

Settlement agreement dated 30 September 2009

PARTIES

The Commerce Commission (“the Commission”)

Westpac New Zealand Limited (“Westpac”)

(“the Parties”)

BACKGROUND

- A The Commission has brought proceeding CIV-2006-485-2535 in the High Court against Westpac and other defendants (“the proceeding”). In the proceeding the Commission seeks relief against Westpac in respect of certain conduct alleged to have been engaged in by Westpac. Westpac has denied any wrongful conduct or liability, and is defending the proceeding.
- B The Commission has discontinued the proceeding as against Visa International Service Association (“Visa”) and MasterCard International Incorporated (“MasterCard”) as a result of agreements reached between the Commission and Visa and between the Commission and MasterCard (“the scheme settlements”). Under the scheme settlements, modifications are to be made to the way in which the rules of both Visa and MasterCard will apply in New Zealand, as set out in redacted settlement agreements available on the Commission’s website. Westpac and other New Zealand scheme participants will be required to comply with those rules.
- C The Commission and Westpac have agreed to settle the claims made against Westpac in the proceeding in so far as they relate to alleged conduct by Westpac prior to the date of this Agreement (“the Westpac claims”), on the terms set out in this Agreement (“Agreement”). Westpac makes no admissions of liability.

AGREEMENT

1 Definitions

1.1 In this Agreement:

1.1.1 []

1.1.2 []

- 1.1.3 “credit card” means a card issued under the rules of Visa or MasterCard that can be used for purchasing goods or services on credit, or any other article issued under the rules of that scheme and commonly known as a credit card (and to avoid doubt does not include scheme debit or pre-paid cards);
- 1.1.4 “interchange rate” means a fee payable by an acquirer to an issuer in respect of a New Zealand acquired transaction, expressed as a percentage of the value of the transaction including, to avoid doubt, in relation to "on us" transactions and any fixed fee payable by an acquirer to an issuer in respect of a New Zealand acquired transaction, expressed as a percentage of the value of the transaction;
- 1.1.5 “merchant service fee” means a fee payable by a merchant to an acquirer in respect of a New Zealand acquired transaction;
- 1.1.6 “New Zealand acquired transaction” means a Visa or MasterCard branded credit 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 any entity carrying on business in New Zealand as an acquirer;
- 1.1.7 []
- 1.1.8 []
- 1.1.9 “Westpac domestic transaction” means a New Zealand acquired transaction that is initiated with a Visa or MasterCard branded credit card issued by Westpac.
- 1.2 []
- 1.3 In clauses 1, 3, 4, 5 and 7 of this Agreement references to “Westpac” include references to any interconnected body corporate of Westpac within the meaning of s 2(7) of the Commerce Act 1986 that carries on business in New Zealand as:
- 1.3.1 an issuer of Visa or MasterCard branded credit cards; or
- 1.3.2 an acquirer,
- but does not include references to The Warehouse Financial Services Limited ("TWFSL").
- 1.4 []

2 Settlement of claims

- 2.1 This Agreement is entered into by the Parties in full and final settlement of the Westpac claims.
- 2.2 The Parties will take such steps as may be necessary or desirable to give full effect to this Agreement.
- 2.3 The Commission acknowledges that nothing in this Agreement amounts to any admission by Westpac or Cards NZ Limited of any wrongful conduct or liability.

3 Westpac commitments in relation to interchange

- 3.1 []

4 Westpac commitments in relation to acquiring services

- 4.1 In respect of each merchant with whom Westpac enters into a new contract for acquiring services, or in respect of whom it renews or rolls over a contract for acquiring services, or who is not on a fixed term contract and requests that the option be made available to it, Westpac will offer:
 - 4.1.1 as soon as practicable (but no later than 31 July 2010), the option to pay merchant service fees that are unblended as between Visa and MasterCard credit card transactions; and
 - 4.1.2 as soon as practicable (but no later than 31 July 2010), the option to pay merchant service fees that are fully unbundled in that they are specified by reference to the interchange rate payable in respect of the transaction, and a margin above that figure ('an interchange plus option'). Westpac may provide this option on an interim basis by periodically adjusting a merchant's merchant service fees to reflect the mix of transactions in a prior period, with the prior written approval of the Commission as to the method adopted and the duration of the interim arrangement (which approval will not be unreasonably withheld).
- 4.2 Westpac will no later than 17 March 2010 send a letter to all merchants to which it provides acquiring services, advising them of the options and timeframes described above. Westpac will also publish on its website information concerning the options and timeframes described above, and will maintain that information on its website for at least three years from publication.
- 4.3 []

5 Other Westpac commitments

- 5.1 Westpac will not, with effect from the date of this Agreement, include in the terms and conditions on which it provides acquiring services to all merchants or to any

class of merchants, any terms which prohibit or prevent surcharging by such merchants.

5.2 Nothing in clause 5.1 prevents Westpac from:

5.2.1 agreeing with an individual merchant that the merchant will not surcharge all transactions or any class of transactions acquired by Westpac; or

5.2.2 requiring that, if a merchant applies a surcharge for payment in respect of New Zealand acquired transactions, 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 the surcharged products and complying with any other scheme requirements.

5.3 Westpac will advise Visa and MasterCard that each may publish on their websites the interchange rates posted from time to time by Westpac in respect of Westpac domestic transactions. This clause does not require Westpac to post interchange rates it may agree bilaterally with an acquirer, merchant or class of merchants.

5.4 []

6 Disposal of proceeding

6.1 The Commission will within 7 days following the date of this Agreement:

6.1.1 seek leave to discontinue the proceeding as against Westpac, and will discontinue the proceeding as against Westpac 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; and

6.1.2 advise the Court that no relief is sought against Westpac.

6.2 The Commission will not commence any new proceedings against Westpac in respect of the Westpac claims.

6.3 Subject to clause 6.5, Westpac acknowledges that this Agreement is not intended to settle or otherwise affect the Commission's claims against any other party in the proceeding.

6.4 Westpac will pay NZ \$150,000 to the Commission on or before 15 October 2009 in respect of costs incurred by the Commission in connection with this proceeding.

6.5 []

6.6 To avoid doubt, nothing in this Agreement affects the ability of the Commission to bring proceedings against Westpac in respect of any conduct engaged in by

Westpac after the date of this Agreement (apart from conduct that Westpac is expressly required to engage in by this Agreement).