

6 June 2018

Mr Alexander Pound
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By email: consumerlaw@treasury.gov.au

Dear Mr Pound

Consultation Regulation Impact Statement on Gift Card Expiry Dates

Summary

1. The Competition and Consumer Committee of the Law Council of Australia's Business Law Section (**Committee**) welcomes the opportunity to respond to the Treasury's *Consultation Regulation Impact Statement on Gift Card Expiry Dates* published on 2 May 2018 (**Consultation Paper**).
2. The Committee provides a forum through which lawyers can discuss competition and consumer laws affecting business, current issues and the process of law reform in Australia.
3. The Treasury's policy objective, as stated in the Consultation Paper, is to ensure that when a consumer purchases a gift card they can have confidence that the gift card will be available for use for a reasonable period of time, while balancing the impact of any reform on businesses. The three options being considered by Treasury in respect of expiry dates for gift cards are:
 - **Option 1** – maintaining the status quo;
 - **Option 2** – prohibiting expiry dates for all gift cards;
 - **Option 3** – introduction of a three-year minimum expiry date requirement(**Options**).
4. While the Committee makes several specific observations in relation to each of the Options, it does not advocate any specific option, but rather takes this opportunity to make suggestions about how the federal government could address the legal uncertainties of the current national gift card framework given the recent introduction of a minimum expiry date for gift cards sold to consumers in New South Wales.
5. The recently enacted expiry date requirements in New South Wales have created confusion for businesses, particularly those that supply to consumers in different States and Territories. While the Committee does not necessarily believe regulation

of gift card expiry dates is required, a national framework is preferable to there being differing regimes in Australia depending on the location of the consumer.

6. The Committee's observations in respect of each of Treasury's options may be briefly stated as follows:
 - Option 1 – The preservation of the status quo does not appear to be the most desirable option, as the NSW Government's recent legislative enactment of minimum gift card expiry dates has created inconsistencies between various States and Territories of Australia, an outcome which poses challenges to national businesses and which undermines the national consumer protection framework enshrined in the Australian Consumer Law (**ACL**);
 - Option 2 – A national prohibition of expiry dates for all gift cards, while superficially appealing from a consumer perspective, may create practical difficulties for businesses which issue gift cards, such as:
 - their ability to recognise and accept very old or damaged gift cards;
 - their ability to process gift card redemptions in circumstances where the list of exempted gift cards changes over time; and
 - how to quantify and record their contingent liabilities associated with gift cards after a reasonable period for redemptions has expired.
 - Option 3 – The introduction of a uniform three-year minimum expiry date requirement would potentially create a nationally consistent regime but is likely to involve a level of complexity due to the need to exempt a constantly evolving range of gift cards which should not be caught by any mandated minimum expiry date.
7. If Treasury wishes to achieve a cohesive national framework, the Committee recommends that:
 - (a) there should be a uniform national gift card law that provides the same requirements in all states and territories. In the Committee's view this is best achieved through an amendment to the ACL;
 - (b) the laws regulating gift card requirements and any exceptions to these laws should be clear; and
 - (c) any changes to the laws on gift card expiry dates should be met with a sufficient transition period of no less than 2 years.

1. There should be a consistent national framework for gift card expiry dates

1.1 Inconsistency under Option 1

8. As discussed in the Consultation Paper, the New South Wales government recently introduced a minimum three-year expiry period for gift cards sold to consumers in New South Wales. The amendments to the *Fair Trading Act 1987* (NSW) (**NSW Act**), which took effect on 31 March 2018, provide that all gift cards sold to consumers in New South Wales must be valid for at least 3 years after the date of sale of the gift

card¹ (**NSW Gift Card Laws**). Under the NSW Gift Card Laws, an expiry date of less than 3 years, or the imposition of a fee for late redemption of a gift card, will be deemed void and punishable by a penalty infringement notice of \$550 with a maximum penalty of \$5,500.

9. The NSW Act has extraterritorial application² such that all businesses supplying to consumers in New South Wales, irrespective of their location, are bound by the NSW Gift Card Laws.
10. While none of the other States and Territories have yet introduced similar laws, a number of other States have indicated that they are considering their introduction. If other States or Territories were to introduce similar laws without guidance at a federal level, even a minor difference to the NSW Gift Card Laws might cause compliance difficulties for businesses operating in different jurisdictions or online. Although the Committee does not believe that it is necessary to introduce a limit on the expiry date of gift cards, it is of the view that it is important to have national consistency of consumer laws.

