “ingenious educational features” of the GST campaign.

⁸ See Income Tax Act 2007 (“Income Tax Act”), ss CE 1; CX 4.

the employer.⁹ Under current FBT rules, certain perquisites, such as the provision of subsidised transport,¹⁰ are defined as fringe benefits.¹¹ Additionally, perks which are not specifically defined nor excluded are taxable as “unclassified benefits”.¹² An employer-provided car park is an unclassified benefit and is therefore prima facie subject to FBT. However, benefits excluded from the FBT net include those used or consumed on the premises of the employer or those of a fellow group company.¹³ Following the common law understanding,¹⁴ the term “premises” includes real property owned or leased by the employer, as well as sites where employees are required to perform their duties. A car park located on premises owned or leased by an employer is therefore exempt from FBT under current law. This exclusion extends to car parks leased by an employer but located in a building the employer does not own.¹⁵ This provision leads to apparent anomalies: for example, if an employer arranges and pays for parking in a reserved area of a commercial car park for certain employees, an FBT liability is incurred but not if the spaces are the subject of a formal lease or rental agreement with the employer.¹⁶

2.2 The Proposal

In terms of the proposal,¹⁷ a fringe benefit arises when an employer makes a parking space available to an employee if any of the following conditions applies:

- The parking space is in the Auckland or Wellington CBD;

⁹ Income Tax Act, ss CX RD 26(1); CX2-CX38.

¹⁰ Income Tax Act, ss CX 9.

¹¹ Income Tax Act, ss CX 6-CX 16.

¹² Income Tax Act, s CX 37.

¹³ Income Tax Act, s CX 23.

¹⁴ “Premises” is a grant of real property: see Peter Spiller *Butterworths New Zealand Law Dictionary* (5th ed, Butterworths, Wellington, 2001) at 233.

¹⁵ See IRD *Tax Information Bulletin* 11(8) (September 1999) 12; IRD, *Tax Information Bulletin* 15(6) (June 2003) at 7.

¹⁶ See John Veal, Therese Turner and Craig Macalister *Staples Tax Guide 2014* (74th ed, Brookers, Wellington, 2014) at [540.235].

¹⁷ To help readability, the present tense is used in this paper to outline the proposal which was not, of course, enacted.

- The parking space is provided to the employer by a commercial car park operator for a consideration of more than \$210 per month; or
- The employee is entitled to a greater amount of employment income if the employee had not chosen to receive the car park benefit (that is, a salary sacrifice).

The tax treatment of a parking space depends on whether or not it is allocated to a specific employee. If a parking space is allocated to a specific employee, a fringe benefit of one parking space arises on a day when the employer makes the space available to the employee. A fringe benefit does not arise if the parking space is restricted to a “business or certificated vehicle” (that is, a motor vehicle with a valid disabled parking permit, a work-related vehicle, or a pool vehicle that is not available for private use).

If a parking space is not specifically allocated to one employee (that is, a pool parking space), a fringe benefit arises from the availability of a pool parking space for an employee, of:

- One parking space, if the number of pool parking spaces is equal to or greater than the number of pool parking users;
- Zero, if the employee is restricted to the use of a pool parking space for parking outside the hours between 6 am and 10 pm;¹⁸
- Zero, if the number of pool parking spaces is equal to or greater than the number of pool parking users and the employee is restricted to the use of a pool parking space for parking a business or certificated vehicle;
- A fraction of a parking space, if the number of pool parking spaces is less than the number of pool parking users, and the night shift exclusion does not apply.¹⁹

The daily value of a fringe benefit that arises from the availability of a parking space is one of the following, if the parking space is:

¹⁸ The rationale for excluding parking outside the hours of 6am to 10pm is set out in the “Commentary on Supplementary Order Paper No 167 to the Bill” (2012) at 7 <www.taxpolicy.ird.govt.nz>: “This recognises the fact that public transport may not be readily available during those hours. It also recognises the fact that two employees may be parking in the same space at different times during the day and night.”

¹⁹ The formula for calculating the fraction is complex and is not detailed here because it would not contribute to the discussion.

- Provided by a commercial car park operator, the value of the parking space is the amount charged by the car park operator to the employer for the parking space for one day (treating a month as having 30 days and a year as having 360 days);
- In the Auckland or Wellington CBD and is not provided by a commercial car park operator, the value is a standard value determined by the Commissioner of Inland Revenue (anticipated to be \$250 per month);
- Not in the Auckland or Wellington CBD and is not provided by a commercial car park operator, a fringe benefit arises only if the employee sacrificed employment income for the parking space. In this situation, the value of the fringe benefit is the amount of additional employment income the employee would have been entitled to if they had chosen not to receive the parking space.²⁰

2.3 The GTPP

According to Adrian Sawyer, the “GTPP is founded on principles of transparency, increased external input, and clear accountabilities’ and is intended ‘to facilitate exposure to alternative views at each stage of the process, and redress the deficiency of focus in the [pre-1984] tax policy process”.²¹ The GTPP has five stages: strategic, tactical, operational, legislative, and implementation and review.²² The legislative stage is the critical concern currently. At this stage, legislation is drafted and introduced to Parliament; subjected to the select committee process during which formal submissions are made and IRD officials’ are afforded the opportunity to respond in detail.²³ The relevant select committee is the Finance and Expenditure Committee (“the Committee”). Struan Little and his co-authors observe that “consultation is based on the premise that interested parties will engage at the appropriate stage

²⁰ SOP 167, cls 12D, 13D, 44B and 67C.

²¹ Adrian J Sawyer “Broadening the Scope of Consultation and Strategic Focus in Tax Policy Formulation – Some Recent Developments” (1996) 2 NZJTL 17 at 18. For a concise, plain language overview of the GTPP, see Peter Dunne “Keynote Address to EMA Annual Payroll Conference” (2013) <www.beehive.govt.nz>. For a critical review of the GTPP in practice, see Peter Vial “The Generic Tax Policy Process: A “Jewel in our Policy Formation Crown”?” (2012) 25(2) NZULR 318.

²² See Matt Bengt “Formalising Good Tax Policy Practice: the New Zealand Model Structures, Processes and Governance in Tax Policy-Making” Paper presented at the Said Business School, Oxford, 8-9 March 2012 <www.sbs.ox.ac.uk>.

²³ Ibid.

of the GTPP”.²⁴ In other words, opposition to a proposed change should be communicated to IRD, considered by officials and communicated to Cabinet at the operational stage.

Of the 56 submissions to the Committee on the Bill, 31 related to SOP 167 although seven of these were supplementary opinions, presented in response to requests from the Committee.²⁵ All support for the measure was qualified. The New Zealand Law Society, the New Zealand Institute of Chartered Accountants (now known as Chartered Accountants Australia and New Zealand), certain large law firms and two “Big Four” accounting practices supported the proposal in principle but suggested simplification measures to reduce compliance costs. While opponents were dominated by FBTAG and business groups, certain large law firms and accounting practices also opposed the proposal. PricewaterhouseCoopers, for example, supported “the policy intent of the proposed changes” but considered “that compliance costs will outweigh the policy objectives and any revenue generation in these circumstances”.²⁶ Broadly, for opponents, the cost of compliance would disproportionately outweigh any benefits that might accrue from extending the FBT net.

In the light of the common concern regarding compliance burden, the Committee requested submitters (and IRD) to quantify costs. Wilson Parking claimed “we estimate at least 10 times as much time will be spent in preparing the FBT return”;²⁷ whereas Ernst & Young conceded it was “difficult to provide specific quantification”.²⁸ Deloitte, which originally submitted that “compliance costs imposed on taxpayers will be in excess of additional tax revenue expected to be gained” admitted that ‘it is very difficult to estimate compliance costs’.²⁹ Indeed, accurately calculating FBT compliance costs is notoriously difficult.³⁰ However, FBTAG commissioned a report from Lock & Co, an Auckland firm of accountants,

²⁴ Little et al, above n 3, at 1054. Little and Fenwick are IRD officials; Nightingale is a director of PricewaterhouseCoopers.

