



Paymark Merchant Agreement

Terms and Conditions

PAYMARK MERCHANT AGREEMENT

This Paymark Merchant Agreement and the following Terms and Conditions (together the "Agreement") is a contract between you (the "Merchant") and Paymark Limited ("Paymark"), a duly incorporated company having its registered office at Level 2, 162 Victoria Street West, Auckland 1010, and applies to your use of the Paymark System. In this Agreement, "you" or "your" means any Merchant using the Services and/or the Paymark System. "Paymark" "we" or "our" refer to Paymark Limited.

Paymark has an arrangement with EFTPOS New Zealand Limited ("ENZ") which enables ENZ Devices to connect to the Paymark System (the "Paymark ENZ Aggregation Agreement"). Access to the Paymark System is subject to you entering into:

- i) An agreement with ENZ related to ENZ Devices that access the Paymark System (the "EFTPOS Services Agreement"); and
- ii) An agreement with a New Zealand bank that provides you with a Merchant Account (the "Bank Merchant Agreement").

By accessing and using the Paymark System, you acknowledge that you have read, understood and agree to be bound by the terms and conditions of this Agreement. If you do not agree to these terms and conditions, you must immediately cease your use of the Paymark System and the Services.

Paymark may amend this Agreement at any time by sending you an updated version. The revised version will be effective at the date it is sent. If the revised version includes a material change, we will provide you with 30 days' prior notice.

Key terms:

Commencement Date	The earlier of the date that the Merchant confirms acceptance of this Agreement and the first date that Paymark provides the Service to the Merchant.
Service	The service to be provided by PAYMARK under this Agreement, excluding any settlement or clearing services.
Term	This Agreement will begin on the Commencement Date and will continue in force until PAYMARK gives at least 3 months' written notice of termination to the Merchant, in accordance with clause 9.1, or at law.

TERMS AND CONDITIONS

1 INTERPRETATION

1.1 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 Payment Instrument which has been approved by PAYMARK for use within the Paymark System and which is able to be processed by ENZ Devices.

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

- (a) the Paymark 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 Paymark System electronically verifies the PIN which is applicable to the Payment Instrument; and
- (c) if Cardholder signature verification is undertaken in accordance with clause 3.8, the Merchant has verified the Cardholder's identity in accordance with clause 3.8.

"Bank" means the bank that the Merchant has entered into a "Bank Merchant Agreement", 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.

"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 Payment Instrument for use in that Transaction.

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

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

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

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

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

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

"ENZ" means EFTPOS New Zealand Limited;

"ENZ Device" means an EFTPOS software application within a physical device, in each case operated by the Merchant and connected with the Paymark System and that is sold or leased to the Merchant by ENZ and is not developed to the Paymark specification;

"Merchant" means the legal entity identified in the EFTPOS Services Agreement 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 pursuant to the Bank Merchant Agreement.

"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 Paymark 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.

"PAYMARK" means Paymark Limited, and includes its successors and assigns.

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

"Person" includes any individual, company, partnership, incorporated society, association or other legal entity.

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

"Payment Instrument Issuer" means the bank, financial institution, retailer or other person which is the issuer of a particular Payment Instrument.

"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 ENZ Device 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 Paymark System, a Cardholder balance enquiry, and, unless the context otherwise specifically requires, includes an Off-Line Transaction.

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

"Valid Transaction" means a Transaction that the Bank has deemed to be valid in accordance with the Bank Merchant Agreement.

1.2 General Interpretation

In this Agreement:

- 1.2.1 unless otherwise stated, a reference to Section or a clause is a reference to section or a clause of or to this Agreement;
- 1.2.2 words in the plural include the singular and vice versa; and
- 1.2.3 headings are inserted for convenience only and must be ignored in construing this Agreement.

1.3 Merchant's Liability

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

1.4 Governing Law

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

2 ENZ DEVICES

For the avoidance of doubt, under this Agreement the Merchant may only use ENZ Devices in the Paymark System. Nothing in this Agreement shall prevent the Merchant from using other types of acceptance devices in the Paymark System under another agreement with Paymark.

