

MERCHANT PRICING FOR AMERICAN EXPRESS PROPRIETARY CARD TRANSACTIONS

This Undertaking is made by American Express Australia Limited ABN 92 108 952 085 of Level 1, 12 Shelley Street, Sydney NSW 2000 (**American Express**) in favour of the Reserve Bank of Australia (**Reserve Bank**) of 65 Martin Place, Sydney NSW 2000 and dated *2 September 2016*.

1. OBJECTIVE

The objective of this Undertaking is to promote:

- *efficiency; and*
- *competition*

in the Australian payments system by providing that American Express will not impose scheme rules or terms and conditions that restrict the ability of merchants to make a charge for accepting payment from an American Express proprietary card holder that reflects the cost to the merchant of accepting an American Express proprietary card.

2. APPLICATION

- 2.1 This Undertaking relates to the system in Australia under which American Express proprietary credit and charge cards (that is, Devices bearing the name 'American Express' and/or any logo, service mark, trademark, trade name or other proprietary designation owned by American Express or any of its Related Bodies Corporate that are not Credit Cards of the American Express Companion Card Scheme) are used to make payments. That system is referred to in this Undertaking as the **System**.

The American Express Companion Card Scheme was designated on 15 October 2015 and from 1 September 2016 is subject to Standard No 3 of 2016, Scheme Rules Relating to Merchant Pricing for Credit, Debit and Prepaid Card Transactions (the **Merchant Pricing Standard**).

- 2.2 In this Undertaking:

Acquired or **Acquiring** includes accepted or accepting;

Acquirer Supplied Element means in relation to a Merchant, those of the Permitted Cost of Acceptance Elements for that Merchant that are supplied, directly or indirectly, by American Express;

Card means a Device that can, under the Rules of the System, be used in Australia for purchasing goods or services (irrespective of whether the Device is issued in or outside Australia);

Card Transaction means a transaction in the System between a holder of a Card and a Merchant involving the purchase of goods or services using a Card that is Acquired by American Express or one of its Related Bodies Corporate and includes any transaction to reverse such a transaction or provide a credit or make a chargeback in relation to such a transaction;

Commencement Date means 2 September 2016;

Cost of Acceptance has the meaning given to it in clause 5;

Device means any card, plate or other payment code or device, including a code or device where no physical card or other embodiment is issued and a code or device used or to be used for only one transaction;

Financial Year means a period from 1 July to the following 30 June;

Large Merchant means a Merchant that satisfies two or all of the following:

- (a) the consolidated gross revenue for the Financial Year ended 30 June 2015 of the Merchant and its Related Bodies Corporate was \$25 million or more;
- (b) the value of the consolidated gross assets at 30 June 2015 of the Merchant and its Related Bodies Corporate was \$12.5 million or more;
- (c) as at 30 June 2015 the Merchant and its Related Bodies Corporate between them had 50 or more employees (whether full time, part time, casual or employed on any other basis);

Merchant means a merchant in Australia that accepts a Card of the System for payment for goods or services;

Merchant Service Fee means a transaction-based fee (or a time period based fee that covers a specified or maximum number of transactions) charged to a Merchant by American Express for Acquiring, or by a Payment Facilitator for arranging the Acquisition of, Card Transactions from that Merchant whether collected on an ad valorem or flat-fee basis, or charged as a blended or bundled rate across more than one type of Card Transaction or on an interchange plus acquirer margin basis or any other basis;

Payment Facilitator means an entity which arranges or procures Acquiring services from American Express for one or more Merchant(s);

Payment Service Provider means an entity that is not a Related Body Corporate of the Merchant that provides services and/or equipment to a Merchant that directly relate to, or are directly used for or in connection with, the acceptance by that Merchant of Cards of the System for payment for goods or services;

Permitted Cost of Acceptance Elements in relation to a Merchant and the System are the fees and premiums referred to in clause 5.1(a) for that Merchant and the System;

Permitted Surcharge has the meaning given to it in clause 4.1;

Reference Period has the meaning given to it in clause 4.2;

Related Body Corporate has the meaning given in the *Corporations Act 2001*;

Rules means the terms of any agreement between American Express and any Merchant and any rules, by-laws, procedures, manuals and other documents or instruments which govern or regulate the acceptance of Cards by Merchants or the Acquiring of Card Transactions by American Express or otherwise regulate or deal with participation in the System;

Statement Period has the meaning given to it in clause 6.1(a);

Surcharge means, in respect of any Card Transaction, any of the following, however named or described:

- (a) an amount charged, in addition to the price of goods or services, for the relevant Merchant accepting payment through the Card Transaction; or
- (b) an amount charged for making payment through the Card Transaction. An amount will be charged for making payment through a Card Transaction if:
 - (i) that amount is charged because the purchase of the relevant goods or services is effected using the relevant Card; or

- (ii) the goods or services could be purchased from the relevant Merchant by a different payment method without that amount being charged;

include or **including** or **such as** when introducing an example do not limit the meaning of the words to which the example relates to that example or examples of a similar kind;

terms defined in the Act have the same meaning in this Undertaking; and

terms defined in the Merchant Pricing Standard that are not defined in this Undertaking have the same meaning in this Undertaking unless this Undertaking provides otherwise.

