

Retail Payment System Bill

Government Bill

Explanatory note

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 1986.

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 from providing net monetary or non-monetary compensation to issuers (such as reduced scheme fees, discounts, and rewards) in addition to issuers receiving interchange fees. The 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 products	Payment methods	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 products	Payment methods	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 6 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 payments system to inform any future regulation.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2021&no=80>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced regulatory impact statements on 30 March 2021 and 23 June 2021 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of these regulatory impact statements can be found at—

- <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/16904-regulatory-impact-statement-additional-tools-for-regulating-the-retail-payments-system-proactiverelease-pdf>

- <https://treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides for most of the Act to commence on the day after the Royal assent. The exception is the initial pricing standard relating to Mastercard and Visa, which commences 6 months later.

Part 1

Preliminary provisions

Clauses 3 and 4 set out the purpose of the Bill and some principles that apply.

Clause 5 sets out an overview of the Bill.

Clause 6 sets out the Commission's functions under the Bill.

Clause 7 defines terms used in the Bill. These include the following:

- **consumer** is not limited to domestic or household consumers, but includes any person or business that acquires goods or services from a merchant:
- **participant** is a term used to cover the operator of, and other service providers to, a retail payment network, but does not include the consumer that makes the retail payment, or the merchant that receives the retail payment, over the network:
- **retail payment** means any payment by a consumer to a merchant for the supply of goods or services.

Clause 8 and Schedule 1 provide for transitional provisions.

Clause 9 provides for the Bill to bind the Crown except to the extent stated in the clause (which is based on a similar exception in the Commerce Act 1986).

Part 2

Designated networks

Subpart 1 gives power to the Governor-General to designate, by Order in Council, retail payment networks as designated networks. First, the responsible Minister must have made a recommendation for designation. The Commission may recommend to the Minister at any time that a retail payment network be designated. *Schedule 1* of the Bill also designates some Mastercard and Visa networks.

Subpart 2 gives the Commission the power to issue standards applying to designated networks and their operators and other participants. The Commission must consult affected persons before issuing a standard. Standards may cover a wide range of matters relating to designated networks, including—

- the public disclosure of information relating to payment services or the designated network:

- pricing for payment services:
- access requirements for aspects of a designated network.

Schedule 1 of the Bill also sets an initial pricing standard for the Mastercard and Visa networks that are designated in that schedule.

Subpart 3 gives the Commission the power to give directions about network rules that will apply to designated networks and their operators and other participants.

Part 3

Merchant surcharging, monitoring and enforcement, and miscellaneous provisions

Subpart 1 gives the Commission the power to issue standards applying to merchants, to ensure that payment surcharges for payment services are not excessive and reflect the cost to the merchant of the payment services used in accepting the retail payment. This power applies whether or not the retail payment network is a designated network.

Subpart 2 applies a large number of provisions that apply to the Commission in respect of its regulatory functions under the Commerce Act 1986. Some relate to the Commission's monitoring and investigation powers. Others are boilerplate provisions. Most provisions will apply whether or not a network is designated, and will apply to all merchants.

Subpart 3 allows the High Court to impose a pecuniary penalty on a participant for various contraventions. Proceedings under this subpart are civil proceedings. In the case of a contravention of a network standard, the maximum pecuniary penalty is \$5 million for a body corporate or \$500,000 for an individual. In the case of a merchant surcharging standard, there are 2 different pecuniary penalty levels, one for failing to comply with a merchant surcharging standard and one for failing to comply with the notice to take corrective action, but it is not always necessary for a corrective notice to be issued first.

Subpart 4 provides for compensation, undertakings, and injunctions.

Subpart 5 contains miscellaneous provisions. The main ones are as follows:

- *clause 53* provides that network standards issued under this Bill are deemed to also be statutorily authorised for the purposes of Part 2 of the Commerce Act 1986:
- *clause 55* is a regulation-making power. If the Commission gives a direction under *section 24(2)(d)*, requiring participants to apply for, and obtain, the Commission's approval for amendments to network rules that are substantive amendments, regulations may require the participants to pay fees and charges to the Commission for obtaining that approval.

Schedule 1 is for transitional and savings provisions, and contains the initial designations and initial pricing standard for some Mastercard and Visa networks. See the table above for its effect.

Hon Dr David Clark

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Retail Payment System Act **2021**.

2 Commencement

- (1) This Act comes into force on the day after the date on which it receives the Royal assent. 5
- (2) However, **subpart 3 of Part 1 of Schedule 1** (initial pricing standard) comes into force 6 months after the date on which this Act receives the Royal assent.

Part 1 10
Preliminary provisions

3 Purpose

The purpose of this Act is to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand. 15

4 Purpose and principles of exercising functions and powers under this Act

- (1) The functions and powers of the Commission and the Minister must be exercised for the purpose set out in **section 3**.
- (2) In deciding whether to exercise their functions and powers, and in exercising them, the Commission and the Minister must take into account the following principles to the extent that the Commission or Minister considers them relevant: 5
- (a) that merchants and consumers should pay no more than reasonable fees for the supply of payment services; and
 - (b) that the retail payment system provides a reasonable degree of transparency. 10

Compare: 2021 No 13 s 13

5 Overview of this Act

This Act—

- (a) provides for the regulation of participants in retail payment networks (including via initial designations and an initial pricing standard); and 15
- (b) confers certain functions and powers on the Commission for that purpose, of which some apply to designated networks and others apply to all retail payment networks; and
- (c) enables the Commission to regulate fees charged by merchants in respect of certain payment services (for example, payment surcharges); and 20
- (d) provides for investigation, monitoring, and enforcement by the Commission.

