



Your ASB Merchant Facility Terms and Conditions

This document contains the terms and conditions of your ASB merchant facility

Depending on the ASB merchant services you receive, you may be bound by third party terms and conditions as well as ASB's Credit Cards Merchant Services Agreement General Terms and Conditions.

The terms and conditions contained in this document are:

- ASB Credit Cards Merchant Services Agreement General Terms and Conditions
- Paymark Limited Merchant Tripartite Agreement Terms and Conditions
- Smartpay Rental Services Limited Hardware and Services Agreement Terms and Conditions

The table below sets out the terms and conditions that apply to each ASB merchant service. Please ensure you read all the relevant terms and conditions and the ASB Merchant Operating Guide which can be found at asb.co.nz.

	Credit Cards Merchant Services Agreement General Terms and Conditions	Paymark Limited Merchant Tripartite Agreement Terms and Conditions	Smartpay Rental Services Limited Hardware and Services Agreement Terms and Conditions
ASB Merchant Account EFTPOS Only	Yes	Yes	No
ASB Merchant Account (via Paymark Limited)	Yes	Yes	No
ASB Merchant Account (via Switching Providers)	Yes	No	No
ASB Accept	Yes	Yes	Yes
ASB Accept mPOS	Yes	Yes	Yes
ASB CardPay	Yes	Yes	No
ASB E-Commerce Solution	Yes	Yes	No



Credit Cards Merchant Services Agreement

General Terms and Conditions

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Credit Card Merchant Services Agreement

General Terms and Conditions

1. Definitions

1.1 Definitions: In this Agreement, unless the context otherwise requires:

"Application Form" means the merchant services application form executed by the Merchant which sets out, among other things, the types of Transactions that the Merchant is authorised to process and the Services that the Bank will provide the Merchant or any other application executed by the Merchant and the Bank in relation to the provision of Card merchant services.

"ASB Accept" means the service provided by the Bank to the Merchant whereby the EFTPOS terminal and network connections are provided together in one package.

"ASB CardPay" means the service provided by the Bank to the Merchant for the secure online authorisation, capture and interchange of Transactions entered into via the Internet.

"Authorisation" means the service provided to the Bank to enable the Merchant to seek approval for a Transaction, including checks on whether the Card account number quoted is a Valid Card, the availability of funds and whether the Card has been reported lost or stolen.

"Business Day" means any day (other than a Saturday and Sunday) on which banks are open for general banking business in Auckland and Wellington.

"Card" means a Mastercard Card, UnionPay Card or Visa Card.

"Cardholder" means a person to whom a Card has been issued.

"Card Present Transaction" means a Transaction which is effected through an imprinter or an EFTPOS terminal used by the Merchant and the Cardholder in each case to authorise the electronic transfer of funds between the Cardholder's nominated account and the Merchant's account in circumstances where the Cardholder and the Card are present when processing that Transaction.

"Card Not Present Transaction" means a Transaction where the Cardholder and the Card are not present when processing that Transaction and includes:

- (a) a MOTO Transaction; and
- (b) an Ecommerce Transaction.

"Card Scheme" means Mastercard, UnionPay and Visa.

"Card Scheme Rules" means the rules, regulations and programmes of the Card Schemes, including the rules, regulations and programmes made available on a Card Scheme's public website or notified to you by the Bank.

"Connectivity Fee" has the meaning given to that term in paragraph 1.3 of Schedule 4.

"Credit Voucher" means any Transaction receipt evidencing a Merchant's refund or price adjustment to be credited to a Cardholder's account.

"Deposit Account" means the account nominated by the Merchant in the Application Form as the account to which any amounts to be paid to the Merchant pursuant to this Agreement are to be credited, or such other account as notified by the Merchant to the Bank from time to time for

this purpose.

"E-Commerce Transaction" means a transaction entered into by a Cardholder with the Merchant via the Internet.

"EFTPOS" means Electronic Funds Transfer at Point of Sale.

"Fees Account" means the account nominated by the Merchant in the Application Form as the account from which any merchant fees or any other amounts payable to the Bank pursuant to this Agreement are to be deducted, or such other account as notified by the Merchant to the Bank from time to time for this purpose.

"Fixed Term Agreement" applies to this Agreement if it is specified as applying in the Application Form or if otherwise specified by the Bank in writing to the Merchant.

"Initial Term" means, in respect of a Fixed Term Agreement, the period specified as such in the Application Form or as otherwise specified by the Bank in writing to the Merchant.

"Interchange Fee" has the meaning given to that term in paragraph 1.2 of Schedule 4.

"Interchange Rate" means the current interchange rate (expressed as a percentage or fixed fee per Transaction depending on the Interchange Type) nominated by a Card Scheme and applicable to a Transaction that the Bank pays to the issuing bank of the Card used for that Transaction.

"Interchange Type" means the type of interchange assigned to a Transaction by a Card Scheme, determined by a number of factors, including the nature of the Transaction, Card type used for the Transaction and the processing environment of the Transaction.

"Internet" means an electronic network that connects computer networks and organisational computer facilities around the world.

"Mastercard" means Mastercard International, Inc and any of its related companies.

"Mastercard Card" means a card issued pursuant to and in accordance with a licence granted by Mastercard and which bears, among other things, the word "Mastercard".

"Merchant" means the person named as such in the Application Form.

"Merchant Operating Guide" means the Bank's "Merchant Operating Guide" issued to merchants, and as re-issued and amended from time to time.

"Merchant's Bank" means the bank at which the Merchant operates the Deposit Account and the Fees Account.

"Merchant Service Fee" has the meaning given to that term in paragraph 1.1 of Schedule 4.

"MOTO Transaction" means a Transaction transacted by mail order or telephone order.

"Open Term Agreement" applies to this Agreement if it is specified as applying in the Application Form or if otherwise specified by the Bank in writing to the Merchant.

"PAN Entry Transaction" means a MOTO Transaction processed by the manual key entry of transaction data, being Card account number, expiry date and transaction amount into an EFTPOS terminal.

“Paymark” means Paymark Limited.

“Paymark Tripartite Agreement” means the agreement between the Merchant, the Bank and Paymark for the supply of EFTPOS services.

“PCI Security Standards” means the Payment Card Industry Data Security Standard and any other security standard published by the PCI Security Standards Council, LLC.

“Pre-Authorisation Transaction” means, in respect of a Transaction, Authorisation of that Transaction obtained prior to the time or date upon which payment is required to be made by the Cardholder.

“Recurring Transaction” means a Card Not Present Transaction for which a Cardholder grants written permission for the Merchant to periodically charge the Cardholder’s Card for recurring goods or services provided.

“Switching Provider” means Mastercard Asia/Pacific Pte Ltd, CyberSource Payment Solutions Pty Ltd and Windcave Limited and any other entity that has agreed with the Bank to provide Switching Services to the Bank’s merchants.

“Switching Services” means the routing of E-Commerce Transactions and Transactions made at unattended terminals to the relevant financial institutions to facilitate Transaction authorisation and settlement.

“Sales Voucher” means any manually imprinted or EFTPOS terminal printed Transaction record.

“Services” means the services provided to the Merchant as specified in the Application Form.

“Subsequent Term” means, in respect of a Fixed Term Agreement, each further period equal to the term of the Initial Term for which this Agreement extends pursuant to clause 2.2, or such other period as otherwise agreed in writing by the parties.

“Tipping Transaction” means a Card Present Transaction effected through an EFTPOS terminal in respect of which the Cardholder authorises a tip for services provided by the Merchant to that Cardholder.

“Transaction” means a transaction where a Card is used to pay the Merchant for goods or services.

“UnionPay” means UnionPay International Co. Ltd. and any of its related companies.

“UnionPay Card” means a card issued pursuant to and in accordance with a licence granted by UnionPay and which bears, among other things, the word “UnionPay”. Some banks issue dual-branded cards, which display a UnionPay logo and also a Visa or Mastercard logo. In a Card Present Transaction or MOTO Transaction, if a dual-branded card displays a Visa logo, the card is then processed as a Visa Transaction, or if it displays a Mastercard logo, the card is then processed as a Mastercard Transaction

“Valid” means in respect of:

- (a) a Card: a Card that is not expired and not listed with a card issuer as being lost or stolen;
- (b) a Sales Voucher or Credit Voucher: a Sales Voucher or Credit Voucher, as the case may be, that has been completed in accordance with this Agreement, does not breach any provision of this Agreement and contains any other information that the Bank, at any time, notifies the Merchant should be recorded on it; and
- (c) a Transaction: a Transaction which has been completed in accordance with this Agreement, does

not breach any provision of this Agreement and is not deemed to be an invalid Transaction pursuant to clause 6.

“Visa” means Visa International Service Association and any of its related companies.

“Visa Card” means a card issued pursuant to and in accordance with a licence granted by Visa and which bears, among other things, the word Visa.

1.2 Interpretation: In this Agreement, unless the context requires otherwise:

If more than one person is named as the **Merchant**, each reference to the Merchant is a reference to each Merchant separately and to all Merchants together.

References to an **agreement** or document includes such agreement or document as may be amended, modified or supplemented from time to time.

References to **clauses and Schedules** are to clauses of and Schedules of this Agreement.

Derivatives of any defined word or term have a corresponding meaning.

A **gender** includes each other gender and a reference to “its” includes a reference to “his” or “her” as the context requires.

The **headings** to clauses and paragraphs shall be ignored in construing this Agreement.

The word **including** and other similar words do not imply any limitation.

A reference to any **legislation** includes a reference to that legislation as from time to time amended, re-enacted or substituted, includes regulations, orders in council and other instruments from time to time issued or made under that legislation and, unless otherwise stated, is a reference to New Zealand legislation.

All **moneys** to be paid to the Merchant in terms of this Agreement shall be paid in New Zealand currency to the Merchant’s Deposit Account at the Merchant’s Bank.

An **obligation not to do anything** includes an obligation not to suffer, permit or cause that thing to be done.

References to paragraphs are to **paragraphs** of the relevant Schedule.

Any **party** to this Agreement includes its successors and permitted transferees and assigns.

References to a **person** includes an individual, body corporate, an association of persons (whether corporate or not), a trust and any other entity (in each case, whether or not having a separate legal personality).

The plural includes the **singular** and vice versa.

1.3 Agreement: This Agreement consists of:

- (a) these general terms and conditions;
- (b) the specific terms and conditions contained in any applicable Schedule;
- (c) the Application Form; and
- (d) the Merchant Operating Guide.

If there is any inconsistency between the above documents, the Bank shall determine in its absolute discretion which terms shall prevail.

1.4 Additional Services: If the parties agree in writing that the Merchant may process additional Transactions or the Bank may provide the Merchant additional Services not

selected in the Application form, the terms of the relevant Schedule applicable to those Transactions or Services will be deemed to apply to the Merchant from the date of such written agreement.

1.5 Paymark Tripartite Agreement: If the Merchant and the Bank have entered into the Paymark Tripartite Agreement, this Agreement is supplemental to the Paymark Tripartite Agreement, which together govern the relationship between the Merchant and the Bank, notwithstanding anything to the contrary contained in the Paymark Tripartite Agreement.

1.6 Trade Purposes: The parties agree: (a) the goods and services provided under this Agreement are not of a kind ordinarily acquired for the personal, domestic or household use or consumption, and are to be supplied and acquired in trade; and (b) to the maximum extent permitted by law to contract out of the provisions of the Consumer Guarantees Act 1993 if, notwithstanding (a), such Act were deemed to apply.

1.7 Joint and several obligations: Where any Merchant consists of more than one person, the obligations of that Merchant under this Agreement shall be both joint and several.

2. Term

2.1 Term: If the Application Form is approved by the Bank, this Agreement shall commence on the date of the Application Form and shall continue:

- (a) if this Agreement is a Fixed Term Agreement, for the Initial Term and each Subsequent Term until terminated in accordance with clause 2.2 or clause 10; or
- (b) if this Agreement is an Open Term Agreement, until terminated in accordance with clause 10.

2.2 Automatic Extension: If this Agreement is a Fixed Term Agreement and unless the Merchant gives the Bank at least 60 days' written notice of termination before the end of the Initial Term or any Subsequent Term, as the case may be, at the end of the Initial Term this Agreement will automatically be extended for further periods equal to the term of the Initial Term until terminated in accordance with clause 10.

3. Services Provided by the Bank

3.1 Services: Subject to the terms of this Agreement, the Bank will provide the Merchant with the Services specified in the Application Form, or as otherwise agreed in writing by the parties from time to time.

3.2 Bank's Obligations: The Bank will:

- (a) accept all Valid Transactions, Sales Vouchers and Credit Vouchers issued by the Merchant relating to this Agreement;
- (b) supply the Merchant with imprinters, Sales Vouchers and other supplies including Card decals and promotional material upon such terms and conditions as agreed from time to time between the Merchant and the Bank; and
- (c) forward to the Merchant once each calendar month a separate statement showing the aggregate amount of all Transactions processed during the previous month.

3.3 Settlement:

- (a) The Bank shall credit the Merchant's Deposit Account in respect of a Valid Transaction accepted by the

Bank, on the Business Day of its deposit with the Bank, with an amount equal to the amount debited to the Cardholder's Card in respect of that Valid Transaction.

- (b) Funds deposited into the Deposit Account in relation to a manually printed Valid MOTO Transaction may not be available until three Business Days after the lodgement date. For all other types of Valid Transactions, if the Bank is also the Merchant's Bank funds will be available on the same Business Day if effected prior to the Merchant's EFTPOS settlement cut-off time for that Business Day or the following Business Day if effected after the Merchant's EFTPOS settlement cut-off time. If the Merchant's Bank is not the Bank such funds may not be processed by the Merchant's Bank until the following Business Day and will become available in accordance with the Merchant's Bank's normal policies and procedures.
- (c) The Bank is under no obligation to make any payment to the Merchant or any other person, or to do any other act, in respect of a Transaction which is not Valid.

3.4 The Bank reserves the right to refuse to process Transactions made using equipment that is faulty or likely to affect the quality or integrity of Transactions, whether or not it is certified by the Bank, Paymark or a Switching Provider (as applicable).

