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Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Retail Payment System Bill: Approval for Introduction	Date to be published	29 October 2021

List of documents that have been proactively released		
Date	Title	Author
September 2021	<i>Retail Payment System Bill: Approval for Introduction</i>	<i>Office of the Minister of Commerce and Consumer Affairs</i>
30 September 2021	<i>LEG-21-MIN-0159</i>	<i>Cabinet Office</i>

Information redacted

YES

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Information redacted for the reason of Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Legislation Committee

Retail Payment System Bill: Approval for Introduction

Proposal

- 1 The purpose of this paper is to seek approval from the Cabinet Legislation Committee to introduce the Retail Payment System Bill to the House on 5 October 2021. It also seeks agreement to refer the Bill to the Economic Development, Science and Innovation Committee for consideration, with the aim of the Bill Confidential advice to Government

Policy

- 2 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, leading to poor outcomes for many people and businesses (consumers) when transacting with merchants.
- 3 To address this issue, as well as any other issues that may arise in future, in April 2021 Cabinet agreed to set up a regulatory regime for the retail payment system [DEV-21-MIN-0075 refers]. Cabinet agreed that:
 - 3.1 a transitional price path be established to reduce interchange fees for the main credit and debit card schemes;
 - 3.2 the Commerce Commission (the Commission) would regulate the regime, recommend to the Minister that a network be designated to allow for regulation of the network and participants, and then regulate designated networks by imposing pricing principles or limits on fees, imposing access or information disclosure requirements, making directions, and entering into enforceable undertakings; and
 - 3.3 the regime would be broadly scoped to potentially apply to any retail payment method (excluding cash), and equip the regulator with a broad toolkit to address problems that may arise in the future.
- 4 Following a targeted consultation process conducted by officials, in July 2021 Cabinet agreed to additional policy proposals for regulating the retail payment system [DEV-21-MIN-0146]. These proposals covered the following matters:
 - 4.1 the design of the designation model;

- 4.2 the Commission's powers to regulate the designated participants and non-designated participants;
- 4.3 the regulation of the surcharges applied by merchants, to limit excessive surcharging;
- 4.4 monitoring and enforcement, including pecuniary penalties; and
- 4.5 the initial designation of Mastercard and Visa retail payment networks and an initial pricing standard that will apply to these networks;

Overview of the Bill

- 5 The Bill introduces several measures to reduce economic inefficiencies and promote competition in the retail payment system. It sets out a process and factors to determine which retail payment networks should be designated, and defines retail payment networks as the arrangements, products, contracts, and participants that facilitate a class of retail payments. The designation process involves the Commission, after applying criteria and consulting with affected persons, making recommendations to the Minister of Commerce and Consumer Affairs as to which retail payment networks should be designated.
- 6 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 network infrastructure or services.
- 7 The Commission can also give directions to participants regarding the rules of designated networks. This includes directing a network operator to set, amend or comply with network rules, notify the Commission of amendments made to rules, or obtain the Commission's approval before making any substantive amendments to rules.
- 8 The Bill provides for initial designations of the Mastercard and Visa credit and debit networks, and sets an initial pricing standard that requires reductions in interchange fees which underpin charges to merchants. This initial pricing standard also prohibits anti-avoidance behaviour such as Visa or Mastercard paying issuers net monetary or non-monetary compensation in addition to the regulated interchange fees. The initial pricing standard will be replaced if and when the Commission issues a new pricing standard in respect of interchange fees for the Mastercard and Visa networks.
- 9 To limit excessive surcharging that does not reflect the costs to the merchant of accepting particular payment types, the Bill provides that the Commission can issue merchant surcharging standards.
- 10 In exercising its powers under this Bill, the Commission will be able to use similar enforcement and functional powers to those set out in the Commerce Act 1986 (Commerce Act), including monitoring and investigation powers. This will ensure a common approach to carrying out the functions of the Commission across the legislation it regulates.

