

# Departmental Disclosure Statement

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Retail Payment System Bill
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The departmental disclosure statement for a Government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

23 September 2021.

## Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information .....	6
Part Three: Testing of Legislative Content.....	9
Part Four: Significant Legislative Features .....	12

## Part One: General Policy Statement

In the November 2020 Speech from the Throne, the Government made a commitment to regulate merchant service fees charged to retailers to bring them into line with overseas fees. Merchant service fees are fees payable by merchants to their acquirer, normally the merchant's bank, for processing certain types of card payments, including credit or debit cards, whether they involve a swiped, inserted, contactless or online payment.

Retail payments between consumers (including businesses) and merchants are central to the economy. In December 2020, the Government initiated a project looking into merchant service fees and the broader retail payment system. This found that there is a lack of efficient competition in aspects of the system, which among other things limits the entry of some participants and the expansion of innovative new payment networks, leading to poor outcomes for many consumers and merchants.

To address those issues, as well as any issues that may arise in future, the Government is introducing a regulatory regime to ensure that the retail payment system delivers long-term benefits to consumers (including businesses) and merchants. The Commerce Commission (the Commission) will be the regulator of this new regime and will have a package of regulatory tools to allow it to achieve the purpose of the regime.

The Bill introduces the following measures to promote competition and economic efficiency in the retail payment system:

- the Bill sets out a process and factors to determine which retail payment networks should be designated for regulation, and defines a retail payment network as the participants, arrangements, contracts, and rules that facilitate a class of retail payment. The designation process involves the Commission, after applying a set of criteria and consulting with relevant parties, making recommendations to the Minister of Commerce and Consumer Affairs as to which retail payment networks should be designated. This designation approach allows the regime to respond to any changes in the system, such as new retail payment networks, payment products, or payment methods that emerge:
- the Commission can issue network standards that certain participants in designated networks must comply with. These may cover requirements for information disclosure, pricing, or access to infrastructure and the network:
- the Commission can also make directions to participants regarding the rules of designated networks. This includes directing an operator to set, amend or comply with network rules, notify the Commission of any amendments made to rules, or obtain the Commission's approval before making any substantive amendments to rules:
- in order to limit excessive surcharging that does not reflect the costs to the merchant of providing those particular transaction types, the Bill provides for the regulation of merchants' payment surcharges. To do this, the Commission can issue merchant surcharging standards, which may include matters such as information disclosure and record-keeping requirements. Standards may also set out the manner in which merchants must represent surcharges and impose limits on payment surcharges:
- in exercising its powers under this Bill, the Commission will be able to use enforcement and functional powers similar to those set out in the Commerce

Act 1986, including monitoring and investigation powers. This will ensure a common approach to carrying out the functions of the Commission across the legislation it enforces.

The Bill also provides for the following:

- a range of remedies and enforcement mechanisms for breaches of regulatory obligations, including pecuniary penalties, enforceable undertakings, injunctions, damages, and compensation:
- network standards issued under this Bill are deemed to also be statutorily authorised for the purposes of Part 2 of the Commerce Act.

The Bill provides initial designations of the Mastercard and Visa credit and debit networks, and sets an initial pricing standard that requires reductions in interchange fees (which are a major component of merchant service fees) as soon as practical for transactions on those networks. This initial pricing standard also prohibits operators providing net monetary or non-monetary compensation to issuers (such as reduced scheme fees, discounts, and rewards) in addition to issuers receiving interchange fees. This initial pricing standard will be replaced if and when the Commission issues a new standard in respect of interchange fees for the Mastercard and Visa networks. The following table sets out how the interchange fee caps apply to the different retail payment networks, payment products, and payment methods:

#### Credit networks

Payment product	Payment method	Interchange fee cap
Commercial payment products	All	None
Payment products issued by non-NZ entities	All	None
All other	All	0.80% or 1 April 2021 level if lower

#### Debit networks

Payment product	Payment method	Interchange fee cap
Prepaid payment products	All	None
Payment products issued by non-NZ entities	All	None
All other	In-person contacted payment methods	0.0%
	In-person contactless payment methods	0.2% or 5 cents per transaction or 1 April 2021 level if lower
	All other payment methods including online	0.6% or 1 April 2021 level if lower