4. Merchant's Obligations

4.1 General Undertakings: The Merchant undertakes that it will:

- (a) at all times observe the provisions of this Agreement and the Paymark Tripartite Agreement (if applicable);
- (b) at all times observe and comply with all applicable Card Scheme Rules, and not take, or fail to take, any action that would result in the bank violating any Card Scheme Rule;
- (c) implement and comply with the PCI Security Standards, as applicable;
- (d) not make any warranty or representation whatsoever in relation to any goods or services supplied by it which may bind the Bank, or a Card Scheme;
- (e) display prominently in its place or places of business the Card decal insignia supplied;
- (f) not use any advertising or promotional material in relation to any Card except as authorised by the Bank. The Merchant shall use advertising or promotional material only to indicate which Cards are acceptable as payment and shall not infringe upon Card Scheme marks or logos in such a way as to create the impression that the Merchant's goods or services are sponsored or in any way affiliated to a Card Scheme;
- (g) not collect or store any Cardholder information or any sensitive account information without the Bank's consent;
- (h) keep all systems and media containing Transaction information (physical or otherwise, including but not limited to Card imprints and Sales Vouchers) in a secure manner in line with industry best practice and as specified in the PCI Security Standards and any Card Scheme data security program or requirements, to prevent access by or disclosure to anyone other than as permitted by clause 4.1(i). The Merchant

must destroy in a manner that will render the data unreadable all such media that the Merchant no longer deems necessary or appropriate to store;

- (i) not sell, purchase, provide or exchange any Cardholder information obtained by reason of a Transaction to any third party, other than:
 - (i) the Merchant's authorised personnel;
 - (ii) the Bank;
 - (iii) the relevant Card issuer;
 - (iv) the relevant Card Scheme;
 - (v) if applicable, the relevant Switching Provider;
 - (vi) any person authorised to receive such information in any applicable Schedule; or
 - (vii) as required by law,and in each case in accordance with all applicable laws;
- (j) permit the Bank, the Card Schemes or the Switching Provider (as applicable) or any of their respective employees, contractors or agents access to its premises at any time during normal business hours for the purpose of conducting an on-site inspection or investigation to check compliance with this Agreement or for the purposes of compliance with the relevant Card Scheme Rules;
- (k) provide the Bank with all information and assistance it reasonably requires to perform its obligations and to deal with any queries in relation to any Transaction or the provision of any Services, including copies of records, logs and purchase requests in accordance with the requirements set out in the Merchant Operating Guide;
- (l) inform the Bank in writing promptly of any change to its Deposit Account or Fees Account and provide a replacement validly executed direct debit authority in relation to any new Fees Account;
- (m) notify the Bank of any proposed change in the nature of the business undertaken by the Merchant by notice in writing at least five days' prior to that proposed change; and
- (n) notify the Bank of any proposed change in ownership or control of the Merchant by notice in writing at least 14 days' prior to the proposed change being effected;
- (o) not process Transactions on behalf of other merchants or third parties, unless approved by the Bank; and
- (p) with respect to equipment used for Transactions:
 - (i) comply with the relevant equipment user guide;
 - (ii) only use equipment certified or approved by the Bank, Paymark or the relevant Switching Provider (as applicable);
 - (iii) properly care for such equipment and ensure that it is regularly serviced and maintained;
 - (iv) ensure that equipment is used in accordance with the Merchant's agreement with the Bank and the equipment supplier, and not move equipment from a registered location to any other location without the consent of the Bank; and
 - (v) without limiting any other clause of this agreement, allow Bank employees, contractors

or agents to enter the Merchant's premises as reasonably required by the Bank to install, maintain and remove equipment the Bank owns or supplies and inspect the condition and operation of equipment owned by others.

4.2 Undertakings relating to Transactions: The Merchant undertakes that it will:

- (a) not accept a Transaction for providing cash to a Cardholder in lieu of, or in addition to, providing goods or services;
- (b) not refuse to accept any Valid Card unless otherwise agreed between the parties or provided for in this agreement;
- (c) lodge all Credit Vouchers with the Bank within three Business Days after issue of that voucher;
- (d) not apply a surcharge to a Transaction that does not bear a reasonable relationship to the Merchant's cost of accepting the applicable Card. Any surcharge must be clearly disclosed to the Cardholder at the time of purchase as a Merchant surcharge;
- (e) not require, or post signs (whether at its place of business, on its website or elsewhere) indicating that the Merchant requires, a minimum amount below which, or a maximum amount above which, the Merchant shall refuse to accept an otherwise Valid Card;
- (f) establish a fair policy for the exchange or return of merchandise paid for by the use of a Valid Card and give credit upon each return, not in cash but by the issue of a Credit Voucher; and
- (g) comply with all relevant laws and contractual requirements in:
 - (i) carrying on its business;
 - (ii) entering in to transactions; and
 - (iii) performing its obligations under this agreement.

4.3 Refunds: If the Merchant is authorised to process refunds of Transactions, the Merchant undertakes to process any refund to the original Card used only and in accordance with directions received from the Bank.

4.4 Pre-authorisation Transactions: If the Merchant is authorised to process Pre-Authorisation Transactions, the Merchant undertakes that, in respect of each Pre-Authorisation Transaction, it will not:

- (a) request an Authorisation for any amount in excess of the total value of the applicable Transaction; or
- (b) seek Authorisation of a Transaction more than 5 days prior to the date on which payment of the Transaction is to be made.

4.5 Liability and authorisation: The Merchant:

- (a) will at all times be liable for the full amount of any chargebacks validly claimed by a Cardholder including the amount of any surcharge;
- (b) will at all times be liable for any loss, cost, expense, damage or liability resulting from any misuse of Cardholder account and Transaction information by the Merchant or any failure to keep Cardholder account and Transaction information secure; and
- (c) is liable for and irrevocably authorises the Bank or the Merchant's Bank, as the case may be, to debit the Fees Account with:
 - (i) any fee, cost, charge, liability or expense or other amount that becomes payable by the Merchant

- to the Bank pursuant to this Agreement;
- (ii) the total amount of any Credit Voucher issued by the Merchant;
- (iii) any overcredits made in respect of Transactions due to errors or omissions;
- (iv) any credits due to the Bank arising in respect of Transactions that are not Valid;
- (v) any chargebacks effected by the Bank pursuant to clause 7;
- (vi) any fees, fines, penalties or other amounts imposed on the Bank by a Card Scheme as a result of any act or omission of the Merchant, its employees, officers or agents; and
- (vii) any other amount that is owing to the Bank by the Merchant on any account.

4.6 Security: If requested, the Merchant must provide the Bank with security of a type specified by the Bank sufficient to secure the Merchant's present, future and contingent obligations under this Agreement, as assessed by the Bank.

5. Fees

5.1 Payment: The Merchant will pay to the Bank the fees set out in, and in accordance with, Schedule 4.

5.2 Variation of fees: The Bank may vary the fees, or advise the Merchant of any additional fees, applicable to this Agreement at any time by prior notice to the Merchant in accordance with clause 14.2.

6. Invalid Transactions

6.1 A Transaction shall be deemed invalid if:

- (a) the transaction it records is illegal; or
- (b) the applicable Card is not current or has expired at the time of the Transaction; or
- (c) the applicable Card is not a Valid Card; or
- (d) the price charged to the Cardholder for goods or services under the Transaction is in excess of the Merchant's normal price as mentioned in clause 4.2(d); or
- (e) in relation to a Card Not Present Transaction, the Cardholder asserts that the Transaction is not authorised; or
- (f) the Transaction it records or any part of that Transaction is deemed to be a cash advance; or
- (g) the Merchant has failed to observe this Agreement.

7. Chargebacks

7.1 The Merchant acknowledges and agrees that Authorisation of a Transaction is not a guarantee of payment by the Bank. Accordingly the Bank may refuse to accept, or having accepted may charge back to the Merchant, any Transaction if:

- (a) the Transaction is an invalid Transaction;
- (b) the Cardholder disputes his or her liability for any reason;
- (c) the Cardholder asserts a claim or set-off or a counterclaim;
- (d) the Bank disputes liability for any reason;
- (e) the Transaction represents the refinancing or transfer or an existing Cardholder obligation that

is deemed not to be collectable or arising from the dishonour of a Cardholder's personal cheque;

- (f) the Merchant is unable to make available to the Bank copies and records of Sales Vouchers or other purchase requests as required by this Agreement; and
- (g) the Merchant has failed to provide the Cardholder with the goods or services covered by the Transaction.

8. Indemnity

8.1 Limited liability: Subject to clause 8.2 and to the extent permitted by law, the Bank has no liability to the Merchant for:

- (a) the failure of the card payment system or any part of it; or
- (b) the failure by Paymark to comply with its obligations under the Paymark Tripartite Agreement; or
- (c) the failure of any EFTPOS terminal; or
- (d) the failure of any third party e-commerce payment solutions or provider including any relevant Switching Provider.

8.2 Bank indemnity: The Bank hereby indemnifies the Merchant against all losses, claims expenses or liabilities incurred or suffered by the Merchant as a result of:

- (a) the failure of the card payment system; or
- (b) the unauthorised use of the card payment system; where that failure or unauthorised use of the card payment system is a consequence of the wilful default or gross negligence of the Bank, its employees or agents.

8.3 No consequential loss: To the extent permitted by law the liability of the Bank under clause 8.2 shall not extend to any indirect or consequential loss or damage or any loss of business or profits suffered by the Merchant.

8.4 Merchant indemnity: The Merchant indemnifies the Bank against any loss, cost, expense, damage or liability (whether direct, indirect or consequential) suffered or incurred by the Bank as a result of:

- (a) the failure of the Merchant to comply with any of its obligations under this Agreement; or
- (b) any incorrect or misleading information supplied to the Bank by the Merchant or any information withheld by the Merchant that would have made any information provided to the Bank incorrect or misleading; or
- (c) any other act of, or omission by, the Merchant or any of its employees, officers, or agents whatsoever (including but not limited to, the completion of a Transaction, the processing of refunds, the use of an EFTPOS terminal, the completion of a Sales Voucher or Credit Voucher, the collection and storage of Cardholder account and Transaction information); or
- (d) any action taken by the Bank, a Card Scheme or a Switching Provider as a result of any act of, or omission by, the Merchant or any of its employees, officers or agents, including, but not limited to, any fees, fines, penalties or other amounts imposed by a Card Scheme on the Bank as a result of any such act or omission; or
- (e) any dispute between any or all of the Merchant, any Cardholder and the Bank.

9. Exclusivity

9.1 The Merchant agrees that during the Term of this Agreement it shall not receive any merchant services from any other financial institution, other than from American Express Company, Diners Club International Limited, Japan Credit Bureau or JCB International, unless expressly agreed in writing by the Bank.

10. Termination

10.1 Termination by Merchant:

(a) Fixed Term Agreement: If this Agreement is a Fixed Term Agreement, the Merchant may terminate either:

- (i) the whole Agreement; or
- (ii) the application of any Schedule if it no longer wishes to process the particular types of Transactions to which the Schedule applies,

by giving the Bank 60 days' prior written notice, provided that if the Merchant terminates the Agreement or any Schedule prior to the end of the Initial Term or the end of any Subsequent Term (as applicable), the Merchant may be required to pay a termination fee in relation to each type of Transaction as set out in clause 11.

(b) Open Term Agreement: If this Agreement is an Open Term Agreement, the Merchant may terminate either:

- (i) the whole Agreement; or
- (ii) the application of any Schedule if it no longer wishes to process the particular types of Transactions to which the Schedule applies,

by giving the Bank 10 days' prior written notice.

10.2 Deemed termination: The Merchant will, at the Bank's election, be deemed to have terminated the whole Agreement if it:

- (a) commences processing any Transaction with another supplier and ceases processing with the Bank; or
- (b) ceases to process one or more of the Cards as stipulated on the Application Form, or a type of Transaction specified on the Application Form, unless consented to by the Bank; or
- (c) commences processing a type of Transaction listed on the Application Form without the prior written consent of the Bank; or
- (d) processes such volume of Transactions under this Agreement or takes any other actions which, in the Bank's opinion, indicate that the Merchant intends to terminate this Agreement (in whole or in part) or intends to commence processing with another supplier.

10.3 Termination by Bank:

- (a) If this Agreement is a Fixed Term Agreement, the Bank may terminate this Agreement, or any part of it at the end of the Initial Term or any Subsequent Term, as applicable, by giving the Merchant written notice not later than 30 days' prior to the end of that Initial Term or Subsequent Term.
- (b) If this Agreement is an Open Term Agreement, the Bank may terminate this Agreement, or any part of it by giving the Merchant 10 days' written notice.
- (c) The Bank may also terminate this Agreement, or any part of it, regardless of whether it is a Fixed Term Agreement or an Open Term Agreement, immediately on notice to the Merchant, if:

- (i) the Merchant becomes insolvent, is declared bankrupt or has applied for entry to or has been admitted to the no asset procedure under the Insolvency Act 2006; or
- (ii) an order is made by the Court, or the Merchant passes a resolution, for the winding up of the Merchant, or a receiver, administrator or similar officer is appointed in respect of any of the Merchant's assets; or
- (iii) the Merchant breaches this Agreement; or
- (iv) the Merchant has, in the Bank's reasonable opinion, processed an excessive number of chargebacks or fraudulent Transactions; or
- (v) any information provided by the Merchant to the Bank becomes false, incorrect or misleading; or
- (vi) without the prior written consent of the Bank, there is a change in the nature of the business undertaken by the Merchant; or
- (vii) without the prior written consent of the Bank, there is a change in ownership or control of the Merchant; or
- (viii) the Bank considers that the Merchant or any of its employees may have been or may be likely to use any Services fraudulently or where the security or integrity of any Service or the reputation of the Bank has been, or is likely to be, in the Bank's opinion, jeopardised by the Merchant or any other person; or
- (ix) in the Bank's opinion, the Merchant is unlikely to be able to meet the Merchant's payments or other obligations to the Bank; or
- (x) in the Bank's reasonable opinion, the Merchant is unlikely to be able to meet any applicable Card Scheme Rules; or
- (xi) the Bank is prohibited by any Card Scheme Rule from providing merchant services to the Merchant or is directed by any Card Scheme to terminate the Bank's relationship with the Merchant; or
- (xii) if applicable, the Paymark Tripartite Agreement is terminated.

10.4 Right to terminate on increase of Merchant Service Fee:

If the Bank increases the Merchant Service Fee applicable to any Transaction type and the Merchant objects to that increase in writing to the Bank within 30 days of receipt of notice of the increase, the Merchant may terminate the whole Agreement by giving the Bank 30 days' prior written notice.

10.5 Without prejudice: Termination of this Agreement shall be without prejudice to the rights of either party against the other in respect of any obligations remaining unfulfilled as at the date of termination.

10.6 Consequences of termination: Upon termination of this Agreement, the Merchant agrees to return to the Bank the imprinter, the imprinter plate, Card decals and promotional material and all other bank related stationary including Sales Vouchers, terminals, and any other property provided to the Merchant by the Bank or its third party suppliers.

10.7 Suspension: Without prejudice to the Bank's rights of termination under clause 10.3, in the event the Bank considers that:

- (a) the Merchant or any of its employees may have been or may be likely to use any Services fraudulently or where the security or integrity of any Service or the reputation of the Bank has been, or is likely to be, in the Bank's opinion, jeopardised by the Merchant or any other person; or
- (b) the Merchant is unlikely to meet the Merchant's payment or other obligations to the Bank; or
- (c) the Merchant is unlikely to be able to meet any applicable Card Scheme Rule,

the Bank may either:

- (d) immediately and without notice suspend the availability of the relevant Service or Services to the Merchant; or
- (e) redirect any transaction settlement proceeds received or due to the Merchant into a suspense account, until such time as the Bank has either:
 - (i) resolved that the reason for the suspension in this clause 10.7 has not occurred or is not likely to occur; or
 - (ii) terminated this Agreement in accordance with clause 10.3.

11. Termination Fee

11.1 Termination fee: If this Agreement is a Fixed Term Agreement and:

- (a) the Merchant terminates, or is deemed to have terminated, this Agreement, or any part of it, before the expiry of the Initial Term or any Subsequent Term, as the case may be (other than as a direct result of the Bank having breached its obligations under this Agreement); or
- (b) the Bank terminates this Agreement because the Merchant has breached its obligations under this Agreement; or
- (c) the Bank terminates this Agreement under clause 10.3(c)(xii),

then the Merchant will, subject to clause 11.3, on demand immediately pay to the Bank, in addition to any other amounts that are payable by the Merchant under this Agreement, by way of liquidated damages:

- (d) the sum of \$3,000 per Transaction type, if termination occurs prior to the date falling 12 months after the date of this Agreement or, if this Agreement is extended in accordance with clause 2.2, prior to the date falling 12 months after the final day of the Initial Term or the final day of any applicable Subsequent Term; or
- (e) if termination occurs:
 - (i) on or after the date falling 12 months after the date of this Agreement but prior to the final day of the Initial Term; or
 - (ii) if this Agreement is extended in accordance with clause 2.2, on or after the date falling 12 months after:
 - (A) the final day of the Initial Term but prior to the final day of the immediately succeeding Subsequent Term; or
 - (B) the final day of any Subsequent Term but prior to the final day of the immediately succeeding Subsequent Term,

an amount equal to:

- (iii) the average of the 12 most recent Merchant Service Fee payments per Transaction type which were, or are, payable by the Merchant to the bank. Or, if fewer than 12 Merchant Service Fee payments have been, or are, payable by the Merchant, the average of all Merchant Service Fee payments made will be payable by the Merchant to the Bank,

multiplied by:

- (iv) the number of months remaining per Transaction type before the end of the Initial Term or the Subsequent Term, as the case may be, or if the Initial Term or the Subsequent Term has less than two months remaining, two,
- (f) being, in each case, the Bank's current reasonable pre-estimate of damages, costs and expenses which arise from the early termination of this Agreement.