6 Functions of Commission under this Act

In addition to the other functions conferred on the Commission by this Act, the Commission's functions in relation to the retail payment system are as follows: 25

- (a) to monitor competition and efficiency in the retail payment system:
- (b) to conduct inquiries, reviews, and studies into any matter relating to the retail payment system in New Zealand:
- (c) to make available reports, summaries, and information about the things referred to in **paragraphs (a) and (b)**: 30
- (d) to co-operate with and assist other law enforcement or regulatory agencies that carry out a role in relation to the retail payment system.

Compare: 1986 No 5 s 49; 1986 No 121 s 6

7 Interpretation 35

In this Act, unless the context otherwise requires,—

access standard means a network standard issued by the Commission under **subpart 2 of Part 2** relating to a matter referred to in **section 20(1)(c)**

affected persons, in relation to a proposed designation, standard, or direction, means the persons that the Commission considers will be substantially affected by the making of the designation, issuing of the standard, or giving of the direction, as the case may be

Commission has the same meaning as in the Commerce Act 1986 5

consumer means a person that acquires goods or services from a merchant

contravention of this Act includes a contravention of any standard or direction

designated network means any retail payment network that is—

(a) declared to be a designated retail payment network under **subpart 1 of Part 2**; or 10

(b) designated under an initial designation

designation order means both of the following:

(a) an Order in Council under **section 10** declaring a retail payment network to be a designated network: 15

(b) an initial designation

direction means a direction of the Commission under **subpart 3 of Part 2** in relation to network rules

goods has the same meaning as in the Fair Trading Act 1986

information disclosure standard means a network standard issued by the Commission under **subpart 2 of Part 2** relating to a matter referred to in **section 20(1)(a)** 20

initial designation means a designation in **subpart 2 of Part 1 of Schedule 1**

initial pricing standard means the initial pricing standard in **subpart 3 of Part 1 of Schedule 1** 25

make publicly available means to publish on an Internet site that is maintained by, or on behalf of, the Commission and is publicly available free of charge

merchant means a supplier (within the meaning of the Fair Trading Act 1986) of goods or services to consumers 30

merchant surcharging standard means a standard issued by the Commission under **subpart 1 of Part 3**

Minister means 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 35

network means a retail payment network

network infrastructure means infrastructure that is necessary for the provision of the network's payment services

network operator or operator, in relation to a retail payment network, means any person that is or does 1 or more of the following:

- (a) is wholly or partly responsible to the participants (or any of them) for the network rules:
- (b) operates or manages the network or the core infrastructure of the network 5

network rules means rules that set out (among other things) the following:

- (a) how the network is to be constituted (for example, as a set of arrangements between its participants or as a legal person with whom its participants are to interact): 10
- (b) how activities on the network are to be carried out:
- (c) the rights and obligations under the network of its operators and participants

network standard means both of the following:

- (a) a standard issued by the Commission under **subpart 2 of Part 2**: 15
- (b) the initial pricing standard

participant, in relation to a retail payment network, means a person that is a network operator or any other service provider

payment means a transfer of monetary value

payment method means the form in which a consumer makes or is able to make a retail payment (for example, using a card online or without contact in person) 20

payment product means a class of retail payment within a retail payment network (for example, personal or commercial retail payments within a retail payment network) 25

payment services means services that facilitate retail payments

payment surcharge means an amount (however described) charged by a merchant, in addition to the price of goods or services,—

- (a) for accepting a retail payment; or
- (b) for using one payment method rather than another 30

pricing standard means both of the following:

- (a) a network standard issued by the Commission under **subpart 2 of Part 2** relating to a matter referred to in **section 20(1)(b)**:
- (b) the initial pricing standard

retail payment means a payment by a consumer to a merchant for the supply of goods or services 35

retail payment network means the participants, arrangements, contracts, and rules that facilitate a class of retail payment

retail payment system means the system comprising all retail payment networks

service provider, in relation to a retail payment network, means any person that provides or facilitates the provision of payment services in the network (for example, a payment or an infrastructure service provider), but does not include a merchant 5

services has the same meaning as in the Fair Trading Act 1986, except that it does include rights or benefits in the form of the supply of goods or the performance of work under a contract of service

standard means a network standard or a merchant surcharging standard. 10

8 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms.