- 2.3 American Express must do all things necessary on its part to ensure compliance with this Undertaking.
- 2.4 If any part of this Undertaking is invalid, it is ineffective only to the extent of such part without invalidating the remaining parts of this Undertaking.
- 2.5 This Undertaking is to be interpreted:
 - (a) in accordance with its objective; and
 - (b) by looking beyond form to substance.
- 2.6 This Undertaking shall not apply in respect of Rules that relate, or the conduct of American Express that relates, to charges made by Merchants for accepting Cards for payment of a taxi fare in a State or Territory of Australia. Accordingly payment of a taxi fare in any State or Territory of Australia effected using a Card is not a payment of a kind covered by this Undertaking.

3. MERCHANT PRICING

- 3.1 American Express undertakes that it will not, and the Rules will not, prohibit or deter:
 - (a) a Merchant from recovering, by charging a Surcharge in respect of a Card Transaction at any time, an amount that does not exceed the Permitted Surcharge for that Merchant and the System at that time; or
 - (b) a Merchant, in recovering part or all of the Cost of Acceptance of Cards of the System, from applying a Surcharge in respect of Card Transactions that is different from a surcharge, fee or charge that the Merchant charges in relation to a transaction in a Scheme or another payment method.

4. PERMITTED SURCHARGE

- 4.1 The Permitted Surcharge for a Merchant and the System at any time is an amount not exceeding the Cost of Acceptance for that Merchant and the System applicable at that time.
- 4.2 For the purpose of clause 4.1 the Cost of Acceptance of Cards of the System applicable at a time is:
 - (a) subject to paragraph (b), the Cost of Acceptance of Cards of the System calculated for a 12 month period that ended not more than 13 months before that time; or
 - (b) if the Cost of Acceptance of Cards of the System for a Merchant for a 12 month period preceding that time is not reasonably ascertainable, an estimate of the average cost of acceptance of Cards of the System for a period of 12 months calculated by the Merchant in good faith using only known and/or estimated Permitted Cost of Acceptance Elements and Card Transaction volumes for Cards of the System.

Each 12 month period referred to in paragraph (a) or paragraph (b) is a **Reference Period**.

5. COST OF ACCEPTANCE

5.1 Subject to the other provisions of this clause 5, Cost of Acceptance for a Merchant and a Reference Period at any time means, in relation to the Merchant's acceptance of a Card of the System, the average cost per Card Transaction in the System calculated for the Reference Period as follows:

- (a) by adding only the following amounts paid by the Merchant in respect of the System during that Reference Period, which are to be determined taking into account any discount, rebate or other allowance received or receivable by the Merchant to the extent any such discount, rebate or other allowance is ascertainable:
 - (i) the applicable Merchant Service Fee or Merchant Service Fees in respect of Card Transactions in the System;
 - (ii) fees paid to American Express or any Payment Facilitator or Payment Service Provider during the Reference Period for:
 - (A) the rental and maintenance of payment card terminals that process Cards; or
 - (B) providing gateway or fraud prevention services referable to the System;
 - (iii) fees incurred in processing Card Transactions and paid to American Express or any entity that was the Merchant's Payment Facilitator during the Reference Period including international service assessments or cross-border transaction fees, switching fees and fraud-related chargeback fees (but, for the avoidance of doubt, excluding the amount of chargebacks); and
 - (iv) if the Merchant acts as agent for a principal, fees or premiums paid by the Merchant to an entity that is not a Related Body Corporate of the Merchant to insure against the risk that the Merchant will be liable to a customer for the failure of its principal to deliver goods or services purchased through a Card Transaction provided that such risk arises because payment for the relevant goods or services is effected through a Card Transaction,
but in each case only if those fees or premiums are:
 - (v) directly related to Card Transactions. A fee or premium will not be so directly related if it is incurred in relation to or in connection with a payment, or the sale or purchase to which the payment relates, irrespective of the method used to make the payment; and
 - (vi) subject to clause 4.2(b), documented or recorded in:
 - (A) a contract in effect between the Merchant and American Express or a Payment Facilitator or Payment Service Provider that relates to or covers the System or Card Transactions in the System (whether or not it also relates to or covers Schemes or card transactions in Schemes); or
 - (B) a statement or invoice from American Express or the Merchant's Payment Facilitator or Payment Service Provider that relates to or covers the System or Card Transactions in the System; and
- (b) expressing the total of the amounts in paragraph (a) above as a percentage of the total value of Card Transactions in the System between the Merchant and holders of Cards in the System in that Reference Period, with that percentage being the average cost per Card Transaction in the System.