11.2 ASB Accept termination fee: If ASB Accept has been selected as a Service on:

- (a) a 36 month contract or a 3 to 6 month seasonal contract and the Merchant terminates the Service before the expiry of the Initial Term of that contract, then the Merchant will, subject to clause 11.3, on demand immediately pay to the Bank, in addition to any other amounts that are payable by the Merchant under this Agreement, \$250 for each of the Merchant's terminals returned being the Bank's reasonable pre-estimate of the cost of refurbishment of each of the terminals to market specifications.

11.3 Circumstances where no termination fee: If the Bank is satisfied, in its discretion, that this Agreement or any part of it, is terminated due to:

- (a) the Merchant becoming insolvent, being declared bankrupt or applying for entry to or being admitted to the no asset procedure under the Insolvency Act 2006; or
- (b) the winding up of the Merchant or a receiver, administrator or similar officer being appointed in respect of any of the Merchant's assets; or
- (c) a change in ownership or control of the Merchant where the Bank has consented to such change; or
- (d) the Merchant terminates this Agreement in accordance with clause 10.4,

then the Merchant will not be required to pay any termination fee payable under clause 11.1 or 11.2.

12. Combination and Set-Off

12.1 The Merchant authorises the Bank, at its discretion, to combine the Merchant's account with any or all other accounts whether alone or together held at the Bank and to set off any credits in those accounts against any amount due and payable to the Bank by the Merchant:

- (a) on death or bankruptcy of any Merchant;
- (b) at the discretion of the Bank, if any Merchant is in breach of this Agreement;
- (c) where funds are owing to the Bank by reason of chargeback effected pursuant to clause 7; or
- (d) upon termination of this Agreement.

This clause 12 does not prejudice, and is in addition to, any other right of set-off, combination of accounts, lien or other similar or related right to which the Bank is, or may at any time be, entitled.

13. Consent

13.1 Authorisation: The Merchant authorises:

- (a) the Bank and its agents and other third parties (whether in New Zealand or overseas) that provide services to the Bank (together its "Agents") to supply to other credit providers, credit reference agencies, Paymark, any applicable Switching Provider, any applicable Card Scheme and any other parties referred to in the Schedules, any information collected and held by the Bank and its Agents at any time in connection with this Agreement; and
- (b) other credit providers, credit reference agencies, Paymark, any applicable Switching Provider, any applicable Card Scheme and any other parties referred to in the Schedules to provide any information about the Merchant to the Bank and its Agents which the Bank may require in connection with this Agreement.

13.2 Credit information authorisation: If the Merchant is an individual then, without limiting clause 13.1, the Merchant authorises:

- (a) the Bank's credit reference agency to:
 - (i) hold the Merchant's personal information on its systems and use the Merchant's personal information to provide its credit reporting services; and
 - (ii) provide the Merchant's personal information to its customers when they use its credit reporting services;
- (b) the Bank to use its credit reference agency in the future for purposes related to the provision of credit to the Merchant;
- (c) the Bank to give its credit reference agency information about any default in the Merchant's payment obligations to the Bank; and
- (d) the Bank's credit reference agency to give information about the Merchant's default in its payment obligations to the Bank to the credit reference agency's other customer.

13.3 Acknowledgement: Pursuant to the Privacy Act 1993, the Merchant understands and acknowledges that if it is an individual:

- (a) this Agreement collects personal information about it;
- (b) the information is being collected to:
 - (i) determine the Merchant's suitability as a Card merchant and providing the Merchant with Services;
 - (ii) provide the Merchant with the use of, and information about, any other Bank products and services and products and services of the Bank's related companies (whether incorporated or constituted in New Zealand or elsewhere);
 - (iii) administering and maintaining any products or services provided to the Merchant by the Bank or by the Bank's related companies (whether incorporated or constituted in New Zealand or elsewhere);
 - (iv) managing the Merchant's relationship with the Bank so, for example, the Bank can respond to the Merchant's queries;

- (v) monitoring products and services for fraud and crime detection purposes; and
- (vi) conducting market research, data processing and statistical analysis;
- (c) The Merchant authorises the Bank to obtain information from the Bank's related companies (whether incorporated or constituted in New Zealand or elsewhere) for the above purposes;
- (d) the intended recipients of the information are:
 - (i) the Bank and its related companies (whether incorporated or constituted in New Zealand or elsewhere), agents, Card Schemes, Switching Providers, other providers of credit, credit reference agencies, debt collection agencies and Paymark;
 - (ii) research firms engaged by the Bank to carry out customer surveys and conduct market research;
 - (iii) other banks (including overseas banks), agents, contractors or other financial service providers assisting with international transactions and same day cleared payments;
 - (iv) the police, certain governmental agencies or other financial institutions where the Bank reasonably believes that disclosure will assist the investigation, detection and/or prevention of fraud or other criminal offences;
 - (v) guarantors and proposed guarantors;
 - (vi) any previous or current employer of the Merchant, if the Bank needs to consider the Merchant's employment history and income; and
 - (vii) any other party authorised by the Merchant,
- (e) certain laws require the Bank to disclose information about the Merchant;
- (f) the information is being collected and held by the Bank's Cards Department, PO Box 35, Shortland Street, Auckland 1140. Any information collected about the Merchant by an agent may also be held by that agent in an overseas jurisdiction. Such agents are subject to the laws of their jurisdiction, which may require the disclosure of the Merchant's personal information from time to time;
- (g) failure to provide this information or unfavourable information ensuing from any credit checks may result in the Bank cancelling this Agreement; and
- (h) the Merchant has rights of access to, and correction of, this information to the extent that it is not evaluative material pursuant to section 29(1)(b) Privacy Act 1993.

13.4 Electronic Communication

- (a) You consent to us giving to you documents, notices and communications in relation to your products and services in electronic form by electronic communication through for example:
 - (i) FastNet Business or FastNet Classic; or
 - (ii) Any other internet banking system provided by us; or
 - (iii) Any application available through your mobile device approved by us for this purpose.
- (b) You agree that any such electronic communication is taken to be dispatched by us and received by you at

the time it is uploaded to the relevant system.

- (c) You consent to any such documents, notices and communications being in a commonly used format (for example, PDF) and being accessible by commonly used software (for example, Internet Explorer).

14. Miscellaneous

14.1 Assignment: The Merchant is not entitled to assign or transfer all or any its rights and obligations under this Agreement without the prior written consent of the Bank. The Bank may assign or transfer any of its rights and obligations under this Agreement to any person.

14.2 Variations: The Bank reserves the right to vary the terms of this Agreement from time to time and to provide a minimum of 14 days' notice of the variation to the Merchant in at least one of the following ways:

- (a) by direct communication with the Merchant;
- (b) by advice or display in the Bank's branches;
- (c) by notice in the media (such as public notices); or
- (d) by notice on our website, or by any other electronic banking channel used by the Merchant.

14.3 Partial Invalidity: The illegality, invalidity or unenforceability of a provision of this Agreement under any law will not affect the legality, validity or enforceability of that provision under another law or the legality, validity or enforceability of another provision.

14.4 Waivers and consents: No waiver by the Bank of its rights under this Agreement will be effective unless it is signed in writing by the Bank. Any consent under this Agreement must also be in writing signed by the Bank. Any such waiver or consent may be given subject to any conditions the Bank deems appropriate and shall be effective only in the instance and for the purpose for which it was given.

14.5 No implied waiver: No failure to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of that right, nor will a single or partial exercise of a right preclude another or further exercise of that right or the exercise of another right.

14.6 Time: Time is of the essence for the performance by the Merchant of its obligations under this Agreement.

14.7 Survival of Covenants: The Merchant's obligations under clauses 4.1(d), (f), (g), (h), (i), (j), (k), 4.5, 5, 7, 8.4, 11 and 12 and the Bank's rights under clauses 8.1, 8.3, 12 and 13 will survive the termination of this Agreement.

14.8 System security: The Merchant agrees to provide the Bank, or a Card Scheme endorsed third party, with access to view, monitor and/or audit the pages of its website for security purposes to ensure compliance with any relevant laws or Bank or Card scheme requirements.

14.9 Compliance certification: From time to time the Bank may require the Merchant to provide satisfactory certification that particular Transactions comply with any relevant law or Card Scheme Rules. The Merchant may be required to meet the costs of complying with any Card Scheme programmes applicable to its business that may be introduced from time to time.

15. Governing Law

15.1 This Agreement is governed by and is to be construed in accordance with New Zealand law. The parties submit to the non-exclusive jurisdiction of the New Zealand courts.

Schedule 1: Card Present Transactions

1. Application

1.1 Application: The terms of this Schedule 1 apply to the Merchant if:

- (a) "EFTPOS", "Paper (manual imprinter)" and/or "Credit Cards" Transactions have been selected as a Transaction on the Application Form and the Bank has approved that Application Form; or
- (b) the parties have otherwise agreed, in accordance with clause 1.4, that the Merchant may process any Card Present Transactions,

to the extent of such Card Present Transactions so selected. The Merchant acknowledges and agrees that the approval by the Bank of one type of Card Present Transaction shall not be, and shall not be deemed to be, approval of other types of Card Present Transactions.

1.2 Supplemental: This Schedule forms part of, and is subject to, the general terms and conditions set out in the Agreement.

2. Definitions

2.1 In this Schedule, unless the context otherwise requires:

"**Authorised Floor Limit**" means, in relation to a Card Present Transaction, the total value of sales the Merchant is authorised from time to time to make to a Cardholder on any one occasion without the Bank's consent.

3. Merchant's Obligations

3.1 In addition to the undertakings set out in the Agreement, the Merchant also undertakes that it will:

- (a) before proceeding with a Card Present Transaction, perform the transaction utilising the highest security method available as advised by ASB;
- (b) obtain prior Authorisation for:
 - (i) any sale in excess of the Authorised Floor Limit in which a Sales Voucher is used, and not split sales or process more than one Transaction where the total sales would be in excess of the Authorised Floor Limit; and
 - (ii) if the Merchant is authorised to process Tipping Transactions, any Tipping Transaction.
- (c) lodge all Sales Vouchers with the Bank within three Business Days after issue of that voucher;
- (d) use reasonable care when accepting Sales Vouchers to detect fraud or forged unauthorised signatures, including checking the signature matches the signature of the Sales Voucher;
- (e) inform the Cardholder of all terms and conditions relative to a particular Transaction and perform all obligations to the Cardholder in connection with the Transaction, prior to the banking of the Sales Voucher with the Bank;
- (f) if in response to an Authorisation request the Merchant is advised to obtain or hold onto a Card or is given other instructions, the Merchant shall use its best efforts by reasonable and peaceful means to comply, without placing its own safety in jeopardy;
- (g) not process any Tipping Transaction unless it has been authorised by the Bank to do so; and

- (h) if the Merchant is authorised to process Tipping Transactions, it will ensure that before accepting any Tipping Transaction:
 - (i) the Cardholder is made aware that a tip has been added and have the opportunity to decline it; and
 - (ii) the tip amount does not exceed 20% of the Transaction amount (exclusive of the tip amount).

4. Disputes

- 4.1** The Merchant acknowledges that any disputes that the Merchant may have with any customer of the Merchant in respect of any Card Present Transaction shall be settled entirely between the Merchant and the customer.

Schedule 2: Card Not Present Transactions

1. Application

- 1.1 Application:** The terms of this Schedule 2 apply to the Merchant if:

- (a) any type of Card Not Present Transaction has been selected as a Transaction on the Application Form and the Bank has approved that Application Form; or
- (b) the parties have otherwise agreed, in accordance with clause 1.4, that the Merchant may process any, or any additional, Card Not Present Transaction,

to the extent of the type of Card Not Present Transactions so selected. The Merchant acknowledges and agrees that the approval by the Bank of one type of Card Not Present Transaction shall not be, and shall not be deemed to be, approval of other types of Card Not Present Transactions.

- 1.2 Supplemental:** This Schedule forms part of, and is subject to, the general terms and conditions set out in the Agreement.

2. Merchant Acknowledgement

- 2.1** The Merchant acknowledges and agrees that:

- (a) by electing to process Card Not Present Transactions it accepts the increased risk of processing transactions where there is no physical Card and the Cardholder's identity or authority may at a later time be questioned;
- (b) it accepts all risks associated with processing a Card Not Present Transaction, including all costs, loss or liability incurred by the Merchant or any other person as a consequence of the processing of that Transaction;
- (c) it accepts all liability for the value of any Card Not Present Transaction where the Cardholder denies any knowledge or involvement with such Transaction; and
- (d) where a Card Not Present Transaction has not been validly authorised by the Cardholder (including where the Cardholder denies any knowledge or involvement with such Transaction) or is in some other way invalid, the value of the Transaction will be charged back to the Merchant's account in accordance with clause 7.

3. Merchant's Additional Obligations

- 3.1 All Card Not Present Transactions:** In addition to the undertakings set out in the Agreement, the Merchant also undertakes, in relation to each Card Not Present Transaction, that it will:

- (a) perform all obligations to Cardholders in relation to a Card Not Present Transaction immediately after any such Transaction has been successfully completed including the dispatch or fulfilment of goods or services agreed to be supplied;
- (b) not present the Card Not Present Transaction for payment until the goods are shipped or the services are performed, unless the Cardholder has agreed to a delayed delivery of goods or performance of services that was properly disclosed to the Cardholder at the time of the Transaction;
- (c) not use any other means to process a Card Not Present Transaction if, in response to an Authorisation request made by the Merchant in relation to that Transaction, that Transaction is declined; and
- (d) seek Authorisation of all Card Not Present Transactions;
- (e) in relation to any Recurring Transaction, immediately update Card account number details when so requested by the relevant Cardholder or the relevant Card issuing bank.

- 3.2 Additional undertaking for MOTO Transactions:** If the Merchant is authorised to process MOTO Transactions, the Merchant undertakes to display the brand marks for all relevant Card Schemes on all advertising and other promotional material associated with its mail order and telephone order business. The brand marks are to be located in close proximity to wherever payment options are presented and must comply with clause 4.1(f).

3.3 Additional undertaking for PAN Entry Transaction:

- If the Merchant is authorised to process PAN Entry Transactions, the Merchant undertakes that it will not:
- (a) use the PAN Entry Transaction facility to process Transactions in circumstances where the Cardholder and the Card are present but the magnetic stripe or microchip on or in the Card cannot be read by the EFTPOS terminal; and
 - (b) process any UnionPay debit card Transaction as a PAN Entry Transaction.

