

## **Parties**

- 1 The Commerce Commission ('the Commission')**
- 2 MasterCard International Incorporated ('MasterCard')**

("the Parties")

## **Background**

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

## **Agreement**

### **1 Definitions**

#### **1.1 In this Agreement:**

- 1.1.1** "New Zealand-acquired transaction" means a MasterCard 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** "New Zealand domestic transaction" means a MasterCard branded payment card transaction for payment at the point-of-sale (including card present and card not present sales) initiated with a card issued by a New Zealand bank or any other entity carrying on business in New Zealand as an issuer that a New Zealand 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;
- 1.1.3** "Interchange rate" means the level of the fee payable from the acquirer to the issuer on a New Zealand-acquired transaction.
- 1.1.4** "MasterCard maximum rate" means an interchange rate or schedule of interchange rates set by MasterCard in accordance with clause 3.1.3 below;
- 1.1.5** "MasterCard rules" means the MasterCard Bylaws and Rules, and any other document issued or approved by MasterCard, or to which MasterCard is a party, that sets out rules or requirements in respect of the operation of the MasterCard 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 MasterCard claims.
- 2.2 The Parties will take such steps as may be necessary or desirable to give full effect to this Agreement.

## **3 MasterCard commitments in relation to interchange**

- 3.1 MasterCard will modify the MasterCard rules as they apply in New Zealand to the extent necessary or desirable to provide for the following arrangements in respect of interchange with respect to New Zealand domestic transactions:
  - 3.1.1 issuers and acquirers in New Zealand will be permitted to bilaterally negotiate the interchange rates applicable to New Zealand domestic transactions (subject to any MasterCard maximum rate). Any bilaterally agreed interchange rate will be notified by the issuer to MasterCard;
  - 3.1.2 a New Zealand issuer may determine the interchange rates applicable to its New Zealand domestic transactions (subject to any bilateral agreements, and subject to any MasterCard maximum rate). An issuer must notify any such rates to MasterCard;
  - 3.1.3 MasterCard will set maximum interchange rates for all New Zealand domestic transactions, 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 rates. 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 MasterCard 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 MasterCard maximum rates);
  - 3.1.4 MasterCard will publish the maximum interchange rates which it sets on MasterCard's website and in such other manner as MasterCard deems appropriate;
  - 3.1.5 MasterCard will require each New Zealand issuer to publish the interchange rates notified by it to MasterCard under clause 3.1.2 on the issuer's website. MasterCard will also either publish on MasterCard's website the interchange rates notified to it by that issuer under clause 3.1.2 or provide a link from MasterCard's website to the relevant page(s) on the issuer's website;
  - 3.1.6 to the extent that MasterCard processes and settles New Zealand domestic transactions, such transactions will 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 MasterCard that applies to a transaction, MasterCard will process the transaction on the basis of a zero interchange rate.

- 3.2 To give effect to clause 3.1, MasterCard will modify the MasterCard rules as they apply in New Zealand. The modifications to give effect to clause 3.1:
- 3.2.1 will be provided in draft to the Commission no later than 21 September 2009. If the Commission gives notice within 5 working days of receiving the draft rules that it considers that the draft is not consistent with clause 3.1, MasterCard will consider the concerns raised and will either modify the rules to address those concerns, or adopt the draft rules on an interim basis and refer the matter for resolution in accordance with clause 8;
- 3.2.2 will come into effect no later than 17 April 2010.
- 3.3 MasterCard will not modify the MasterCard rules in a manner inconsistent with clause 3.1.
- 4 MasterCard commitments in relation to other aspects of the MasterCard scheme**
- 4.1 MasterCard represents and warrants to the Commission that:
- 4.1.1 subject to clause 4.1.2, MasterCard participation is, and will remain, open to all New Zealand entities, including financial and related institutions and other entities, on application to MasterCard, other than entities that are business competitors of MasterCard;
- 4.1.2 applications will be considered by MasterCard applying criteria which are directed solely to confirming that, as a matter of reasonable judgment, 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 MasterCard, and the ability to support its proposed card activities and business plan. Minimum capital and collateral may be required. Applications will be determined by MasterCard 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.
- 4.2 MasterCard represents and warrants to the Commission that the MasterCard 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 MasterCard and Eftpos, or cards from different schemes, or different types of MasterCard cards). MasterCard will not adopt any rule to such effect after the date of this Agreement.
- 4.3 MasterCard will not, with effect from the date of this Agreement:
- 4.3.1 subject to clause 4.4, enforce any MasterCard rule which prohibits or prevents surcharging by merchants in respect of New Zealand-acquired transactions, whether uniformly or differentially and whether on an *ad valorem* or flat-rate basis; 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 MasterCard from requiring in the MasterCard rules that, if a merchant applies a surcharge for payment by any MasterCard 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 MasterCard products.

- 4.5 MasterCard will no later than 28 September 2009:
- 4.5.1 advise all New Zealand acquirers that MasterCard will not enforce any MasterCard rules prohibiting or preventing surcharging by merchants in respect of New Zealand-acquired transactions except as permitted in clause 4.4;
  - 4.5.2 confirm to all New Zealand acquirers that MasterCard 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 MasterCard and Eftpos, or cards from different schemes, or different types of MasterCard 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 4.5.2 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 MasterCard to New Zealand acquirers for the purposes of this clause is set out in schedule 1.
- 4.6 MasterCard will, no later than 28 September 2009, take appropriate steps to ensure that the MasterCard rules as they apply in New Zealand do not prohibit or prevent surcharging by merchants in respect of New Zealand-acquired transactions except as permitted in clause 4.4. MasterCard will not subsequently modify the MasterCard rules as they apply in New Zealand to prohibit or prevent surcharging by merchants in respect of New Zealand-acquired transactions.
- 4.7 To avoid doubt, nothing in this Agreement prevents MasterCard from distinguishing between merchants that surcharge MasterCard transactions and those that do not do so, in the setting of maximum interchange rates or otherwise, provided that such distinctions do not effectively prohibit or prevent merchants from surcharging.

## **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 MasterCard, and will discontinue the proceeding as against MasterCard 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 advise the Court that no relief is sought against MasterCard, and no relief is sought modifying or affecting the future operation of the MasterCard rules; and
  - 5.1.3 seek leave to amend its statement of claim to reflect discontinuance against MasterCard, and to reflect that no relief is sought against MasterCard and no relief is sought modifying or affecting the future operation of the MasterCard rules.
- 5.2 The Commission will not commence any new proceedings against MasterCard in respect of the MasterCard claims.

- 5.3 MasterCard 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 MasterCard will pay NZ \$3 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 MasterCard in respect of any conduct engaged in by MasterCard after the date of this Agreement (apart from conduct that MasterCard is expressly required to engage in by this Agreement), or in respect of any aspect of the MasterCard scheme that is in force after the date of this Agreement.
- 5.6 The Commission acknowledges that this Agreement does not constitute an admission by MasterCard of any wrongful conduct or liability.

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