- 5.2 If a Permitted Cost of Acceptance Element is not levied or charged on a per transaction basis and is not referable only to Card Transactions undertaken in the System (for example, a fixed monthly terminal rental cost that allows card transactions in the System and card transactions in one or more Schemes to be made), that Permitted Cost of Acceptance Element is to be apportioned among the System and other payment systems to which it relates for the purpose of determining Cost of Acceptance on a pro-rata basis. The apportionment is to be based on the value of the Card Transactions in the System over the period to which the cost relates as a proportion of the total value of transactions undertaken in any payment system to which the cost relates over that period (in each case, the value of the Card Transactions and transactions excludes the amount of any cash obtained by the holder of a Card of a System or other Device as part of a Card Transaction or other transaction).

6. TRANSPARENCY

- 6.1 Subject to clauses 6.2 and 6.3, American Express undertakes to issue or cause to be issued monthly statements to each Merchant for which it provides Acquiring services. Each such statement must set out:
- (a) the dates on which the period covered by the statement begins and ends (**Statement Period**). For that purpose, for all statements except the first, the date a statement period begins must be the day after the day the immediately previous statement period ends;
 - (b) for the relevant Statement Period:
 - (i) the aggregate cost of the Acquirer Supplied Elements of the Cost of Acceptance for the Merchant of Cards of the System over the Statement Period (a **Month Element Cost Total**);
 - (ii) the aggregate value of Card Transactions Acquired for the Merchant over the Statement Period (a **Month Value Total**); and
 - (iii) the Month Element Cost Total expressed as a percentage of the Month Value Total; and
 - (c) if it is the statement for the last full Statement Period within a Financial Year:
 - (i) the aggregate cost of the Acquirer Supplied Elements of the Cost of Acceptance for the Merchant over the 12 month period ending on the last day of that Statement Period (an **Annual Period**) of Cards of the System (an **Annual Element Cost Total**);
 - (ii) the aggregate value of Card Transactions Acquired for the Merchant over the Annual Period (an **Annual Value Total**); and
 - (iii) the Annual Element Cost Total expressed as a percentage of the Annual Value Total.
- 6.2 American Express will not contravene clause 6.1 if:
- (a) It provided Acquiring services to the Merchant indirectly via a Payment Facilitator;
 - (b) prior to the time the Acquirer was required to give a statement under clause 6.1, it entered into a written agreement with the Payment Facilitator which obliged the Payment Facilitator to provide the statements described in clause 6.1 at the times described in that clause;
 - (c) after conducting due inquiries of the Payment Facilitator before that agreement was entered into, it was satisfied that the Payment Facilitator had sufficient processes in place to provide those statements at the times described in clause 6.1; and

(d) after entering into that agreement and prior to the time the statement was required to be sent, it had not had cause to suspect that the statement would not be sent to the Merchant by the Payment Facilitator in accordance with clause 6.1.

6.3 American Express will not contravene clause 6.1 in relation to a Statement Period and a Merchant if:

(a) during that Statement Period it provided Acquiring services to the Merchant in relation to Devices of the American Express Companion Card Scheme as well as Cards of the System;

(b) during that Statement Period the applicable Merchant Service Fee or Merchant Service Fees charged to the Merchant in respect of Card Transactions in the System were the same or substantially the same as the Merchant Service Fee or Merchant Services Fees (each as defined in the Merchant Pricing Standard) charged to the Merchant in relation to transactions using Devices of the American Express Companion Card Scheme, with the result that the percentage calculated in accordance with clause 6.1(b)(iii) of this Undertaking for the Statement Period is the same as the percentage calculated in accordance with clause 7.2(b)(iii) of the Merchant Pricing Standard for the Statement Period; and

(c) American Express provides to the Merchant on the statement for that Statement Period:

(i) the percentage calculated in accordance with clause 6.1(b)(iii) of this Undertaking; and

(ii) if it is the statement for the last full Statement Period within a Financial Year, the percentage calculated in accordance with clause 6.1(c)(iii) of this Undertaking,

in each case displaying that percentage in such a way that it is clear to the Merchant that it applies to both Devices of the American Express Companion Card Scheme and Cards of the System,

but American Express does not provide to the Merchant on the statement for that Statement Period the Month Element Cost Total and Month Value Total (and, where applicable, the Annual Element Cost Total and Annual Value Total).

6.4 Nothing in this Undertaking affects, modifies or waives compliance by American Express with the Merchant Pricing Standard.

