



Merchant Tripartite Agreement

Terms and Conditions

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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 EOVS, 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 EOVS, 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 71; 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
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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
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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.