3 SERVICES AND PROCEDURES

3.1 Provision of Service

During the term of this Agreement, PAYMARK will:

- 3.1.1 provide the Merchant with access to and use of the Paymark System, on the terms contained in this Agreement;
- 3.1.2 take all reasonable steps practicable to maintain the Paymark System in proper working condition to provide a continuous and accurate service to the Merchant; and
- 3.1.4 monitor the telecommunications components of the Paymark System to support delivery of the Service.

3.3 Merchant Accounts

PAYMARK shall be entitled to facilitate the depositing of Transaction settlement proceeds.

3.4 Acceptance of Approved Cards

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

- 3.4.1 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
- 3.4.2 the Approved Card is a Debit Card.

3.5 Transaction Record

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

3.6 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.

3.7 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:

- 3.7.1 in the case of Transactions effected using ENZ Devices 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
- 3.7.2 in the case of Transactions which are stored as Off-Line 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 ENZ Device is capable of doing so and establishes connection to the Paymark 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 Paymark System and PAYMARK shall not be liable for their settlement through the Paymark System.

3.8 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.

3.9 Verification of Cardholder Identity

- 3.9.1 The Merchant will not effect a Transaction with a Cardholder unless:
 - (i) that Cardholder's identity is verified in accordance with clause 3.8.2 below; or
 - (ii) the Transaction is effected using a Payment Instrument which can interact with the energy field of a contactless reader on the Terminal and the value of the Transaction is less than the limit mandated by the relevant Acquirer as requiring verification by PIN or signature.
- 3.9.2 The Cardholder's identity can be verified by:
 - (i) the correct entry of the Cardholder's PIN into the ENZ Device, followed by the verification of the PIN within the Paymark System, and the Paymark System response "ACCEPTED" at the ENZ Device; or
 - (ii) where the Transaction is made using a Credit Card, 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.

3.10 Communications

The Merchant agrees that PAYMARK may contact the Merchant by post, email or other forms of commercial electronic message for the purposes of:

- (i) providing EFTPOS services and EFTPOS related services including but not limited to account administration and technical support;
- (ii) providing further information about PAYMARK, or other goods or services offered by PAYMARK;
- (iii) providing news, reports or information that PAYMARK considers may be of interest; and
- (iv) marketing, promotional and publicity purposes (including direct marketing), market research and surveys.

The Merchant acknowledges that it will have the option to unsubscribe from any contact list for electronic messages that is not essential to the provision of the Service at any time using the "unsubscribe" link contained within any electronic message.

4 SETTLEMENT PAYMENTS DUE TO MERCHANT

The Merchant acknowledges that the obligation to settle Transactions with the Merchant is an obligation of the relevant Payment Instrument 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 an ENZ Device which has the capability to store Transactions is limited by the circumstances described in clause 3.7.2.

5 RECORDS AND INSPECTION

5.1 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.

5.2 Inspection of Records

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

5.3 PAYMARK to Maintain Records

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

5.4 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 Paymark System, the Service and any Transaction, or any interest in such rights.

6 NON EXCLUSIVITY

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 Paymark System.

7 LIABILITY AND INDEMNITY

7.1 Service Provided by PAYMARK

The service to which PAYMARK is contractually able to commit is as described in clause 3, and the Merchant acknowledges that PAYMARK cannot guarantee continuous fault-free access to the Paymark System. However, PAYMARK and the Merchant recognise that should PAYMARK be unable to provide part of the Service or should the Paymark System be unavailable for any reason:

- 7.1.1 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 Off-Line Transactions in accordance those agreements; and
- 7.1.2 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.

7.2 Exclusion of PAYMARK's Liability

Except as provided in clause 7.3, PAYMARK is not liable to compensate the Merchant for any loss, cost, injury or damage arising directly or indirectly from:

- 7.2.1 any act, omission, error, default or delay of PAYMARK or its officers, employees or agents; or
- 7.2.2 any failure (including telecommunications failure), breakdown or malfunction of the Paymark System or of any equipment, ENZ Device, Communication Channels, or Payment Instrument; or
- 7.2.3 any cause beyond the reasonable control of PAYMARK; or
- 7.2.4 any act or omission of the Bank, ENZ or any other third party.

7.3 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.

7.4 Indemnity by Merchant

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

- 7.4.1 any breach by the Merchant of this Agreement; or
- 7.4.2 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 Paymark System, an ENZ Device, Communication Channels, or any Payment Instrument; or
- 7.4.3 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.

7.5 Limitation of Liability

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

- 7.5.1 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
- 7.5.2 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 7.

