COMMERCE COMMISSION
NEW ZEALAND
Te Komihana Tauhokohoko

Retail Payment System Bill

Submitted to:

Economic Development, Science and Innovation Committee

25 November 2021

Commerce Commission submission on the Retail Payment System Bill

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Retail Payment System Bill 80-1 (the Bill).

2. Our submission is focused on the practical implementation of the Bill to support your consideration in:

   2.1 ensuring the legislation reflects the policy objectives and effectively supports the achievement of the desired outcomes; and

   2.2 ensuring that the legislative provisions are clear for participants, merchants and consumers and are readily administered by the relevant agencies and the Commission.

3. We have provided input to the Ministry of Business, Innovation and Employment (MBIE) during policy development for the Bill, focussing on practical implementation matters.

4. Our submission covers some background and context about the Commission and its proposed role under the Bill and comments on substantive points relating to implementation matters. Addressing these issues would help ensure the functions and powers under the regime are clear and the tools can be readily administered and enforced. More detailed comments on aspects of drafting and technical matters are included in Attachment 1.

Background to the Commission

5. The Commission is an independent Crown entity and is New Zealand's competition, fair trading, consumer credit and economic regulatory agency. We play a crucial role in ensuring New Zealand's markets are competitive, consumers are well informed and protected, and sectors with little or no competition are appropriately regulated.

6. Our vision is that New Zealanders are better off because markets work well and consumers and businesses are confident market participants. Our overarching goal is to make New Zealanders better off. We aim to do this by playing our part in ensuring markets work well and consumers and businesses are confident participants in those markets.

7. As an independent Crown entity, we provide independent advice and regulation. We act in a spirit of service to everyone in our communities and we do not take for granted the trust that New Zealanders place in us to protect and promote their interests.

8. We are governed by a Board of Commissioners, appointed for their knowledge of, and experience in, areas relevant to the Commission's interests. We have responsibilities for enforcing laws relating to competition, fair trading, and consumer

credit contracts. We also have regulatory responsibilities in the electricity lines, gas pipelines, telecommunications, fuel, dairy and airport sectors.

9. We work with a range of organisations including consumer and user groups, consumer advocacy and advice agencies, other government entities, as well as the Ministers and ministries which oversee policy across our competition, consumer protection and regulatory workstreams.

10. In recent years, growth in our regulatory functions, powers and duties has coincided with increased public expectations. We now have around 300 staff across Wellington and Auckland. We expect our organisation to continue to grow through implementing new responsibilities (for example, through recent reforms relating to the fuel industry and as a result of this Bill).

Role of the Commission under the Bill

11. The Government signalled its intention to regulate retail payment system in 2020. The initial focus was on constraining merchant services fees (the fees that are paid from a merchant to its bank for a credit or online or contactless debit card transaction). However, the scope was widened to future-proof the legislative framework to be able to respond to rapidly changing payment systems.

12. The Bill will enable regulation of any payment network, including bank-to-bank transactions, within bank transfers, EFTPOS, debit, credit card, other mobile payment platforms or buy-now-pay-later services. Initially, only Visa and Mastercard credit and debit payment networks will be subject to regulation.

13. Under the Bill, the Commission will be the regulator of the retail payment system. In addition to 'system-wide' functions outlined in clause 6 (including monitoring, inquiring, reviewing and reporting), there are specific functions and powers proposed for the Commission including to:

    13.1 make recommendations to the Minister on which networks should be designated as regulated

    13.2 issue network standards for designated networks (including pricing principles) and give directions about network rules

    13.3 issue merchant surcharging standards

    13.4 monitor compliance and enforce the obligations in the Bill, including through proceedings for pecuniary penalties.

Substantive comments on the Bill

14. The Commission is broadly comfortable with the Bill from a practical implementation perspective. However, our submission focuses on two aspects that we consider could be improved to ensure the legislation supports the intended purpose and desired outcomes. These relate to:

14.1 what, when and how information is disclosed to the Commission

14.2 when and how Commerce Act 1986 (Commerce Act) provisions can be applied.

15. We discuss these points below. We have also attached a table that contains a range of drafting and technical points for the Committee's consideration.