9 Act binds the Crown

- (1) This Act binds the Crown. 15
- (2) However, the Crown is not liable to pay a pecuniary penalty under **subpart 3 of Part 3**.
- (3) Where it is alleged that the Crown has contravened any provision of this Act, the Commission or the person directly affected by the contravention may apply to the court for a declaration that the Crown has contravened that provision and, if the court is satisfied beyond a reasonable doubt that the Crown has contravened that provision, it may make a declaration accordingly. 20

Compare: 1986 No 5 s 5

Part 2

Designated networks 25

Subpart 1—Designations

10 Designation of networks by Order in Council

- (1) The Governor-General may, on the recommendation of the Minister, make an Order in Council declaring a retail payment network (excluding the cash retail payment network) to be a designated network. 30
- (2) A designation order is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

11 Minister's recommendation

- (1) The Minister may recommend to the Governor-General that a retail payment network be designated only after receiving a recommendation from the Commission. 35

- (2) In deciding whether to make a recommendation that a designation order be made, the Minister may do any of the following:
- (a) accept or reject the Commission’s recommendation:
 - (b) request that the Commission reconsider any matter (such as an error, an oversight, or competing policy interests): 5
 - (c) make any other decision that the Minister considers is in the public interest.
- 12 Commission’s recommendation**
- (1) The Commission may recommend to the Minister that a retail payment network be designated. 10
- (2) In deciding whether to make a recommendation, the Commission must take into account the following:
- (a) any features of the retail payment network, or any conduct of participants in the network, that reduce, or are likely to reduce, competition or efficiency: 15
 - (b) the nature of the network, including the number, value, and nature of the transactions that the network currently processes or is likely to process in the future:
 - (c) the Financial Market Infrastructures Act 2021 and any other regulatory requirements in other New Zealand laws that the Commission considers relevant. 20
- 13 Process for Commission’s recommendation**
- (1) Before making a recommendation under **section 12**, the Commission must—
- (a) consult the Reserve Bank of New Zealand if the network comprises any part of a system that is a designated FMI within the meaning of the Financial Markets Infrastructures Act 2021; and 25
 - (b) notify an operator of the network; and
 - (c) consider any submissions made.
- (2) The Commission must make the recommendation publicly available as soon as practicable after making it, including a statement of its reasons for making the recommendation. 30
- 14 Content of designation**
- (1) A designation order must specify both of the following:
- (a) the network:
 - (b) at least 1 person that is an operator of the network. 35
- (2) A designation order may specify 1 or more of the following:
- (a) the payment products in the designated network:

(b) documents that set out some or all of the network rules (whether the documents are referred to by name or description):

(c) classes of participants.

Compare: 2021 No 13 s 29

15	Duration of designation	5
(1)	A designation order continues in force until the date on which the order expires (the expiry date) or is revoked or replaced, whichever occurs first.	
(2)	A designation order must state its expiry date, which must be no later than 10 years after the date on which the order commences.	
16	Amendment and revocation of designation	10
	A designation order may be amended or revoked under sections 10 to 14 , except that—	
(a)	sections 12 and 13 do not apply to an order that amends a designation order if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature only (for example, a name change of an operator):	15
(b)	section 12 does not apply to a revocation order.	
	Subpart 2—Network standards for designated networks	
17	Commission may issue network standards for designated networks	
(1)	The Commission may issue network standards.	20
(2)	A network standard may do either or both of the following:	
(a)	impose requirements on participants in designated networks:	
(b)	set out requirements applying to designated networks with which the participants must ensure compliance.	
(3)	A network standard may—	25
(a)	apply to all participants in designated networks, a particular participant, or a class of participants:	
(b)	apply to all designated networks, a particular designated network, or a class of designated networks:	
(c)	apply in all circumstances, particular circumstances, or a class of circumstances (for example, in relation to payment products or payment methods).	30
(4)	A network standard issued under this section is secondary legislation (<i>see</i> Part 3 of the Legislation Act 2019 for publication requirements).	
	Compare: 2021 No 13 s 31	35

18 Criteria for issuing network standards

In deciding whether to issue a network standard (the **proposed standard**), and in deciding on its terms, the Commission must,—

- (a) in the case of a proposed pricing standard or access standard, take into account whether there are any features of the retail payment network, or any conduct of participants in the network, that reduces, or are likely to reduce, competition or efficiency: 5
- (b) in the case of a proposed access standard, consider the effect on innovation in the retail payment system of issuing a network standard.

19 Process for issuing network standards 10

(1) Before issuing a network standard (the **proposed standard**), the Commission must—

- (a) make the proposed standard publicly available; and
- (b) 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; and 15
- (c) consider any submissions received about the proposed standard.

(2) After issuing a network standard, the Commission must make the standard, and the Commission's reasons for issuing the standard, publicly available.

Compare: 2021 No 13 s 32 20

20 Subject matter of network standards

(1) A network standard may deal with, or otherwise relate to, 1 or more of the following matters:

- (a) the disclosure of information relating to payment services or the designated network, including requirements for information to be provided— 25
 - (i) by participants to all or any of merchants, consumers, and the public; and
 - (ii) by 1 class of participants to another:
- (b) pricing for payment services, including—
 - (i) pricing principles and limits on fees (or components of fees) charged by all or any participants or classes of participants in a designated network: 30
 - (ii) pricing method requirements, including requirements relating to pricing methodologies and how prices are expressed, and to pricing formats when prices are offered to merchants: 35
- (c) access requirements for aspects of a designated network, including—
 - (i) how a person may become a participant of a network or gain access to network infrastructure or services, including requiring

