

Parties

The Commerce Commission (“the Commission”)

Visa International Service Association and Visa Worldwide Pte Limited (“Visa”)

(“the Parties”)

Background

- A The Commission has brought proceeding CIV-2006-485-2535 in the High Court against Visa and other defendants (“the proceeding”). In the proceeding the Commission seeks relief against Visa in respect of certain conduct alleged to have been engaged in by Visa.
- B The Commission has agreed to settle the claims made against Visa in the proceeding in so far as they relate to alleged conduct by Visa prior to the date of this Agreement (“the Visa claims”), on the terms set out in this Agreement.

Agreement

1 Definitions

1.1 In this Agreement:

- 1.1.1 “New Zealand-acquired transaction” means a Visa branded payment card transaction for payment at the point-of-sale (including card present and card not present sales) that a merchant submits for processing and payment to a New Zealand bank or to any other entity carrying on business in New Zealand as an acquirer;
- 1.1.2 “Visa maximum rate” means an interchange rate or schedule of interchange rates set by Visa in accordance with clause 3.1.3 above;
- 1.1.3 “Visa rules” means the Visa Worldwide Supplemental Operating Regulations, Visa International By-Laws and the Visa International Operating Regulations, and any other document issued or approved by Visa, or to which Visa is a party, that sets out rules or requirements in respect of the operation of the Visa scheme that are applicable in New Zealand.

2 Settlement of claims

- 2.1 This Agreement is entered into by the Parties in full and final settlement of the Visa claims.
- 2.2 The Parties will take such steps as may be necessary or desirable to give full effect to this Agreement.

3 Visa commitments in relation to interchange

- 3.1 Visa will modify the Visa rules as they apply in New Zealand to provide for the following arrangements in respect of interchange with respect to New Zealand acquired transactions initiated with a New Zealand issued Visa branded payment card:
 - 3.1.1 issuers and acquirers in New Zealand will be permitted to bilaterally negotiate the interchange rates applicable to New Zealand-acquired transactions (subject to any Visa maximum rate). Any bilaterally agreed interchange rate will be notified by the issuer to Visa;
 - 3.1.2 a New Zealand issuer may determine the interchange rates applicable to its New Zealand-acquired transactions (subject to any bilateral agreements, and subject to any Visa maximum rate). An issuer must notify any such rates to Visa (together with any bilaterally agreed rates to which clause 3.1.1 applies);
 - 3.1.3 Visa will set maximum interchange rates for all New Zealand-acquired transactions with respect to New Zealand issued Visa branded payment cards, which may not be exceeded by any effective rate applicable under the interchange rates notified by a New Zealand issuer, including any bilaterally-agreed interchange rate. New Zealand issuers will be responsible for ensuring that the effective rates applicable under the interchange rates notified by them under clauses 3.1.1 and 3.1.2 do not exceed the Visa maximum rates. (To avoid doubt, the effective rate for each transaction is assessed by applying the relevant issuer rate or bilateral rate to that transaction, and that rate must not result in an interchange amount in respect of that transaction in excess of the amount payable in respect of that transaction pursuant to the Visa maximum rates);
 - 3.1.4 Visa will publish the maximum interchange rates which it sets, on Visa's website and in such other manner as Visa deems appropriate;
 - 3.1.5 Visa will require each issuer to publish the interchange rates notified by it to Visa under clause 3.1.2 on the issuer's website, and will provide a link from Visa's website to the relevant page(s) on the issuer's website. Visa will also, subject to consent from an

issuer, publish on Visa's website the interchange rates notified to it by that issuer under clause 3.1.2;

3.1.6 all transactions are to be processed and settled at the interchange rate notified by the issuer under clause 3.1.2 or (where applicable) at a bilaterally agreed rate notified by the issuer under clause 3.1.1. To avoid doubt, New Zealand issuers and acquirers are responsible for ensuring that the correct interchange rate is applied to transactions between their institutions;

3.1.7 if there is neither an issuer rate nor a bilaterally agreed rate notified to Visa that applies to a transaction, then no interchange will be applied to the relevant transaction.

3.2 To give effect to clause 3.1, Visa will modify the Visa rules as they apply in New Zealand in the manner set out in schedule 1 no later than 15 September 2009. Those modifications will come into effect no later than 17 April 2010. Subject to clause 3.3, Visa may amend the provisions set out in the schedule.

3.3 Visa will not modify the Visa rules (including the provisions set out in the schedule) in a manner inconsistent with clause 3.1.