²⁵ See New Zealand Parliament “Committee Documents: Evidence/Submissions” (2013) <www.parliament.nz>.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See, for example, Cedric Sandford and John Hasseldine *The Compliance Costs of Business Taxes in New Zealand* (Institute of Policy Studies, Victoria University of Wellington, 1992) at 56.

which concluded that the costs would be \$30 million a year – far in excess of the amount of projected revenue and savings (\$17 million in additional income tax and \$5 million in benefit savings).³¹ IRD did not present evidence to contradict this figure but was, it is understood, preparing a rebuttal at the time the proposal was withdrawn.³² The disclaimer to the Lock & Co calculation is notable because it indicates the lack of robustness in their calculation:

Figures in this document have been compiled from data obtained from Statistics New Zealand, Wikipedia, the 2012 Hays Salary guide, discussions with [the] Chief Financial Officer and relevant staff of a large Auckland CBD company and relevant assumptions. We believe the figures above to be accurate however these have not been audited or verified in any way and we accept no responsibility whatsoever for them.³³

Despite the questionable provenance of the Lock & Co figure,³⁴ it was broadly accepted as authoritative in the media and by the opposition Labour party.³⁵

2.4 Application of Tax Principles

The Tax Working Group identified the following six principles of a good tax system: the overall coherence of the system; efficiency and growth; equity and fairness; revenue integrity; fiscal cost; and compliance and administration costs.³⁶ IRD has adopted these principles.³⁷ The more criteria to be taken into account, the less likely it becomes that a particular tax measure

³¹ New Zealand Parliament, above n 25.

³² See Adam Bennett “Inner-City Carpark Tax Plan about Fairness, Says Dunne” *The New Zealand Herald* (online ed, Auckland, 18 March 2013).

³³ Ibid.

³⁴ Compliance costs “take diverse forms and are dispersed throughout the economy”: see Sandford et al, above n 7, at 27. It seems unlikely that Locke & Co’s cursory investigation could have accurately captured the true cost.

³⁵ See, for example, Vernon Small and William Mace “Government Ditches Controversial Car Park Tax Plan” *Stuff* (online ed, New Zealand, 18 March 2013).

³⁶ See *A Tax System for New Zealand’s Future: Report of the Victoria University of Wellington Tax Working Group* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, 2010) (TWG) at 15 <www.victoria.ac.nz>.

³⁷ See, for example, IRD *Briefing to the Incoming Minister* (2011) at 27-28 <www.ird.govt.nz>.

will meet all criteria.³⁸ It is then a matter of preference and political judgment as to the weight given to each criterion. In its regulatory impact statement (‘RIS’),³⁹ IRD placed particular emphasis on equity⁴⁰ but a politically plausible narrative needs to be constructed, and achieving this is difficult given FBT’s unpopularity as an element of income tax.

2.4.1 Coherence

“Individual reform options should make sense in the context of the entire tax system. While a particular measure may seem sensible when viewed in isolation, implementing the proposal may not be desirable given the tax system as a whole.”⁴¹ We might reasonably consider a tax in the context of other policy goals: for example, levying heavy excise duties on tobacco is congruent with the efficient allocation of scarce resources in the public health system.⁴² Likewise, FBT on motor vehicles may be considered along with government priorities for transport.⁴³

In 2012, the New Zealand Transport Agency, the government agency charged with implementing national transport policy, commissioned a research report from Booz & Co on

³⁸ Carl S Shoup *Public Finance* (Weidenfeld and Nicolson, London, 1969) at 22 identifies only equity and efficiency as “consensus criteria”.

³⁹ A regulatory impact statement “provides a standalone summary of the [regulatory] impact analysis for decision-makers and must include all the required information”: see The Treasury *Regulatory Impact Analysis Handbook* (2013) at [1.2] <www.treasury.govt.nz>.

⁴⁰ IRD “Regulatory Impact Statement: Salary Trade-Offs” (2012) at [61] <www.taxpolicy.ird.govt.nz>.

⁴¹ TWG, above n 36, at 15.

⁴² Heavy excise duties on cigarettes encourage smokers to quit. Quitting before surgery has positive surgical and thus cost outcomes: see Michelle Duff and Jo Moir “Quit before Surgery, Doctors Tell Smokers” *The Dominion Post* (online ed, Wellington, 9 November 2013).

⁴³ See New Zealand Transport Agency *Addressing Severe Congestion* (2012) <www.nzta.govt.nz>.

the effects of company cars and FBT on strategic transport targets.⁴⁴ In addition to noting the breach of the fundamental principle of horizontal equity, the report concluded:⁴⁵

- Commuters with the highest parking costs gain the largest untaxed fringe benefit;
- The FBT system subsidises and encourages (long-distance) driving over resource-efficient ways of travelling to work, such as walking, cycling and public transport;
- FBT policy does not take into account the externalities of driving which include congestion, road and parking facility costs, crashes, energy consumption, pollution emissions, sedentary living/obesity and sprawl. The broader community bears the costs of these externalities;
- Exemption of employer-provided parking is a widespread benefit that has a significant impact on transport choices. The value of employer-provided car parking in the largest cities is around \$2700 per employee;
- Australia provides a viable model for taxing employer-provided car parks;
- Employee parking subsidies undermine attempts to encourage more efficient commuting behaviour.

In a joint submission to the TWG, IRD's Policy Advice Division and the Treasury suggested:⁴⁶

One area where the government could potentially take the lead and which is recommended as a forerunner to any attempt to "green" the tax base to raise revenue, is reviewing existing tax legislation to identify whether there are biases or implicit subsidies currently embedded in the tax Acts which might run counter to environmental policy settings and sustainability objectives more generally.

⁴⁴ R A Scott, G V Currie and K J Tivendale *Company Cars and Fringe Benefit Tax – Understanding the Impacts on Strategic Transport Targets* (2012) NZ Transport Agency Research Report 474 at [7.1] <www.nzta.govt.nz>. The report considered both the provision of company cars and car parks. The arguments for each are similar but, it seems likely that the provision of subsidised company cars has the greater effects on inner city congestion and urban sprawl.

⁴⁵ Ibid.

⁴⁶ IRD and the New Zealand Treasury "Other Base Broadening and Revenue Raising Ideas: Background paper for Session 3 of the Victoria University of Wellington Tax Working Group" (2009) at 38 <www.victoria.ac.nz>.

Unfair parking subsidies are an obvious area for correcting environmentally unfriendly tax policies.

2.4.2 Efficiency and Growth

“Taxes should be efficient and minimise as far as possible impediments to economic growth. That is, the tax system should avoid unnecessarily distorting the use of resources”.⁴⁷ This criterion in part aligns with the principle of neutrality which holds that taxes should not alter individuals’ or companies’ investment decisions.⁴⁸ Under the current set up, FBT on car parks does not have neutral effect; rather it encourages an inefficient allocation of resources from both financial and environmental perspectives. The proposal appropriately seeks neutrality. However, the second leg of the efficiency and growth criterion is that taxes should not impose “heavy costs on individuals and firms”.⁴⁹ This issue is considered under the heading of compliance and administration costs below.

2.4.3 Equity

“The tax system should be fair ... Assessment of both vertical equity ... and horizontal equity ... is important.”⁵⁰ A fundamental and uncontroversial tax principle holds that taxes on income should manifest horizontal equity so that taxpayers with similar incomes should bear a similar income tax burden.⁵¹ FBT can be seen as an element of the Haig-Simons comprehensive income tax model,⁵² which seeks to ensure horizontal equity by including all annual increments in wealth in the income tax base. In New Zealand, FBT is charged to the employer,⁵³ rather

⁴⁷ TWG, above n 36, at 15.

⁴⁸ William J Baumol and Alan S Blinder *Economics: Principles and Policy* (5th ed, Harcourt Brace Jovanovich, San Diego (Cal), 1991) at 705.

⁴⁹ TWG, above n 36, at 15.

⁵⁰ Ibid.