- any class of participants to allow new participants to access all or certain aspects of the network (for example, to allow access for new acquirers to a network or to provide for new entrants or acquirers to access switch infrastructure or for providers of new payment products to use the retail payment network): 5
- (ii) how a participant may be required to provide access to network infrastructure or services to participants.
- (2) A network standard may require participants to give to the Commission reports relating to any contraventions of requirements imposed by or under this Act. 10
Compare: 2021 No 13 s 34
- 21 Pecuniary penalty for contravention of network standard**
- (1) A participant who contravenes a network standard is liable to a pecuniary penalty.
- (2) See **subpart 3 of Part 3** for further provisions about pecuniary penalties.
- 22 Duration of network standard** 15
- (1) A network standard continues in force until the date on which it expires (the **expiry date**) or is revoked or replaced, whichever occurs first.
- (2) A standard must state its expiry date, which must be no later than 10 years after the date on which the standard commences.
- 23 Amendment and revocation of network standards** 20
- A network standard may be amended or revoked under **sections 17 to 20**, except that—
- (a) **sections 18 and 19** do not apply to an amendment of a network standard if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature only: 25
- (b) **section 18** does not apply to the revocation of a network standard.
- Subpart 3—Rules of designated networks
- 24 Commission may give directions about network rules**
- (1) The Commission may, by notice (a **direction notice**), direct 1 or more participants of a designated network to take specified action in accordance with the direction. 30
- (2) A direction may require 1 or more operators to do 1 or more of the following in accordance with the direction:
- (a) set network rules:
- (b) amend network rules: 35
- (c) notify the Commission of any amendments made to network rules:

- (d) apply for, and obtain, the Commission’s approval before making amendments to network rules that are of a type identified in the direction as substantive amendments.
- (3) A direction may require 1 or more participants to comply with 1 or more network rules. 5
- (4) A direction must state the reasons for which it is given.
- (5) A direction given to a class of participants is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
Compare: 2021 No 13 s 80
- 25 Criteria for giving directions** 10
- In deciding whether to give a direction that relates to setting or amending network rules, and in deciding on its terms, the Commission must take into account whether there are any features of the retail payment network, or any conduct of participants in the network, that reduces, or are likely to reduce, competition or efficiency. 15
- 26 Process for giving directions**
- (1) Before giving a direction that relates to setting or amending network rules (the **proposed direction**), the Commission must—
- (a) make the proposed direction publicly available; and
- (b) send a copy of the proposed direction, and the Commission’s reasons for giving the proposed direction, to affected persons or to persons that the Commission considers to be representatives of affected persons; and 20
- (c) consider any submissions received about the proposed direction.
- (2) After giving a direction, the Commission must make the direction, and the Commission’s reasons for giving the proposed direction, publicly available. 25
- 27 Pecuniary penalty for contravention of direction**
- (1) A participant that contravenes a direction is liable to a pecuniary penalty.
- (2) *See* **subpart 3 of Part 3** for further provisions about pecuniary penalties.
- 28 Amendment and revocation of directions**
- A direction may be amended or revoked in the same way in which it may be made, except that— 30
- (a) **sections 25 and 26** do not apply to an amendment of a network standard if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature only:
- (b) **section 25** does not apply to the revocation of a network standard. 35

Part 3

Merchant surcharging, monitoring and enforcement, and miscellaneous provisions

Subpart 1—Merchant surcharging standards

- 29 Purpose of this subpart** 5
- (1) The purpose of this subpart is to ensure that payment surcharges for payment services are not excessive and reflect the cost to the merchant of the payment services used for accepting the retail payment.
- (2) The functions and powers of the Commission under this subpart must also be exercised for that purpose. 10
- Compare: Competition and Consumer Amendment (Payment Surcharges) Act 2016 (Aust), s 55
- 30 Commission may issue merchant surcharging standards**
- (1) The Commission may issue merchant surcharging standards.
- (2) A merchant surcharging standard may impose requirements on merchants that use payment services for retail payments. 15
- (3) A merchant surcharging standard may—
- (a) apply to all merchants that accept payment services from networks or a class of those merchants;
- (b) apply to all networks, a particular network, or a class of networks;
- (c) apply in all circumstances, particular circumstances, or a class of circumstances (for example, in relation to payment methods or payment products). 20
- (4) A standard issued under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements). 25
- Compare: 2021 No 13 s 31
- 31 Process for issuing merchant surcharging standards**
- (1) Before issuing a merchant surcharging standard (the **proposed standard**), the Commission must—
- (a) make the proposed standard, and the Commission’s reasons for issuing the proposed standard, publicly available; and 30
- (b) send a copy of the proposed standard, and the Commission’s reasons for issuing the proposed standard, to persons that the Commission considers to be representatives of affected persons; and
- (c) consider any submissions received about the proposed standard.