4 Visa commitments in relation to other aspects of the Visa scheme

4.1 Visa represents and warrants to the Commission that:

4.1.1 Visa participation is, and will remain, open to all New Zealand entities, including financial institutions and other entities, on application to Visa;

4.1.2 applications will be considered by Visa applying criteria which are directed solely to confirming that the applicant has the capability (for example, capital/financial strength, systems, risk practices – that is, credit, fraud and operational risk), operational readiness and skills to provide intended services without bringing undue credit, reputational or other risks to Visa, and the ability to support its proposed card activities and business plan. Minimum capital and collateral may be required. Applications will be determined by Visa alone, and existing issuers and/or acquirers will not participate in any way in the making of such decisions;

4.1.3 New Zealand acquirers need not also be issuers, and vice versa;

4.1.4 Visa has no objection to participation in the scheme by any New Zealand entity, including entities other than financial and related institutions, provided such entity meets the relevant criteria referred to above.

- 4.2 Visa represents and warrants to the Commission that the Visa rules as they apply in New Zealand do not prevent merchants from steering by offering discounts, promotions or financial incentives to encourage a customer to use an alternate form of payment (including as between Visa and Eftpos, or cards from different schemes, or different types of Visa cards). Visa will not adopt any rule to such effect after the date of this Agreement.
- 4.3 Visa will not, with effect from the date of this Agreement:
- 4.3.1 enforce any Visa rule which prohibits or prevents surcharging by merchants in respect of New Zealand-acquired transactions; or
- 4.3.2 require or encourage acquirers to include any provision to that effect in any merchant agreement, or to take steps to enforce any such provision in an existing merchant agreement.
- 4.4 Nothing in clause 4.3 prevents Visa from providing in the Visa rules that if a merchant applies a surcharge for payment by any Visa card, the surcharge amount must be clearly disclosed to the cardholder at the time of purchase and must bear a reasonable relationship to the merchant's cost of accepting Visa products for payment. To avoid doubt, any such requirement imposed by Visa will not prevent merchants from applying such a surcharge on a flat rate basis, to some or all Visa branded payment cards.
- 4.5 Visa will no later than 15 September 2009:
- 4.5.1 advise all New Zealand acquirers that Visa will not enforce any Visa rules prohibiting or preventing surcharging by merchants in respect of New Zealand-acquired transactions;
- 4.5.2 confirm to all New Zealand acquirers that Visa does not prohibit merchants from steering at the point of sale by offering discounts, promotions or financial incentives to encourage a customer to use an alternate form of payment (including as between Visa and Eftpos, or cards from different schemes, or different types of Visa cards);
- 4.5.3 advise all New Zealand acquirers that they are not required to include any provision of the kind referred to in clauses 4.5.1 and 4.5.1 in any merchant agreement, or to take steps to enforce any such provision in an existing merchant agreement; and
- 4.5.4 require New Zealand acquirers to communicate such information to merchants. The text of the member letter to be sent by Visa to New Zealand acquirers for the purposes of this clause is set out in schedule 2.
- 4.6 Visa will, no later than 15 September 2009, take appropriate steps binding on Visa to ensure

that the Visa rules as they apply in New Zealand do not prohibit or prevent surcharging by merchants in respect of New Zealand-acquired transactions. Visa will not subsequently modify the Visa rules as they apply in New Zealand to prohibit or prevent surcharging by merchants in respect of New Zealand-acquired transactions.

5 Disposal of proceedings

5.1 The Commission will promptly following the date of this Agreement:

5.1.1 seek leave to discontinue the proceeding as against Visa, and will discontinue the proceeding as against Visa once leave is granted to the Commission to do so. This discontinuance will be on the basis that neither party seeks an order for costs against the other;

5.1.2 amend its statement of claim so that no relief is sought modifying or affecting the future operation of the Visa rules.

5.2 The Commission will not commence any new proceedings against Visa in respect of the Visa claims.

5.3 Visa acknowledges that this Agreement is not intended to settle or otherwise affect the Commission's claims against any other party in the proceeding.

5.4 Visa will pay NZ \$2.6 million to the Commission on or before 15 September 2009 in respect of costs incurred by the Commission in connection with these proceedings. []

5.5 To avoid doubt, nothing in this Agreement affects the ability of the Commission to bring proceedings against Visa in respect of any conduct engaged in by Visa after the date of this Agreement (apart from conduct that Visa is expressly required to engage in by this Agreement), or in respect of any aspect of the Visa scheme that is in force after the date of this Agreement.

5.6 To avoid doubt, nothing in this agreement amounts to an admission of wrong-doing or liability by Visa in respect of the Visa claims.

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