Transport Committee
7th Floor
14 Tothill Street
House of Commons London
SW1H 9NB

27 April 2014

Inquiry into user experience of Government motoring agencies

Dear Sir/Madam

The NoToMob (www.notomob.co.uk) was formed in July 2010 in response to the Prime Minister's speech of May 2010 in which he invited the public to become armchair auditors to make local and central government accountable and to take part in his "Big Society" vision. The Secretary of State for Local Government Eric Pickles repeated the invitation in October 2010 and extended the remit, stating he wanted the public to use the provisions of the Freedom of Information Act 2000 and the Audit Commission Act 1998 to make local government accountable. The Notomob has accepted these invitations and continues to do so. Since mid-2010 its members have had extensive contact with members of the public, Enforcement Authorities and enforcement company personnel. We have also met and interacted with various parties involved in the private parking industry, including senior executives from the British Parking Association Limited (BPA Ltd). In 2013, some of our members gave a seminar at Europe's largest dedicated parking exhibition, Parkex. The following reflect the views of the NoToMob, based upon contact with these groups.

Is personal or otherwise sensitive data handled appropriately?

Whilst we will not be addressing all the consultation questions directly, we would like to take this opportunity to raise serious concerns we have with the DVLA's release of keeper details to members of an Approved Operator Scheme (AOS) run by an Accredited Trade Association (ATA). We are currently aware of only two organisations that have been granted ATA status, with the BPA Ltd having the lion's share of members in its AOS. At the time when the Protection of Freedoms Act 2012 (PoFA) became law, the BPA Ltd were the only ATA in existence, and all references to an ATA or an AOS member below refer solely to BPA Ltd and its members.

History – pre PoFA

Prior to the introduction of the PoFA, private landowner/leaseholders were allowed to clamp vehicles deemed to be parked on their land without permission. This gave rise to the so called "rogue clampers" who were ultimately responsible for bringing the trade into such disrepute that clamping and towing away on private land was outlawed under PoFA.

However, Government recognised that outlawing clamping and towing away would leave landowner/leaseholders with little redress if drivers chose to abuse landowner/leaseholder's rights, save for a ticketing system that required the landowner/leaseholder to show reasonable cause to the DVLA in order to pursue the driver of the vehicle by post. At that time (i.e. pre PoFA) it was common knowledge that motorists could safely ignore any demands for payment of any private parking ticket on the grounds that even if taken to court (which was the landowner/leaseholder's only form of redress), the landowner/leaseholder could never prove who the driver was, and consequently any such claim would fail if defended in this manner. Further, there was no power available to landowner/leaseholders to force the keeper of the vehicle to name the driver.

Government were persuaded that such circumstances could not be allowed to prevail and an alternative method of protecting the rights of landowner/leaseholders was sought. Page 1 of the Impact Assessment (Document 6) performed by the DfT summarises the situation, with the remainder of the document laying out plans and recommendations that would ultimately

lead to the introduction of powers that would provide for keeper liability pursuant to Schedule 4 of PoFA.

In the lead up to the introduction of PoFA on 1st October 2012 there were lengthy and detailed consultations between the BPA Ltd and amongst others the DVLA, the DfT and the OFT as to the operation of any ATA and AOS, and the penalties to be applied should members of the AOS fail to comply with the CoP and terms and conditions of membership of the AOS. These penalties included the possibility of suspension or total banning of PPCs from using the DVLA database.

Documents 1, 2, 3 and 6 attached provide a flavour of the many consultations that took place when the AOS was being contemplated. Amongst other things, documents 2 and 3 also provide very specific guidance/advice as to what can be considered a genuine pre estimate of loss, what constitutes a loss, and importantly, the establishment of a contract between the landowner/leaseholder and the motorist.

The landowner/leaseholder/private parking company (PPC) business model

The business model widely adopted (there may be a few exceptions but these are extremely rare) is one where the landowner/leaseholder contracts with the PPC to allow the PPC to provide parking enforcement on its land. The PPC provides appropriate signs which it claims are adequate to establish an enforceable contract between the motorist and the PPC if the terms of that contract are breached by the motorist. The nature of these contracts has been the subject of great controversy and much debate, and has been tested on numerous occasions both at the independent appeals service known as Popla (Parking On Private Land Appeals – please see document 4 attached), and in the County Court (Small Claims). Motorists and PPCs regularly claim victories in both of these adversarial arenas, but in our opinion the problems can never be properly resolved while the current business model exists.