⁵¹ See Bernard Herber *Modern Public Finance* (5th ed, Irwin, Homewood (Ill), 1983) at 119.

⁵² See, generally, Robert Murray Haig *The Federal Income Tax: A Series of Lectures Delivered at Columbia University in December, 1920* (Columbia University Press, New York, 1921) and Henry C Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (University of Chicago Press, Chicago, 1938).

⁵³ Despite separate legislation for FBT in Australia, it is submitted that, in both Australia and New Zealand, FBT is an element of comprehensive income tax, even though the employer pays the tax. New Zealand

than the value of the benefit being included in the employee's income as the Haig-Simons model indicates but it may be presumed that the employer will pass on the FBT cost to the employee by reducing their remuneration.⁵⁴ However, employees with strong negotiating power, notably executive directors, may be able to ensure that the tax cost stays with the employer.⁵⁵ Current FBT rules favour some benefits over others, for example: employer A, which subsidises its employees' public transport costs, is subject to FBT but employer B, which provides on-site parking, is not.⁵⁶ Assuming employers do in practice pass on their FBT costs to their employees, employee A of employer A, who earns the same income as employee B of employer B, pays more tax on a similar value of income.⁵⁷

Vertical equity is not technically breached since the calculation of FBT is based on the employee's marginal income tax rate. Nevertheless, the sentiment prevails that the proposal is

was the first country to adopt this unusual method of taxing fringe benefits and has only been followed by Australia: see Sandford and Hasseldine, above n 30, at 49.

⁵⁴ In the orthodox economic view, FBT imposed "on an employer has the same economic effect as imposing it on the employee": see Robert McLeod "Tax Avoidance Revisited" (2000) 6(2) NZJTL 103 at 109.

⁵⁵ A firm's surplus (income that exceeds claims of third party creditors) is contestably distributed between employees, directors and shareholders: see Erling Rasmussen *Employment Relations in New Zealand* (2nd ed, Pearson Education New Zealand, Auckland, 2009) at 390. If executive directors can avoid assuming FBT costs, those costs must deplete the pool of surplus available to employees and shareholders.

⁵⁶ How the subsidy is provided will determine its tax treatment. If the subsidy is paid to the employee in cash (or the employee is reimbursed for tickets purchased), it will be subject to income tax (PAYE) but not FBT. If the employer purchases tickets and gives these to the employee, this would be treated as a fringe benefit. In the latter case, the benefit would be subject to FBT at the rate of 42.86 per cent (based on the employee's total income and at current rates). In the example provided below n 58, it is presumed that a FBT liability is incurred.

⁵⁷ If employee A is entitled to cost-to-company annual remuneration of \$55 000, including a \$5000 subsidy for public transport, the transport benefit would be subject to FBT at the rate of 42.86 per cent (based on the employee's total income), i.e. \$2143. If this cost is passed on to the employee, Employee A's salary would be reduced to \$47 857. Tax at (assumed) 20 per cent would be \$9571, leaving a net salary of \$38 286 plus the \$5000 subsidy.

For Employee B (\$50 000 salary plus \$5000 tax-free on-site parking), the employee only pays PAYE on the \$50 000 salary, since the \$5000 on-site parking is income tax and FBT-free. Tax at 20 per cent would be \$10 000, leaving a net income \$40 000 plus \$5000 free parking.

regressive and that “[T]he only ones who will really get pinged by this carpark tax will be low-paid inner-city workers”.⁵⁸ As noted, senior employees are more likely to be able to bargain with the employer to assume the FBT cost. Furthermore, Kim Campbell, chief executive of the Employers and Manufacturers Association (Northern) (EMA), suggests “[T]he big end of town can afford to pay their tax lawyers more than the IRD can pay theirs. And they’ve always found their way around things.”⁵⁹ Conversely, if the proposal is rejected, a regressive benefit will continue to accrue to wealthier workers.⁶⁰

2.4.4 Revenue Integrity

“The tax system should be sustainable over time, minimise opportunities for tax avoidance and arbitrage, and provide a sustainable revenue base for government.”⁶¹ Along with promoting equity, IRD considered protecting the tax base to be an important motivation for the proposal. The failure to tax fringe benefits, it argues, “may also encourage further behavioural changes that cause a material risk to the tax base as they become increasingly common”.⁶² Conversely, as John Hasseldine argues, “a significant part of the problem of tax non-compliance may be attributed to the complexities of tax laws and high compliance costs”.⁶³

2.4.5 Fiscal Cost

⁵⁸ Matt McCarten “On Bosses’ Side over Carpark Tax” *The New Zealand Herald* (online ed, Auckland, 17 March 2013).

⁵⁹ Hamish Rutherford “Car Parks Tax Broken Promise – Employers” *The Dominion Post* (Wellington), 14 March 2013 at A2. Somewhat cryptically, Campbell adds “I have no idea but they’re very, very inventive”: see *ibid*.

⁶⁰ Julie Anne Genter notes: “The reality is that the vast majority of people driving to work in the Auckland and Wellington central business districts are on high incomes, so continuing to subsidise car-parks is actually a regressive move.” See *New Zealand Parliamentary Debates*, House of Representatives, 26 June 2013, 691, 11340 (Julie Anne Genter) <www.parliament.nz>.

⁶¹ TWG, above n 36, at 15.

⁶² IRD, above n 40, at [10].

⁶³ John Hasseldine “Linkages between Compliance Costs and Taxpayer Compliance Research” in Chris Evans, Jeff Pope and John Hasseldine (eds) *Tax Compliance Costs: A Festschrift for Cedric Sandford* (Prospect, St Leonards (NSW) 2001) 3 at 11.

“Tax reforms need to be affordable given fiscal constraints.”⁶⁴ There is no indication that the proposal would create significant costs for government; indeed, it would generate modest revenue. But a critical feature of FBT is that it shifts costs to taxpayers with a disproportionate effect being incurred by smaller businesses which lack the economies of scale enjoyed by larger firms. Cedric Sandford and John Hasseldine argue that since this “is a state-created disadvantage and not one arising from their inefficiency in the market they have chosen. It can be strongly argued that the state has an obligation to remove, compensate for, or, at least, minimise that disadvantage”.⁶⁵ The cost of compliance is, of course, the most contentious feature of the proposal.

2.4.6 Compliance and Administration Costs

“The tax system should be as simple and low cost as possible for taxpayers to comply with”.⁶⁶ Sandford and Hasseldine define “compliance costs” as “the costs which individuals and organisations incur in meeting the requirement laid on them by tax law, over and above the payment of tax, and over and above any distortion costs inherent in the nature of tax”.⁶⁷ Because of the importance of the small and medium enterprise (SME) sector, compliance costs attract significant research attention in New Zealand,⁶⁸ particularly since such costs tend to be

⁶⁴ TWG, above n 36, at 15.

⁶⁵ Sandford and Hasseldine, above n 30, at 110.

⁶⁶ TWG, above n 36, at 15.

⁶⁷ Sandford and Hasseldine, above n 30, at 5. See also Binh Tran-Nam, Chris Evans, Michael Walpole and Katherine Ritchie “Tax Compliance Costs: Research Methodology and Empirical Evidence from Australia” (2000) 53(2) NTJ 229 at 229 and Sandford et al, above n 7, at 10.