Disclosing information to the Commission

16. A common feature of the economic regulation legislation administered by the Commission is the regular disclosure of information from regulated parties to the Commission. Typically, this information is provided to support the Commission's monitoring of how the regulated service or market is performing in relation to the purpose of the legislation.

17. The Bill gives the Commission a broad system monitoring role (refer clause 6) and the ability to use Commerce Act powers (refer Part 3 Sub-part 2). Based on our experience, we note such Commerce Act powers are well-suited to investigations into the potential designation of networks, which will be discrete in nature. However, we consider that effective monitoring of designated networks will also require a regular flow of information, including commercially sensitive information (that should not be disclosed publicly). As drafted, the Bill does not provide a clear mechanism to establish a regular flow of information to the Commission.

18. We suggest that, rather than the Commission relying only on using a power such as section 98 of the Commerce Act for gathering information relevant to the monitoring of designated networks, it might be better regulatory practice to also be able to request regular information through network standards for a designated network.

19. Clause 20 (1)(a) allows the Commission to set standards for information disclosure for designated networks and merchant surcharging respectively. The provisions are limited to requiring information disclosure between participants and between participants and merchants or the public. We therefore suggest that this clause is amended to allow the Commission to set standards that require the provision of regular information to the Commission; and that information disclosed to the Commission can be used for all Commission monitoring and compliance functions.

20. Standardising some aspects of information provision for a particular network could have real benefits. It would provide certainty for all parties and could reduce participants' and the Commission's transaction costs. It could also encourage stronger engagement with participants, establish expectations among parties involved, and allow flexibility to adjust the information requested over time.

Application of Commerce Act provisions

21. We understand the intent is to take a common approach to exercising enforcement, monitoring and investigation powers across the regimes that the Commission regulates by referencing Commerce Act powers. We therefore support the intent of

Part 3 to provide Commerce Act powers in the Bill. However, we suggest the following changes to the Bill to better achieve the intent.

Remove clause 36

21.1 The Commission has functions under other legislation which requires applying the monitoring, investigation and related powers of the Commerce Act. This is mainly achieved in those statutes by stating that "The following provisions of the Commerce Act 1986 apply with any necessary modifications" (as is used for example in section 33 of the Fuel Industry Act 2020). This simple formula works because there are limitations inherent in the Commerce Act powers that constrain their use. For example, section 98 must be used for the purpose of carrying out the Commission's functions and exercising its powers.

21.2 The Bill is unusual in that there is an additional clause, clause 36, that specifies that the sub-part applies to "all retail payment networks". We understand that clause 36 was designed to avoid doubt in how Commerce Act powers can be used. However, we suggest that clause 36 is unnecessary and might cause confusion about how Commerce Act powers can be applied in respect of non-designated networks (for example, sourcing information from parties that are not participants or otherwise not directly involved in a retail payment network).

Expand the purposes for which clause 38 may be used

21.3 Our understanding is that clause 38 is modelled on section 53ZD of the Commerce Act and is intended to be applied in a targeted way for investigating a particular payment service or designated network. This contrasts with the wider powers available under section 98 of the Commerce Act which could, for example, be used from time to time to consider whether a network should be designated.

21.4 As drafted, the powers in clause 38 may be used only for the purposes of Part 2 of the Bill (designations, network standards, network rules and directions). Some of the powers in clause 38 can only be applied in respect of "participants" and would not be able to be used in relation to merchant surcharging (Part 3, Subpart 1).

21.5 The imposition of merchant surcharging standards is a significant regulation-making power and is likely to require a broad range of information to support that power. The Commission may need information to better understand which types of merchants and/or networks a standard might apply to (refer clause 30(3)); or to inform an appropriate methodology or surcharge limit (refer clauses 32 (1)(c) and (2)(b)).

21.6 We suggest amending clause 38 such that the powers may be used for the purposes of Parts 2 and 3 of the Bill. Without the availability of clause 38, the main power available to gather information and develop standards regarding merchant surcharges would be section 98 of the Commerce Act. We believe

this will be inadequate as section 98 is more limited than the powers in clause 38 (for example, section 98 is limited to requesting information that already exists, rather than requiring a person to compile and provide information).

