

Settlement agreement dated September 2009

PARTIES

The Commerce Commission (“the Commission”)

ASB Bank Limited (“ASB”)

(“the Parties”)

BACKGROUND

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

AGREEMENT

1 Definitions

1.1 In this Agreement:

1.1.1 []

1.1.2 “ASB domestic transaction” means a New Zealand acquired transaction that is initiated with a Visa or MasterCard branded credit card issued by ASB;

1.1.3 [];

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;

1.1.5 “Merchant service fee” or “MSF” means the fee payable by a merchant to an acquirer in respect of a New Zealand acquired transaction, expressed as a percentage of the value of the transaction, and incorporating fixed rate and other non-ad-valorem fees charged for providing acquiring services, [];

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 "acquirer" includes a Visa or MasterCard issuer to whom a Visa or MasterCard branded credit card transaction is switched by a merchant without utilising the Visa or MasterCard payment processing networks.

1.2 In clauses 3,4, 5 and 7 of this Agreement references to “ASB” include references to any interconnected body corporate of ASB within the meaning of s 2(7) of the Commerce Act 1986 that carries on business in New Zealand as:

1.2.1 an issuer of Visa or MasterCard branded credit cards; or

1.2.2 an acquirer.

2 Settlement of claims

2.1 This Agreement is entered into by the Parties in full and final settlement of the ASB claims.

2.2 The Parties will take such steps as may be necessary or desirable to give full effect to this Agreement.

3 ASB commitments in relation to interchange

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4 ASB commitments in relation to acquiring services

- 4.1 In respect of each merchant with whom ASB 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, ASB will offer:
- 4.1.1 from 1 January 2010 until the date on which it makes available to that merchant the option in clause 4.1.2, the option to pay merchant service fees that are unblended as between Visa and MasterCard card transactions; and
 - 4.1.2 with effect from not later than [], the option to pay merchant service fees for which the interchange payable on (at least) domestic Visa and MasterCard credit transactions is unbundled from other elements of price, in that the merchant service fees for those transactions include a component corresponding to the interchange rate payable in respect of the transaction (an “interchange plus” option). ASB 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 ASB will no later than 1 January 2010 send a letter to all merchants to which it provides acquiring services, advising them of the options and timeframes described in clause 4.1. ASB will also advise merchants of any applicable option referred to above prior to entering into or renewing or rolling over or modifying any contract for provision of acquiring services.

5 Other ASB commitments

- 5.1 ASB 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 ASB from:
- 5.2.1 agreeing with an individual merchant (or merchant group engaging in collective negotiations) that the merchant will not surcharge all transactions or any class of transactions; 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; or

5.2.3 taking action otherwise available to it to enforce any such terms.

5.3 ASB will advise Visa and MasterCard that each may publish on their websites the interchange rates posted from time to time by ASB in respect of ASB domestic transactions.

6 Disposal of proceedings

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

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

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

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

6.3 ASB 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 ASB 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 these proceedings.

6.5 []

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

6.7 The Commission acknowledges that this Agreement does not constitute an admission by ASB of any wrongful conduct or liability.

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