- (2) After issuing a merchant surcharging standard, the Commission must make the standard, and the Commission’s reasons for issuing the proposed standard, publicly available.
Compare: 2021 No 13 s 32
- 32 Subject matter of merchant surcharging standards** 5
- (1) A merchant surcharging standard may deal with, or otherwise relate to, 1 or more of the following matters:
- (a) the disclosure of information relating to payment surcharges, including requirements for information to be provided—
 - (i) by merchants to all or any consumers and the public; and 10
 - (ii) by 1 class of merchants to consumers that acquire their goods or services:
 - (b) requirements that merchants must represent payment surcharges in respect of payment services in a manner set out in the standard:
 - (c) requirements that merchants must limit payment surcharges in respect of payment services in accordance with the standard: 15
 - (d) requirements that merchants must keep records of how payment surcharges are calculated.
- (2) Requirements under **subsection (1)(b)** and **(c)** may be linked to—
- (a) principles and limits on payment surcharges (or components of payment surcharges) payable by consumers or classes of consumers to merchants: 20
 - (b) requirements relating to surcharging methodologies and how payment surcharges are expressed, and to formats when payment surcharges are charged to consumers.
- Compare: 2021 No 13 s 34 25
- 33 Pecuniary penalty for contravention of merchant surcharging standard**
- (1) A participant who contravenes a merchant surcharging standard is liable to a pecuniary penalty.
- (2) *See* **subpart 3** for further provisions about pecuniary penalties.
- 34 Amendment and revocation of merchant surcharging standards** 30
- A merchant surcharging standard may be amended or revoked in the same way in which it may be made, except that **section 31** does not apply to—
- (a) a standard that amends another standard if the Commission is satisfied that the amendment is only correcting a minor error or is otherwise of a minor nature only: 35
 - (b) a revocation of a standard.

35 Notice to take corrective action

- (1) If satisfied that a merchant has failed to comply with any requirements of a merchant surcharging standard, the Commission may, by written notice given to the merchant, require the merchant to take any steps specified in the notice to— 5
- (a) remedy the non-compliance; or
 - (b) ensure that the non-compliance is not continued or repeated.
- (2) The notice must specify a reasonable period (a **specified period**) within which the required steps must be taken.
- (3) A merchant given a notice must comply with the notice within the specified period. 10
- (4) A merchant that contravenes a notice is liable to a pecuniary penalty.
- (5) *See* **subpart 3** for further provisions about pecuniary penalties.
- Compare: 2020 No 60 s 23

Subpart 2—Provisions of Commerce Act 1986 of general application 15**36 Application of this subpart**

This subpart applies to all retail payment networks.

37 Monitoring and investigation powers of Commission

The following provisions of the Commerce Act 1986 apply with any necessary modifications: 20

- (a) section 98 (Commission may require person to supply information or documents or give evidence):
- (b) sections 98A and 98G (Commission's powers of search and seizure):
- (c) section 99 (powers of Commission to take evidence):
- (d) section 100 (powers of Commission to prohibit disclosure of information, documents, and evidence): 25
- (e) section 106 (proceedings privileged).

38 Powers of Commission based on subpart 8 of Part 4 of Commerce Act 1986

For the purpose of **Part 2**, the Commission may, in addition to exercising its powers under section 98 of the Commerce Act 1986, do any of the following: 30

- (a) investigate any of the following:
 - (i) how effectively and efficiently any participant is supplying retail payment services:

- (ii) how any standard or direction being considered by the Commission may be applied, or how any standard or direction has been applied, in considering standards or directions:
- (b) examine, consider, or investigate any activity, cost, revenue, transfer, asset valuation, circumstance, or event that is occurring or that has occurred during the previous 7 years: 5
- (c) by notice in writing, require any participant—
 - (i) to prepare and produce forecasts, forward plans, or other information; and
 - (ii) to apply any methodology specified by the Commission in the preparation of forecasts, forward plans, or other information: 10
- (d) by notice in writing, require any participant that the Commission has reason to believe may have information or documents relevant to an investigation, audit, or inquiry to do either or both of the following:
 - (i) produce or supply to the Commission documents and information in relation to payment services or the prices or operations of the person in respect of payment services: 15
 - (ii) answer any questions about any matter that the Commission has reason to believe may be relevant to the investigation, audit, or inquiry: 20
- (e) by notice in writing, require any participant, at the time and place specified in the notice, to produce or supply to the Commission an expert opinion from an appropriately qualified person, or a member of a class of appropriately qualified persons, as determined by the Commission in relation to the matters in **paragraphs (a), (b), (c), and (d)(i)**. 25

Compare: 1986 No 5 s 53ZD

39 Application of other provisions of Commerce Act 1986

The following provisions of the Commerce Act 1986 apply with any necessary modifications:

- (a) section 13 (termination of appointment of members): 30
- (b) section 15 (meetings of Commission):
- (c) section 16 (chairperson may direct Commission to sit in Divisions):
- (d) section 17 (assent to determination):
- (e) section 25 (functions of Commission in relation to dissemination of information): 35
- (f) section 26 (Commission to have regard to economic policies of Government):
- (g) section 79 (evidence not otherwise admissible):
- (h) section 79A (proceedings for pecuniary penalties):

- (i) section 88 (general provisions relating to granting of injunctions), as if the reference in subsection (3A) to acquirers were a reference to merchants:
 - (j) section 88A (when undertaking as to damages not required by Commission): 5
 - (k) section 89 (other orders):
 - (l) section 90 (conduct by employees, agents, and others):
 - (m) sections 99B to 99P (assistance to overseas regulators), as if references to an overseas regulator were a reference to an overseas body that has functions in relation to payment services corresponding to those of the Commission under this Act: 10
 - (n) section 100A (Commission may state case for opinion of High Court):
 - (o) sections 101 (notices) and 102 (service of notices):
 - (p) section 103 (offences), as if the reference to section 53ZD were a reference to **section 38** of this Act and as if the references to sections 53B(1)(c) and 53N were ignored: 15
 - (q) section 104 (determinations of Commission):
 - (r) section 106A (judicial notice):
 - (s) section 109 (Commission may prescribe forms). 20
- Compare: 2020 No 60 s 33 20