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

Additional policy decisions made since July 2021 Cabinet decisions

- 12 In July 2021, Cabinet invited me to issue drafting instructions to the Parliamentary Counsel Office for the Bill, and authorised me to make additional policy decisions and minor or technical changes, consistent with the general policy intent, regarding issues that arise in drafting [DEV-21-MIN-0146 refers]. This authorisation was necessary due to the intended timeframe for the Bill, ^{Confidential advice to Government} [REDACTED]
- 13 The first additional policy decision I have made relates to merchant surcharging. In July 2021, Cabinet agreed that the Commission would be able to issue standards detailing the sorts of payment surcharging to be prohibited for the purposes of the Fair Trading Act 1986 (Fair Trading Act) [DEV-21-MIN-0146 refers].
- 14 Having reconsidered this original proposal, my view is that aligning with the general misrepresentation prohibition in the Fair Trading Act does not go far enough to deal with merchant surcharging. As such, the Bill now enables the Commission to issue standards for the purpose of ensuring that payment surcharges are not excessive and reflect the cost to the merchant of the payment services used for accepting the retail payment. These standards must be complied with by merchants.
- 15 The Commission will be able to issue a compliance notice to a merchant where the Commission is satisfied there is non-compliance with a surcharging standard, which would direct the merchant to take corrective action. Continued non-compliance in breach of a compliance notice could result in pecuniary penalties of up to \$10,000 for individuals and \$30,000 for a body corporate. The corrective notice regime is intended to make it easier for the Commission to enforce what may be less serious breaches, potentially by smaller merchants.
- 16 The Bill also provides for pecuniary penalties for contravention of a merchant surcharging standard of up to \$200,000 for individuals and \$600,000 for a body corporate. This will allow for the Commission to directly address compliance issues on a large scale at the 'top end of town', rather than needing to go through a two-stage process of first seeking corrective action.
- 17 The second additional policy decision I have made relates to enforceable undertakings. Cabinet agreed that the Commission should be able to enter into enforceable undertakings either to remedy non-compliance or as an alternative to regulation. Cabinet also agreed that a maximum pecuniary

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penalty of \$500,000 should apply for contravention of an enforceable undertaking [DEV-21-MIN-0146 refers].

- 18 The idea behind enforceable undertakings as an alternative to regulation was that once the initial designations of Mastercard and Visa take effect, the Commission could enter into an enforceable undertaking with unregulated competitors like American Express. This could prevent them from taking advantage of their competitors' regulated fees by raising their own fees.
- 19 Having an enforceable undertaking that is an alternative to regulation would mean that the person entering into the undertaking would need to promise to meet some alternative requirements instead of a standard or direction applying to them. It may not be appropriate for the usual consequences of breaching an undertaking to apply to a person for failure to meet alternative requirements, where no requirements under the Act (i.e. a standard or direction) actually apply to them.
- 20 After further analysis and consultation, I have agreed with my officials' recommendation that the Commission should only be able to accept enforceable undertakings to remedy non-compliance. This is consistent with the Commission's existing powers under the Commerce Act and Fair Trading Act, and helps to ensure that all regulation falls within this regime.
- 21 As such, the Bill no longer includes enforceable undertakings as an alternative to regulation nor provides for pecuniary penalties for a breach of enforceable undertakings. Monetary penalties for contravention of an enforceable undertaking should be determined by the Court, and should not exceed any financial benefit that the person has obtained directly or indirectly that is reasonably attributable to the breach. Pecuniary penalties should not apply in addition to this amount.
- 22 I have also agreed to the following minor and technical amendments being made to the Bill:
- 22.1 by leveraging off the powers in section 74B of the Commerce Act, regulations are no longer needed to set fees to recover the Commission's costs of enforceable undertakings;
- 22.2 change to the commencement of the initial designations of the Mastercard and Visa networks so that these will come into force the day after Royal assent, enabling the Commission to begin monitoring these networks and preparing for any possible future regulation;
- 22.3 to clarify the criteria the Commission must have regard to when making decisions regarding designations, standards or directions, minor changes have been made to the purpose clauses in the Bill;
- 22.4 changes to one of the secondary purposes of the Bill to better ensure that consumers and merchants pay no more than reasonable fees for the supply of payment services;