7. ANTI-AVOIDANCE

7.1 American Express undertakes that it will not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a plan or arrangement or otherwise be knowingly involved in a plan or arrangement if it would be concluded that American Express did so for a purpose of avoiding the application of this Undertaking, and the plan or arrangement or part of the plan or arrangement has achieved or would but for this provision have achieved or could reasonably be considered to have achieved that purpose.

7.2 For the purpose of this Undertaking, a provision of a plan or arrangement shall be deemed to have a particular purpose if the provision was included in the plan or arrangement by a party or parties for purposes that include that purpose and that purpose was a substantial purpose.

7.3 Without limiting clause 7.1, neither American Express nor the Rules of the System, shall directly or indirectly deny a Merchant access to Acquiring services or decline to provide Acquiring services to a Merchant for the reason (whether solely or in combination with other reasons) that:

(a) the Merchant imposes or intends to impose a Surcharge in relation to Card Transactions; or


- (b) the amount of any Surcharge charged, or proposed to be charged, by the Merchant in relation to Card Transactions is a particular amount, either in absolute terms or relative to any other surcharge, fee or charge (unless that amount would exceed the Permitted Surcharge for Card Transactions).

8. COMMENCEMENT AND IMPLEMENTATION

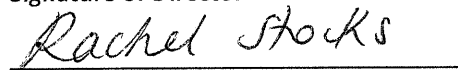
- 8.1 This Undertaking takes effect on the Commencement Date, but certain provisions in it have a deferred commencement as set out in this clause 8.
- 8.2 Without limiting clause 8.1, the provisions of clauses 3, 4 and 5 will apply in relation to a Merchant that is a Large Merchant on and from the Commencement Date.
- 8.3 The provisions of clauses 3, 4 and 5 will not apply in relation to a Merchant that is not a Large Merchant until 1 September 2017, on which date clauses 3, 4 and 5 will commence to apply in relation to Merchants that are not Large Merchants.
- 8.4 American Express undertakes that for the period from the Commencement Date until 31 August 2017 the following will apply in relation to Merchants that are not Large Merchants:
 - (a) neither the Rules of the System nor American Express shall prohibit:
 - (i) a Merchant from recovering, by charging a Surcharge in respect of a Card Transaction at any time, part or all of the reasonable cost of acceptance of Cards at that time; or
 - (ii) a Merchant, in recovering part or all of the reasonable cost of acceptance of Cards, from applying different Surcharges in respect of card transactions in different systems or schemes; and
 - (b) for the purposes of paragraph (a), a Merchant's cost of acceptance of Cards issued under the System may, for the purpose of determination of a Surcharge, be determined by reference to:
 - (i) the cost to the Merchant of the Card Transaction in relation to which the Surcharge is to be levied;
 - (ii) the average cost to the Merchant of acceptance of all Cards of all types issued under the System; or
 - (iii) the average cost to the Merchant of acceptance of a subset of Cards issued under the System that includes the type of Card in relation to which the Surcharge is to be levied, and includes, but is not necessarily limited to, in the case of (i), the applicable Merchant Service Fee and, in the case of (ii) and (iii), all applicable Merchant Service Fees.
- 8.5 The provisions of clauses 6.1 and 6.2 will not apply until 1 June 2017, on which date those clauses will commence to apply. For the avoidance of doubt, a monthly statement issued on or after 1 June 2017 relating to a Statement Period ending during June 2017 must contain:
 - (a) the information required by clause 6.1(b) in relation to the Statement Period to which that statement relates even though that Statement Period may have commenced before 1 June 2017; and
 - (b) the information required by clause 6.1(c) in relation to the Annual Period ending on the last day of the Statement Period to which that statement relates even though that Annual Period commenced before 1 June 2017.

- 8.6 The obligations in the undertaking provided by American Express to the Reserve Bank dated 18 March 2013 (**2013 Undertaking**) will be replaced by this Undertaking on the Commencement Date, on which date the 2013 Undertaking will be withdrawn.
- 8.7 American Express reserves the right to withdraw this Undertaking by giving the Reserve Bank not less than six (6) months' (or any shorter period agreed by the Reserve Bank) prior notice of its intention to do so.
- 8.8 American Express acknowledges that the Reserve Bank reserves its rights to designate the System under the Act at any time should it consider this best serves the purposes of the Act.

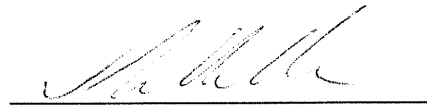
Signed by American Express Australia Limited
In accordance with s127 of the *Corporations Act 2001*



Signature of Director



Name of Director



Signature of Director/Secretary

John Allan Galletta

Name of Director/Secretary