⁶⁸ In addition to sources otherwise cited, see, inter alia, Chris Evans and Binh Tran-Nam “Tax Compliance Costs in New Zealand: An International Comparative Evaluation” (Tax Administration for the 21st Century Working Papers WP 02/2014, 2014); Katherine Ritchie “The Tax Compliance Costs of Small Business in New Zealand” in Chris Evans, Jeff Pope and John Hasseldine (eds) *Tax Compliance Costs: A Festschrift for Cedric Sandford* (St Leonards (NSW), Prospect, 2001) at 297; W Robert J Alexander, John D Bell and Stephen Knowles “Quantifying Compliance Costs of Small Businesses in New Zealand” Economics Discussion Paper No. 0406 (University of Otago, 2004); Colmar Brunton *Measuring the Tax Compliance Costs of Small and Medium-Sized Businesses: A Benchmark Survey, Final Report prepared for Inland Revenue* (2004) <www.taxpolicy.ird.govt.nz>; IRD *SME Tax Compliance Costs 2009, Evaluation Reports 1, 2 and 3* (2010) <www.ird.govt.nz>; Ranjana Gupta and Adrian J Sawyer “Tax Compliance Costs for Small Businesses in New Zealand: Some Recent Findings” (2015) 30(1) Australian Tax Forum 135.

regressive and impact disproportionately on smaller businesses “whose competitiveness is therefore reduced”.⁶⁹ Generally, FBT is “costly to enforce but is seen as necessary to counter tax avoidance by way of paying non-cash remuneration”.⁷⁰

Heather Buchan and her co-authors observe that “[t]he general motivation behind the introduction of FBT is to encourage the employer to pay the employee in cash-based remuneration rather than using fringe benefits”.⁷¹ Employers can therefore avoid all FBT compliance costs by paying their employees in cash. In other words, if employers choose to pay in-kind, they voluntarily incur compliance costs.⁷² Regarding the proposal, IRD argues that “complexity is required to appropriately tax non-cash benefits and integrate the approach with the already detailed FBT system”.⁷³ Such an approach fuels the “criticism that the Inland Revenue and the various governments (sic) commitment to reducing small business tax compliance costs has not been genuine”.⁷⁴ Whether or not IRD is unsympathetic to SMEs incurring ostensibly voluntary compliance costs,⁷⁵ it should have sought to quantify the cost of FBT extension in the RIS but did not do so: this omission would prove to be the Achilles heel of the proposal.

⁶⁹ Sandford et al, above n 7, at 212.

⁷⁰ Jon Greenheld “The Tax Environment in New Zealand” in Keith Hooper et al (eds) *Tax Policy & Principles: A New Zealand Perspective* (Brookers, Wellington, 1998) 79 at 92.

⁷¹ Heather Buchan, Karin Olesen and Helen Carberry “Fringe Benefit Tax on Motor Vehicles: Complexity and Compliance Cost” (2013) 11(2) NZJABR 59 at 59.

⁷² However, Shirley Carr and Carrol Chan observe that “employees are no indifferent as to whether they provide fringe benefits or cash, and many in-kind benefits are provided for business reasons which are not necessarily tax related”: see Shirley Carr and Carrol Chan “New Zealand’s Fringe Benefit Tax” 20 Years on: An Empirical Investigation into Employers’ Perceptions” (2004) 10 NZJTL 245 at 266.

⁷³ IRD, above n 40, at [60].

⁷⁴ Richard Lynch “Reducing Small Business Tax Compliance Costs: A Review” (2002) 8 NZJTL 253 at 279.

⁷⁵ Indicating a degree of sympathy for employers, IRD says “[e]mployer FBT systems/processes would need to be updated to ensure compliance with these new rules. This would increase compliance costs, although substantial work has been done (taking submitters’ concerns into account) in order to minimise the compliance costs.” See IRD, above n 40, at [58]. Adopting an Australian-style “statutory formula method” would have improved the proposal: see Fringe Benefits Tax Assessment Act 1986 (Cth), div 10A of pt III.

2.5 Critique of Proposal

The proposal manifested a number of policy flaws, including the unnecessary inclusion of low-pay workers and arbitrary geographic specificity, but was, it seems, principally undermined by an inadequate RIS.

2.5.1 Inclusion of Low-Pay Workers

The in-principle exclusion of shift workers was not given full effect. It emerged at the Committee stage but not, it seems, during consultation⁷⁶ that some low-pay shift workers (including Unite union members) would, most likely, be disproportionately affected by the proposal. Since it was accepted in principle that shift workers should be excluded, greater efforts could have been made, before or during the select committee stage, to identify who would be affected and appropriate exclusions crafted.

2.5.2 Geographical Specificity

Specific application of the proposal to the Auckland and Wellington CBDs was designed to reduce compliance costs.⁷⁷ But, once this decision was made, policymakers were left with the inevitably controversial task of delineating the affected areas.⁷⁸ Furthermore, the proposal was exposed to claims of a breach of horizontal equity.⁷⁹ Applying FBT to car parks above a certain value threshold would have obviated arbitrary geographical outcomes and neutralised arguments such as “incentivising development outside of the central business district”.⁸⁰

⁷⁶ See Dunne’s comments on lack of opposition during the consultation phase reported in Bennett, above n 32.

⁷⁷ See IRD, above n 41, at [58].

⁷⁸ SOP 167 defined the extent of the respective CBDs. For Wellington, the delineated area extended significantly beyond the parameters of what is generally recognised as the city’s CBD. For both affected cities, the boundaries of the CBDs, as drawn in the proposal, created arbitrary outcomes: for examples, see McCarten, above n 58.

⁷⁹ Parliamentary Services’ submission to the Committee particularly criticised the geographical inequity of the proposal: see New Zealand Parliament, above n 26.

⁸⁰ See Genter, above n 60.

FBTAG presented some related arguments: see, for example, McCarten, above n 58. However, numerous other factors would be relevant to a decision as to where a company locates its offices, for example, local government rating policy, and efficient and cheap public transport. In Wellington, the

2.5.3 Inadequate RIS

The New Zealand Institute of Economic Research (“NZIER”), which was commissioned by FBTAG, concluded that the RIS failed to:⁸¹

- Comply with the Cabinet requirement for best possible advice, notably identifying the nature and size of a problem;
- Quantify the number of employer-sponsored car parks;
- Consider the indirect economic effects;
- Identify plausible compliance costs;
- Take into account distortionary effects of geographical boundaries.

Proportionality requires a rational link between a policy goal and a predicted outcome to be demonstrated.⁸² Although the NZIER did not present alternatives,⁸³ its report highlighted the RIS’s lack of sufficient evidence to demonstrate a rational nexus between the proposal and the desired policy outcome. In short, IRD should not have proposed regulatory change without “undertaking impact analysis to provide assurance that the case for the proposed change is robust”.⁸⁴

2.6 Concluding Comments on Part II

Writing in 1989, when tax compliance cost measurement was in its infancy, Sandford and others observed that “minimising compliance costs cannot be pursued without regard to the

costs of earthquake strengthening are likely to be far more significant considerations for building owners than parking costs.

⁸¹ See NZIER “Taxation of Salary Trade-offs” (7 March 2013) <www.parliament.nz>.

⁸² The principle of proportionality links appropriate means and justifiable ends: see, for example, Eric Engle “The History of the General Principle of Proportionality: An Overview” (2012) 10 *Dartmouth LJ* 1 at 1-11. RISs are underpinned by the proportionality principle: see, generally, Treasury, above n 39.

⁸³ Rob Hosking “What’s Behind Government Nip and Tuck Tax Grab?” *The National Business Review* (New Zealand), 15 March 2013, at 4 reports that the NZIER provided FBTAG with a report showing “the cost to employers could be \$30 million a year”. If this is correct, the report was not made publicly available. It seems more likely that the estimated figure is derived from accountants Lock & Partners’ estimate.

⁸⁴ Treasury, above n 39, at [2.1]. Why IRD pushed ahead with the proposal before gathering plausible evidence is a matter of speculation. Cynics might ask: did officials become obsessed with pursuing technical purity in FBT or were they perhaps keen to eliminate a privilege they did not enjoy?

effect of administration costs, and it will often conflict with equity or a concern for neutrality or efficiency in resource use and it will often have to give way”.⁸⁵ It seems that since then, compliance costs have taken on greater urgency in tax policy. Despite uncertainty about the amounts involved, the proposal would have removed unjustified breaches of horizontal equity and brought a clear fringe benefit into the tax net. Furthermore, the likely effects of the extension of FBT on traffic congestion were in line with government’s long-term transport goals. Certainly, the proposal as introduced manifested certain design faults but these deficiencies could have been identified, investigated and remedied during the Committee stage of the Bill. However, IRD’s failure to provide persuasive information left a blank slate on which opponents’ spin doctors could project their own unsupported figures.⁸⁶

3 Narrative

In this part of the paper, the main players are identified and a timeline of the proposal’s defeat is sketched.