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- 22.5 a change to allow access standards to require a participant to provide access to network services as well as network infrastructure;
- 22.6 a variation of the rule approval power for the Commission to require a network to notify it of any rule changes; and
- 22.7 a requirement that designations and network standards must be reviewed or face expiry to ensure the regulation is fit for purpose.

Aspects of the Bill that may be contentious

- 23 Due to the fast pace of this project, some of the provisions of the Bill may come as a surprise to some participants of the retail payment system. Given time constraints, officials were unable to consult stakeholders on many of the finer details. In particular, some merchants may not be aware of the proposal to allow the Commission to issue and regulate merchant surcharging standards.
- 24 In addition, stakeholders may not be fully aware that the Bill includes a broad remit for the Commission to regulate the retail payment system. While the Bill largely regulates via the designation approach, the Commission also has powers to require information to be produced by non-designated parties.

Impact analysis

- 25 Two regulatory impact statements were prepared in accordance with the necessary requirements: *Regulating the retail payments system* [DEV-21-MIN-0075]; and *Additional tools for regulating the retail payments system* [DEV-21-MIN-0146]. These were submitted at the time that Cabinet approval of the policy relating to the Bill was sought. No changes to these regulatory impact statements are required as a result of the subsequent additional policy decisions.

Compliance

- 26 The proposed legislation complies with:
 - 26.1 the principles of the Treaty of Waitangi;
 - 26.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 26.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
 - 26.4 the principles and guidelines set out in the Privacy Act 2020;
 - 26.5 relevant international standards and obligations; and
 - 26.6 the [Legislation Guidelines](#) (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

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Consultation

- 27 The Ministry of Business, Innovation and Employment consulted publicly with a December 2020 Issues Paper, which discussed issues in the retail payment system and briefly canvassed some limited options. There were 36 submissions received from banks, card schemes and organisations representing businesses and consumers. Submitters generally agreed with the case for introducing greater regulatory oversight.
- 28 Officials undertook targeted consultation on the details of the proposals with 18 key industry participants via individual meetings in May 2021.
- 29 Officials also consulted with the following stakeholders in developing the Bill:
- 29.1 The Treasury, Reserve Bank of New Zealand, and Financial Markets Authority. The Department of Prime Minister and Cabinet (Policy Advisory Group) was informed.
- 29.2 Officials worked closely with the Commission on the draft Bill to make it easier to implement and enforce the proposals. This included the Commission undertaking a scenario testing exercise to ensure that the provisions of the Bill would be workable.
- 29.3 The Ministry of Justice was consulted on the proposed new pecuniary penalties for contraventions of merchant surcharging standards.

Binding on the Crown

- 30 The Bill gives effect to Cabinet decisions that the Act will bind the Crown; with the exception of pecuniary penalties, for which the Crown shall not be liable [DEV-21-MIN-0146].

Creating new agencies or amending law relating to existing agencies

- 31 The legislation does not create any new agencies. The Act will amend the law relating to existing agencies. The Ministry of Business, Innovation and Employment will administer the Act and the Commission will be empowered as the regulator. The Act will provide extended powers and a sector-specific framework for the Commission to regulate the retail payment system.
- 32 The Act will not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982, or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

- 33 The Executive is empowered to make regulations requiring the payment of fees and charges to the Commission to approve substantive network rule changes and prescribe how they are set, authorise the Commission to refund or waive any fees or charges, and provide for any other matters necessary for the administration of the Act.

- 34 The courts are able to make decisions about contraventions and pecuniary penalties, and other enforcement matters. Their powers under this Bill are based on existing powers under the Commerce Act and Fair Trading Act.
- 35 The criteria relating to the qualifications and responsibilities of decision makers and the procedures that they follow have been applied.