Subpart 3—Pecuniary penalties

40 Pecuniary penalty orders for contraventions of network standards and directions

- (1) The High Court may, on the application of the Commission, order a participant (A) to pay to the Crown a pecuniary penalty if satisfied that A has— 25
 - (a) contravened a pricing standard; or
 - (b) been involved in a contravention of a pricing standard.
- (2) The amount of any pecuniary penalty under **subsection (1)** must not exceed,— 30
 - (a) in the case of an individual, \$500,000 for each act or omission; or
 - (b) in any other case, \$5 million for each act or omission.
- (3) The High Court may, on the application of the Commission, order a participant (A) to pay to the Crown a pecuniary penalty if satisfied that A has— 35
 - (a) contravened an information disclosure standard; or
 - (b) contravened an access standard; or
 - (c) contravened a direction to set or amend network rules under **section 24(2)(a) or (b)**; or

- (d) contravened a direction to comply with 1 or more network rules under **section 24(3)**; or
- (e) been involved in a contravention of any of those things.
- (4) The amount of any pecuniary penalty under **subsection (3)** must not exceed,— 5
- (a) in the case of an individual, \$200,000 for each act or omission; or
- (b) in any other case, \$2 million for each act or omission.
- (5) The High Court may, on the application of the Commission, order an operator (A) to pay to the Crown a pecuniary penalty if satisfied that A has— 10
- (a) contravened a direction to notify the Commission of any amendments made to network rules under **section 24(2)(c)**; or
- (b) contravened a direction to obtain the Commission’s approval before making any substantive amendments to network rules under **section 24(2)(d)**; or
- (c) been involved in a contravention of either of those things. 15
- (6) The amount of any pecuniary penalty under **subsection (5)** must not exceed,—
- (a) in the case of an individual, \$15,000 for each act or omission; or
- (b) in any other case, \$150,000 for each act or omission. 20
- Compare: 1986 No 5 s 80; 2020 No 60 s 30
- 41 Pecuniary penalty orders for contraventions of merchant surcharging standards**
- (1) The High Court may, on the application of the Commission, order a merchant (A) to pay to the Crown a pecuniary penalty if satisfied that A has— 25
- (a) contravened a merchant surcharging standard; or
- (b) been involved in a contravention of a merchant surcharging standard.
- (2) The amount of any pecuniary penalty under **subsection (1)** must not exceed,—
- (a) in the case of an individual, \$200,000 for each act or omission; or
- (b) in any other case, \$600,000 for each act or omission. 30
- 42 Pecuniary penalties for contravention of notice to take corrective action**
- (1) The District Court may, on the application of the Commission, order a merchant to pay to the Crown a pecuniary penalty if satisfied that the merchant has failed to comply with a notice given by the Commission under **section 35(1)**.
- (2) The amount of any pecuniary penalty under **subsection (1)** must not exceed,— 35
- (a) in the case of an individual, \$10,000 for each act or omission; or

(b) in any other case, \$30,000 for each act or omission.

Compare: 2020 No 60 s 30(4), (5), (6)

43 Who is involved in contraventions

In this subpart, a person is **involved in a contravention** of any of the provisions of this Act if the person—

- (a) has attempted to contravene any of those provisions; or
- (b) has aided, abetted, counselled, or procured any other person to contravene any of those provisions; or
- (c) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene any of those provisions; or
- (d) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of any of those provisions; or
- (e) has conspired with any other person to contravene any of those provisions.

44 Proceedings for pecuniary penalties

- (1) Where conduct by any person constitutes a contravention of 2 or more provisions referred to in this subpart, proceedings may be instituted under this subpart against that person in relation to the contravention of any 1 or more of the provisions.
- (2) However, no person is liable to more than 1 pecuniary penalty under this subpart in respect of the same conduct.

45 Considerations for court

In determining an appropriate penalty under this subpart, the court must have regard to—

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered by any person because of the contravention; and
- (c) any gains made or losses avoided by the person in contravention; and
- (d) whether the person in contravention has paid an amount in compensation or taken other steps for reparation or restitution; and
- (e) the circumstances in which the contravention or other act or omission took place (including whether it was intentional, inadvertent, or caused by negligence); and
- (f) any previous contraventions of a similar nature; and
- (g) any other relevant matter.

Compare: 2020 No 60 s 30(6)

Subpart 4—Other proceedings and enforcement

Compensation

46 Court may order compensation

- (1) The court may order a person to pay compensation to any person (an **aggrieved person**) who has suffered, or is likely to suffer, loss or damage as a result of the contravention of this Act. 5
- (2) An application for an order under this section may be made by the Commission or by an aggrieved person.
- (3) In proceedings under this section, the court may make any orders as to costs that it thinks fit. 10

Compare: 1986 No 5 s 87A; 2013 No 69 s 494; 2020 No 60 s 32

Undertakings

47 Enforceable undertakings in connection with enforcement of this Act

The following provisions of the Commerce Act 1986 apply with any necessary modifications: 15

- (a) section 74A (Commission may accept undertakings):
- (b) section 74B (matters included in undertakings):
- (c) section 74C (enforcement of undertakings).