3.4 Additional undertaking for E-Commerce Transactions:

- If the Merchant is authorised to process any type of E-Commerce Transactions, it undertakes that it will:
- (a) provide PCI Security Standards compliant, secure payment processing for transmission and processing of Card information; and
 - (b) ensure that its website contains all of the following information:
 - (i) a complete and accurate description of all goods and services offered by the Merchant;
 - (ii) the Merchant's return and refund policy;
 - (iii) the currency of the purchase price for all goods and services offered by the Merchant;
 - (iv) to the extent known by the Merchant, whether any export restrictions, or legal restrictions apply to any goods or services offered by the Merchant;

- (v) the Merchant's delivery and fulfilment policies and terms;
- (vi) the country in which the Merchant is permanently resident and, if a company, its jurisdiction of incorporation;
- (vii) the Merchant's privacy policy;
- (viii) customer service contact details, including email address or telephone number, and a physical address in New Zealand for service;
- (ix) obtain confirmation from customers that they're of age to purchase goods and services where those goods or services are subject to an age restriction; and
- (x) a description of the method of security being used to secure Cardholder data.

4. Disputes

4.1 The Merchant acknowledges that any disputes that the Merchant may have with any customer of the Merchant in respect of any Card Not Present Transaction shall be settled entirely between the Merchant and the customer.

5. Survival of Covenants

5.1 The Merchant's obligations under paragraphs 2 and 4 will survive the termination of this Schedule and the Agreement.

Schedule 3: ASB CardPay

1. Application

1.1 Application: The terms of this Schedule 3 apply to the Merchant if:

- (a) "CardPay E-Commerce" has been selected on the Application Form and the Bank has approved that Application Form; or
- (b) the parties have otherwise agreed, in accordance with clause 1.4, that the "ASB CardPay" Service will apply.

1.2 Supplemental: This Schedule forms part of, and is subject to, the general terms and conditions set out in the Agreement.

2. Definitions

2.1 For the purposes of this Schedule only, the defined term "**Card**" shall include any additional card approved by the Bank pursuant to paragraph 3.4 of this Schedule and "**Cardholder**" shall have a corresponding meaning. In addition in this Schedule, unless the context otherwise requires:

"**Certified Solutions Provider**" means a person who has completed the Certified Solutions Provider Programme.

"**Certified Solutions Provider Programme**" means the programme established by Paymark to provide ASB CardPay integration and Merchant Host services.

"**Confidential Information**" means the Software together with all user manuals, operating manuals and materials that are designed to assist or supplement the use and understanding of the Software and other written materials that are disclosed or delivered to the Merchant in connection with this Agreement.

"**Merchant Host**" means the person operating the Software for the Merchant's operations.

"**Software**" means the software provided by the Bank to the Merchant, or the Merchant Host, to enable them to use the ASB CardPay service and includes all modifications to it (including the correction of any error in the software), a change to the functions of the software (including an addition) and upgrades to the software (including new versions) whether in source code or object code.

3. Merchant's Additional Obligations

3.1 Additional Undertakings: In addition to the undertakings set out in the Agreement (including any other applicable Schedule), the Merchant also undertakes that it will:

- (a) display on the Merchant's website the ASB CardPay logo and the Card decal insignia for the Cards as supplied by the Bank from time to time; and
- (b) if connecting to ASB CardPay through a Merchant Host, ensure that the Merchant Host has been approved by Paymark as a Certified Solutions Provider.

3.2 Disputes: The Merchant acknowledges that any disputes that the Merchant may have:

- (a) with any customer of the Merchant in respect of any Transaction processed through CardPay shall be settled entirely between the Merchant and the customer; and
- (b) with its Merchant Host in relation to its Internet connection or the service provided by the Merchant's Host, shall be settled entirely between the Merchant and the Merchant's Host,

and the Bank shall have no liability in relation to those disputes whatsoever.

3.3 Bank Disclosures: The Merchant acknowledges that:

- (a) the Bank is a member of the Card Schemes; and
- (b) the Bank may contract with other parties to provide the ASB CardPay service.

3.4 Additional Cards: From time to time additional cards other than the Card Schemes may be approved by the Bank for processing through ASB CardPay. The Merchant acknowledges that these cards are required to be certified by Paymark and approved by the Bank prior to use on ASB CardPay. The Bank will not be liable for the processing, authorisation or settlement of these other card transactions.

3.5 Networks: The Merchant acknowledges that key components of ASB CardPay are the networks of relevant Card Schemes, any other institution which issues cards approved under paragraph 3.4 of this Schedule and Paymark and that where the performance of ASB CardPay is affected by these networks, the Bank shall not be regarded as being in default of its obligations to the Merchant under this Agreement, and shall have no liability accordingly for any losses suffered by the Merchant.

3.6 Non-exclusive: The Merchant acknowledges that the provision of ASB CardPay to the Merchant is non-exclusive and that the Bank has the right to offer and provide ASB CardPay to any other person.

4. Return of Materials

4.1 Upon the termination of this Agreement, the Merchant:

- (a) agrees to delete all copies of the Software and delete from its website any Card decal, ASB CardPay logo or Bank logo which the Merchant may have been authorised to use; and

- (b) will lose all rights under this Agreement and must return either to the Bank or Paymark (as directed by the Bank) any material supplied under this Agreement. On the Bank's request, the Merchant must certify to the Bank or Paymark (as directed by the Bank), that all copies of the Software have been deleted in accordance with this paragraph 4.

5. Suspension

5.1 In the event the Bank or Paymark considers on reasonable grounds that the Merchant or any of its employees may have been or may be likely to use ASB CardPay fraudulently or where the security or integrity of ASB CardPay has been, or is likely to be jeopardised by the Merchant or any other person, either:

- (a) immediately and without notice suspend availability of ASB CardPay to the Merchant; or
- (b) redirect any transaction settlement proceeds received or due to the Merchant into a suspense account,

until such time as the Bank has resolved that such fraudulent use or threat to ASB CardPay's security or integrity has not occurred or is not likely to occur.

6. Software Licence and Conditions of Use

6.1 Licence: The Bank grants the Merchant a personal, non-exclusive, non-transferable licence to:

- (a) use the Software in accordance with this Agreement; and
- (b) install the Software within the Merchant's own infrastructure in accordance with the requirements of this Agreement or otherwise as agreed in writing by the Bank.

6.2 Title: The Merchant acknowledges that the Software is confidential and copyrighted. Title to the Software and all associated intellectual property rights is retained by Paymark, as the developer of the Software. The Merchant will not sublicense or otherwise deal with the Software, or permit anyone else to deal with the Software, without the Bank's prior written consent.

6.3 No merger: The Merchant will not merge all or any part of the Software with any other software without the prior written consent of the Bank.

6.4 Installation: The Bank is not responsible for installing or integrating the Software into the network of the Merchant. It is the Merchant's responsibility to verify the suitability of its computer or network environment for the functionality of the Software.

6.5 Termination: Notwithstanding any other provision of this Agreement, the Bank may immediately terminate this Agreement by notice in writing to the Merchant, if the Merchant, any of its employees, agents or contractors breach this paragraph 6.

7. Paymark Access

7.1 Access for testing: If the Merchant does not use a member of the Certified Solutions Provider Programme to perform its integration, then it agrees to permit Paymark to perform integration testing on the Merchant's production system. This integration testing will need to be performed prior to the Merchant being able to use the Software. Once the integration has passed the testing process, Paymark will provide the Merchant with a password to enable it to use the Software. If the Merchant is using a member of

the Certified Solutions Provider Programme to complete integration then it is likely that no integration testing will be required by Paymark and the Merchant will be able to use the Software once it has been configured or integrated by the Certified Solutions Provider.

7.2 Access where fault: The Merchant shall permit Paymark to perform integration testing after the Merchant has begun using the Software. This will enable Paymark to attempt to remedy a fault with the Merchant's Software which has been advised by the Merchant's customers or the Paymark help desk.

7.3 Changes to website: The Merchant shall permit Paymark to retest the integration if there has been an upgrade of the Software or new release of the Merchant's business application software that may impact on the Merchant's integration. Paymark has discretion whether or not to undertake such testing.

8. Confidential Information

8.1 The Merchant shall not:

- (a) copy, reproduce or transmit any of the Confidential Information by any means or in any form, other than user manuals, operating manuals, training manuals or parts thereof that are required for its employees, agents, consultants and contractors to conduct their position related responsibilities; or
- (b) disclose any of the Confidential Information to any person other than those of its employees, agents, consultants and contractors who need such disclosure for the conduct of their ordinary responsibilities as employees, agents, consultants and contractors; or
- (c) use the Confidential Information in any way other than as expressly permitted under this Agreement; or
- (d) remove any copyright, proprietary rights, ownership indication, confidentiality or non-disclosure label, notice label or notice appearing on or in the Software or any other item of the Confidential Information.

9. Rights of Paymark

9.1 The Merchant and the Bank acknowledge that, for the purposes of Part 2, Subpart 1, of the Contract and Commercial Law Act 2017, paragraphs 4, 5 and 7 of this Schedule confer a benefit on, and are intended to be enforceable by, Paymark.

10. Survival

10.1 Paragraphs 8 and 9 will survive the termination of this Schedule and the Agreement.

Schedule 4: Fees

1. Transaction Fees

1.1 Merchant Services Fee: Each month during the term of this Agreement a fee (the "Merchant Service Fee") will be calculated. The Merchant Service Fee for each Transaction type will be the greater of:

- (a) an amount equal to the rate for that Transaction type (as specified in the Application Form or as otherwise notified by the Bank to the Merchant) multiplied by the sum of:
 - (i) the total value of all Transactions of that type for that month; less

- (ii) the aggregate amount of refunds for the particular Transaction type for that month; and
- (b) the minimum monthly Merchant Service Fee for that Transaction type, as specified in the Application Form or as otherwise notified by the Bank to the Merchant.

The total Merchant Service Fee for each month is equal to the sum of each Merchant Service Fee for each Transaction type calculated in accordance with this paragraph. The amount of the Merchant Service Fee to be debited will be specified on the statement of Transactions issued following the close of business each month and mailed to the Merchant.

1.2 Interchange Fee: In addition to the Merchant Service Fee, for those Merchants on an Interchange Plus pricing plan (as specified in the Application Form or as otherwise notified by the Bank to the Merchant) a monthly interchange fee ("Interchange Fee") will be payable. The Interchange Fee will be the sum of the variable interchange fees for each Transaction Interchange Type calculated as follows:

- (a) if the Interchange Rate for that Transaction Interchange Type is expressed as a percentage, that percentage multiplied by the sum of:
 - (i) the total value of all Transactions of that Interchange Type for that month; less
 - (ii) the aggregate amount of refund Transactions of that Interchange Type for that month.
- (b) if the Interchange Rate for that Transaction Interchange Type is expressed as a fixed per-transaction fee, that fee multiplied by:
 - (i) the total number of Transactions of that Interchange Type for that month; less
 - (ii) the aggregate number of refund Transactions of that Interchange Type for that month.

1.3 Direct Debit: The Merchant Service Fee and Interchange Fee will be direct debited from the Merchant's Fees Account on the 10th Business Day following the last Business Day of the relevant month.

2. Other ASB Products

2.1 If other optional ASB products and services have been selected as a Service on the Application Form and the Bank has approved that Application Form, the fees for these Services will be set out on the Application Form. The fees will be payable monthly or as otherwise set out on the Application Form.

3. ASB Accept E-Commerce Solutions

3.1 If an ASB Accept E-Commerce solution has been selected as a Service on the Application Form and the Bank has approved that Application Form, the Merchant will pay the following additional fees:

- (a) Establishment Fee: upon execution of the Application Form, an "Establishment Fee" as specified in the Application Form; and
- (b) Urgent Establishment Fee: upon execution of the Application Form, an "Urgent Establishment Fee" as specified in the Application Form, if such fee is specified in the Application Form; and
- (c) Monthly Licence Fee: once a month during the term of this Agreement, a monthly licence fee at the rate specified in the Application Form as the "Monthly Licence Fee". The monthly licence fee will be direct debited to the Merchant's Fees Account at the same time as the Merchant Service Fee.

4. Variation

4.1 The Bank may:

- (a) vary the Merchant Service Fee, the minimum monthly Merchant Service Fee, the ASB Accept Monthly Fee, and/or the Monthly Licence Fee (as applicable); or
- (b) advise the Merchant of any additional fees payable by the Merchant in respect of this Agreement,

at any time by prior written notice to the Merchant of the variation or additional fees in accordance with clause 14.2.

5. Construction

5.1 For the purposes of this Schedule, in relation to any Transaction type or Service agreed to be provided after the date of this Agreement, a reference to the Application Form shall be deemed to be a reference to any agreement entered into between the parties in accordance with clause 1.4 in relation to that additional Transaction or Service.

Schedule 5: mPOS

1. Application

1.1 Application: The terms of this Schedule 5 apply to the Merchant if:

- (a) "mPOS" has been selected on the Application Form and the Bank has approved that Application Form; or
- (b) the parties have otherwise agreed that the mPOS Service will apply.

1.2 Supplemental: This Schedule forms part of, and is subject to, the general terms and conditions set out in the Agreement.

2. Definitions

2.1 In this Schedule, unless the context otherwise requires:

"ASB Pi" means the ASB Payments Interface application, designed for use within mPOS.

"mPOS" means the mobile point of sale solution, including mPOS Lite and mPOS Basic, and incorporating the Mobile Solution and a related terminal.

"Mobile Solution" means ASB Pi or the Third Party Solution.

"Third Party Solution" means the mobile point of sale/cash register application nominated by the Bank and provided by a third party for use within mPOS.

3. Coverage and Suspension

3.1 Availability: The Merchant agrees that the availability of mPOS will be subject to relevant network provider coverage.

3.2 Termination and suspension of ASB Pi: The Bank may terminate or suspend ASB Pi, functionality of ASB Pi or the Merchant's use of ASB Pi at any time.

3.3 Changes to ASB Pi: The Bank may change the format, functionality or content of ASB Pi at any time without notice.

3.4 Termination and suspension of Third Party Solution: The Bank may terminate or suspend access to the Third Party Solution for the purpose of use with mPOS at any time.

3.5 Third Party Solution: The Merchant's use of the Third Party Solution is governed by, and subject to, separate third party service and/or license agreements. The Bank will not be party to such agreements and does not warrant or guarantee the Third Party Solution.

4. Back-up of Data

4.1 In addition to the undertakings set out in the Agreement, the Merchant agrees to regularly back-up the Transaction data (including electronic Transaction records) generated through the use of mPOS.

5. Liability

5.1 Bank's liability for ASB Pi and mPOS: Without limiting any other provision of the Agreement and except in instances of wilful default or fraud by the Bank, its employees or appointed agents, to the extent permitted by law, the Bank will not be liable to the Merchant (or any other person) for any loss, damage, claim, cost, expense, interruption, delay, non-performance or other liability arising from:

- (a) the Bank providing or facilitating the provision of the Mobile Solution to the Merchant;
- (b) any loss of Transaction data (including electronic Transaction records);
- (c) any failure or malfunction of the Merchant's mobile device or any other hardware, software, communication link or network used by the Merchant or on the Merchant's behalf to access the Mobile Solution or mPOS;
- (d) the use of the Mobile Solution or mPOS in a manner or for a purpose other than that intended by the Bank or its suppliers or in contravention of any law or regulation for the time being in force;
- (e) The Mobile Solution becoming unavailable, for whatever reason (including but not limited to the suspension or termination of ASB Pi by the Bank or access to the Third Party Solution); or
- (f) any other cause that may be considered as beyond the reasonable control of the Bank.

6. No Affiliation

6.1 ASB Pi and the use of ASB Pi is in no way sponsored, endorsed by or affiliated with Apple or Google.

Schedule 6: ASB Accept E-Commerce

1. Application

- 1.1 Application:** The terms of this Schedule 6 apply to the Merchant if:
- (a) "ASB Accept E-Commerce" has been selected on the Application Form and the Bank has approved that Application Form; or
 - (b) The parties have otherwise agreed that the ASB Accept E-Commerce Service will apply.