Associated regulations

- 36 Regulations will not be needed to bring the Bill into operation.
- 37 Cabinet agreed to include in the Bill the ability to make regulations allowing the Commission to recover, through fees, costs incurred to review and approve substantive network rule changes [DEV-21-MIN-0146 refers]. As such, clause 55 of the Bill includes a regulation-making power to require fees to be paid to the Commission to approve substantive network rule changes. Before making a recommendation, the Minister responsible for administering the Act must consult affected parties.

Other instruments

- 38 The Bill provides that the Governor-General may, on the recommendation of the Minister, make an Order in Council declaring a retail payment network to be a designated network. The Bill also provides that the Commission may issue network standards, direction notices regarding network rules, and merchant surcharging standards.
- 39 Designation orders, standards, and direction notices (if applying to classes of participants) would be secondary legislation for the purposes of the Legislation Act 2019.
- 40 As recommended by the Legislation Design and Advisory Committee, 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. The Commission has the appropriate level of expertise to make regulatory decisions under this Bill, and its regulatory powers are subject to consideration of criteria, as well as publication and consultation requirements.
- 41 This designation approach also allows the regulatory regime to respond to any changes in the retail payment system, such as new retail payment networks, products or payments methods that emerge.

Definition of Minister/department

- 42 The Bill defines Minister as: “...*the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act*”. The Bill does not contain a definition of department, or chief executive of a department.

Commencement of legislation

- 43 The initial pricing standard will commence six months after enactment of the Bill. This will allow regulated parties sufficient time to make any necessary changes in order to comply. The remainder of the Bill will commence the day after Royal assent. This will allow the Commission to begin to monitor the initially designated networks and the broader retail payment system to inform any future regulation or potential compliance issues.

Parliamentary stages

- 44 The original policy intent was for the Bill should be introduced to the House on 5 October 2021 and Confidential advice to Government
- 45 I now seek agreement for the Bill Confidential advice to Government and for the Bill to be referred to Select Committee with a report back date of 3 March 2022.
- 46 I propose that the Bill be referred to the Economic Development, Science and Innovation Committee.

Proactive Release

- 47 I propose to release this paper proactively within 30 business days following its consideration, subject to any redactions that may be required consistent with the Official Information Act 1982.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that the Retail Payment System Bill Confidential advice to Government
- 2 **note** that the Bill introduces a regulatory regime to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand;
- 3 **note** that Cabinet authorised me to make additional policy decisions and minor or technical changes, consistent with the general policy intent;
- 4 **note** that minor technical amendments have been made to the Bill since the July 2021 Cabinet decisions, and that the following changes have been made to the Bill to reflect additional policy decisions:
 - 4.1 the Commerce Commission is able to issue merchant surcharging standards to ensure that payment surcharges are not excessive and reflect the cost to the merchant of the payment services used for accepting the retail payment;

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- 4.2 the Bill provides for pecuniary penalties for a contravention of a merchant surcharging standard, of up to \$200,000 for individuals or \$600,000 for a body corporate;
 - 4.3 the Commission can issue a notice to take corrective action related to a contravention of a merchant surcharging standard, with pecuniary penalties for breaching a notice, of up to \$10,000 for individuals or \$30,000 for a body corporate;
 - 4.4 the Bill provides for enforceable undertakings to remedy non-compliance only, rather than also as an alternative to regulation;
 - 4.5 the Bill no longer provides for pecuniary penalties for a contravention of enforceable undertakings.
- 5 **approve** the Retail Payment System Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 6 **agree** that the Bill be introduced on 5 October 2021;
- 7 **agree** that the government propose that the Bill be referred to the Economic Development, Science and Innovation Committee for consideration;
- 8 **agree** that the government propose that Confidential advice to Government and that the Bill be referred to Select Committee with a report back date of 3 March 2022.

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

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