Injunctions

48 Court may grant injunction 20

- (1) The court may, on the application of the Commission or any other person, grant an injunction—
- (a) restraining a person from engaging in conduct that constitutes or would constitute a contravention of this Act:
- (b) requiring a person to do an act or a thing if— 25
- (i) that person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do that act or thing; and
- (ii) the refusal or failure was, is, or would be a contravention of this Act.

- (2) The court may at any time rescind or vary an injunction granted under this subpart. 30

Compare: 2013 No 69 s 480; 2020 No 60 s 35

49 When court may grant restraining injunctions

- (1) The court may grant an injunction restraining a person from engaging in conduct of a particular kind if— 35

- (a) it is satisfied that the person has engaged in conduct of that kind; or
 - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will engage in conduct of that kind.
- (2) The court may grant an interim injunction restraining a person from engaging in conduct of a particular kind if in its opinion it is desirable to do so. 5
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind.
- (4) **Subsections (1)(b) and (2)** apply whether or not—
- (a) the person has previously engaged in conduct of that kind; or 10
 - (b) there is an imminent danger of substantial damage to any other person if the person engages in conduct of that kind.

Compare: 2013 No 69 s 481; 2020 No 60 s 36

50 When court may grant performance injunctions

- (1) A court may grant an injunction requiring a person to do an act or a thing that they are required to do under this Act if— 15
- (a) it is satisfied that the person has refused or failed to do that act or thing; or
 - (b) it appears to the court that, if an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing. 20
- (2) The court may grant an interim injunction requiring a person to do an act or a thing that they are required to do under this Act if in its opinion it is desirable to do so.
- (3) **Subsections (1)(a) and (2)** apply whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing. 25
- (4) **Subsections (1)(b) and (2)** apply whether or not—
- (a) the person has previously refused or failed to do that act or thing; or
 - (b) there is an imminent danger of substantial damage to any other person if the person refuses or fails to do that act or thing. 30

Compare: 2020 No 60 s 37

51 Commission's undertaking as to damages not required

- (1) If the Commission applies to the court for the grant of an interim injunction under this subpart, the court must not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages. 35

- (2) In determining the Commission’s application for the grant of an interim injunction, the court must not take into account that the Commission is not required to give an undertaking as to damages.

Compare: 2013 No 69 s 482; 2020 No 60 s 38

52 Limit on proceedings 5

Proceedings for civil pecuniary penalties or compensation may be commenced within 3 years after the contravention occurred.

Compare: 1986 No 5 ss 86(6), 87(6)

Subpart 5—Miscellaneous provisions

53 Authorisation for restrictive trade practices 10

Part 2 of the Commerce Act 1986 does not apply in respect of a network standard or direction or any matter reasonably necessary for giving effect to a network standard or a direction.

54 Applications, submissions, and other information given to Commission or other person in accordance with Commission’s requirement 15

- (1) An application or a submission made, or any other information given, to the Commission, or to be made or given to another person in accordance with a requirement of the Commission, must be made or given in the way required by the Commission.

- (2) The Commission’s requirements may include (without limitation) requirements about 1 or more of the following: 20

(a) the form in which the application, submission, or information must be made or given:

(b) the information that must be given with the application, submission, or information: 25

(c) the way in which any information referred to in this section must be verified.

- (3) Information to be given to the Commission or other person must be given within the period determined by the Commission.

Compare: 2021 No 13 s 149 30

55 Regulations

- (1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations for 1 or more of the following purposes:

(a) requiring the payment to the Commission of fees and charges for obtaining the Commission’s approval for amendments to network rules that are of a type identified by the Commission in a direction under **section 24(2)(d)** as substantive amendments, and prescribing the amounts of the fees and charges or the way in which the amounts are to be calculated: 35

-
- (b) providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect.
- (2) The Minister may make a recommendation only if the Minister has consulted persons that the Minister considers are likely to be significantly affected by the regulations or persons that the Commission considers to be representatives of those persons. 5
- (3) Regulations made under this section are secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- (4) Regulations may authorise the Commission to refund or waive, in whole or in part and on any conditions as may be prescribed, payment of any fee or charge payable in relation to any person or class of persons. 10
- (5) The Commission may refuse to carry out a function until a fee or charge is paid.
- (6) Any fee or charge payable to the Commission is recoverable by the Commission in any court of competent jurisdiction as a debt due to the Commission. 15
- (7) If the regulations authorise the Commission under **subsection (4)**,—
- (a) an instrument by which the Commission grants a refund or waiver is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements), unless it applies only to 1 or more named persons; and
- (b) the regulations must contain a statement to that effect. 20