1.2 Achieving national consistency under Options 2 or 3

11. The Committee respectfully submits that in its view the most efficient way to legislate a new national law with respect to gift card expiry dates would be through an amendment to the ACL which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (**CCA**). This is because each State and Territory has enacted legislation to apply the ACL as part of its jurisdiction.³
12. In each jurisdiction, the ACL, as in force from time to time, applies as a law of the jurisdiction. A modification of the ACL will apply unless the Governor of the State or Territory proclaims that it does not apply.
13. If Options 2 or 3 were enacted through an amendment to the ACL, the ACL provisions would therefore automatically become part of the laws in all Australian States and Territories. If there were an inconsistency between the ACL and the NSW Gift Card Laws, the ACL would prevail because of the presumption that later laws prevail over earlier laws within the same jurisdiction.⁴
14. If the NSW government were to proclaim that an ACL amendment with respect to gift card expiry dates does not apply to the State of New South Wales, or the federal government enacted its gift card laws outside the ACL framework, arguably the federal law would prevail, and the NSW Gift Card Law would be invalid to the extent that there is an inconsistency between the two laws.⁵
15. The Committee recommends that any national scheme be structured in such a way that the federal government evinces a clear intention that its national gift card laws 'cover the field' with respect to gift card expiry dates. Specifically, legislation to regulate gift cards should contain an express provision that sets out the

¹ *Fair Trading Act 1987*(NSW) s 58N.

² *Fair Trading Act 1987*(NSW) s 5A.

³ See *Fair Trading Act 1987* (NSW) ss 28 and 29; *Fair Trading (Australian Consumer Law) Act 1992* (ACT) ss 7 and 8; *Consumer Affairs and Fair Trading Act* (NT) ss 27 and 28; *Fair Trading Act 1989* (QLD) ss 16 and 17; *Fair Trading Act 1987* (SA) ss 14 and 15; *Australian Consumer Law (Tasmania) Act 2010* (TAS) ss 6 and 7; *Australian Consumer Law and Fair Trading Act 2012* (VIC) ss 8 and 9; *Fair Trading Act 2010* (WA) s 19.

⁴ When applying the Latin maxim, *lex posterior derogate (legi) priori*

⁵ *Australian Constitution* s 109.

Commonwealth's intention. This would have the effect of overriding all laws relating to gift card expiry dates made in any State or Territory and ensure that a national framework can be established, so that businesses are aware of their obligations no matter where their consumers are located.

16. This example illustrates how the Commonwealth can evince a clear intention to override specific State and Territory laws:

The State Acts set out in the First Schedule shall, to the extent specified in that Schedule, cease to apply to bills of exchange, cheques, and promissory notes drawn or made after the commencement of this Act.⁶

17. To further support an express intention by the Commonwealth to 'cover the field' with respect to gift cards, the national law should be as detailed as possible and also comprehensively address exceptions to the gift card laws, particularly those contemplated in the existing NSW Gift Card Laws. This is because silence with respect to a known provision in the NSW Gift Card Laws may not result in a clear inconsistency. For example, as contemplated in the Consultation Paper, the federal government may not choose to ban the use of post purchase fees under the implementation of Option 3.⁷ However, the NSW Gift Card Laws expressly ban the charging of any post purchase fee associated with redeeming a gift card.⁸ If the federal government chooses to allow post purchase fees, the Committee suggests that, rather than remaining silent about post purchase fees, it would be prudent for the federal government to enact an express provision with, for example, the following wording: '*A person, in trade of commerce, is entitled to impose a post purchase fee associated with redeeming a gift card, notwithstanding any State or Territory instrument to the contrary.*'

2.2 Laws regulating expiry dates for gift card should have clear application

18. The Committee strongly agrees with the observation in the Consultation Paper that any expiry date laws in relation to gift cards should have a clear definition of what constitutes a 'gift card'.⁹ This includes setting clear parameters for all exceptions to the application of such laws.
19. The NSW Gift Card Laws define 'gift card' broadly as any '*card or voucher (in hard copy or electronic form) that is redeemable for goods and services in New South Wales*'.
20. The term 'gift card' or 'voucher' is used in many contexts by businesses and retailers, for example in promotional contexts, that do not necessarily align with the traditional meaning of a 'gift card' bought by one consumer as a gift to be redeemed for goods and services by another person. Because of this, it is essential that any exceptions to gift card expiry date laws be clearly defined.
21. Clause 23A of the *Fair Trading Regulation 2012* (NSW) initially created the following exceptions to gift card expiry dates:
- (a) where a refund has been processed onto a gift card;

⁶ *Bills of Exchange Act 1909* (Cth) s 7.

⁷ Consultation Paper, p 31

⁸ *Fair Trading Act 1987* (NSW) s 58N(2)

⁹ Consultation Paper, page 13.