**Timing for implementation of Bill**

The initial pricing standard will commence six months after enactment of this Bill to allow regulated parties sufficient time to make any necessary changes in order to comply. The remainder of the Bill will commence the day after the Royal assent, allowing the Commission to begin monitoring the retail payment system to inform any future regulation.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p><i>Issues paper: Retail payment systems in New Zealand</i>, Ministry of Business, Innovation and Employment, October 2016, accessible on MBIE's website: <a href="https://www.mbie.govt.nz/have-your-say/retail-payment-systems-issues-paper/">https://www.mbie.govt.nz/have-your-say/retail-payment-systems-issues-paper/</a></p> <p><i>Issues paper: Regulating to reduce Merchant Service Fees</i>, Ministry of Business, Innovation and Employment, December 2020, accessible on MBIE's website: <a href="https://www.mbie.govt.nz/dmsdocument/12383-issues-paper-regulating-to-reduce-merchant-service-fees-pdf">https://www.mbie.govt.nz/dmsdocument/12383-issues-paper-regulating-to-reduce-merchant-service-fees-pdf</a></p>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
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### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p><i>Regulatory Impact Statement: Regulating the Retail Payments System</i>, MBIE, 30 March 2021, available at: <a href="https://www.mbie.govt.nz/dmsdocument/14342-retail-payments-system-policy-decisions-to-reduce-merchant-service-fees-coversheet-ris-pdf">https://www.mbie.govt.nz/dmsdocument/14342-retail-payments-system-policy-decisions-to-reduce-merchant-service-fees-coversheet-ris-pdf</a> and <a href="https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments">https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments</a></p> <p><i>Regulatory Impact Statement: Additional tools for regulating the retail payments system</i>, MBIE, 23 June 2021, available at: <a href="https://www.mbie.govt.nz/dmsdocument/16904-regulatory-impact-statement-additional-tools-for-regulating-the-retail-payments-system-proactiverelease-pdf">https://www.mbie.govt.nz/dmsdocument/16904-regulatory-impact-statement-additional-tools-for-regulating-the-retail-payments-system-proactiverelease-pdf</a> and <a href="https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments">https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments</a></p>	
<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>YES</b>

*Regulatory Impact Statement: Regulating the Retail Payments System:*

“A quality assurance panel with representatives from the Regulatory Impact Analysis Team at the Treasury and the Ministry of Business, Innovation and Employment have reviewed the Regulatory Impact Statement “Regulating the retail payments system” produced by the Ministry of Business, Innovation and Employment. The panel considers that it **meets** the Quality Assurance criteria.

The Regulatory Impact Statement demonstrates a clear understanding of the regulatory gap in the retail payments system and provides clear and comprehensive examination around options for regulatory design and tools. Time constraints in policy development have limited the depth and scope of consultation with stakeholders, although this will be mitigated by further targeted consultation intended to be conducted prior to final Cabinet decisions being made. The Ministry of Business, Innovation and Employment anticipates that further regulatory impact analysis will be completed with refined policy design which will reflect feedback from wider consultation. It is noted that an evaluation of the regulatory changes three years after they come into effect and periodically thereafter is expected. As the proposed regulator, the Commerce Commission will need additional resources to support its new functions.”

*Regulatory Impact Statement: Additional tools for regulating the retail payments system:*

“A quality assurance panel with members from the Treasury’s Regulatory Impact Analysis Team at the Treasury and the Ministry of Business, Innovation and Employment (MBIE) has reviewed the Regulatory Impact Statement (RIS) “Additional tools for regulating the retail payments system” produced by the MBIE. The panel considers that it **meets** the Quality Assurance criteria.

The RIS has clearly and concisely described the technical and complex proposals in plain language. Additional tools for regulating the retail payments system have been identified and evaluated against a comprehensive assessment framework. The analysis indicates that effective implementation will depend on the Commerce Commission, as the regulator of the retail payments system, having sufficient resources to support its new functions. While consultation has been constrained due to timing, the risk is mitigated as a range of stakeholders have been consulted via a targeted approach.”

