

23 September 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Retail Payment System Amendment Bill

Purpose

1. We have considered whether the Retail Payment System Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 25 (minimum standards of criminal procedure) and s 21 (freedom from unreasonable search and seizure). Our analysis is set out below.

The Bill

3. The purpose of the Bill is to promote competition and efficiency in the retail payment system for the long-term benefit of merchants and consumers in New Zealand.
4. To achieve this the Bill is introducing a regulatory regime. The Commerce Commission (the Commission) will be the regulator of this new regulatory regime.
5. The Bill sets out a process and factors for the Commission to apply to determine which retail payment networks should be designated for regulation.
6. The Commission can issue network standards and directions that designated networks must comply with. These may cover information disclosure, pricing, and access to infrastructure or the network.
7. In exercising its powers under the Bill, the Commission will be able to use existing enforcement and functional powers provided by the Commerce Act 1986 (the Commerce Act). The Bill also gives the Commission additional powers when regulating designated networks.

Consistency of the Bill with the Bill of Rights Act

Interaction with other legislation

8. Our analysis reveals that the Bill engages several rights and freedoms affirmed under the Bill of Rights Act by applying existing provisions of the Commerce Act to a new regulatory regime, through sections 37 and 39 of the Bill.
9. We have determined that the freedoms and rights engaged by these Commerce Act provisions do not fall within the scope of our analysis, except in relation to s 39(p) of the Bill, which is discussed at paragraph 22 below.

Sections 38(c)-(e) of the Bill

10. Sections 38(c)-(e) of the Bill empower the Commission to compel participants to provide information; and non-compliance with such a requirement will be an offence under s 103 of the Commerce Act.¹

Section 21 – Unreasonable search and seizure

11. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
12. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a “search or seizure”. Secondly, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are “unreasonable” in the circumstances.
13. We consider that the power to compel information under ss 38(c)-(e) of the Bill constitutes a search for the purposes of s 21 of the Bill of Rights Act.²
14. The next question is whether this search power is reasonable. In assessing this, we have considered the place of the search, the degree of intrusiveness into privacy, and reasons why it is necessary.³
15. We consider that the search powers in ss 38(c)-(e) of the Bill are reasonable, and therefore consistent with s 21 of the Bill of Rights Act. This is because:
 - a. the search powers contribute to the important objective of administering, and ensuring compliance with, the regulatory regime;
 - b. the search powers are exercised by written notice, rather than physical entry onto premises, which is less of an intrusion into a person’s expectation of privacy; and
 - c. a regulated supplier in a marketplace has less of an expectation of privacy than an ordinary citizen.

Section 14 – Freedom of expression

16. In addition to engaging s 21 of the Bill of Rights Act, we consider that ss 38(c)-(e) also engage s 14 of that Act.
17. Section 14 affirms the right to freedom of expression, and has been interpreted as including the right not to be compelled to say certain things or provide certain information.⁴

¹ Pursuant to s 39(p) of the Bill.

² *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PCP).

³ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172] per Blanchard J.

⁴ See, for example, *Slight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

18. We consider that the powers contained in ss 38(c)-(e) of the Bill limit the right to freedom of expression. However, we consider that this limit is justified under section 5 of the Bill of Rights Act, for the reasons canvassed at paragraph 15.

Sections 20 and 32 of the Bill

19. Sections 17 and 30 of the Bill empower secondary legislation (referred to as “standards”) to be made, in order to regulate designated networks and merchant surcharging respectively. Sections 20 and 32 provide that these standards may compel participants or merchants to disclose certain information.
20. These empowering provisions do not, in themselves, limit the right to freedom of expression, and are accordingly consistent with the Bill of Rights Act. However, secondary legislation made under these empowering provisions may limit the right to freedom of expression. We note for completeness that secondary legislation must be consistent with the Bill of Rights Act, otherwise it risks being ultra vires.

Section 39(p) of the Bill

21. Section 25 of the Bill of Rights Act affirms the right to minimum standards of criminal procedure. This includes s 25(c), which protects the right to be presumed innocent until proved guilty according to law.
22. We have considered s 39(p) of the Bill in our analysis, because this section provides that the Commission’s new powers in s 38 of the Bill are enforceable by existing offences in s 103(1)(a) and (b) of the Commerce Act. We consider that s 103(1)(a) of the Commerce Act, as modified by s 39(p) of the Bill, contains a strict liability offence for where a person, without reasonable excuse, refuses or fails to comply with a notice given under s 38 of the Bill or s 98 of the Commerce Act.
23. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act by shifting the onus of proof onto a defendant. We have therefore considered whether this limit can be justified under section 5 of the Bill of Rights Act.
24. We consider that this limit is justified because:
 - a. these provisions have the important objective of supporting the promotion of competition and efficiency in the retail payment system;
 - b. the limit is rationally linked to this objective, as it encourages greater efficacy in the supervision of, and maximum compliance with, the regulatory regime;
 - c. the offence involves straightforward issues of fact, and the relevant context is often only known to the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a course of action than it is for the Crown to prove the opposite, justifying a strict liability offence;
 - d. the penalty for this offence is a fine only.

Conclusion

25. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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