2. Definitions

2.1 In this Schedule, unless the context otherwise requires: "ASB Accept E-Commerce" means the E-Commerce payment solution fully hosted by IP Payments (New Zealand) Limited.

3. Coverage and Suspension

3.1 Availability: The Merchant agrees that the availability of the ASB Accept E-Commerce Service will be subject to relevant network provider coverage.

3.2 Termination and suspension of ASB Accept

E-Commerce: The Bank may terminate or suspend ASB Accept E-Commerce, functionality of ASB Accept E-Commerce or the Merchant's use of ASB Accept E-Commerce at any time.

3.3 Changes to ASB Accept E-Commerce: The Bank may change the format, functionality and content of ASB Accept E-Commerce at any time without notice.

4. Liability:

4.1 Bank's liability for ASB Accept E-Commerce: Without limiting any other provision of the Agreement and except in circumstances of wilful default or fraud by the Bank, its employees or appointed agents, to the extent permitted by law, the Bank will not be liable to the Merchant (or any other person) for any loss, damage, claim, cost, expense, interruption, delay, non-performance, or other liability arising from:

- (a) the Bank providing ASB Accept E-Commerce to the Merchant;
- (b) any failure by the Merchant to implement ASB Accept E-Commerce as directed and approved by the Bank;
- (c) any failure of IP Payments (New Zealand) Limited to maintain PCI Security Standards compliance;
- (d) any loss of transaction data, including electronic transaction records;
- (e) any failure or malfunction of IP Payment (New Zealand) Limited's networks or systems or any other hardware, software, communication link, data security or network used by the Merchant, or on the Merchant's behalf to access ASB Accept E-Commerce;
- (f) ASB Accept E-Commerce becoming unavailable, for whatever reason (including but not limited to the suspension or termination of ASB Accept E-Commerce by the Bank); or
- (g) for any other cause that may be considered beyond the reasonable control of the Bank.

Schedule 7: Mastercard Payment Gateway Services

1. Application

- 1.1 Application:** The terms of this Schedule 7 apply to the Merchant if:
- (a) Mastercard Payment Gateway Services ("MPGS") has been selected on the Application Form and the Bank has approved that Application Form; or
 - (b) the parties have otherwise agreed, in accordance with clause 1.4, that MPGS will apply.

1.2 Supplemental: This Schedule forms part of, and is subject to, the general terms and conditions set out in the Agreement.

2. Definitions

- 2.1** In this schedule, unless the context otherwise requires:
- (a) **Information Security Incident** means any event that compromises the security, confidentiality or integrity of Personal Information or information systems containing Personal Information, including without limitation any unlawful or unauthorised access, acquisition, use, transmission, disclosure, alteration, destruction or deletion of Personal Information.

- (b) **Mastercard AP** means Mastercard Asia/Pacific Pte. Ltd. and includes its related body corporates.
- (c) **Mastercard Information** means all information or material which is proprietary to Mastercard AP provided to the Merchant in connection with this Schedule and the Services, whether or not designated as confidential by Mastercard AP or the Bank or which is by its nature is confidential but does not include information that is publicly available, other than by breach of this Schedule by the Merchant.
- (d) **Personal Information** means any information about an identifiable individual collected by the Merchant, including Cardholder information, which is collected in connection with the Services.
- (e) **Process** or **Processing** means any operation performed upon Personal Information, such as creating, collecting, obtaining, accessing, recording, organising, storing, altering, retrieving, using, disclosing or destroying the data.
- (f) **PSP** means a payment service provider who has agreed with the Bank to provide services through which the Merchant can accept payments from Cardholders through MPGS.
- (g) **Services** means the services described in paragraph 3.1 of this Schedule.

3. Mastercard Payment Gateway Services

3.1 Mastercard AP, a corporation registered in Singapore, owns and operates MPGS which includes an electronic payment gateway system, through which merchants may make various electronic payment methods available to their customers. The Merchant may, on the terms and conditions set out in this Schedule, accept E-Commerce Transactions from Cardholders through MPGS via an approved PSP (the **Services**).

3.2 The Merchant undertakes to:

- (a) immediately notify the Bank if it is or becomes treated as having a business establishment or fixed establishment in Singapore; and
- (b) provide the Bank any information reasonably requested by either the Bank or Mastercard AP in relation to the Merchant's Singapore tax position.

3.3 The Merchant acknowledges and accepts that:

- (a) The Bank does not guarantee the absence of breakdowns, errors, interruption, operational failures, delays or other similar causes and the Bank shall have no liability for loss, liability, cost, damage or expense resulting directly or indirectly from any such cause.
- (b) The Bank will not be liable with respect to any loss, liability, cost, damage or expense arising from any loss, theft, disappearance of or damage to data that occurs during transmission. The Merchant shall bear all risk of loss of items, records, data and materials during transit from the Merchant to Mastercard AP's service delivery point (or that of Mastercard AP's agents or sub-contractors).
- (c) In no event shall the Bank be liable with respect to any loss, liability, cost, damage or expense arising out of a claim by the Merchant or by third parties in connection with the data, computations and services provided and/or performed by the Bank in connection with the Services to the extent that such data, computations and/or services in relation to which such claim arises were provided and/or performed, either:
 - (i) in accordance with the Merchant's written requirements and/or instructions; or

- (ii) in manner which the Merchant has agreed satisfied its requirements and/or instructions.

3.4 The Merchant must reasonably satisfy itself as to the correctness and sufficiency of any information provided or identified by:

- (a) the Bank in relation to this Schedule; and
- (b) Mastercard in relation to MPGS.

4. Confidentiality

4.1 The Merchant acknowledges that it may receive Mastercard Information in connection with this Agreement, and that it will:

- (a) not disclose the Mastercard Information, except:
 - (i) with the Bank's written consent; or
 - (ii) as required under law or regulation.
- (b) take all steps and do all things necessary, prudent or desirable in order to safeguard the confidentiality of the Mastercard Information.

4.2 On termination of this Agreement, at any time it is agreed that this Schedule will no longer apply or at the Bank's request, the Merchant must either return to the Bank or destroy, and certify in writing the destruction of, all Mastercard Information in the Merchant's possession.

4.3 The Merchant acknowledges that the value of the Mastercard Information is such that an award of damages may not be adequate compensation if this paragraph 4 is breached. The Merchant acknowledges that, without in any way compromising its right to seek damages or any form of relief in the event of a breach of this paragraph 4, the Bank may seek and obtain an injunction to prohibit or restrain the Merchant or its advisers from any breach or threatened breach of this paragraph.

5. Intellectual Property Claims

5.1 In acknowledging that Mastercard AP owns MPGS, the Merchant agrees that if any third party makes any claim that the use of MPGS by the Merchant infringes any intellectual property rights of that third party (**IP Claim**), the Merchant will:

- (a) promptly notify the Bank in writing after the Merchant first learns of the IP Claim; and
- (b) provide such information, assistance and co-operation as the Bank or Mastercard may request from time to time in relation to the IP Claim.

5.2 Mastercard AP shall have full and sole discretion to defend, compromise or settle any such IP Claim on such terms as Mastercard AP thinks fit (and the Merchant must not defend, compromise or settle any claim).

5.3 The Bank's liability with respect to each IP Claim shall be limited to the amount that the Bank has been reimbursed, paid or recovered from Mastercard AP in relation to that IP Claim.

6. Personal Information

6.1 The Merchant will comply with:

- (a) all applicable privacy laws and regulations in connection with performing its obligations, responsibilities and duties under this Schedule; and
- (b) any Bank privacy policies notified to the Merchant from time to time.

6.2 With respect to any Personal Information the Merchant collects, accesses or holds pursuant to this Schedule, the Merchant will:

- (a) only use such Personal Information for the purposes of the Services and performing the Merchant's obligations under this Agreement;
- (b) not disclose such Personal Information to any third party, except as permitted or required under applicable privacy law or regulation or this Agreement;
- (c) comply with any reasonable requests or directions of the Bank concerning the storage, security, use and disclosure of that Personal Information;
- (d) in accordance with applicable privacy law or regulation, develop and implement appropriate procedures for complying with the rights of Cardholders (including access and correction requests);
- (e) co-operate with the Bank to assist it to comply with its obligations under any privacy law or regulation and demonstrate such compliance, including assisting the Bank to comply with any request or requirements relating to the rights of Cardholders; and
- (f) on termination or expiry of this Agreement, securely destroy or otherwise deal with such Personal Information in accordance with the directions of the Bank.

6.3 The Merchant shall implement and maintain comprehensive written information security policies, procedures and processes that comply with all applicable privacy laws and regulations and that include technical, physical, operational and organisational measures and safeguards designed to:

- (a) ensure the security and confidentiality of Personal Information; and
- (b) protect against any actual, anticipated or suspected loss of or threats to Personal Information or unauthorised or unlawful Processing of any Personal Information and any other Information Security Incident.

6.4 If an Information Security Incident occurs:

- (a) the Merchant must immediately notify the Bank of the Information Security Incident (and in any event no later than 24 hours after the Information Security Incident first occurs);
- (b) to the extent the Merchant is required to, or otherwise intends to, notify any regulatory authority and/or any Cardholder whose Personal Information may have been affected by the Information Security Incident, the Merchant must promptly advise the Bank that it intends to, or has notified such regulatory authority or Cardholder(s); and
- (c) the Merchant must investigate and put in place measures to prevent a recurrence of such Information Security Incident; and
- (d) the Merchant must co-operate with the Bank to the extent that the Bank requires any further information in relation to the Information Security Incident, or wishes to conduct an investigation or audit.

6.5 The Merchant must provide any information reasonably requested by the Bank to demonstrate the Merchant's compliance with paragraphs 6, 7 and 8 of this Schedule.

7. Mastercard's use of Personal Information

7.1 The Merchant acknowledges that Personal Information will be made available to Mastercard AP in relation to or in the course of the Parties performing their obligations under this Agreement.

7.2 Mastercard AP may use Personal Information provided to it in relation to the provision of MPGS for the following purposes:

- (a) the provision of MPGS to the Bank, payment service providers (including the PSP), and merchants, including protecting against or preventing actual or potential fraud, unauthorised transactions, claims, or other liability;
- (b) the processing and/or resolving of chargebacks or other disputes;
- (c) analysing or improving MPGS, including the security of processing transactions;
- (d) providing other products or services, including those involving data analytics, to the Bank or other third parties, using aggregated and anonymized information;
- (e) preparing and furnishing compilations, analyses and reports using aggregated and anonymized information; and
- (f) any activity for which adequate consent in compliance with all applicable laws and regulations has been provided by the Cardholders to whom the Personal Information relates.

7.3 Mastercard AP may disclose Personal Information provided to it in relation to the provision of MPGS:

- (a) with any of its related body corporates, or any of its third-party suppliers to enable Mastercard AP to provide MPGS; and
- (b) in order to comply with applicable legal requirements, including, as may be required or requested by any judicial process or governmental agency having jurisdiction over Mastercard and/or any of its related body corporates, including assisting law enforcement agencies by responding to requests for the disclosure of Personal Information, in accordance with applicable laws and regulations.

7.4 Mastercard AP may transfer, store and Process information in Mastercard AP's regional centres which are currently located in Australia and which may change from time to time and as such this may require Mastercard AP to transfer data outside of New Zealand or outside of the country where any data subject is based.

7.5 Mastercard AP may Process Personal Information as permitted by the Mastercard Standards even if not expressly set out in this Agreement.

8. Disclosure and Consent

8.1 With respect to the Personal Information that may be made available to Mastercard AP in relation to or for the purposes set out under this Schedule, the Merchant must:

- (a) satisfy the requirements of any applicable laws or regulations in relation to the use, Processing and disclosure of such Personal Information to Mastercard AP; and
- (b) provide all assistance and copies of relevant documentation reasonably requested by Mastercard AP or the Bank in order to enable Mastercard AP and/or the Bank to comply with applicable laws and regulations in relation to Mastercard AP's Processing of such Personal Information.

8.2 Without limiting paragraph 8.1, and to the extent required under applicable laws and regulations, in relation to Mastercard AP's use, disclosure and Processing of Personal Information as set out under paragraph 7 of this Schedule, the Merchant must ensure that each Cardholder:

- (a) has given proper consent to Mastercard AP's use, disclosure and Processing of Personal Information;
- (b) is informed of any rights that the individual has, including to:
 - (i) request access to and receive information about the Personal Information maintained by Mastercard AP;
 - (ii) update, delete, block and correct Personal Information;
 - (iii) withdraw any consent previously provided or object at any time on legitimate grounds to the Processing of Personal Information;
 - (iv) limit the Processing of Personal Information by Mastercard AP including the choices and means for doing so; and
- (c) is properly informed:
 - (i) that the Personal Information may be processed outside the country of card issuance or the location of the PSP or the Merchant; and
 - (ii) about the categories of recipients of Personal Information.

8.3 The Merchant must:

- (a) ensure all of its instructions to Mastercard AP related to the Processing of Personal Information are in accordance with the laws and regulations that apply to the Merchant;
- (b) take reasonable steps to ensure that Personal Information it provides to Mastercard AP is suitable for its intended use and is accurate, complete and current;
- (c) provide all assistance and copies of relevant documentation reasonably requested by Mastercard AP and/or the Bank in order to enable Mastercard AP to comply with applicable data protection law in relation to Mastercard AP's Processing of Personal Information with respect to MPGS; and

- (d) cooperate with Mastercard AP and/or the Bank (as the case may be) in promptly responding to any access, correction and/or deletion requests that may be made directly to Mastercard AP, or the Bank.

9. Termination

9.1 In addition to the termination rights in the clause 10.3 of this Agreement, the Bank shall be able to terminate or suspend this Agreement or any part of it, regardless of whether it is a Fixed Term Agreement or an Open Term Agreement, immediately on notice to the Merchant, if:

- (a) the Merchant is or becomes:
 - (i) a country, entity or individual designated by the US Government (or any other government that regulates Mastercard AP or any of its relevant related body corporates) as a country, entity or individual with which it is prohibited to do business including, without limitation, any country, entity or individual on the Office of Foreign Assets Control of the US Department of Treasury List as updated and amended from time to time (the **OFAC List**); or
 - (ii) owned or controlled by any countries, entities or individuals on the OFAC List;
- (b) Mastercard AP is prevented from providing MPGS, or the Bank is prevented from providing the Services, due to a change in applicable law or regulation; or
- (c) the Bank no longer holds a licence in respect of MPGS under which it can provide the Services.



Merchant Tripartite Agreement

Terms and Conditions

Terms and Conditions

Part I INTRODUCTION AND INTERPRETATION

1 INTRODUCTION

This Agreement is between

Paymark Limited (Paymark)

and

The Merchant

and

The Merchant's Bank (Bank)

1.1 Separate Agreements

This Agreement comprises two separate agreements:

- (a) an agreement between PAYMARK and the Merchant, as set out in Parts I, II and IV;
- (b) an agreement between the Bank and the Merchant, as set out in Parts I, III and IV. The agreement set out in Part IV is also an agreement between PAYMARK and the Bank.

1.2 PAYMARK and Bank not Liable for Each Other's Obligations

PAYMARK will not be liable for the Bank's obligations and the Bank will not be liable for PAYMARK's obligations.

2 INTERPRETATION

2.1 Definitions

In this Agreement, the following words have the following meanings, unless the context requires otherwise:

"Acquirer" means a bank or other financial institution which obtains Transactions from the Merchant and makes settlement payments to the Merchant for these Transactions.

"Agreement" means this Agreement as amended from time to time.