The fundamental arguments most often raised by motorists stem from the PPC's claim that they are entitled to stand in the shoes of the landowner/leaseholder - which includes issuing County Court proceedings in the PPC's own name - and that the contract confers any loss to the PPC.

We maintain that all of these often complex arguments would disappear if the industry adopted a different business model, based loosely on the successful model already adopted by local authorities. Under the current business model there is an incentive for PPCs to issue as many parking charge notices as possible in order to maximise their profit, a situation we at the NoToMob find abhorrent.

The law governing local authorities who issue penalty charge notices specifically forbids incentivised contracts that reward or penalise contractors dependant upon the number of tickets issued. When adopting this approach, Government obviously recognised the potential for abuse were it to allow local authorities to incentivise unscrupulous contractors to issue penalty charge notices. But the business model adopted by the private parking industry positively encourages its AOS members to issue as many tickets as possible on the basis that the more you issue, the more you earn.

It is unfortunate that this situation has been allowed to develop unchecked, because it has allowed erstwhile rogue clampers to be reincarnated as rogue ticketers. Hardly a day goes by where we don't see another story about a PPC pursuing a completely uncaring and relentless approach with a view to maximising its profits. We offer Document 4 attached as a perfect demonstration of the bullying attitude adopted by companies in pursuit of a profit.

The situation to date and the need for a Post Implementation Review of the DfT Impact Assessment.

During the consultation process the BPA Ltd provided figures to Government that implied that the courts were being overrun with claims by PPCs and that the introduction of PoFA and an

independent appeals service (Popla) would resolve the MoJ's perceived problem. Please see Document 6 attached at **page 6** (1.8 million parking charges issued per year with 2% to 5% of them progressing to court), **page 9** (BPA claim keeper liability will have a positive impact in that it would result in *"a reduction in the number of cases taken to court, which in turn would benefit the Ministry of Justice"*), **page 9 again** *("The BPA has said that of the 1.8 million parking charges currently issued each year around 2-5% (36,000 to 90,000) of cases are taken to civil court per year."),* and **page 10** *("The Ministry of Justice agree that the introduction of keeper liability will not have any adverse affect and therefore no increased costs."),* **page 14** *("**courts -** There may be a slight increase in cases taken to court to begin with as the public may not be aware of keeper liability. However, the BPA suggest that the number of cases taken to court should decrease as motorists become aware that they will be responsible for paying the parking charge, where ticketing is concerned and following the introduction of an independent complaints body.*
Impact: Low
Likelihood: Low").

It was not until Government had been persuaded to grant PPCs powers to enforce against a vehicle's keeper that it came to light that the BPA Ltd's figures were fatally flawed and that the courts were not experiencing anywhere near the number of claims the BPA Ltd had suggested. The flaw was exposed when the MoJ answered an FoIA request (please see Document 7) which stated that in 2011 it had identified 845 cases as being brought by AOS members of which 49 had proceeded to a trial in court. Of those 49 cases the Claimant PPC had succeeded in winning 24.

It is therefore more than a little ironic that the very situation the BPA Ltd suggested needed to be remedied, but which did not in fact exist, has now become a reality under PoFA. Document 5 attached provides information gathered via FoIA requests (see links at top of Document 5) made to the MoJ, which when collated provides the number of small claims issued by only one AOS member (ParkingEye Ltd) in the County court for the period 22 March 2011 to 4 November 2013.

Document 8 attached
(see link: https://www.whatdotheyknow.com/request/contested_hearings_where_claiman) provides details of the number of ParkingEye cases that have actually gone to a court hearing in 2013. It should be noted that although 283 cases are included on the spreadsheet, 281 of them took place in the six months between 1 June 2013 and 31 December 2013, with the vast majority of those cases (228 = 80% of all cases heard in 2013) being held in the three months between 1 October 2013 to December 2013. It should be noted that these figures are in relation to only one AOS member and there another 157 members of the BPA Ltd's AOS.