3.1 *Dramatis Personae*

- FBTAG originally comprised the EMA, the Property Council and Tournament Parking.⁸⁷
- Matthew Hooten is a right wing commentator and principal of Exceltium,⁸⁸ the corporate and public affairs consultancy that ran the anti-proposal campaign for FBTAG.
- Matt McCarten is an experienced left wing activist, who is particularly noted for his success in recruiting fast food and other low-pay workers into the Unite union and negotiating better wages and conditions, including subsidised parking for cleaners at the SkyCity casino in central Auckland.

⁸⁵ Sandford et al, above n 7, at 212.

⁸⁶ “Editorial: Good Reasons to Ditch Plan for Tax on Carparks” *The New Zealand Herald* (online ed, Auckland, 18 March 2013).

⁸⁷ See FBTAG “Government Plans New Tax on Motorists” (media release, 11 March 2013).

The New Zealand Confederation of Trade Unions (“CTU”) announced that it would join FBTAG on the day the proposal was withdrawn: see CTU “CTU Joins Action Group against Carpark Tax” (media release, 18 March 2013).

⁸⁸ “FBT Action Group” Exceltium (2013) <www.exceltium.com>.

- Peter Dunne, solo Member of Parliament for and leader of the centrist United Future party, was the Minister of Revenue (outside Cabinet) at the time of the proposal; he held the same post under the previous Labour-led government.
- Prime Minister John Key was previously National Party spokesperson for finance and was an outspoken opponent of FBT extensions which might give rise to undue compliance costs.
- Bill English is Minister of Finance.
- Michael Cullen was Minister of Finance under the fifth Labour government (1999-2008).
- David Cunliffe was at the time of the proposal Labour Party opposition finance spokesperson.
- Julie Anne Genter is the Green Party's transport spokesperson and, by profession, a transportation consultant.

3.2 Timeline

According to Exceltium, “[T]he proposed tax was abandoned within a week of the campaign going public”.⁸⁹ Once the issue entered into public discourse, the Minister of Revenue capitulated in a remarkably short period of time;⁹⁰ indeed, the Communication Agencies Association of New Zealand (“CAA”), which represents about 100 advertising and media agencies, joined FBTAG but the proposal was retracted before CAA could put its planned campaign into action.⁹¹ However, the issue is older than that, as the following timeline indicates.

1 April 1985

FBT is introduced to New Zealand as part of the radical restructuring of the economy under the neoliberal fourth Labour government (1984-1990). Neutrality is a key informing principle

⁸⁹ See *ibid.* Hooten does, of course, have an interest in boosting his firm's effectiveness as spin doctors.

⁹⁰ Dunne announced the proposal on 11 December 2012 and, with Bill English, announced its withdrawal on 18 March 2013.

⁹¹ See Ricki Green “NZ Communications Agencies Represented by CAANZ Join FBT Anti Car Park Tax Group” *Campaign Brief* 13 March 2013 <www.campaignbrief.com>. “CAA” has been used in this paper rather than “CAANZ” to avoid confusion with Chartered Accountants Australia and New Zealand which also uses “CAANZ”, and whose initials are likely to be more familiar to readers of this paper.

of the tax reforms.⁹² However, while full capture of the value of all perquisites is an impeccable principle,⁹³ FBT may be problematic to implement.⁹⁴

2004

Michael Cullen rejects IRD officials' proposal for an extension of FBT. According to an anonymous Fairfax Media reporter, IRD officials 'tried to get their car park tax through ... but finance minister Sir Michael Cullen was not having it. In 2004, he said the tax had several "thorny issues" and his government had "no intention of imposing extra costs on businesses for the sake of it".⁹⁵

2005

As opposition finance spokesperson, John Key promises not to extend FBT.⁹⁶

September 2009

A joint Treasury-IRD submission to the TWG promotes the benefits of FBT on employer subsidised cars and car parking as a transitional measure towards explicitly green taxes.

20 May 2010

In his 2010 Budget Speech,⁹⁷ Bill English talks of reforms to improve the fairness and integrity of the tax system but no explicit mention is made of extending the FBT base.

April 2012

⁹² See Paul Goldsmith *We Won, You Lost, Eat That!: A Political History of Tax in New Zealand since 1840* (David Ling, Auckland, 2008) at 294-99.

⁹³ See Kim Brooks "Delimiting the Concept of Income: The Taxation on In-kind Benefits" (2004) 49 McGill LJ 255 at 293-96 on the principle of taxing employer-subsidised parking.

⁹⁴ See Simons, above n 52, at 53 on Kleinwächter's Conundrum which related to in-kind benefits for Austrian military personnel, such as compulsory opera attendance.

On perceived complexity of FBT and motor vehicles, see Paul Swain "Fringe Benefit Tax Review – Motor Vehicles Top List of Concerns" (media release, 24 February 2003).

⁹⁵ "Today in Politics: Friday, March 15" *Stuff* (online ed, New Zealand, 15 March 2013).

⁹⁶ Rutherford, above n 59 at A2.

⁹⁷ Bill English *Budget Speech* (2010) <www.treasury.govt.nz>.

IRD's Policy Advice Division publishes an officials' issue paper.⁹⁸ Referring to the 2010 Budget comments on fairness and integrity, the paper establishes the following basic principle:⁹⁹

Key in this objective is the comprehensive taxation of labour income and other benefits provided by employers to their employees in exchange for labour services, or as comprehensive an approach as practicalities will allow.

Furthermore, revisiting the issue that Cullen had rejected as too "thorny", the paper states:¹⁰⁰

Focusing on salary trade-offs also addresses a long-standing issue with the current boundary used to determine whether the provision of a car park is or is not a fringe benefit. That boundary has traditionally been whether the car park is on the employer's premises, with "premises" being based on the interpretation of common law so that a leased car park, like one that is owned by the employer, is exempt from FBT whereas a licensed car park is not. There are, however, arguments that some licensed car parks would also qualify for an exemption, which would make the boundary hard to identify. Under the suggested salary trade-off approach, this distinction would be removed. All car parks and childcare benefits would be excluded from the on-premises FBT exemption and instead only be taxable when part of a salary trade-off.

13 September 2012

The Bill is released.

19 September 2012

IRD submits its RIS to Cabinet in which it states:¹⁰¹

Inland Revenue consulted on the proposals ... Submissions generally supported the concept of equity of treatment ... A major concern was the additional compliance costs ... To address these compliance concerns, the proposed approach focuses primarily on the material (largest) benefits which are provided to employees.

3 October 2012

⁹⁸ IRD *Recognising Salary Trade-offs as Income: An Officials' Issues Paper* (2012) <www.taxpolicy.ird.govt.nz>.

⁹⁹ Ibid, at [1.2].

¹⁰⁰ Ibid, at [1.3].

¹⁰¹ IRD, above n 41, at [62]-[63].

Announcing new FBT rules in relation to employer-provided car parks, Dunne says “[W]e have listened to public submissions and the proposed new rules are now narrower than originally suggested, focusing predominantly on employer-provided car parks”.¹⁰² He explains further:¹⁰³

A wider set of car parks provided to employees are to be taxed, through the FBT (Fringe Benefit Tax) rules. The new FBT rules will focus predominantly on car parks provided to employees in the Auckland and Wellington CBDs (the areas where the benefits to the employee are greatest). There will be certain exclusions, for example, for car parks used by work vehicles, for late night shifts and disabled car parks. To reduce compliance costs, standard values will apply when the car park is not provided through a commercial car park operator.

11 December 2012

Supplementary order paper 167 is released. Although the extended rules cover all car parks that cost an employer more than \$210 a month, the proposal is generally interpreted as a regional tax as it will mostly affect Auckland and Wellington CBDs.¹⁰⁴

13 February to 27 March 2013

Submissions are made to the Committee, including NZIER’s critical assessment of the RIS submitted by FBTAG on 7 March.