21.7 We also suggest that the term "participant" which is used throughout clause 38, should be changed to "person". This would ensure the powers can be used in respect of other parties, including merchants.

22. In summary, as a matter of practical implementation and consistency, the Commission suggests clause 36 is deleted; clause 38 should apply to powers exercised by the Commission to support its functions as described in Parts 2 and 3; and clause 20(1)(a) should include disclosure of information relating to payment services or the designated network to the Commission.

Implementation – operationalising the Bill

23. It will be important for the effective operation of the new regime that the Commission is given time to build capability and adequate funding to carry out its functions under the legislation. New regulation takes time to settle-in with the stability and success of a regime developing over time.

24. The Bill envisages the regulatory framework will come into effect immediately. However, there will be a six-month period before commencement of the price-capping standard in Schedule 1 for the interchange fee regime for Visa and Mastercard. The Commission will need this period to commence monitoring, to develop initial standards, and to prepare participants for implementation.

25. The retail payment system regime will add a new regulatory function to the Commission which will require the Commission to build operational capability to administer the regime under the Bill. While interim funding has been provided for establishing the new function, the Commission will be seeking additional resourcing to support ongoing operations. We will continue to discuss this with MBIE as our monitoring agency.

Conclusion

26. We thank the Committee for the opportunity to provide comment.

27. The Commission is not seeking to present this submission orally to the Committee. However, should the Committee wish to hear further from the Commission, we are happy to accommodate. Please contact Pippa Player, Principal Policy Analyst, via pippa.player@comcom.govt.nz in the first instance.

Attachment 1: Specific drafting comments and suggestions

Reference / Clause	Comments / Suggestions
Clause 11	Clause 11 relates to the Minister's consideration of designation recommendations made by the Commission. Clause 11 (2)(b) allows the Minister to request that the "Commission reconsider any matter (such as an error, an oversight, or competing policy interest)". We assume that the Minister in making such a request, and the Commission in responding to such a request, would still be bound by the purpose and principles set out in clauses 3 and 4. However, it may be helpful to clarify this in the Bill.
Clause 13(1)(b)	Clause 13 sets out process requirements that must be followed when making a recommendation to the Minister to designate a retail payment network. Clause 13(1)(b) requires that the Commission must "notify an operator of the network". We assume that the Commission would be 'notifying' the operator about the recommendation. In practice, the Commission would seek to consult with the operator of a network as part of developing a recommendation. We therefore suggest in clause 13(1)(b) that "notify" is replaced with "consult". Note: the consultation/notification obligation expressed in clause 13(1)(b) is different to those expressed in clauses 19(1)(b), 26(1)(b) and 31(1)(b), which we discuss below.
Clauses 19(1)(b), 26(1)(b) and 31(1)(b)	Clauses 19, 26 and 31 set out process requirements the Commission must follow when exercising certain rule-making functions. These clauses, along with other processes, require the Commission to (using clause 19(1)(b) as an example): "send a copy of the proposed standard, and the Commission's reasons for issuing the proposed standard, to affected persons or to persons that the Commission considers to be representatives of affected persons". Sending a copy is quite a specific requirement and possibly does not reflect the range of mechanisms and technologies that can be used to engage affected persons. Without diminishing the intent of the Bill's consultation obligation, we suggest that greater flexibility could be provided in terms of the practicalities of how the Commission consults and disseminates information about a proposed standard. This could be achieved by amending clause 19(1)(b) to "consult affected persons on the proposed standard".