7.6 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 \$100.

7.7 Each Limitation Separate

Each provision of this clause 7 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 7 is held inapplicable or invalid in any circumstances.

8 TERMINATION

8.1 Automatic Termination

This Agreement will automatically terminate if any of the following agreements are terminated:

- 8.1.1 the EFTPOS Services Agreement;
- 8.1.2 the Paymark ENZ Aggregation Agreement; and
- 8.1.3 the Bank Merchant Agreement, unless Merchant enters into a new agreement for a Merchant Account with another New Zealand bank.

8.2 Termination by Notice

Paymark may terminate by written notice to the Merchant if:

- 8.2.1 the Merchant has materially breached this Agreement and has not remedied that breach within 10 Business Days of receipt of written notice from PAYMARK, as the case may be, requesting the breach to be remedied; and
- 8.2.2 without further notice to the Merchant if PAYMARK 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; or
- 8.2.3 ENZ fails to notify PAYMARK of a Merchant's change of ownership and/or control in accordance with the terms of the Paymark ENZ Aggregation Agreement.

8.3 Suspension or Re-direction of Settlement Proceeds

Without affecting their rights under clause 8, PAYMARK may, at its discretion:

- 8.3.1 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, as the case may be; or
- 8.3.2 in the event PAYMARK 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 Paymark System fraudulently or where the security or integrity of the Paymark 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 PAYMARK has resolved that such fraudulent use or threat to the Paymark System's security or integrity has not occurred or is not likely to occur.

8.4 Pre Existing Rights and Obligations

If this Agreement is terminated pursuant to clauses 8.1 and 8.2, all rights and obligations that have arisen under this Agreement before the termination will continue and will not be affected in any way.

9 WARRANTIES AND REPRESENTATIONS

9.1 No Warranty by Merchant

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

- 9.1.1 on behalf of PAYMARK in relation to the Paymark System or the Service; and/or
- 9.1.2 that PAYMARK or any other participant in the Paymark System recommends any goods or services provided by the Merchant.

9.2 No Warranty as to Cardholders or Payment Instrument Issuers

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

10 NOTICES

10.1 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 email to the recipient at its address or email address stated on the first page or alternatively, in the case of a party which is a company, at its registered office.

10.2 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 email will:

- 10.2.1 in the case of an email sent to PAYMARK, be deemed to have been given upon receipt of a return email from PAYMARK (as the case may be) acknowledging receipt of such email (for the avoidance of doubt, an automatic or Paymark System generated acknowledgement from PAYMARK will not be considered a return email for the purposes of acknowledgement of receipt notice); and
- 10.2.2 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.

11 GENERAL

11.1 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 may be requested to provide confirmation of transactional information only.

11.2 Waiver

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

11.3 Assignment

- 11.3.1 The Merchant may not assign or transfer its rights or obligations under this Agreement to any other person.
- 11.3.2 PAYMARK 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.

11.4 Entire Agreement

- 11.4.1 Without affecting clause 11.4.2, 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.
- 11.4.2 Nothing in this Agreement limits any provision of any other agreement existing between the Merchant and the Bank or the Merchant and any Acquirer.

11.5 Privacy and Information Sharing

- 11.5.1 If the Merchant is an individual, the personal information in this Agreement and any other personal information which the Merchant may provide to PAYMARK, ENZ or the Bank at any time, whether in writing, by telephone, electronically or any other means, may be used by PAYMARK, ENZ or the Bank for the purposes of providing EFTPOS services to the Merchant. The intended recipients of the personal information are PAYMARK, ENZ 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.
- 11.5.2 The Merchant consents to PAYMARK sharing information related to a Merchant, ENZ, the Bank, and to selected third party service providers who hold or process information on behalf of PAYMARK to help PAYMARK provide

EFTPOS services, associated services or operate the PAYMARK website. Third party service providers are subject to contractual restrictions to ensure that information held or processed on behalf of PAYMARK is protected.

- 11.5.3 The Merchant consents to PAYMARK sharing information related to a Merchant and its Terminals that are connected to the Paymark System, to an accredited service provider of that Merchant, as identified using PAYMARK's keyset database.

11.6 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 Paymark System.

11.7 Dispute Resolution

In the event of any dispute between the parties, the 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 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.

11.8 Severance

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