"Approved Card" means a Card which has been approved by PAYMARK for use within the System and which is able to be processed by Terminals.

"Authorisation" means the process that occurs during a Point of Sale Transaction by which:

- (a) the System electronically verifies the Approved Card and the dollar amount of the Transaction to establish that the Card Issuer or Acquirer accepts the Transaction as a liability owed to the Merchant; and
- (b) if a PIN is offered by the Cardholder, the System electronically verifies the PIN which is applicable to the Card; and
- (c) if Cardholder signature verification is undertaken in accordance with clause 4.9, the Merchant has verified the Cardholder's identity in accordance with clause 4.9.

"Bank" means the bank named in the Schedule, and includes its successors and assigns.

"Business Day" means a day on which the Bank is open for normal banking business in Wellington and Auckland.

"Card" means a plastic card (whether a Credit Card or a Charge Card or a Debit Card), issued to facilitate payment for goods or services.

"Cardholder" means a person who has been issued with an Approved Card and, in the event that a Point of Sale Transaction is authorised in accordance with the procedures set out in this Agreement, includes the person presenting the Card for use in that Transaction.

"Cardholder's Nominated Account" means an account of the Cardholder.

"Card Issuer" means the Bank, financial institution, retailer or other person which is the issuer of a particular Card.

"Charge Card" means a Card used to charge payments to the charging facility provided to the Cardholder by the Card Issuer.

"Communication Channels" means the telecommunication networks approved by PAYMARK from time to time for linking Terminals through to the processing centres from which Authorisations are provided.

"Credit Card" means a Card used to charge payments to the credit facility provided to the Cardholder by the Card Issuer.

"Currently Approved" means, in relation to a Terminal, conforming at all times, for the duration of this Agreement, with the specifications advised by PAYMARK from time to time.

"Debit Card" means a Card used to access, and immediately debit funds from, a Cardholder's bank account.

"Donation Point Tap" means a Terminal that enables Merchants that are not-for-profit organisations, as decided by Bank, to accept low-value Transactions for a predetermined set dollar value, as agreed by Bank and Merchant, via a contactless-only reader.

"EFTPOS" means electronic funds transfer at point of sale.

"Electronic Offline Voucher" and **"EOV"** means a process whereby the card details required for the authorisation of a Point of Sale Transaction are automatically accepted and stored by the Terminal for subsequent dispatch to PAYMARK pending reconnection to the System.

"Merchant" means the merchant named in the Schedule and includes its successors.

"Merchant Account" means the bank account in New Zealand nominated by the Merchant from time to time for the settlement of Transactions with the Merchant and the debiting of charges under this Agreement.

"Merchant Help Desk" means the help desk operated by PAYMARK and to which merchants have access.

"Merchant Premises" and **"Premises"** means the premises of the Merchant recorded in PAYMARK's files.

"Merchant Refund" means a refund by a Merchant through the System to a Cardholder of all or some of the money received by that Merchant from that Cardholder for payment of goods or services which has previously been effected by virtue of a Valid Transaction.

"mPOS" means mobile payment application within a mobile device (smartphone, tablet, PDA's) that connects to a Terminal via the audio/USB port or Bluetooth, as offered by Bank to the Merchant in conjunction with a Merchant Account.

"Offline Transaction" means a Point of Sale Transaction effected in accordance with clause 7.1 which is sought to be effected using:

- (i) EOV, in the case of a Debit Card not bearing a point-of-sale acceptance mark of an international card scheme; or
- (ii) EOV, sales voucher or credit voucher, in the case of a Credit Card, Charge Card or Debit Card bearing a point-of-sale acceptance mark of an international card scheme.

"PAYMARK" means Paymark Limited, and includes its successors and assigns. "Person" includes any individual, company, partnership, incorporated society, association or other legal entity.

"PIN" means the personal identification number of the Cardholder issued in relation to an Approved Card.

"Point of Sale Transaction" and **"Transaction"** means the process by which a Terminal is used by the Merchant and a Cardholder to authorise the electronic transfer of funds between the Cardholder's Nominated Account and the Merchant Account to effect payment by a Cardholder for goods or services and/or a cash withdrawal by a Cardholder or a Merchant Refund and, where this service is available on the System, a Cardholder balance enquiry, and, unless the context otherwise specifically requires, includes an Offline Transaction.

"Service" means the service to be provided by PAYMARK under this Agreement, excluding any settlement or clearing services.

"System" means the electronic delivery system owned and operated by PAYMARK to facilitate Point of Sale Transactions.

"Terminal" means an EFTPOS software application within a physical device, both of which have been certified by PAYMARK as conforming to PAYMARK's specifications (including the communications controller and interfacing software integrated into an electronic cash register), in each case operated by the Merchant and connected with the System.

"Valid Transaction" means a Transaction as described in clause 5.1.

2.2 General Interpretation

In this Agreement:

- 2.2.1 unless otherwise stated, a reference to a Part, Section, clause or the Schedule is a reference to a part, section, clause or the schedule of or to this Agreement;
- 2.2.2 words in the plural include the singular and vice versa;
- 2.2.3 headings are inserted for convenience only and must be ignored in construing this Agreement.

2.3 Merchant's Liability

Where the Merchant consists of two or more persons, their liability under this Agreement will be joint and several.

2.4 Governing Law

This Agreement will be construed and take effect in accordance with New Zealand law.

Part II AGREEMENT BETWEEN PAYMARK AND MERCHANT

3 PROVISION AND MAINTENANCE OF TERMINALS

3.1 Terminals to be Approved by PAYMARK

The Merchant will not use any Terminal in the System unless that type of Terminal is Currently Approved by PAYMARK.

3.2 Use of Terminals

The Merchant will not:

- 3.2.1 interfere with or alter the software within the Terminal or any attached cryptographic device;
- 3.2.2 knowingly or negligently use or attempt to use the System with a malfunctioning Terminal;
- 3.2.3 knowingly or negligently do or allow anything to happen which might damage or interfere with the System or compromise the System's security;
- 3.2.4 use the refund functionality of the Terminal to make a payment from the Merchant to a Cardholder for goods or services.

4 SERVICES, PRICING AND PROCEDURES

4.1 Provision of Service

During the term of this Agreement, PAYMARK will:

- 4.1.1 provide the Merchant with access to and use of the System, on the terms contained in this Agreement, for an administration fee as set out in Part 'A' of the Schedule;
- 4.1.2 take all reasonable steps practicable to maintain the System in proper working condition to provide a continuous and accurate service to the Merchant;
- 4.1.3 permit the Merchant free-phone access 24 hours daily to the Merchant Help Desk to report faults and obtain advice on how to correct them;
- 4.1.4 administer the key loading system which imposes the security for the operation of the Terminals, at the then applicable charges; and
- 4.1.5 monitor the telecommunications components of the System to support delivery of the Service, and for pricing to the Merchant as set out in Part 'A' of the Schedule.

4.2 Notification of Default

The Merchant will notify PAYMARK promptly if it becomes aware of any problems with the System that affect the Merchant's ability to access or use the System.

4.3 Merchant Accounts

PAYMARK shall be entitled to facilitate the depositing of Transaction settlement proceeds and the debiting of any amount payable by the Merchant under this Agreement to such account as advised by the Merchant to the Bank, and the Bank to PAYMARK, as being the Merchant Account.

4.4 Acceptance of Approved Cards

The Merchant may use the System to accept an Approved Card to effect a Point of Sale Transaction where either:

- 4.4.1 the Merchant has a separate agreement with the relevant Acquirer governing the use of that Approved Card, and the Merchant has elected to effect the Point of Sale Transaction using that Approved Card; or

4.4.2 the Approved Card is a Debit Card.

4.5 Transaction Record

The Merchant must offer the Cardholder a Transaction record in respect of the relevant Transaction.

4.6 Confidentiality

The Merchant will not do anything which might jeopardise the confidentiality of a Transaction or of a Cardholder's details. This includes the Merchant ensuring that the pinpad device used for entry of PINs is able to be used in such a manner that no other person (including the Merchant and its employees) is able to see or detect the PIN or other details entered by the Cardholder.

4.7 Settlement

PAYMARK will ensure that the process necessary to deposit value for valid Transactions to the Merchant Account is initiated. However, the Merchant acknowledges that:

- 4.7.1 in the case of Transactions effected using Terminals which have the capability to store Transactions, those Transactions will only be forwarded for processing once the Merchant activates the function to transmit those Transactions to PAYMARK; and
- 4.7.2 in the case of Transactions which are stored as Offline Transactions due to technical malfunction at the central processors or failure of the telecommunications links, those Transactions will only be forwarded for processing when the Terminal is capable of doing so and establishes connection to the System, once the malfunction or failure is remedied, and, unless those Transactions are so forwarded promptly, PAYMARK will not be able to process them through the System and neither PAYMARK nor the Bank shall be liable for their settlement through the System.

4.8 Wrongful Use

The Merchant will take all reasonable care to prevent wrongful use of an Approved Card for a Point of Sale Transaction at the Merchant Premises.

4.9 Verification of Cardholder Identity

- 4.9.1 The Merchant will not effect a Transaction with a Cardholder unless that Cardholder's identity is verified as outlined in this clause.
- 4.9.2 The Cardholder's identity can be verified by:
 - (i) the correct entry of the Cardholder's PIN into the Terminal, followed by the verification of the PIN within the System, and the System response "ACCEPTED" at the Terminal; or
 - (ii) where the Transaction is a Credit Card Transaction, verification of the Cardholder's signature, whereby the Merchant must take all reasonable steps to ensure that the signature on the relevant Transaction record is not forged or unauthorised and that it corresponds with the signature on the relevant card.

4.10 Payment by direct debit

The Merchant will irrevocably and unconditionally authorise the bank at which it maintains the Merchant Account to debit the Merchant Account with the amount of any fee, cost, charge, liability or expense or other amount which becomes payable by the Merchant to PAYMARK (including the administration and telecommunications access fees as set out in Part 'A' of the Schedule).

4.11 No manual entry of details

The Merchant will ensure that a Debit Card Transaction is not initiated by manually entering the details of a Debit Card into a Terminal.

Part III AGREEMENT BETWEEN BANK AND MERCHANT

5 PAYMENTS TO AND BY MERCHANT

5.1 Valid Transactions

A Point of Sale Transaction will be valid if:

- 5.1.1 in the case of a Transaction, other than an Offline Transaction, the Transaction has been effected through the System and initiated by the use of an Approved Card and:
 - (a) the identity of the relevant Cardholder has been verified in accordance with clause 4.9;
 - (b) the Transaction complies with the authorisation procedures agreed to by the Merchant and the Acquirer in respect of Transactions using that Approved Card;
 - (c) the Terminal has printed details of the:
 - (i) type of account;
 - (ii) type and amount of the Transaction;
 - (iii) date of the Transaction;
 - (iv) time of the Transaction;
 - (v) Terminal transaction record number; and
 - (d) the Terminal has confirmed that the Transaction has been accepted; or
- 5.1.2 in the case of an Offline Transaction:
 - (a) the Transaction has been effected in accordance with clause 7.1; and
 - (b) if the Card is a Debit Card that does not bear a point-of-sale acceptance mark of an international card scheme, the amount of the Transaction does not exceed the maximum dollar amount set out next to "Offline Transaction Guarantee Limit" in Part 'A' of the Schedule, or such other amount as PAYMARK may notify the Merchant in writing; and
- 5.1.3 in the case of all Transactions if:
 - (a) the Transaction is not prohibited by law;
 - (b) the Merchant has complied with this Agreement;
 - (c) there has been no fraud or deception on the part of the Merchant or its employees or agents;
 - (d) the Merchant has taken reasonable care to detect any forged signature or improper use of the relevant Card and to ensure that the Transaction has not been effected before any issue date embossed on the relevant Card,

BUT nothing in this Agreement negates or overrides anything contained in any contract, arrangement or understanding between the Merchant and an Acquirer as to the validity of a Transaction or the authority of that Acquirer to decline, reverse or charge back a Transaction.

For the avoidance of doubt, a Transaction of the type described in clause 7.1.5 and for which an offline voucher is completed is not a Valid Transaction.

5.2 Valid Transaction to Constitute Instruction

A Valid Transaction will be deemed to constitute an irrevocable instruction by the Cardholder to the relevant Card Issuer to debit the Cardholder's Nominated Account and to pay the relevant amount to the Merchant.

5.3 Credit of Payment to Merchant Account

In relation to a Valid Transaction:

- 5.3.1 for Debit Card Transactions, the Bank will arrange for the Merchant Account to be credited with an amount equivalent to the amount debited to the Cardholder's Nominated Account. This will take place on the same Business Day up to the Merchant's settlement cut-off for that Business Day, or the following Business Day if the relevant Transaction is effected after the Merchant's settlement cut-off or if necessary to settle weekend and public holiday trading or to recover from a System malfunction.
- 5.3.2 for Approved Cards which require a separate agreement between the Merchant and the Acquirer, the Acquirer (but not the Bank unless it is also the Acquirer) will settle with the Merchant in accordance with the terms specified in the separate agreement between the Merchant and the Acquirer.

5.4 Validity of Authorisations

The validity and acceptance of an Authorisation obtained through the System is a matter as between the Merchant and the Card Issuer or Acquirer.

5.5 Charge Backs

Subject to the Merchant complying with clauses 5.1 and 7.1.5 of this Agreement, and subject to anything contained in any separate contract, arrangement or understanding between the Merchant and an Acquirer as to the validity of a Transaction or the authority of that Acquirer to decline, reverse or charge back a Transaction, the Bank will not be entitled to charge back a Valid Transaction to the Merchant.

5.6 Recovery of Funds and Other Charges

The Bank may debit, or procure the debiting of, the Merchant Account or any other account of the Merchant with:

- 5.6.1 any amount previously credited to the Merchant by the Bank either in error or as a consequence of the Merchant not observing the provisions of this Agreement;
- 5.6.2 any amount which the Merchant is liable to pay the Bank under clause 12.4 as a result of a disputed Transaction; and
- 5.6.3 any amount previously credited to the Merchant by the Bank in error where, in breach of this Agreement, the Merchant has permitted another person (whether a purchaser of the Merchant's business or otherwise) to effect a Transaction through the System acting in the capacity of a different merchant, and using a Terminal at the Premises, and the Bank has credited funds to the Merchant in respect of that Transaction, so long as the Bank promptly advises the Merchant of the details of any corrective debitings.

5.7 Prohibition on Surcharges and Minimum Transaction Amounts

Except as may be expressly required by law, the Merchant agrees that it will not:

- 5.7.1 add any identifiable surcharge to a Transaction, which

is in any way attributable to PAYMARK, EFTPOS or in relation to use of the System; nor

- 5.7.2 refuse to effect a Transaction on the basis that it is below a certain monetary value.

5.8 Reconciliation Records

The Bank will ensure that the Merchant is provided with adequate data to reconcile the Merchant's activities through the System.

6 ADVERTISING AND PROMOTION

6.1 Supply of Material

The Bank may supply the Merchant with promotional material for the System, and the Merchant may at its discretion display at the Premises any of the material supplied by the Bank.

6.2 Display of Material on Termination

As soon as this Agreement is terminated, the Merchant will cease displaying any advertising or promotional material relating to the System.

6.3 Display of PAYMARK Logo

- 6.3.1 The Merchant will clearly display the Merchant Help Desk number and the PAYMARK logo, in the form previously notified to the Merchant by PAYMARK, on any PINpad or terminal device that is used at the Premises to effect Point of Sale Transactions.
- 6.3.2 All promotional material or signs used to advertise the availability of the PAYMARK EFTPOS Service shall bear the PAYMARK logo.
- 6.3.3 The Merchant will not do anything, including permitting the display of other parties' name, symbol or logo, to denote availability of EFTPOS at the Premises or to mislead any person in respect of the EFTPOS Service or its provider.