11 March 2013

FBTAG releases its first press release.¹⁰⁵

13 March 2013

CAA joins FBTAG.

14 March 2013

- EMA’s Campbell publicly reminds Key of his 2005 promise to “remove a substantial amount of the paperwork that currently occupies too much administrative time for many of

¹⁰² Peter Dunne “Decisions on Salary Trade-offs Follow Consultation” (media release, 3 October 2012).

¹⁰³ Ibid.

¹⁰⁴ See, for example, Christopher Adams “Carparks Set to Tax Employers” *The New Zealand Herald* (online ed, Auckland, 13 December 2012).

¹⁰⁵ FBTAG, above n 88.

our businesses, especially the small ones’ and not to ‘entertain suggestions of applying FBT to on-premises car parks’.¹⁰⁶

- National Party MPs seek to distance themselves from the proposal, claiming it was Dunne’s “brainchild”.¹⁰⁷

15 March 2013

An anonymous Fairfax Media political commentator blames IRD officials for the proposal:¹⁰⁸ “Inland Revenue Department officials are like rust, they never sleep ... Almost a decade [after Cullen’s rejection], officials are trying again with Revenue Minister Peter Dunne.”

18 March 2013

AM

- IRD officials are reported to be testing FBTAG’s claim of an annual compliance cost of \$30 million a year “across the almost 200,000 carparks in the Auckland and Wellington CBDs the tax would apply to”.¹⁰⁹
- *The New Zealand Herald*, the country’s largest circulation daily newspaper,¹¹⁰ publishes an editorial opposing the proposal.¹¹¹
- Dunne defends the fairness of the proposal and the consultation process.¹¹²

PM

¹⁰⁶ Rutherford, above n 59, at A2.

¹⁰⁷ Richard Meadows “Govt Blames Dunne for Car Park Tax Mess”, *Stuff* (online ed, New Zealand, 14 March 2013).

¹⁰⁸ “Today in Politics: Friday, March 15”, above n 96.

¹⁰⁹ Bennett, above n 32.

¹¹⁰ *The New Zealand Herald* has a daily circulation of approximately 150 000: see ‘Press Audit Results’ (2013) ABC <www.newspaper.abc.org.nz>. Online readers are far more numerous. In a representative survey of New Zealand adults, more than 35 per cent had visited the *Herald*’s webpage in the previous month: see “Google Tops Web Site Use in New Zealand” HorizonPoll (2012) <www.horizonpoll.co.nz>.

¹¹¹ “Editorial: Good Reasons to Ditch Plan for Tax on Carparks”, above n 87. See below n 138 on Genter’s claim that there are only 24 000 car parking spaces in Auckland.

¹¹² Bennett, above n 32.

English and Dunne release a joint media release announcing withdrawal of the proposal and stating:¹¹³

While we do not resile from that general principle of fairness, we do need to be pragmatic. This was considered likely to be *one of those proposals from IRD* where the cost of compliance, compared with the likely return, made it not worth pursuing.

19 March 2013

- The government back-down on the proposal is widely reported.
- Prime Minister Key casts doubts on IRD officials' figures, saying: "Not \$30 million, maybe \$3 million, but what the officials said that it's very subjective, so it could be a bit more, it's hard for them to absolutely know. Say you raise \$17 million but you put \$6 million or some other number like that cost on the private sector, in the end it probably wasn't worth that."¹¹⁴
- Key makes it clear that a mooted extension of FBT to employer-provided cellphones and laptops will not go ahead.¹¹⁵

6 June 2013

The Committee issues its report on the Bill and SOP 167. The Committee notes the compliance cost issues and also says "we also consider the proposed measure would raise safety issues for some CBD employees".¹¹⁶ Focus on this argument was unexpected, since FBTAG alone raised the issue of shift worker safety at the submission stage but then as a minor point, in a submission that was dominated by compliance and related concerns. (No trade union submissions were made to the Committee.) However, in a telling observation, the Committee noted that the proposal "generated some considerable comment in the media".¹¹⁷ Indeed, the

¹¹³ Bill English and Peter Dunne, "Tax Status of Carparks to Remain Unchanged" (media release, 18 March 2013) (italics added). The release was published on *Scoop*, a news aggregator at 2.24 PM.

¹¹⁴ Adam Bennett "Tax Backdown Pleases Business" *The New Zealand Herald* (online ed, Auckland, 19 March 2013).

¹¹⁵ Adam Bennett "iPad Tax' also Taken off the Table" *The New Zealand Herald* (online ed, Auckland, 19 March 2013).

¹¹⁶ New Zealand Parliament "Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill as reported from the Finance and Expenditure Committee, Commentary" (2013) <www.parliament.nz>. As noted, shift workers could have been more effectively excluded.

¹¹⁷ Ibid.

issue of worker safety – as opposed to cost and inconvenience – was essentially constructed by Matt McCarten;¹¹⁸ then taken up by the CTU *after* the proposal had become moribund.¹¹⁹

7 June 2013

Dunne resigns as Minister of Revenue. While his resignation is not caused by the failure of the proposal, David Cunliffe’s observation that “the u-turn showed Dunne was a lame duck minister” proves prophetic.¹²⁰

26 June 2013

Speaking in Parliament, Julie Anne Genter notes that, when the Bill “came to the Finance and Expenditure Committee, no one on the select committee, nobody speaking to the select committee, and not even the officials from the Inland Revenue Department were apparently aware of this [Booz & Co] report and the research that had gone into it”.¹²¹

December 2013

Little and others publish an article in the *Canadian Tax Journal* discussing the GTPP. On the defeat of the proposal, they observe:

Although a full consultative process was undertaken, the depth of private-sector concern was not truly evident (at least from the perspective of government officials) until the bill was before a select committee. This resulted in a solid policy proposal being overturned at the 11th hour. In this case, perhaps officials and private-sector representatives were only talking past each other, and a degree of “consultation fatigue” set in.¹²²

4 Analysis and Discussion

¹¹⁸ See McCarten, above n 58.

¹¹⁹ See CTU, above n 88.

¹²⁰ Small and Mace, above n 35. In early 2014, Dunne was re-appointed a Minister outside Cabinet but not as Minister of Revenue: see John Key “Prime Minister Announces Changes to Ministry” (media release, 21 January 2014).

¹²¹ Genter, above n 60. As noted, Treasury and IRD have advocated the use of FBT as a transitional measure towards environmental taxes: see IRD and Treasury, above n 47. It may be further noted that, first, the Booz & Co report did not investigate compliance costs and, second, Russell Norman, then co-leader of the Green Party, was a member of the Committee at the time of the submissions on the proposal.

¹²² Little et al, above n 3, at 1054.

In this part of the paper, it is argued that the way in which the debate was framed in the media was a crucial factor in the defeat of the proposal. The communications tactics of the various parties are therefore analysed and discussed. To this end, a search was conducted of the EBSCO Host Australia/New Zealand Reference Centre.¹²³ Results from Fairfax Media regional newspapers were excluded because articles are commonly repeated in group newspapers. It was thought likely that arguments would be sufficiently covered by *The Dominion Post* (Wellington) or *Stuff*, Fairfax's national news website.

4.1 Spin and Frames

Around half of the stories appearing in New Zealand newspapers “are likely to have some input from public relations people”.¹²⁴ Private and government communications specialists therefore play a critical role in influencing media content and thereby shaping public opinion. Steven Foster notes, “[T]he goal of [spin doctors] is to set the media's agenda, ensuring that the headlines are dominated by stories which play to their party's advantage”.¹²⁵ Trevor Morris and Simon Goldsworthy observe:¹²⁶

Spin is firmly associated with the exercise of power ... It conveys ... a sense of manipulation ... Spin implies that the information communicated is carefully selected and delivered in a way that is to the advantage of the sender of the message.