- (b) when a consumer has purchased a prepaid card or voucher which is redeemable for example, for phone credit or internet access;
 - (c) pre-paid cards supplied by financial institutions, for instance, debit or credit cards or prepaid travel cards; and
 - (d) when a consumer receives a gift card or voucher as part of a consumer loyalty program.
22. However, in February 2018, shortly before the NSW Gift Card Laws were set to take effect, the NSW Parliament repealed the above clause 23A and, by way of the *Fair Trading Amendment (Ticket Scalping and Gift Cards) Regulation 2018* (NSW), instead inserted a more extensive list of exceptions to the NSW Gift Card Laws, including:
- ATM cards, charge cards, credit card or debit cards;
 - a reloadable prepaid card;
 - a gift card or voucher redeemable only for phone credit, internet access or any other utility;
 - gift cards supplied as part of customer loyalty or employee rewards programs;
 - gift cards or vouchers which are supplied as part of a temporary marketing promotion; and
 - where a gift card is redeemable only for a particular item or service and is being sold at a discounted price that a reasonable person would consider to be a genuine discount on the market value of the good or service.
23. The new clause 23A addressed a number of the queries that arose in relation to the list of exceptions initially suggested by the New South Wales Parliament. However, despite the more comprehensive wording of the current list of exceptions, there is still some doubt about whether certain types of gift cards and vouchers would be exempt under the NSW Gift Card laws. For example, pre-paid cards (ordinarily with a 12-month expiry date) are frequently issued by FBT-exempt employers (such as Government agencies) under salary packaging arrangements with their employees. Also, a marketing promotion that lasts for 11 months or a card sold at a discount where it is not clear what 'a reasonable person would consider to be a genuine discount'.
24. The Committee submits that a national law on gift card expiry dates should, to the greatest extent possible, give effect to the following general principles by way of clear and unambiguous drafting:
- the law should apply equally to both open and closed loop gift cards;
 - 'gift card' should be defined clearly;
 - customer loyalty programs should be exempt from its application;
 - promotional or discounted gift cards should be exempt, and the term 'promotion' and 'discount' clearly defined;

- cards issued under salary packaging/sacrificing arrangements (such as salary packaging cards and meal and entertainment cards provided to employees of FBT-exempt organisations) should be exempt;
- prepaid cards for services should be exempt, and the terms 'prepaid' and 'services' clearly defined; and
- vouchers for specific services should be exempt as the value of these services goes up over time and vouchers for specific goods should be exempt because retailers cannot ensure continuity of stock. It is not clear why under the NSW law they are only exempt if they are discounted.

3. Australian Consumer Law should protect customers from misleading and deceptive representations

25. As noted in the Consultation Paper, there are various mechanisms under which the CCA (including the ACL) operate to protect consumers from some of the concerns that arise from the use of gift cards by businesses including the provisions against misleading and deceptive conduct, unconscionable conduct and unfair contract terms (**Consumer Provisions**).
26. While these provisions should be sufficient, the Committee also supports the imposition of mandatory disclosure requirements to businesses that would supplement the existing Consumer Provisions, including disclosure requirements compelling businesses to ensure that gift card expiry dates are prominent, legible and information about redemption can easily be passed on to the end user.
27. This would also bring all gift cards in line with those that are currently regulated under the Australian Securities and Investments Commission (**ASIC**) *Corporations (Non-Cash Payment Facilities) Instrument 2016/211*, which provides that gift cards (such as open loop multi-store cards) must prominently disclose the expiry date and would again ensure national consistency of gift card regulation.

4. A substantial transition period should accompany any changes to the law

28. A new Commonwealth law to regulate gift card expiry dates should be introduced with an adequate transition period to allow businesses to use up their existing stock of gift cards and introduce compliance procedures to satisfy the new legislative requirements.
29. The NSW Gift Card Laws contemplate a transition period of six months for businesses to run down their stock. However, our understanding is that businesses often buy their hard copy gift cards in bulk and can cover up to 24 months of their operations. For this reason, the Committee recommends that if the government were to mandate an expiry date, it should allow businesses with non-compliant hard copy gift cards a two-year transition period to run down their existing stock.
30. For gift cards sold online, we suggest that this two-year transition period would also account for the significant changes that businesses will need to take including updating their IT and accounting systems, educating staff about changes to laws and updating customer relations policies.
31. Any changes to the law should also be accompanied by substantial media coverage and publicly available information, perhaps on the Australian Competition and

Consumer Commission (**ACCC**) website, to ensure that all businesses and consumers are aware of the changes to the law. This may include working with Australian embassies and consular services to promote understanding of these laws by foreign companies supplying goods and services to Australians.

5. Penalties

32. If the federal government were to embark on legislating for Option 2 or Option 3, the Committee recommends that the effect of non-compliance with the minimum validity period should be that the gift card expiry period imposed be 'void', as provided by the NSW Gift Card Laws. This would be similar to the operation of the Unfair Contract Terms provisions under Part 2-3 of the ACL. This would have the effect of placing the consumer in control of the gift card relationship, such that they could assert their rights at the point at which a business tries to enforce an expiry time limit that is contrary to the consumer's rights under the relevant gift card expiry laws. The Committee believes this would be preferable to a penalties regime at this time.

Please contact Fiona Crosbie, Chair of the Committee at Fiona.crosbie@allens.com.au in the first instance, if you require further information or clarification.

Yours sincerely



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Chair, Business Law Section