Compare: 2021 No 13 s 153

Schedule 1
Transitional, savings, and other related provisions

s 8

Part 1
Provisions relating to this Act as enacted

5

Subpart 1—Interpretation

1 Interpretation

In this Part, unless the context otherwise requires,—

acquirer, in relation to an initial designated network, has the same meaning that it has under the network rules of that network 10

card or **payment instrument** means any form of payment method (including virtual cards and tokenised credentials)

credit retail payment network, in relation to the initial pricing standard, means a designated network described in **clauses 3 to 6** that is known as Mastercard credit or Visa credit 15

debit retail payment network, in relation to the initial pricing standard, means a designated network described in **clauses 3 to 6** that is known as Mastercard debit or Visa debit

initial designated network means a designated network referred to in **subpart 2** 20

interchange fee, in relation to an initial designated network, has the same meaning that it has under the network rules of that network

issuer, in relation to an initial designated network, has the same meaning that it has under the network rules of that network

per transaction, in relation to a maximum percentage or amount, means calculated on a per transaction basis according to value. 25

Subpart 2—Initial designations

2 Initial designated networks

(1) Each of the retail payment networks that are described in a designation order in this subpart is a designated network (an **initial designated network**). 30

(2) A designation order in this subpart continues in force until the earlier of—

- (a) the date that is 10 years after the date on which this subpart commences:
- (b) the date on which the designation order is revoked or replaced under **subpart 1 of Part 2** of this Act (*see subpart 4*).

- 3 Mastercard credit designation order** 5
- The retail payment network known as Mastercard credit (including commercial and personal payment products) of which—
- (a) the person known as Mastercard International Incorporated is a network operator: 5
 - (b) the network rules include the rules called Mastercard Rules dated 11 December 2020 (as updated from time to time).
- 4 Mastercard debit designation order** 10
- The retail payment network known as Mastercard debit (including pre-paid and standard debit payment products) of which—
- (a) the person known as Mastercard International Incorporated is a network operator:
 - (b) the network rules include the rules called Mastercard Rules dated 11 December 2020 (as updated from time to time).
- 5 Visa credit designation order** 15
- The retail payment network known as Visa credit (including commercial and personal payment products) of which—
- (a) the person known as Visa Worldwide Pte Limited is a network operator:
 - (b) the network rules include the rules called Visa Core Rules and Visa Product and Service Rules dated 17 April 2021 (as updated from time to time). 20
- 6 Visa debit designation order**
- The retail payment network known as Visa debit (including pre-paid and standard debit payment products) of which—
- (a) the person known as Visa Worldwide Pte Limited is a network operator: 25
 - (b) the network rules include the rules called Visa Core Rules and Visa Product and Service Rules dated 17 April 2021 (as updated from time to time).
- Subpart 3—Initial pricing standard**
- 7 Initial pricing standard** 30
- (1) This clause sets out the pricing standard (the **initial pricing standard**) that applies to each initial designated network.
Limits on interchange fees
 - (2) This standard requires that interchange fees for credit retail payment networks (excluding commercial credit payment products and payment instruments that 35

- are issued outside New Zealand (for example, foreign-issued cards)) must not exceed the lower of—
- (a) 0.80% per transaction:
 - (b) their 1 April 2021 levels per transaction.
- (3) This standard requires that interchange fees for debit retail payment networks (excluding prepaid payment products and payment instruments that are issued outside New Zealand (for example, foreign-issued cards)) must not exceed the lowest of— 5
- (a) their 1 April 2021 levels per transaction:
 - (b) whichever of the following applies: 10
 - (i) in the case of interchange fees for any contacted-in-person payment method, 0.00% per transaction:
 - (ii) in the case of interchange fees for any contactless-in-person payment method, 0.20% per transaction:
 - (iii) in the case of interchange fees for any online or any other payment method, 0.60% per transaction: 15
 - (c) if a contactless-in-person debit card interchange fee is charged by the cents (for example, a flat fee rather than a percentage of the transaction value), 5 cents per transaction.
- Prohibition on certain compensation* 20
- (4) The initial pricing standard prohibits an operator providing, either directly or indirectly, net monetary or non-monetary compensation to an issuer in addition to interchange fees.
- (5) In **subclause (4)**,—
- (a) monetary compensation includes the effect of changes to scheme fees for issuers that are also acquirers: 25
 - (b) non-monetary compensation includes discounts on rewards and reward programmes offering prizes to consumers.
- Duration of standard*
- (6) This standard continues in force in respect of a designated network until the earliest of— 30
- (a) the date that is 10 years after the date on which this subpart commences:
 - (b) the date on which the standard is replaced in respect of the network under **subpart 2 of Part 2** of this Act (*see subpart 4*):
 - (c) the date on which the network ceases to be a designated network (*see subpart 4*). 35

Subpart 4—Replacement and revocation

8 Replacement and revocation of initial designations

- (1) The Governor-General may at any time make an order under **subpart 1 of Part 2** of this Act in respect of all or any of the initial designated networks.
- (2) If the Governor-General does so, the initial designation ceases to apply to the network to the extent that it is replaced or revoked in respect of that network. 5

9 Replacement and revocation of initial pricing standard

- (1) The Commission may at any time, under **subpart 2 of Part 2** of this Act,—
 - (a) issue a pricing standard to replace the initial pricing standard in respect of all or any of the initial designated networks, with effect no earlier than 6 months after the date on which this Act receives the Royal assent: 10
 - (b) revoke the initial pricing standard in respect of all or any of the initial designated networks.
- (2) If the Commission does so, the initial pricing standard ceases to apply to the network to the extent that it is replaced or revoked in respect of that network. 15