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
<p>Qualitative and some limited quantitative analysis of the potential costs and benefits are summarised in both of the regulatory impact statements prepared to support the policy in this Bill. Benefits that we have not quantified but which may arise from greater competition include:</p> <ul style="list-style-type: none"> <li>• Higher quality and innovative payment services that better meet the needs of consumers and merchants</li> <li>• Faster payments</li> <li>• Increased ability for merchants to invest in business growth, resulting in higher quality and innovative products and services for consumers.</li> </ul>	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>
<p>The key potential benefits of the policy are to merchants and consumers (including businesses). Consumers will only benefit from the policy if cost savings are passed on to consumers by merchants, including through payment surcharges that are cost-reflective and not excessive. The effectiveness of this will depend on compliance with merchant surcharging standards and the regulator's effective enforcement, as discussed on page 23 of <i>Regulatory Impact Statement: Additional tools for regulating the retail payments system</i>.</p> <p>We discuss in the Implementation sections of both regulatory impact statements that the effectiveness of the policy will depend on sufficient resourcing of the Commission to support its enforcement function.</p>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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No international obligations have been identified or raised through the policy process as being relevant to the Bill.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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No inconsistencies between the proposals and the principles of the Treaty of Waitangi have been identified or raised through the policy process. The Bill does not specifically impact the rights or interests of Māori.
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### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at: <a href="http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/">http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/</a>
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### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
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The Bill creates new pecuniary penalties for contraventions of the requirements in the Bill. These are for:
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| <ul style="list-style-type: none"><li>• contraventions of network standards (clauses 21 and 40)</li><li>• contraventions of directions (clauses 27 and 40)</li><li>• contraventions of merchant surcharging standards (clauses 33 and 41)</li><li>• contraventions of notice to take corrective action (clause 42).</li></ul> |
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Clauses 37 to 39 also adapt the Commerce Commission's enforcement powers from the Commerce Act 1986, which includes section 103 - offences for obstructing the Commission.
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<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
<p>The Ministry of Justice (Offences and Penalties Vetting team) was consulted on the proposed pecuniary penalties prior to Cabinet decisions, and indicated they were comfortable with the proposals. MBIE provided information on the need for penalties to deter particular conduct, and information on precedents for similar levels of penalties in other legislation, to assure the Ministry of Justice of the necessity of including pecuniary penalties at their proposed levels.</p> <p>The Ministry of Justice was further consulted on additional proposed pecuniary penalties for merchant surcharging standards. The Ministry of Justice queried the ratio of penalties for individuals versus bodies corporate (three times the penalties) for merchant surcharging standards. This is because the penalties are modelled off the amounts in the Fair Trading Act 1986 and Fuel Industry Act 2020. The Ministry of Justice ultimately indicated they were comfortable with the proposal.</p>	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p>Clause 37 provides that certain monitoring and investigation powers of the Commerce Commission from the Commerce Act 1986 apply to the Bill, including powers of the Commission to prohibit the disclosure of personal information.</p> <p>Clauses 17 and 20 provide a power for the Commerce Commission to issue network standards requiring designated participants to disclose information relating to payment services or the designated network, including by participants to merchants, consumers and the public, or by one class of participants to another. While it is not expected that personal information will be required to be disclosed, the Privacy Act will apply and therefore adequate privacy protections will be in place.</p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>
<p>MBIE does not consider this proposal to have a negative impact on any individuals or the privacy of personal information.</p>	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>MBIE consulted publicly in a December 2020 Issues Paper, which discussed issues in the retail payment system and briefly canvassed some limited options. We received 36 submissions from banks, card schemes and organisations representing businesses and consumers. On the whole, submissions generally agreed with the case for greater regulatory oversight.</p> <p>MBIE undertook targeted consultation on the detail of proposals with 18 key industry participants in May 2021. Consultation primarily took place through meetings. This limited the breadth and depth of issues that stakeholders were usefully able to provide comment on. Stakeholders were, for the most part, supportive of the decisions taken by Cabinet and stressed the need for the Bill to be competitively neutral. Stakeholder engagement largely focused on the proposed approach to designation, the regulator's toolkit and the timeline for implementation of the regime.</p>	

### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p>MBIE has worked closely with the Commerce Commission on the draft Bill to ensure the Commerce Commission, as the regulator, will be able to implement and enforce the proposals. Specifically, the Commerce Commission undertook a scenario testing exercise to ensure that the provisions of the Bill are workable.</p> <p>MBIE also consulted the Legislative Design and Advisory Committee (LDAC) on the details of the regulatory design. LDAC has not been consulted on the draft Bill.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>YES</b>
<p>The Bill includes the ability for the Commerce Commission to issue access standards. Clause 20 sets out that an access standard may involve requirements for participants of a designated network to provide access to network infrastructure or services. Before issuing such a standard, the Commerce Commission must first consider a set of criteria, including the effect of such a standard on innovation, and consult affected persons on the proposed standard.</p> <p>Currently, restricted access to certain infrastructure is inhibiting competition in some markets which has flow on impacts for competition in the broader retail payments system. Allowing the regulator to intervene to impose requirements for participants in a network to provide access does impact on property rights, in that they have invested in infrastructure which they are now being directed to provide access to. However on balance, providing the Commerce Commission with this power is expected to increase competition and efficiency in the retail payment system and access would not by default be free of charge.</p>	

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>
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### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>
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### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>YES</b>
<p>Clause 9 of the Bill provides that the Crown shall not be liable to pay pecuniary penalties. The Bill provides for pecuniary penalties for a breach of merchant surcharging standards, and Crown agencies have the potential to be merchants who may be subject to such standards. The presumption against imposing criminal fines on the Crown is relevant here, as pecuniary penalties are analogous to criminal fines. To mitigate this, clause 9 also provides that the High Court can make a declaration that the Crown has contravened.</p>	

## Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person’s rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>
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## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>YES</b>
<p>Subpart 4 of Schedule 1 provides that an Order in Council can be made to replace the initial designations of the Mastercard and Visa networks, and that the Commerce Commission may issue a network standard to replace the initial pricing standard. This can be done subject to the same process and safeguards set out in clauses 11 to 13 and 18 to 19. It is necessary because the initial designations and initial pricing standard are not necessarily intended to be enduring, but are in the primary legislation so that they can be implemented as soon as possible. The initial pricing standard in particular is intended to be an interim measure until the Commerce Commission may decide to replace it with another pricing standard. Clause 2(2)(a) of Schedule 1 sets out that the initial designation expires 10 years after commencement unless replaced earlier. Clause 7(6)(a) sets out that the initial pricing standard expires 10 years after commencement unless replaced earlier.</p>	

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>The following delegated decisions are secondary legislation (apart from directions to individuals):</p> <ul style="list-style-type: none"> <li>• Clause 10 – designation by Order in Council, following recommendation by Minister and Commerce Commission</li> <li>• Clause 17 – Commission may issue network standards for designated networks</li> <li>• Clause 23 – Commission may give directions to designated networks</li> <li>• Clause 30 – Commission may issue merchant surcharging standards.</li> </ul> <p>The designation model will enable the technical details of regulation to be considered by an independent regulator who has expertise in the retail payment system, as recommended by the Legislation Design and Advisory Committee. In each case of delegated decision-making by the regulator, the decisions are highly technical and the Commission has the appropriate level of expertise, which is why it is appropriate that these decisions be delegated. The exercise of each of these powers is subject to consideration of criteria by the decision-maker (apart from clause 30), publication and consultation requirements before they can be exercised.</p> <p>Clause 55 provides a regulation-making power which can require the payment of fees and charges to the Commerce Commission to approve substantive network rule changes and prescribe how they are set, authorise the Commerce Commission to refund or waive any fees or charges, and provide for any other matters necessary for the administration of the Act. Before making a recommendation, the Minister of Commerce and Consumer Affairs must consult affected parties.</p>	

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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