7 OFFLINE TRANSACTIONS

7.1 Offline Transactions

- 7.1.1 Where the System is unable to process Transactions due to technical malfunction at the central processors or failure of the telecommunications links, the Merchant may:

- (i) use automated procedures, such as EOv, within the Terminal to accept and store Transactions for subsequent dispatch to PAYMARK; or
- (iii) complete a sales voucher or credit voucher supplied by the Card Issuer or Bank for any Transactions made using a Credit Card, Charge Card or Debit Card bearing a point-of-sale acceptance mark of an international card scheme,

provided that, where there is a technical problem affecting the System which prevents the Terminal from sending the Transaction to the Card Issuer for online authorisation and the Merchant is entitled to use the automated procedures within the Terminal, the Merchant is not entitled to process the Transaction using a sales voucher or credit voucher.

- 7.1.2 Should the Merchant use EOv, then:

- (i) the Cardholder's identity must be verified by taking and referring the Cardholder's signature on the Transaction record to the signature on the Card in accordance with clause 4.9.2(ii) (which for these purposes shall apply to Transactions

made using Debit Cards, Credit Cards and Charge Cards);

- (ii) in the event that the Transaction is required to be stored within a point of sale device attached to the Terminal, such point of sale device must be secure against unauthorised access;
- (iii) a signed copy of the relevant transaction record must be retained and filed by the Merchant, and should this not be available upon request of the Bank, the Bank may charge back the value of the Transaction;
- (iv) in the case of a Transaction sought to be effected using an invalid Card, the Bank will not be liable for settlement of the value of the transaction recorded;
- (v) any Transaction made with a Credit Card, Charge Card or Debit Card bearing a point-of-sale acceptance mark of an international card scheme is taken and stored within the Terminal will be subject to the separate agreement governing the use of that Card (including, without limitation, provisions as to checking of the Card's issue date and expiry date).

7.1.3 Should the Merchant utilise a sales voucher or credit voucher for Credit Cards, Charge Cards or Debit Cards bearing a point-of-sale acceptance mark of an international card scheme:

- (i) the voucher must be completed with all required details; and
- (ii) the Cardholder must sign the voucher and the Merchant must verify the Cardholder's identity by reference to the Cardholder's signature in accordance with clause 4.9.2(ii).

7.1.4 In circumstances where the Terminal malfunctions, the procedures set out in clause 7.1.3 shall be followed in respect of Transactions made using Credit Cards, Charge Cards and Debit Cards bearing a point-of-sale acceptance mark of an international card scheme.

7.1.5 In all circumstances where an offline facility (including EOV, sales vouchers or credit vouchers) is used to process a Transaction:

- (i) the offline facility must not be used:
 - where the Terminal is working normally;
 - to provide a Cardholder with cash;
 - to process a Transaction where the Card's magnetic stripe is unable to be read by the Terminal;
 - to process a Transaction which has been declined by the System;
 - to process a Transaction which could not be completed as a result of Cardholder PIN errors;
 - in respect of a Debit Card Transaction, to process a Transaction where there is a technical problem with the Card or the card reader which prevents the Terminal from reading the Card;
 - in respect of a Debit Card Transaction, to allow the Merchant to sell goods or services at a location that is different from the location of the Merchant's Terminal's connection to the System;
 - to split a single purchase Transaction of more than the limit set out in clause 5.1.2(b) into two

or more purchase Transactions within that limit.

- (ii) the Merchant must comply with such further instructions as the Bank may provide as to the completion of sales voucher or credit vouchers;
- (iii) the Merchant must comply with any separate agreement governing the use of that Card (including, without limitation, provisions as to checking of the Card's issue date and expiry date), and, in the event that this clause 7.1.5 is not observed, the Card Issuer may charge back the amount of that Transaction to the Merchant.

7.1.6 The Merchant must stop using the sales or credit vouchers to accept Transactions as soon as practicable after the technical problem affecting the System or the Terminal's connection to the System is resolved.

PART IV PROVISIONS APPLYING TO AGREEMENTS SET OUT IN PARTS II AND III

8 PAYMENTS BETWEEN PAYMARK AND THE MERCHANT

8.1 Fees and Charges

The parties acknowledge that PAYMARK will be entitled to debit or procure the debiting of the Merchant Account with:

- 8.1.1 the fees and charges, plus GST, set out in Part 'A' of the Schedule, as varied or supplemented from time to time by PAYMARK in accordance with clause 16.3;
- 8.1.2 any other amounts payable plus GST (if any), to PAYMARK by the Merchant under this Agreement.

8.2 Settlement Payments Due to Merchant

The Merchant acknowledges that the obligation to settle Transactions with the Merchant is an obligation of the relevant Card Issuer or Acquirer or of the Bank. It is not an obligation of PAYMARK. PAYMARK will not be liable to the Merchant in any way for any amount payable to, or receivable by, the Merchant arising out of any Transaction. In addition, the Merchant acknowledges that settlement of Transactions effected using Terminals which have the capability to store Transactions is limited by the circumstances described in clause 4.7.2.

9 SALE OF BUSINESS BY MERCHANT

9.1 Merchant to Notify Bank

The Merchant must notify the Bank not less than five Business Days prior to any sale by the Merchant of its business.

10 RECORDS AND INSPECTION

10.1 Retention of Records

The Merchant will maintain complete and accurate records of all Point of Sale Transactions and will preserve all signed Transaction records, Transaction records which are generated electronically, tally rolls and other records ("Records"), relating to each Transaction for not less than 12 months from the date on which that Transaction took place. If, within 120 calendar days of the date of any Transaction initiated by a Cardholder, the relevant

Cardholder asks the Merchant for a receipt for the Transaction (whether the Transaction was accepted or declined), the Merchant will give the Cardholder the Transaction receipt as soon as practicable after the request.

10.2 Details required

The Merchant must ensure that the Records for all Debit Card Transactions (whether the Transaction is accepted or declined) contain the following minimum information:

- 10.2.1 the Merchant's business name and location;
- 10.2.2 the type and general location of the Terminal or a symbol identifying the Terminal;
- 10.2.3 date and time of the Transaction;
- 10.2.4 whether the Cardholder selected the cheque or savings account;
- 10.2.5 information that enables the Merchant to identify the Transaction;
- 10.2.6 type of Transaction, e.g. 'purchase';
- 10.2.7 amount of the Transaction; and
- 10.2.8 if the Card has an expiry date, the Card expiry date.

10.3 Inspection of Records

The Merchant will permit PAYMARK, the Bank and their authorised agents, at all reasonable times, to inspect and copy the Records of the Merchant relating to any Point of Sale Transaction.

10.4 Bank to Provide Assistance

The Bank will, upon request by the Merchant, provide details of Transactions recorded through the System by the Merchant to assist the Merchant with particular enquiries, but this does not oblige the Bank to provide regular statements to the Merchant.

10.5 Business Recovery Process

A Merchant must have a business recovery procedure that supports protection and retention of the Merchant's records in a contingency. For example, if a technical problem results in a Terminal losing memory of a stored payment instruction awaiting delivery to the System, the Merchant must have another way of retaining a record of the payment instruction.

10.6 PAYMARK to Maintain Records

PAYMARK will maintain records of each Transaction recorded through the System for at least 12 months after the date of the Transaction.

10.7 Ownership of Intellectual Property

Nothing in this Agreement shall confer upon the Merchant any intellectual property rights (whether registered or unregistered, including trade marks, patents, copyright, registered designs, symbols, logos, database rights or any application to register the same) in relation to the System, the Service and any Transaction, or any interest in such rights.

11 NON EXCLUSIVITY

11.1 No Franchise

No franchise in favour of the Merchant is created by this Agreement and PAYMARK is free to enter into agreements with other merchants to allow them use of the System.

12 LIABILITY AND INDEMNITY

12.1 Service Provided by PAYMARK

The service to which PAYMARK is contractually able to commit is as described in clause 4.1, and the Merchant acknowledges that PAYMARK cannot guarantee continuous fault-free access to the System. However, PAYMARK and the Merchant recognise that should PAYMARK be unable to provide part of the Service or should the System be unavailable for any reason:

- 12.1.1 the Merchant will, subject to the provisions of this Agreement and the terms of any separate agreements governing the use of Cards, nevertheless be able to process Transactions as Offline Transactions in accordance with clause 7.1; and
- 12.1.2 in any event, any loss or damage that the Merchant may suffer may be disproportionate to the level of service to which PAYMARK is contractually able to commit under this Agreement, and accordingly it is reasonable that PAYMARK's liability under this Agreement be limited in the manner described below.

12.2 Exclusion of PAYMARK's Liability

Except as provided in clause 12.3, PAYMARK is not liable to compensate the Merchant for any loss, cost, injury or damage arising directly or indirectly from:

- 12.2.1 any act, omission, error, default or delay of PAYMARK or its officers, employees or agents; or
- 12.2.2 any failure (including telecommunications failure), breakdown or malfunction of the System or of any equipment, Terminal, Communication Channels, or Card; or
- 12.2.3 any cause beyond the reasonable control of PAYMARK; or
- 12.2.4 any act or omission of the Bank or any other third party.

12.3 Liability of PAYMARK for Negligence and Wilful Default

If PAYMARK is negligent, or wilfully defaults, in the performance of its obligations to the Merchant under this Agreement, then PAYMARK will be liable to the Merchant (but not any other person) for the direct loss or damage sustained by the Merchant itself as a result of such negligence or wilful default.

12.4 Indemnity by Merchant

The Merchant will indemnify PAYMARK and the Bank against all liabilities, losses and costs which PAYMARK or the Bank may incur, directly or indirectly, as a result of:

- 12.4.1 any breach by the Merchant of this Agreement; or
- 12.4.2 in the case of the Bank, any liability, loss or cost arising from a disputed Transaction; or
- 12.4.3 any fraud or negligence of the Merchant or its employees or agents in using, or any misuse or unauthorised act or act causing damage by any of them in relation to the System, a Terminal, Communication Channels, or any Card; or
- 12.4.4 in the case of PAYMARK, PAYMARK being liable to any supplier to PAYMARK of telecommunications services which, directly or indirectly, results from any claim made by the Merchant against that supplier relating to the telecommunications service provided to or for the benefit of PAYMARK.

12.5 Indemnity by Bank

The Bank will indemnify the Merchant against all direct

liabilities, losses and costs which the Merchant may incur, directly or indirectly, as a result of a breach by the Bank of this Agreement, provided that in no event shall the liability of the Bank under this Agreement ever exceed the aggregate of all merchant service fees payable by the Merchant to the Bank during the period of six consecutive months immediately preceding the date on which the liabilities, losses or costs first arose.

12.6 Limitation of Liability

Notwithstanding any other provision of this Agreement, none of PAYMARK, the Bank, or the Merchant will be liable to each other or to any other person:

- 12.6.1 in contract, tort (including negligence) or otherwise for any loss of revenue, profits, business, goodwill or anticipated savings or any consequential or indirect loss or damage; or
- 12.6.2 for any claims, demands, actions or proceedings by third parties, and any costs or expenses in connection therewith, that are not already excluded under this clause 12.

12.7 Maximum Liability of PAYMARK

Notwithstanding any other provision of this Agreement, in no event shall PAYMARK's liability to the Merchant under this Agreement ever exceed the aggregate of all fees and charges payable by the Merchant to PAYMARK under clause 8.1.1 during the period of six consecutive months immediately preceding the date on which the liability, loss or cost first arose.

12.8 Each Limitation Separate

Each provision of this clause 12 is to be construed as a separate limitation, exclusion or protection applying and surviving even if for any reason any of the other provisions of this clause 12 is held inapplicable or invalid in any circumstances.

13 TERMINATION

13.1 Duration of Agreement

This Agreement will continue in force for an initial term of, or where no initial term is specified, for a period of 12 months unless terminated earlier by the Merchant, PAYMARK or the Bank in accordance with the following:

- 13.1.1 the Bank or PAYMARK may terminate this Agreement immediately if the Merchant enters into a composition with its creditors, is unable to pay its debts (within the meaning of section 287 of the Companies Act 1993), is declared bankrupt or commits an act of bankruptcy (within the meaning of section 19 of the Insolvency Act 1967), or goes into liquidation or a receiver, statutory manager or a receiver and manager is appointed in respect of the Merchant;
- 13.1.2 the Merchant may terminate this Agreement as it relates to one or more of the Merchant Premises if it ceases trading from such Premises;
- 13.1.3 PAYMARK or the Bank may terminate this Agreement:
 - (i) by written notice to the Merchant if the Merchant has materially breached this Agreement and has not remedied that breach within 10 Business Days of receipt of written notice from PAYMARK or the Bank, as the case may be, requesting the breach to be remedied; or
 - (ii) without further notice to the Merchant if

PAYMARK or the Bank, as the case may be, has already given written notice to the Merchant indicating that the Merchant has materially breached this Agreement such that the security or integrity of the System may be jeopardised and requiring the Merchant to remedy that breach immediately, and the Merchant has not done so.

- 13.1.4 The Merchant may terminate this Agreement immediately by giving written notice of termination to PAYMARK and the Bank, if PAYMARK or the Bank breaches this Agreement and has not remedied that breach within 10 Business Days of receipt from the Merchant of written notice of the breach.
- 13.1.5 The Merchant may terminate this Agreement by giving notice to PAYMARK and the Bank if the Bank or PAYMARK amends this Agreement or varies the fees and charges payable or assigns this Agreement. This notice of termination must be given within 30 Business Days of the Merchant receiving the notice pursuant to clauses 16.3 or 16.4.
- 13.1.6 The Bank may terminate this Agreement by written notice to PAYMARK and the Merchant where the Bank is the Merchant's relevant Credit Card and/or Charge Card Acquirer and the acquiring agreement between the Bank and the Merchant terminates or expires.

13.2 Automatic Renewal

Following the conclusion of the term set out in clause 13.1 ("the Initial Term"), this Agreement will continue in force for further successive terms of 12 months on the same terms and conditions (including as to successive terms and renewal), unless PAYMARK, the Bank or the Merchant gives at least 3 calendar months' written notice to the other parties before the end of any 12 month term that the Agreement should not be so renewed for the next 12 months. For the avoidance of doubt, the termination provisions outlined in clauses 13.1.1 to 13.1.6 will continue to apply during any term beyond the Initial Term.

13.3 Suspension or Re-direction of Settlement Proceeds

Without affecting their rights under clause 13.1.4, PAYMARK or the Bank may, at their discretion:

- 13.3.1 suspend availability of the Service to the Merchant under this Agreement in the event of a material breach of this Agreement by the Merchant which has not been remedied within 10 Business Days of receipt of written notice of breach from PAYMARK or the Bank, as the case may be; or
- 13.3.2 in the event PAYMARK or the Bank considers on reasonable grounds that the Merchant or any of its officers or employees may have been using, or may be likely to use, the System fraudulently or where the security or integrity of the System has been, or is likely to be, jeopardised by the Merchant or any other person, either immediately and without notice suspend availability of the Service to the Merchant under this Agreement, or redirect any Transaction settlement proceeds due to the Merchant into a suspense account until such time as the Bank or PAYMARK has resolved that such fraudulent use or threat to the System's security or integrity has not occurred or is not likely to occur.

13.4 Pre Existing Rights and Obligations

If this Agreement is terminated pursuant to clause 13.1, all rights and obligations that have arisen under this Agreement before the termination will continue and will not be affected in any way.