Frames are communication devices that reduce the complexity of an issue;¹²⁷ they include the key messages used to influence how people engage with political issues.¹²⁸ The

¹²³ “FBT OR fringe benefit tax AND car park*% OR carpark*” with a time parameter of 11–20 March 2013. Some additional Google searches were made.

¹²⁴ Gary Mersham, Petra Theunissen and Joseph Peart *Public Relations and Communication Management: An Aotearoa/New Zealand Perspective* (Pearson, Auckland, 2009) at 136.

¹²⁵ Steven Foster *Political Communication* (Edinburgh University Press, Edinburgh, 2010) at 6.

¹²⁶ Trevor Morris and Simon Goldsworthy *PR – A Persuasive Industry: Spin, Public Relations and the Shaping of the Modern Media* (Palgrave Macmillan, London, 2008) at 154.

¹²⁷ See Dietram A Scheufele and David Tewksbury “Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models” (2007) 57 *Journal of Communication* 9 at 12.

¹²⁸ See Elizabeth A Shanahan, Mark K McBeth and Paul L Hathaway “Narrative Policy Framework: The Influence of Media Policy Narratives on Public Opinion” (2011) 39(3) *Politics & Policy* 373 at 378; Samara Klar, Joshua Robinson and James N Druckman “Political Dynamics of Framing” in Travis N Ridout (ed) *New Directions in Media and Politics* (Taylor and Francis, London, 2013) 173 at 174.

architects of frames seek to establish the most persuasive “policy narratives”.¹²⁹ It is plausible that “if one side can establish the relevant terms of debate over an issue it can successfully persuade individuals to support its position”.¹³⁰ Both information emphasised and information omitted influence audiences. Framing is, then, a critical element of spin and FBTAG’s spin doctors proved more effective than those of government in shaping opinion on the proposal. Establishing the way a tax is referred to in the media is important in shaping discourse. Thus, by successfully dubbing the proposal as a “carpark tax”, FBTAG ensured that the proposal was conceived as a new tax, rather than a refinement of the broad base which is a pillar of New Zealand income tax.

4.2 Tactics and Frames

Excelltium identifies its key tactics in the FBTAG campaign as:¹³¹

- Pressure on government through direct lobbying;
- Distribution of bumper stickers;
- A “No Carpark Tax” Facebook page;
- Sustained print, radio and television media activity.

It is not clear whether an FBTAG Facebook page was in fact established and, if so, the number of “friends” or “likes” it might have garnered.¹³² Indeed, a notable feature of the defeat of the proposal is that it was not brought about by popular use of new social media, such as Twitter,¹³³ which have stoked mass protests around the world.¹³⁴ Rather, reversal of the proposal appears to represent “old school” public relations manipulation by a small number of media-savvy

¹²⁹ A policy narrative exists “when the author or group strategically constructs the story to try to win the desired policy outcome”: see Shanahan et al, above n 129 at 375.

¹³⁰ Dennis Chong and James N Druckman “A Theory of Framing and Opinion Formation in Competitive Elite Environments” (2007) 57 *Journal of Communication* 99 at 102.

¹³¹ Excelltium, above n 89.

¹³² A search of Facebook and Google conducted on 25 October 2013 showed no evidence of such a page.

¹³³ A search of the Twitter website conducted on 28 January 2014 showed fewer than 10 results for ‘#carparktax’, including Hooton’s tweet “Had fun with #carparktax. Can’t wait for #internetshoppingtax. Bring it on @johnkeypm Should be a good little earner. For about a week”. See “Results for #carparktaxTwitter” (2014) <www.twitter.com>.

¹³⁴ See, for example, Philip N Howard and Muzammil M Hussain *Democracy’s Fourth Wave?: Digital Media and the Arab Spring* (Oxford University Press, Oxford, 2013).

insiders. In this regard, it is important to note that the National-led government demonstrates a particular sensitivity to public opinion. Thus, according to Key, the National Party is “addicted to polling” and conducts polls every week.¹³⁵

From the texts analysed, frames or discrete messages were identified. Twelve frames supported the proposal but 28 were against.¹³⁶ A multiplicity of frames might be expected to detract from key messages; however FBTAG was successful in ensuring that critical points were repeatedly cited. In particular, the frame that compliance costs would be disproportionately high in relation to revenue raised was reiterated and dominated debate. FBTAG successfully engaged NZIER, as a plausible independent agency, to critique the robustness of IRD’s RIS and, having done this, was able to frame the debate in accordance with its own figures. In particular, it successfully asserted that FBT would apply to 200 000 car park spaces, whereas, according to Genter, “there are only 24,000 employer-provided car-parks in the Auckland central business district”.¹³⁷ As Genter observes, “Government and Labour were quite quick to jump on the numbers provided by the FBT Action Group”.¹³⁸ Thus, despite the lack of conclusive proof, Labour’s Cunliffe argued the proposal “would have been inefficient, costing twice as much to administer as it would have brought in”.¹³⁹ Other unproven claims included the contention that “Auckland and Wellington carpark costs will shoot up 50 per cent”.¹⁴⁰ Furthermore, according to CAA’s CEO, Paul Head “one [of] our members did a back of the envelope calculation that immediately added \$30,000 a year to his compliance costs”.¹⁴¹ A more plausible source, the accounting firm Lock & Partners, estimated “the costs of gathering the carpark tax would be almost double the take”¹⁴² but these calculations were

¹³⁵ Cited by Nicky Hager *Dirty Politics: How Attack Politics is Poisoning New Zealand’s Political Environment* (Craig Potton Publishing, Nelson, 2014) at 101.

¹³⁶ See Appendix B.

¹³⁷ Genter, above n 60. She also notes that more than “half the people who travel into the Auckland central business district at the moment travel by public transport, walking, or cycling”: see *ibid.*

¹³⁸ *Ibid.*

¹³⁹ Small and Mace, above n 35. See Bennett, above n 114 on Key’s undermining of IRD’s calculations.

¹⁴⁰ Anne Gibson “Staff Carpark Costs Likely to Soar” *The New Zealand Herald* (online ed, Auckland, 11 March 2013).

¹⁴¹ Green, above n 92.

¹⁴² See “Editorial: Good Reasons to Ditch Plan for Tax on Carparks”, above n 87

not subjected to the rigorous analysis to which IRD's RIS had been. Nevertheless, they were widely accepted as correct. FBTAG's unproven figures prevailed in the debate: IRD's ability to calculate costs, it seems, were disbelieved by both government and opposition.

4.3 Political Parties' Frames

Dunne, as government spokesperson, argued that the proposal would make the tax system fairer and would be "pretty reasonable". (National, as senior coalition partner, was absent from the debate until English jointly withdrew the proposal with Dunne.¹⁴³ Key then cast doubt on IRD officials' calculations.¹⁴⁴) Ignoring the issue of equity, Labour principally portrayed the proposal as "penny pinching", a desperate attempt by government to balance its books.¹⁴⁵ Thus Labour MP David Clark said "now it's putting a tax on carparks. What next?"¹⁴⁶ Labour also questioned IRD's competence.¹⁴⁷

Genter, the MP perhaps best qualified to comment on the issue, presented compelling arguments in favour of the proposal (in principle, if not detail) *after* the government had backed down,¹⁴⁸ but the Green Party was significantly absent from the debate before then. This is unfortunate since the environmental grounds for extending FBT could have taken the debate about the proposal in a significantly different direction.

5 Conclusion

¹⁴³ See English and Dunne, above n 114.

¹⁴⁴ See Bennett, above n 114.

¹⁴⁵ Small and Mace, above n 35.

¹⁴⁶ Adams, above n 104. FBT did, of course, already apply to car parks – just not *all* car parks.

¹⁴⁷ Cunliffe asked: "How did that one — \$2 to collect for every \$1 it raised — get past the goalie at the Inland Revenue Department quality control centre? That is what I want to know. But even if it got past the goal line in the boffin building, what happened in the Minister's office?" *New Zealand Parliamentary Debates* House of Representatives, 2 July 2013, 691, 11743 (David Cunliffe) <www.parliament.nz>. Technically, compliance, rather than administration, costs were at issue.