ParkingEye Ltd are the largest volume issuers of private parking tickets in the AOS. ParkingEye Ltd continue to issue county court claims at a phenomenal rate and having seen the rate of return being achieved by ParkingEye Ltd, other PPCs are now joining them in the race to take motorists to court. The other PPCs recognise that ParkingEye's bullying tactics are working sufficiently well that they can incorporate the cost of pursuing motorists through the courts into their business models, with a reasonable expectation that the majority of motorists will be intimidated into paying up once a writ drops on their doormat.

However, if ParkingEye Ltd continue to issue court proceedings at a similar rate and other AOS members do the same, the MoJ would soon be faced with the nightmare scenario where it would have to provide court facilities and valuable court time for many thousands of Small Claims cases, which could by no means be funded from the £15 court fee PPCs pay to issue a small claim.

We offer this as yet more evidence that the current business model is flawed and needs to be fixed, failing which it will be Britain's taxpayers who will have to bear the judicial costs arising from ever increasing burdens on court time.

Solution

To date, landowner/leaseholders have attempted to contractually transfer their responsibilities to PPCs, which includes allowing PPCs who are AOS members to have electronic access to the DVLA database. This access is granted only to those who can show "reasonable cause" and the DVLA have deemed that all requests made by AOS members relating to private parking tickets are automatically accepted as demonstrating a "reasonable cause".

The main challenges to private parking tickets at both Popla and in the County Courts concern whether the landowner/leaseholder can transfer to a PPC his/her right to issue a parking charge, and whether the charge constitutes an actual loss to the PPC, which loss must be based on the PPC's genuine pre estimate of same. When mounting this type of defence the motorist automatically challenges (although he/she will probably not realise it) whether the PPC has shown any "reasonable cause" to access the DVLA database.

The solution to all of these problems is simple and can be achieved without the introduction of any further legislation. It is this:

Local authorities who issue penalty charge notices do so in their own name. In doing so the local authority is granted access to the DVLA database, with "reasonable cause" being established by the legislation (The Road Traffic Act 1988) that allows relevant enforcement authorities to issue penalty charge notices.

Landowner/leaseholders have a right to enter into contracts with others and can apply to the courts in the usual way if there is a breach of that contract. Landowner/leaseholders can contract with PPCs to enforce those contracts on its land. In the contract between the landowner/leaseholder and the PPC it can stipulate that should said landowner/leaseholder consider a motorist to be in breach of contract, the PPC is authorised to issue a parking charge notice to the keeper of the vehicle, thereby establishing a "reasonable cause" that would allow an AOS member to have access to the DVLA database.

However, any such contract between the landowner/leaseholder and a PPC would automatically cancel out any "reasonable cause" if it attempted in any way to transfer the rights of the landowner/leaseholder to the PPC.

In order to monitor this and to ensure the system is not abused whereby a PPC may attempt to bring court proceedings in its own name, the DVLA can amend its requirements to include a clause that stipulates that if a landowner/leaseholder requires access to the DVLA database via its PPC contractor, "reasonable cause" can only be established if the landowner/leaseholder lodges a contract with the DVLA that satisfies the above criteria, i.e. there is no attempt to transfer any of the rights of the landowner/leaseholder to the contractor.

It is our submission that in adopting this new business model, it by no means diminishes the landowner/leaseholder's common law right to bring court proceedings and enforce against any person it contracts with to provide a service if that person breaches said contract. PPCs can still be contracted to provide all aspects of enforcement, including issuing court proceedings on behalf of the landowner/leaseholder, but never in the PPC's own name unless they are the de facto landowner/leaseholder.

It is also our view that this would see a much more sensible and proportionate approach being taken by landowner/leaseholders, most of whom are shopkeepers who will undoubtedly be far less likely to take court proceedings against their own customers. Persistent offenders can be targeted, with the ultimate sanction of court proceedings still available once all other avenues are exhausted. By taking the decision out of the hands of PPCs as to whether to proceed with any type of enforcement, and placing it back in the hands of the the landowner/leaseholder, the incentivised nature of the current business model evaporates.

Yours faithfully

NoToMob