14 WARRANTIES AND REPRESENTATIONS

14.1 No Warranty by Merchant

The Merchant will not, without the prior written consent of PAYMARK and the Bank, make any warranty or representation:

- 14.1.1 on behalf of PAYMARK or the Bank in relation to the System or the Service;
- 14.1.2 that PAYMARK or the Bank or any other participant in the System recommends any goods or services provided by the Merchant.

14.2 No Warranty as to Cardholders or Card Issuers

The Merchant acknowledges that no representation, warranty or assurance concerning the credit worthiness of a Cardholder or Card Issuer or Acquirer may be inferred from the issue of a Card to that Cardholder or from the use of that Card in the System or from the approval of any Card for use in the System.

15 NOTICES

15.1 Notices in Writing

Any notice to be given by a party under this Agreement must be in writing and may be delivered or mailed by pre paid post or sent by facsimile or email to the recipient at its address, facsimile number or email address stated in the Schedule or alternatively, in the case of a party which is a company, at its registered office.

15.2 Effective Receipt of Notice

A notice which is mailed in a correctly addressed pre-paid envelope will be deemed to have been given on the second Business Day after the day on which it is mailed. A notice which is sent by facsimile will be deemed to have been given on the next Business Day following the day on which it is sent.

A notice which is sent by email will:

- 15.2.1 in the case of an email sent to PAYMARK or the Bank, be deemed to have been given upon receipt of a return email from PAYMARK or the Bank (as the case may be) acknowledging receipt of such email (for the avoidance of doubt, an automatic or system generated acknowledgement from PAYMARK or the Bank will not be considered a return email for the purposes of acknowledgement of receipt notice); and
- 15.2.2 in the case of an email sent to the Merchant, be deemed to have been given at the time specified in the email as the time at which it was sent.

16 GENERAL

16.1 Disputes between Merchant and Cardholder

Any dispute between a Merchant and a Cardholder about goods and services supplied will be entirely between the Merchant and that Cardholder. PAYMARK and the Bank may be requested to provide confirmation of transactional information only.

16.2 Waiver

Any additional time given to the Merchant by PAYMARK or the Bank, or any failure or delay by PAYMARK or the Bank in exercising their rights under this Agreement, will not be construed as a waiver of PAYMARK's or the Bank's rights or remedies and will not prejudice PAYMARK's or the Bank's ability to exercise such rights or remedies at any subsequent time.

16.3 Amendment and Notice of Variation of Fees

PAYMARK or the Bank may amend this Agreement or notify the Merchant of any variation or supplement to the fees and charges referred to in clause 8.1 or of a proposed assignment under clause 16.4 by giving written notice to all other Parties. The amendment, notification or assignment will take effect according to its terms but in any event not earlier than 1 month after the date of service of the notice, and will not affect any Transaction occurring before the date it takes effect.

16.4 Assignment

- 16.4.1 The Merchant may not assign or transfer its rights or obligations under this Agreement to any other person.
- 16.4.2 PAYMARK and the Bank may assign or transfer their respective rights and obligations under this Agreement to any other person so long as notice of the proposed assignment is given to the Merchant.

16.5 Entire Agreement

- 16.5.1 Without affecting clause 16.5.2, this Agreement constitutes the entire agreement between the parties. The Merchant acknowledges that there are no oral or written understandings, representations or commitments of any kind, express or implied, with respect to the matters covered by this Agreement.
- 16.5.2 Nothing in this Agreement limits any provision of any other agreement existing between the Merchant and the Bank or the Merchant and any Acquirer.

16.6 Privacy

If the Merchant is an individual, the personal information in this Agreement and any other personal information which the Merchant may provide to PAYMARK or the Bank at any time, whether in writing, by telephone, electronically or any other means, may be used by PAYMARK or the Bank for the purposes of providing EFTPOS services to the Merchant. The intended recipients of the personal information are PAYMARK and Bank staff who need to receive the information for the purpose of providing EFTPOS services to the Merchant. The Merchant has the right to access their personal information, or to request an update or correction of the personal information held by PAYMARK or the Bank.

16.7 Consumer Guarantees Act

The Merchant confirms that it has entered into this Agreement solely for business purposes and agrees that nothing in the Consumer Guarantees Act 1993 shall apply in respect of the provision of the Service or the operation of the System.

16.8 Dispute Resolution

In the event of any dispute between the Merchant on the one hand and PAYMARK or the Bank on the other, the relevant parties shall first attempt to resolve the dispute by good faith negotiations. Only if those negotiations are unsuccessful, either party may then refer the dispute to arbitration in accordance with the Arbitration Act 1996, except that the arbitrator shall be a person agreed by the relevant parties or, in the absence of agreement, shall be appointed (at the request of either party) by the President for the time being of the New Zealand Law Society.

16.9 Severance

If any provision of this Agreement shall be invalid, void, illegal or unenforceable, this will not affect the remaining provisions of this Agreement.

SCHEDULE OF MERCHANT CHARGES AS AT DATE OF THIS AGREEMENT

Parties:

- 1. Paymark Limited
Level 2, 162 Victoria Street West, Auckland 1010
PO Box 799, Auckland
Telephone: (09) 356 8088
Fax: (09) 302 1262
Attention: General Manager
Email: support@paymark.co.nz

- 2. _____
(Insert bank details)

Email: _____

- 3. _____
(Insert merchant details)

Email: _____

Execution:

PAYMARK, the Bank and the Merchant agree to observe and be bound by their respective obligations set out in this Agreement.

Signed for and on behalf of PAYMARK

Date

D	D	M	M	Y	Y	Y	Y
---	---	---	---	---	---	---	---

Signed for and on behalf of Bank

Date

D	D	M	M	Y	Y	Y	Y
---	---	---	---	---	---	---	---

Signed for and on behalf of Merchant

Date

D	D	M	M	Y	Y	Y	Y
---	---	---	---	---	---	---	---

SCHEDULE OF MERCHANT CHARGES AS AT DATE OF THIS AGREEMENT (continued)

Please note fees and charges are payable by the Merchant to Paymark Limited for the EFTPOS Service. The following fees are payable as at the date of the Agreement:

PART A:

EFTPOS Administration Fee:

\$18.00 per month or part month (plus GST) per Merchant Terminal record entered on the System (regardless of Transaction volume)^{1,2}.

Donation Point Tap Fee:

\$5 per month or part month (plus GST) per Donation Point Tap record entered on the System (regardless of Transaction volume). Any fees related to Donation Point Tap will be charged by Paymark to Merchant via Quest³.

Telecommunications Access Fee:

- \$6.95 per month or part month (plus GST) per Merchant Terminal for any Merchant Terminal that processes less than 80% but more than 0% of its Transactions via a dial-up connection;
- \$9.95 per month or part month (plus GST) per Merchant Terminal for any Merchant Terminal that processes 80% or more of its Transactions via a dial-up connection;
- direct port connection:
 - 0 to 3,000 Transaction monthly - \$200 plus GST monthly per leased line;
 - 3,001 to 5,000 Transactions monthly - \$140 plus GST monthly per leased line;
 - 5,001 to 8,000 Transactions monthly - \$60 plus GST monthly per leased line;
 - Greater than 8,000 Transactions monthly - no charge.

Paper Statement Fee:

\$2 per month or part month (plus GST) for each Merchant that elects to receive its monthly statements/invoices in paper form delivered to a postal address.

Offline Transaction Guarantee Limit

The Offline Transaction guarantee limit for Debit Cards that do not bear a point-of-sale acceptance mark of an international card scheme is: \$300 (refer clause 5.1.2(b)).

PAYMARK will advise the Merchant in writing of any variation in fees.

¹ Excludes mPOS. Any fees related to mPOS will be charged by Paymark to Bank.

² Excludes Donation Point Tap.

³ Quest Payment Systems Pty Limited, a terminal provider that offers a Donation Point Tap solution to Banks and Merchants.



Smartpay Hardware and Services Agreement

Terms and Conditions

Smartpay Hardware and Services Agreement Terms and Conditions

Smartpay Limited ("**Smartpay**") agrees to provide you with the equipment ("**Equipment**") and services ("**Services**") described on the ASB Accept Application Form (together "**Products**") on the terms and conditions set out in these terms and conditions.

By signing the ASB Accept Application Form you agree to comply with these terms and conditions ("**Agreement**").

1. Equipment

- 1.1. Smartpay will arrange for delivery of the Equipment as soon as reasonably possible following the date you sign the ASB Accept Application Form ("**Effective Date**").
- 1.2. You are lessee of the Equipment. Nothing in this Agreement confers on you any other right, property or interest in or to the Equipment and you will not assign, mortgage, charge, encumber or permit any security interest to attach to the Equipment or otherwise deal with or part with possession of or control of the Equipment without Smartpay's prior written consent.
- 1.3. Smartpay may at any time swap the Equipment for alternative equipment offering essentially the same functionality.
- 1.4. You agree:
 - a) to take proper care of the Equipment and ensure the Equipment is not lost, stolen, damaged or destroyed;
 - b) not to alter or otherwise tamper with the Equipment or any identifying number or mark on the Equipment;
 - c) to maintain, with an insurer reasonably acceptable to Smartpay, insurance for the Equipment for its full value, not being less than the amount, if any, specified by Smartpay;
 - d) that you will immediately forward any money received from such insurance to Smartpay; and
 - e) that if you fail to maintain insurance in accordance with clause 1.4(c) that Smartpay may itself insure the Equipment and recover the cost from you.
- 1.5. You must not affix the Equipment to land without Smartpay's consent in writing and you agree:
 - a) that the Equipment is personal property;
 - b) to grant Smartpay, where the Equipment has become affixed to land, an interest in and right of entry to such land for the purposes of removing the Equipment; and
 - c) to obtain an acknowledgement from all mortgagees of the land and, if you are not the owner of the land, from the land owner that the Equipment is personal property and not a fixture.
- 1.6. Smartpay can charge you for repairs to or replacement of any Equipment that is lost, damaged or destroyed while it is in your care.
- 1.7. You must return the Equipment immediately when this Agreement expires or is terminated.

2. Services

- 2.1. Smartpay will provide the Services to you at the times shown on the front of the ASB Accept Application Form, but excluding public holidays in Auckland.

3. Customer Obligations

- 3.1. In addition to your other obligations under this Agreement, you must do everything reasonably required by Smartpay to

facilitate the provision of the Products, including but not limited to:

- a) permit and facilitate access to relevant sites and equipment;
- b) provide or pay Smartpay for any spare parts, materials, and other consumables required by Smartpay; and
- c) make all relevant operational and technical documentation for the equipment available to Smartpay while Smartpay is performing the Services.

- 3.2. You authorise Smartpay to, on your behalf, make such arrangements with network service providers as Smartpay may determine necessary to install the Equipment or carry out the Services.

4. Fees and Payment

- 4.1. You agree to pay the fees for the Products ("**Fees**") to ASB Bank Limited in accordance with the Credit Card Merchant Services Agreement General Terms and Conditions between you and ASB Bank Limited.

5. Warranties and Indemnities

- 5.1. Except as expressly provided otherwise in this Agreement, and to the maximum extent permitted by law, Smartpay excludes all express or implied warranties or representations in relation to the Products.
- 5.2. You agree that the Products are acquired for business purposes and that the Consumer Guarantees Act 1993 does not apply to the Products provided under this Agreement.
- 5.3. You agree to indemnify Smartpay against damage, loss or theft of the Equipment.
- 5.4. If you receive any Product under this Agreement provided by a third party supplier to Smartpay then you agree to comply with that third party supplier's terms and conditions relating to the supply of that Product and indemnify Smartpay against all loss, costs or damage suffered or incurred by Smartpay as a result of your failure to comply with such terms and conditions.

6. Limitation of Liability

- 6.1. In no event will Smartpay be liable (whether in contract, tort including negligence, or otherwise):
 - a) for loss of revenue or profit, loss of anticipated savings, loss of goodwill or opportunity, loss of production, loss or corruption of data or wasted management or staff time; or
 - b) loss, damage, cost or expense of any kind whatsoever that is indirect, consequential, or of a special nature, arising directly or indirectly out of this Agreement, even if Smartpay had been advised of the possibility of such damages, and even if such loss, damage, cost or expense was reasonably foreseeable by Smartpay.
- 6.2. Subject to clause 6.1, the maximum liability of Smartpay to you arising out of any and all claims under this Agreement, or relating to the Products, will not in any circumstances exceed the Fees actually paid for the Products to which the claim relates.

7. Termination and Renewal

- 7.1. This Agreement will come into force on the Effective Date and will expire on the date that your Merchant Services Agreement with ASB Bank Limited expires or, if no expiry date is stated, will continue until terminated.
- 7.2. Where this Agreement and your Merchant Services Agreement with ASB Bank Limited expires, but you intend to continue use of any of the Products, or substantially similar products from another supplier, you agree to renew this Agreement provided Smartpay can match or better the price offered to you in writing by any third party for the same or substantially similar products to the Products you require on an ongoing basis.

- 7.3. Notwithstanding termination or expiry of this Agreement, your obligations under this Agreement will continue in full force and effect until Smartpay agrees, in its sole discretion, that the Equipment has been returned in good working order.
- 7.4. Smartpay may terminate this Agreement:
- a) in the case of a material breach of this Agreement by you, immediately by notice in writing;
 - b) where you become insolvent, are declared bankrupt or you have applied for entry to or you have been admitted to the no asset procedure under the Insolvency Act 2006, immediately by notice in writing;
 - c) an order is made by the Court, or you pass a resolution, for the winding up of your business, or a receiver, administrator or similar officer is appointed in respect of any of your assets; or
 - d) in any case, by giving you at least three months notice in writing.
- 8. General**
- 8.1. PPSA: Smartpay may register a financing statement under the Personal Property Securities Act 1999 ("PPSA") over the Equipment and you will do everything reasonably required by Smartpay to enable such registration.
- 8.2. Contracting out of the PPSA: You agree, under s107 of the PPSA, that you waive your right under s116, to receive a copy of any verification statement, under s119, to recover any surplus, under s114(1)(a), to receive notice about the sale of secured goods, under s120(2), that Smartpay intends to retain collateral, under s125, not to have goods damaged should Smartpay remove an accession, under s129, to receive notice of intent to remove an accession, and under s131, to apply to the court for an order in relation to our removal of an accession.
- 8.3. Assignment: Smartpay may, at its sole discretion assign or novate its rights and obligations to a third party, including any purchaser of Smartpay's business, and you agree to do everything necessary to effect that assignment or novation. Smartpay may also engage third parties to fulfil any of its obligations under this Agreement. You may not assign any of your rights or obligations under this Agreement without Smartpay's permission in writing.
- 8.4. Force majeure: Neither party will be liable to the other for any breach of, or failure to perform, any of its obligations under this Agreement where such breach or failure is caused by anything beyond that party's reasonable control, including (without limitation) war, civil commotion, hostility, act of terrorism, strike, lockout, other industrial act, weather phenomena or other act of God, or governmental regulation or direction.
- 8.5. Variations: Smartpay may vary this Agreement from time to time and the varied Agreement will become effective immediately when it is provided to you.
- 8.6. Waiver: No failure or delay by either party to exercise any right or remedy under this Agreement will be treated as a waiver of such right or remedy. No single or partial exercise of any right or remedy will prevent the further exercise of such right or remedy.
- 8.7. Severability: If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, this Agreement will remain otherwise in full force apart from such provisions, which will be deemed deleted.
- 8.8. Entire agreement: This Agreement contains the whole of the contract and understanding between the parties relating to the matters covered by it. This Agreement supersedes all prior representations, agreements, statements and understandings between the parties relating to those matters, whether verbal or in writing.

Keep in touch

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