¹⁴⁸ For Genter, above n 60: "The purpose of extending fringe benefit tax to car-parks was to achieve greater horizontal tax equity, but the primary reason would be to get smarter transport outcomes. The best way to get smarter transport outcomes is to remove the unintentional subsidies that exist for people to drive alone to work in the Auckland and Wellington central business districts."

This paper has examined how a reasonable, albeit flawed, tax policy proposal which followed an open and consultative development process appears to have been defeated by a small but determined interest group. Dunne, as a junior coalition partner, was saddled with the blame for the failure of the proposal as National MPs quickly distanced themselves from the reversal. However, the failure of the proposal did not reflect well on the governing party's competence. In one of the rare – it seems, the only article – supporting the proposal, Brian Rudman observes:¹⁴⁹

A smarter right-wing Government would have latched on to the distortions the taxation system creates in the transport market, and painted the present move as a levelling of the playing field. Instead, it's making no friends by treating it purely as a simple tax-gathering exercise.

Labour opportunistically attacked the extension of FBT, whereas the Greens were absent from the debate until after the event. Yet the proposal was underpinned by sound principles; it would have enhanced the equity of FBT, which is an element of the broad income tax base, and promoted desirable transport goals – outcomes any of the major parties might have promoted.

Head, CAA's CEO, described the government back down from the proposal as a "pragmatic response" and said "the reality is it's a democracy and this is politics".¹⁵⁰ It is not obvious which kind of democratic model is envisaged when a relatively small number of business interests represented by their spin doctors can defeat a rational and fair tax proposal. Without discounting the role played by officials in failing to adduce plausible evidence, it is clear from the car park tax story that democratically-elected government's tax policy can be derailed notwithstanding a rational, policy formation process. The proposal may have been petty in the greater scheme of distributive justice but the message to be learnt is not trivial – in relation to effectuating tax policy, spin does matter. As Jon Greenheld observes, "each tax has its own political or economic justification for its existence".¹⁵¹ The political justification for the proposal was simply not established where it matters – in the media.

¹⁴⁹ Brian Rudman "Taxing Carparks the Right Move" *The New Zealand Herald* (online ed, Auckland, 13 March 2013). It may be noted that, while promoting horizontal equity in the area of FBT, the National-led government, including Dunne, opposes the more significant horizontal equity measure of introducing a general capital gains tax.

¹⁵⁰ Small and Mace, above n 35.

¹⁵¹ Greenheld, above n 71, 92.

Appendix A: Media Items Analysed (chronological order)

- Isaac Davison “Staff Carpark Perks Come under Gaze of Taxman” *The New Zealand Herald* (online ed, Auckland, 4 October 2012).
- Christopher Adams “Carparks Set to Tax Employers” *The New Zealand Herald* (online ed, Auckland, 13 December 2012).
- Anne Gibson “Staff Carpark Costs Likely to Soar” *The New Zealand Herald* (online ed, Auckland, 11 March 2013).
- “Bosses, Workers Unite against Car Park Tax” *The Dominion Post* (Wellington, 12 March 2013) at A2.
- Audrey Young “Banks Hopes Carpark Tax Idea Will Be Withdrawn” *The New Zealand Herald* (online ed, Auckland, 13 March 2013).
- Brian Rudman “Taxing Carparks the Right Move” *The New Zealand Herald* (online ed, Auckland, 13 March 2013).
- Adam Bennett “Ad Agencies Join anti-Carpark Tax Lobby” *The New Zealand Herald* (online ed, Auckland, 13 March 2013).
- Adam Bennett “Carpark Tax Might Go if Cost Too High” *The New Zealand Herald* (online ed, Auckland, 14 March 2013).
- Anne Gibson “Opposition to Carpark Tax Steps up” *The New Zealand Herald* (online ed, Auckland, 14 March 2013).
- Richard Meadows “Govt Blames Dunne for Car Park Tax Mess” *Stuff* (online ed, New Zealand, 14 March 2013).
- Hamish Rutherford “Car Parks Tax Broken Promise – Employers” *The Dominion Post* (Wellington, 14 March 2013) at A2.
- Vernon Small “Car Park Tax Looking for Rubbish Bin of History” *The Dominion Post* (Wellington, 14 March 2013) at A11.
- Rob Hosking “What’s behind Government Nip and Tuck Tax Grab?” *The National Business Review* (New Zealand, 15 March 2013) at 4.
- Matt McCarten “On Bosses’ Side over Carpark Tax” *The New Zealand Herald* (online ed, Auckland, 17 March 2013).
- Rebecca Stevenson “Teachers Caught up in Car Park Tax Wrangle” *Sunday Star-Times* (New Zealand, 17 March 2013) at A7.
- “Editorial: Good Reasons to Ditch Plan for Tax on Carparks” *The New Zealand Herald* (online ed, Auckland, 18 March 2013).

- Adam Bennett “Inner-City Carpark Tax Plan about Fairness, Says Dunne” *The New Zealand Herald* (online ed, Auckland, 18 March 2013).
- Kate Shuttleworth “Government Backs out of Carpark Tax” *The New Zealand Herald* (online ed, Auckland, 18 March 2013).
- Vernon Small and William Mace “Government Ditches Controversial Car Park Tax Plan” *Stuff* (online ed, New Zealand, 18 March 2013).
- Adam Bennett “Tax Backdown Pleases Business” *The New Zealand Herald* (online ed, Auckland, 19 March 2013).
- Adam Bennett “‘iPad Tax’ also Taken off the Table” *The New Zealand Herald* (online ed, Auckland, 19 March 2013).

Appendix B: Frames Identified

Positive Frames (number of mentions)

1. Would make the tax system fairer/more equitable (6)
2. Dunne's 'It is being pretty reasonable' (2)
3. Parking subsidies provide a significant untaxed benefit (1)
4. Lack of car park tax encourages people to drive into CBD (1)
5. Lack of car park tax encourages use of bigger cars (1)
6. Lack of car park tax encourages workers to live further away from workplace (1)
7. Lack of car park tax exacerbates rush-hour traffic jams (1)
8. Lack of car park tax creates need for more expenditure on road network (1)
9. Would make public transport more viable (1)
10. Lack of car park tax promotes traffic congestion in CBDs (1)
11. Most opposition comes from people with vested interests (1)
12. Compliance costs of new tax overestimated by opponents (1)

Negative Frames (number of mentions)

1. Compliance costs would exceed amount of tax collected (14)
2. It would only raise NZ\$17 million in tax (8)
3. Will impact on some shift workers and create health and safety issues (7)
4. The proposed tax is petty (7)
5. Would cost businesses an extra NZ\$1500 per annum for on-premises carparks; NZ\$2400 for commercial carparks (5)
6. Discriminatory and inefficient legislation (5)
7. Breaks an election pledge by Key (5)
8. Limiting it to Wellington and Auckland makes it a regional tax (which government previously ruled out) (3)
9. Cost would be passed on to employees (3)
10. Bad policy to restrict the tax to Auckland and Wellington CBDs (3)
11. Complexity of legislation and calculations (3)
12. It will hit low paid workers as well as the high paid executives (3)
13. Damaging to small businesses (3)
14. Unfair because focuses only on Wellington and Auckland (2)
15. A 'barrel-scraping' levy (2)

16. Business will get rid of carpark or lower salary rates (2)
17. Affected CBD car park costs will increase by 50 per cent (2)
18. Would push businesses to the fringes of the affected cities (2)
19. A desperate attempt by government to balance its books (1)
20. Contains some 'nasty fish hooks to look out for' (1)
21. Increased parking costs (1)
22. It would hurt businesses and workers (1)
23. Difficult for IRD to enforce/administer (1)
24. Creates distortions and inequities, rather than removing them (1)
25. Will reduce competitiveness of the affected CBDs (1)
26. Big business would inevitably find a way round it (1)
27. The expression 'car park tax' (1)
28. Would take money from the budgets of inner city schools in the affected cities (1).