Reference / Clause	Comments / Suggestions
	If adopted for clause 19(1)(b), the equivalent amendments should also be made to clauses 26(1)(b) and 31(1)(b).
Clause 16	Clause 16 determines the process for revoking or making minor amendments to designations. However, the Bill only references the process to *make* designations in clauses 10–14, which might cause procedural issues as outlined below. • Clause 11 provides for the Minister to recommend designation "only after receiving a recommendation from the Commission." • Clause 12 provides the Commission with the function of making recommendations to the Minister and the matters that the Commission must take into account. • Clause 13 provides the process the Commission must follow to make a recommendation under clause 12, which includes consultation. • Clause 16 provides that: o clauses 12 and 13 do not apply to the process for making minor amendments to designations (clause 16(a)); and o clause 12 does not apply to revocation orders (clause 16(b)). If clause 12 does *not* apply to revocations, the Commission would need to infer from clause 11 its power to make a recommendation to the Minister to revoke or amend a designation. Further, the drafting could also imply that because clause 16(b) only exempts clause 12, the consultation and public notification requirements in clause 13 are intended to apply to revocation orders. However, clause 13 is framed only in relation to clause 12 ("Before making a recommendation under section 12, the Commission must—"). It therefore appears that clause 13 may not work without clause 12. We suggest these clauses are revisited to clarify the process that can be used to recommend amending or revoking a designation.

Reference / Clause	Comments / Suggestions
Clause 22	Clause 22 notes a network standard continues in force until the date it expires (on a specific date, after 10 years or if it is revoked or replaced). It might be useful in the Bill to make it clear that if a designation is revoked, a standard will also expire. Section 62 of the Telecommunications Act provides a useful example that when a designated service (equivalent of a designated network) ceases to "have that status", a determination (equivalent to a network standard) is deemed to have expired.
Clause 33	Clause 33 provides that "A participant who contravenes a merchant surcharging standard is liable to pay a pecuniary penalty". However, merchant surcharge obligations apply to merchants, and merchants are excluded from the definition of "participant". We therefore recommend replacing "participant" with "merchant" in clause 33.
Clause 36	*Refer para 21.1-21.2 of main submission* Clause 36 specifies that sub-part 2 applies to "all retail payment networks". We understand that clause 36 was designed to avoid doubt in how Commerce Act powers can be used. However, we suggest that clause 36 is unnecessary and might cause confusion about how Commerce Act powers can be applied in respect of non-designated networks (for example, sourcing information from parties that are not participants or otherwise not directly involved in a retail payment network). We therefore suggest deleting clause 36.
Clause 38	*Refer para 21.4-21.7 of main submission* We suggest amending clause 38 such that the powers to obtain information may be used for the purposes of Parts 2 and 3 of the Bill. Without the availability of clause 38, the main power available to gather information and develop standards regarding merchant surcharges would be section 98 of the Commerce Act. We believe this will be inadequate as section 98 is more limited than the powers in clause 38. We also suggest that the term "participant" which is used throughout clause 38, should be changed to "person". This would ensure the powers can be used in respect of other parties, including merchants.
General	As currently structured, the Bill includes the administrative, enforcement, and miscellaneous provisions within Part 3, which also include the operative provisions on merchant surcharging. This is somewhat unintuitive because

Reference / Clause	Comments / Suggestions
	many of the administrative, enforcement, and miscellaneous provisions contained in Part 3, Subparts 2–4, apply to Parts 1 and 2 in addition to Part 3, Subpart 1. It would aid the clarity of the Bill, and assist readers, if Part 3 only included what is currently Part 3, Subpart 1 (ie the operative provisions on merchant surcharging). Then, the remaining subparts of Part 3 could be grouped together under a new Part 4. The structure of the Bill would then become: • Part 1 – Preliminary provisions • Part 2 – Designated networks • Part 3 – Merchant surcharging • Part 4 – Monitoring and enforcement, and miscellaneous provisions (or similar title). Consequential amendments to referencing within the Bill would also need to be made.
General	Clauses 21, 27 and 33 provide that a participant who contravenes (respectively) a network standard, direction or merchant surcharging standard is liable to pecuniary penalty. Our reading of the Bill is that it is the network standards, directions and merchant surcharging standards that create obligations, and a failure to comply with those obligations is a contravention. For example, clause 17(2) provides that a network standard "may… impose requirements on participants in designated networks". In this instance, a failure to comply with a requirement in a network standard would be a contravention. We think it would be helpful if the Bill explicitly identified what a contravention is. For example, the Bill could provide that it is contravention to fail to comply with a requirement in a network standard, direction or merchant surcharging standard.